IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No. SC04-1921

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL 79, AFSCME, AFL-CIO; SEIU 1199FLORIDA; ROSE ASSINTHE; CASSANDRA FLOYD; LINDA GALLAGHER; and MONICA O'NEAL,

Plaintiffs-Appellants,

v.

GLENDA E. HOOD, in her official capacity as Secretary of State of the State of Florida, *et al.*,

Defendants-Appellees.

Appeal from the Circuit Court of the Second Judicial Circuit
in and for Leon County,
Case No. 2004-CA-2104
(Certified by First District Court of Appeal, Case No. 1D04-4304)

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INTRODUCTION

This case is a state constitutional challenge pursuant to the declaratory judgment act to the portions of Florida's provisional ballot statute that deny constitutionally qualified, properly registered voters the ability to cast votes solely on the basis of precinct residency. §101.048(1), (2)(b)(2.), Fla. Stat. (Supp. 2004). The strict precinct residence requirement means that, for instance, when elections officials make mistakes in notifying voters of assigned precincts, and voters in good faith appear at those precincts, voters are not allowed to cast a valid ballot. This lawsuit seeks to prevent unconstitutional disenfranchisement.

The Leon County Circuit Court denied a temporary injunction with respect to the upcoming election and dismissed the Amended Complaint. These decisions are erroneous. We demonstrate below that the statute violates the Florida Constitution for two separate reasons: First, the statute modifies the qualifications for voting set forth in Article VI, §2 – which delineates requirements relating to citizenship, age, State residency, and registration, and makes voters electors of the *county* – by imposing a rigid precinct residency requirement nowhere found in the Constitution itself. Second, the statute impermissibly infringes on the fundamental right to vote protected by both Article VI, §2 and Article I, §1. Accordingly, the lower court

erred in dismissing the Amended Complaint. There is also a substantial likelihood of success for purposes of a temporary injunction. To prevent inevitable irreparable harm to voters in the upcoming election, the Circuit Court's denial of the temporary injunction should be reversed.

STATEMENT OF THE CASE AND FACTS

Nature of the Case

Following the election of 2000, and reports of "eligible voters [who] were turned away from the polls on election day because their names were not on the precinct registers," the Legislature enacted a statute permitting voters whose eligibility cannot readily be determined to cast "provisional ballots." (Request for Judicial Notice ("RJN"), Exh. A at 143.)[1] *See also* Ch. 2001-40, §35, Laws of Fla. According to the legislative history, the law provides that "[a] provisional ballot will be issued to a person who goes to the polls on election day and whose name does not appear on the precinct register and whose eligibility cannot be determined." (RJN, Exh. B at 2.)

[1] The Request for Judicial Notice was erroneously omitted from the Record. Appellants have filed a motion to supplement the Record. Because there are no Record pages, we cite to the exhibit of the Request. Exhibit A is an excerpt of the 2001 Session Summary, Major Legislation Passed, from the Florida Senate. Exhibit B is the Staff Analysis and Economic Impact Statement on CS/SB1118 (March 24, 2001). The remaining exhibits provide county precinct information.

The Legislature's stated purpose in enacting the provisional ballot statute was to "assure that voters who are entitled to vote are given the opportunity to do so." (RJN, Exh. B at 2.) The Florida provisional ballot system thus has the salutary purpose of ensuring that voters are not disenfranchised.

But at the same time, the statute denies the right to vote by provisional ballot unless voters appear at the *precinct* to which they have been assigned by elections officials. Constitutionally qualified voters are ineligible to cast, and county Canvassing Boards cannot count, provisional ballots unless the voters' residency within the precinct at which they appear to vote can be established:

> (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. Once voted, the provisional ballot shall be placed in a secrecy envelope and thereafter sealed in a provisional ballot envelope. . . .
>
> (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."

§§101.048(1), (2), Fla. Stat. (emphases added).

Statement of Facts

There are many reasons why voters may be uncertain of their precinct assignment through no fault of their own. Although precincts frequently change, notice to voters of precinct changes is imperfect. According to a former Supervisor of Elections, in past elections in Florida voters whose precincts changed did not receive notice of the change prior to the election, and county elections officials have even provided incorrect notice to voters regarding precinct changes. (R2-435-36.)[2] In such circumstances, it is wholly the fault of elections officials that voters do not know their assigned precinct. Indeed, given that registration books close a mere 29 days before the election (§97.055(1), Fla. Stat. (2002)), and elections officials have only a short time thereafter to process what can be large numbers of new voter registrations, the failure to notify some voters is inevitable.

[2] This appeal concerns both the denial of a temporary injunction and dismissal of the Amended Complaint. When citing to facts, we refer to *evidence* submitted (without objection) in support of the temporary injunction motion. To avoid confusion, we do not cite to *allegations* pleaded in the Amended Complaint (R3-404-31), which parallel and encompass the evidence submitted. No evidence was introduced below in opposition to the temporary injunction motion.

In addition, emergency situations can result in polling place changes close to the election date. For instance, Hurricane Charley rendered many polling places in Charlotte County unusable for the August 2004 primary, and as a result all 80 precincts in the county were consolidated into 22 sites. (RJN, Exh. L.) Voter uncertainty as to where to vote in such circumstances is inevitable and understandable.

Moreover, the total number of precincts in the State is immense: 6,870 total precincts statewide, as of the March 2004 primary. (R2-354.) Leon County, with a total population of only 255,000 has 180 precincts. (RJN, Exhs. D, E.) It is very easy to arrive at a precinct other than that to which a voter has been assigned when there may be several within the general vicinity of a voter's residence.

Further, the number of voters subject to precinct changes since the last large-turnout election in 2000 is substantial. The November 2004 election is the first presidential election to occur following the redrawing of district and precinct lines after the 2000 census. Statewide, the number of precincts increased from 5,885 in the 2000 election to 6,870 in March 2004. (R2-354.) In Miami-Dade County, the number of precincts increased from 614 to 744. (RJN, Exhs. F, G.) Brevard County increased its precincts from 176 to 220. (RJN, Exhs. H, I.) In Pasco County, 111 of 151 precincts changed as a result of redistricting. (RJN, Exh. J at

3.) In Broward County, 125,000 registered voters have been affected by precinct changes in 2004 alone. (RJN, Exh. K.) In Leon County, approximately two-thirds of precincts have undergone changes since the 2000 election. (R2-355; RJN, Exh. C.)

For the above reasons, experienced elections observers know that in any large group of voters, some number of voters will inevitably appear to vote at a polling place outside their assigned precinct. (R2-349, R3-435.) This has consistently happened in past elections in Florida. (R2-349, R3-401-02, 435.)

Once voters appear to vote outside their assigned precincts, there is a significant likelihood that the voters will not be directed to or able to go to the assigned precinct to vote. This is so for several reasons. Some poll workers inevitably will lack the training, ability, and/or resources to help voters find their assigned precincts. According to the legislative history of the provisional ballot statute, during the 2000 election, "numerous poll workers reported that they were unable to reach the supervisor of elections' offices to verify whether the persons were registered to vote," and hence "voters were turned away, others were told to come back later." (RJN, Exh. B at 2.) Polling places are not all provided with the equipment or information necessary for poll workers to determine voters' assigned precincts. (R2-436.) Thus, some voters will not be able to obtain information

about their precinct assignment. (R2-349-50, R3-436.)

