

IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

CASE NO. 1D2026-0145
Lower Tribunal Case No. 2025-CA-2540

SECRETARY OF STATE CORD BYRD,

Appellant/Cross-Appellee,

v.

SMART & SAFE FLORIDA, et al,

Appellee/Cross-Appellant.

On Appeal of a Final Order from the Circuit Court of the Second
Judicial Circuit in and for Leon County, Florida

**SMART & SAFE FLORIDA'S EMERGENCY MOTION FOR
REHEARING EN BANC**

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INTRODUCTION AND BACKGROUND

Because this case and the issues presented herein are of exceptional importance, Smart & Safe Florida (“SSF”) respectfully moves pursuant to Florida Rule of Appellate Procedure 9.331(d) for rehearing en banc of: (i) the Panel’s merits opinion dated January 23, 2026 (“Panel Opinion”); and (ii) the Order dated January 19, 2026, declining to certify this appeal for immediate resolution by the Florida Supreme Court (“1/19/26 Order”).

SSF is a registered Florida political committee sponsoring the citizen initiative entitled “Adult Personal Use of Marijuana,” to amend the Florida Constitution pursuant to Article XI, section 3. SSF’s petition form was approved for use in the 2026 General Election by the Secretary of State on January 14, 2025, and assigned Serial No. 25-01. App. 125, 130. Since the petition was approved by the Secretary, SSF has continued to actively gather the signatures necessary to secure ballot placement and to allow Florida voters to decide whether to accept the proposed amendment.

SSF recently learned of two directives from the Secretary of State that jeopardize the ability of Florida’s citizens to vote on the initiative in the 2026 General Election. Both directives instruct the

County Supervisors to invalidate previously verified petitions. There is no dispute that these petitions were properly verified as valid and accurately reflect the signer's desire to place the measure on the ballot.

The Secretary's Directives and Litigation Below

With less than six weeks to go in the initiative petition gathering and verification process for placement on the 2026 General Election ballot, the Secretary of State contravened decades of Florida statutes and how the Division of Elections and all County Supervisors interpreted and applied the law governing the treatment of "inactive" voters. That sea-change was not based on any change in law, such as a new statutory enactment or court decision. Rather, it was a legally unsupported dictate imposed upon an entire class of independently elected constitutional officers.

On December 23, 2025, the Secretary issued a statewide directive to all 67 County Supervisors of Elections ("County Supervisors") instructing that "an INACTIVE voter's petition **must be verified as INVALID** ... because the voter was inactive at the time

they signed the petition.”¹ App. 49 (“Inactive Voter Directive”). The Inactive Voter Directive instructed the County Supervisors to invalidate all such petitions, even those signed by voters who updated their registration information by checking the change of address box on SSF’s petition form. *Id.* The directive did so notwithstanding that such “inactive” voters remain registered and eligible to vote under Florida law. Approximately 41,894 previously verified petitions, including approximately 606 in Leon County, were rendered invalid by the statewide Inactive Voter Directive. App. 128. The great irony of the Inactive Voter Directive is that it prohibits counting the petition of an inactive voter who is nonetheless able to show up at the polls, show their driver’s license or other proof of address, and vote for the initiative. In other words, an inactive voter can vote on the amendment, but their petition will not count towards placing the measure on the ballot.

On December 23, 2025, upon receiving documents responsive to a public records request revealing the Inactive Voter Directive, SSF

¹ All emphasis in quotations is added unless otherwise stated. Citations to the “App.” Are to the Corrected Appendix, filed Jan. 23, 2026.

also learned for the first time of an earlier statewide directive issued by the Secretary, this one directing the County Supervisors to retroactively invalidate previously verified petitions gathered by non-resident circulators while a federal court’s preliminary injunction was in place that enjoined a recently enacted statutory prohibition on non-resident circulators (“Non-Resident Circulator Directive”). App. 49, 59. Approximately 28,752 petitions, including 267 in Leon County, are impacted by the Non-Resident Circulator Directive.

