IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-884

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

Appellants,

v.

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

Appellees.

INITIAL BRIEF OF APPELLANTS

On Appeal from a Decision of the First District Court of Appeal
Case No. 1D07-6024

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STATEMENT OF THE CASE AND FACTS

This appeal arises from the First District's reversal of a trial court's ruling that a statute empowering electors to revoke their own signatures on petition forms for proposed constitutional amendments is constitutionally permissible. Fla. Hometown Democracy, Inc. PAC v. Browning, 980 So. 2d 547 (Fla. 1st DCA 2008) (Tab A1). The First District concluded that section 100.371, Florida Statutes, and its related administrative rules (the "Revocation Provisions"), are unnecessary for "ballot integrity" and thereby unconstitutional under article XI, section 3, which provides that the power to propose revisions or amendments to the constitution "is reserved to the people." Id. at 550.

The First District based its ruling on article XI, section 3 and two of this Court's ballot integrity cases. It mentioned neither the fraud in the signature-gathering process that motivated the legislature's enactment of section 100.371 nor this Court's decision in Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 843 (Fla. 1993), which held that the right to petition may be subject to reasonable regulations that are necessary "to ensure ballot integrity and a valid election process." It mentioned nothing about the political power of the people to control their own signatures' use in the petition process. Appellants, Secretary of State Kurt S. Browning and the State of Florida, Department of State, Division of Elections (collectively the "State"), seek reversal of the First District's decision.

Protecting the Signature Gathering Process and Ballot Integrity

The signature gathering process is a critical element of the initiative process that can be compromised if fraud or other methods of deception or dishonesty are allowed to undermine the electorate's confidence in this exercise of their political power. The power to propose a revision or amendment to the constitution via initiative, as set forth in article XI, section 3, is reflective of the fact that "[a]ll political power is inherent in the people" under article I, section 1.

The duty to protect this exercise of political power and the initiative process, thereby ensuring that the will of the voters prevails, resides with both the Florida Legislature and the Secretary of State. *See* State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566-567 (Fla. 1980) ("the legislature, in its legislative capacity, and the secretary of state, in his executive capacity, have the duty and obligation to ensure ballot integrity and a valid election process."). In exercising this duty, the legislature was presented in its 2007 general session with numerous reports of fraud in the signature gathering process that occurred during the 2004 election cycle, resulting in two bills addressing the topic of signature revocation. Fla. CS for SB 900 (2007); Fla. HB 7009 (2007). The concern underlying each of the proposed bills was that the people's right to exercise their political power, including the power to control whether their petition signatures are to be counted, should be protected from fraud or other irregularities in the

signature gathering process. As stated in the legislative history of Senate Bill 900:

> During the 2004 election cycle, numerous stories appeared in newspapers concerning fraud in the petition process to place constitutional amendments on the ballot. Two petition gatherers were arrested in Santa Rosa County for over 40 counts each of uttering a forged document. Several other elections supervisors found petitions signed with the names of dead voters. The Florida Department of Law Enforcement (FDLE) issued a press release in October of 2004 indicating that it had received numerous complaints relating to voting irregularities and had initiated several investigations. Specifically, the FDLE created regional elections task forces to address the issue of voter fraud in a statewide manner. While the FDLE did not reveal details of the investigations, it noted that the investigations focused on the following conduct:
>
> > In some cases, persons who believed they were signing petitions later found out that their signatures or possible forged signatures were used to complete a fraudulent voter registration. In other instances, it appears that workers hired to obtain legitimate voter registrations filled in the information on the registration forms that should have been completed by the registrants. On several occasions, workers appear to have signed multiple voter registrations themselves using information obtained during the registration drive. In many of the situations complained about, the workers were being paid on the basis of each registration form submitted.

Fla. S. Comm. on Judiciary, CS/SB 900 (2007) Staff Analysis (April 18, 2007).

Senate Bill 900 was identical, except for a 120-day revocation period, to the provisions added via floor amendment to the bill that was passed as Chapter 2007-30, Laws of Florida. Fla. CS for HB 537, § 25 (2007).[1]

[1] The Revocation Provisions were added by a Senate floor amendment on April 27, 2007. Fla. S. Jour. 650 (Reg. Sess. 2007).

The Signature Revocation Provisions

Facing these reports of fraud and other related problems in the signature gathering process, the Florida Legislature amended section 100.371, Florida Statutes,[2] to allow electors to exercise the right to revoke their signatures on constitutional amendment initiative petitions. Ch. 2007-30, § 25, Laws of Fla. New subsection 100.371(6) created procedures and a system by which electors may revoke their signatures by signing an approved petition revocation form[3] and submitting it to the appropriate supervisor of elections within 150 days of signing the relevant initiative petition. § 100.371(6)(a), Fla. Stat. (2007). Supervisors of elections provide the approved revocation forms to the public. § 100.371(6)(c), Fla. Stat. (2007).

