IN THE SUPREME COURT OF FLORIDA

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| RONALD TAYLOR, et al., | |
| Plaintiffs-Appellants | Case No. SC00-2448 |
| | District Court No. 1D00-4829 |
| vs. | Circuit Court No. CV00-2850 |
| THE MARTIN COUNTY CANVASSING BOARD, et al., | |
| Defendants-Appellees | |
| vs. | |
| Richard J. Kosmoski, et. al.. | |
| Defendants-Intervenors-Appellees. | |

# DEFENDANT-INTERVENORS' ANSWER BRIEF


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## TYPE SET CERTIFICATION

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## PRELIMINARY STATEMENT

In this Answer Brief of Defendant-Intervenors, the parties will be referred to as they appeared before the trial court. Plaintiffs will be referred to by name or as "Plaintiffs." Defendant Peggy Robbins will be referred to as "Supervisor"or "Supervisor of "Elections." All other Defendants will be referred to by name or as "Defendants." Defendant-Intervenors will be referred to as "voters" or as "Defendant-Intervenors." Witnesses will be referred to by their proper names. References to the Appendix will be referred to as "A", followed by the section of the appendix, followed the page number of the appendix. For example, page 1 of section 1 of the Appendix will be referred to as A-1(1).

## STATEMENT OF THE CASE AND FACTS

Defendants-Intervenors adopt the Statement of the Case and Facts as stated in Seminole County Supervisor of Elections Peggy Robbins Brief to this Court, with the following additions: Some of these voters received their absentee ballot request forms from the Republican party (App. A-1, A-2), others phoned in their request (App. A-5), others went to the election office and made their request in person (App. A-6, A-7, A-9), and others received their ballots automatically due to disability (A-3, A-4). If Defendant-Intervenors had known that their requests to vote absentee were invalid, they would have made other arrangements to ensure that their voices were heard in the November 7election. (App. A-1 to A-9). If the voters had known that there might be a problem with their absentee ballot applications, they would have made other arrangements to obtain an absentee ballot. *See eg.*, App. A-1, A-2.

Some voted voted by absentee because they were out of the state (App. A-1(3), App. A-2(6)), others because of disability or age (App. A-3(9), A-5(14), A-6(17)), still other because of illness of family members (App. A-7(20), A-9(26)). Virginia White voted by absentee because she intended to volunteer her time as a poll worker. *See* App. A-8(23). These voters completed their absentee requests forms, voted by absentee, and do not want to be disenfranchised. *See* A-1 through A-9.

## SUMMARY OF ARGUMENT

Plaintiffs' Complaint should be dismissed because it does not state a cause of action. Plaintiffs seek to proceed under Fla. Stat. §102.168, which does not apply to a presidential election. In voting for President, the voters cast their ballot for "electors" of the President. A presidential "elector" is not a candidate. Fla. Stat. §102.168 refers to a "candidate", and thus does not apply to presidential elections. To change the rules of the election after the election would violate 3 U.S.C. §5 as well

as notice requirements under the First and Fourteenth Amendments to the United States Constitution. Moreover, to disenfranchise voters for failure to include a voter ID number on an absentee ballot when the statute does not specifically state the penalty for failure to include this information would also change the rules after the election. Courts cannot engage in presidential politics by changing rules that were established prior to the election in hopes that a different result might occur. This Court cannot deviate from established precedent to throw out the clear and unquestionable voice of the voters.

The right to vote is protected by the United States Constitution, and the Florida State Constitution. The right to vote is the pre-eminent right of all Americans. All other rights, even the most basic, are illusory if the right to vote is undermined. Many Americans have given their lives to ensure that future generations will possess this fundamental right. Voting absentee for President is a right that cannot be denied by the states. Consequently, this Court must proceed with extreme caution because the right, which so many Americans have given lives to protect, is at stake. The state must have a compelling interest to infringe the right to vote, and any restriction must be achieved in the least restrictive means available. The voter ID number is not necessary to prevent fraud by determining whether the voter is qualified to vote, and thus to require the ID number is not the least restrictive means available to achieve any alleged interest.

Plaintiffs' Complaint should be dismissed as the relief sought by the Plaintiffs is barred by federal law that states that no person acting under color of state law shall deny the right of any individual to vote in an election because of an error or omission on an application to vote. *See* 42 U.S.C. §1971(a)(2)(8).

The absentee ballots must not be discarded as all election laws were substantially complied with as they related to the casting of the absentee ballots.

Plaintiffs' proposed remedy is fundamentally unfair as it seeks to throw out and disenfranchise voters who strictly complied with every statutory directive. This Court has only awarded such harsh remedies where there has been a finding of blatant fraud on the ballots themselves, not a mere technical violation in requesting the ballots. The plaintiffs have failed to clear the first hurdle, that there was fraud in requesting the ballots, not to mention they failed to clear the second hurdle, that such fraud prevented voters from otherwise voting in the election.

This Court has consistently ruled that the will of the people will prevail even if substantial noncompliance with the election statutes occurred. Plaintiffs seek to discard thousands of unquestionably legitimate votes that were cast due to an alleged hyper-technical violation of the election law statutes concerning the requesting of ballots. Plaintiffs have not made a single allegation questioning the ballots themselves. Their only contention is that the integrity of the election was compromised when the Supervisor of Elections allowed a Republican official to correct a typographical error on the absentee ballot request forms, an error that was caused by the Republican party. The requested remedy does not match the alleged violation.