Even if voters are able to obtain the necessary information, some will not be able to travel to that precinct. Voters who attempt to vote at the end of the day may not have time to travel to an alternative site prior to the close of the polls. (R2-350, R3-436.) Some voters will be busy with work or other obligations and have limited time to vote on election day; such voters will lack the time to travel to and wait in line at two separate polling places. (*Id.*) Finally, Florida voters who are elderly, disabled, or otherwise limited in terms of mobility may be unable to travel to an additional polling place. (*Id.*)

As a result, if voters are denied the opportunity to cast a ballot at the initial precinct at which they appear, they may never have the opportunity to vote at all.

Additionally, other voters who appear outside their assigned precinct will cast provisional ballots outside their assigned precinct, only later to discover that their votes were "rejected as illegal." §101.048(2), Fla. Stat. The legislative history of the statute indicates that poll worker confusion has been rampant. (RJN, Exh. B at 2.) As a former Supervisor of Elections relates, even though poll workers receive training in polling place procedures, some poll workers will provide provisional ballots whenever a voter is not on the registration list at the polling place – perhaps because it is the easiest option and does not require the poll worker to sort through

eligibility requirements. (R3-436.)[3]

In past elections in Florida, voters have cast provisional ballots outside of their assigned precinct, and their votes have been rejected. (R3-401-02.) In the November 2002 election, for example, 15% of all provisional ballots cast in Orange County and 19% of all provisional ballots cast in Brevard County were rejected because they had been cast outside the voters' assigned precinct. (*Id.*)

Voting is not always precinct-based. Florida law already permits early voting at a central location in the county in which a voter is registered. §101.657, Fla. Stat. (Supp. 2004). Some states, like Georgia and California, do not require voters to

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[3] A complex set of provisions, to be implemented by poll workers, governs who may receive a provisional ballot. *See, e.g.*, §101.048(1), Fla. Stat. ("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"), §101.043(3), Fla. Stat. (Supp. 2004) ("If the elector . . . is a first-time voter who registered by mail and has not provided the required identification to the supervisor of elections prior to election day, the elector shall be allowed to vote a provisional ballot."), §101.045(2)(c), Fla. Stat. (2002) (if elector completes change of address or name form and "the elector's eligibility to vote cannot be determined, he or she shall be entitled to vote a provisional ballot"), §101.69, Fla. Stat. (Supp. 2004) (if "elector who has received an absentee ballot, but desires to vote in person . . . [and] elector does not return the ballot and the election official . . . [c]annot determine whether the supervisor has received the elector's absentee ballot, the elector may vote a provisional ballot"), §101.111(3)(b), Fla. Stat. (Supp. 2004) ("If the challenged person refuses to complete the oath or if a majority of the clerk and inspectors doubt the eligibility of the person to vote, the challenged person shall be allowed to vote a provisional ballot.").

cast provisional ballots in their assigned precincts on election day. *See* Ga. Code §21-2-419(c)(2); Cal. Elec. Code §14310(c)(3). The current Georgia Director of the Division of Elections explains that "county election superintendents have successfully implemented and are administering Georgia's provisional ballot laws without difficulty." (R2-348.) Administration of Georgia's system is easy: "When a voter appears at a polling place on election day and his eligibility to vote cannot be immediately determined, the poll worker simply provides that voter with a provisional ballot." (*Id*.)

Course of Proceedings

On August 17, 2004, this case was filed in this Court as an original writ of mandamus against Secretary of State Glenda Hood, Leon County Supervisor of Elections and Canvassing Board member Ion Sancho, and Leon County Canvassing Board members Augustus Aikens and Jane Sauls. (R1-1-54.) This Court transferred the petition to the Leon County Circuit Court, which dismissed the petition *sua sponte*. (R1-100-02.)

Appellants – Plaintiffs below – moved to alter or amend the Circuit Court's judgment to allow an Amended Complaint, and also sought leave to file an Amended Complaint for declaratory and injunctive relief and petition for writ of mandamus expanding this action. (R1-103-10, R2-392-97.) In addition,

Appellants sought a temporary injunction to prevent disenfranchisement of voters in the upcoming November election. (R2-342-79.) Appellants also moved to certify defendant classes of Supervisors of Elections and Canvassing Board members from all counties in Florida. (R2-380-84.)

Appellee-Defendant Secretary of State Hood filed an opposition to the motion to alter or amend the judgment. (R2-204-98.) Cecilia Rush, an individual voter, and Bill Cowles, Supervisor of Elections of Orange County, and President of the Florida State Association of Supervisors of Elections, moved to intervene as defendants. (R3-439-47.)

The Circuit Court granted intervention. (R3-459, 461.) The court also permitted the Amended Complaint. (R3-461.) On the merits, the lower court ruled that the precinct-based scheme for provisional voting constitutes a permissible regulation of elections under Article VI, §1 of the Florida Constitution. (R3-461-62.) With respect to the temporary injunction, the Circuit Court accordingly held that Appellants were unlikely to succeed. (R3-461.) The court also concluded that there was no irreparable harm, reasoning that provisional ballots would not be issued until the November election and there would be ample time before then to resolve the case. (*Id.*) The lower court dismissed the Amended Complaint with prejudice for failure to state a claim. (R3-462.) The court also denied class

certification. (R3-461.)

On September 28, 2004, the same day the Circuit Court ruled, Appellants filed a Notice of Appeal, as well as a Suggestion of Certification to this Court. (R3-463-69.) On October 5, 2004, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The Circuit Court's decisions to dismiss the Amended Complaint for failure to state a claim and to deny a temporary injunction should be reversed. The portions of Section 101.048 that deny constitutionally qualified voters the right to cast and have counted provisional ballots on the basis of voters' precinct residency violate both Article VI, §2 and Article I, §1 of the Florida Constitution.

Article VI, §2 sets forth the exclusive qualifications for voting: United States citizenship, minimum age of eighteen, residency in Florida, and registration. The Constitution makes voters who satisfy these qualifications "elector[s] of the *county* where registered." Art. VI, §2, Fla. Const. (emphasis added). It is well-established that the Legislature is powerless to modify the constitutional qualifications for suffrage. *State ex rel. Landis v. County Bd. of Pub. Instruc. of Hillsborough County*, 188 So. 88, 89 (Fla. 1939). By redefining voter eligibility to include an inflexible *precinct* residence requirement not set forth in the Constitution, Section 101.048 denies the right to vote to electors who meet all constitutional qualifications

for suffrage. Instead, even though voters have the constitutional right to be "elector[s] of the county where registered" under Article VI, §2, Section 101.048 impermissibly relegates voters to being electors only of a precinct. Although the Legislature may regulate elections, it may not constrain the geographic breadth of the right to vote in derogation of the Constitution.

The provisional ballot statute is also unconstitutional for a wholly separate reason: The precinct requirement of Section 101.048 impermissibly infringes upon the fundamental right to vote, as guaranteed by both Article VI, §2 and Article I, §1. Section 101.048 is subject to strict scrutiny because it "implicates substantial voting . . . rights" by disenfranchising constitutionally qualified electors. *Libertarian Party of Florida v. Smith*, 687 So.2d 1291, 1294 (Fla. 1997). But under any standard of review, the challenged portions of Section 101.048 are unconstitutional because they are not "reasonable or necessary" to further any state interest. *Treiman v. Malmquist*, 342 So.2d 972, 975 (Fla. 1977). The precinct requirement undermines the Legislature's stated interest in ensuring that all registered, eligible voters are able to vote. Nor is the precinct requirement necessary to promote the State's interest in orderly elections. Florida already permits voters in some circumstances to vote outside their assigned precinct. *See* §101.657, Fla. Stat. The neighboring state of Georgia does not invalidate provisional ballots on the basis of

precinct, and has not experienced any resulting administrative problems. (R2-348.) Indeed, the precinct requirement may well *increase* administrative burdens (and therefore add to voting delays) by requiring poll workers to engage in detailed inquiries into eligibility rather than simply to provide all voters whose names are not on the precinct register with provisional ballots.

