O.A. 5-6-93 047

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FILED
SID J. WHITE
JAN 22 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FLORIDA SUPREME
COURT CASE NO.: 80,189

SECOND DCA
CASE NO. 91-04045

HILLSBOROUGH COUNTY
Supervisor of Elections,

Petitioner,

v.

TAKE BACK TAMPA POLITICAL COMMITTEE and RICHARD M. CLEWIS, III,

Respondents.

INITIAL BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Supervisor of Elections for Hillsborough County, Florida, is referred to as "the Supervisor."

Respondents, The Take Back Tampa Political Committee and Richard M. Clewis, III, the petitioners below, are referred to as "Take Back Tampa" or "TBT."

The record on appeal is cited by the letter "R" followed by the applicable page number: (R ___). An exception to this method of citing the record is used whenever citations are to the deposition of Robin C. Krivanek. This deposition will be cited as follows: the letter "R" followed by "RCK" and the page number of the deposition (R RCK ___).

STATEMENT OF THE CASE AND OF THE FACTS

All 67 Supervisors of Elections are required by law to follow detailed statutes that precisely define their duties. One critical responsibility of all Supervisors is the regular maintenance of their respective voter registration books. Section 98.081(1), Florida Statutes, provides that during each odd-numbered year each Supervisor shall commence a well-defined procedure that results in the removal of inactive voters' names from the official voter registration books. The Supervisors of this state are also saddled with the heavy statutory responsibility of validating signatures on petition drives submitted for numerous purposes. This case involves the issuance of a writ of mandamus by the trial court that mandates how the Supervisor is to perform both tasks identified above.

On May 16, 1991, former Hillsborough County Supervisor of Elections, Robin C. Krivanek,[1] began the process of maintaining her registration books, just as she had done in each other odd-numbered year during her eighteen year tenure. It is undisputed that on that date she mailed to each elector, who had not voted in any election or made a written request that his registration records be updated during the previous two years, a standard postcard form to be filled in, signed, and returned to her office by mail within thirty (30) days after the postmark date (R RCK 39,40). The form returned advised the Supervisor "whether the elector's status has changed from that of the registration record." Section 98.081(1),

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[1] Petitioner, Pam Iorio, was recently elected to replace Robin Krivanek who retired after serving eighteen years as Hillsborough County Supervisor of Elections.

Fla. Stat. After the 30-day period for returning the cards ended, the Supervisor directed her data processing department to purge the names of those electors who had not returned the cards from the "voter registration books" in accordance with the statute (R RCK 41). The purge occurred on June 21, 1991 (R RCK 41). In that process the Supervisor temporarily removed more than 25,000 names of electors from the County's permanent voter registration books.

Coincidentally, Respondent Take Back Tampa ("TBT") was mounting a petition drive contemporaneously with the Supervisor's Section 98.081(1) purge. This petition drive, undertaken solely in accordance with Section 10.07 of the Tampa Home Rule Charter, was initiated to place on the election ballot a referendum to repeal a recently adopted City Human Rights Ordinance. Section 10.07 provides as follows:

> **The qualified voters of the city shall have the power to propose ordinances to the council or to require reconsideration of any ordinance by petition signed by the electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election . . .**

(emphasis supplied).

In the absence of Section 10.07, Respondents would have not had any other opportunity to have the ordinance repealed by referendum.

TBT filed its signature petition on August 15, 1991. Pursuant to Section 100.361(d), Florida Statutes, the Supervisor immediately began evaluating it to determine whether the petition contained the requisite number of "valid" signatures of qualified voters. To accomplish this task for TBT and, for that matter, any other "petition gatherer" attempting to comply with this charter

provision, the Supervisor first checked each signature against her computer file list of active registered voters. If the name was not there, it was marked as not registered (R RCK 28,29). If it was determined that the person was on the active voter registration list, then the address was checked to make sure it was within the City (R RCK 11). If the address was within the City, it was then verified that the signature resembled or looked sufficiently like the signature on file in the Elections Office to determine whether it was made by the same hand (R RCK 11). As an extra precaution to ensure that she did not eliminate those who signed the petition prior to the County's Section 98.081 purge, she checked the names of persons who signed the petition before June 21 against the inactive voter list to determine if they were "qualified voters" on the date they signed the petition (R 184, 340, 357 ¶ 20). The Supervisor identified 462 signatures of persons who had been purged on June 21, 1991, and therefore were not "qualified voters" when they signed the petition. She eliminated those names from TBT's petition, and on September 3, 1991, informed the Mayor of Tampa and City Council Chairman that Take Back Tampa's petition contained signatures of only 12,130 electors qualified to vote - 180 signatures short of the 12,310 signatures required by the Tampa Charter[2] (R 507).

On September 27, 1991, Take Back Tampa filed a petition for

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[2] Relying upon her count of 123,093 electors qualified to vote in the previous general municipal election, the Supervisor determined that Take Back Tampa needed to obtain 12,310 signatures to be successful (R 507). As noted by Take Back Tampa in its Brief to the Second District Court of Appeal, this determination excluded City electors who were on the inactive voter list at the time of the last general municipal election.

writ of mandamus in the Circuit Court in and for Hillsborough County seeking to require the Supervisor to count the signatures of the 462 persons whose names had been removed from the registration books during the June 21, 1991 purge (R 507).

The Honorable Judge Guy W. Spicola entered an alternative writ in mandamus on September 30, 1991, commanding the City Clerk and the Supervisor to show cause why a peremptory writ of mandamus should not issue (R 331-334). After a hearing on the matter, the trial court entered its order on petition for writ of mandamus on November 22, 1991, and issued a peremptory writ of mandamus to the City Clerk and the Supervisor on November 25, 1991 (R 531). The court entered an order clarifying its order on petition for writ of mandamus on December 5, 1991 (R 557).