## ARGUMENT

### I. PLAINTIFFS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE FLA. STAT. §102.168 DOES NOT APPLY TO A PRESIDENTIAL ELECTION.

Plaintiffs' have not stated a cause of action. Section 102.168 of the Florida Statutes does not apply to a presidential election. Presidential elections in Florida are governed by statutory law, not common law. There is no common law right to contest an election. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *see also Harden v. Garrett*, 483 So. 2d 409, 411 (Fla. 1985); *Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947). The right to challenge an election, if one exists, must be

expressly granted by the Florida legislature. *See McPherson*, 397 So. 2d at 668.

The United States Constitution provides: "The Congress may determine the time of choosing the electors, and the day on which they shall give their vote; which day shall be the same throughout the United States." Art. 2, §1, cl. 4. The United States Congress enacted the following clear and unambiguous statute to schedule the precise day in which to hold the election for presidential electors:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. §1.

In the event that any State fails to elect its "electors" as prescribed by the above statute, Congress enacted the following provision:

> Whenever any State has held an election for the purpose of choosing electors and has failed to make a choice on the day prescribed by law, the electors may be *appointed* on a subsequent day in which manner as the legislature of such State may direct.

3 U.S.C. §2 (emphasis added).

In the event there is a controversy as to the appointment of electors, Congress enacted the following statute:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. §5.

The Florida legislature, pursuant to authority granted by Congress, enacted Section 103.011 of the Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for presidential electors. Section 103.011 provides:

> Electors of President and Vice President known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. ***Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential elector supporting such candidates.*** The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Fla. Stat. §103.011 (emphasis added).

In the present case, the election to select presidential electors throughout the nation was held on November 7, 2000. The Governor of the state of Florida, in advance of the election, nominated and certified to the Secretary of State competing slates of presidential electors for the Republican Party of Florida and for the Florida Democratic Party as well as other parties. *See* Fla. Stat. §103.021(1). Although the names of the candidates for President and Vice President of the United States were printed on the ballots that were used in the November 7 election, Florida voters cast their votes not for the candidates, but for the presidential electors. *See* Fla. Stat. §103.011. The results of the November 7 election have been certified by each county canvassing board and forwarded to the Department of State. *See* Fla. Stat. §102.11. The elections canvassing commission thereafter certified the returns of the election.

The Plaintiffs in this action challenge the certification. Following the certification on November 26, 2000, the Governor of the state of Florida executed a Certificate of Ascertainment certifying the twenty-five Republican Presidential Electors for the State of Florida. On November 27, 2000, the Governor forwarded this Certificate of

Ascertainment to the United States Archivist. Pursuant to Section 90.202 of the Florida Evidence Code, this court may take judicial notice of this public record.

Section 102.168 is unambiguous. Where the language of a statute is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998); *see also Palm Beach County Canvassing Board v. Harris*, No. 00-2346, at 25-26 (Fla. Nov. 22, 2000). The Florida Supreme Court has noted that "the courts of this state are without power to construe an unambiguous statute in any way which would, *extend, modify, or limit* its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *McLaughlin,* 721 So. 2d at 1172 (emphasis added).

Section 103.011 of the Florida Statutes provides for the certification of the election of "presidential electors." This section specifically relates to the election of Presidential electors and does not provide for any contest of the election. Chapter 103 provides means by which a presidential elector can be replaced. If an elector is "unable to serve because of death, incapacity or otherwise... the Governor may appoint a person to fill such vacancy..." Fla. Stat. §103.021(5). If an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. *See* Fla. Stat. §103.061. However, Florida law does not provide a mechanism for replacing presidential electors after the election is certified and does not provide for any contest of that election. Despite the inclusion of the names for President and Vice President on the ballot of November 7, the only persons "elected" in connection with the Presidential election were the "presidential electors", not the candidates for president. *See* Fla. Stat. §103.021.

A presidential elector is not considered a successful candidate for office as that

term is used in the Election Code. Section 99.012 of the Florida Statutes and Article 2, Section 5 of the Florida Constitution, require that a person who already holds one "office" must resign in order to run for another office. If the "presidential elector" were an "office", then numerous presidential electors proposed by the candidates prior to the November 7 election would have been required to resign from their offices which some of them currently hold. Therefore, Attorney General Bob Butterworth, Senate Minority Leader Buddy Dyer, Senators Daryl Jones, Kendrick Meek and Les Miller, and Representative Robert Henriquez would all be in violation of Florida law since they currently hold office and also were part of the proposed slate of presidential electors recommended prior to the election. Florida law is clear that no "person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other." Fla. Stat. §99.012(3)(a). *See also* Fla. Stat. §102.168(1) (providing that a non-successful "candidate for such office" may file a contest).

If the Florida legislature had intended Section 102.168 of the Florida Statutes to be a means for contesting a Presidential election, it would have identified the "unsuccessful candidate" as a proper plaintiff or require that the "successful candidate" be named as an indispensable party. *See* Fla. Stat. §102.168(1) and (4).