Appellants do *not* contend that the Florida Constitution forbids the use of precincts to make the voting process more convenient for all concerned. The precinct system is certainly appropriate as the ordinary method for regular voting. But when voters appear to vote at a precinct to which they have not been assigned, perhaps because of an error by elections officials, there must be some mechanism to permit those voters to cast a ballot. Without a back-up voting mechanism, voters who do nothing wrong will be disenfranchised in violation of the Constitution. This was the point of adopting provisional ballots, but the Legislature, in enacting Section 101.048, did not comply with the Constitution. Permitting voters to cast a provisional ballot in compliance with the State Constitution will not interfere with Florida's system for regular voting, but would merely provide a constitutional safety net for voters who fall through that system.

For these reasons, Appellants have not only stated a claim such that the dismissal of this action should be reversed, but have shown a substantial likelihood

of success on the merits. This merits showing, in combination with the irreparable harm Florida voters will suffer in the upcoming election because they will be unconstitutionally disenfranchised, and the substantial public interest in ensuring a legitimate election where all eligible voters are permitted to vote, demonstrates that the Circuit Court also erred in denying the temporary injunction. Relief is necessary now because otherwise it is inevitable that voters who make every effort to vote will be disenfranchised.

STANDARD OF REVIEW

The Circuit Court's holding that the Amended Complaint fails to state a claim is a question of law reviewable *de novo*. *See, e.g., Siegle v. Progressive Consumers Ins. Co.*, 819 So.2d 732, 734-35 (Fla. 2002). Because the Circuit Court's denial of injunctive relief was premised on conclusions of law, that decision is also reviewable *de novo*. *See, e.g.*, *Smith v. Coalition to Reduce Class Size*, 827 So.2d 959 (Fla. 2002). The same standard applies to all of the points discussed below.

ARGUMENT

In Point I below, we demonstrate that the provisional ballot statute is

unconstitutional for two separate reasons. This merits discussion shows why the Circuit Court erred as a matter of law in both dismissing the Amended Complaint and failing to find a substantial likelihood of success to support a temporary injunction. In Point II, we discuss the remaining factors counseling in favor of a temporary injunction. In Point III, we describe the relief requested. Finally, in Point IV, we show that neither the doctrine of standing nor of laches bars this suit.

I. FLORIDA'S PROVISIONAL BALLOT STATUTE UNCONSTITUTIONALLY RELIES ON PRECINCT RESIDENCY

A. The Statute Modifies the Qualifications for Voting in Violation of Article VI, §2

The first reason that Section 101.048 violates the Florida Constitution is that Article VI, §2 sets forth the exclusive qualifications for voting in Florida and creates a *per se* prohibition against the Legislature imposing an additional precinct residency requirement.

1. The Legislature May Not Modify the Voter Qualifications Set Forth in the Constitution

Article VI, §2 of the Florida Constitution 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.) The Constitution thus sets forth elector

qualifications relating to citizenship, age, residency within the State, and registration. Upon meeting these qualifications, a person becomes an elector of the county. There is no constitutional qualification regarding residency in an assigned precinct; nor is it a registration requirement.

It is well established that the Legislature is forbidden from "plac[ing] [statutory] restrictions on the qualification of electors which will prohibit any of those electors who may be qualified to vote in such elections under the provisions of the Constitution from participating in such election." *Landis*, 188 So. at 89. In *Landis*, this Court held unconstitutional a statute that limited the right to vote in certain elections to those voters who had voted in the prior general election because the statute prohibited constitutionally eligible voters from participating in elections on the basis of criteria not contained in the Constitution (having voted in the prior general election). *Id.* at 89.[4] *See also Bowden v. Carter*, 65 So.2d 871, 873 (Fla.

[4] Although *Landis* was decided under an earlier version of the Florida Constitution, that version, like the current one, both set forth specific elector qualifications, including requirements relating to citizenship, age, and residence, and required voters to register. *See* Art. VI, §1, Fla. Const. (1885, Amended, Joint Resolution 2, Acts 1893; adopted at general election, 1894); Art. VI, §2, Fla. Const. (1885). Given the structural parallel between the version of the Constitution in effect at the time *Landis* was decided and the current version, "interpretations of the former [version of the Constitution] are persuasive for our analysis here." *Bath Club v. Dade County*, 394 So.2d 110, 112 n.5 (Fla. 1981) (relying on interpretations of predecessor to Article II, §5(a)).

1953) ("It is universally recognized that where the constitution prescribes the qualifications for suffrage, the legislature is powerless to modify such qualifications."); *Riley v. Holmer*, 131 So. 330, 331 (Fla. 1930) ("Where the Constitution in terms prescribes qualifications for suffrage, the Legislature is powerless to modify these qualifications."); *State ex rel. Lamar v. Dillon*, 14 So. 383, 387 (Fla. 1893) ("Where a constitution has conferred the right, and prescribed the qualifications of electors, it, of course, is paramount until amended, and the legislature cannot change or add to them in any way.").

The rationale underlying the prohibition against legislative modifications of elector qualifications is that "when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision." *Thomas v. State ex rel. Cobb*, 58 So.2d 173, 179 (Fla. 1952) (internal quotation marks, citation omitted).

Under the Florida Constitution, citizens aged eighteen and older, who are residents of Florida and who have registered to vote, are constitutionally entitled to be "elector[s] of the *county* where registered." Art. VI, §2, Fla. Const. (emphasis added). But in allowing for provisional ballots, the Legislature unconstitutionally provided that voters are not entitled to cast a provisional ballot unless they "claim[]

to be . . . eligible to vote at the precinct" and moreover that if "the person voting the provisional ballot was not 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 . . . envelope shall be marked 'Rejected as Illegal.'" §101.048(1), (2)(b)(2.), Fla. Stat. (emphasis added).

Thus, even though electors may have satisfied all of the constitutional qualifications for suffrage under Article VI, §2, Section 101.048 nevertheless imposes a new voter eligibility requirement: precinct residency. This law disallows the votes of voters – who were otherwise constitutionally entitled to vote in a particular *county* as a matter of right – because of the *precinct* in which they reside. Like the statute in *Landis*, Section 101.048 prohibits constitutionally eligible voters from participating in elections on the basis of a criterion not contained in the Constitution (here, residency in a particular precinct). That being so, it "contravenes, and is repugnant to, the standard of qualifications established by . . . the Constitution and is, therefore, of no force and effect." *Landis*, 188 So. at 89.[5]

[5] The Florida Constitution has always contained a clause setting forth elector qualifications. *See* Art. VI, §1, Fla. Const. (1838); Art. VI, §1, Fla. Const. (1861); Art. VI, §1, Fla. Const. (1865); Art. XIV, §1, Fla. Const. (1868); Art. VI, §1 Fla. Const. (1885); Art. VI, §2, Fla. Const. (1968). Various versions of the elector qualifications clause have contained requirements that electors be residents of the State or county. *See, e.g.*, Art. VI, §1, Fla. Const. (1838) (elector must be resident (continued)

The modification of voter qualifications at issue in this case is even more problematic than that in *Landis* because the challenged portions of Section 101.048 modify one of the voter qualifications actually set forth in the Constitution – residency. The Constitution provides a state residency requirement and makes voters electors of their county. Just as the Legislature is powerless to substitute an alternative age qualification for voting, *Riley*, 131 So. at 940-41, so too is it precluded from substituting an alternative precinct residency requirement.

