**IN THE SUPREME COURT OF FLORIDA**

**AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL.**

**Appellants,**

**vs.**

**GLENDA E. HOOD, ETC., ET AL.**

**Appellees.**
_____/

**Case No: SC04-1921**
**Lower Tribunal Nos:**
**2004-CA-002104**
**1D04-4304**

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# BRIEF OF INTERVENOR/APPELLEE, CECILIA RUSH

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## STATEMENT OF THE CASE AND FACTS

### A. STATEMENT OF THE CASE.

This appeal involves a challenge by various labor unions and voters to Florida's long-standing statutory scheme of regulating the elections process through precinct voting. This brief is submitted today pursuant to this Court's request, and after the following flurry of events.

On August 17, 2004, appellants filed a petition for original writ of mandamus in this Court (under case #SC04-1544), contending that § 101.048, Fla. Stat., (Florida's provisional ballot statute) violates Article VI, Section 2 of the Florida Constitution. This Court declined to invoke its all writs jurisdiction, and transferred the case to the Leon County Circuit Court.

Following this transfer, and on or about September 3, 2004, the trial court *sua sponte* dismissed the complaint for failure to state a *prima facie case* for mandamus. (RI, p.60)[1]. On September 8, 2004, the trial court entered an amended order of dismissal on the same grounds. (RI, p.100). On September 9, 2004, appellants filed in the trial court a motion to alter or amend the judgment. On September 15, 2004, appellants filed motions for a temporary injunction and for class certification. (RII, p.342,380). On September 17, 2004, appellants filed a

[1] References to record shall be by "R" followed by the volume in roman numerals and page by "p" followed by the page number in arabic.

motion for leave to file an amended complaint, a proposed amended complaint for declaratory judgment and for temporary and permanent injunctive relief, and writ of mandamus. (RII, p.392, 404). In their amended complaint, appellants contended that the provisional ballot statute was violative of Article VI, Section 2, and Article I, Section I of the Florida Constitution. On September 22, 2004, motions to intervene were filed by Cecilia Rush, a registered voter, and Bill Cowles, President of the Florida State Association of Supervisors of Elections and Supervisor of Elections for Orange County. (RII, p.439,442).

On September 22, 2004, the trial court held a hearing on the pending motions. No court reporter was present. By agreement of the parties, the trial court granted the motions to intervene. (RII, p.460). The trial court then denied the motions to alter or amend the judgment, temporary injunction, and class certification, but granted the motion for leave to amend the complaint.

In denying the motion for temporary injunction, the trial court concluded that appellants had failed to meet their burden of establishing that they would suffer irreparable harm if an immediate injunction were not granted because no provisional ballots would be issued until election day, and there was ample time between the hearing and election day for the case to be resolved on the merits. (RII, p.461). The trial court further concluded that the appellants failed to meet their burden of

establishing that they had a substantial likelihood of success on the merits. *Id.* The trial court reasoned that rather than being an unconstitutional additional suffrage requirement imposed by the Legislature in violation of Article VI, Section 2 of the Florida Constitution, or an infringement on the fundamental right to vote, the requirement of precinct voting in the provisional ballot statute is a reasonable regulation of the elections process permissible under Article VI, Section 1 of the Florida Constitution. *Id.* The trial court specifically found that 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 on Election Day" and that "[s]uch a requirement brings order to the elections process." *Id.* The trial court denied the motion for class certification on the grounds that any decision holding Florida's provisional voting statute unconstitutional would have statewide application, and there was no danger of inconsistent adjudications from any such determination because the Secretary of State and two Supervisors of Elections were named as defendants. *Id.*

Finally, by agreement by the parties, the trial court treated the appellees' and intervenors' opposition to the motion for leave to amend as a motion to dismiss the amended complaint, and the trial court dismissed the amended complaint with prejudice for failure to state a cause of action. (RII, p.462). In doing so, the trial

court expressly found: "The Constitution does not prohibit the Legislature from adopting the precinct-based scheme for provisional voting found in Section 101.048 Florida Statutes;" and that the statute is a "permissible, reasonable regulation of the elections process." *Id.* The trial court entered its order of dismissal with prejudice so as to allow appellants a prompt opportunity to appeal. *Id.*

On September 28, 2004, appellants filed their notice of appeal with the First District Court of Appeal requesting immediate certification to the Florida Supreme Court or in the alternative an expedited appeal. (RII, p.463). On October 1, 2004, the First District Court of Appeal certified the appeal to the Florida Supreme Court pursuant to Fla. R. App. 9.125, and this Court accepted jurisdiction.