Plaintiffs' Complaint fails to state a cause of action because there is no provision in Florida law to contest the certification of presidential electors. Section 102.168 states that "the certification of election or nomination of any person to office, or of the result of any question submitted by referendum, may be contested in the Circuit Court by an unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively." It is clear that on November 7 the Florida voters elected the "presidential electors" and not the presidential candidates. Therefore, Section

102.168, which provides a mechanism to contest the election or nomination of any "person to office", does not apply to presidential elections. A "presidential elector" is not a "person to office" under Section 102.168 and therefore the appointment of the "presidential electors" cannot be contested. Therefore, Plaintiffs' Complaint must be dismissed.

### A. Plaintiffs' Requested Remedy Would Violate The Electoral Count Act Of 1887.

In reaction to the hotly contested Hayes-Tilden presidential election of 1876, Congress passed the Electoral Count Act of 1887. *See* 3 U.S.C. §5. Section 5 states as follows:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to set time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. §5.

Since Florida Statutes do not provide for a judicial contest in a presidential election, to accept the Plaintiffs' remedy would be to change the rules of the election after the election occurred. Changing the rules of the election after the occurrence of the election is a clear violation of 3 U.S.C. §5. As noted, Section 5 was enacted in 1887 as a reaction to the contested Hayes-Tilden election of 1876, a contest marked by naked partisanship, post-election maneuvering and accusations of corruption. In adopting the statutory scheme that emphasizes certainty and clear, pre-set rules to govern disputes, Congress was evidently determined to avoid a similar episode. *See*

18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876" in which a "cabal . . . had determined . . . to debauch[] the Electoral College"). The manifest purpose of this federal law is to ensure that attempts by state courts or other tribunals to influence or affect the determination of the State's electors will not be effective when reached pursuant to rules, standards or criteria adopted after the voters have gone to the polls. As Representative William Craig Cooper of Ohio explained in the congressional debate on this statute (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose").

Against this backdrop, any contention that the Florida Legislature satisfied 3 U.S.C. § 5 merely by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable. First and foremost, nothing in Florida's election statutes authorizes this court to disenfranchise all qualified absentee voters who voted in the election for the conduct of county officials who simply filled in voter registration numbers on otherwise complete and properly submitted absentee voter application forms in an effort to make sure all qualified absentee voters got a chance to vote. As explained in Part I above, even the Florida Supreme Court has consistently instructed the lower courts to avoid such a result. Given these facts, there is no basis for inferring that the legislature intended courts to exercise equitable powers to change the established rules and practices in the midst of the State's efforts to ascertain and pronounce election results.

Moreover, such an interpretation of the Judiciary's authority would render § 5

a virtual nullity, and would offer none of the protections that Congress sought to achieve in enacting the statute. If state legislatures could simply convey authority to a chosen tribunal to create new post-election rules to govern disputes over the appointment of electors, States could easily avoid the limitations imposed by 3 U.S.C. § 5. Section 5 plainly does not admit of such an interpretation, because it provides that the judicial or other determination at issue must have been made "pursuant to" preexisting law, not merely by a preexisting tribunal. As Representative Cooper cogently observed, "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 CONG. REC. 47 (Dec. 8, 1886).

Thus, any judicial decision that has the effect of adopting a new rule of law to govern election disputes cannot, consistent with § 5, be applied retroactively to affect the appointment of presidential electors at an already-conducted election. Under 3 U.S.C. § 5, this court has the obligation to ensure that Florida resolves any controversies over the appointment of electors by reference to the rules enacted by the legislature prior to the election, not *post hoc* standards announced for the first time by this court, inconsistent with existing state law and judicial precedent, some weeks after the election.

In cases arising under the *Ex Post Facto* Clause, which similarly forbids certain types of retroactive state rulemaking, this Court has held that the question whether state law has changed in a manner that violates the Clause is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *See Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within

the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."); *see Carmell v. Texas*, 120 S. Ct. 1620, 1639 n.31 (2000) ("Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause, however, is a federal question we determine for ourselves."). By the same token, the question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appointment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. § 5, is ultimately a question of federal law.

Thus, by refusing to grant the relief sought by Plaintiffs, this court will not only avoid violating the federal due process rights of Defendants-Interveners, it will also avoid violating Voter's right to vote protected by the United States Constitution and the federal Voters Rights Act, as well as 3 U.S.C § 5.

### B. The Plaintiffs' Requested Remedy Would Violate The Notice Requirement Of *Roe v. Alabama*.

In *Roe v. Alabama*, 43 F.3d 578 (11th Cir. 1995) ("Roe I"), the Federal Court of Appeals for the Eleventh Circuit ruled that the state of Alabama violated the plaintiffs' First and Fourteenth Amendments when it departed from Alabama's longstanding policy of not counting unwitnessed absentee ballots. The *Roe* court stated that departing from Alabama's previous practice of not counting unwitnessed ballots would implicate fundamental fairness. "First, counting ballots that were not previously counted would dilute the votes of those who met the [statutory] requirements... Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id*. at 581. The same would hold true in this case if Plaintiffs' remedy were accepted by this Court. Plaintiffs' requested remedy would actually change the rules of the election after the election and provide no notice to the

absentee voters based on the previous practice of the state of Florida. The previous practice of the state of Florida has been routinely to accept absentee ballots without voter identification numbers. Plaintiffs' requested remedy would therefore violate the notice requirement of *Roe v. Alabama*.

