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.

REPLY BRIEF OF APPELLANTS

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

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

Florida Hometown Democracy ("FHD") argues that the Revocation Provisions are invalid because (a) they are neither mentioned nor permitted under the plain language of article XI, section 3; (b) no factual predicate exists for concluding that the Revocation Provisions were enacted to prevent fraud or other irregularities in the citizen initiative process; (c) they are not reasonable regulations to ensure ballot integrity; and (d) they weaken the initiative process.

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

FHD asserts that the language of article XI, section 3 is clear, unambiguous, and "fully addresses" the citizen initiative process thereby foreclosing the legislature from enacting any type of signature revocation provision, even if deemed necessary to address concerns regarding fraud and other irregularities. [AB 13, 16 ("The plain meaning of the citizen initiative provision does not permit signature revocation.")][1] FHD also emphasizes the First District's statement, that "signature revocation is not even referenced" in article XI, section 3. [AB 16] The

[1] The answer brief is cited as [AB #] where # is the page number. The initial brief is cited as [IB #] where # is the page number. Record citations are [R* #] where * is the volume number and # is the page number.

fact that article XI, section 3 does not set forth an explicit revocation right, however, does not end the inquiry.

First, FHD overlooks the point in the State's initial brief that the signature verification process is not mentioned in article XI, section 3, yet this Court upheld the legislature's actions based on ballot integrity. State v. Firestone, 386 So. 2d 561, 566-67 (Fla. 1980). The Court concluded that signature verification, though not explicitly authorized in the constitutional text, was permissible. Indeed, signature verification – like signature revocation – is designed to address concerns related to fraudulent signatures and the need to ensure that the will of the people prevails. Ensuring that the people's will prevails is critical whether counting ballots on election day to determine winners, or counting petition signatures to determine whether sufficient numbers of electors truly want an initiative on the ballot.

Second, FHD's position would thwart the legislature from ever taking any role in the initiative process other than providing for signature verification. Its argument creates doubt as to whether the legislature could ever take action to prevent fraud or potential fraud in the initiative process. This argument fails to take into account this Court's longstanding principle that:

> The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority

> to declare legislative Acts invalid. The Legislature may exercise any lawmaking power that is not forbidden by organic law.

Chiles v. Phelps, 714 So. 2d 453, 458 (Fla. 1998) (quoting Savage v. Bd. of Pub. Instruction, 133 So. 341, 344 (Fla. 1931)). While article XI, section 3 does not expressly authorize signature revocation, neither does it prohibit it.

Because no express prohibition exists, the Revocation Provisions are constitutionally permissible under this Court's caselaw if they are deemed necessary for ballot integrity and a valid election process. As argued in the State's initial brief, the prevention of fraud and giving signers the opportunity to change their minds ensures ballot integrity, because it ensures that the level of elector support required by article XI, section 3 exists for a proposed amendment before it is placed on the ballot. [*See* IB 21] The purpose of the Revocation Provisions and the argument that this purpose is necessary for ballot integrity is entirely consistent with this Court's decision in Smith v. Coal. To Reduce Class Size, 827 So. 2d 959, 963 (Fla. 2003), which struck extraneous financial impact information not approved by the electors from the ballot. Here, empowering electors to revoke their own petition signatures serves the dual purpose of ensuring that the constitutionally required degree of support actually exists for a proposed initiative while protecting and providing a remedy for fraud and other irregularities that may arise during the signature gathering process. Article XI, section 3 makes clear that the people do

not want initiatives on the ballot where the requisite level of genuine elector support does not exist.

Finally, FHD's argument also fails to take into account that this Court has already determined that the legislature has a *duty and obligation* in regulating the citizen initiative process to ensure a fair process and just results. *See* Firestone, 386 So. 2d at 566-67 ("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."). The two decisions of this Court upon which the First District relied do not eliminate the legislature's important role in the initiative process. Rather, they require that any such regulations be necessary for ballot integrity and a valid election process. *See* Smith, 827 So. 2d at 963; Firestone, 386 So. 2d at 566.

B. The legislature's concerns about fraud in the signature gathering process are relevant.

Next, FHD asserts that "[t]here is no factual predicate for finding that the signature revocation law and rules are intended to prevent fraud or other irregularities." [AB 18] As primary support, FHD claims that reliance on the legislative history underlying the signature revocation statute is inappropriate on appeal unless the history was formally admitted as evidence in the trial court. [AB 19] FHD's concerns are unavailing for several reasons.

