D47 D.A. 5-6-93

IN THE SUPREME COURT OF FLORIDA

FLORIDA SUPREME
COURT CASE NO.: 80,189

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 91-04045

HILLSBOROUGH COUNTY
Supervisor of Elections,

Petitioner,

v.

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

Respondents.

REPLY BRIEF OF PETITIONER

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PETITIONER HILLSBOROUGH COUNTY
SUPERVISOR OF ELECTIONS' REPLY BRIEF

PETITIONER HILLSBOROUGH COUNTY SUPERVISOR OF ELECTIONS, through its undersigned attorney, hereby files the following Reply Brief.

I. INTRODUCTION

Why must a simple issue be obfuscated with so much subterfuge? The true issue before this Court is whether the Supervisor of Elections of Hillsborough County acted within her sound discretion when, under guidance from the Secretary of State Division of Elections, she determined that she could not legally verify the petitions of electors who were not qualified to vote, as their names had been "temporarily withdrawn" from the County's Registration Records. In other words, if one is a registered voter, but is "temporarily withdrawn" from the Supervisor's official registration records, in accordance with Section 98.081(1) is she still "qualified to vote" and therefore qualified to execute a petition? The Division of Elections has already answered this question in the negative (see DE 87-16).

The red herrings raised in Respondents' brief include the following:

- The Supervisor's use of a computer in her 1991 Section 98.081(1) purge resulted in a violation of Respondents' Constitutional rights.

Red Herrings (continued)

- The Supervisor violated Respondents' Constitutional rights by refusing to verify the signatures of non-parties.
- The "temporarily withdrawn" electors should have been able to reinstate themselves by merely signing the petition.
- The Supervisor acted in bad faith when she refused to verify the signatures at issue.
- The Supervisor's statement that "she believed" that her acts may have resulted in unfairness, is relevant to whether she acted in a legally defensible fashion.
- The Supervisor should have used the signatures of the purged electors in her possession to verify the petitions even though she had determined that when they signed the petition they were legally unqualified to vote.

II. THE ISSUE AT BAR

THE SUPERVISOR ACTED WITHIN HER SOUND DISCRETION WHEN SHE REFUSED TO VERIFY THE PETITIONS OF PERSONS WHO HAD BEEN "TEMPORARILY WITHDRAWN" FROM HER OFFICIAL REGISTRATION RECORDS, WHEN THEY SIGNED THE PETITION.

Respondents attempt to mislead this Court into believing that there is no substantive difference between a person who has been temporarily withdrawn from the Supervisor's registration books pursuant to Section 98.081(1), Florida Statutes, and one who has not (Answer Brief, 15-24). Respondents argue that electors who have been "temporarily withdrawn" from the Supervisor's

Registration Books in accordance with Section 98.081(1) retain their complete status and are indistinguishable from those electors who have not. This is not only contrary to a plain reading of the statute, but, moreover, defies common sense.

Section 98.081(1) expressly mandates that in each odd-numbered year all Supervisors of Elections must purge their registration records of all electors who have not exercised their right to vote for two years and have failed to notify their Supervisor in writing of a change associated with their registration records (e.g., change of address). It is uncontroverted that this is not a discretionary task. In their Answer Brief, Respondents imply that the Supervisor somehow conducted herself improperly when she purged 65,000 electors from her registration records on June 21, 1991 (R.RCK 41).

As such, it is important to identify exactly what actions were taken to comply with Section 98.081(1) because, when the smoke clears, this case is really about an experienced Supervisor with a fine reputation for impartiality and integrity who conducted herself in strict accordance with the precepts of Section 98.081(1) as follows:

A) If an elector in Hillsborough County failed to exercise their right to vote for two consecutive years, and also failed to request, in writing, that the Supervisor update their registration records; then

B) On May 15, 1991, the Supervisor initiated her 1991 purge by mailing those electors a simple form to be completed, signed, and returned by

mail within 30 days advising the Supervisor whether the electors' status has changed from that of their registration record.

C) After waiting for slightly more than 30 days[1] the Supervisor purged (temporarily withdrew) the names of those inactive and unresponsive electors who (i) had not exercised their right to vote for two years, (ii) failed to notify the Supervisor of any address change, or other relevant change in their records, and (iii) failed to complete, sign and timely return a simple form to the Supervisor on June 21, 1991, in accordance with the requirements of Section 98.081(1), Florida Statutes.