The Supervisor filed a motion for rehearing which was denied on December 9, 1991, and filed her Notice of Appeal on that same date (R 560-562). The Second District Court of Appeal affirmed Judge Spicola's decision on July 1, 1992. This Court granted the Supervisor's Petition for Writ of Certiorari on December 28, 1992.

SUMMARY OF ARGUMENT

The court below erred when it affirmed the lower court's writ of mandamus ordering the Supervisor to count the petitions of those "unqualified voters" who had been properly removed from the County's permanent voter's registration list.

Respondent, Take Back Tampa, circulated a petition to repeal a City ordinance via a municipal referendum in accordance with a unique provision of the City Charter. The Charter provision expressly provides "qualified voters" with the opportunity to sign a petition to have an ordinance placed on the ballot if 10% of the electors "qualified to vote" at the previous election sign the petition. The Supervisor invalidated 462 of the signatures on the petition as she determined that those electors had been purged from the permanent voter's registration list in accordance with applicable statute and were therefore unqualified to vote <u>until</u> they took the affirmative step of notifying the Supervisor in writing that their "status" as electors had not changed. The Supervisor utilized her best judgment in making this determination and based her sound decision on her interpretation of a complex set of election laws and on advisory opinions from the Attorney General and Secretary of State.

The court below further erred when it suggested that the 462 purged electors, whose signatures were invalidated by the Supervisor, had provided sufficient notice for the Supervisor to reinstate them as "qualified voters" by merely signing the petition and indicating their address and precinct number.

Although in a footnote the District Court states that it did not rely upon Constitutional principles in reaching its decision,

it subsumed the circuit court's opinion including that portion where the lower court erred by holding that there were Constitutional issues involved. Specifically, the court found that Respondent's First Amendment right to "petition" had somehow been maligned. Respondents and the lower court have misconstrued the Constitutional provision "inherent right to petition one's government for redress" with the right to petition endowed to "qualified voters" by the City Charter.

The court lacks jurisdiction to review this matter. it is well established that a party only has standing to raise its own legal rights or interests. Take Back Tampa and Clewis have failed to allege or prove that their own rights or interests were violated by the Supervisor when she invalidated the 462 signatures on the petition. Specifically, it is uncontroverted and Take Back Tampa admits that Mr. Clewis' signature was not one of the 462 invalidated. Likewise, Take Back Tampa is an organization, not an elector and, therefore, could not, and did not, sign the petition. in theory, if the Supervisor violated anyone's legal rights or interests, it would have been those 462 electors -- <u>who are not before the court</u>.

Finally, and in conjunction with the Constitutional confusion noted above, the trial court has recently exacerbated its original error by awarding attorney's fees of $60,500 to Respondents under 42 U.S.C. §§ 1983 and 1988 in the face of a lack of standing, on the part of Respondents, to raise any Constitutional claims. As such, Petitioner urges this court to issue an extraordinary writ of prohibition requiring the trial judge to rescind his order and dismiss the claim for fees on the ground that the Court lacks

subject matter jurisdiction to hear such a motion.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THIS MATTER AS CLEWIS AND TAKE BACK TAMPA HAVE FAILED TO ALLEGE ANY OF THEIR OWN LEGAL RIGHTS OR INTERESTS THAT HAVE BEEN VIOLATED BY THE SUPERVISOR.

In their Petition for Writ of Mandamus filed on September 27, 1991, Clewis and TBT merely allege that TBT is a committee consisting of "qualified voters in Tampa" and that Clewis is a qualified voter of the City of Tampa. The parties then asserted jurisdiction under Florida Constitution, Article 5, Section 6 and Florida Rules of Appellant Procedure 9.030(c)(3) (Petition at 4). Finally, Clewis and Take Back Tampa allege that the effect of the Supervisor and City Clerk's action has been that "electors of the City of Tampa are being denied their Constitutional right to vote on an issue of great public importance." (Id.)

The Supervisor acknowledges that she invalidated the signatures of 462 electors who signed the petition. Assuming for purposes of this argument that said invalidation violated the rights of those 462 persons, TBT and Clewis have still failed to allege that Mr. Clewis or any named members of TBT were among those 462 persons. In the absence of such an allegation, the court does not have jurisdiction to pursue this matter.

This issue came to light recently when Judge Spicola ruled that the Supervisor and City are liable to Clewis and Take Back Tampa for their "reasonable attorney's fees" of $60,500 under 42

U.S.C. § 1988.[3] The Court below made this decision in the face of argument from the undersigned and corroborating uncontroverted testimony[4] that the Court lacked jurisdiction to address those claims. The Honorable Judge Spicola decided long ago that somehow TBT and Clewis' rights were infringed upon by the actions of the Supervisor when she failed to count the 462 signatures of persons purged from the permanent voter registration rolls (see Judge Spicola's decision subsumed within Judge Danahy's opinion at 5-6). At the above-referenced "fee hearing," TBT's vice-chairman, legal representative and spokesperson, David Caton, testified that Richard Clewis, the only individual plaintiff identified as an original petitioner in this lawsuit, was a city resident who had signed TBT's petition. Moreover, Mr. Caton testified that Mr. Clewis remained on the Supervisor's registration list throughout this process and that his signature was not one of the 462 signatures invalidated by the Supervisor.

Mr. Caton also testified that the Take Back Tampa Political Action Committee was co-chaired by three persons, and that only one of them, Mr. Clewis, was a city resident. Mr. Caton was unable to identify any other participants or members of TBT. Finally, Mr. Caton expressly stated on the record that the unincorporated Take Back Tampa Political Action Committee was fighting for the

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[3] The Honorable Judge Spicola issued his verbal decision on January 15, 1993. Petitioner will file said Order with the Clerk of the Supreme Court.

[4] The subject hearing on attorney's fees only occurred seven (7) days prior to the filing of this brief; therefore, Petitioner has not been able to procure the official transcript to date. Said transcript will be filed upon receipt with a Motion for Supplemental Filing.