### B. STATEMENT OF THE FACTS.

Precinct voting has been the structural vehicle in Florida for regulating the casting of votes for over 100 years. *Laws of Florida*, s. 13, ch. 3879, 1889; § 101.045, Fla. Stat. Prior to 2001, potential electors attempting to vote in precincts in which they were not a legal resident were either directed to the correct precinct or not permitted to vote. If a person claimed to be legally registered to vote at the precinct, but the person's name did not appear on the precinct rolls, the elections staff would contact the county supervisor of elections office to verify the

person's eligibility to vote. If the person's eligibility to vote could not be confirmed, the person would not be permitted to vote at the precinct. *Senate Staff Analysis and Economic Impact for CS/SB 1118* (March 24, 2001).

In response to the problems that arose during the presidential election of 2000, the Florida Legislature enacted the provisional ballot statute, § 101.048, Fla. Stat. The senate analysis for the law states: "During the 2000 General Election, there were reports of voters presenting themselves at the polls only to find that their names were not on the precinct register. Numerous poll workers reported that they were unable to reach the supervisor of elections offices to determine whether the persons were registered to vote. Some voters were turned away, others told to come back later, and still others allowed to vote even though their eligibility was questionable." *Id.*

Under § 101.048, Fla. Stat., a voter claiming to be properly registered at the precinct in the election, but whose eligibility can not be determined, may, nevertheless, cast a provisional ballot. § 101.048, Fla. Stat. The county canvassing board then reviews the provisional ballot to determine whether the person was, in fact, entitled to vote at the precinct where the person cast a vote at the election. § 101.048, Fla. Stat. If the canvassing board determines that the voter was registered and entitled to vote at the precinct, and that the voter's signature on the

provisional ballot envelope and the voter's registration card match, the vote is counted. § 101.048(2)(b)(1), Fla. Stat. If the voter is determined by the board not to have been registered or entitled to vote at the precinct, the vote is not counted. § 101.048(2)(b)(2), Fla. Stat. Any voter who believes his/her ballot was illegally excluded by the canvassing board may challenge that decision in circuit court. § 102.168, Fla. Stat.

Thus, the provisional ballot statute makes access to the voting booth easier by allowing persons who otherwise would not have been able to cast their votes on election day prior to the passage of the statute to do so. Furthermore, provisions for early and absentee voting prior to election day have been built into the Florida election code, enabling a person to vote while physically out of their precinct. § 101.62-101.698, Fla. Stat.

## APPLICABLE STANDARD OF APPELLATE REVIEW

The applicable standard of review of the circuit court's final order is *de novo*. The final order rests on purely legal matters decided by the circuit court, namely, the constitutionality of § 101.048, Fla. Stat., under the Florida constitution. Because the order rests on purely legal matters, the order is subject to *de novo* review on appeal. *See Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d

664, 670 (Fla. 1993), rev'd. in part on other grounds by *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 114 S.Ct. 2516 (1994); *Browning-Ferris Indus. of Florida, Inc. v. Manzella*, 694 So. 2d 110, 111-112 (Fla. 4th DCA 1997).

## SUMMARY OF THE ARGUMENT

This appeal is effectively an effort by appellants to overturn over 100 years of precinct voting in Florida. Contrary to appellants' assertions, the precinct voting requirement in Florida's provisional ballot statute is a constitutional, and reasonable regulation of the elections process necessary to prevent chaos, confusion, and fraud on election day.

Appellants' main contention is that Article VI, Section 2 of the Florida Constitution requires county-wide voting, and thereby precludes precinct-based voting. When read *in pari materia* with other state constitutional provisions on the same subject, specifically, Article VI, Section 1, it is clear that the Florida Constitution vests with the Legislature the power to make laws regulating the voting process. The Legislature has, in turn, specifically mandated precinct voting consistent with the Florida Constitution. The very constitutional provision appellants rely on, in fact, authorizes the Legislature to enact laws providing for the

registration of voters, and the legislature has specifically authorized precinct voting in § 101.045, Fla. Stat., and with regard to provisional ballots under § 101.048, Fla. Stat.

Finally, overturning the Legislatures voting mechanism and granting the appellants the relief they seek would amount to this Court substituting its judgment as to the proper administration of presidential elections for that of the Legislatures, a role placed exclusively in the Legislature by the United States Constitution. Likewise, because of the Legislatures exclusive role in the administration of presidential elections, declaring the provisional ballot law unconstitutional would effectively eliminate provisional ballot voting for the 2004 election.

