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SC2026-0255

In the Supreme Court of Florida

SMART & SAFE FLORIDA,
Petitioner,

v.

CORD BYRD, in his official capacity as Florida's Secretary of State, and MARK EARLEY, in his official capacity as Supervisor of Elections for Leon County, Florida,
Respondents.

On Petition for Discretionary Review from the First District Court of Appeal
DCA No. 1D2026-0145

SECRETARY OF STATE'S JURISDICTIONAL BRIEF

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March 2, 2026

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STATEMENT OF THE ISSUES

Whether the Secretary of State has the statutory authority to issue written direction to the Supervisors of Elections under Section 97.012(16), Florida Statutes.

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STATEMENT OF THE CASE AND FACTS

To appear on the ballot, an initiative petition to amend the Florida Constitution must be signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding presidential election. Art. XI, § 3, Fla. Const.

The Florida Constitution establishes February 1 of the general election year as the deadline by which the initiative petition must be "filed with the [Secretary of State]." Art. XI, § 5(b), Fla. Const.; *see also* § 100.371(1)(a), Fla. Stat. An initiative petition is "deemed to be filed with the Secretary of State upon the date the secretary determines that valid and verified petition forms have been signed by the constitutionally required number and distribution of voters." § 100.371(1)(a), Fla. Stat. Additionally, petition signatures are valid only "until the next February 1 occurring in an even-numbered year." *Id.* § 100.371(14)(a). So, if the sponsor of an initiative petition fails to obtain the signatures necessary for ballot placement by February 1 of the general election year, the initiative petition does not appear on the ballot, and its signatures expire.

Petitioner Smart & Safe Florida ("Smart & Safe") is the sponsor of Initiative Petition 25-01, Adult Personal Use of Marijuana ("the petition"). That initiative proposes to legalize the recreational use of marijuana in Florida.

CS/HB 1205 became law in May 2025. Ch. 2025-21, Laws of Fla. (2025). Among other things, the legislation requires Supervisors of Elections to invalidate initiative petition forms collected by petition circulators who are not United States citizens and Florida residents. *Id.* § 6 (amending § 100.371(4)(b), (14)(h) Fla. Stat.). The United States District Court for the Northern District of Florida preliminarily enjoined those eligibility criteria on July 8, 2025, *Fla. Decides Healthcare, Inc. v. Byrd*, 790 F. Supp. 3d 1335, 1360–61 (N.D. Fla. 2025) (Walker, J.), but the Eleventh Circuit stayed the preliminary injunction on September 9, 2025. *Fla. Decides Healthcare Inc. v. Fla. Sec'y of State*, No. 25-12370, 2025 WL 3738554, at *8 (11th Cir. Sept. 9, 2025).

In light of the Eleventh Circuit stay, the Division of Elections directed the Supervisors to invalidate petition forms collected by non-citizens and non-residents during the pendency of the preliminary injunction ("the Non-Resident Directive"). App. 124–25; *see infra*

n.4.[1] Then, in December, the Division of Elections directed the Supervisors to invalidate petition forms submitted by inactive voters ("the Inactive Voter Directive"). App. 122; *see infra* n.4 (collectively, the Non-Resident Directive and Inactive Voter Directive are hereafter referred to as "the Directives").

Smart & Safe initiated this lawsuit in Florida's Second Judicial Circuit later that month. App. 4. Its complaint ("the Complaint") sought a declaration that the Directives were unlawful and injunctive relief. App. 24–25. Secretary of State Cord Byrd and Leon County Supervisor of Elections Mark Earley were named as defendants. *Id.*

On January 15, 2026, the circuit court granted summary judgment in favor of Smart & Safe with respect to the Inactive Voter Directive and in favor of the Secretary with respect to the Non-Resident Directive. *Id.* at 154. The Secretary appealed, and Smart & Safe cross-appealed.

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[1] Citations to "App." refer to the appendix submitted with the Secretary's Response to Smart & Safe's Suggestion of Certification in the First District Court of Appeal (ECF No. 239763965, Jan. 18, 2026). Citations to "Pet. App." refer to the appendix submitted with Smart & Safe's jurisdictional brief.

The First District Court of Appeal issued its opinion on January 23, 2026. It emphasized that Smart & Safe's complaint characterized the Directives as "nothing more than non-binding requests." Pet. App. 11. "Assuming without deciding" that the Directives were non-binding, the First District concluded that the only "immunity, power, privilege, or right" identified by Smart & Safe for adjudication was whether the Secretary possesses authority to provide written direction to Supervisors. *Id.* at 8–9 (citing § 86.011, Fla. Stat.), 12. He clearly does. *Id.* at 11 (citing § 97.012(16), Fla. Stat.). The First District therefore "affirm[ed] the circuit court's order denying relief to [Smart & Safe] on the non-resident-circulator directive," "reverse[d] the portion of the order declaring the inactive voter directive to be unlawful," and "vacate[d] the injunction entered against Supervisor Earley." *Id.* at 8. In other words, the district court declined to address the underlying merits of the parties' dispute because—as pleaded by Smart & Safe in its complaint—the only question properly presented by the case was whether the Secretary had the statutory power to issue written directions to the Supervisors.

