IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC08-884

KURT S. BROWNING in his capacity as the SECRETARY OF STATE and head of the DEPARTMENT OF STATE; STATE OF FLORIDA, DEPARTMENT OF STATE, DIVISION OF ELECTIONS; and SAVE OUR CONSTITUTION, INC.,

Appellants,

v.

FLORIDA HOMETOWN DEMOCRACY PAC, INC., and LESLEY G. BLACKNER,

Appellees.

ANSWER BRIEF OF APPELLEES FLORIDA HOMETOWN DEMOCRACY, PAC INC. and LESLEY G. BLACKNER TO APPELLANTS' BRIEF

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NOTE FOR REFERENCE TO PARTIES AND BRIEF

The Appellants Secretary of State and Division of Elections are collectively referred to as "Browning."

Since SOCI adopted the State's Brief, references are to Browning's Initial Brief are simply to "Brief."

The Appellant Save Our Constitution, Inc. is referred to as "SOCI".

Appellees, Florida Hometown Democracy, PAC, Inc. an Lesley G. Blackner are referred to as "FHD/Blacker."

STATEMENT OF THE CASE AND FACTS

FHD/Blackner cannot concur with, and object to, Browning's Statement of the Case and Facts. [Brief, pages 1-9]. In addition to containing argument, it refers to matters that are not in the record or otherwise properly before this Court. For example, without record citation, Browning purports to set out the "legislative history" of section 25 of chapter 2007-30, Laws of Florida by reference to CS for SB 900 (2007) and HB 7009 (2007). [Brief, pages 2-4].

FHD/Blackner provide the following statement of the case and facts.

STATEMENT OF THE CASE

This is an appeal of a First District Court of Appeal decision that declared a State Statute (and implementing rules) unconstitutional. The Court has jurisdiction. Art. V, §3(b)1, Fla. Const.

Florida Hometown Democracy PAC, Inc., and Lesley G. Blackner filed a Complaint for Declaratory and Injunctive Relief in the Second Judicial Circuit Court, Leon County against the Florida Secretary of State, and the State Division of Elections. [RI 1-68].

The Plaintiffs and Defendants filed cross motions for summary judgment and associated memoranda and responses,

respectively. [R.I 81-106; 135-159; 164-179]. FHD/Blackner filed Blackner's Affidavit in Support of the Motion for Summary Judgment. [R.I 107-123]. The Defendants did not file any discovery materials or affidavit in support of the Cross-Motion for Summary Judgment. [R.I 135-159]. The Plaintiffs and Defendants filed a Stipulation of Facts. [R I 182-200; II 201-220].

The Stipulation of Facts appended the Florida House of Representatives Bill Detail for CS for HB 537 and all four staff analyses of that bill. [R.I 185; 190-218]. CS for HB 537 was enacted as Ch. 2007-30, Laws of Florida.

Save Our Constitution, Inc. (SOCI) was granted intervention just before the summary judgment hearing. [R.I 180-181].

On November 27, 2007, the circuit court granted the Final Summary Judgment for Defendants. [R.II 221-230].

FHD/Blackner appealed that judgment to the First District Court of Appeal. [R.II 231-243].

On April 23, 2008, the First District Court of Appeal reversed and remanded the Final Summary Judgment for Defendants with directions that judgment be entered for Florida Hometown Democracy, Inc. and Lesley G. Blackner (Plaintiffs). The district court expressly declared section 25 of chapter 2007-30, Laws of Florida, and implementing

rules to be unconstitutional under Article XI, section 3 of the Florida Constitution.

The Secretary of State and Division of Elections appealed that decision to this Court. (Case No. SC08-884).

Save Our Constitution, Inc. (SOCI) appealed that decision to this Court, and the appeal was consolidated with Case No. SC08-884. SOCI adopted Browning's Brief.

STATEMENT OF THE FACTS

The Stipulation of Facts filed with the trial court provided [R.I 182-200; II 200-220]:

1. Plaintiff Lesley G. Blackner (Blackner) is a citizen, resident and registered voter in Palm Beach County, Florida, and the President and chair of Plaintiff Florida Hometown Democracy, Inc. PAC. [R.I 183].