Constitutional rights of the persons who are not before this Court, namely, the 462 petition signers whose signatures were not before the Court.

In Warth v. Seldin, 95 S.Ct. 2197, 2205 (1975), the Supreme Court made it abundantly clear that a plaintiff can only assert its own legal rights and interests and cannot rest its claims for relief on the rights and interests of others. See also Higdon v. Dade City, 446 So.2d 203 (Fla. 3d DCA 1983). Likewise, in El Faison Dorado, Inc. v. Hillsborough County, 483 So.2d 518 (Fla. 2d DCA 1986) the Second District Court of Appeal ordered a declaratory judgment when it found that an organization failed to allege that it (not its members) was threatened under the ordinance in question. Here, Mr. Clewis' petition was actually counted by the Supervisor, and therefore, he could have no claims (Constitutional, or otherwise) against the Supervisor. The uncontroverted evidence indicates that the other two named members of TBT were not even remotely eligible to sign the petition as they were not residents of the City of Tampa.

Mr. Clewis' alleged Constitutional right to sign a petition (or vote) was not violated by the Supervisor. Likewise, TBT is an organization, not an elector, and therefore has no right to vote or petition under § 10.07 of the Tampa City Charter or the Constitution. Furthermore, Take Back Tampa did not name, or create a "class" of persons, who may have actually had a potential Constitutional claim; vis-a-vis, even one of the 462 persons whose signatures had been rejected. In other words, if, for argument's sake, the Supervisor violated anyone's legal rights or interests, it would have been those 462 electors -- who are not before this

Court.

The Courts below lacked jurisdiction to review this case and more recently lacked subject matter jurisdiction to award attorney's fees on the basis of alleged violations of 42 U.S.C. §§ 1983 and 1988. Therefore, Petitioner respectfully urges this Court to dismiss this matter for lack of jurisdiction or in the alternative as to exercise its discretionary authority and issue a writ of prohibition ordering the trial court to rescind its Order Granting Attorney's Fees and Dismiss Respondent's Motion for Fees with prejudice.

II. THE COURT BELOW ERRED IN AFFIRMING THE MANDAMUS THAT REQUIRED THE SUPERVISOR TO COUNT THE PETITIONS OF PERSONS WHO WERE NOT QUALIFIED VOTERS.

The principal issue before this Court is whether the courts below committed reversible error in mandating that the Supervisor of Elections count the petitions of persons who were not "qualified voters" for purposes of a petition drive initiated in satisfaction of a provision of Tampa's City Charter. Petitioner respectfully asserts that error was committed as the subject petition signers were not "qualified voters" when they signed a petition as their names had been legally purged from the Supervisor's official voter registration list.

The Supervisor is the official custodian of the registration books and has the exclusive control of matters pertaining to the registration of electors. § 98.161(3), Fla. Stat. (1991). As the official custodian of the registration books, the Supervisor is charged with checking signatures on various types of petitions to verify the legal status of the persons signing and to determine

whether the particular petition contains the requisite number of signatures for its intended purpose. See §§ 99.095(4)(a) and (b), 99.0955(3)(a) and (b), 99.006(4), 100.361(1)(c), (d) and (h), Florida Statutes (1991).

The courts below properly recognized that it is the Legislature's role to regulate the electoral process in a reasonable fashion (DCA Op. 6) and noted that the parties do not here challenge the validity of any of the applicable election law statutes, including Section 98.081, Florida Statutes.

The Supervisors of this state are each regularly faced with the arduous task of evaluating various petitions to determine if they contain an adequate number of "required valid signatures." Section 100.361(1)(d). Here the Supervisor of Elections of Hillsborough County was presented with a petition submitted in accordance with the requirements of Section 10.07 of the Tampa City Charter. In order to establish the validity of the signatures she first considered the express language of that Charter provision and then relied upon relevant election statutes and opinions from the Attorney General and Division of Elections in order to determine which signatures would be valid under this unique Charter. Her decision to strike the signatures of those persons not qualified to vote at the time they signed the petition was appropriate and must stand.

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ISSUED A WRIT OF MANDAMUS COMPELLING THE SUPERVISOR OF ELECTIONS TO PERFORM A DUTY WHICH SHE HAD NO CLEAR LEGAL DUTY TO PERFORM.

The trial court abused its discretion when, contrary to well established law, it issued a writ of mandamus compelling the

Supervisor to perform a duty involving the exercise of judgment and which she had no "clear legal duty" to perform. Relators Take Back Tampa and Clewis petitioned the court below to issue a writ of mandamus to compel the Supervisor of Elections to count the signatures of the 462 electors whose signatures had been invalidated by the Supervisor. It is well settled that mandamus will not issue for purposes of compelling the performance of a discretionary duty or one that involves the exercise of judgment. Reese v. Baron, 256 So.2d 70 (Fla. App. 1971). Likewise, for mandamus to issue, the relator must show that he has a clear legal right to it and that the public officer in question has a clear legal duty to perform a given act. Hatten v. State, 561 So.2d 562 (Fla. 1990); Heath v. Becktell, 327 So.2d 3 (Fla. 1976).

The Supervisor of Elections is statutorily mandated to perform numerous tasks, some ministerial and some that involve the exercise of judgment. For example, Section 98.081 mandates that the Supervisor purge her permanent registration rolls every two years. If, for any reason, the Supervisor resisted conducting this task, a relator could petition the circuit court and upon a showing that the Supervisor was failing to perform such a ministerial task and that he had no other remedies at law, mandamus would issue.

In contrast, some of the Supervisor's duties are not ministerial. For instance, a regular task of the Supervisor is to compare a voter's signature at the polls with the signature on her permanent registration records. The evaluation of said signature is clearly subject to the discretion of the Supervisor and could never be subject to a writ of mandamus. Likewise, here the Supervisor was required by law to evaluate the validity of more

than 12,000 signatures to determine compliance with the requirements of the City Charter.