On December 29, 2025, SSF filed suit bringing two claims for declaratory judgment against the Secretary on his respective statewide directives and seeking injunctive relief against the Leon County Supervisor of Elections to prohibit enforcement of the directives.

The Complaint alleged, and SSF argued on summary judgment, quintessential claims for declaratory judgment as to the two directives. SSF alleged that it is exercising the right granted under Article XI, section 3, to propose an amendment to the Florida Constitution by acting as a sponsor of the proposed amendment and conducting a statewide campaign to gather hundreds of thousands of verified petitions necessary to achieve ballot certification. SSF

further alleged that the directives violated Article XI, section 3, and numerous statutes, rules, and various legal guidance previously issued by the Secretary—establishing a dispute over the legal effect of the Secretary’s directives. That dispute between SSF and the Secretary is adverse and antagonistic, concerns a present, ascertained set of facts and is a controversy concerning the legal effect of the directives. The effect of those directives is anticipated to be determinative as to whether SSF makes ballot placement. The Complaint alleged that SSF’s right to propose an amendment under Article XI, section 3, is dependent upon resolving the legal effect of the two directives, which invalidated more than 70,000 of SSF’s signed, verified petitions—representing more than eight (8) percent of the total required for ballot certification. This is a brief summary of SSF’s allegations and arguments. When reviewing the Complaint and summary judgment papers, it is clear that a justiciable controversy was presented and, ultimately, adjudicated.

The circuit court recognized that SSF sufficiently pled and proved as a matter of law that it was entitled to declaratory judgment as to the Inactive Voter Declaration. Adjudicating the legal effect of that directive, the circuit court interpreted the relevant statutes and

the Secretary's earlier guidance² and found that the Inactive Voter Directive was "irreconcilable with the plain language" of same. App. 7. Because of this, the trial court found the Inactive Voter Directive "unlawful, void ab initio, and of no effect." App. 10.

Regarding the Non-Resident Circulator Directive, the circuit court concluded that the federal court's preliminary injunction, stayed on appeal, did not save the petitions from invalidation by the non-resident circulator prohibition due to section 100.371(14)(h), which provides "[a] signed petition form submitted by an ineligible or unregistered petition circulator must be invalidated and not counted toward the number necessary for placement on the ballot." App. 9. Because the "stayed preliminary injunction is a circumstance not contemplated by the statute ... [the] court concludes that such circumstance demonstrates the absence of a clear legal right." *Id.*

² SSF relied upon more than 30 years of how the law was applied, including the Secretary's earlier guidance, in determining how to identify and screen potential petition signers to ensure their petitions would count. So, too, did the County Supervisor when verifying thousands of petitions. The Secretary's last-minute reversal deprived SSF the ability to adjust its petition gathering strategy, rendered months of signature gathering and processing meaningless, and severely jeopardizes its ability to make ballot placement.

This Appeal

SSF filed its Notice of Cross-Appeal on January 16, 2026. That same day, pursuant to Fla. R. App. P. 9.125(c), SSF filed its *Time-Sensitive Suggestion That Order to be Reviewed be Certified to the Florida Supreme Court and Motion for Expedited Consideration*. That suggestion was denied by the 1/19/26 Order.

On January 23, 2026, the Panel Opinion was issued. In sum, the Panel Opinion concluded that SSF failed to identify a justiciable controversy because SSF referred to the directives as “non-binding requests,”³ “void and unenforceable” and, as such, “SSF’s complaint never alleged the existence of any immunity, power, privilege, or right that the court could adjudicate in a declaratory judgment action.”⁴

Panel Op., pp. 7-8. More specifically, the Panel Opinion found:

SSF essentially sought judicial advice different from the advice provided by the Secretary in his written directions to the Supervisors. And thus, based on the complaint, the circuit court’s declaration that the Secretary’s written directions were “unlawful and void ab initio” was not a binding adjudication of any right.

