IN THE SUPREME COURT
STATE OF FLORIDA

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS, et al.,

Appellants/Plaintiffs,

vs.

Case No. SC04-1921
DCA Case No. 1D04-4304

GLENDA E. HOOD, et al.,

Appellees/Defendants.

INITIAL BRIEF OF INTERVENOR BILL COWLES, SUPERVISOR OF ELECTIONS OF ORANGE COUNTY, FLORIDA AND PRESIDENT OF THE FLORIDA STATE ASSOCIATION OF SUPERVISORS OF ELECTIONS, INC.

On Appeal From an Order and Final Judgment of
the Leon County Circuit Court and Order Certifying
Case to the Florida Supreme Court as a
Matter of Great Public Importance

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PRELIMINARY STATEMENT

The Plaintiffs/Appellants are American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), American Federation of State, County and Municipal Employees ("AFSCME") AFL-CIO, Service Employees International Union, AFL-CIO, Florida Public Employees Council 79, AFSCME, AFL-CIO, and SEIU 1199Florida. The Defendants/Appellees are Glenda E. Hood, in her official capacity as Secretary of State of the State of Florida; Ion Sancho, in his official capacity, as Supervisor of Elections in Leon County and a member of the Leon County Canvassing Board; and Augustus D. Aikens and Jane Sauls in their official capacities as members of the Leon County 2004 Fall Election Canvassing Board. Intervenors/Appellees in this proceeding are the Florida State Association of Supervisors of Elections, Inc. ("FSASE") and Bill Cowles, Supervisor of Elections of Orange County, Florida and President of the FSASE and Celia Rush. Unless otherwise noted, all references to Florida Statute are to the 2004 edition. Florida Statutes are cited as F.S. and the Florida Administrative Code as F.A.C. References to the Index to the Record on Appeal prepared by the Leon County Circuit Court in the Second Judicial Circuit in and for Leon County, Florida, are designated as (R. _____).

STATEMENT OF THE CASE

This matter began as a Petition for Writ of Mandamus ("Petition") filed in the Florida Supreme Court that was referred to the Circuit Court of the Second Judicial in and for Leon County, Florida. (R. 1-54). Leon County Circuit Court Judge Ralph Smith entered an Order on September 3, 2004, dismissing the Petition based on the failure of the Petition to state a *prima facie* case for mandamus relief. (R. 60-62).

After dismissal by the Circuit Court, an Amended Order Dismissing Complaint was entered on September 8, 2004. (R. 100-102). Thereafter, a Motion to Alter or Amend Judgment was filed on September 9, 2004, by the Appellants. (R. 103-110; R. 299-306). The Appellants filed an Amended Complaint for Declaratory Judgment and for Temporary and Permanent Injunctive Relief and Petition for Writ of Mandamus and a Motion for Leave to Amend Complaint on or about September 17, 2004. (R. 392-397; R. 404-431). Appellee Hood filed a Response to the Motion to Alter or Amend on September 10, 2004. (R. 201-203).

Celia Rush filed a Motion to Intervene on September 22, 2004. Bill Cowles, in his capacity as Supervisor of Elections of Orange County, Florida and as President of the Florida State Association of Supervisors of Elections, Inc., filed a Motion to Substitute or Designate as Class Representative or in the Alternative Motion to Intervene on September 22, 2004. (R. 439-441; 442-447). The Circuit Court entered an Order allowing intervention by Bill Cowles as Supervisor of Elections of Orange

County, Florida and as President of the Florida State Association of Supervisors of Elections, Inc. on September 24, 2004. (R. 458-459).

A hearing was held on September 22, 2004, on the Plaintiffs' various Motions and Hood's Response thereto. An Order and Final Judgment was entered by the Circuit Court in and for Leon County on September 28, 2004, which dismissed the Plaintiffs Amended Complaint, with prejudice. The Court explained that the dismissal with prejudice was undertaken in order to afford Plaintiffs a prompt opportunity to appeal. (R. 460-462). A Notice of Appeal was filed with the First District Court of Appeal on September 28, 2004. (R. 463-469). The First District Court of Appeal of Florida granted the Suggestion of Certification of Appeal to the Florida Supreme Court on October 1, 2004.