A petition drive in satisfaction of Section 10.07 of the City Charter was unprecedented for her in her seventeen year career as Supervisor. Therefore, there was no established procedure or case law directly on point for her to base her evaluation upon. As such, she used her best judgment in reliance upon relevant statutes and Attorney General and Division of Elections Opinions. Of particular significance was her reliance upon Division of Elections Opinion 87-16 which was directly on point (See full text of opinion infra.) There the Division advised all Supervisors not to validate signatures on petitions of persons pureed pursuant to Section 98.081. In reviewing this persuasive opinion, it is apparent that if the Supervisor had any "clear legal duty" it was to follow the Secretary of State's guidance and invalidate the 462 signatures, as she did. There is no evidence to the contrary to show that she ever had a "clear legal duty" to perform otherwise.

Furthermore, relators Take Back Tampa and Clewis, failed to even allege, nonetheless prove, that <u>they</u> personally have a "clear legal right" to a mandamus forcing the Supervisor to validate the 462 signatures in question. As a matter of fact, Take Back Tampa's representative and vice-chairman recently testified that no named parties to this lawsuit had their own petition invalidated by the Supervisor. (See Jurisdiction discussion Supra). Moreover, Take Back Tampa and Clewis have failed to establish that the Supervisor has a "clear legal duty" to perform this act. If the Supervisor's validation task merely involved counting or tabulating the 12,000 petitions, mandamus would lie. However, it is apparent from the

detailed analysis offered by relators and the Supervisor, in their briefs as well as the lengthy opinions filed by the courts below, that the Supervisor's task of determining who the "qualified voters" of the City are was not purely ministerial. In reality, as indicated by her deposition testimony, the Supervisor took numerous factors into consideration prior to using her "best judgment" in deciding which signatures would be valid. Her exercise of judgment is apparent when one observes that she opted to not invalidate the signatures of persons who actually signed the petition prior to the June 21, 1991, purge date. (R 184, 340, 357 ¶ 20)

The trial court committed reversible error when it abused its discretion by issuing the writ of mandamus against this public officer, when it was apparent that she had no "clear legal duty" to perform the act in question. Likewise, the court below erred when it affirmed the mandamus under these facts.[5] The writ should be quashed.

B. THE SUPERVISOR PROPERLY ELIMINATED THE SIGNATURES OF THOSE PERSONS NOT REGISTERED UNDER THE COUNTY'S PERMANENT VOTER REGISTRATION SYSTEM AS THOSE PERSONS WERE NOT "QUALIFIED VOTERS" WHEN THEY SIGNED THE PETITION.

The citizens of Tampa do not have the inherent "fundamental" right to sign, or circulate, a petition to place a referendum on the ballot repealing a local ordinance. This right only exists for Tampa's "qualified voters" as a result of the existence of Section 10.07 of the City Charter. In the absence of that provision, no

[5] The Supervisor raised this issue as her Second Affirmative Defense in her Response to Petition for Writ of Mandamus filed October 21, 1991.

"right to petition" to repeal a local ordinance via a referendum exists under the state or federal constitutions or applicable statutes.

Section 10.07 of the Tampa City Charter provides in pertinent part as follows:

> **The qualified voters of the city shall have power to require reconsideration of any adopted ordinance by petition signed by the electors of the city equal in number to not less than 10 percent of the electors of the city qualified to vote at the last general municipal election . . .**

(emphasis supplied).

Under this ordinance only "qualified voters" of the City may "require reconsideration" of a city ordinance. The critical issue before the Supervisor and now before this Court is: Who are the "qualified voters" of the City? To answer this question the Supervisor looked to relevant statutory provisions and Attorney General and Division of Elections Opinions for guidance. Section 98.091(3), Florida Statutes, sets forth the criteria under which a supervisor is permitted to allow a municipal elector to vote:

> **Any person who is a duly registered elector pursuant to this code and who resides within the boundaries of a municipality is qualified to participate in all municipal elections, the provisions of special acts or local charters notwithstanding. Electors who are not registered under the permanent registration system shall not be permitted to vote.**

(emphasis supplied).

Likewise, Section 98.041, Florida Statutes, expressly mandates that all supervisors of elections are statutorily charged with maintaining a "permanent single registration system for the registration of electors to qualify them to vote" in all elections,

including municipal elections.

In order to become a qualified elector under the permanent registration system, a person must possess the qualifications set forth under Article VI, Section 2, Florida Constitution, and Section 97.041(1)(a), (3), and (4), Florida Statutes. Article VI, Section 2 of the Florida Constitution provides in pertinent part:

> **Every citizen of the United States who is at least twenty-one years of age and who has been a permanent resident for one year in the state and six months in a county, if registered as provided by law, shall be an elector of that county.**

(emphasis supplied). It is clear from Article VI that, prior to becoming a qualified elector, a citizen must be registered as provided by law. Section 97.041, Florida Statutes, which mandates those qualifications that electors must possess in order to register to vote, provides in pertinent part as follows:

> **Any person who is not registered shall not be entitled to vote.** Section 97.041(c), Florida Statutes.

(emphasis supplied).

In accordance with these constitutional and statutory mandates, in order for a person to be a qualified elector of a municipality and therefore qualified to vote, the elector must possess certain constitutional and statutory qualifications and be registered in the supervisor's permanent registration system. It is undisputed in this case that the names of the electors in question were no longer on the Supervisor's permanent registration list. Therefore, they were not registered in accordance with Florida law and were not "qualified voters" when they signed the petition.

C. THE SUPERVISOR PROPERLY INVALIDATED THE 462 ELECTORS SIGNATURES AS THEY WERE LEGALLY PURGED FROM THE PERMANENT REGISTRATION LIST AND THEREFORE NOT QUALIFIED TO VOTE.