³ SSF used this description from Supervisor Earley, *see* App. 191.

⁴ This issue was not a previously raised nor briefed by the parties. SSF is prepared to provide additional briefing on this issue should the Court deem it helpful to its deliberations.

Panel Op., p. 8. The Panel Opinion concluded: “There was nothing unlawful about the Secretary’s providing written directions to the Supervisors on how to perform their official duties to verify petitions submitted by inactive voters. Rather, the Secretary had specific statutory authority to provide directions to Supervisors on how they should perform their official duties. § 97.012(16), Fla. Stat.” *Id.*, p. 9.

With all due respect to the Panel, SSF did not allege nor argue that the Secretary lacked the authority to provide directions to the Supervisors; rather, SSF challenged the effect of the two directions at issue. This is true regardless of whatever nomenclature is used, including “directives” as used by SSF, “non-binding request” or “email request” as used by Supervisor Earley,⁵ App. 191, 192, or

⁵ Despite that characterization, Supervisor Earley told the trial court that he “as well as all other Supervisors, is **in the process of invalidating previously validated** initiative petitions from ‘inactive voters.’” App. 233. Supervisor Earley did so because “to not follow [the] request could be seen as neglect of duty or dereliction of duty.” App. 192 (emphasis in original). The County Supervisors did not treat the directive as non-binding or that it could be ignored. Governmental “advisory functions”, like that suggested here, can have coercive effect. *Bennett v. Spear*, 502 U.S. 154, 169 (1997). The point is, regardless of characterization, the key issue is the validity of the directives given and the effect they had.

“reminders and requests”⁶ as referred to by the Director of the Division of Elections, App. 143. Regardless of how described, the Secretary’s directions were alleged by SSF and found by the trial court in part to be unlawful in contravention of express Florida statutes. And, by whatever name, those directions resulted in the retroactive invalidation of petitions signed by approximately 70,000 registered Florida voters that had been previously verified by the County Supervisors, having the direct causal effect of putting SSF’s ballot certification in jeopardy. While acknowledging the Secretary’s undisputed authority to issue directions to the County Supervisors, the Panel Opinion did not reach the substantive legality of those directions. The full Court is respectfully requested to do so upon rehearing en banc.

⁶ The Director’s use of “reminders and requests” belies the apparently mandatory intent of the directives. App. 143 (“an INACTIVE voter’s petition **must be verified** as INVALID.”).

ARGUMENT

I. This Case Is of Exceptional Importance.

Judges of this Court have oft noted that “exceptional importance” is undefined by Rule 9.331 and “only a handful of Florida decisions expressly address the factors which may render a case ‘exceptionally important.’” *See, e.g., In re Doe 13-A*, 136 So. 3d 748, 753-54 (Fla. 1st DCA 2014) (Rowe, J., dissenting on denial of hearing en banc) (citation omitted). “This Court has ordered en banc review on the basis of exceptional importance in numerous cases despite the lack of established criteria[.]” *Id.* Despite the dearth of authority on what constitutes “exceptional importance,” a throughline in the cases warranting en banc review emerges among those that affect fundamental constitutional and legal rights. *See, e.g., id.* (dissenting from the denial of en banc review in a “case affect[ing] the fundamental legal and constitutional rights of parents in this State to receive notice that their minor child is seeking an abortion”); *In Interest of D.J.S.*, 563 So. 2d 655, 657 (Fla. 1st DCA 1990) (cases interpreting fundamental legal or constitutional rights are worthy of en ban review); *Logue v. Book*, 297 So. 3d 605, 620 (Fla. 4th DCA 2020) (Gross, J., concurring specially) (cases involving First

Amendment issues, such as petitioning the government warrant en banc review).⁷

Cases involving the fundamental right to amend the Florida Constitution under Article XI, section 3, are of such exceptional importance warranting en banc review. *See Floridians Against*

