IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1921

AFL-CIO, *et al.*,

Petitioners,

v.

GLENDA HOOD, *et al.*

Respondents.

ON APPEAL FROM A DECISION OF THE SECOND JUDICIAL CIRCUIT
CERTIFIED AS A QUESTION OF GREAT PUBLIC IMPORTANCE
REQUIRING IMMEDIATE RESOLUTION BY THE SUPREME COURT

BRIEF OF RESPONDENT HOOD

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STATEMENT OF THE CASE AND FACTS

In 2001, the Florida Legislature passed 2001-40, Laws of Florida, providing, for the first time, that Florida voters who appear to vote at their assigned precincts, but whose names do not appear on the voter rolls, are permitted to cast a provisional ballot. (Codified at § 101.048, Fla. Stat. (2003) (the "Provisional Ballot Statute")). This ballot is then counted once election officials confirm the voter is in fact eligible. To be counted, the provisional ballot, like all election day ballots cast in Florida, must be cast in the voter's assigned precinct. Section 101.045, Florida Statutes, contains the requirement, familiar to all Florida voters, that votes must be cast in a voter's assigned precinct. Some variant of this provision has been the law in Florida since 1889. The Provisional Ballot Statute contains this identical "time place and manner" voting requirement.

Plaintiffs below initially filed an original petition for mandamus before this Court on August 17, 2004, challenging this requirement that a voter cast a provisional ballot at his or her assigned precinct [Case no. SC04-1544]. Oddly however, Plaintiffs asserted therein they had no intention of challenging the general precinct requirement in Section 101.045. On August 26, 2004, this Court transferred the case to the Second Judicial Circuit, which, on September 8, 2004, entered its amended order dismissing the case, finding meritless the claim that those

who cast provisional ballots on election day are constitutionally entitled to cast them anywhere in the county. [R. Vol. 1, p.100-102] Plaintiffs then filed an amended complaint seeking a declaration that parts of the Provisional Ballot Statute were unconstitutional, a motion to certify defendant classes consisting of the 67 Supervisors of Elections and the 67 County Canvassing Boards, and a motion for Temporary Injunction. [R. Vol. 2, p. 404-31] By order dated September 28, the trial court accepted the amended complaint as filed, denied class certification, denied the temporary injunction, and dismissed the case with prejudice. [R. Vol. 2, p. 460-62] As to the ultimate issue, the circuit court held:

> "Rather than being an unconstitutional additional suffrage requirement added by the Legislature, the requirement of precinct voting in § 101.048 is a reasonable regulation of the elections process permissible under Art. VI, § 1, Fla. Const. There is no constitutional provision prohibiting the legislature from requiring that users of provisional ballots, or for that matter any voters, vote in their assigned precincts. Such a requirement brings order to the elections process." [R. Vol. 2, p.462]

Plaintiffs filed a notice of appeal [R. Vol. 2, p. 463-69] and a suggestion of certification of the case as one of great public importance requiring immediate resolution by this Court or a motion to expedite. The 1st DCA granted certification on October 1, 2004, and this Court accepted the case.

SUMMARY OF ARGUMENT

The Provisional Ballot Statute for the first time enfranchised voters who did not appear on the precinct voter rolls by allowing them to vote by provisional ballot and have their ballot counted. Like all voters, voters casting provisional ballots must be registered voters and they must cast their ballot in their assigned precinct. The Provisional Ballot Statute was intended to prevent voters from being disenfranchised, through no fault of their own, because their name did not appear on the precinct voter rolls despite their being registered and appearing in their assigned precinct. The statute was not intended to invalidate the precinct system altogether, by allowing voters to cast provisional ballots anywhere.

I.

Nothing in the Florida Constitution prohibits the Legislature from imposing reasonable time, place and manner regulations on registered voters in exercising their vote. Indeed, Art. VI, §1, affirmatively commands the legislature to regulate the voting process. This Court has expressly acknowledged the propriety of time, place and manner regulations. Thus, the Provisional Ballot Statute does not violate Art. VI, § 2, Fla. Const. because requiring a voter to cast a provisional ballot (or any ballot for that matter) in his or her assigned precinct is simply a time, place and manner regulation, not an additional suffrage qualification.

II.

Article I, § 1, Fla. Const., allows reasonable, non-discriminatory restrictions on the right to vote provided such restrictions advance important regulatory interests. Reasonable restrictions necessary to reduce election disorder and protect the integrity and reliability of the electoral process are constitutionally permissible. The precinct voting requirement is a reasonable, non-discriminatory restriction that advances the state's compelling interest in maintaining fairness, honesty and order in the election process and avoiding voter confusion.