It is undisputed that the Supervisor properly purged approximately 25,000 electors from the permanent registration list on or about June 21, 1992. Likewise, under Section 98.081 (which is not under attack here) none of those purged electors could vote in Hillsborough County unless they first took the affirmative step of advising the Supervisor, in writing, that their "status" had not changed. Therefore, the Supervisor properly invalidated the 462 elector's signatures as they were not "qualified" to vote when they signed the petition; therefore, under § 10.07 they were not qualified to petition.

In June, 1991, Take Back Tampa began circulating a petition to bring to a referendum the question of repeal of Tampa Ordinance No. 91-88. 462 of the petitions submitted by Take Back Tampa were removed from the Supervisor's permanent registration list (R 507) in accordance with Section 98.081, Florida Statutes, which mandates the following:

> **(1) During each odd-numbered year, the supervisor shall mail, to each elector who, during the past 2 years, did not vote in any election in the county or did not make a written request that his registration records be updated, a form to be filled in, signed, and returned by mail within 30 days after the notice is postmarked. The form returned shall advise the supervisor whether the elector's status has changed from that of the registration record. Electors failing to return the forms within this period shall have their names withdrawn temporarily from registration books. In addition, the name of an elector may be removed temporarily from the registration books when any first-class mail sent by the supervisor to the elector is**

> returned as undeliverable. Such name shall not be removed until a diligent effort has been made by the supervisor to locate such elector. This shall constitute such notice for purposes of this section. The list of the electors temporarily withdrawn shall be posted at the courthouse. When the list is completed, the supervisor shall provide a copy thereof, upon request, to the chairman of the county executive committee of any political party, and the supervisor may charge the actual cost of duplicating the list. A name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed. A federal post card application from a citizen overseas indicating that the elector's status has not changed shall constitute such a written notification to the supervisor. The supervisor shall then reinstate the name on the registration books without requiring the elector to re-register. Notice of these requirements shall be printed on the voter identification card. This method prescribed for the removal of names is cumulative to other provisions of law relating to the removal of names from registration books. This is not a re-registration but a method to be used for keeping the permanent registration list up to date.

(emphasis supplied).

Under the express language of Section 98.081, it is clear that if the elector fails to return the form notifying the Supervisor that his status as a qualified elector has not changed, the Supervisor must temporarily withdraw the elector's name from her permanent registration list. It is equally clear that in so removing the elector's name from the permanent registration list, the elector loses her ability to vote as a qualified elector until such time as the elector, in writing, makes known to the Supervisor that her status as a qualified elector has not changed.

Here, the Supervisor acted in full compliance with constitutional and statutory mandates when she refused to verify

the names of the 462 electors who had been temporarily removed from her permanent registration books and who had failed to notify the Supervisor, in accordance with Section 98.081, Florida Statutes, that their legal "status" had not changed.

Notwithstanding this, however, the courts below commanded the Supervisor to count all the signatures of electors who had been temporarily removed from the permanent registration books, because, according to the court, such removal was not a removal at all and had no effect on the status of a qualified elector. Those decisions are in error in that regard, as they ignore the interplay between the above-referenced statutes and are contrary to the interpretations of the Attorney General and the Department of State, Division of Elections, the agencies which have been statutorily charged by the Florida Legislature with the duty of interpreting the Florida election laws at the executive level.[6]

Furthermore, the decision is contrary to the only Florida case on point, State ex rel. Kyle v. Brown, 167 So.2d 904 (Fla. 3d DCA 1964). In Brown, the court issued an alternative writ of mandamus commanding the Supervisor of Registration[7] to strike the name of a particular elector from the registration books pursuant to Section 98.201, Florida Statutes, on the grounds that he had become

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[6] Under the current law, the Secretary of State, as the chief elections officer of the state, is responsible for obtaining and maintaining "uniformity in the application, operation, and interpretation of the election laws" and providing "uniform standards for the proper and equitable implementation of the registration laws." § 97.012(1) and (2), Fla. Stat. Advisory opinions relating to any provisions of Florida election laws are provided by the Division of Elections, under the Secretary of State. § 106.23(2), Fla. Stat.

[7] Supervisors of election were formerly titled supervisors of registration.

disqualified to vote by virtue of being adjudicated mentally incompetent. The supervisor in that case moved to quash the alternative writ because he had already removed the elector's name pursuant to Section 98.081, Florida Statutes. The district court agreed and quashed the writ as being moot, stating:

> **There is merit in respondent's motion to quash the writ in that it has been made to appear the elector's name has been removed from the registration books, and that by reason thereof the respondent has already done by way of an alternative method, that which relator sought by mandamus. Therefore, the question has been rendered moot.**

Id. at 906. (Emphasis supplied).

In so ruling, the Third District found that an elector's name which had been withdrawn pursuant to section 98.081, Florida Statutes, was removed from the registration books. Applying the Court's reasoning in Brown to this case, if an elector's name has been temporarily removed from the permanent registration books, the elector's name is not on the permanent registration list and cannot be counted as a "qualified voter" for purposes of petition verification or otherwise, absent the statutorily mandated written notification to the supervisor that the elector's status has not changed.

D. THE SUPERVISOR'S DECISION IS CONSISTENT WITH ATTORNEY GENERAL AND DIVISION OF ELECTIONS OPINIONS WHICH MUST BE GIVEN GREAT WEIGHT.

For her entire eighteen-year tenure Supervisor Krivanek not only followed express constitutional and statutory mandates associated with her position as Supervisor, but also relied upon the sound guidance provided in this arena by the Attorney General and the Secretary of State, Division of Elections. Petitioner's

interpretation of the relevant ordinance and statute here is consistent with opinions issued by both agencies. Such official opinions, while not legally binding upon the courts, are persuasive and entitled to great weight in construing the laws of this state.[8] Richey v. Town of Indian Rivershores, 337 So.2d 410 (Fla. 4th DCA 1976); Beverly v. Division of Beverage, 282 So.2d 657 (Fla. 1st DCA 1973).