Indeed, this Court has made plain that the Legislature may not constrain the geographic breadth of the right to vote beyond that set forth in the Constitution. In *Ervin v. Richardson*, 70 So.2d 585 (Fla. 1954), the Court held unconstitutional a statute that provided for the nomination of county commissioners by district. The Constitution gave "'the qualified electors of said county'" the right to vote for county commissioners. *Id.* at 586 (quoting Art. VIII, §5, Fla. Const.). By reducing the geographic breadth of the right to vote for commissioners, so that voters were no longer electors of the county, but only of the district where they resided, "the act

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of Florida for two years and county for six months); Art. VI, §1, Fla. Const. (1861) (elector must be resident of Florida for one year and county for six months); Art. VI, §2, Fla. Const. (current) (elector must be resident of Florida). When the people of the State of Florida desire to impose geographic residency requirements, they have done so in the Constitution. But the Constitution has never contained a precinct residency requirement.

impose[d] an undue burden on the right of franchise." *Id.* at 588. Similarly, Section 101.048 unconstitutionally constrains the geographic breadth of the right to vote, so that electors are no longer "elector[s] of the county," Art. VI, §2, Fla. Const., but only of the precinct in which they reside.

2. The Power to Regulate Elections in Article VI, §1 Does Not Extend to Modifying Voter Qualifications in Violation of Article VI, §2

Contrary to the Circuit Court's conclusion, the Legislature's power to regulate voter registration and elections, *see* Art. VI, §1 ("Registration and elections shall . . . be regulated by law"), does not save the challenged portions of Section 101.048 from invalidity as an unconstitutional modification of voter qualifications. This is so for two independent reasons.

First, there can be no doubt that a residency requirement constitutes a form of voter qualification because Article VI, §2 explicitly defines it as such in enumerating voter qualifications. Section 101.048 thus differs from laws regulating elections – for instance, those that specify the hours polls are open – because the Constitution delineates geographic residency as a type of voter qualification. Under Florida's constitutional framework, any law, like Section 101.048, that imposes an additional residency requirement necessarily regulates voter qualifications.

Indeed, the Legislature itself framed the precinct residency requirement in the

manner of a qualification. *See* §101.048(1), Fla. Stat. ("a voter claiming to be properly registered in the county and *eligible to vote at the precinct* in the election" shall receive a provisional ballot) (emphasis added); §101.048(2), Fla. Stat. (directing county canvassing board to count ballot if voter is "*entitled to vote at the precinct* where the person cast a vote in the election") (emphasis added).[6]

Second, this Court has repeatedly stated that the *general* grant of authority to the Legislature to regulate elections does not supersede the Legislature's obligation to obey the *specific* constitutional prohibition against modification of voter qualifications. "A special constitutional or statutory provision treating a specific subject-matter will generally supersede and overcome a general provision treating the same subject." *Riley*, 131 So. at 941 (constitutional provision authorizing Legislature to enact laws "relieving minors from legal disabilities" did not authorize Legislature to modify age qualification for voting in violation of "special provision

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[6] The statutory scheme contradicts any effort to cast Section 101.048 as a regulation of voter *registration* rather than voter qualifications. Voter registration is linked to an elector's *county* of residence. *See* §97.041(1)(a)(4), Fla. Stat. (2002) (voter must be "legal resident of the county in which that person seeks to be registered"); *see also* Art. VI, §2, Fla. Const. (voter "shall be an elector of the county where registered"). In addition, voter registration closes 29 days before an election. §97.055, Fla. Stat. Section 101.048 is not a voter registration requirement because the voters disqualified from casting valid provisional ballots on election day include those who have properly registered to vote in their county of residence more than 29 days prior to the election.

dealing with the right of suffrage"); *see also Reform Party of Florida v. Black*, _ So.2d _, 2004 WL 2075415 at *7 (Fla. 2004) (noting rule that constitutionally granted powers may not be exercised so that they violate other specific constitutional provisions).

Thus, in *Barndollar v. Sunset Realty Corp.*, 379 So.2d 1278 (Fla. 1980), this Court rejected the same type of argument relied upon by the Circuit Court here – that the Legislature's power to regulate elections constitutes a grant of authority to modify voter qualifications. Under the statute at issue in that case, the Legislature had conferred the right to vote in certain municipal elections to specified non-residents. *Id.* at 1280. This Court rejected the effort to justify the statute as authorized by the Constitution's grant of authority to the Legislature to regulate "'[r]egistration and elections in municipalities.'" *Id.* (quoting Art. VI, §6, Fla. Const.). As the Court explained, "[t]his provision does not pertain to the qualifications of voters," which are instead governed by Article VI, §2. *Id.* The Court accordingly struck down the statute. *Id.* at 1281.

Like the statute at issue in *Barndollar*, Section 101.048 alters the constitutional residency qualifications for voting. Also like the statute at issue in *Barndollar*, the Legislature's general power to regulate elections and registration does not save the statute. Any other result would permit the Legislature to enact

unconstitutional voter qualifications through the guise of voter registration or elections regulations. Under such a theory, the Legislature could for instance permit only those 21 and older to register to vote or to cast votes on election day, effectively nullifying the constitutional right of those 18 and older to vote.

3. The Constitution Requires a Safeguard So Eligible Voters Will Not Be Disenfranchised

Appellants do not contend that the Legislature is prohibited from using precincts as an *initial matter* to make the voting process more convenient, both for elections officials and voters, by requiring voters to appear at their assigned precincts to cast a regular ballot. If, however, a voter appears at another precinct within the county, perhaps because an election official has not provided proper notice of the designated precinct, there must be some mechanism to permit the voter to vote. Otherwise, precinct residency – an unconstitutional voter qualification – would stand as a limitation on the right of suffrage. The use of provisional ballots is one way to guard against disenfranchisement of constitutionally qualified voters. But tying such ballots to precinct residency, as Section 101.048 does, squarely violates Article VI, §2.[7]

[7] That Section 101.048 permits more voters to cast votes than was the case prior to the statute's enactment is irrelevant. Prior to enactment of the statute, two distinct groups of constitutionally qualified voters were disenfranchised in Florida:

(continued)

Casting a vote at the assigned precinct is certainly not a uniform requirement under Florida's statutory scheme. The early voting statute, for example, permits voters to cast ballots before election day outside their assigned precinct, as long as they do so within the county. *See* §101.657, Fla. Stat. (early voting at central location in county). It is a voter's county of residence that bears significance – and that significance is constitutional. Art. VI, §2, Fla. Const. (voter is "elector of the county where registered").[8]

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(1) those actually residing within the precinct at which they appear to vote who for some reason were not on the precinct list, and (2) those residing outside the precinct at which they appear to vote. Both groups of voters have a right to vote. That Section 101.048 attempts to provide a safeguard for the first group does not excuse its failure to provide one for the second or render it a proper mechanism for preventing the unconstitutional disenfranchisement of voters.

Nor does permitting provisional voters but not regular voters to cast votes without regard to precinct residency raise equal protection concerns. Equal protection principles do not require equal treatment of *differently* situated individuals. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications," but rather forbids "treating differently persons who are in all relevant respects alike."). Provisional voters and regular voters are not similarly situated. Provisional voters are defined as those voters "whose eligibility cannot be determined." §101.048(1), Fla. Stat. Regular voters, by contrast, are those whose are eligible because their names appear on the precinct register. §101.043(1), Fla. Stat. Because provisional and regular voters are differently situated with respect to the ability to verify their eligibility, equal protection principles do not prohibit the State from providing each group of voters a different voting mechanism.