III.

Plaintiffs claim is barred by laches. Although the challenged statute was passed more than three years ago, this case was filed several weeks before the 2004 general election. Defendants, and the people of Florida, would be prejudiced by any relief granted to Plaintiffs. The suspect timing of this case threatens the ordinary, reliable conduct of the upcoming election and portends absolute chaos.

IV.

Plaintiffs lack standing. They have failed to allege or prove the particularized injury necessary to have standing to challenge the constitutionality of a statute.

STANDARD OF REVIEW

This case presents a question of law reviewed by this Court *de novo*: whether Section 101.048 violates Art. VI, §§ 1 or 2, Fla. Const.

ARGUMENT

After the 2000 election, the Florida Legislature determined to bring about election reform in Florida, adopting for the first time a provision allowing certain voters to cast provisional ballots. § 101.048, Fla. Stat. Prior to enactment of the Provisional Ballot Statute, if a voter appeared at the polls and her name was not on the voting list, she was denied the right to vote regardless of whether the omission was due to administrative error or her own error for appearing in the wrong polling place.[1] The Legislature adopted the Provisional Ballot Statute so that a duly registered voter will no longer, through no fault of her own, be denied the opportunity to cast a vote and have it counted due to administrative error.

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[1] Section 101.045, Fla. Stat., provides:

> 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.

Plaintiffs do not challenge the validity of this statute.

The Provisional Ballot Statute provides:

> (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, ... 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 ....
>
> (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."

Plaintiffs below asserted that the precinct requirement in the Provisional Ballot Statute violates two provisions of the Florida Constitution. First, they argued that Art. VI, § 2, Fla. Const., contains the qualifications for suffrage in Florida and that the precinct requirement "denies the right to vote to electors who meet all constitutional qualifications for suffrage." Such denial, according to Plaintiffs, violates "settled precedent that the Legislature may not modify the

qualifications for voting in the Constitution." Second, they argued that such denial "impermissibly infringes the fundamental right to vote ... guaranteed by Art. I, § 1 of the Florida Constitution." Neither contention has merit.

I.

THE PROVISIONAL BALLOT STATUTE DOES NOT VIOLATE ART. VI, SECTION 2, FLA. CONST.

Article VI, § 2, Fla. Const. sets forth the suffrage qualifications for electors (voters) in Florida. There are four: 1. You must be a United States citizen; 2. You must be 18 years old; 3. You must be a permanent resident of Florida; and 4. You must be registered as provided by law. The Legislature cannot add new restrictions. *State ex rel. Landis v. County Board of Public Instruction*, 188 So. 88 (Fla., 1939).

However, the restriction on the power of the Legislature is not a restriction on its power to enact reasonable regulations of the elections process regarding time, place, and manner. To the contrary, the Constitution *requires* that the Legislature do so. Article VI, § 1, Fla. Const., provides in part: "Registration and elections shall . . . be regulated by law[.]"

This Court has expressly recognized that regulations on the place a vote is cast are not inconsistent with the constitutional right to be an elector. In *State ex*

rel. Gandy v. Page, 169 So. 854, 858 (Fla. 1936), this Court held that a voter is:

> entitled to exercise his suffrage as such, on condition, however, that he comply with such other requirements of law as may be imposed upon him as a matter of policing the process by which he is authorized to cast his vote ***at a place and within the time, and subject to the regulations, provided by law to govern the elections themselves***. (emphasis added).

In *State ex rel. Davis v. Adams*, 238 So. 2d 415 (Fla. 1970), this Court further elaborated the Legislature's authority over election procedure explaining:

> The subject-matter is the 'times, places and manner of holding elections for senators and representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect.

Id. at 416 (quoting *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397 (1932).

The United States Supreme Court has similarly recognized the latitude given to states to control their own elections in *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986), stating:

> the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and

> Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.

See also, *Anderson v. Celebrezze*, 460 U.S. 780, 788 (U.S. 1983)("We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."). Time, place, and manner regulation of the elections process was recognized as valid and in fact necessary by the United States Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992). The Court explained that [a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'") Id. at 433; See also, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.")