2. Plaintiff Florida Hometown Democracy, Inc. PAC (FHD) is a Florida not-for-profit corporation established under Ch. 617, Fla. Stat., and a political committee registered pursuant to Ch. 106 Fla. Stat., to sponsor and advocate for the adoption of a proposed amendment to the State Constitution titled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans." [R.I 183].

3. Plaintiffs have utilized the initiative process in advancing the proposed constitutional amendment at issue, as set forth in Art. XI, § 3, Fla. Const. [R.I 183].

4. Defendant Kurt. S. Browning is Florida's Secretary of State and, pursuant to section 20.10, Florida Statutes, the head of the Florida Department of State (DOS). [R.I 183].

5. Defendant, State of Florida, Department of State, Division of Elections (DOE), is established by section 20.10, Florida Statutes. [R.I 183].

6. DOE maintains an internet site (http://election.dos.state.fl.us/legal.shtml) that contains "legal references" for the initiative petition process, and it includes the following legal references: article IV, section 10, article XI, sections 3 and 5, Florida Constitution; and sections 15.21, 16.061, 100.371, 101.161, 104.185 and 106.19(3), Florida Statutes. [R.I 183].

7. On June 21, 2005, DOE approved FHD's initiative petition form and assigned it Serial Number 05-18 after FHD had submitted the text of a proposed constitutional amendment (including the ballot title, ballot summary and text) and the form on which signatures would be affixed pursuant to sections 100.371 and 101.161, Florida Statutes, and DOE's implementing rules. The ballot title of FHD's

petition is "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans" (Proposed Amendment). [R.I 183-84].

8. A true and correct copy of the Proposed Amendment, as approved by DOE, is attached to the Complaint as Exhibit A. [R.I 184].

9. FHD's Proposed Amendment qualified for review pursuant to section 15.21, Florida Statutes, and DOS notified the Attorney General. In February 2006, the Attorney General petitioned the Florida Supreme Court for an Advisory Opinion on FHD's Proposed Amendment. [R.I 184].

10. On June 22, 2006, the Florida Supreme Court issued *Advisory Opinion to the Attorney General Re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006). The Court approved the Proposed Amendment for placement on the ballot. [R.I 184].

11. The Financial Impact Estimating Conference prepared an analysis and financial impact statement for the Proposed Amendment that was submitted to the Florida Supreme Court for review by the Attorney General. On July 12, 2007, the Court issued *Advisory Opinion to the Attorney General Re: Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 963 So.

2d 210 (Fla. 2007). The Court remanded the financial impact statement to the Financial Impact Estimating Conference for redrafting. [R.I 184].

12. In the 2007 regular session, the Florida Legislature enacted Committee Substitute for House Bill 537, "[a]n act relating to elections." The Governor signed the legislation on May 21, 2007, and it was codified as Chapter 2007-30, Laws of Florida. A true and correct copy of the law is attached to the Complaint as Exhibit B. [R. I 184-85].

13. A true and correct copy of the Florida House of Representatives Bill Detail for CS for HB 537, together with all four of the House Staff analyses of the bill, is attached hereto as Exhibit 1. [R. I 185; 190-218].

14. On June 29, 2007, DOE published a Notice of Development of Proposed Rules in Volume 33, No. 26 of the Florida Administrative Weekly, regarding proposed rule 1S-2.0095 "Constitutional Amendment Petition Revocation." [R. I 185].

15. On June 29, 2007, DOE published a Notice of Development of Proposed Rules in Volume 33, No. 26 of the Florida Administrative Weekly, regarding proposed rule 1S-2.0091 "Constitutional Amendment Initiative Petition

Submission Deadline; Verifying Electors’ Signatures." [R.I 185].

16. DOE published a Notice of Proposed Rules for proposed rules 1S-9.0095 and 1S-2.0091 and on August 24, 2007. DOS filed the rules for final adoption on September 25, 2007, and they became effective on October 15, 2007. [R. I 185].