The Division of Elections promulgated two administrative rules to implement the amended statute. Rule 1S-2.0091, which was identical to and

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[2] Section 100.371 generally sets forth the procedures by which citizens may exercise their power to amend the Florida Constitution via initiative petitions.

[3] Under the 2007 legislation, the revocation process must reflect the "same relevant requirements and timeframes as the corresponding" initiative process. § 100.371(6)(b), Fla. Stat. (2007). For this reason, a revocation sponsor must propose a revocation form to be certified by the Secretary of State, pay a fee of ten cents for the verification of each revocation signature, and file verified revocation signatures with the supervisors of elections by February 1 of the year that the amendment is sought to be placed on the ballot. § 100.371(6)(d), Fla. Stat. (2007). As of July 1, 2008, those seeking to revoke their signatures individually may do so on a standard revocation form. *See* Ch. 2008-95, § 14, Laws of Fla.

replaced the Division of Elections' emergency rule 1SER07-1 on October 15, 2007, sets forth details about the revocation process.[4] Rule 1S-2.0095, which replaced and was identical to emergency rule 1SER07-2, became effective on October 15, 2007 and sets forth how revocation signatures are collected.[5]

The Parties

Appellees, Florida Hometown Democracy, Inc. PAC and Lesley G. Blackner (collectively "FHD"), are the proponents of a proposed amendment entitled "Referenda Required for Adoption and Amendment of Local Government Comprehensive Use Plans." The Secretary of State approved their initiative

[4] Signatures on initiative petitions cannot be verified if the signers previously signed and subsequently revoked their signatures from the proposed amendment. Fla. Admin. Code R. 1S-2.0091(2)(a)(2.); *see also* Fla. Admin. Code R. 1S-2.0095(13). The number of verified revocations recorded by February 1 are deducted from the number of verified signatures in support of the proposed amendment to determine whether an initiative amendment has enough support to gain a position on the ballot. Fla. Admin. Code R. 1S-2.0091(4)(b).

[5] Groups sponsoring the revocation must register as a political committee and the Division of Elections must approve their revocation form. Fla. Admin. Code R. 1S-2.0095(1). All signed revocation forms are returned to the revocation sponsor, and the group submits these forms to the appropriate supervisor of elections. Fla. Admin. Code R. 1S-2.0095(8). The revocation signatures are verified by the supervisors of elections subject to similar conditions as initiative signatures. Fla. Admin. Code R. 1S-2.0095(9). Signed revocation forms must be verified and filed no later than February 1. Fla. Admin. Code R. 1S-2.0095(11). The sponsoring political committee provides the revocation forms to the public at local supervisors of elections' offices. Fla. Admin. Code R. 1S-2.0095(12).

petition form [R2 183][6] and this Court reviewed the amendment language, concluding that it complied with the single subject rule and the statutory requirements for ballot titles and summaries. Advisory Op. to the Att'y Gen. re: Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 938 So. 2d 501, 501 (Fla. 2006).[7] The proposed amendment cannot attain placement on the 2008 ballot, however, because FHD failed to file the required number of verified signatures[8] by the constitutionally-imposed deadline of February 1, 2008.[9]

Pursuant to the Revocation Provisions, Save Our Constitution, Inc. ("SOCI") registered as a non-profit corporation with the Department of State in July 2007.

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[6] Record citations are [R# *] where # is volume number and * is page number.

[7] The Court has since held that the proposed financial impact statement drafted by the Financial Impact Estimating Conference was misleading. Advisory Op. to the Att'y Gen. re: Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 963 So. 2d 210, 214-15 (Fla. 2007). A redrafted statement was submitted and this Court heard oral argument in Case Number SC06-521 as to whether it is acceptable on May 6, 2008.

[8] For 2008, the total number of required signatures statewide was 611,009. *See* Fla. Dep't of State, Div. of Elections, Initiative Petition Process: Cong. Dist. Requirements, *available at* http://election.dos.state.fl.us/initiatives/congres.shtml (last visited July 25, 2008).

[9] *See* Unofficial verified total signatures for FHD amendment, Fla. Dep't of State, Div. of Elections, *available at* http://election.dos.state.fl.us/initiatives/initdetail.-asp?account=37681&seqnum=2 (last visited May 16, 2008) (reflecting 594,096 signatures verified before taking revocations into account).