STATEMENT OF THE FACTS

This matter comes before this Court based upon the decision of the Circuit Court of the Second Judicial Circuit in and for Leon County and its Order and Final Judgment entered September 28, 2004. (R. 460-462). That Order and Final Judgment dismissed the Plaintiffs'/Appellants' Amended Complaint and denied the Plaintiffs' Motion for Temporary Injunction. The basis for the dismissal of the Complaint was a failure to state a cause of action. (R. 460-462). The trial court found that the Florida Constitution does not prohibit the Legislature from adopting the precinct-based scheme for provisional voting found in Section 101.048, F.S. (R. 462).

No party entered any testimony or evidence at any point in the proceedings below to establish, pursuant to such testimony or documentary evidence, any facts in this case.

The primary claim brought by the Appellants in the lower court in their Amended Complaint asserts that Section 101.048, F.S., is unconstitutional because it conflicts with the provisions of Article VI, Section 2, Florida Constitution, and infringes on the right of citizens under Article I, Section 1 of the Florida Constitution to participate in the political process.

SUMMARY OF THE ARGUMENT

The Florida Legislature has been provided pursuant to Article VI, Sections 1 and 2, the authority and responsibility to create laws which provide for the registration of competent electors and the elections process. The Florida courts have construed these provisions to provide that the Legislature, in enacting laws in this regard, must create regulations that are reasonable and necessary and which provide a legitimate state interest.

In enacting Section 101.048, F.S., dealing with the casting of a provisional ballot which provides that a provisional ballot will be counted, provided that the person is registered and entitled to vote at the precinct where the ballot was cast, is a reasonable and appropriate implementation of the Legislature's authority. The provisions of Section 101.048, F.S., are constitutional pursuant to the provisions of the Florida Constitution.

Adopting the argument of the Appellants herein, would require elimination of the precinct voting system which has been in existence in Florida for more than 150 years and would allow for convenience voting at any polling place by electors. This would cause confusion and chaos in implementing the election in November 2004.

ARGUMENT

FLORIDA STATUTE 101.048, PROVIDING FOR PROVISIONAL BALLOTS, IS CONSTITUTIONAL.

In 2001, the Florida Legislature created Section 101.048, Florida Statutes. See Ch. 2001-40, Laws of Florida. That section provides for the issuance of a provisional ballot. A "provisional ballot" is defined by Section 97.021(25), F.S., as "a conditional ballot, the validity of which is determined by the canvassing board."

Pursuant to the provisions of Section 101.048, F.S., a provisional ballot will be issued under the following circumstances:

> (1) At all elections, a voter claiming to be properly registered in the county and eligible to vote at the precinct in the election, but whose eligibility cannot be determined, and other persons specified in the code shall be entitled to vote a provisional ballot. . . .
>
> (2)(a) The county canvassing board shall examine each provisional ballot envelope to determine if the person voting that ballot was entitled to vote at the precinct where the person cast a vote in the election and that the person had not already cast a ballot in the election.
>
> (b)1. If it is determined that the person was registered and entitled to vote at the precinct where the person cast a vote in the election, the canvassing board shall compare the signature on the provisional ballot envelope with the signature on the voter's registration and, if it matches, shall count the ballot.

> 2. If it is determined that the person voting the provisional ballot was not registered or entitled to vote at the precinct where the person cast a vote in the election, the provisional ballot shall not be counted and the ballot shall remain in the envelope containing the Provisional Ballot Voter's Certificate and Affirmation and the envelope shall be marked "Rejected as Illegal."

By creating a provisional ballot, the Legislature allows a person to cast a ballot under certain circumstances, particularly when that person's eligibility cannot be determined at the precinct where that person is attempting to vote. Section 101.048, F.S., represents a safeguard intended to protect the rights of a voter who has taken the actions necessary as a qualified elector within the county and the precinct in which the voter resides. The provision operates to ensure that the voter will not be disenfranchised due to the fact that the voter's name may not be on the precinct register at the time he/she presents himself/herself to vote. This section of law seeks to protect such a voter and ensure that the vote is cast and counted, provided the voter acts within the provisions of Florida law.