17. On August 10, 2007, DOE published an Emergency Rule in Volume 33, No. 32 of the Florida Administrative Weekly, Emergency Rule 1SER07-2 “Constitutional Amendment Initiative Petition Revocation; Submission Deadline; Signature Verification.” A true and correct copy of the Emergency Rule is attached to the Complaint as Exhibit C. [R. I 185].

18. On August 10, 2007, DOE published an Emergency Rule in Volume 33, No. 32 of the Florida Administrative Weekly, Emergency Rule 1SER07-1. A true and correct copy of the Emergency Rule is attached to the Complaint as Exhibit D. The Emergency Rules expire on October 29, 2007, and are identical to new DOS Rules 1S-2.0091 and 1S-2.0095. [R.I 185].

19. Since June 21, 2005 FHD has collected signatures of valid registered voters on the Proposed Amendment. FHD has submitted signed petitions to supervisors of elections

for verification, and paid the costs associated with verification of voter signatures, in order to qualify for the 2008 general election ballot by February 1, 2008. [R. I 185-86].

20. A copy of the DOE printout of FHD's campaign finance activity through the reporting period ending on September 30, 2007 is attached hereto as Exhibit 2. [R. I 186; II 219-220].

21. Through June 30, 2007, FHD has expended in excess of $412,557 in its efforts to place the Proposed Amendment on the ballot. [R. I 186].

22. On August 17, 2007, DOE, pursuant to section 100.371, Florida Statutes, as amended by Chapter 2007-30 and Emergency Rule 1SER07-2, approved for circulation a petition revocation form submitted by Save Our Constitution, Inc. (SOCI). DOE assigned the SOCI form Serial Number 05-18R. A true and correct copy of the SOCI form is attached as Exhibit E to the Complaint. [R. I 186].

23. SOCI filed its incorporation papers with DOS on July 24, 2007, as a Florida non-profit corporation. [R. I 186].

24. DOE has posted the SOCI petition form on the Division of Elections website, where it can be downloaded.

See http://election.dos.state.fl.us/legal.shtml. [R. I 186].

25. As of September 26, 2007 DOE's Initiative Signature Data for FHD's Proposed Amendment credits FHD with 331,060 verified citizen initiative petitions that have been verified by the supervisors of elections and certified to the DOE. A true and correct copy of the printout is attached at Exhibit 2 to Blackner's Affidavit. DOE's website indicates that "currently verified totals are unofficial until the Initiative receives certification and a ballot number." [R. I 186].

26. The 331,060 number includes petition forms filed with the supervisor of elections not more than 150 days from the date the voter signed the underlying original initiative petition. [R. I 186-87].

27. On August 22, 2007, Plaintiffs filed suit against the Defendants to prevent enforcement of Chapter 2007-30, section 25, Laws of Florida, and under the authority of such legislation, two emergency rules, Florida Administrative Code Rules 1SER07-1 and 1SER07-2, all effective as of August 1, 2007. [R. I 187].

28. The Defendants were served with the Summons and Complaint on August 23, 2007 and filed their Answer on September 19, 2007. [R. I 187].

29. The parties filed a Joint Motion for Case Management Conference and Expedited Hearing seeking accelerated review pursuant to the authority of section 86.111, Florida Statutes (2007). [R. I 187].

30. On October 4, 2007, this Court entered its Order Granting Joint Motion for Case Management Conference and Expedited Hearing, setting the final hearing in this cause on October 24, 2007. [R. I 187].

31. On October 10, 2007, SOCI filed a Motion to Intervene in this case. The Motion alleges, in part, that "This case affects the substantial interests of SOC in that it is actively engaged in collecting signature revocations from Home town (sic) Democracy signatories." Motion to Intervene, Paragraph 3. [R. I 187].

32. Plaintiffs have a genuine, present doubt and a genuine dispute with Defendants about whether section 100.371(7), Florida Statutes (2007), and the implementing Emergency Rules violate article XI, section 3 of the Florida Constitution and rights of due process and equal protection in the state and federal constitutions. [R. I 187].