[R2 186] SOCI registered to sponsor a revocation effort against FHD's proposed amendment. [R2 161] Following the approval of its revocation petition by the Division of Elections in August 2007, SOCI began circulating the revocation form. [R2 161]

FHD's Constitutional Challenge & the Trial Court's Order

On August 22, 2007, FHD filed a complaint in Leon County circuit court for a declaratory judgment and injunctive relief to prevent the enforcement of the Revocation Provisions. [R1 1-68] FHD asserted that the Revocation Provisions violated article XI, section 3 of the Florida Constitution, as well as the due process and equal protection provisions of the federal and state constitutions. The parties agreed to file cross-motions for summary judgment, and SOCI joined the State's motion as an intervenor. [R1 81-106; 135-59; 160-63]

Following an October 24, 2007 hearing, the trial court entered summary final judgment on November 27, 2007 in favor of the State and SOCI on all three counts. [R2 221-230; Tab A2] The trial court ruled that the Revocation Provisions do not violate the Florida Constitution, nor do they result in due process or equal protection violations. [R2 221-22]

First, the trial court held that article XI, section 3 of the Florida Constitution was not violated, stating:

> The Revocation Provisions do not place any additional requirement or burden on the elector who intends to sign a petition, or to vote on the

> initiative once it is placed on the ballot. The Revocation Provisions do in fact grant the elector more power over his signature and decision to support the placement of an initiative on the ballot. The Provisions do not change or add to the requirements set forth in Article XI, Section 3 of the Florida Constitution. Furthermore, the Revocation Provisions do not in any way strengthen the power of the Legislature vis-à-vis the people.

[R2 225-26] Thus, the trial court held that allowing voters to revoke their signatures under the Revocation Provisions is not unconstitutional. [R2 226]

The trial court also held that the Revocation Provisions do not violate equal protection rights under the federal and state constitutions. Applying the rational basis test, the court reasoned that "[t]he state has a legitimate interest in ensuring that the petition process evidences the will of the people," and concluded that signature revocation is rationally related to that interest. [R2 227]

Lastly, the trial court ruled in the State's favor on FHD's due process claims under the federal and state constitutions. The court explained that the requisite signatures for FHD's initiative to be placed on the ballot had not yet been obtained and filed, and as such "no valid right to be on the ballot has ripened" for purposes of a due process claim. [R2 228] Instead, "[t]he only right that Plaintiffs will have is the right guaranteed by Article XI, Section 3, to have the measure placed on the ballot for consideration once the requirements have been met." [R2 228] The court concluded that the application of the Revocation Provisions does not infringe on any right protected by due process. Moreover, because revocations are effective

when made and do not invalidate signatures nunc pro tunc, there was no retroactivity problem for due process purposes. [R2 229]

The First District's Decision

FHD appealed the trial court's decision. [R2 229][10] Oral argument in the case was held on March 31, 2008. On April 23, 2008, the First District reversed, holding that the Revocation Provisions are impermissible regulations on the citizen initiative process that violate article XI, section 3, because they are not necessary to ensure ballot integrity. Fla. Hometown Democracy, Inc., 980 So. 2d at 548. The First District relied on two of this Court's ballot integrity decisions, and concluded that the Revocation Provisions were not necessary for ballot integrity because they "do not serve to confirm compliance with constitutionally-specified requirements for submission of proposed amendments through the initiative process" and they "burden the initiative process with requirements that are not prescribed by the constitution." Id. at 550. The State timely appealed the First District's decision, and this Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

[10] The First District denied FHD's request for certification to this Court, but agreed to expedite briefing. [1D07-6024, Dec. 10, 2007 orders]

SUMMARY OF ARGUMENT

Due to concerns about fraud and other irregularities at the signature gathering stage, the legislature acted to protect voters by empowering them to revoke their own signatures on initiative petitions. The power to revoke promotes the purpose of article XI, section 3, and protects ballot integrity, by ensuring that only those initiatives truly achieving the requisite level and breadth of voter support appear on the ballot. As this Court has held, "reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process." Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 843 (Fla. 1993). The Revocation Provisions are reasonable regulations on the initiative signature gathering process that prevent and remedy fraud, which can undermine the electorate's confidence in the election process.

The Revocation Provisions, like both the signature verification provisions this Court upheld in State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980), and the exclusion of petition signatures of electors removed from voter rolls upheld in Krivanek, are reasonable regulations that are necessary to ensure ballot integrity and a valid election process. The provisions effectuate the political power of the people under article I, section 1 and article XI, section 3, by ensuring that the will of the electorate is reflected in the signature-gathering process, and certain types of fraud and other potential irregularities

occurring in the signature gathering process can be rectified during the limited 150-day statutory revocation period. As the trial court recognized, this signature revocation right protects the integrity of the initiative process and the power of the citizens *without* strengthening the power of the legislature.