Prior to the November 1994 general election, it was a uniform practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *See* 43 F.3d at 578; *Roe v.Alabama*, 68 F.3d at 406, 407(11th Cir. 1995) ("Roe III")(stating that the district court's findings, which were "supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes, the order placed the outcome of the race for Chief Justice in doubt. *Roe I,* 43 F.3d at 578. The 200 to 300-vote spread in *Roe* is similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." 43 F.3d at 580. "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements . . . . Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.*

It was the rule and practice in Florida prior to the date of the election of November 7, 2000, that "the court should not frustrate the will of [absentee] voters if the failure to perform official election duties is unintentional wrongdoing and the will

of the [absentee] voters can be determined." *Beckstrom v. Volusia County Canvassing Board*, supra, 707 So. 2d at 726. In this case there is no allegation that the absentee voters were not qualified to vote or that the will of these voters cannot be determined. Moreover, the evidence will fail to establish any failure to perform official election duties, much less the intentional wrongdoing by the electors themselves, that would be required under existing Florida law before the court could even consider the sort of draconian relief sought by Plaintiffs.

Under these circumstances, it would be violative of the Defendants-Interveners' due process rights as enunciated in *Roe v. Alabama* for this court to grant Plaintiffs' request to disenfranchise all absentee voters in Seminole County. *Roe* simply does not permit this court to ignore and so change the preexisting election rules of the State of Florida.

## II. THE RIGHT TO VOTE IS THE PRE-EMINENT RIGHT OF AMERICAN CITIZENS.

The right to vote is the most cherished and protected right that citizens possess in the United States. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1 (1964). Over the past three centuries, generations of Americans have given their lives to ensure that future generations possess this fundamental right.

The right to vote is the foundation of our American democratic system and has been purchased with the blood and tears of not only our ancestors, but by many Americans still alive. Plaintiffs' petition seeks to throw away the vote of people like Bob Russell and Colonel Frederick Eisele, individuals who stand alongside the many Americans who have bravely fought to preserve this right. *See* Affidavit of Bob

Russell and Colonel (Ret.) Frederick Eisele. Plaintiffs seek to strip Helga Powell of her right to vote. Born in Nuremberg, Germany, and a former member of the Hitler Youth (by requirement, not by choice), Mrs. Powell grew up in an atmosphere where she could not protest any form of governmental action or decision for fear of being persecuted or put to death. *See* Affidavit of Helga Powell. In her affidavit, Mrs. Powell stated, "I have chosen this Country as my home country, and I know first hand the price that citizens of a country pay when they have no right to vote for representatives and have no voice in the governance of their country. As an American, I hold my right to vote in the highest regard and it is the most precious right I have." *Id.* at ¶¶ 8 & 9.

### A. The Right To Vote Is The Pre-Eminent Right Protected By Florida Constitutional Law.

The right to vote is the pre-eminent right of citizens in Florida. All other rights Floridians possess are grounded in the precept that Floridians can voice their pleasure, or displeasure, on issues effecting them by exercising their right to vote. The State of Florida has consistently recognized the importance of the people's right to vote. The Florida Constitution begins with a Declaration of Rights, a "series of rights so basic that the founders accorded them a place of special privilege." *See Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992). The Declaration of Rights contain such fundamental and pre-eminent rights that the Florida Supreme Court recently cautioned, "Courts must attend with special vigilance whenever the Declaration of Rights is in issue." *Palm Beach County Canvassing Board v. Harris*, Nos. SC00-2346, SC00-2348 & SC00-2349, 30 (Nov. 21, 2000) *remanded on other grounds*, 531 U.S. ____ (2000). The right to vote is the pre-eminent right contained in the Declaration of Rights. The very first words in the body of the Florida Constitution, the section embodying Florida's Declaration of Rights, state:

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

Art. I., § 1, Fla. Const.

The Florida Supreme Court explained the significance of this declaration by stating, "The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide when that power may be given up." *Harris*, at 31.

In speaking of the pre-eminent right to vote, this Court stated:

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of upmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. **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 of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right**.

*Harris*, at 9 (*citing Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)) (emphasis added).

In *Harris*, this Court reiterated Florida's long standing policy that the public's will, as expressed through their votes, is superior to strict statutory compliance by election supervisors and officers. *See id.* at 37 (concluding that the will of the electors supercedes any technical statutory requirements); *see also State ex rel. Chappell v. Martinez*, 536 So. 2d 1007, 1008-09 (Fla. 1988) ("The electorate's effecting its will through its balloting, not the hyper-technical compliance with statutes, is the object of

holding an election"); *McLean v. Bellamy*, 437 So.2d 737 (Fla. 1st DCA 1983) ("In developing a rule regarding how far irregularities in absentee ballots will affect the result of the election, a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will."); *Boardman*, 323 So. 2d at 267 ("When the voters have done all that the statute has required them to do, they will not be disenfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions."). This Court cautioned against hyper-technical compliance with statutes that has the effect of disenfranchising voters, stating, "**Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy**." *State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933)(emphasis added); *see also Boardman*, 323 So. 2d at 269 (Technical statutory requirements must not be exalted over the substance of this right).