First, the State took the position from the outset of this litigation that the Revocation Provisions are reasonable regulations that advance the important state interest in preventing fraud.[2] This position was presented in the State's answer brief in the First District and at oral argument. For this reason, FHD cannot claim unfair surprise or lack of notice about the nature of the fraud argument itself. Nor can it claim an inability to respond to the legislative history presented, its answer brief providing the appropriate vehicle for doing so.

Second, the cited staff analysis is a part of the legislative history underlying CS/HB 537, which is an amalgamation of various election related matters, several of which were initially introduced and considered under separate bill numbers. The signature revocation portion of CS/HB 537 originated, in large measure, in CS/SB 900 thereby making its history relevant on the issue presented. As FHD acknowledges [AB 21], the caselaw provides that an appellate court may consider legislative history even if not formally admitted as evidence in the trial court; it

[2] [*See, e.g.*, R1 142 (Defs.' Mem. In Opp'n to Pls.' Mot. for Summ. J. & Cross-Mot. for Summ. J. at 8) ("…the limited revocation period advances the important governmental interest in avoiding election fraud. The potential exists for voters to be duped into signing petitions to get initiatives on the ballot. Preventing this type of fraud from impacting elections is a laudable goal. *See* Krivanek, 625 So. 2d at 845 ("[T]he entire process ... is to prevent fraud and to assure integrity in the electoral process.").)]

need not be judicially noticed, and can be introduced via advocacy or even the Court's own independent research.[3]

Finally, as this Court has noted, legislative history is a "basic and invaluable tool of statutory construction." Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 369 (Fla. 2005). It would be form over substance to ignore it. *See* In re: Estate of Boyd, 519 So. 2d 692, 693 (Fla. 1st DCA 1988) (Glickstein, J., concurring) ("It strikes me that substance over form makes justice possible; and that whatever fairly enables an appellate court to reach an *informed* decision is consistent with the goal of effective administration of justice."). For these reasons, the legislature's concerns regarding fraud in the initiative petition process, as reflected in the relevant legislative history, is relevant and should be considered.[4]

[3] For example, FHD cites to Ellsworth v. Ins. Co. of N. Am., 508 So. 2d 395, 398 (Fla. 1st DCA 1987), which notes that legislative staff summaries "may be consulted in the course of the court's independent research, through advocacy, or through introduction into the record at the trial level by judicial notice."

[4] For similar reasons, cases in which fraud or alleged fraud come before the courts are relevant because they highlight the potential for the types of irregularities the Revocation Provisions are designed to prevent or remedy. *See* Floridians Against Expanded Gambling v. Floridians for a Level Playing Field, 945 So. 2d 553, 557 (Fla. 1st DCA 2006).

C. The Revocation Provisions are consistent with this Court's jurisprudence regarding the requirements for ballot integrity and a valid election process.

FHD relies on this Court's decision in Smith, implying that legislative regulation of the initiative process is unnecessary because the initiative process has produced amendments without the type of fiscal impact statement at issue in Smith. [AB 22] FHD notes that since 2002, the year in which Smith was decided, amendments have been approved without the Revocation Provisions and they therefore are an unnecessary part of the initiative process. Id. The inference is that no further government regulation of the initiative process is warranted.

Under this logic, the legislature would be unable to take any action – even if it is deemed necessary to ensure ballot integrity and a valid election process – simply because it has not done so in the past. FHD's view provides no role for the legislature, a position this Court has squarely rejected in its ballot integrity caselaw. *See, e.g.*, Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 843-44 (Fla. 1993) (upholding ballot law designed to prevent fraud); Firestone, 386 So. 2d at 567 (upholding signature verification law). Moreover, FHD overlooks that the fiscal impact statement in Smith was inserted on the ballot *after* the signature-gathering process was complete. 827 So. 2d at 963. Here, the Revocation Provisions are designed to ensure integrity *during* the period for gathering

signatures, so that the total count at the end of that period truly reflects the people's will as to whether they want an initiative to appear on the ballot.

Notably, the statement in Smith to which FHD cites is a quote from this Court's 1980 decision in Firestone, whose point was that article XI, section 3 is self-executing. Firestone, 386 So. 2d at 566. This Court did not view its statement as somehow limiting its ability to consider the validity of new legislative enactments, such as the signature verification requirements it upheld in that case. Like the Revocation Provisions at issue, the signature verification requirements at issue in Firestone did not previously exist; yet this Court concluded they were "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." Id.