Section 101.045, F.S., provides as follows:

> **101.045 Electors must be registered in precinct; provisions for residence or name change.**—
>
> (1) No person shall be permitted to vote in any election precinct or district other than the one in which the person has his or her legal residence and in which the person is registered. . . .

Through this provision, the Florida Legislature has created the manner and process by which individuals shall register to vote, and vote, as provided in Chapters 97 and 98, F.S. The Legislature has specifically decided that Florida voters shall be assigned to a precinct or district after they have registered to vote as provided by law. See Section 101.045(1), F.S.

Appellants challenge the provisions of Section 101.048, F.S., claiming that it is unconstitutional to not count provisional ballots cast by persons not registered at a precinct at which they cast the ballot. Appellants assert that such provisional ballots should be counted. Appellants rely on two provisions of the Florida Constitution as grounds for invalidating the decision of the Legislature concerning counting of provisional ballots. Appellants argue that Article I, Section 1 and Article VI, Section 2, make this provision unconstitutional. Those Constitutional sections provide as follows:

ARTICLE I

DECLARATION OF RIGHTS

> **SECTION 1. Political power.**—All political power is inherent in people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

* * *

ARTICLE VI

SUFFRAGE AND ELECTIONS

* * *

> **SECTION 2. Electors.**—Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.

The substance of the Appellants' argument is that requiring persons to vote in a specific precinct or district in order to have their vote counted is unconstitutional.

Unfortunately, the Appellants fail to acknowledge, and have completely avoided in their Complaint and all of their pleadings in the lower court, to reference the provisions of Article VI, Section 1, which provides:

ARTICLE VI

SUFFRAGE AND ELECTIONS

> **SECTION 1. Regulation of elections.**—All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law . . . .

It is clear that the Florida Constitution has provided in both Article VI, Sections 1 and 2, the authority to the Florida Legislature to regulate by law, the registration of electors and the elections process. In enacting Section 101.045, F.S., the Legislature has provided that persons shall vote in the precinct or district, which is their legal residence in order to properly cast their vote. Under Section 101.048, F.S., persons may cast their votes provisionally when it becomes necessary because of some identification problem at the polling place. The

Legislature has acted properly and treated all persons in an identical fashion when it comes to counting votes.

The requirement that a Florida voter vote in a specific precinct is not a new one. As early as 1847, Florida law provided that electors would vote in their precinct or district as created by the executive body in charge of the elections process. See Digest of Statute Law, State of Florida (1847) Chapter III, Section 3, (stating that it was the duty of the Board of County Commissioners in each county at its first annual meeting to fix and designate the several precincts or places in their respective counties at which elections shall be held).

Review of the Constitution of the State of Florida of 1885, as amended, demonstrates that the provisions of Article VI, dealing with suffrage and eligibility, have not changed significantly compared to the current Florida Constitution, which Appellants use as a basis for their invalidation of Section 101.048, F.S. The Florida Constitution in 1949, provided not only that all political power is inherent in the people in Article I, Section 2, as currently is provided, but also provided in Article VI, Section 1, that persons must be 21 years of age at the time of registration, a citizen of the United States, and shall have resided in Florida for one year and in the county for six months before they would be deemed in such county as a qualified elector at all elections.

Similarly, Section 98.01(6), F.S. (1949), provided that "no person shall be permitted to vote, or shall such vote be counted, unless the person registered to vote in the election

district in which he or she shall have his permanent place of residence.