[8] That Florida has long used precincts does not change the constitutional analysis. In *Ervin*, that district-based elections of county commissioners had "been (continued)

Nor is there any reason to believe that invalidating the unconstitutional provisions of Section 101.048 will result in a substantial number of voters purposely voting outside their assigned precincts, thereby causing problems on election day. Rather, the evidence points to exactly the opposite conclusion: Georgia, for instance, allows voters whose eligibility to vote cannot be determined to cast provisional ballots, but does not require that the ballots be cast at the voters' assigned precinct in order to be counted. *See* Ga. Code §21-2-419(c)(2). That system has been implemented without difficulty. (R2-348.)

In the end, Article VI, §2 of the Constitution forbids Section 101.048's precinct residency requirement. The Constitution may always be amended if it is creating unworkable elections. But unless it is amended, it must be followed.

B. The Statute Impermissibly Infringes on the Fundamental Right to Vote Guaranteed by Article VI, §2 and Article I, §1

As discussed above, Section 101.048 violates the *per se* prohibition against legislative modification of the voter qualifications in Article VI, §2. The statute is also unconstitutional for a separate and independent reason: Even if the Legislature

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the established policy of the State for many years" did not permit the Court to "escape the . . . conclusion that the effect of it is to unduly limit the voter's choice in the election" as protected by the Constitution. 70 So.2d at 587.

has an implied power to modify voter qualifications, it may not do so in a way that effectively nullifies the fundamental right to vote. The right to vote and participate in the democratic process is guaranteed not only by Article VI, §2, but also by Article I, §1 of the Florida Constitution. Article I, §1 provides: "All political 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." Section 101.048 fails the exacting scrutiny required by Article VI, §2, and Article I, §1.

1. Section 101.048 Is Subject to Strict Scrutiny Because it Substantially Affects the Right to Vote

Florida courts have jealously guarded the right to vote:

> The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So.2d 259, 263 (Fla. 1976). Statutes that implicate voting rights are subject to constitutional scrutiny, and the greater the asserted injury to voting rights, the more rigorous the scrutiny. *See Libertarian Party*, 687 So.2d at 1294. A statute that "implicates substantial voting, associational and expressive rights" is subject to strict scrutiny and must be narrowly tailored to meet a compelling interest. *Id.*

Section 101.048 substantially affects the right to vote and is therefore subject to strict scrutiny because the statute will completely disenfranchise constitutionally qualified electors in the following three ways:

First, Section 101.048 denies a provisional ballot to constitutionally qualified electors who, through no fault of their own, appear to vote outside their assigned precinct. In past elections, Florida elections officials have failed to provide voters with notice of precinct changes and provided voters with incorrect information regarding precinct changes. (R3-435-36.) Natural disasters such as hurricanes have resulted in eleventh hour changes in polling place locations. (RJN, Exh. L.) Moreover, 1,000 new precincts have been added and many other precinct boundaries have been changed statewide since the last high-turnout election in 2000, affecting hundreds of thousands of voters. *See supra* at 5-6. For many voters who appear to vote at a polling place outside their assigned precinct through no fault of their own, the denial of a provisional ballot will eliminate the opportunity to vote altogether: Many poll workers will not direct voters to the proper precinct and some voters will not be able to travel to a different location. *See supra* at 6-7.

Second, Section 101.048 disenfranchises those voters whom poll workers mistakenly allow to cast provisional ballots outside their assigned precinct. Some poll workers, either out of a misguided attempt to be helpful, or because it is the

easiest option, will simply provide voters with provisional ballots if their names do not appear on the precinct register. *See supra* at 7-8. Pursuant to Section 101.048(2), the county canvassing boards *must* reject these votes. These voters will leave the polling place with the false confidence that they have cast a ballot, only later to discover that their votes did not count.

Third, Section 101.048 denies the right to cast a provisional ballot to constitutionally qualified electors who are uncertain as to their assigned precinct, even if they actually appear to vote *at the polling place for their assigned precinct*. Due to administrative errors that inevitably occur, the names of some qualified, registered electors who reside within a precinct will not appear on that precinct's register, preventing those voters from casting a regular ballot. If any of these voters are genuinely uncertain about their assigned precinct, they will not be entitled to cast provisional ballots. §101.048(1), Fla. Stat. (requiring voter to *claim* to be eligible to vote in precinct to receive provisional ballot); §101.048(3) (requiring voter to sign provisional ballot affidavit acknowledging criminal penalties for fraudulent voting). These voters will be denied the right to vote.

The *denial* of the right to vote is undoubtedly a substantial infringement on that right. Section 101.048 does more than regulate the technicalities of how votes are cast and counted. By placing restrictions, based on voter characteristics

(namely, precinct residency), on who can cast a ballot and on whose ballots will be counted, the statute directly limits the franchise. To justify this serious infringement on the right to vote, Section 101.048 must pass strict scrutiny.

Should this Court instead impose the more deferential standard of review reserved for elections laws that do not substantially infringe voting rights, the Court must then determine whether Section 101.048 imposes a "restraint[] on the elective process" that is "reasonable and *necessary*." *Treiman*, 342 So.2d at 975 (emphasis added). Given the strong protection of the right to vote, courts do not hesitate to strike down unreasonable or unnecessary laws. *See, e.g., id.* at 976.

2. The Precinct-Residency Requirement in Section 101.048 Fails Any Level of Constitutional Scrutiny

Whatever level of constitutional scrutiny the Court applies, Section 101.048 fails. As a threshold matter, the Legislature's stated purpose in enacting Section 101.048 was to allow all voters entitled to vote to be given the opportunity to do so, while preventing ineligible voters from casting ballots. (RJN, Exh. A at 143, Exh. B at 1-2.) This purpose is not at all served, and is indeed undermined, by preventing constitutionally qualified electors from voting. The stated statutory purpose of allowing all eligible voters to vote can only be furthered by allowing individuals lawfully registered in the county to cast provisional ballots and by requiring that

those ballots be counted.[9]

Nor is the precinct residency requirement of Section 101.048 justified by the State's interest in promoting an orderly election process.

First, there is simply no evidence to suggest that the precinct-residency requirement in the provisional ballot statute is necessary for conducting an orderly election. This case does not challenge the assignment of voters to precincts for the purpose of regular voting. §101.045, Fla. Stat. The vast majority of individuals will continue to vote in their assigned precinct – for the comfort level of knowing their vote has been immediately counted, rather than determined at some later date; to avoid the additional burden of preparing an affidavit to vote provisionally; to be able to vote in all races, including ones particular to their assigned precinct; and because that is where they have been assigned and voters' assigned polling places are ordinarily conveniently located and so, absent uncertainty, there is no reason to vote elsewhere. This case involves only the relatively small portion of voters,

[9] The statute does not even serve the purpose of ensuring that only voters who *actually* reside in the precinct have the ability to cast provisional ballots. Only voters who "*claim*[] to be . . . eligible to vote at the precinct in the election," are "entitled to vote a provisional ballot." §101.048(1), Fla. Stat. (emphasis added). Voters who actually reside in the precinct, but are uncertain as to their precinct assignment, will be unable to *claim* that they have appeared to vote in the assigned precinct and will be denied a provisional ballot.

compared to the entire electorate, that will cast provisional ballots. Requiring this discrete portion of the overall electorate to vote at the assigned precinct is certainly not necessary to conduct an orderly election.