The right of the people to select their own officers is their sovereign right. Any unnecessary or unreasonable restraints on the elective process are prohibited. *See Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977). In *Harris,* this Court re-emphasized the importance of not overturning the people's sovereign right to chose their own elected officials, unless such action was both reasonable and necessary. *See id.* at 38. Any decision to discard this sovereign right, however, should be guided by, and subject to, the will of the people. "Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases." *Id.* at 8. Any election law must be liberally construed in favor of protecting the citizens' right to vote. *See id.* at 32; *see also State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) ("Generally, the courts, in construing statutes relating to elections, hold that the same should receive

a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disenfranchisement of legal voters and the intention of the voters should prevail when counting ballots.").

In the case at hand, thousands of voters unquestionably complied with every "hyper-technical" rule in the Florida Statutes in voting, not only for the next president of the United States, but for all of their local officials as well. Their voices should not be silenced solely based on an election official's failure to observe "hyper-technical" directory statutory instructions. "When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions." *Boardman*, 323 So. 2d at 268-69. Indeed, by throwing out all of the legally cast votes, this Court would be punishing the voters of Florida for the actions of an elected official, an action that the Florida Supreme Court has declared would "miss the constitutional mark." *See Harris,* at 38. ("But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark.").

### B. The Right To Vote Is A Pre-Eminent Right Protected By The United States Constitution

The United States Constitution protects the citizen's right to vote. Indeed, the right to vote is the most fundamental and is the highest right a citizen of the United States holds. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (stating, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). Without the right to vote, all other rights become merely illusory. "The right to vote. . . is constitutionally protected." *Ex parte Yarbrough*, 110 U.S. 651, 663-665 (1884); *Smith v. Allwright*,

321 U.S. 649, 664 (1944). "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *See also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). "This right to vote is a personal right that is vested in qualified individuals by virtue of their citizenship. It is not a privilege to be granted or denied at the whim or caprice of state officers or state governments." *U. S. v. Penton,* 212 F. Supp. 193, 202 (M.D. Ala. 1962). The Supreme Court has stated that the "political franchise of voting" is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Supreme Court has also stated:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

*Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. This 'right to choose, secured by the Constitution,' is a civil right of the highest order." *Oregon v. Mitchell,* 400 U.S. 112, 139 (1970)(*partially superceded by* U.S. Const. Amend. XXVI (regarding voting age))(*citing United States v. Classic*, 313 U.S. 299, 315 (1941).

The Supreme Court has held unequivocally that Article I, section 2 of the United States Constitution confers upon individuals a constitutional right to vote in federal elections. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). While this section of the Constitution describes the right to vote in Congressional elections, the Supreme Court has held that the right to vote in Presidential elections is just as fundamental as the right to vote for congressional representatives. In speaking of

Congress' power to regulate congressional elections, the Court has stated, "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." *Mitchell*, 400 U.S. at 124. Indeed, it would be incongruous and illogical to state that a citizen holds a fundamental right to vote for Congressional representatives, but not for President and Vice President. Considering the logical conclusion that a citizen has a fundamental right to vote for federal offices, the Supreme Court stated, "It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted." *United States v. Mosley*, 238 U.S. 383 (1915).

The Supreme Court has also held that the right to vote is protected by the Fourteenth Amendment to the United Sates Constitution. "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper*, 383 U.S. at 670.

The right to vote is a fundamental right and must be closely protected. The right to vote has also been held to be protected under the Privileges and Immunities Clause of the Fourteenth Amendment. "The right to vote for national officers is a privilege and immunity of national citizenship." *Mitchell,* 400 U.S. at 149. In five different Amendments to the United States Constitution, this country has guaranteed to its citizens, regardless of race, color, sex, age, geographic location or other condition, the right to vote, especially in presidential, vice-presidential and congressional elections. In addition to the Fourteenth Amendment, the Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. The Nineteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by

any State on account of sex." U.S. Const. XIX. The Twenty-Fourth Amendment states:

> The right of citizens of the United States to vote in any primary or other election for President r Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. XXIV. And finally, the Twenty-Sixth Amendment states that "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. Amend. XXVI.

Therefore, the right to vote in Presidential and Vice Presidential elections is a fundamental right secured to every citizen under the United States Constitution. As a fundamental right, any abridgement of the right to vote must pass the most exacting scrutiny. The Supreme Court has stated, with regard to the standard of review, "Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. 'A more exacting standard obtains.' In such cases, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" *Mitchell,* 400 U.S. at 241 (*citing Metropolitan Cas. Ins. Co. of New York v. Brownell*, 294 U.S. 580, 583--584 (1935)); *see also Kramer v. Union School District*, 395 U.S. 621, 633 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969). In *Evans v. Cornman*, 398 U.S. 419, the Court said: "Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Blumstein v. Ellington,*

337 F.Supp. 323, 329 (M.D. Tenn 1970). The Court has also held that a "classification is subject to the 'compelling interest' test if the result of the classification may be to affect a 'fundamental right,' regardless of the basis of the classification. And it is now settled beyond doubt that the right to vote is just such a 'fundamental right'-indeed, the most fundamental right of all." *Id*. (*citing Shapiro v. Thompson*, 394 U.S. 618, 660 (1969)).