⁷ *See also Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966 (Fla. 1st DCA 2013) (challenging a university regulation prohibiting the storage of a firearm in a vehicle on the university's property, which was preempted by state legislature); *Westphal v. City of St. Petersburg*, 122 So. 3d 440 (Fla. 1st DCA 2013) (constitutional challenge to a worker's compensation statute); *Haridopolos v. Citizens for Strong Schools, Inc.*, 81 So. 3d 465 (Fla. 1st DCA 2011) (constitutional challenge to the adequacy of the educational system); *Hall v. Maal*, 32 So. 3d 682 (Fla. 1st DCA 2010) (marital ceremony without a proper license did not constitute a legally cognizable marriage under statute prohibiting a marriage from being solemnized without a license); *Bush v. Holmes*, 886 So. 2d 340 (Fla. 1st DCA 2004) (discussing whether statutory school voucher program violated the state constitution); *Brooks v. State*, 816 So. 2d 199 (Fla. 1st DCA 2002) (analyzing a defendant's entitlement to a belated appeal "pursuant to what is now Florida Rule of Appellate Procedure 9.141(c)"); *Morris v. State*, 789 So. 2d 1032 (Fla. 1st DCA 2001) (involving interpretation of statutory proscription against the commission of a lewd or lascivious act); *State v. Diamond*, 553 So. 2d 1185, 1192 (Fla. 1st DCA 1988) (reviewing the propriety of a trial court's order directing a child sexual battery witness to submit to a physical examination, which "constitutes a violation of a clearly established principle of law resulting in a miscarriage of justice"); *Marr v. State*, 470 So. 2d 703 (Fla. 1st DCA 1985) (reviewing the appropriateness of a jury instruction that, where there were no witnesses to the alleged act, the testimony of a rape victim should be rigidly scrutinized).

Expanded Gambling v. Floridians for a Level Playing Field, 945 So. 2d 553 (Fla. 1st DCA 2006) (granting rehearing en banc in an action where objectors challenged legality of placing proposed constitutional amendment on ballot); see also *Wright v. Frankel*, 965 So. 2d 365, 372 (Fla. 4th DCA 2007) (rehearing en banc concerning citizens participating in the referendum process). In *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553 (Fla. 1st DCA 2006), this Court granted en banc review of a challenge to the legality of placing a proposed constitutional amendment on the ballot. The fundamental interests there involved a citizen initiative to amend the constitution under Article XI, section 3 and the interplay of statutory requirements relating to same expressed in section 100.371, Florida Statutes.

This case presents the same fundamental constitutional and legal rights deemed worthy of en banc review by this Court in *Floridians Against Expanded Gambling*; as such, en banc review here is similarly warranted.

A. This Case Affects Fundamental Constitutional and Legal Rights Under Article XI, Section 3 and Related Florida Statutes and Warrants En Banc Review.

“The power to propose the revision or amendment of any portion of this constitution is reserved to the people....” Fla. Const. Art. XI, § 3. As recognized by the Florida Supreme Court, “[T]he initiative petition method to amend the constitution is a *fundamental right* and any rule or statute which regulates this initiative process *must not unduly burden the petitioners' initiative access.*” *Browning v. Florida Hometown Democracy, Inc. PAC*, 29 So. 3d 1053, 1063-64 (Fla. 2010) (emphasis added); *see also Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 819 (Fla. 2014) (Medical Marijuana I) (Canady, J., dissenting) (“One of the most important rights enjoyed by the people of Florida under our constitution is the right to vote on constitutional amendments through the initiative process.”). Importantly, no agency of government has unlimited power to change, modify, or amend the initiative petition method of amending the constitution by governmental fiat. *Browning*, 29 So. 3d at 1064. Yet that is precisely what the Secretary’s directives do here.