Article VI, § 1, Fla. Const., directs the Legislature to exercise this power.[2] The court below correctly recognized that the enactment of the Provisional Ballot Statute was just such an exercise of power under Art. VI, § 1, Fla. Const., rather than an unconstitutional additional suffrage requirement prohibited by Art. VI, § 2. A suffrage requirement is a characteristic of the voter that cannot be changed at the polling place. That is, a failure to qualify eliminates the individual as an elector. Suffrage requirements address the ability to register and establish the right to vote. In contrast, a time, place and manner regulation of the voting process establishes the manner in which the franchise is exercised once an individual qualifies. Regulations apply after suffrage requirements are met and do not eliminate the voter as a registered elector.

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[2] Art. I, § 4, Cl 1, U.S. Const., provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

Although different language is used, the charge of Art. VI, § 1, Fla. Const., to regulate elections contemplates these time, place and manner issues.

The suffrage requirements are age, citizenship, state residency, and proper registration. A potential voter who is under age, not a citizen, not a permanent resident of Florida, or not registered pursuant to law, is precluded *by law* from *any* participation in the electoral process. These are the requirements that are prerequisites to obtaining your voter registration card. Once a voter is qualified - has a card - she must exercise her rights as an elector by complying with the time, place, and manner regulations set forth in the election code.

Having obtained a registration card, the rules a voter must abide by in the election code are the permissible reasonable time, place, and manner regulation of the electoral process authorized by Art. VI, § 1. For example, a voter cannot vote if she does not show up at the polling place on time - before 7 P.M. This rule is clearly not a suffrage requirement. Similarly, a voter cannot vote if she does not show up at the polling place to which she is assigned. Returning to the language in *Landis*, a voter is not **prohibited** by this rule from participating in the process. If she shows up at the wrong precinct, she can exercise the franchise by going to the correct one. By contrast, if a potential voter is under age, there is nothing she can do to participate.

The cases relied upon by Plaintiffs certainly state the black letter principle that the Legislature cannot add qualifications, but do not support their argument

that a precinct based election system is unconstitutional. In *State ex rel. Landis v. County Board of Public Instruction*, 188 So. 88 (Fla. 1939), the Court held that a statute limiting the right to vote in a school district election to those electors voting in the previous general election contravened the state constitution's standard of qualifications. *See also, Bowden v. Carter*, 65 So. 2d 871 (Fla. 1953) (statute requiring that a registered voter seeking to change party affiliation take oath affirming he voted for party candidates at last general election did not violate elector qualification); *Riley v. Holmer*, 100 Fla. 938 (Fla. 1930)(Fla. Rev. Gen. Stat. § 3962 was ineffective as to removing the disability of non-age with respect to voting because Fla. Const. Art. VI, § 1 provided that voting was restricted to male citizens 21 years of age); *State ex rel. Lamar v. Dillon*, 14 So. 383, 387 (Fla. 1893)(In a case involving challenge to statutory suffrage requirements in a municipal election not governed by the constitutional suffrage provisions, the court held "but where the Constitution does not fix the right of suffrage or prescribe the qualifications of voters it is competent for the Legislature as the representative of the law-making power of the state to do so."). Clearly none of the cases cited mandate reversal of the lower tribunal's judgment.

The Provisional Ballot Statute does not impose a qualification; it merely regulates ***where*** you cast your vote after you have qualified and determined you will

cast your vote. A requirement that precludes an otherwise qualified individual from becoming a registered voter can be stricken as an invalid suffrage or candidacy requirement. In contrast, a regulation that affects how the franchise is exercised, such as time, place and/or manner, will be approved as a reasonable exercise of the Legislature's regulatory authority.

Plaintiffs also disavow any intent to challenge the basic requirement of voting in precincts as required by Section 101.045. But it is entirely inconsistent to argue that the precinct voting requirement of Section 101.048 is invalid while the general precinct voting provision in Section 101.045 is valid. This failure of Plaintiff's argument to have any boundary highlights its frailty. In truth, if this Court accepts Plaintiffs' argument, it must logically declare precinct voting generally unconstitutional. If the Court avoids holding Section 101.045, likewise unconstitutional, then accepting Plaintiffs' argument repeals Section 101.045 since any voter can then appear at any polling place in the county in which he is registered and be entitled to cast a provisional ballot.