Here, the First District erred by reading article XI, section 3 in a way that renders the legislature unable to empower voters or rectify fraud in the signature gathering process. It fails to mention or apply the principles of this Court's important ballot integrity case, Krivanek. Its holding deprives voters of the ability to effectuate their own political power via signature revocation (a right they arguably already have as part of their inherent political powers). The court also placed emphasis on the lack of an explicit signature revocation right in the constitution, overlooking that this Court upheld the signature verification law in Firestone on ballot integrity principles even though signature verification is not explicitly authorized in the constitution.

In summary, the Revocation Provisions, like signature verification provisions, are reasonable regulations on the petition process that ensure ballot integrity and a valid election process. They empower voters without increasing the legislature's power. The First District's narrow construction of article XI, section 3 should be reversed, and the revocation right upheld.

ARGUMENT[11]

I. The Revocation Provisions Do Not Violate Article XI, Section 3 of the Florida Constitution.

A. The legislature and Secretary must ensure ballot integrity and a valid election process for citizen initiatives.

The Florida Constitution provides the only methods for its own amendment and revision, each of which requires an affirmative vote of the electorate. Among those methods is the right reserved to the people to amend their constitution by initiative. Art. XI, § 3, Fla. Const. This power is invoked by obtaining a sufficient number of valid voter signatures on petitions in support of the proposed amendment. This sufficient number must come from at least half of the state's congressional districts, and equal "eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen." Id. The constitution is then amended if the initiative is approved by a vote of at least sixty percent of the electorate voting on the measure at the next general election. Art. XI, § 5(e), Fla. Const.

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[11] **Standard of Review:** A statute's constitutionality is a legal question, and accordingly is reviewed de novo. Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004). "When a court has declared a state statute unconstitutional, the reviewing court must begin the process with a presumption that the statute is valid." St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, 967 So. 2d 794, 799 (Fla. 2007). Doubts as to a statute's validity are resolved in favor of its constitutionality. Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 263 (Fla. 1976).

As this Court has emphasized, the methods for amending the Florida Constitution are "delicately balanced." State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980). The people's power to amend is given substantial protection under the Florida Constitution and this Court's precedents. Article XI, section 3 is a self-executing provision and the legislature has only "limited authority" to regulate the initiative process. Smith v. Coal. to Reduce Class Size, 827 So. 2d 959, 962 (Fla. 2002). The delicate balance struck by the Florida Constitution, however, does not prohibit the legislature from protecting the integrity of the initiative process and ensuring a valid election process:

> The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity. *We do, however, recognize that the legislature, in its legislative capacity, and the secretary of state, in his executive capacity, have the duty and obligation to ensure ballot integrity and a valid election process. Ballot integrity is necessary to ensure the effectiveness of the constitutionally provided initiative process.*

Id. at 963 (emphasis added) (quoting Firestone, 386 So. 2d at 566-67). Thus, the legislature and the Secretary of State not only are empowered, but indeed share a duty and obligation to enact laws to ensure the integrity of the initiative process.

B. The right of electors to revoke their own petition signatures is a proper exercise of legislative authority that protects and enhances ballot integrity and a valid initiative process.

The First District's interpretation of article XI, section 3 nullifies the right of electors to revoke their signatures and renders the legislature powerless to address

the unique type of fraud or related irregularities in the petition process upon which the signature revocation statute is based, leaving it to the electorate to amend the constitution to add a revocation right. This interpretation is erroneous in light of this Court's ballot integrity cases, which have addressed the meaning of ballot integrity in various contexts. In a case the First District failed to even mention, this Court explained the necessity standard, effectively allowing the legislature to have leeway to enact reasonable regulations that ensure ballot integrity and a valid election process. Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840 (Fla. 1993). The Court stated:

> Given its constitutional underpinnings, the right to petition is inherent and absolute. *This does not mean, however, that such a right is not subject to reasonable regulation. Quite the contrary, reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process*.

Id. at 843 (emphasis added). The highlighted principles support the legislature's enactment of the signature revocation statute, as detailed below.

1. This Court has upheld regulations that ensure the validity of signatures and that prevent fraud in the petition process as necessary for ballot integrity.

Three decisions of this Court shed light on the parameters of the meaning of ballot integrity, which includes the prevention of fraud and ensuring a valid election process. In Firestone, this Court in 1980 held that verification of ballot signatures to ensure that election outcomes reflect the will of duly-qualified

electors is "an element of ballot integrity." 386 So. 2d at 567. Because signature verification ensures ballot integrity, "the legislature and the secretary may prescribe reasonable regulations to ensure an expeditious and proper verification process." Id. The Court also concluded, however, that a regulation setting a deadline for filing signatures that conflicted with the deadline in the Florida Constitution was beyond the permissible bounds of the legislature's power. Id.