It is uncontroverted that the Supervisor properly conducted her Section 98.081(1) purge in 1991 and, as she explained in her deposition, she initiated this task early in May of 1991, long before she was ever advised of, or received, the petitions at issue. When the "purge" was complete those "temporarily withdrawn" electors occupied a new and different status, not because Supervisor Krivanek wanted them to, but because under the statute

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[1] Respondents attempt to "make hay" out of the fact that the statute does not expressly mandate what month the Supervisors should conduct their Section 98.081 purge of inactive and unresponsive electors and that she could have just as easily conducted her purge on another day in 1991. Respondents obviously misses the point that the purge was conducted by the Supervisor in satisfaction of her statutory duty and completely independent of the fact that Take Back Tampa happened to be collecting signatures contemporaneously. Moreover, Respondents fail to mention that the Supervisor conducted her purge in May and June of 1991, the same months that she had done it in 1989 (R.RCK, 38).

these electors must now be treated differently. Despite Respondents' creative arguments, there is no getting around the fact that under Section 98.081, once the electors are "temporarily withdrawn" from the Supervisor's official "registration books" they are no longer "qualified to vote" absent an affirmative step by those inactive and unresponsive electors (see discussion in Plaintiff's Initial Brief).

In her various briefs, Petitioner often uses the terms "qualified voters" or "qualified to vote" because those are the precise terms used in the Tampa City Charter provision at issue, Section 10.07. In contrast, Respondents selectively excerpt various words and phrases from § 10.07 and conveniently fail to provide this Court with its entire text. As noted several times in Petitioner's Initial Brief, 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 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).

Respondents play other words games. For instance, at page 15 of the Answer Brief, Respondents select four words from the lengthy City Charter -- "electors of the city," wholly out of context and proceed to analyze them under the state's election code as somehow dispositive of the issue at hand. This Court cannot be mislead to believe that the question turns upon this analysis. Respondents also attempt to convince this Court that if the "non-voting" purged petition signers were still qualified electors, in the sense that

they could be reinstated to vote, as opposed to having to re-register, then they retained all the voting and petitioning, powers and privileges of their "voting" counterparts who were not purged pursuant to Section 98.081(1).

Respondents would likewise prefer that this Court take the Supervisor's answers from her deposition out of context. In order to gain a complete understanding of a) how the Supervisor conducted her 1991 Section 98.081(1) purge, and b) her rationale for not verifying the signatures of those "temporarily withdrawn" electors, it is necessary to actually review the Supervisor's entire deposition. For example, in her deposition, the Supervisor acknowledged that from the outset of this litigation she acted in reliance upon applicable statutes, opinions from the Division of Elections and advise of local counsel (R.RCK 5). Specifically, the Supervisor stated that she followed the Division's verbal and written opinion because "[t]hey're my boss." (RCK at 35). In addition to reviewing Division of Election Opinion 87-16, the Supervisor testified that she was advised by the Division that:

> **The suspended elector is an elector, but he is not qualified to vote or to sign petitions until he has signed a document that reinstates him under the active voter registration file.**

(R.RCK 50)

Finally, as noted in Petitioner's Jurisdictional Brief, the Supervisor argues that it was her duty to follow guidance from the Division of Elections for the sake of statewide consistency as she was personally aware that all Supervisors across the state were following Division of Elections Opinion 87-16 and were not verifying the petitions of electors whose names were "temporarily

withdrawn" pursuant to § 98.081 (Fla. Stat.). The Division of Elections is statutorily vested with the sole authority for rendering advice to all the Supervisors of the State, § 106.12, Florida Statutes. In 1987, the Division opined as follows:

> **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).

In reliance upon DE 87-16, Petitioner, and all Supervisors of the state, have consistently refused to verify signatures of purged electors on local and statewide initiatives over the past five (5) years (R.RCK 79, 80). Petitioner sought, and this Court assumedly granted, certiorari on the basis that this matter expressly affects an entire class of constitutional officers -- all Supervisors of Elections. Other than State ex rel. Kyle v. Brown, the courts have not addressed the issue at bar. As such, it is important that this Court not only address the narrow issue of whether this Supervisor abused her discretion in evaluating petitions in satisfaction of the Tampa City Charter, but moreover that it also expressly decides on the validity of DE 87-16.

III. THE RED HERRINGS

Petitioner has identified and analyzed just a few of the many "Red Herrings" raised by Respondents in their Answer Brief.

A. RESPONDENTS ASSERT THAT THE SUPERVISOR'S USE OF A COMPUTER IN HER 1991 SECTION 98.081(1) PURGE WAS IMPROPER AND SOMEHOW RESULTED IN A VIOLATION OF RESPONDENTS' CONSTITUTIONAL RIGHTS.