Second, it is entirely feasible to allow a voter to cast a provisional ballot in a precinct other than that designated by local elections officials and for that ballot to be counted. Florida elections officials have experience with early voting procedures that allow voters to cast ballots outside their assigned precinct. *See* §101.657, Fla. Stat. Moreover, other states such as Georgia and California have implemented provisional ballot statutes that contain no precinct constraints.[10] Georgia's Director of Elections states that elections officials "are administering Georgia's provisional ballot laws without difficulty." (R2-348.) The systems in place in Georgia and California, both of which are large states like Florida, refute any dire predictions that allowing voters access to provisional ballots anywhere in the county will open the floodgates and undermine the even distribution of voters and poll workers across

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[10] *See, e.g.*, Ga. Code §21-2-419(c)(2) ("If the registrars determine after the polls close . . . that the person voting the provisional ballot timely registered and was eligible and entitled to vote in the primary or election but voted in the wrong precinct . . . [t]he superintendent shall count such person's votes which were cast for candidates in those races for which the person was entitled to vote"); Cal. Elec. Code §14310(c)(3) ("The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.").

the county's polling places.

Third, the statute's precinct-residency requirement is not necessary to prevent an administrative burden. Any provisional ballot system will impose administrative burdens. The only issue is the incremental burden that would be caused by eliminating the precinct requirement, and the precinct requirement in the statute may well *increase* administrative burdens. It would be much easier for poll workers simply to provide provisional ballots to persons not listed on the precinct's register. Instead, Section 101.048 requires poll workers to perform an inquiry into a voter's assigned precinct. *See supra* at 7-8 & n.3. This in turn can result in delays in voting – such as lengthy lines – that affect all voters.

In sum, the precinct residency requirement of Section 101.048 does not alleviate administrative burdens in the administration of the provisional ballot statute, and it is entirely feasible – if not easier – to administer the underlying provisional ballot scheme without it. As a result, the requirement is neither sufficiently tailored to survive strict scrutiny nor does it qualify as a "reasonable and necessary restraint[] on the elective process." *Treiman*, 342 So.2d at 975.

Regulations implementing the elections process that unduly constrain constitutional rights have the effect of destroying them and must be struck down. *See Lamar*, 14 So. at 394. Although the Legislature has the authority to regulate

elections, under some circumstances such regulations "will completely destroy the liberty of choice." *Id.* The plaintiffs in *Lamar* claimed that their right to "vote for whom they pleased" was violated when they were restricted to voting "for persons whose names were placed upon an official ballot" without a write-in option. *Id.* at 393. This Court agreed and held the restriction unconstitutional. *Id.* at 394. Even though the Legislature permitted voters to choose between any of the candidates on the ballot and had not completely violated voter free choice, by for instance requiring all voters to vote for a particular candidate on the ballot, the prohibition against voting for candidates whose names did not appear on the ballot constituted an unconstitutional limitation. *See id.* Here, as in *Lamar*, Section 101.048 – even if it were not *per se* unconstitutional as a modification of voter qualifications as discussed in Point I.A – unduly constrains the right to vote so as to effectively destroy it for some voters.[11] No matter how much effort voters in good faith make to vote, the provisional ballot statute will still result in disenfranchisement.[12]

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[11] Although the Legislature has the authority as a general matter to regulate elections, such regulation cannot unnecessarily impede the right to cast a ballot and have it counted. For example, the Legislature can designate the hours polls are open on election day. But limiting polling hours to two hours would be an impermissible restraint on the right to vote by disenfranchising qualified electors – even though such a law does not close polling places entirely. By denying provisional ballots to electors who attempt to vote in a non-assigned precinct through no fault of their own, Section 101.048 amounts to an unconstitutional

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II. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING THE TEMPORARY INJUNCTION

All of the elements required to issue a temporary injunction are present in this

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limitation on the right to vote.

[12] Appellees may argue that, at least insofar as the statute affects presidential races, Article II of the federal Constitution limits this Court's power to find that the challenged portions of Section 101.048 violate the Florida Constitution. *See Reform Party*, 2004 WL 2075415 at *8. This argument is without merit for two reasons. First, the Legislature enacted Section 101.048 as a generally applicable elections law, thus reflecting legislative intent to have a unitary provisional ballot system for all elections. There is no indication that the Legislature intended to invoke its authority under Article II. Nor is there any indication that the Legislature intended to exempt itself from State constitutional requirements or to adopt a bifurcated system – unconstitutional as a matter of State law for presidential races and obedient to the Florida Constitution for all other races. The Court should give effect to legislative intent and require a unitary, constitutional provisional ballot system for all elections – one that contains no precinct residency requirement.

Second, at most, Article II of the federal Constitution means only that Florida courts cannot *construe* statutes in a manner that would infringe on the Legislature's power to provide for the selection of presidential electors. *Id.* at *10 ("If we were to more narrowly *construe* the term the Legislature intended, we could run afoul of article II.") (emphasis added); *Bush v. Gore*, 531 U.S. 98, 115 (2000) (plurality opinion expressing view that "*interpretation* of the Florida election laws" violated Article II) (emphasis added). Article II is not implicated where a state legislature lacks the power under its *own constitution* to enact a statute. As the United States Supreme Court explained in delineating the scope of a state legislature's power under Article II, "[t]he legislative power is the supreme authority, *except as limited by the constitution of the state.*" *McPherson v. Blacker*, 146 U.S. 1, 6-7 (1892) (emphasis added). Thus, Article II does not authorize the Legislature to provide for the selection of presidential electors in a manner that the State Constitution itself prohibits. And nothing in Article II eliminates the authority of this Court to serve as the final arbiter of the Florida Constitution.

case: (1) a substantial likelihood of success on the merits, (2) a likelihood of irreparable harm, (3) the unavailability of an adequate remedy at law, and (4) considerations of the public interest. *See, e.g.*, *Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla. 1995).

A. Appellants have Established a Substantial Likelihood of Success on the Merits

For the given reasons in Point I, there is a substantial likelihood of success on the merits. The Circuit Court erred as a matter of law in finding to the contrary.

B. Irreparable Harm Will Result from the Provisional Ballot Statute and No Remedy at Law Can Compensate for this Harm

The Circuit Court also erred in concluding that there is no irreparable injury. The evidence shows unequivocally that the provisional ballot statute's precinct requirement will cause severe irreparable injury to the right to vote. *See supra* at 4-8, 27-28. For instance, some voters will be denied the opportunity to cast a provisional ballot at all because elections officials provide incorrect notice of precinct changes (R3-435-36), due to uncertainty as to polling place location because of unforeseen circumstances such as hurricanes (RJN, Exh. L), and for other legitimate reasons. Other voters will cast provisional ballots outside their assigned precinct and those votes will not be counted. (R2-350, R3-401-02, 436.) These and other electors will be denied their constitutional right to vote if the

unconstitutional portions of Section 101.048 are enforced in the upcoming election.

Moreover, once the election transpires, that right can never be recovered. No amount of money damages can remedy the loss of the franchise. *Cf. Florida Power Corp. v. City of Winter Park*, 827 So.2d 322, 327 (Fla. 5th DCA 2002) (no irreparable injury where money damages provides an adequate remedy at law).