Therefore, it is clear that Florida has consistently provided for and established that electors shall vote within their county and in their assigned precinct in order to have their votes properly cast and counted. The methodology employed by the Legislature in Section 101.048, F.S., treats every elector within the state the same. Electors who vote on election day at their precinct, of course, are voting in their precinct and their votes are counted accordingly. Electors who vote absentee, pursuant to the provisions of Sections 101.62 and 101.68, F.S., cast the ballot provided them for their proper precinct and have those ballots counted accordingly. Voters who vote pursuant to the provisions of early voting prescribed by Section 101.657, F.S., will vote at a central location, but also cast a ballot which is precinct-specific and to which they are assigned. Likewise, voters who vote a provisional ballot are required to vote in their appropriate precinct when they cast their ballot. All persons who vote in Florida are treated in a uniform fashion with respect to the ballot they cast and the counting by the canvassing board involved. There is no disparate treatment between any of the voters who vote and as such the provisions are reasonable.

As previously stated, the intent of the Legislature was to provide that an individual whose precinct status could not be ascertained, would be allowed to cast a provisional ballot rather than refusing to allow that individual to vote where they

assert that they are, in fact, registered. See Section 101.048(1), F.S. The Polling Place Procedural Manual adopted by the Florida Department of State, Division of Elections, and which is utilized by each of the respective 67 counties in Florida as a guide for matters undertaken at polling places, clearly provides that individuals who present themselves at a polling place, and whose status cannot be verified because their name is not on the precinct register, will be directed to the proper precinct where they are registered if that can be determined by the personnel at the polling place. See Rule 15-2.034, F.A.C. However, in the event that the polling place personnel are unable to determine through the Supervisor's office whether the person is eligible to vote, they will allow that person to cast a provisional ballot. See Rule 15-2.034, F.A.C.

The Appellants' challenge to the requirement that parties who vote a provisional ballot must be in their precinct in order to have that vote counted is legally unfounded and amounts to a direct attack on the precinct system. The Legislature, in adopting that provision, acted in a reasonable and necessary manner and has treated all voters in Florida the same. In Treiman v. Malmquist, 342 So. 2d 972 (Fla. 1977), this Court stated:

> Although the Legislature is charged with the authority and responsibility of regulating election process so as to protect political rights of the people and the integrity of the political process, these regulations must be reasonable and necessary restraints

> on the elective process and not inconsistent with the constitution.

At issue in Treiman was a statute that required candidates for judicial office to vote in the last preceding General Election. The Court found that statute to be arbitrary and an unreasonable restraint on the election process. Treiman, at 975. The Court went on to observe and state as follows:

> We find that Section 105.031(4)(a) does not serve any reasonable or legitimate state interest. It does not in any way protect the integrity of the election process or the purity of the ballot; it does not serve to keep the ballot within manageable limits, nor does it serve to assure orderly and effective elections; it does not serve to maintain party loyalty and perpetuate the party system. The barrier it erects is an unnecessary restraint on one's right to seek elective office. Noteworthy is the fact that this restriction applies solely to candidates for judicial office. No such similar restraint is placed on candidates for any other political office.

(Citations omitted). Section 101.048, F.S., provides exactly what this Court has stated is a proper objective for the Legislature pursuant to its constitutional authorities. It treats all voters equally in the counting of their ballots, it maintains orderly and effective elections, and it is reasonable and legitimate.

The net effect of the Plaintiffs' argument in this case, is to create a special class of voters. This special class will consist of those voters who, for whatever reason, do not present themselves at their proper precinct, as all other voters in the state do. It allows this special class of electors to cast a

ballot and have it counted in a manner different from all the other registered electors in the state who vote either at their precinct, by absentee, or during the early voting time frames. Because they either have not been able to present themselves at their proper precinct, or have voluntarily chosen not to go to their assigned precinct, they desire to vote and have their ballot counted contrary to all other electors.

The net result, if the Court chooses to accept Appellants' argument, is to create "convenience voting." No registered elector would be required to go to a specific precinct and vote as Floridians have for over 150 years. Any elector could go to any voting location and vote a provisional ballot; the net result of this convenience voting would be that voters would not be able to cast a ballot which contains certain races, which would be unique to precincts where they reside and are, in fact, required to vote.[1] The State has a reasonable and legitimate interest in having individuals go to their precinct, not only so they will vote for all those candidates that they are entitled to vote for but avoid an attempt to vote for persons for whom they are not entitled to vote. It allows election officials to manage the elections process without confusion and resulting in chaos.