In Krivanek, the Court in 1993 held that the exclusion of petition signatures of electors whose names had been removed from voter registration lists was valid:

> As indicated, *the entire process ... as to temporary and permanent removal* [of voter names from the registration books] *is to prevent fraud and to assure integrity in the electoral process*. In light of the need to maintain the integrity of the verification process by assuring that the elector is still qualified to vote as registered, we find that the express construction of the statute by the Division of Elections ... is a reasonable and correct interpretation of the statute.

Krivanek, 625 So. 2d at 845 (emphasis added). The highlighted language emphasizes the need for the electoral process to be regulated and to ensure that signatures are properly qualified, so that the duly-qualified electorate's will controls the initiative process.

In Smith, the Court addressed the importance of ballot integrity, stating that "[b]allot integrity is necessary to ensure the effectiveness of the constitutionally provided initiative process." 827 So. 2d at 962. The Court held that supplementing the initiative language on the ballot with a fiscal impact statement, which had not

been a part of the initiative at the signature-gathering stage, did not ensure ballot integrity because it "weaken[ed] the power of the initiative process." Id. at 963.[12] The Court noted that this weakening occurred due to the substantial alteration of the initiative's appearance. Id. Therefore, alterations to the ballot, to add extraneous information that the electors did not themselves approve, are not within the parameters of permissible regulations on the initiative process.[13]

This Court's jurisprudence on regulations of the initiative process demonstrates that those regulations seeking to ensure that petition signers are qualified, signatures are verified, and therefore an adequate level of elector support exists, are elements of and necessary for ballot integrity. Provisions that are outside of these concerns, such as those altering the language of the ballot after signatures are gathered or those directly in conflict with explicit constitutional provisions for initiative petitions, are not necessary and are therefore unconstitutional.

[12] After Smith, article XI, section 5(c) was amended in 2002 to provide for the inclusion of a financial impact statement on the ballot with the proposed initiative.

[13] By contrast, "[a] law which requires a minimum word limit on ballot summaries insures ballot integrity by limiting the ballot to a workable and user friendly length." Fla. Hometown Democracy, Inc. v. Cobb, 953 So. 2d 666, 676 (Fla. 1st DCA 2007).

2. The Revocation Provisions are necessary to ensure that citizen initiatives have the constitutionally-required degree of elector support to gain ballot access and to protect against fraud in the initiative process.

A central purpose of article XI, section 3 is that a proposed initiative will be placed on the ballot if it obtains the requisite degree of elector support as reflected in a specified level (8%) of valid signatures both statewide and among one half of the congressional districts. Absent this support, the measure is deemed not to have sufficient elector support, and is not placed on the ballot. *See* Let's Help Florida v. Smathers, 360 So. 2d 494, 495 (Fla. 1st DCA 1978) ("It is clear that the people, in providing that their Constitution may be amended by their own initiative, engrafted a constitutional protection of such right by requiring specified elector endorsement of that proposed amendment.").

The Revocation Provisions help to ensure that only those initiatives that truly have the constitutionally specified level of elector endorsement are placed on the ballot. Signature revocation empowers electors who believe they were misled or who simply have changed their minds about initiatives to revoke their signatures and thereby withdraw their support within a limited time. As the trial court correctly noted, this limited statutory right of revocation protects and enhances the integrity of the process without strengthening the power of the legislature vis-à-vis the people. Instead, it strengthens the right of the *electorate*, by affording those

electors who sign an initiative petition the right to decide, after further reflection, whether their signatures should remain on a proposed initiative.

In Krivanek, this Court noted that signatures must be properly qualified, so that the duly-qualified electorate's will controls the initiative process. Krivanek, 625 So. 2d at 845. Similarly, allowing electors to withdraw their support for an initiative by revoking their signatures within a limited time ensures that those initiatives on the ballot truly reflect the electorate's will. Ballot integrity is thereby enhanced by ensuring that the purpose of article XI, section 3 is fulfilled.

The legislature's judgment to allow this limited right of revocation is sound and reflects the common sense notion that electors who hastily sign initiative petitions may have been misled or may legitimately have second thoughts. This concept is highlighted in the Supreme Court of North Carolina's discussion:

> It is supposed that second thoughts are apt to be sounder, and this conviction has led courts to consider the right of withdrawal favorably, both as a matter of justice to the individual, who is entitled to apply his best judgment to the matter in hand, and as sound policy in community and public affairs, where the establishment of governmental institutions should rest upon mature consideration rather than be mere unnecessary excrescences upon the body politic, raised by the whim and fancy of a few men….
>
> The facility with which signatures may be obtained to petitions is proverbial, and in other instances the amount and character of the persuasion is unknown. "*What good reason is there why one who has changed his mind since signing a petition, and who concludes that either the public good or his own interest is not in harmony with the petition, may not recede from his signature before action taken thereon? The rule which permits a withdrawal at any time before final action upon the petition is much more likely to get at the real and*

> *mature judgment of the voters, and it is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question.* Circulators of the petition can usually avoid sufficient withdrawals to defeat the petition by taking care that the matter is fully understood by those to whom it is presented for signature." … And in considering the effect of the withdrawal upon other petitions we must remember that the defeat of an aspiration is not the destruction of a right.