A denial of the right to vote, protected by the United States Constitution, must survive a compelling interest test. Any restriction on the right to vote must meet a compelling governmental interest that is advanced in the least restrictive means.[1] In the present case, it is inconceivable that the Plaintiffs could offer a compelling interest in order to justify an Order from this Court denying the right of the voters in this case to cast their vote in a Presidential and Vice-Presidential election. The only justification that Plaintiffs have raised for disqualifying all or a portion of the absentee ballots in Seminole County is the fact that some of the request forms did not contain the Voter Registration number on the forms. However, this allegation is not sufficient to throw out any of the absentee ballots. Plaintiffs have not alleged, nor shown, voter fraud or any other irregularity that would rise to the level of a compelling justification to disqualify all absentee ballots in Seminole County.

Assuming, *arguendo*, that the government has a compelling interest to prevent fraud in the casting of absentee ballots, requiring a voter identification number is not the least restrictive means of achieving that interest. If the state of Florida does not require a voter ID number to cast an absentee ballot, then there is no compelling reason to require an ID number to submit an application form. Pursuant to Fla. Stat.

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[1] The United States Supreme Court has stated, with regard to the compelling interest test that, "[I]f 'compelling interest' really means what it says,. . . many laws will not meet the test." *Employment Division v. Smith*, 494 U.S. 872, 887 (1990).

§101.68(2)(c)1, an absentee ballot must contain the voter's signature, the last four digits of the social security number and one of the following: (1) the subscription of a notary public, or (2) the printed name, address, ID number, and county of registration of one attesting witness who is a registered voter. Under Florida law, a voter can cast an absentee ballot without the voter ID number. Obviously, the interest in preventing fraud is higher in the casting of an absentee ballot than in applying for an absentee ballot, yet the ID number is not required for the former but is required for the latter. If the interest in preventing fraud can be achieved without the voter ID number (as in the casting of the ballot), then the interest in preventing fraud in obtaining a ballot can also be achieved without the ID number.

The purpose behind Fla. Stat. §101.62(b) is to provide sufficient information to identify the voter who applies for an absentee ballot. If the voter is applying in person, a driver's license is sufficient to identify the voter. If the person is applying by telephone, the last four digits of the social security number, the name and address is sufficient. If the person is applying by mail, the person's last four digits of the social security number, address and signature is sufficient. Using this information, the Supervisor of Elections can pull up the voter on the computer to verify that the person is qualified to vote. The voter ID number is not necessary. Indeed, the voter's last four digits of the social security number is not public information; whereas the voter ID number is public information. Between the two, the social security number is more relevant than the voter ID number. If the Supervisor of Elections is given the last four digits of the voter's social security number, then the ID number is surplusage. To require the voter ID is not the least restrictive means of preventing fraud because the other information listed above will achieve this interest. To reject an application for an absentee ballot for lack of an voter ID number is unconstitutional. The history of this country has revealed a trend to break down barriers to voting. This country has

struggled to eliminate the barriers of race, gender, age, poll taxes, and geographic location. After fighting a civil war and amending our Constitution no less than five times to eliminate voting barriers, we must not retreat in our progress toward equality by erecting a voter ID number. To do so would dishonor those who fought and died for the right to vote. To allow a voter ID number to stand in the way of an American citizen from using the most powerful and precious weapon of a democratic society would make America the scorn of the free world.

The relief Plaintiffs request is not advanced in the least restrictive means available. Plaintiffs seek the disqualification of absentee ballots in regardless of whether they suffer from any alleged infirmity. The relief requested is breathtakingly staggering and is not related to any alleged wrong Plaintiffs have been able to show this Court. In short, Plaintiffs have offered nothing to this Court that would justify infringing the most fundamental right of the voters.

**C. Voting By Absentee Ballot Is A Right, Not A Privilege.**

The ability to vote by ballot is a right, not a privilege. The Voting Rights Act protects the right to vote by absentee ballot and preempts state law to the contrary. *See* 42 U.S.C. §1973aa-1 (West 2000). Section 1973aa-1 states, as follows:

> (a) Congressional findings
>
> The Congress hereby finds that . . . the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections--
> (1) denies or abridges **the inherent constitutional right of citizens to vote for their President and Vice President**;
> (2) denies or abridges **the inherent constitutional right of citizens to enjoy their free movement across State lines**;
> (3) denies or abridges **the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;**
> (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;
> (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and
> (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.
>
> (b) Congressional declaration:. . . absentee registration and balloting standards, establishment
> Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary . . . to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.
>
> (c) Prohibition of denial of right to vote because of . . . absentee balloting
> No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election . . . if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

42 U.S.C. §1973aa-1 (emphasis added). Congress intended to create a national, uniform system for voting by absentee ballot and has mandated that each state have procedures for voting by absentee ballot. Indeed, Congress has preempted any state law that denies the right to vote by absentee ballot. "Express preemption occurs when Congress has expressly stated its intent to supersede state law. This often requires an inquiry into statutory construction." *Worth v. Universal Pictures, Inc.,* 5 F.Supp.2d 816, 820 (C.D. Calif. 1997) (*citing Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 95-98, (1983)). Express preemption of state law "occurs when the language of the federal statute reveals an express congressional intent to preempt state law." *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Com'rs.,* 199 F.3d 1185, 1190 (10th Cir. 1999).