For example, Division of Elections Opinion 87-16 specifically answered the question before this Court and was directly applicable to the situation in which the Supervisor found herself when verifying the Take Back Tampa petition. The question was as follows:

> **When a petition is submitted to the supervisor of elections to verify signatures, should the supervisor verify a name of an elector whose name has been "purged" from the rolls pursuant to section 98.081(1), Florida Statutes?**

The Division's response was:

> **An elector whose name has been temporarily removed from the registration books pursuant to Section 98.081(1), Florida Statutes, is not on the registration books. If the elector's name is not on the registration books when a supervisor is verifying signatures on a petition, the supervisor may not verify the elector's signature for a petition.**

Op. Div. Elect. Fla. DE 87-16 (Oct. 12, 1987).

Likewise, the Florida Attorney General, in response to the question of whether a qualified elector whose name has been removed

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[8] Division of Elections opinions, though advisory, are binding on any person or organization who sought the opinion or with reference to whom the opinion was sought. § 106.23(2), Fla. Stat. (1991). Supervisors of Elections in all 67 counties of Florida rely on and follow Division of Elections opinions. (R RCK-79, 80)

from the registration books may be reinstated at a time when the registration books are closed, opined that although Section 98.081, Florida Statutes (a part of the election code relative to the permanent registration system), includes a provision for reinstating names on the registration books at any time the books are open, "there are three other sections of Florida Statutes which, although not a part of the section dealing with permanent registration, are a part of the election code and tend to cloud the issue at hand." The Attorney General then cited Sections 98.201, 97.091, and 98.291, Florida Statutes, all dealing with restoration to the registration books, and stated that they must be considered in pari materia.

> **"It appears from the final line in the last paragraph of section 98.201, Florida Statute, that Section 98.201 was intended to be implemented under the procedure described in the preceding Section 98.081, Florida Statute. ... it is obvious legislative intent that these two sections be construed in pari materia."**
>
> **. . .**
>
> **"When ... Section 97.091 is read together with Section 98.081, there is only one possible conclusion and that is the reinstatement under the permanent registration should be made only at a time when the registration books are open."**
>
> **Under the situation outlined in Section 98.291, Florida Statute, an elector's name may be restored at any time. This appears proper in those situations where the name should not have been removed in the first instance ... .**
>
> **. . .**
>
> **In situations <u>where an elector through his own negligence fails to return the form</u> mailed out by the supervisor of registration under the provisions of Section 98.081, Florida Statute, it seems to have been the <u>legislative intent</u> <u>that those names should only be restored to</u>**

> **the registration books by way of a personal appearance[9] of the elector involved before the supervisor of registration at a time when the registration books are open.**

Op. Att'y. Gen. Fla. 058-285 (Oct. 3, 1958), (emphasis supplied).

The very way the question was phrased in Attorney General Opinion 054-38 demonstrates that the state agencies which have been charged with interpreting the election laws have consistently, for almost 40 years,[10] considered an elector removed pursuant to Section 98.081, Florida Statutes, to be unqualified to vote:

> **When a county is under the permanent single registration system prescribed by §§ 98.041 through 98.151, F.S., and forms are being sent out in compliance with § 98.081 to determine which registrants are no longer qualified to vote, is the supervisor of registration authorized to mail the forms to registered electors at addresses other than those shown on the registration books?**

Op. Att'y. Gen. Fla. 054-38 (Feb. 18, 1954).

The Division of Elections, which is now statutorily vested with the sole authority for rendering advisory opinions on the election laws, analyzed Section 98.081 and opined as follows:

> **Section 98.081(1) provides for a purge during the odd-numbered years, in response to which purge letter an elector is obligated to provide a written response to the supervisor, and thereby to obtain reinstatement. However, subsection (1) of Section 98.081 is specifically and expressly made cumulative to rather than exclusive of all other provisions having to do with removal and reinstatement.**
>
> **This subsection, like Section 98.081(1) does not limit restoration of a name to the period prior to the time that the books close or**

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[9] § 98.081 formerly required a personal appearance rather than written notice.

[10] The law establishing a permanent registration system for counties was enacted in 1949. Ch. 25391, Laws of Fla. (1949).

> **prior to the time that the polls open: restoration may be made until the polls close. Indeed, Section 98.081, Florida Statutes (1976), did contain a requirement that restoration be made in response to a purge letter only if done "in person" and then only "at any time the books are open." Those two limitations have now been removed.**
>
> . . .
>
> **Neither Section 97.091 nor 98.081 sets a limitation upon the time allotted to the elector whose name has been erroneously or illegally or otherwise removed to have his name reinstated. This does not mean that no purge is provided by law, for it is clearly provided by Section 98.081(1), Florida Statutes. It does not mean that there is not an affirmative obligation upon electors notified of purging to respond as provided in Section 98.081(1), Florida Statutes, for such an obligation is spelled out in and by that subsection. It does mean, however, that reinstatement may be made as prescribed, upon the presentation of proofs to the supervisor, who is then required to exercise sound discretion, up to the closing of the polls at a given election.**

Op. Div. Elect. Fla DE 77-23 (Oct. 12, 1977), (emphasis supplied).

Contrary to the courts' finding, those electors who have been temporarily removed from the permanent registration list in accordance with the mandates of Section 98.081(1), Florida Statutes, must be treated as "unqualified to vote" for purposes of voting or signing a petition in the same way as persons who have been removed permanently or who never registered at all, until those temporarily purged electors make known to the supervisor that their status as qualified electors has not changed.[11] Moreover,

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[11] The fact that the supervisor continues to maintain records of the purged electors in accordance with section 98.081(4), is of no legal significance. Under section 98.081(4), once an elector's name is removed from the permanent registration system under the provisions of sections 98.081(1)-(3), 98.201, or 98.301, the (continued...)

under the express directive of Section 98.091(3), Florida Statutes, the supervisor is prohibited from permitting electors who are not registered under the permanent registration system to vote in any election. Contrary to the statutory interpretation endorsed by the Attorney General and Secretary of State, the opinions below effectively command the Supervisor to violate this clear statutory provision.