The basic precinct voting system has been in force in Florida for some 115 years. 1889 Fla. Laws ch. 3879. Although Florida's election laws have undergone numerous revisions in the interim, the geographically based precinct system has remained relatively unchanged. *See* § 101.011, Fla. Stat. The 1889 law also

provided that "[n]o person shall be allowed to vote in any other election district than the one in which he is registered." 1889 Laws of Florida ch. 3879, § 13. This is the precursor to the provision requiring precinct voting in Section 101.045. It is simply inconceivable that the constitutional revisions of 1968, 1978 and 1998 would have changed the provisions of Article VI so drastically as to invalidate such a bedrock principle of Florida election law without so much as a footnote. Election ballots will vary greatly depending on the address of the voter due to the presence of many overlapping and inconsistently shaped jurisdictions, including, e.g., single member districts in counties, cities and school boards. The precinct system is essential to ensure that voters are voting in elections in which they are entitled to vote. Even the early voting, absentee voting, and military voting programs provide precinct based ballots to the voters in order to ensure they are voting in the proper elections.

Plaintiffs construct an argument based on the language of Art. VI, § 2 which provides that when the voter meets the four constitutional criteria for suffrage, he becomes "an elector of the county where registered." From this language, Plaintiffs glean a principle that the county is the basic geographical unit governing the exercise of the franchise and that the precinct requirement is an invalid additional geographic restriction on the right to vote. Plaintiffs posit that a county elector has

an unqualified right to cast her vote anywhere in the county of her residence. However, as noted above, this Court has expressly recognized that regulations on the place a vote is cast are not inconsistent with the constitutional right to be an elector. *State ex rel. Gandy v. Page,* 169 So. 854, 858 (Fla. 1936). Therefore, the fact that an individual who is otherwise qualified to vote, and attests to her qualifications through the registration process, becomes "an elector of the county where registered" does not imply that the individual, by virtue of her status as an elector of the county, has an unconditional right to vote anywhere within that county. In order to ensure orderly elections, voters can be directed to vote at a particular place. That is what Florida law requires of all voters, provisional or otherwise.

II.

THE PROVISIONAL BALLOT STATUTE DOES NOT VIOLATE ART. I, SECTION 1, FLA. CONST.

The Provisional Ballot Statute is not a voter qualification requirement. Rather, it is a valid time, place, and manner regulation of the voting process. Plaintiffs argue that requiring a voter to show up at her assigned polling place "unduly limits the right" to vote and constitutes a severe restriction on that right requiring strict scrutiny from the Court.

Plaintiffs rely on *Ervin v. Richardson*, 70 So. 2d 585 (Fla. 1954), for the proposition that the Legislature cannot unduly limit the right to vote. In *Richardson* the Court addressed a statute that provided "that county commissioners are nominated by the several districts of the county instead of by the county at large." The Court agreed with the chancellor below who found:

> Section 5 of Article VIII of the Constitution made specific provision for the election of County Commissioners by the qualified electors of the county, the effect of the act was to restrict each elector's choice to one county commissioner when the constitution provides that he might vote for five; the result of which was to impose an unreasonable and unnecessary burden on the right of suffrage as guaranteed by Section 5, Article VIII of the Constitution.

Id. at 586-587. Restricting voters to voting for one county commissioner when the constitution provided for voting for all five is not analogous to requiring that a voter vote at his assigned precinct. *Richardson* is therefore inapposite.

Similarly, Plaintiffs cite *Libertarian Party v. Smith*, 687 So. 2d 1292 (Fla. 1997), for the proposition that the precinct requirement is a severe restriction on the franchise requiring strict scrutiny. In fact, in *Smith*, the Court applied a much lower level of scrutiny, holding that, "reasonable, nondiscriminatory restrictions' need only advance important regulatory interests." *Id.* at 1294. The restriction here is reasonable and nondiscriminatory. Even if strict scrutiny were applicable here, "[t]he states' compelling interests include maintaining fairness, honesty, and order

and avoiding confusion, deception, and even frustration of the democratic process." *Reform Party v. Black*, 2004 Fla. LEXIS 1532 (Fla. 2004). Requiring precinct voting is a narrowly tailored regulation, in place for some 115 years in Florida, addressing those compelling interests.

All voters, provisional or otherwise, must vote at their assigned precinct. Indeed any distinction between provisional voters and other voters raises serious equal protection concerns. Further, the restriction advances important regulatory interests. As the Supreme Court stated in *Burdick, supra*, "there must be a substantial regulation of elections if they are to be fair and honest and in some sort of order, rather than chaos."