Blackner's Affidavit

Blackner submitted an Affidavit in support of the Motion for Summary Judgment, that included nine exhibits. [R. I 107-123]. The exhibits included:

1. FHD's Petition (05-18).

2. DOS September 26,2007 signature data for FHD Petition, O5-18.

3. DOS Corporate detail for Save Our Constitution, Inc.

4. DOS approved Save Our Constitution, Inc. petition revocation form (05-18R).

5. Save Our Constitution, Inc. petition revocation form (05-18R) downloaded from http://www.takebackmysignature.com by Plaintiff Blackner.

6. Save Our Constitution, Inc. petition revocation form (05-18R) downloaded from http://www.takebackmysignature.com by Plaintiff Blackner's husband, Richard L. Stone.

7. Steve Bousquet's article, "Finally, Something Scares Big Business," St. Petersburg Times, August 25, 2007.

8. Electronic mail, Steve Bousquet to Lesley Blackner of September 25, 2007, forwarding mail from St. Petersburg Times reader Kathleen Schultz, September 25, 2007 to Steve Bousquet.

9. SOCI Signature Revocation Packet mailed to FHD supporter, Alan Ross.

Legislative History

The measure declared unconstitutional, section 25 of Chapter 2007-30, was Council Substitute for House Bill 537 (CS/HB 537). [R19-39]. The title began "An act relating to elections...." and did not mention prevention of fraud. CS/HB 537 contains no legislative findings or express statement of legislative intent.

The Plaintiffs and Defendants stipulated to the Florida House of Representatives' Bill Detail for CS/HB 537, and filed all of the staff analyses with the circuit court. [R 182; 190-218]. The Bill Detail indicates that there were fifteen "related bills." One of the fifteen "related bills" was characterized as having a "similar" relationship to CS/HB 537 -- CS/CS/SB 960. [R 190]. None of the House of Representatives Staff Analyses for CS/HB 537 discussed the revocation provision. [R.I 190-218].

No request for judicial notice for any legislative history materials related to 2007 bills: CS/HB 537, CS/CS/SB 960, CS/SB 900 or HB 7009 was filed in either the circuit court or the First District Court of Appeal, and neither court took judicial notice of such materials on its own motion.

SUMMARY OF ARGUMENT

The District Court correctly determined that the signature revocation law and rules are not necessary for ballot integrity under Smith v. Coalition to Reduce Class Size, 827 So.2d 959, 962 (Fla. 2002), and State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566 (Fla. 1980).

The plain meaning of the citizen initiative, which is clear, unambiguous and fully addresses the subject of a "petition containing a copy of the proposed revision or amendment," does not imply the legality of a petition revocation scheme.

Even if an inquiry into the Legislative intent for the ballot revocation process were relevant, there is no factual predicate to establish the necessity of the scheme. The Legislative history of various bills cited in the Appellants' Brief is not properly before the Court. Moreover, the items cited in the referenced Staff Analyses are inconclusive and unreliable to establish fraud in the citizen initiative process.

The revocation statute and rules are not reasonable measures to ensure ballot integrity. Revocation is only available to persons who have signed a citizen initiative that is the subject of a paid political campaign waged by a

political action committee opposed to the proposed initiative.

Additional collection of petitions and verification of revocation petitions by Supervisors of Elections actually increases the potential for fraud or mistake based upon an aggressive revocation political campaign.

Browning concedes the FHD may have to collect more signatures to quality for the ballot based upon revocations, but rejects the District Court's conclusion of an additional burden to FHD. Instead of promoting a valid initiative process, the revocation statute and rules violate FHD's vested rights in verified petitions that it has collected and paid to have verified in reliance of obtaining an advisory opinion and qualifying for the ballot.

This Court should affirm the District Court of Appeal's decision below.

ARGUMENT

STANDARD OF REVIEW: The standard of review is de novo. Zingale v. Powell, 885 So.2d 277, 280 (Fla. 2004). In considering any legislative act or administrative rule which concerns the initiative amending process, we must be careful that the legislative statute or implementing rule is necessary for ballot integrity since any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. Smith v. Coalition to Reduce Class Size, 827 So.2d 959, 962 (Fla. 2002).