E. THE COURT BELOW ERRED IN FINDING THAT BY SIGNING THE PETITION THE 462 PURGED PETITION SIGNERS SATISFIED THEIR STATUTORY REINSTATEMENT REQUIREMENTS.

The court below further erred when it held that the electors who had been purged from the Supervisor's permanent registration list should be counted because (according to the court below) such electors had, in effect, reinstated themselves as fully qualified voters by the mere act of signing TBT's petition. (R 519) Again, the trial court is mistaken. The petition contained, at most, the signature, current address, and precinct number of the elector. This is not the same information requested on the form prescribed by Section 98.081(1), Florida Statutes (1991), as the court below suggests.

Under Section 98.081(1), Florida Statutes, both the form and the written notice required by the elector must advise the supervisor that his "<u>status</u>" as an elector has not changed. The "status" of an elector is not simply his signature, his current

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[11](...continued)
Supervisor is statutorily directed to file the elector's original registration form alphabetically in her office, or, as an alternative, to remove the form from the books to be microfilmed or maintained digitally or on electronic, magnetic, or optic media.

address, and his precinct number; it means much more. It means that the elector is statutorily required to notify the supervisor that his constitutional and statutory qualifications as an elector have not changed.

In support of this assertion, Petitioner notes that in 1988, the Division of Elections issued an advisory opinion interpreting what the word "status" meant as used in Section 98.081(1), stating:

> **A person's status as used in Section 98.081(1), refers to those voter registration qualifications contained in Section 97.041, Florida Statutes. Thus, a person must continue to be a citizen of the United States, a permanent resident of the State of Florida, and a permanent resident of the county where the elector is registered to vote. In addition, if the person has been adjudicated mentally incompetent, his competency must have been restored and a person convicted of a felony must have had his civil rights restored.**
>
> **In reference to your request for a procedure which may be followed uniformly during a countywide election, Section 98.081(1), Florida Statutes, provides only that an elector's name shall be restored to the registration records when the elector, in writing, makes known to the supervisor that his status has not changed. In addition, this section provides that a federal post card application from a citizen overseas indicating that an elector's status has not changed constitutes written notification to the supervisor. Therefore, when an elector notifies the supervisor in writing that his status has not changed, his name must be restored to the registration records.**

Op. Div. Elect. Fla. DE 88-38 (Sept. 12, 1988).

Here, the electors in question negligently failed to return the form which would have advised the Supervisor that their status as qualified electors had not changed. These electors also negligently failed to otherwise notify the Supervisor in writing

that their status had not changed. Instead, these electors merely signed a petition, indicating only their current address and precinct number. The courts below, however, holding that this constituted all the notice statutorily mandated by Section 98.081 should be reversed, even under the most liberal construction of Section 98.081(1).[12] The decision below begs for the following question: Would the 462 petition signers have cured their deficiency if TBT had opted to not provide the Supervisor with the signed petition? The answer is obvious.

Moreover, the trial court erroneously concluded that the Division of Elections had followed the procedure of notification which the trial court approved in Division of Elections Opinion 91-01 (Feb. 4, 1991). In that opinion, the Division stated that the act of signing a petition card constituted sufficient notice that an elector on the active voter list had moved from outside municipal boundaries to a new address within municipal boundaries so as to make the elector qualified to vote in a municipal election. However, as the Supervisor correctly pointed out, this procedure cannot be followed here where electors have been temporarily purged from the permanent registration list because their status as qualified electors is in question.

Notification of the supervisor to show that their constitutional and statutory qualifications ("status") as qualified electors have not changed, demands more than mere notice of address

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[12] Although as a general rule election laws should be liberally construed in favor of the right to vote, this construction has been discarded by this Court when fraud or a voter's qualifications are involved. See e.g., Broadman v. Esteva, 323 So.2d 259 (Fla. 1976); State v. Rinehart, 192 So. 819 (Fla. 1939).

change. Quite significantly, in DE 91-01 the Division of Elections did not approve the supervisor's verification of an elector who no longer possessed the qualifications to be a qualified elector as the court suggested and has commanded the Supervisor to do here.

Thus, contrary to the trial court's ruling, an elector who has been temporarily removed from the permanent registration books does not possess the same voting status as a qualified elector who is listed on the permanent registration books. Moreover, he does not regain that voting status until he notifies the supervisor in writing that his status has not changed or produces sufficient written proof to that effect at the polls. He is not qualified to do what those electors whose names are on the permanent registration list may do: enter the precinct in which they are registered, sign their name, receive a ballot, and vote. Quite simply, persons not qualified to merely sign their names and vote at the polls (e.g., purged electors) are not "qualified voters" able to merely sign their names to a "City of Tampa Charter § 10.07 petition" and have their signatures validated by the Supervisor.

F. PUBLIC POLICY DICTATES A STRICTER CONSTRUCTION OF THE RELEVANT ORDINANCES AND STATUTES.

There are a number of strong public policy reasons which dictate a stricter construction of the above-referenced ordinances and statutes and require a reversal of the trial court's ruling. The principal state interest which Section 98.081 protects is the prevention of fraudulent voting. Preventing fraud and maintaining up-to-date, reliable registration lists are essential to preserve the purity of ballots and to ensure the integrity of the electoral

process in this state. This compelling state interest far outweighs the minimal and incidental burden imposed on an elector who has negligently failed to maintain or reactivate his registration on the Supervisor's permanent registration records.

To prevent being temporarily removed from the permanent registration list, a registrant must vote only once every two years or undertake some affirmative act to inform the supervisor of elections that his status as a qualified elector has not changed. This action can be as simple as returning a signed form furnished by the supervisor or furnishing written notification that his status has not changed. The Legislature may properly require an elector, under Section 98.081(1), to vote and to update his registration records periodically to ensure that he is a qualified elector when he casts his ballot. See Williams v. Ossner, 350 F. Supp. 646 (E.D. Pa. 1972), and Duprey v. Anderson, 518 P.2d 807 (Colo. 1974) (both rejecting Michigan State UAW Community Action Program Council v. Austin, 198 N.W.2d 385 (Mich. 1972).