It is manifestly clear that Congress has expressly preempted state law that would deny the right to vote by absentee ballot for President and Vice President. Most telling in the construction of this statute is the basis or justification behind the federal statute that protects the right to vote by absentee ballot. Congress specifically stated in the statute that the section was intended to protect the "inherent constitutional right of citizens to vote for their President and Vice President," "the inherent constitutional right of citizens to enjoy their free movement across State lines," and "the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution." 42 U.S.C. §1973aa-1(a)(1)-(3). Therefore, the right to vote by absentee ballot in Presidential elections, protected by 42 U.S.C. §1973aa-1 against abridgement by the states, finds its basis and justification in the United States Constitution. Under this section, Congress clearly and expressly preempted state law that would deny the right to vote by absentee ballot. Therefore, any state law to the contrary is preempted, and the right to vote by absentee ballot is guaranteed and protected by the United States Constitution.

Plaintiffs argue that the right to vote by absentee ballot is a privilege and not a right. Although some Florida case law suggests that voting by absentee ballot is a privilege as opposed to a right, none of the cases involve Presidential elections. This is a crucial difference. For example, in the case of *In re The Matter of the Protest of Election Returns and Absentee Ballots*, 707 So. 2d 1170, 1173 (Fla. 3d DCA 1998), the court stated, "We first note that unlike the right to vote, which is assured every citizen by the United States Constitution, the ability to vote by absentee ballot is a privilege." *Id* at 1173. In that case, the court was asked to disqualify absentee ballots in a local mayoral race, and so the court focused solely on state law. The case did not address Presidential elections. Further, the court stated in *Spradley v. Bailey*, 292 So. 2d 27 (Fla. 1st DCA 1974), that voting by absentee ballot was a privilege. However, as in the above case, the court was asked to decide a contest related to a candidate for sheriff, and, therefore, focused solely on state law. The case did not deal with the right to vote by absentee ballot in Presidential elections. *The critical distinction is that in all of these cases, the courts addressed the right to vote by absentee ballot in local and state elections, not presidential elections.* As seen above, in §1973aa-1, the right to vote by absentee ballot for President and Vice-President is protected by the United States Constitution and the federal Voting Rights Act. In this regard, **there is a distinction to be drawn between voting by absentee ballot in a state election and voting by absentee ballot for President and Vice-President. The latter is clearly a right protected by the United States Constitution and the Voting Rights Act.** Any state law to the contrary has been expressly preempted by federal law.

Because the right to vote by absentee ballot is protected by the United States Constitution and 42 U.S.C. § 1973aa-1, any restriction on this right must pass the most exacting scrutiny by the courts. As the Supreme Court stated, "[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights

and privileges. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans v. Cornman*, 398 U.S. 419 (1970). As stated earlier, the Plaintiffs have asserted no compelling justification for overriding this most important of rights. Requiring a voter ID number is not the least restrictive means available of achieving any alleged interest. Further, the relief sought by the Plaintiffs is staggeringly overbroad and does not advance any alleged compelling interest in the least restrictive means.

## III. THE RELIEF PLAINTIFFS SEEK IS BARRED BY 42 U.S.C. §1971(a)(2)(B).

Plaintiffs, in their Complaint, seek to invalidate all the absentee ballots in Seminole County. Alternatively, Plaintiffs seek to have only those ballots invalidated where the request forms for those ballots were allegedly corrected by members of the Republican party. This relief sought by the Plaintiffs is barred by federal law in a section of the United States Code that seems tailor-made to this case, and this Court may not grant the relief Plaintiffs seek without violating 42 U.S.C. §1971(a)(2)(B). That section of the United States Code states:

> No person acting under color of law shall - deny the right of any individual to vote in any election **because of an error or omission on any** record or paper relating to any **application**, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

42 U.S.C. §1971(a)(2)(B) (emphasis added).

The plain, clear, and unambiguous language of this statute applies specifically and compellingly to the facts of this case. Indeed, it is hard to imagine a statute that is not tailored more narrowly to apply to the facts of this case. Here, Plaintiffs have alleged that there is an error or omission on the application for an absentee ballot;

namely the inadvertent omission of the voter registration number on the application. Plaintiffs seek to deny the right to vote to absentee ballot voters because of this error or omission. Further, the error or omission is not material in determining whether the voter is qualified to vote under state law. In this respect, the registration cards received by the Supervisor of Elections that were missing the Voter Registration number had the name and address, the signature and the last four digits of the social security number of the individual. Certainly, this information is sufficient to determine whether an individual is qualified to vote. In this case, the Supervisor of Elections had all the information she needed to determine the qualification of the voter to vote absentee.

Two points should be clear from the application of this statute to the facts of this case. First, the Supervisor of Elections could not have rejected the absentee ballot request forms, and should not have done so, simply because they were missing the Voter registration number. As long as there was sufficient information to ascertain the qualification of the voter to vote absentee, the Supervisor should have accepted the request form and sent an absentee ballot. Otherwise, she would have been violating 42 U.S.C. §1971(a)(2)(B), because she would have been denying the right to vote under color of law on account of an immaterial omission or error in a registration or application form.