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY HELD THAT FLORIDA'S PROVISIONAL BALLOT STATUTE (§ 101.048, FLA. STAT.) DOES NOT VIOLATE FLORIDA'S CONSTITUTION.

#### A. General Legal Principles Governing Whether a State Statute Violates Florida's Constitution.

Any inquiry into the constitutionality under Florida's constitution of an act of the Florida Legislature must begin with a presumption that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily. *Chicago Title Insurance Company v. Butler*, 770 So. 2d 1210 (Fla. 2000); *Wright v. Board of*

*Public Instruction of Sumter County*, 48 So. 2d 912 (Fla. 1950)(Court should presume that the Legislature would not knowingly enact an unconstitutional measure.) All doubts regarding the constitutionality of a statute should be resolved in favor of its constitutionality. *Bonvento v. Bd. Of Public Instruction of Palm Beach County*, 194 So. 2d 605 (Fla. 1967). An act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. *Knight and Wall Co. v. Bryant*, 178 So. 2d 5 (Fla. 1965) *Biscayne Kennel Club, Inc. v. Florida State Racing Commission*, 165 So. 2d 762 (Fla. 1964) (presumption of constitutionality continues until the contrary is proved beyond a reasonable doubt.).

Multiple constitutional provisions addressing a similar subject must be read *in pari materia* to ensure a consistent and logical meaning that gives effect to each provision. *Carribean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492 (Fla. 2003); *Thomas v. State ex. rel. Cobb*, 58 So. 2d 173 (Fla. 1952) (Every provision of the state constitution was inserted with a definite purpose and all sections and provisions of it must be construed together, that is *in pari materia*, in order to determine its meaning effect, restraints, and prohibitions.).

Although the Legislature is charged with the authority and responsibility of regulating the elections process, these regulations must be reasonable and necessary

restraints on the elections process and, not arbitrary or inconsistent with the constitution of this state. *Treiman v. Mamquist*, 342 So. 2d 972, 975 (Fla. 1977).

### B. § 101.048, Fla. Stat., Does Not Violate Article VI, Section 2.

Appellants' contention that § 101.048, Fla. Stat., violates Article VI, Section 2 of Florida's Constitution is misplaced. Appellants' contention is based on the faulty premise that Article VI, Section 2 requires county-wide voting, thereby, eliminating any precinct voting requirement. Clearly, appellants' reading of Article VI, Section 2 is overly-broad.

Article VI, Section 2 specifically provides: "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." [emphasis added]. Thus, contrary to appellants' position, this section does not require county-wide voting. Rather, the section simply means what it says: that any person who is an eighteen year old United States citizen and permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered. The place of voting is notably absent from this section as is any other requirements for registration or eligibility not specifically identified therein.

Importantly, the phrase " . . . shall be an elector of the county where registered" does not preclude the organizing of county-wide voting into precincts -- a practice that has been wide-spread in Florida for over 100 years. Clearly, appellants have overlooked the critical language in Section 2 which requires that electors "be registered as provided by law." This phrase clearly contemplates that one must look elsewhere, (Florida's statutes), as to any restrictions on the place to vote, requirements for registration, and the counting of votes. Simply put, appellants read into the constitution a requirement that does not exist.

### C. § 101.048, Fla. Stat., Is Authorized by Article VI, Section 1 of the Florida Constitution.

Also addressing this subject is Article VI, Section 1 of the Florida Constitution, which provides in pertinent part: "Registration and elections shall, and political party functions may, be regulated by law." Florida law, specifically, §101.045, Fla. Stat., not only contemplates precinct voting, it requires a person to vote in the precinct in which he/she resides. When read *in pari materia* with Article VI, Section 2, it is clear that the precinct voting requirement in § 101.048, Fla. Stat., is authorized by the Florida constitution and by Florida law, and is "a reasonable regulation of the elections process permissible under Art. VI, Section 1, Fla.

Const." The trial court's judgment in this regard was correct, and the trial court's judgment should be affirmed.