Finally, Plaintiffs assert the statute causes great - or grave - harm to voters because some will inevitably be disenfranchised. This emotional appeal misses the mark. Prior to the enactment of the Provisional Ballot Statute, a voter whose name did not appear on the rolls of the precinct where she appeared would be prevented from voting. This was so regardless of whether her name was absent due to administrative error by election officials or to her own error in appearing at the wrong polling place. The Legislature chose to adopt a remedy for the former. Rather than *dis*enfranchising voters, this statute actually *enfranchises* a group of voters who would have previously been denied the opportunity to cast a ballot.

III.

PLAINTIFFS' CLAIM IS BARRED BY LACHES

The provisions of the Provisional Ballot Statute with which Plaintiffs take issue (the precinct voting requirement for provisional voters) was enacted in 2001 by Ch. 2001-40, s. 35 and Ch. 2002-17, s. 15. Therefore, Plaintiffs have had more than three and a half years in which to bring this action; they did not do so. Their claims are therefore barred by laches.

To state a laches defense, a party must show: (1) a delay in asserting a right or claim; (2) the delay was not excusable; and (3) the delay caused the defendant undue prejudice. *Fouts v. Harris,* 88 F. Supp. 2d 1351, 1353-54 (S. D. Fla. 1999). Here, the challenged legislation is more than three and a half years old. Plaintiffs could have brought their action at that time, or certainly within a reasonable time thereafter. That they chose to file their action several weeks before the November 2nd general election says much about their motivation and creates substantial prejudice. *See C. E. Huffman Trucking, Inc. v. Red Cedar Corp.*, 723 So. 2d 296, 298 (Fla. 2d DCA 1998)(timing and manner of presentation of case severely prejudiced the county). In this case, more than three and a half years have passed since the subject statute was enacted. At least one statewide election and more than one primary election have occurred in the interim.

Waiting until the last minute, Plaintiffs bring their claim as elections officials prepare for the 2004 general election, and ask the Court to inject a process that would upend the ongoing preparation by allowing voters to cast provisional ballots wherever they appear, regardless of where they reside within a county. In a case involving the operation of a school system, the court's language is most revealing:

> I am most concerned about the prejudice to the Defendants occasioned by the timing of the lawsuit on two fronts–on the court's ability to carefully address the issues, and on the potential disruption to the ... system caused by the requested emergency relief.

Boston's Children First v. City of Boston, 62 F. Supp. 2d 247, 256 (D. Mass. 1999). Given the prejudice caused by the inordinate delay, the doctrine of laches must bar this action.

IV.

PLAINTIFFS LACK STANDING

It is axiomatic that one who challenges the constitutionality of a statute must show a personalized injury. *State ex rel. McClure v. Sullivan*, 43 So. 2d 438 (Fla. 1949). A challenger must establish the existence of a personal stake in the outcome by demonstrating the suffering or immediate threat of suffering injury differing in kind from that of the general public. *Upper Keys Citizens Association v. Wedel*, 341 So. 2d 1062 (Fla. 3d DCA 1977). Thus, a very precise condition precedent

exists to maintaining a constitutional challenge.

Against this backdrop, Plaintiffs' assertion of a general interest in good government through citizen participation in the electoral process and having their votes count is nothing more than a truism applicable to everyone, and a claim anyone and everyone can make. Standing to challenge a statute is not predicated on an association's or organization's bare declaration of its interests and concerns; there must be a demonstration of particularized injury different in kind from that putatively sustained by the public generally. Plaintiffs' claims are no different from that of a group that wants potential voters to have their votes count. This does not meet the required injury-in-fact standard which is a condition precedent to establishing standing to challenge a statute.

Plaintiffs have not identified how and in what manner they will be adversely affected by the statute they challenge. There are no allegations in the complaint or in Plaintiffs' affidavits showing anyone will likely show up at the wrong precinct on election day and be "disenfranchised" by the challenged statute. Even if, as set forth in one affidavit, a voter is not listed at her precinct, all she has to do is show up at that precinct and cast a provisional ballot which will be counted. Plaintiffs thus fail to allege or prove the particularized harm necessary to establish standing.

CONCLUSION

The court below properly held that § 101.048, Fla. Stat., is a reasonable regulation of the voting process, valid under Art. VI, § 1, Fla. Const., not an invalid voter qualification prohibited under Art. VI, § 2, Fla. Const. Plaintiffs are guilty of laches and they have failed to establish standing to challenge this statute. This court should AFFIRM the judgment of the trial court and DISMISS this case with prejudice.

Respectfully submitted this 8th day of October, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was served by U.S. Mail this 8th day of October, 2004, on:

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