In their reiteration of the facts of this case (see e.g., Answer Brief, 4-5) and in their argument (Answer Brief, 35) Respondents insinuate that because 1991 happened to be the first year that the Supervisor had, and used, an automated system for her purge, that this somehow resulted in her not verifying the petitions at issue. As identified above, the Supervisor knew exactly what she was doing when she used her discretion and did not verify the petitions at issue. It is abundantly clear that, under the direction of the Division of Elections, the Supervisor would have conducted herself in the exact same manner even if her 1991 purge had been performed manually.

Respondents' argument is interesting as they have never alleged that the new computers malfunctioned during the purge or signature verification process. Moreover, one can only assume that, by using an automated system, the Supervisor was able to verify the 12,000-plus signatures much faster than she would have been able to "by hand."

B. RESPONDENTS CLAIM THAT BECAUSE THE SUPERVISOR HAD THE SIGNATURES OF THE PURGED ELECTORS IN HER POSSESSION, SHE SHOULD HAVE USED THEM TO VERIFY THESE ELECTORS WHO REMAIN LEGALLY UNQUALIFIED TO VOTE.

Respondents argue that because the Supervisor still maintained the signatures of the 65,000 purged electors in her computer and manual file systems she had a legal duty to use those signatures to verify the petitions of those "temporarily withdrawn" persons. Again Respondents either miss, or dodge, the point. The Supervisor

is required to retain the signature cards of persons "temporarily withdrawn" in case they seek reinstatement via formal notification pursuant to Section 98.081.[2]

Naturally, she was well aware that she still retained all 65,000 signatures of the electors, "temporarily withdrawn" as a result of her 1991 purge, in both her automated and manual system. However, based upon Section 98.081 and guidance from the Division she concluded that once she had conducted her statutorily mandated purge (commenced on May 15, 1991 and completed on June 21, 1991[3]) those 65,000 electors' names were legally removed from the County's active registration records. Therefore, she could not legally verify those signatures, regardless of their physical accessibility.

C. RESPONDENTS CONTEND THAT THE "TEMPORARILY WITHDRAWN" PETITION SIGNERS EFFECTIVELY REINSTATED THEMSELVES BACK ONTO THE "REGISTRATION RECORDS" BY MERELY COMPLETING AND SIGNING THE PETITION.

Respondents contend that the "temporarily withdrawn" petition signers effectively reinstated themselves back onto the "registration records" by merely completing and signing the

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[2] The Supervisor faithfully retains these records even though only about ten percent (10%) of purged electors seek reinstatment (R.RCK).

[3] Respondents now argue that the Section 98.081 "purge" did not occur until after the Supervisor received the "Petition" -- on August 12, 1991. This is blatantly incorrect. At the Supervisor's deposition she testified that she prepared for the computer system as early as 1989 and commenced the 1991 purge on May 15, 1991 when she mailed the forms to inactive voters. She completed the purge on, or about, June 21, 1991, when, using her computer, she "temporarily removed" 65,000 names from her official registration records (R.RCK 41, 76). Moreover, counsel for Respondents acknowledged during the Supervisor's deposition that the purge occurred on June 21, 1991 (R.RCK 40).

petition (Answer Brief, 28). Respondents come to this conclusion by unilaterally determining that the requirements for reinstatement under § 98.081(1) "are so minimal" that they were satisfied by the electors when they merely signed the Petition and included their address and precinct number. This contention is unsupported by law and logic. The Legislature explicitly mandated the formal procedures that all supervisors must go through prior to "temporarily removing" electors from their official registration records. Once the supervisors have performed their duty by mailing the "purge" forms to all inactive voters, the statutory burden shifts to the electors to simply complete and execute the form and return it to their supervisor within thirty (30) days. Failure to comply with this basic requirement results in a "temporary withdrawal" of their names from their supervisor's official registration records. Only the Legislature can modify the reinstatement requirements of Section 98.081(1), not Respondents, or the courts.

If, as Respondents assert, the "purged electors" reinstated themselves merely by signing the petition, then (reiterating the question posed in Petitioner's Initial Brief) what would their status have been if Take Back Tampa's petition collectors had lost their petitions or opted to not turn them in to the Supervisor?

D. EVEN IF THE SUPERVISOR MISINTERPRETED THE CITY CHARTER AND THE RELEVANT STATUTES AND THIS COURT DECIDES THAT DE 87-16 IS INVALID, RESPONDENTS' ARGUMENT THAT THE SUPERVISOR VIOLATED CLEWIS' AND TAKE BACK TAMPA'S CONSTITUTIONAL RIGHTS WHEN SHE REFUSED TO VERIFY THE SIGNATURES OF NON-PARTIES IS UNSUPPORTED BY LAW.