### 1. The State Has an Interest in Ensuring Reasonable Registration Requirements to Vote.

The State certainly has a reasonable interest in preserving order at the ballot box, and very strong public policy concerns are implicated by the precinct-voting requirement. *Treiman v. Malmquist*, 342 So. 2d 972, 976 (1977)(recognizing that statutes which protect the integrity of the election process or purity of the ballot, and serve to keep the ballot within manageable limits are not unreasonable or illegitimate). The thrust of appellants' suit is to eliminate Florida's precinct-based voting requirement for persons who wish to vote by provisional ballot. In its place, appellants seek to create a convenience-based voting system: voters being permitted to cast provisional ballots, and have those ballots counted, if the voter chooses not to vote at his or her assigned precinct for any reason whatsoever. *Wit v. Berman,* 306 F.3d 1256, 1261 (2nd Cir. 2002). What appellants overlook is that Florida's precinct based voting requirement deters fraud by fixing in advance the location where a person is assigned to vote. The precinct-based voting system helps to prevent fraud because in general, voters are only permitted to vote at the correct location – the location where their particular names are on the precinct register.

*Hoffman v. State of Maryland*, 736 F.Supp. 83, 87 (D.Md. 1990); *State ex rel. McCaffery v. Mason*, 55 S.W. 636, 642 (Mo. 1900), aff'd 179 U.S. 328 (1900). In *McCaffery*, the Missouri Supreme Court succinctly explained the importance of requiring a specific place for the casting of votes as a deterrent to fraud, stating:

> Although the constitution provides that all male citizens twenty-one year of age and upwards shall be entitled to vote, it would not be seriously contended that a statue which should require all such citizens to go to the established place for holding the polls, and there deposit their ballots, and not elsewhere, was a violation of the constitutional, because prescribing an additional qualification, namely, the presence fo the elector at th polls. All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard fraud, undue influence, and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential.

*McCaffery,* 55 S.W. at 642.

Not only does Florida's precinct voting requirement deter actual fraud, it also serves the important state goal of preventing the appearance of and potential for fraud. Florida voters are familiar with the precinct-based voting system, and they know that every voter is supposed to vote at their assigned precinct. Thus voters are assured that Florida's precinct-based voting system contains internal-controls, such as the precinct registers, that help deter fraud.

Furthermore, under Florida's election laws, voters cannot vote more than once in multiple locations, because their name will not appear on the registers of

more than their neighborhood polling location. Precinct-based voting ensures that voters can express a choice in the candidates and issues unique to their geographic area and are not able to cast a ballot for candidates or issues in which they are not eligible to vote, thereby avoiding chaos, confusion, and maintaining a fair and effective representation for all citizens. *Reynolds v. Sims,* 377 U.S. 533 (1964). If precinct voting is eliminated, what will be the value of proportional representation and the goal of redistricting if a person can go into an adjoining district and cast a vote that will be counted? What will result from a voter who lists one address on the provisional ballot envelope and is registered at a different address? In which races (i.e. congressional district, county commission, city commission, school district) will he/she cast a ballot? The answer is chaos, confusion, and unfair representation - - the antithesis of an orderly election in our republican form of government.

Finally, precinct-based voting increases the efficiency of elections. Requiring registered voters to cast votes at preassigned locations allows elections officials to adequately prepare for elections, both in terms of the number of poll workers and polling stations necessary to ensure efficiency on election day, and in regard to securing the appropriate number of ballots. The ability to accurately allocate those necessities prior to actual voter turnout on election day allows the state to

adequately allocate resources to its various voting precincts, thereby reducing costs, avoiding the allocation of too much, or too few resources to a particular precinct. Precinct voting has been a reasonable and sensible method of facilitation orderly elections in the United States and it is hardly unconstitutional.

The specific remedy requested by the appellants in this case is the elimination of precinct voting for provisional ballots, given that precinct voting will occur for the regular balloting process, this relief would guarantee to create chaos and confusion. Every voting precinct would be required to have on hand and properly manage the ballots from every other precinct in order to accommodate any county-wide voter because of the differing candidates for district specific races. County-wide provisional balloting would thus encourage the fraud, chaos, and disorderly elections that the Legislature has sought to prevent.

### D. Florida's Provisional Ballot Statute Does Not Violate Article I, Section 1 of the Florida Constitution.

Appellants' contention that Florida's provisional ballot statute violates Article I, Section I of the Florida Constitution is also without merit. Article I, Section I provides: "All power is inherent in the people the enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Within the context of election law, this Court has held that this section

enables the state to impose reasonable controls on the elections process. *Treiman v. Malmquist*, 342 So. 2d 972, 976 (1977). Clearly, for the reasons discussed above, Florida's provisional ballot statute is a reasonable regulation of the elections process, and therefore, does not violate Article I, Section I.