I. SIGNATURE REVOCATION IS NOT NECESSARY FOR BALLOT INTEGRITY.

Browning correctly cites to Smith v. Coalition to Reduce Class Size, 827 So.2d 959, 962 (Fla. 2002) and State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566 (Fla. 1980) to summarize the requirement that legislation regarding the citizen initiative process be "necessary for ballot integrity." In fact, the First District Court of Appeal cited only to those two cases in its opinion in the case at bar for guidance as to the meaning of the phrase "ballot integrity."

The District Court properly determined that the Revocation Law and Rules "do not ensure ballot integrity." Instead, the District court properly found that the Revocation Law and Rules "serve to burden the initiative process with requirements that are not prescribed by the constitution...."

A. THE PLAIN MEANING AND INTERRELATIONSHIP OF CONSTITUTIONAL PROVISINGS REGARDING CIITZEN INITIATIVES PROHIBIT THE STATUTE AND RULES.

To the point, the District Court of Appeal's opinion below provides in part: "Indeed, signature revocation is not even referenced in the citizen initiative provisions of the Constitution." [Brief, Appendix A, page 6].

The plain meaning of the citizen initiative provision does not permit signature revocation. Article XI, section 3 of the Florida Constitution. One operative phrase provides:

> It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors....

Notably absent is any mention of a "revocation petition" or the number of electors "who signed and did not timely revoke" petitions filed with the Secretary of State.

The Constitutional language is clear, unambiguous and fully addresses the matter at issue - citizen initiative signatures, and as such warrants that this Court affirm the opinion below. See, Coastal Florida Police Benevolent Assoc. v. Williams, 838 So.2d 543, 548-550 (Fla. 2003)(inquiry into interpretation of Constitution begins with explicit language).

The cases cited by Browning regarding deference owed to the Legislature are inapposite. [Brief, pages 12, 21-22. Instead, Smith v. Coalition to Reduce Class Size, 827 So.2d 959, 962 (Fla. 2002) provides the standard of review. Consistent with the plain meaning, and requirement that any legislation or rule affecting the citizen initiative be necessary for ballot integrity, this Court should reject any implication that Legislature has authority to engraft a revocation scheme onto the process. See, Advisory Op. to the Governor, 22 So.2d 398, 399 (Fla. 1945)("when the Constitution prescribes the method of doing a thing, it impliedly prohibits legislation prescribing a different manner of doing it").

The other Constitutional provisions calling for the Attorney General to petition this Court to issue an advisory opinion on citizen initiatives are not benefited by the uncertainty created revocation of petitions that

would trigger such proceedings. Art. V, section 3(10) and Art. IV, section 10, Fla. Const. Indeed, this Court's rules of Appellate Procedure governing such advisory opinion proceedings do not recognize a signature revocation process, but instead refer to the "signature-collection process." Fla. R. App. P. 9.510(b)(4).

The opinion below should be affirmed.

B. THERE IS NO FACTUAL PREDICATE FOR FINDING THAT THE SIGNATURE REVOCATION LAW AND RULES ARE INTENDED TO PREVENT FRAUD OR OTHER IRREGULARITIES.

Based upon the foregoing Point I.A, any analysis of a Legislative predicate for enacting the revocation process as necessary for ballot integrity is unnecessary. See, Coastal Florida Police Benevolent Assoc. v. Williams, 838 So.2d at 550.

However, even assuming for the sake of argument that the Legislative intent were relevant to the case at bar, the facts of record do not bear out the need for the revocation statute and rules.

Browning's Statement of the Case and Facts, and Argument repeatedly stresses the Legislature's purported reason to enact the revocation law and rules "due to concerns about fraud and other irregularities at the

signature gathering stage...." [Brief, pages 2-4, 10, 13-14, 19-21, 25, 29].

The record developed at the trial court is devoid of any affidavit, evidence or other matter contemplated by Rule 1.510, Florida Rules of Civil Procedure, that the Legislature enacted the Revocation Law and Rules to prevent fraud.

Neither the trial court, nor the District Court of Appeal took judicial notice of any materials related to Legislative intent, as permitted by Sections 90.201, 90.202 and 90.204, Florida Statutes.