Idol v. Hanes, 14 S.E.2d 801, 802-03 (N.C. 1941) (citations omitted and emphasis added). While not binding precedent, the North Carolina high court's logic and reasoning are unassailable: allowing voters to reconsider their initial support of an initiative protects and enhances ballot integrity and the election process. *See also* Volusia County v. Eubank, 151 So. 2d 37, 50 (Fla. 1st DCA 1963) (permitting signers to withdraw their names from a petition to move the county seat because "the right to add is a fair concomitant to the right to take from such petition.").

The limited revocation period also advances the important governmental interest of correcting fraud in the initiative process. The legislative history of the bills underlying what ultimately became Chapter 2007-30, Laws of Florida, illustrates that fraud in the initiative process was of paramount importance. One Staff Analysis cited "numerous stories ... in newspapers concerning fraud in the petition process to place constitutional amendments on the ballot" in the 2004 election. Fla. S. Comm. on Judiciary, CS/SB 900 (2007) Staff Analysis (April 18,

2007).[14] This legislative history shows that the potential exists for voters to be misled into signing initiative petitions. Specifically referenced were incidents involving the arrest of signature gatherers charged with over forty counts of uttering forged documents, and petitions signed with the names of dead voters. Id. Evidence of fraud in the initiative process was also at issue in recent caselaw. *See* Floridians Against Expanded Gambling v. Floridians for a Level Playing Field, 945 So. 2d 553, 557 (Fla. 1st DCA 2006) (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); *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617-19 (2008) (citing numerous incidents of voter fraud as "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process.").

The prevention and correction of this type of fraud in the initiative process is a critical obligation of the legislature and directly impacts the integrity of the election process. As this Court stated in Krivanek, the "*prevention of fraud* and the maintenance of up-to-date and reliable registration records are *necessary to preserve ballot integrity* and a valid election process." Id. at 844 (emphasis added) & 845 (noting that "entire process … is to prevent fraud and to assure integrity in

[14] The Revocation Provisions of this bill were incorporated into House Bill 537, which ultimately became chapter 2007-30, Laws of Florida. [R2 184]

the ballot process."). One approach to preventing fraud is the statutory scheme in Krivanek, which provided for the temporary removal of the names of electors who had not voted recently and whose current status was unknown. *See* id. Another is to permit electors to revoke their signatures on initiative petitions.

Ensuring that electors have a means to revoke their signatures on initiative petitions should they discover that they were victims of fraud in the petition process, or even should they simply have second thoughts about signing the initiative petition, is as important to ballot integrity as is the signature verification process. Both regulations are designed to carry out the constitutional requirement that citizen initiatives must genuinely be supported by a proportion of Florida's electors before they are placed on the ballot.

3. The First District's decision gives the legislature little deference and renders it powerless to protect against fraud in the initiative process.

The First District gave no weight to the legislature's determination that the Revocation Provisions were necessary for ballot integrity. This Court has long recognized that the legislature is due deference in its regulating functions:

> The legislature's power is inherent, though it may be limited by the constitution. Thus, the legislature "looks to the Constitution for limitations on its power and if not found to exist its discretion reasonably exercised is the sole brake on the enactment of legislation."

Chiles v. Phelps, 714 So. 2d 453, 458 (Fla. 1998) (quoting State v. Board of Pub. Instruction, 170 So. 602, 606 (Fla. 1936)). A "legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution." Metro. Dade County v. Bridges, 402 So. 2d 411, 413-14 (Fla. 1981).

Here, the First District overlooked this long history of judicial deference, leaving little room, if any, for the legislature to regulate the initiative process absent some explicit language for doing so already set forth in the constitution. The legislature's regulatory role, of course, must be both reasonable and limited so that the delicate balance of power reflected in the constitution is maintained. That said, the legislature surely has an important role to play in ensuring that electors who believe their signatures should be revoked are able to do so. Signature revocation enhances the people's power; it does not enhance the government's power. The First District, however, rejected these arguments, summarily concluding that signature revocation is not a proper exercise of the legislature's authority over the initiative process. It relied on an unduly expansive view of this court's decision in Smith, which, as explained below, has little to do with a signature revocation law.

In short, while the scope of the legislature's power over the initiative process is limited to that which is necessary for ballot integrity, the legislature's determination as to what this necessary standard encompasses is due deference,

particularly where its own powers are not increased. This Court recognized as much in Krivanek, holding that the right to petition is "subject to reasonable regulation." 625 So. 2d at 843. The decision below deprives the legislature of its legitimate authority to address fraud and other irregularities in the petition process and to empower voters to have greater control over their signatures.