Next, FHD attempts to distinguish Krivanek, claiming that the voter registration status notification process upheld in that case is performed by election supervisors while the signature revocation process allows political action committees to obtain revocations. [AB 25] The revocation process, FHD claims, is a political process and therefore is not neutral. This Court's distinction between political and nonpolitical processes in Krivanek, however, explained its interpretation of the status notification regulation and the rationale supporting a strict interpretation of that regulation. 625 So. 2d at 844. The discussion of a

political versus neutral process did not extend to the Court's determination that the regulation was necessary for ballot integrity. Id. ("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.").

Here, the Revocation Provisions were designed to mirror the initiative process itself by maintaining its delicate balance and to avoid injecting the government directly into it. Their laudable goal, which is consistent with this Court's ballot integrity caselaw, is that those groups seeking revocation of signatures must act and operate under the guidelines that apply to proponents of an initiative. The processes established are not rendered unconstitutional by their possible political uses, particularly given the symmetry the legislature sought in balancing the interests of proponents and opponents.

In passing, FHD claims that the Revocation Provisions impair vested rights and are unreasonable because revocation forms must be provided at the offices of the supervisors of elections. [AB 28] As the trial court found, FHD has no vested rights in the verified signatures it holds under established legal principles.[5] [R2 228

[5] *See, e.g.*, Notami Hosp. of Fla., Inc. v. Bowen, 927 So. 2d 139, 143-44 (Fla. 1st DCA 2006) (hospital had no vested right in confidentiality of medical records; any "right" was "no more than an expectation that previously existing statutory law would not change"); Lakeland Reg'l Med. Ctr. v. State of Fla., Agency for Health Care Admin., 917 So. 2d 1024, 1032 (Fla. 1st DCA 2006) (quoting Div. of Workers' Comp. v. Brevda, 420 So. 2d 887, 891 (Fla. 1st DCA 1982)) ("To be (Continued…)

(Final Summ. J. for Defs. at 8)] Here, initiative sponsors do not have entitlement to or ownership of signatures on petitions; electors control their own signatures. Moreover, this Court's decision in Smith, upon which FHD relies, addressed only the validity of fiscal impact statements; it did not address a vested rights argument. Smith, 827 So. 2d at 964. Furthermore, the right to have a proposal placed on the ballot does not arise until signatures are "filed with the Secretary of State." § 100.371(1), Fla. Stat. (2006). "Filed" means, and meant even before the Revocation Provisions were adopted, "the date the secretary determines that the petition has been signed by the constitutionally required number of electors." Id. FHD has no right to place a proposed constitutional amendment on the ballot, and thus no property interest can plausibly exist.

In addition, making revocation forms available at the offices of supervisors of elections affords signers the most efficient and readily-ascertainable opportunity to revoke their signatures, and is therefore rationally related to the State's legitimate interests. No denial of equal protection results. Similarly, the State has a legitimate interest in ensuring finality in the initiative process, which is reflected in both the 150-day revocation window and the one-time revocation provision, which

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vested, a *right must be more than a mere expectation based on an application of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand") (emphasis added).

is consistent with section 104.185, Florida Statutes (2008), by allowing a person only one opportunity to sign a petition.

D. The Revocation Provisions do not weaken the initiative process.

FHD's claims that the initiative process is weakened are addressed in large measure in the State's Initial Brief and need not be repeated here. Lacking in both the First District's and FHD's analyses on this point is a key principle stated in Firestone. In that case, this Court stated that "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." 386 So. 2d at 566. Here, in contrast, the Revocation Provisions strengthen rather than restrict the initiative process – without strengthening the power of the legislature. They are akin to the signature verification requirements upheld in Firestone and the law removing nonvoting electors from registration rolls upheld in Krivanek. The Revocation Provisions address legitimate concerns about fraud in the signature gathering process for initiatives and empower voters to participate more fully, thereby ensuring ballot integrity and a valid election process.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the First District's opinion and uphold the constitutionality of the Revocation Provisions at issue.

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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., 1018 Holland Drive, Tallahassee, FL 32301, on this 11th day of September, 2008, and that this brief is prepared in Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210.

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