Browning's brief contains purported references to selected Legislative materials that were never presented to trial court or the District Court of Appeal. It is not appropriate for Browning to inject these references for the first time before this Court. See, Thornber v. City of Ft. Walton Beach, 534 So.2d 754, 755 (Fla. 1st DCA 1988)(appeal not an evidentiary proceeding). Browning has not provided FHD/Blackner with any fair opportunity to ensure that the matters argued are susceptible of being judicially noticed in accordance with Sections 90-201 through 90.207, Florida Statutes and constitute an accurate and complete Legislative history. See, §90.204(1), Fla. Stat.

Browning's brief contains an extensive quotation purportedly from an April 18, 2007, Senate staff analysis of CS/SB 900, relating to newspaper stories "concerning fraud" and a Florida Department of Law Enforcement October 2004 Press Release[1] about numerous complaints related to voting irregularities. The two newspaper stories allegedly reported the arrest[2] of two petition gatherers in Santa Rosa County and "several other elections supervisors who found petitions with the names of dead voters[3]." [Brief, page 3].

Typically, Courts rely upon the plain meaning of Constitutional or statutory terms to discern intent. See, Coastal Florida Police Benevolent Assoc. v. Williams, 838 So.2d 543, 548-550 (Fla. 2003). However, when faced with an irreconcilable ambiguity, this Court has resorted to consideration of Legislative staff analyses to help discern Legislative intent. See, American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360, 368-370 (Fla. 2005)

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[1] On its face, the press release focused on conduct related to voter registration forms, not citizen initiative forms.

[2] Apparently the presumption of innocence does not apply when the Legislative staff reads news reports of alleged arrests.

[3] Even assuming that the Supervisors of Elections failed to cull out the petitions purported signed by deceased persons or by persons who died after signing the petitions during the verification process, a deceased person cannot sign a signature revocation form.

(discussing use of Legislative staff analyses for legislative history).

A court may take judicial notice of materials discovered through its own independent research on its own motion. Id. and §90.202, Fla. Stat.

When a court takes judicial notice on its own motion, it must afford each party a reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed. §90.204, Fla. Stat. The failure of either the trial court, or the First District Court of Appeal to take judicial notice of the non-record Legislative materials does not preclude this Court from taking judicial notice. §90.207, Fla. Stat.

The First District Court of Appeal has questioned the wisdom of taking judicial notice of Legislative staff analyses on appeal. See, Ellsworth v. Insurance Co. of N. America, 508 So.2d 395, 398 (Fla. 1st DCA 1987); Department of Health & Rehabilitative Srvcs. V. Shatto, 487 So.2d 1152, 1153-54 (Fla. 1st DCA 1986).

There is no basis to conclude that an analysis of the legislative history of the revocation law is necessary to review the District Court's opinion. Moreover, there is no

record foundation for finding that the revocation law and rules were meant to prevent fraud or other irregularities.

C. THE SIGNATURE REVOCATION LAW AND RULES ARE NOT REASONABLE REGULATIONS TO ENSURE BALLOT INTEGRITY.

Without waiver of the argument that any Legislative predicate for the revocation law and rules was based upon prevention of fraud or other (unspecified) irregularities in the citizen initiative process, FHD/Blackner assert that the enactments are not reasonable regulations to necessary to ensure ballot integrity.

In discussing the "necessary for ballot integrity" standard in the context of 2002 legislation to require a fiscal impact statement, this Court observed: "this initiative process has already produced a constitutional amendment which was adopted without benefit of the subject statute or rule." Smith v. Coalition to Reduce Class Size, 827 So.2d at 962, citing Art. II, section 8 (Ethics in Government). Since that case was decided in 2002, additional citizens initiatives have been enacted by voters without the revocation process. E.g., Art. X, §19 (repealed); Art. X, §§ 23, 24, 25, and 26.

In 2004, Florida voters enacted Amendment Number Four, the validity of which was considered by a circuit court, and on appeal. Browning cites one of those opinions --

Floridians Against Expanded Gambling v. Floridians for a Level Playing Field, 945 So.2d 553, 557 (Fla. 1st DCA 2006) -- to stand for the proposition:

> Investigation revealed thousands of initiative petitions were procured by fraud and that one-third of the purported signers who were surveyed reported that their signatures were forged.