“A proposed amendment or revision of this constitution, or any part of it, by initiative **shall be submitted to the electors** at the general election provided the initiative petition is filed with the custodian of state records no later than February 1 of the year in which the general election is held.” Art. XI, § 5(b); § 100. 371(1)(a), Fla. Stat. (2025)⁸ (“A petition shall be 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 under this code.”). The timely and correct verification of signed petitions by the County Supervisors by February 1, 2026, is of paramount importance in exercising the power granted under Article XI, § 3.

An initiative sponsor such as SSF has the right to have its petitions counted where they are signed by registered voters, and the other requirements are met. § 99.097(3)(a) (“If all other requirements for the petition are met, a signature on a petition shall be verified and counted as valid for a registered voter if, after comparing the signature on the petition and the signature of the registered voter ...

⁸ All statutes cited and referenced are to the Florida Statutes (2025) unless otherwise stated.

the supervisor is able to determine that the petition signer is the same as the registered voter...”); § 100.371(14)(c)4. (“a supervisor may verify that the signature on a form is valid only if: ... The purported voter is, at the time he or she signs the form and at the time the form is verified, a duly qualified⁹ and registered voter in the state.”); Rule 1S-2.0091(3)(a)1., F.A.C. (providing that “the Supervisor of Elections for the county in which the signee is a registered voter shall verify the signature on each petition form ... to verify that the petition signer: 1. Was, at the time of signing and verification of the petition, a registered voter in the state.”).¹⁰

⁹ A qualified voter is one who is at least 18 years of age, is a citizen of the United States, a resident of Florida and the county in which that person seeks to be registered, and registered pursuant to the Florida Election Code. § 97.041(1)(a); *see also* Fla. Const. Art. VI, § 2. In contrast, unqualified voters are those who preregister prior to their 18th birthday, or who registered but have been adjudicated mentally incompetent and have not had their right to vote restored or have been convicted of a felony and not had their right to vote restored. *Id.* at (2).

¹⁰ Section 98.065(4)(d), which provides that “[n]ames on the inactive list may not be used to calculate the number of signatures needed on any petition,” does not apply to determining whether an initiative has met the threshold for ballot placement. Rather, it clearly speaks solely to calculating that threshold to begin with. That such calculation excludes inactive voters makes sense because the Florida Constitution requires that the threshold be based upon the number of votes cast in the last presidential election. Fla. Const. Art. XI, § 3. Inactive voters, by definition, did not vote in the last presidential

Noticeably absent from any of these authorities is a requirement that a voter have “active” status in the voter registration list maintenance system in order to have their petition count. That is because no such requirement exists—at least not until the Secretary decreed it so on December 23, 2025. For decades, the Secretary had long recognized that “A petition would be **considered valid if signed by a registered voter, active or inactive**,¹¹ provided all other

election; therefore, their numbers cannot be used to calculate the signature count and congressional district distribution threshold. Had the Legislature intended otherwise, it would have expressly stated so. *See, e.g.*, § 100.371(14)(h) (“A signed petition form submitted by an ineligible or unregistered petition circulator must be invalidated and **may not be counted toward the number of necessary signatures for placement on the ballot.**”); *see also Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (“It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.”); *Coley v. State*, 391 So. 2d 725, 727 (Fla. 1st DCA 1980) (“The familiar canon of statutory construction, ‘the expression of one thing excludes another,’ supports our conclusion that if the legislature had intended the statute to apply to the offense of robbery, it would have said so.”); *see also Brooks v. State*, 363 So. 3d 181, 185 (Fla. 5th DCA 2023) (“when a legislative body knows how to say something but chooses not to, its silence is controlling.”).