III. SUPERVISOR MUST COUNT THE PETITIONS OF ELECTORS WHOSE NAMES HAVE BEEN PURGED PURSUANT TO SECTION 98.081, THIS COURT MUST, FOR THE SAKE OF CONSISTENCY, REMAND FOR A DECISION TO DETERMINE HOW MANY QUALIFIED ELECTORS EXISTED AT THE LAST GENERAL MUNICIPAL ELECTION.

If this Court affirms the mandate that the Supervisor must count the petitions of electors whose names have been purged pursuant to Section 98.081, this Court must remand for a decision to determine how many qualified electors existed at the last general municipal election. In other words, if this Court affirms the decision below and concludes that the Supervisor must count the signatures of those persons temporarily removed from the official

voter registration records pursuant to § 98.081, then, for purposes of consistency, the Supervisor must also include those persons who were on the inactive list at the last election for purposes of establishing the number of signatures required to place the matter on the ballot.

The Courts below opted to avoid addressing this issue; however, it is one that this Court cannot avoid. Specifically, the opinion below held as follows:

> **The Supervisor's [sic] makes two final arguments in opposition to accepting withdrawn names. First, . . . Second, she argues that inactive electors should not be permitted to sign because electors who were inactive prior to the last municipal election were not included in the count of signatures required to petition pursuant to § 10.07 of the Tampa City Charter. She argues that if they are included in the right to petition, they should likewise be included in the count of signatures required, thereby increasing the number of signatures required considerably. . . . The court notes that the Supervisor may <u>be correct</u> in asserting that persons on the inactive list at the last election should be included in the count because they are "qualified voters," [sic] however, the method of determining the number of signature required is not before the court.**

(emphasis supplied)(DCA Op. at 9-10).

The reality of the situation is that the courts below mandated that the Supervisor count the 462 signatures at issue and include the repeal referendum on the November 3, 1992 ballot. The Courts below concluded that this second issue identified above was not before them and refused to clarify the matter for the sake of consistency. As a result an election was held on the referendum. The Supervisor respectfully urges that this Court utilize its discretionary authority to address this issue here to avoid the

necessity for protracted litigation over this single issue.

IV. THE DISTRICT COURT BELOW ERRED WHEN IT SUBSUMED THE CIRCUIT COURT'S ANALYSIS OF RESPONDENT'S ALLEGED CONSTITUTIONAL RIGHTS.

The district court below noted that it decided the case only on the basis of statutory interpretation (Judge Danahy Opinion at note 1); however, it erred by subsuming Judge Spicola's analysis of TBT and Clewis' alleged infringement of their Constitutional rights.

The exercise of the right to "petition the government" is a fundamental right recognized in the First Amendment to the Constitution; however, this is not the full text of this important passage. The First Amendment actually provides as follows:

> **Congress shall make no law respecting . . . the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.**

TBT and the court below (see e.g., Judge Danahy Opinion at 5) confuse the term "petition" as used in Section 10.07 of the City Charter, with the type of "petition" identified in the First Amendment. Specifically, they equate TBT's "petition" drive, that was initially deemed short of the requisite number of signatures of "qualified voters," with the right of all citizens to "petition their government for redress of grievances" as called for under the First Amendment. The cases addressing this latter form of "petition" clearly establish a meaning unrelated to the "petition drive" at issue here. For instance, typically the right to petition our government for redress of grievances arises over an individual's accessibility to the court system. See e.g., NAACP v. Button, 83 S.Ct. 328 (1963). (Court noted that minority groups who

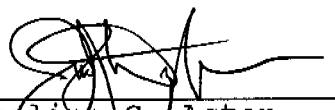
are unable to achieve objectives through the ballot box frequently turn to the courts to petition their government for redress of their grievances); Brotherhood of Railway Trainmen v. Virginia, 84 S.Ct. 1113 (1964)(Under the First Amendment right to petition, the courts cannot be handicapped by government efforts to keep union members from utilizing cooperative legal assistance plan and gathering for the purpose of helping and advising one another in asserting their statutory rights). Likewise, in several antitrust cases, the Supreme Court has construed the First Amendment "right to petition" to include a person's right to attempt to lobby the legislative or executive for the purpose of influencing the passage or enforcement of laws. See e.g., Eastern Railway Presidents Conference v. Noerr Motor Freight, Inc., 81 S.Ct. 523 (1961). The Constitutional right to petition one's government has also arisen in the context of protecting the right of people to publicly protest, seeking a redress of their grievances. This right may not be abridged so long as it is peaceable. Brown v. Louisiana, 86 S.Ct. 719 (1966); DeJorge v. Oregon, 57 S.Ct. 255 (1937).

These are the logical interpretations of the term "petition" as used in the First Amendment and recognized by the Supreme Court. Any other construction is misplaced. Ironically, here, Clewis and TBT have fully exercised their Constitutional right to "petition" their government for grievances by filing and successfully pursuing their petition for mandamus through our state court system.

CONCLUSION

For the reasons cited, the Supervisor respectfully urges that this Court reverse and quash the Writ issued below or the other remedies identified above.

Respectfully submitted,



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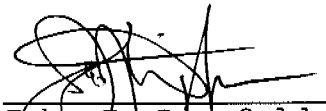
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief has been furnished to **G. Donovan Conwell, Jr., Esquire**, Post Office Box 1438, Tampa, Florida 33601, and **Tyron Brown, Esquire**, Assistant City Attorney, 315 East Kennedy Boulevard, City Hall, Fifth Floor, Tampa, Florida 33602, by U.S. Mail on this 22nd day of January, 1993.



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