On February 2, 2026, the Secretary of State notified the Attorney General that the petition had "failed to meet the legal

requirements for placement on the 2026 General Election ballot" and that "all [of its] signatures are now expired."[2] Notice of Dismissal, Ex. 1, *Advisory Op. to the Att'y Gen. re Adult Personal Use of Marijuana*, No. SC25-2009 (ECF No. 240817822, Feb. 2, 2026).

Smart & Safe now seeks this Court's discretionary review.

ARGUMENT

Discretionary review is unwarranted. First, the First District's opinion does not meet any of the criteria for discretionary jurisdiction in Article V, Section 3(b)(3) of the Florida Constitution. Second, the decision below is plainly correct: the Secretary has statutory authority to provide written direction to the Supervisors, and the circuit court's declarations about the Directives' legal conclusions constituted impermissible advisory opinions. Third, because Smart & Safe missed the deadline for qualifying its petition for the ballot and the disputed signatures have expired, this case is moot.

I. There Is No Basis for Discretionary Jurisdiction.

This Court may review "any decision of a district court of appeal

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[2] Previously, the Attorney General had requested an advisory opinion from this Court on the validity of the petition. He withdrew that request when the signatures expired, and this Court dismissed.

that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. The decision on appeal does none of these.

Smart & Safe asserts that the First District's decision "expressly affects 'how the supervisors of elections are to determine the validity of signatures on initiative petitions.'" Jur. Br. 9 (quoting *Krivanek v. Take Back Tampa Pol. Comm.*, 625 So. 2d 840, 841 (Fla. 1993)). Not so. The First District held that, based on the Complaint's characterization of the Directives as "non-binding," the only immunity, power, privilege, or right capable of adjudication in this declaratory action is whether the Secretary has authority to provide written direction to Supervisors. Pet. App. 9, 11–13. The First District simply answered that question in the affirmative. *Id.* at 11 (citing § 97.012(16), Fla. Stat.). Lest there be any confusion, the court made clear that its decision did *not* address the effect of the Secretary's direction on the Supervisors. *Id.* at 12; Pet. Juris. Br. at 12 (conceding the decision "does not address the merits of either directive").

In short, the decision on appeal in no way "expressly affected" how Supervisor Earley (or any other Supervisor) was to determine the validity of petition signatures, as Smart & Safe asserts. The decision recognized the Secretary's authority to provide written direction to Supervisors, and did so without opining on the manner in which Supervisors must exercise their own constitutional and statutory authority. Accordingly, "there is nothing in the instant district court decision that affects [Supervisors of Elections] as constitutional officers," expressly or otherwise. *Sch. Bd. of Pinellas Cnty. v. Dist. Ct. of Appeal*, 467 So. 2d 985, 986 (Fla. 1985).

II. The Decision on Appeal Is Correctly Decided.

In any event, review is unwarranted because the First District correctly concluded that Smart & Safe sought an impermissible advisory opinion "in the form of a declaratory judgment." *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995). A party seeking declaratory relief under Chapter 86 must show that, among other things, "the relief sought is not merely the giving of legal advice." *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952)). Otherwise, the proceeding is outside "the constitutional powers of the

[circuit] courts." *Id.*; *see also* § 86.011, Fla. Stat.

The First District correctly concluded that Smart & Safe flunked this criterion. By describing the Secretary's Directives as "nonbinding," the Complaint sought nothing more than an advisory opinion about the Secretary's own "non-binding" (i.e., advisory) direction to the Supervisors. Stated differently, Smart & Safe asked the courts to weigh in on instructions that—by its own lights—had no legal effect on the Supervisors, and by extension, no legal effect on the petition.[3] Such advisory proceedings are neither "judicial in nature" nor "within the constitutional powers of the [circuit] courts." *Martinez*, 582 So. 2d at 1170 (quoting *Holley*, 59 So. 2d at 639).

As pleaded by Smart & Safe, this is a straightforward case resolved by the plain text of Section 97.012(16). By statute, the Secretary may "[p]rovide written direction and opinions to the supervisors of elections on the performance of their official duties with respect to the Florida Election Code or rules adopted by the Department of

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[3] While the Complaint insinuated that Supervisors would invalidate petition forms based on the Directives, it did not allege that Supervisor Earley had done so. Thus, Smart & Safe's request for a declaratory judgment rested on "merely the *possibility* of legal injury on the basis of a hypothetical state of facts which ha[d] not arisen." *Santa Rosa Cnty.*, 661 So. 2d at 1193 (internal quotations omitted).