Where, as here, plaintiffs make a strong showing of the probable unconstitutionality of a statute and seek "permanent relief against the enforcement of the statute challenged," a trial court appropriately "stay[s] the enforcement of the statute pendente lite, when otherwise the enforcement of such statute pendente lite might result in [injuries] for which no redress could be later had." *Mayo v. Florida Grapefruit Growers' Protective Assn.*, 151 So. 25, 44 (Fla. 1933). Under these circumstances, the Circuit Court erred as a matter of law in failing to find irreparable injury to the rights of Florida voters.[13]

C. Public Interest Considerations Support Issuing an Injunction

There can be no question about the fundamental importance of the right to vote. *See, e.g., Gore v. Harris*, 772 So.2d 1243, 1253 (Fla. 2000) ("This essential

[13] Although the Circuit Court found no irreparable harm because provisional ballots will not be issued until election day (R3-461), it is critical that an injunction be in place *before* the election to prevent disenfranchisement of constitutionally qualified voters *on* election day.

principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court."). The public interest will be served by ensuring that all constitutionally qualified electors are allowed to vote. Indeed, no other result can ensure a legitimate election.

Even were the Court to weigh those fundamental interests against mere administrative interests, for the reasons described above the implementation of the requested injunction will pose no great administrative burden on elections officials as the Georgia example shows, and indeed is likely to reduce or facilitate the implementation of elections officials' responsibilities under the provisional ballot statute. *See supra* at 31-32. In particular, permitting poll workers simply to hand out provisional ballots when a voter appears who is not listed on the rolls will greatly ease the current administrative burden.

Although any provisional ballot system creates additional administrative responsibilities relating to verification of voter eligibility, a provisional ballot system like Florida's, that requires voters to cast provisional ballots in their assigned precinct, shifts the bulk of verification responsibilities to poll workers. A scheme that allows voters to cast provisional ballots outside their assigned precinct, by contrast, vests primary administrative responsibility with the central elections

officials who actually count the provisional ballots. Allocating voter eligibility verification responsibilities to central elections officers, rather than individual poll workers, allows for greater ease of implementation because central elections officers have superior training, resources, and expertise. (R2-350-51, R3-436-37.) Moreover, the more that requirements can be centralized, the greater the chance of uniformity within a county, (R2-350-51, R3-436-37), and ultimately, the greater the protection for the right to vote.[14]

Finally, because, in the event of a close election, the handling of provisional ballots could determine who prevails, the public interest will also be served by remedying the constitutional violation prior to the election. Otherwise, the Florida courts may be called upon to address the constitutionality of Section 101.048 in the chaotic days following the election to determine whether rejected provisional ballots should be counted. The issue should be resolved now while there is time to

[14] Counting the ballots of individuals who vote outside their assigned precinct can, in certain circumstances, require the Canvassing Board to count votes for only some races on the ballot. The Canvassing Board can easily determine the small number of localized races for which the voter is ineligible, and count the remaining county, state, and national races. This is precisely the system used in Georgia without difficulty. (R2-348.) Florida county Canvassing Boards already have expertise in counting only the portions of ballots for which voters are entitled to vote. *See* §101.663, Fla. Stat. (2002) (voters may vote absentee ballot in county of former residence, but only voters' statewide votes may count).

implement a remedy and ensure that the election proceeds smoothly.

III. RELIEF REQUESTED

This Court should rule for Appellants and reverse the Circuit Court's erroneous dismissal of the Amended Complaint and denial of temporary injunctive relief. Because time is short, to ensure that the unconstitutional portions of Section 101.048 are not enforced in the upcoming election, the Court should provide appropriate instructions to the Circuit Court.

First, a temporary injunction should issue requiring Appellee Hood to issue uniform instructions to *all* Supervisors of Elections and Canvassing Boards that they are not to deny constitutionally qualified voters the opportunity to cast provisional ballots solely because of the voters' precinct assignment, and they are to count the ballots of constitutionally qualified voters who cast provisional ballots at polling places within their county of residence, regardless of their designated precinct. *See* §97.012(1), Fla. Stat. (Supp. 2004) (Secretary of State has duty to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws").

Second, Appellee Hood should be prohibited from taking any measures to enforce or implement the unconstitutional provisions of Section 101.048. Appellee Hood earlier this year issued a provisional ballot envelope that states: "YOUR

BALLOT WILL NOT COUNT IF YOU DO NOT VOTE IN THE CORRECT PRECINCT." Form DS DE 49 (effective February 2, 2004). The Circuit Court should be instructed to issue an injunction prohibiting Appellee Hood from circulating, making available, or requiring counties to use the unconstitutional provisional ballot envelope or any other materials that implement the unconstitutional portions of Section 101.048.

Third, Supervisors of Elections have a statutory duty to oversee the administration of the upcoming election at the county level and the proper implementation of election laws, including the duty to train all poll workers on "balloting and polling place procedures" such as the precinct residency requirement. §§102.012, 102.014, 101.048(1), Fla. Stat. (2002). To prevent enforcement of an unconstitutional statute, the Circuit Court should be instructed to issue a temporary injunction prohibiting Appellee Supervisor of Elections Sancho from implementing balloting and polling place procedures that deny constitutionally qualified voters the opportunity to cast a provisional ballot in their county of residence based solely on the voters' precinct assignment. The same injunction should apply to all members of the Class of Supervisors of Elections from the 67

counties in Florida.[15]

Fourth, Canvassing Boards have a statutory duty to determine the eligibility of voters who have cast provisional ballots and are required to reject provisional ballots cast by voters outside their assigned precinct. §101.048(2), Fla. Stat. The Circuit Court should issue a temporary injunction prohibiting Appellees Sancho, Aikens, and Sauls, in their capacity as members of the Leon County Canvassing Board, and all members of the Class of Canvassing Boards, from rejecting the

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[15] This Court should reverse the denial of the class certification motion to allow for classwide relief. A constitutional challenge to a state statute administered by county officials presents the classic case for a defendants' class action. *See, e.g., CBS, Inc. v. Smith*, 681 F. Supp. 794, 801-02 (S.D. Fla. 1988) (certifying defendant class of all county Supervisors of Elections in Florida). The Circuit Court did not disagree that each proposed class satisfies the requirements of numerosity, commonality, typicality, and adequacy of representation. Rule 1.220(a), Fla. R. Civ. P. The lower court instead denied the motion to certify defendant classes of county Supervisors of Elections and Canvassing Board members on the ground that any rulings would have consistent statewide application to which county elections officials, as constitutional officers, could be presumed to follow. (R3-461.) But it remains the case that this is a proper class action because if there were separate challenges to Section 101.048 in other counties there would be "a risk of . . . inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct" for voters across the State. Rule 1.220(b)(1)(A), Fla. R. Civ. P; *see also CBS*, 681 F. Supp. at 802. This action may also be maintained under Rule 1.220(b)(2) because "the relief plaintiffs seek is identical as to each member of the defendant class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *NBC, Inc. v. Cleland*, 697 F. Supp. 1204, 1217 (N.D. Ga. 1988).

provisional ballots of constitutionally qualified voters cast in their county of residence based solely on the voters' precinct assignment and, in particular, from rejecting the votes on the ballots for any race or measure for which the voter was constitutionally eligible to vote based on the voter's residence.

Finally, the Circuit Court should be ordered to enter such other and further injunctive relief as is necessary to ensure a constitutional election.

IV. THIS ACTION WAS PROPERLY BROUGHT

In the Circuit Court, Appellee Hood claimed that Appellants lack standing to bring this lawsuit and that the case is barred by the doctrine of laches. We demonstrate below that these arguments are misplaced.