A perfect example of how such confusion and chaos could arise would be Palm Beach County, which has more than 693

[1] For example, a voter could not cast a ballot in a school board election where multiple districts are located within the county. Similarly, a voter could not vote in a U.S. congressional election if the county included more than one congressional district.

precincts and 162 ballot styles. If this Court adopts the Plaintiffs theory, any of the nearly 800,000 electors in Palm Beach County could go to any precinct and demand to cast a ballot. When they present themselves at that precinct, the ballot styles that are unique to that precinct would not be those which the electors are entitled to, and after the election is concluded, the canvassing board in Palm Beach County would be required to manually review each and every provisional ballot and determine which races the voter was entitled to vote for and discount those ones which they were not entitled to vote. This would be the case unless this Court is going to choose to change the entire election process and allow electors to vote for every office, regardless of their geographical and residency location.

In the event a large number of electors choose to vote at whatever precinct they prefer, rather than their own, counties such as Palm Beach, Broward, Dade, and others which have a large number of electors, would have to prepare a significant number of provisional ballots, which then need to be manually reviewed by the county canvassing board, which will canvass the returns pursuant to provisions of Section 102.141(3) and (4), F.S. As reflected in that section, the boards are required to have their returns to the Department of State on all federal, statewide, state and multi-county offices, no later than noon the second day after the General Election. If there were thousands, if not tens of thousands, of these ballots in the respective counties throughout the State, it would be impossible for the canvassing boards to meet the deadline. Such a situation would cause

impossible delays, in addition to the confusion and chaos that would result at the polling places. It would be impossible for the counties to have their returns to the Department of State within the statutory deadlines.

The Appellants also assert that individuals will be unable to locate their appropriate precincts due to the fact that precincts have been dramatically changed following legislative reapportionment in 2000. Appellants' assertion however is based on the flawed underlying premise that electors have not been exposed to these new precincts. In November 2002, Florida conducted a statewide election for the Governor of the State of Florida and numerous other federal and state, county and municipal offices. Current precincts had already been established at that time following reapportionment. Therefore, the majority of the current precincts were in existence during the 2002 Florida General Election and numerous local elections that have taken place in these jurisdictions since.

The Legislature has provided in Section 101.031, F.S., instructions to electors and creates the Voter's Bill of Rights and Voter Responsibilities. In the Voter Responsibilities, one of the specified directives is that the voter maintain, at the office of the Supervisor, a current address and know the location of his or her polling place and its hours of operation. See Section 101.031(2), F.S.

Appellants also assert that the recent spate of hurricanes impacting Florida, should force this Court to adopt a new standard for vote counting in the State. The Appellants'

assertion is misplaced. If there are unique problems to certain locations within the State, the Governor pursuant to the provisions of Section 101.733, F.S., has the authority to issue executive orders to deal with such circumstances, as described by the Appellants, and ensure that the election process in those counties are undertaken in a manner to provide an orderly and effective election. The Governor has already exercised this authority during the primary elections earlier this year.

In summary, the Legislature has adopted a reasonable and rational election process of precinct voting and precinct vote counting with respect to all voters in the State of Florida. The Appellants' arguments, if adopted, would drastically change the election process for each and every elector and cause chaos within the election system. Without stating such, Appellants would have this Court eliminate the precinct election requirements which have existed for more than 150 years in Florida. The provisions of Section 101.048, F.S., are not unconstitutional and, in fact, wholly meet the constitutional directives that are provided under Article VI, Section 1 and 2 of the Florida Constitution.

CONCLUSION

The Order of the Circuit Court in and for Leon County is correct and must be affirmed. The provisions of Section 101.048, F.S., are not unconstitutional pursuant to the provisions of Article I, Section 1 or Article VI, Section 2 of the Florida Constitution.

Respectfully submitted this 8th day of October, 2004.

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CERTIFICATE OF SERVICE

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Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that this Initial Brief of Intervenor was generated using Courier New, not a proportionately spaced font, and has a typeface of 12 points.

_____
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