[Brief, page 20]. There was no finding of fraud in that case, indeed, the First District Court of Appeal's majority opinion provides in part:

> We do not comment of whether Appellants may be able to prove their assertions at trial because it is not before us.

This Court subsequently accepted review of the case, but discharged jurisdiction in a written opinion. Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So.2d 832 (Fla. 2007). As an alternative basis for such discharge, this Court quoted at length from the Secretary of State's Answer Brief agreeing that it was "sound" to wait "until the specific allegations of fraud are adjudicated" based upon a "fully-developed record with a proven set of facts...." Id. at 835.

That case was decided by the trial court on summary judgment and dismissal of the complaint for declaratory and injunctive relief. Neither the trial court nor the

appellate courts found any facts concerning the alleged fraud, nor was "evidence of fraud ... at issue." [Brief, page 20].

Browning urges this Court to place particular emphasis on a decision not cited by the First District's opinion below. [Brief, pages 10, 11, 14, 15, 18, 29, citing Krivanek v. Take Back Tampa Political Comm., 625 So.2d 840 (Fla. 1993). However, that case is not cited in Smith v. Coalition to Reduce Class Size. Unlike Smith v. Coalition to Reduce Class Size and State ex rel. Citizens Proposition for Tax Relief v. Firestone, which dealt with the citizen initiative process and constitutionality of a State enactment under Article XI, section 3, Krivanek v. Take Back Tampa Political Comm. concerned the propriety of mandamus to require Supervisor of Elections' validation of signatures of purged voters, and this Court determined that it was reasonable to require voters to make a minimal effort to either vote at least once every two years or to notify the Supervisor in writing that their voter registration information had not changed. Id. at 844. The Court deferred to the Division of Elections' view that signing an ordinance recall petition under the City Charter was not an allowable form of written notification. Id.

Krivanek v. Take Back Tampa Political Comm. supports the First District Court of Appeal's opinion below.[4] The process established by the revocation statute and rules mandate that a political action committee use a paid political advertisement to solicit revocations, and that only that committee can submit revocation petitions for verification. Krivanek v. Take Back Tampa Political Comm., distinguished a voter registration "status notification process" by detached, neutral Election Supervisors from political advocacy:

> A recall or initiative petition is presented to an elector by an advocate of a particular political view. Such a recall or petition is in not way connected to the status notification process.

Id. at 844. In other words, Supervisors of Elections prevent fraud and the maintain voter registration records as part of ballot integrity and a valid election process.

Instead of establishing a neutral process that allowed for revocation as to all pending citizens' initiatives, the Legislative set up a political process whereby a rival political action committee must be established to circulate a paid political advertisement urging revocation. Voters

[4] Smith v. Coalition to Reduce Class Size relied primarily upon State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561 (Fla. 1980).

cannot directly submit signed revocation petitions to their respective Supervisor of Elections, they must be submitted by the political action committee. In addition, a revocation petition once signed cannot be rescinded or revoked and the voter cannot sign the subject initiative again to restore his or her intent. See, 33 F.A.W. 3690 (August 10, 2007) (13) "Irrevocable Effect of Revocation." [R. I 64].

The trial court record demonstrated that although there are other active citizen initiative petitions being circulated, only FHD has been targeted for revocation. Accordingly, due to politics, signatories of non-targeted petitions do not benefit from the purported "anti-fraud" and right to equivocate benefits of the revocation statute and rules.

Instead of preventing fraud or misleading of voters, the Revocation Law and Rules enable fraud and misinformation by establishing a political process. The Affidavit of Blackner and her exhibits clearly show that at least one voter was tricked by the SOCI revocation telemarketing and letter and only realized it after reading Steve Bousquet's St. Petersburg Times article published on September 15, 2007 (Finally, Something Scares Big Business)[R. I 116-117]:

> I read your column in the paper on 9/15/2007. I'm sorry I didn't see it sooner. I had received a phone call and letter to revoke my signature. I was duped into believing that the petition I signed was deceptive. Now I realize that the phone call and letter I received regarding the petition was deceptive. It was not accurate and did not contain vital information, such as who he represents. Is there not something that can be done about this practice? I am sure many people were in the same situation of not knowing who to believe. Now I am very leery of signing any petitions. Is there any way I can fix this now and get my signature back on the petition? Thanks. Kathy Schultz.