A. Appellants Have Standing

Appellants are a federation of labor unions and four separate labor unions, all of which have thousands of Florida members who are constitutionally qualified, registered voters who desire to have their votes counted; and four individual constitutionally qualified, registered voters who desire to have their votes counted. There can be no doubt that, particularly because this is an action under the declaratory judgment statute, there is standing to challenge a law that threatens to disenfranchise voters.

This Court has made plain that Florida's standing requirement is relaxed compared to the federal courts:

> Unlike the federal courts, Florida's circuit courts are tribunals of plenary jurisdiction. Art. V., §5, Fla. Const. They have authority over any matter not expressly denied them by the constitution or applicable statutes. Accordingly, the doctrine of standing certainly exists in Florida, but not in the rigid sense employed in the federal system.

Department of Revenue v. Kuhnlein, 646 So.2d 717, 720 (Fla. 1994); *see also Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 403 (Fla. 1996) ("in Florida, unlike in the federal system, the doctrine of standing has not been rigidly followed"). To be sure, "Florida recognizes a general standing requirement in the sense that every case must involve a real controversy." *Kuhnlein*, 646 So.2d at 720. But this means only that "the parties must not be requesting an advisory opinion." *Id.* at 721.

Florida's standing requirements parallel the standard for establishing jurisdiction in a declaratory judgment action. *Id.* "The purpose of the declaratory judgment statute is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations, and it should be liberally construed." *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla. 1991).

The individual Appellants are constitutionally qualified, registered voters who desire to have their votes counted. (R2-360-63.) They have standing in this

declaratory judgment action to challenge the portions of Section 101.048 that impose an unconstitutional precinct residency requirement on the right to cast a valid provisional ballot. That they may not yet have been disenfranchised by the challenged portions of Section 101.048 is of no significance. In *Kuhnlein*, various plaintiffs brought a declaratory judgment action challenging the constitutionality of a statute that imposed a fee on the registration of out of state cars in Florida by Florida residents. The State claimed "that various plaintiffs below lacked standing to pursue this case because they either have not paid the fee or have not requested a refund of any fee paid." 646 So.2d at 720. This Court rejected that argument:

> We find that the present case does involve an actual controversy that is directly affecting, or can directly affect, the lives of many Florida residents. This is so because the law in question here requires certain residents either to pay an allegedly illegal tax or *risk* being penalized by the State. . . . Accordingly, standing existed for the plaintiffs below to bring this action for declaratory judgment.

Id. at 721 (emphasis added).

Section 101.048 requires constitutionally qualified voters to appear at a particular precinct in order to cast a valid provisional ballot, or be disenfranchised. Provisional ballots have been rejected in past elections in Florida by virtue of the challenged statute. (R2-350, R3-401-02.) In light of the actual harm caused by the challenged portions of Section 101.048 to voters, there can be no question that

Appellants are not seeking an advisory opinion on an abstract controversy. Just as in *Kuhnlein*, where the Court found there was an actual controversy regardless of whether the plaintiffs had paid the fee in question, Florida voters risk disenfranchisement if they do not show up at their assigned precinct. Appellants have "a bona fide need for . . . a declaration based on present, ascertainable facts." *Martinez*, 582 So.2d at 1170-71.[16]

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[16] The Court need not examine whether all Appellants have standing so long as one does. *See Coalition for Adequacy and Fairness*, 680 So.2d at 403 n.4. Nonetheless, the unions have standing in their own right because this case "involve[s] an actual controversy that is directly affecting, or can directly affect, the lives of many Florida residents." *Kuhnlein*, 646 So.2d at 721. The unions also have standing to sue on behalf of their members. *See Cannery, Citrus, Drivers, Warehousemen and Allied Employees of Local 444 v. Winter Haven Hosp.*, 279 So.2d 23 (Fla. 1973) (union has standing to bring suit to protect rights of its members under Florida Constitution); *Florida Home Builders Assn. v. Dept. of Labor and Empl.*, 412 So. 2d 351 (Fla. 1982) (association has standing to bring suit on behalf of members where "(a) its members would otherwise have standing to sue in their own right; (b) the interests its seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"). Because some voters in any large group will inevitably appear at a non-assigned precinct (R3-435), the unions with their large numbers of members are perfectly suited to bring this action. The unions each have members who are constitutionally qualified registered voters who desire to have their votes counted. (R2-364, 366, 373.) For the reasons discussed above, these members have standing to sue in their own right. The right to vote and participate in the political process that the unions seek to protect is germane to each organization's purpose. (R2-364-79.) Because this case involves a straightforward legal question regarding the constitutionality of a state statute, the participation of the individual members is not necessary.

B. Laches is Inapplicable

Finally, the equitable doctrine of laches is inapplicable. The operative event for considering whether laches applies is the date the defendant actually violates the plaintiff's rights, not the date an unconstitutional statute was passed. *See Van Meter v. Kelsey*, 91 So.2d 327, 331 (Fla. 1956) (laches requires proving sufficient "acts or conduct" by defendant to "put plaintiff on notice that his rights were invaded"). Florida courts routinely allow individuals to challenge the constitutionality of statutes years after enactment. *See, e.g., Krishner v. McIver*, 697 So.2d 97, 100 (Fla. 1997) (constitutional challenge to law prohibiting assisted suicide first enacted in 1868). Were it otherwise, an individual to whom an unconstitutional statute was applied would be prohibited from challenging the statute, and unconstitutional statutes would be frozen into effect, simply because the statute was not applied to that plaintiff immediately following enactment.

In this case, Appellants do not seek to require that votes rejected in previous elections be counted – where the doctrine of laches could apply – but are seeking to prevent an unconstitutional denial of the right to vote *that has not yet occurred.* The violations about which Appellants are concerned will occur when Section 101.048 is implemented on election day in November to disenfranchise constitutionally qualified voters. Because the statute has not yet unconstitutionally

infringed voters' rights, no inexcusable delay has occurred. *See Van Meter*, 91 So.2d at 331 (laches applies where "the plaintiff, having had knowledge or notice of the defendants' conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his rights by suit").

Moreover, even if the doctrine of laches were applicable here, Appellees cannot show that they will sustain prejudice. *See Van Meter*, 91 So.2d at 331. Regardless of this lawsuit, election officials will implement a provisional ballot system in the upcoming election. Because Appellants challenge only small portions of the provisional ballot statute, the relief requested – that elections officials (1) give provisional ballots to all county residents who appear to vote and are not on the list, without taking the extra step of trying to discern the precinct to which the voter has been assigned, and (2) count those provisional ballots of individuals who are registered in the county – will impose minimal burdens relative to the entire provisional ballot system and may well simplify the system. Preparation for the handling provisional ballots in the upcoming election can proceed on course and need only be minimally altered by an injunction.

Equity requires addressing the constitutionality of the provisional ballot statute prior to the upcoming election. *See Polly v. Navarro*, 457 So.2d 1140, 1143 (4th Dist. DCA 1984). Certainly, there can be no argument that laches would bar a

post-election challenge to the failure to count particular provisional ballots. Any argument that a ruling from this Court prior to the election will cause an administrative burden pales in comparison to the burden that would be imposed by a post-election challenge, brought in the hours or days following election day, asking for ballots to be counted immediately.

CONCLUSION

For the foregoing reasons, the Court should reverse the dismissal of the Amended Complaint and the denial of a temporary injunction and class certification, and remand this matter to the Circuit Court for immediate entry of a temporary injunction as set forth above.

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