Even if the Supervisor misinterpreted the City Charter and the relevant statutes, and improperly relied upon DE 87-16, Respondents' argument that the Supervisor violated Clewis and Take Back Tampa's Constitutional rights when she refused to verify the signatures of non-parties is unsupported by law. In classic form, Respondents twist the text of Petitioner's Brief. On page 30, Respondents take a quote from Petitioner's Brief out of context when they state that the Supervisor concedes that qualified voters have an inherent right to sign, or circulate, a petition to place a referendum on the ballot repealing a local ordinance. A more careful reading of the Supervisor's Brief at page 14 clearly indicates that Petitioner was actually making the point that a citizen's right to sign or circulate a petition to repeal a local ordinance, only exists as a result of the existence of Tampa's City Charter, and is not an inherent, fundamental right. Without belaboring the points made in Plaintiffs' Initial Brief, Respondents were not deprived of any Constitutional right to file a recall petition with the city, as none ever existed. Moreover, Respondents did not even have standing to raise these issues and in light of the fact that "standing" is jurisdictional, Petitioner did not waive the issue even if she did not raise it below.

IV. IF THE ELECTION IS OVERTURNED, IT WILL NOT BE THE RESULT OF ANY ACTION BY THE SUPERVISOR, BUT INSTEAD WILL BE DIRECTLY ASSOCIATED WITH THE NONFEASANCE OF CERTAIN ELECTORS AND TAKE BACK TAMPA.

The Supervisor has received a great deal of criticism for taking the position she has and pursuing it through to this Court. It obviously would have been much easier for her to have disregarded the applicable statutes and the Division of Elections' written opinions and verbal directions. Furthermore, it would have been much simpler to have accepted the decisions of the courts below. She has even acknowledged that her position may not be "fair," but recognized that her opinion as to the equities is irrelevant when faced with a question of law (R.RCK 55).

As it is uncontroverted that the Supervisor is absolutely neutral in regard to the substantive issue underlying the referendum, one cannot help but wonder why the Supervisor is before this Court. The Supervisor is here because eighteen (18) years ago she took an oath to uphold the laws of this state to the best of her ability and she has consistently believed that she was following the laws of this state when she refused to verify the petitions at issue. In contrast, Respondents assert that the Supervisor "misused § 98.081 by classifying registered electors who were on the inactive list differently from registered electors who were on the active list" (Answer Brief, 33).

It must not be forgotten <u>why</u> the "temporarily withdrawn" electors were purged from the Supervisor's registration books. It is because <u>they</u> failed to take the initiative to notify the Supervisor of a change in their registration record or complete, sign and timely return the <u>simple</u> form mailed to them by the

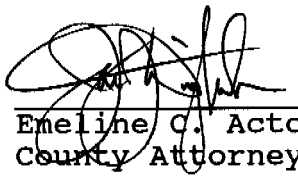
Supervisor. It is uncontroverted that the Supervisor completed her side of the bargain when she performed her statutorily mandated duties. It is the purged electors who must accept the responsibility for the fact that their records were purged and their petitions were not verified.

Likewise, Take Back Tampa's representative, Mr. Caton, was advised by the Supervisor's office on June 17, 1991, that the Section 98.081 purge was about to occur (R.RCK 43). This actual notice was given more than two months before Take Back Tampa submitted the petition sheets for verification. Take Back Tampa could have guaranteed that it would not fall short of the required number of petitions by either ensuring that all petition signers had either voted within two years or by requiring that all petition signers who were purged have themselves reinstated pursuant to Section 98.081 prior to signing the petition. In the alternative, Take Back Tampa could have waited until after the June 21, 1991 purge, obtained a list of the purged electors and compared it to their own to ensure that they were not relying on the signatures of purged electors to take them over the requisite number. Once again, if fault must lie, it lies with Respondents as they knew that the Supervisor's purge was imminent, and had at least constructive knowledge of the Division of Elections' dispositive 1987 opinion (DE 87-16). With this information, Respondents were clearly on notice that the Supervisor could not verify the signatures at issue here.

V. CONCLUSION

Respondents raise numerous irrelevant issues and arguments in their Answer Brief; however, Petitioner is confident that this Court will focus on the only real issue to be resolved here and determine that the Supervisor did not abuse her discretion when she refused to verify the petitions of electors who had been "temporarily removed" from her official registration records.

Respectfully submitted,



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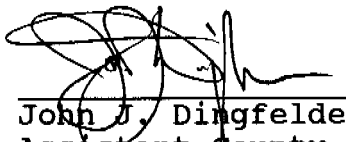
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief has been furnished to **G. Donovan Conwell, Jr., Esquire**, Post Office Box 1438, Tampa, Florida 33601, by U.S. Mail on this 1st day of March, 1993.



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