Another voter was targeted with a direct mail on letterhead from "The Honorable John Thrasher Former Speaker of the Florida House of Representatives" that says: "I have enclosed an official government PETITION REVOCATION FORM...." and notes: "it turns all power over use of Florida's lands to certain ""electors." Guess who the "electors" will be. The "special interests" and their slick lawyers will rig the system to put our future in the hands of their cronies." [R. I 122-23]. Only on the last page of the three-page letter does it add, in smaller font, "Paid Political Advertisement paid for by Save Our Constitution, Inc...." [R. I 123].

In addition, the revocation law and rules mandate that "supervisors of elections shall provide petition-revocation forms to the public at all main and branch offices." Ch. 2007-30, s. 25, creating new 100.371 (6)(c)]. No similar provision is made for citizens' initiative petitions.

Another aspect of the unreasonableness of the revocation law and rules is the impairment of vested rights represented by verified petitions. FHD has consistently asserted that the signature revocation process violated its vested rights to signatures already verified and briefed the issue below. The trial court record established that FHD had 331,060 "unofficial" verified petitions certified to the Secretary of State, which represents FHD's expenditure of $33,106.00 for the ten cents per petition signature verification charges by Supervisors of Elections.

Smith v. Coalition to Reduce Class Size, 827 So.2d at 961, affirmed the circuit court's judgment, and the circuit court found that the statute "would abrogate vested rights in violation of the due process clauses of the state and federal constitutions."

D. THE SIGNATURE REVOCATION LAW AND RULES WEAKEN THE CITIZEN INITIATIVE PROCESS.

Browning admits that FHD "may have to obtain more signatures overall to ensure that a greater percentage of

those gathered are ultimately deemed valid." [Brief, page 29].

Browning asserts, "nothing in the record supports the First District's conclusion that a burden exists...." (from the revocation law and rules)[Brief, page 28]. To the contrary, the evidence was undisputed that FHD President Blackner had personally spoken with many Florida voters who called FHD to ask questions and complaint after being targeted with a SOCI telephone solicitation urging revocation of the FHD petition. [R. I 113]. Similarly, nothing in the record controverts the electronic mail that Kathy Schultz sent to the St. Petersburg Times reporter. [R 118]. Indeed, it is self evident that the revocation law and rules establish a political process whereby opponents of a citizens initiative can use the revocation process to circulate "paid political advertisements" to solicit petition revocations. As quoted in the St. Petersburg Times, Associated Industries of Florida President Barney Bishop noted: "it's much cheaper to fight Hometown Democracy over signatures than at the ballot box." [R. I 116].

Browning urges that the revocation process empowers voters who wish to change their minds, at least those who "hastily sign" or "have legitimate second thoughts."

[Brief, page 18]. The Brief quotes a 1941 decision that concerned creation of a sanitary district in the Village of Walkertown, North Carolina. Id. pages 18-19, citing Idol v. Hayes, 14 S.E.2d 801, 802-03 (N.C. 1941). That decision has no place in weighing the "delicate symmetrical balance" at issue in the instant case. Smith v. Coalition to Reduce Class Size, 827 So.2d at 963. The North Carolina Constitution does not permit amendment by citizen initiative. Art. XIII, §§1-4, N.C. Const. Existing North Carolina statutes do not provide for petition revocation and do not include a signature verification process. §§163.218 - 221, N.C. Stat.

The District Court of Appeal properly concluded that the revocation statute and rules burden the citizen initiative process and are unconstitutional.

CONCLUSION

Florida Hometown Democracy, Inc. and Lesley G. Blackner respectfully requests this Court to affirm the decision of the First District Court of Appeal and to grant such other relief as is just and proper.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that the foregoing was word-processed using Courier New, 12-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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