C. The Revocation Provisions are consistent with the Florida Constitution's placement of power in the people's hands.

The Florida Constitution states that "[a]ll political power is inherent in the people." Art. I, § 1, Fla. Const. It further provides that the "power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people[.]" Art. XI, § 3, Fla. Const. Given that the people have this degree of political power under the state constitution, it follows that an elector's right to revoke his or her signature on an initiative petition is within such power unless expressly, or by necessary implication, prohibited in the constitution. *See* Peters v. Meeks, 163 So. 2d 753, 755 (Fla. 1964) (state constitutions are limitations on the power of state legislatures). Because no such prohibition exists, the people through their legislature retain the power to authorize signature revocation on citizen initiative petitions subject only to the requirement that the initiative process is not unconstitutionally burdened.

The Revocation Provisions effectuate the inherent political power of the people, referenced in article I, section 1, and the reserved power of the people to

propose constitutional change referenced in article XI, section 3. Given the constitution's acknowledgement of these powers, the more limited right of electors to revoke their signatures on an initiative petition is within such power unless expressly, or by necessary implication, prohibited by the constitution. *See* Peters, 163 So. 2d at 755. Because no such prohibition on the revocation right exists, the people retain the power to revoke signatures on initiative petitions, which in this case is effectuated via the enactment of the Revocation Provisions.

The First District held to the contrary. It stated that the Revocation Provisions "do not serve to confirm compliance with constitutionally-specified requirements for submission of proposed amendments through the initiative process." Fla. Hometown Democracy, Inc., 980 So. 2d at 550. The court's analysis is faulty because it did not mention the electorate's inherent political power in article XI, section 3; the court simply disregarded a right of signature revocation because it was not explicitly mentioned in the constitution. Id. The court overlooked, however, that this Court upheld a signature verification statute in Firestone despite no explicit signature verification requirement in the constitution. For this reason, it is error to hold that signature revocation cannot be a part of the electorate's inherent political power, to be effectuated through legislative enactment, simply because the constitution does not directly authorize it. As in Firestone, the legislature's enactment of a reasonable regulation that empowers

voters in a way that enhances ballot integrity and furthers the goal of a valid petition process (without empowering the legislature) is constitutional.

Like verification, electors' ability to revoke their signatures ensures that those initiatives that eventually appear on the general election ballot are supported by a sufficient number of electors, and are not the product of fraud in the process. The Revocation Provisions therefore confirm compliance with and reflect the very essence of what the Florida Constitution specifically addresses regarding initiatives: that those invoking the initiative process must have an adequate level of elector support before gaining ballot access. Art. XI, § 3, Fla. Const. Indeed, "[i]f essential mandatory provisions of the organic law are ignored in amending the constitution of the State[,] … it violates the right of all the people of the State to government regulated by law." Crawford v. Gilchrist, 59 So. 963, 967-68 (Fla. 1912); *see also* Floridians Against Expanded Gambling, 945 So. 2d at 560 (constitutional provisions regarding number of signatures required on an initiative before ballot access allowed are critical and mandatory).

Notably, caselaw from Florida and other states uniformly holds that the right of revocation enhances the people's election process. Florida courts have discussed revocation rights, indicating that they are generally consistent with applicable legal principles. *See* Volusia County v. Eubank, 151 So. 2d 37, 50 (Fla. 1st DCA 1963) (the "right to add [signatures] to [a petition] is a fair concomitant to the right to

take from such petition."); *see also* Kelly v. State, 185 So. 157, 159 (Fla. 1938) (allowing voters who signed a recall petition to withdraw their names under certain circumstances). The revocation right also exists in other states as a matter of statutory or implied right.[15]

D. The First District misconstrued this Court's ballot integrity cases.

Finally, the First District summarily rejected arguments in support of the Revocation Provisions, describing them as mere "espous[als of] the virtues and benefits of signature revocation provisions." Fla. Hometown Democracy, Inc., 980 So. 2d at 550. Its decision incorrectly states that this Court rejected similar arguments in Smith. The fiscal impact statement at issue in Smith, however, was inserted directly on the ballot *after* the signature-gathering process had concluded and, in this Court's judgment, added nothing to the integrity of the placement of the proposal on the ballot in the first instance. *See* Smith, 827 So. 2d at 964. Fiscal impact statements do not protect the signature-gathering part of the initiative process from fraud or other abuses. In sharp contrast, the Revocation Provisions help to ensure integrity *during* the signature-gathering process, thereby assuring

[15] *See, e.g.*, Town of Gulf Shores v. Coggin, 112 So. 2d 793, 795 (Ala. 1959); Lynn v. Supple, 140 N.E.2d 555, 561 (Ohio 1957); In re Initiative Petition No. 2, 41 P.2d 101, 102 (Okla. 1935); Halgren v. Welling, 63 P.2d 550, 555-56 (Utah 1936).

that the will of the people and the requisite level of support are accurately reflected on the ballot.