¹¹ An “inactive voter” is one whose registration record has been placed on inactive status due to a County Supervisor receiving some indicia of a possible change of the voter’s address pursuant to the address maintenance procedures in section 98.065. Rule 1S-2.041(2)(d),

requirements are met.” App. 78; *see also* App. 190 (Supervisor Earley noting: “That interpretation has been the law of the land in Florida ever since [HB 2325 was enacted in 1994], as validated and set forth in several recent Initiative Petition Handbooks and later Advisory Opinions (DE 04-01).”). *See also* §§ 28, 30, Ch. 94-224, Laws of Florida (“HB 2325”). Similarly, a petition will be verified as valid where “the circulator was validly registered under subsection (4) **when** the signature was obtained.” § 100.371(14)(c). There was no dispute below that the non-resident circulators were validly registered by the state **when** they obtained the signed petitions during the federal court preliminary injunction period. App. 127-28.

Further justification for en banc review is the fact these constitutional rights and various statutory provisions governing the verification of the initiative petitions at issue affect the rights of a large number of persons (*e.g.*, SSF and its supporters, including the

F.A.C. As recognized by the Secretary, “An inactive voter remains eligible to vote until he or she is removed from the official list of registered voters.” App. 150. All an inactive voter need do to vote, and automatically convert their status to “active,” is “appear” at the polls and confirm their address, § 98.065(4)(d), such as by showing their driver’s license, which is a typical form of identification required of even “active” voters to vote. § 101.043(1)(a).

tens of thousands of voters across the state¹² who signed SSF's petition and either have "inactive" status or had their petitions gathered by non-resident circulators that were validly registered at the time, as well as the hundreds of thousands of other voters who expressed their desire to vote on the initiative by signing the petition) and impacts the way all 67 County Supervisors apply the law as to SSF and those voters. *See, e.g., Normandy Ins. Co. v. Bouayad*, 372 So. 3d 671, 703 (Fla. 1st DCA 2023) (M.K. Thomas, J., dissenting from the denial of rehearing en banc noting that such review is warranted where the outcome of the case "impacted a large share of the community" or "is of greater moment or impact within the community"); *Florida Dept. of Agric. & Consumer Services v. Lopez-Brignoni*, 114 So. 3d 1135, 1136 (Fla. 3d DCA 2013) (Logue, J.,

¹² While not parties here, as is often the case in election law matters, the voters who signed the petitions at issue here are parties in interest, not in a legal sense but in realistic terms, because their rights under Article XI, § 3 are affected by the outcome of this Court's decision. *See Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975); *see also Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 724 (Fla. 1998) ("[The people] are possessed of the ultimate interest, and it is whom [the court] must give primary consideration... [The court] must tread carefully on that right or we risk the muting of the public voice."). Akin to associational standing, these signers support SSF's initiative and share an interest in seeing it appear on the 2026 General Election ballot.

dissenting from denial of en banc review where the decision would affect 86,630 homeowners); *In re Doe*, 973 So. 2d 548, 554 (Fla. 2d DCA 2008) (Casanueva, J., concurring in granting en banc review as warranted for issues that impact a larger share of the community or the jurisprudence of the state); *In re Estate of Walker*, 609 So. 2d 623, 625 (Fla. 4th DCA 1992) (en banc review where the decision will have a far reaching effect).

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant rehearing en banc of the Panel Opinion and, in doing so, affirm the final summary judgment below as to the Inactive Voter Directive and reverse the final summary judgment below as to the Non-Resident Circulator Directive. In the alternative, the Court is respectfully requested to grant rehearing en banc of the 1/19/26 Order and, in doing so, certify this appeal to the Florida Supreme Court for immediate resolution.

RULE 9.331(d)(2) STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the case or issue is of exceptional importance.

Respectfully submitted this 25th of January, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the Florida Courts E-Filing Portal this 25th day of January, 2026, which will electronically serve all counsel of record.

s/ Glenn Burhans, Jr.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this reply brief complies with the font requirements of Fla. R. App. P. 9.045(b) and Fla. R. App. P. 9.210(a)(2)(B). This brief contains 4,184 words as counted by Word, excluding the parts of the brief exempted by Fla. R. App. P. 9.210(a)(2)(E).

s/ Glenn Burhans, Jr.

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