State." § 97.012(16), Fla. Stat.; *see also Pines v. DeSantis*, No. SC2026-0209, 2026 WL 555563, at *1 (Fla. Feb. 27, 2026) ("The Secretary of State is the chief election officer of the state and has the authority to interpret the election laws." (citing § 97.012, Fla. Stat.)).[4]

III. The Case Is Moot.

Finally, moot cases must generally be dismissed. *Casiano v. State*, 310 So. 3d 910, 913 (Fla. 2021). This rule is "a corollary to the

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[4] Even if the Court were to reach the validity of the written direction provided by the Secretary, the decision below "reache[d] the right result" because the Directives accurately describe Florida law. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (describing the tipsy coachman doctrine). The Inactive Voter Directive accurately concluded that petitions submitted by inactive electors are invalid under *Krivanek* and the plain text of Section 98.065(4)(d). *Krivanek*, 625 So. 2d at 845 (holding that when the Florida Election Code "requires an affirmative act of notification . . . before the elector can vote," the elector "is not a qualified voter for the purpose of executing a petition"); § 98.065(4)(d), Fla. Stat. (requiring an inactive elector to take an affirmative act of notification in order to vote). The Non-Resident Directive accurately concluded that the Supervisors must enforce the law governing circulator eligibility as if it had never been enjoined. *See State ex rel. Badgett v. Lee*, 22 So. 2d 804, 806 (Fla. 1945) (holding that "a statute declared unconstitutional . . . is not dead, only dormant," and that "if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective"). Smart & Safe's arguments to the contrary commit the "writ of erasure fallacy." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 938 (2018) ("All the injunction does is prevent the named defendants from *enforcing* that law while the court's injunction remains in place.").

limitation on the exercise of judicial power to the decision of justiciable controversies." *Id.* This Court has "defined" mootness as occurring "when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Id.* (quoting *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)).

Smart & Safe's failure to file the initiative petition with the Secretary by February 1 "fully resolved" this case. Article XI, Section 5(b) of the Florida Constitution, as implemented by Section 100.371(1)(a), Florida Statutes, conditions an initiative petition's ballot placement on the sponsor obtaining a determination from the Secretary "that valid and verified petition forms have been signed by the constitutionally required number and distribution of voters" by "no later than February 1 of the year the general election is held." Art. XI, § 5(b), Fla. Const.; § 100.371(1)(a), Fla. Stat. So, even if this Court granted discretionary jurisdiction and determined that Smart & Safe's claims are procedurally proper and meritorious, the petition still failed to attain the requisite determination from the Secretary by February 1

and cannot appear on the 2026 General Election ballot.[5]

Neither can this case affect any attempt to place the petition on the ballot in the future. All signatures submitted for the petition dated on or prior to February 1, 2026 are now expired and invalid. *See* § 100.317(14)(a), Fla. Stat. Because "a judicial determination can have no actual effect" on the initiative petition's ballot placement in 2026 or beyond, the case is moot. *See Casiano*, 310 So. 3d at 913. That is a separate reason to deny review.[6]

CONCLUSION

This Court should deny discretionary jurisdiction.

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[5] Indeed, this is why Smart & Safe has repeatedly insisted that this litigation needed to be resolved prior to February 1, 2026. *See, e.g.*, Time-Sensitive Suggestion that Order to Be Reviewed Be Certified to the Florida Supreme Court and Motion for Expedited Consideration, *Byrd v. Smart & Safe Florida*, 1D2026-0145 at 3, 6 (ECF No. 239718620, Jan. 16, 2026).

[6] Moreover, because Smart & Safe made the strategic decision to sue just one Supervisor, any declaratory or injunctive relief resulting from this case can affect—by Smart & Safe's own tabulation, App. 90, 92—no more than 873 petition forms. *See Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 n.3 (Fla. 1984) ("A final decision will bind those parties joined in the suit, but will have no effect on . . . unjoined parties."); *Valparaiso Realty Co. v. City of Valparaiso*, 473 So. 2d 1, 2 (Fla. 1st DCA 1985) ("An injunctive order cannot be enforceable by contempt proceedings against any person not made a party to the proceedings." (quotation omitted)).

March 2, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 2,421 words.

/s/ Samuel F. Elliott
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CERTIFICATE OF SERVICE

I certify that on March 2, 2026, this document was furnished to counsel of record through the Florida Courts E-Filing Portal:

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