The First District found important the fact that "signature revocation is not even referenced in the citizen initiative provisions of the constitution." Fla. Hometown Democracy, Inc., 980 So. 2d at 550. As this Court held in Firestone, however, the lack of explicit constitutional authorization does not prevent a legislative enactment that is designed to assure ballot integrity. In upholding the legislature's adoption of signature verification requirements, this Court specifically noted that while "[n]othing is said in the constitution concerning verification," it "is an element of ballot integrity and a task which the legislature may require to be accomplished as a prerequisite to filing an initiative constitutional proposal with the secretary of state." Firestone, 286 So. 2d at 566-67. It is error to conclude that the absence of any explicit mention of a revocation right in the constitution means that the Revocation Provisions do not meet the judicial test for ballot integrity.

Moreover, the First District misconstrued Firestone and Smith. Those cases invalidated legislation that conflicted directly with article XI, section 3 by changing time periods set forth therein (Firestone) or that added burdensome financial impact information *prepared by the government* (Smith). Neither circumstance exists here. The First District confused legislative action that directly limits or unnecessarily burdens the initiative process (which is impermissible) with

legislative action that empowers voters to participate more fully in the process thereby ensuring ballot integrity (which is permissible). The restrictions invalidated in Firestone and Smith address the former, not the latter.

The First District summarily held that the Revocation Provisions burden the initiative process, but did not describe what additional burden it found. Fla. Hometown Democracy, Inc., 980 So. 2d at 550. Nothing in the record supports the First District's conclusion that a burden exists; instead, the trial court found that no burden existed and that the Revocation Provisions empowered voters. [R2 225-26] Moreover, unlike the governmentally-prepared fiscal impact statement in Smith, permitting voters to revoke their signatures creates no disorder on the ballot. To the contrary, it protects ballot integrity by enabling voters who have been misled or changed their minds to control their own signatures, so that the final petition signature tally more truly reflects the will of the electorate.

The initiative process and the power of the people are not weakened by the Revocation Provisions. The same number of valid signatures still must be gathered. The time period for filing the signatures is unchanged. Admittedly, those who seek to gather signatures for a proposed constitutional amendment may need to account for the revocation right in various ways. First and foremost, they will have a greater incentive to ensure that signatures are valid and less susceptible to revocation by ensuring that only valid signatures are obtained from electors who

are accurately informed upfront of a proposed amendment's purpose. They may have to obtain more signatures overall to ensure that a greater percentage of those gathered are ultimately deemed valid. This effect of the Revocation Provisions, however, is much like the effect of the signature verification requirement upheld in Firestone. The natural result of a signature verification requirement was that some signatures will be deemed invalid, thereby requiring sponsors to obtain additional signatures in excess of the number of valid signatures specified in the constitution. This effect is not an unconstitutional burden. Instead, it is the natural and constitutional by-product of the signature verification process; likewise, such an effect is the natural and constitutional by-product of the Revocation Provisions.

Finally, this Court in Krivanek stated that the "[*t]he prevention of fraud* and the maintenance of up-to-date and reliable registration records *are necessary to preserve ballot integrity and a valid election process*." 625 So. 2d at 844 (emphasis added). The First District failed to even mention Krivanek, which is a critical case in this Court's ballot integrity jurisprudence. This failure resulted in the court ignoring the importance of the Revocation Provisions in protecting against fraud, which is a key component of ballot integrity.

CONCLUSION

No sound basis supports the legal conclusion that allowing electors a 150-day window within which to revoke their own signatures on a proposed initiative is an unreasonable legislative enactment that undermines ballot integrity or fails to ensure a valid election process. The right of revocation allows voters who have signed petitions through haste, confusion, or even deception to rectify their error. The revocation right serves the interests of the people in whom all political power inheres. The Revocation Provisions protect ballot integrity; counting electors' signatures against their will does not. For the foregoing reasons, the State respectfully requests that this Court reverse the First District's opinion holding the Revocation Provisions unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF SERVICE/COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail on: Mark Herron, Esq., Messer, Caparello & Self, P.A., 2618 Centennial Place, Tallahassee, FL 32308, & Ross S. Burnaman, Esq., 1-18 Holland Drive, Tallahassee, FL 32301, on this 28th day of July, 2008, and that this brief is prepared in Times New Roman 14-point font in compliance with Rule 9.210, Fla. R. App. P.

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