## II. A DECLARATION THAT FLORIDA'S PROVISIONAL BALLOT STATUTE VIOLATES FLORIDA'S CONSTITUTION BASED ON THE PRECINCT VOTING REQUIREMENT WOULD RUN AFOUL OF THE UNITED STATES CONSTITUTION AND FEDERAL AUTHORITY, AND WOULD RESULT IN THE ELIMINATION OF PROVISIONAL VOTING IN FLORIDA ALTOGETHER.

Putting aside the state constitutional issues, this Court should consider that the Legislature's precinct voting requirement regarding provisional ballots is consistent with its exclusive federal constitutional role in the choosing of presidential electors. Any decision by this Court which attempts to re-write the Legislature's precinct voting mechanisms would run afoul of the United States Constitutional requirements that the appointment of presidential electors is exclusively the province of the state legislatures, not the courts. Furthermore, any declaration by this Court that the statute violates the state constitution because of the precinct voting requirement would effectively result in the elimination of provisional voting in Florida altogether.

Article II, Section 1, Clause 2 of the United States Constitution authorizes each State "to appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress," and these electors are, in turn, empowered to meet and to vote by ballot for the election of the President. As this Court recognized within just the past three weeks, "with respect to a presidential election, this provision constitutes a 'direct grant of authority' to state Legislatures." *Reform Party v. Black*, 2004 WL 20755415, *5 (Fla. September 17, 2004), *quoting, Bush v. Palm Beach County Canvassing Bd.,* 531 U.S. 70, 76 (2000).

This Court went on to state: "In construing the statute we are also mindful that the Legislature has the exclusive power to define the method of determining how the electors of the state are chosen under Article II, Section 1, Clause 2 of the United States Constitution." *Reform Party v. Black*, 2004 WL 20755415, *8 (Fla. September 17, 2004). Although the judiciary has the power and authority to construe statutes, it cannot construe a statute in a manner that would infringe on the direct grant of authority to the Legislature through the United States Constitution. *Id.*

Any construction of the provisional ballot statute which would result in the Court rewriting the Legislature's law to eliminate the precinct voting method adopted by the Legislature would constitute a judicial re-write of the statute and would infringe on the direct grant of authority to the Legislature through the United States Constitution pursuant to Article II, Section I, Clause 2. Declaring the entire statute unconstitutional would effectively eliminate provisional voting altogether. This would have the effect of disenfranchising *all* persons seeking to cast a provisional ballot on election day - - a result obviously not contemplated by the Legislature. *Id.*

Moreover, Article I, Section 4, Clause 1 of the United States Constitution provides that: "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 Senators." As the Honorable Justice Lewis, in his concurring opinion in the *Reform Party* case pointed out, this provision recognizes that States retain the power to regulate their own elections, and that the right to vote in any manner through the ballot is not absolute. This is so because government must have an active role in structuring elections, and as 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." *Reform Party v. Black*, 2004 WL 20755415, *11 (Fla. September 17, 2004), *Lewis, concurring, quoting, Burdick v. Takushi,* 504 U.S. 428, 433 (1992). *See also, Storer v. Brown*, 415 U.S. 724, 730 (1974). For the reasons discussed above, the requirement of precinct voting is a reasonable regulation of the elections process, and Florida's precinct voting requirement is a reasonable time, place and manner restriction consistent with Article I, Section 4, Clause I of the United States Constitution.

Finally, it is well-established that the states have the power to require that voters be bona-fide residents of precincts in which they are registered or vote as being necessary to preserve the basic concept of political community, and to prevent voter confusion and fraud. *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *Bell v. Marinko*, 367 F. 3d 588, 592 (6th Cir. 2004); *Wit v. Berman*, 306 F. 3d 1256, 1260-1264 (2d Cir. 2002); *Hoffman v. State of Maryland*, 736 F. Supp. 83, 87 (D. Md. 1990); *Gallagher v. Indiana State Election Board,* 598 N.E. 2d 510, 514 (Ind. 1992); *Lloyd v. Babb*, 251 S.E. 2d 843, 859 (N.C. 1979).

## CONCLUSION

For the reasons stated above, the trial court's judgment should be affirmed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following via fax transmission and U.S. Mail, postage prepaid, this _____ day of October, 2004:

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I do hereby certify that, pursuant to Fla. R. App. P. 9.100(1), this Initial Brief was printed in Times New Roman with a 14-point font.

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