Second, this Court cannot grant Plaintiffs' relief to throw out or invalidate those ballots where the Republican party filled in the voter registration number without violating 42 U.S.C. §1971(a)(2)(B). Plaintiffs' requested relief asks this Court to act under color of law to deny the right to vote to individuals because of an immaterial omission or error in an application for an absentee ballot. State action occurs when a private individual attempts to use the power of the Court to enforce an invalid private action. Governmental conduct will be found to occur in actions undertaken by a

private party where the private party makes extensive use of state procedures with the overt, significant assistance of state officials. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 622 (1991). In cases such as this, the government has "elected to place its power, property and prestige behind the alleged discrimination." *Id*. at 624. Government action under this circumstance has been found where a private party sued to enforce a racially restrictive land covenant. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). Government action has also been found in this situation when a private party uses peremptory challenges to discriminate based on a person's race. *See Edmonson*, 500 U.S. 614. For this situation to exist, the government must be asked to enforce a private action that discriminates, thereby involving government in the discrimination.

In this case, Plaintiffs are requesting this Court to act in a discriminatory fashion violative of 42 U.S.C. §1971(a)(2)(B). Plaintiffs seek to place the authority of this Court behind its action to invalidate absentee ballots in violation of this section. Therefore, this Court should not act in such a way as to violate 42 U.S.C. §1971(a)(2)(B) by granting Plaintiffs' requested relief.

Although §1971 grew out of a concern for racial discrimination, a number of courts have applied this section in situations where there has been no racially-motivated discrimination. *See Frazier v. Callicutt,* 383 F.Supp. 15, 20 (N.D. Miss. 1974)(college students); *Howlette v. City of Richmond*, 485 F. Supp. 17 (E.D. Va. 1978)(bond referendum); *Ball v. Brown*, 450 F.Supp. 4 (N.D.Ohio 1977)(action based on sex discrimination where court stated, **"[T]he prevalent trend permits §1971 actions to redress non-racial discrimination** (emphasis added)); *See also Shivelhood v. Davis*, 336 F.Supp. 1111 (D. Vt. 1971) (college students); Sloane v. Smith, 351 F.Supp. 1299, 1305 (M.D.Pa.1972)(students). It is the prevalent trend to allow §1971(a)(2)(B) to be applied in situations where there is a violation of the

language of the section regardless of whether race is involved. Indeed, the plain language of the statute broadly states that, "No person acting under color of law shall - deny the right of **any individual** to vote in any election because of an error or omission on **any** record or paper relating to **any** application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. §1971(a)(2)(B) (emphasis added).

The statute is not limited to racial discrimination. Nowhere in 42 U.S.C. §1971(a)(2)(B) is the term race, color, or other similar term used to limit its application. Congress specifically limited 42 U.S.C. §1971(a)(1) to situations where race, color, or previous condition of servitude was at issue. If Congress had so chosen to limit 42 U.S.C. §1971(a)(2)(B) in the same manner, it would have specified that the subsection was limited to those specific instances. Additionally, a construction of 42 U.S.C. §1971(a)(2)(B) that limits its application specifically to situations involving racial discrimination would likely raise Equal Protection concerns under the Fourteenth Amendment to the United States Constitution, as application of the statute would entail a race-based classification.

This Court may resolve any potential conflict between Fla. Stat. §101.62 and 42 U.S.C. §1971(a)(2)(B) in one of several ways. First, this Court can rule Fla. Stat. §101.62(b) unconstitutional. Second, this Court can rule that 42 U.S.C. §1971(a)(2)(B) preempts Fla. Stat. §101.62(b) to the extent the Florida Statute disqualifies a vote for failure to include a voter ID number when said number is not material to determine whether the voter is qualified to vote. Finally, this Court may construe Fla. Stat. §101.62(b) as directory, not mandatory. *See Boardman v.*

*Esteva*, 323 So. 2d 259, 265 (Fla. 1975).[2]

## IV. ALL ELECTION LAWS WERE SUBSTANTIALLY COMPLIED WITH BY THE VOTERS AND THE SUPERVISOR OF ELECTIONS.

The absentee ballots cast in the November 7, 2000, should not be voided or thrown out as all election laws were substantially complied with as they related to the casting of the absentee ballots. The Supervisor of Elections simply allowed a Republican representative to amend typographical printing errors on the absentee ballot request forms.

Pursuant to Florida Statutes and this Court's interpretation of election statutes,

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[2]Plaintiffs incorrectly argue that Fla. Stat. §101.62 does not violate 42 U.S.C. §1971(a)(2)(B) because the former was "precleared" by the United States Department of Justice. Although Fla. Stat. §101.62 was "precleared" *See* App. A-10, A-11. Plaintiffs refuse to explain the purpose and meaning of preclearance.. The requirement of preclearance was enacted in 1965 as temporary legislation applicable only to several states. *See* App. 13(54-55). However, Congress has continued to extend preclearance to the present. Not all states must be precleared. Only those states with a history of racial discrimination require preclearance. Covered jurisdictions must have any change in voting statutes precleared by the Justice Department prior to statute going into effect. Florida has been included as one of the "covered jurisdictions." *See* App. 12(47). In 1998, Florida amended certain sections of the Election Code, including Fla. Stat. §101.62. Although Fla. Stat. §101.162 was precleared by the United States Justice Department, the preclearance procedure is limited to a determination of whether the proposed statute on its face is racially discriminatory. Even when the statute has been precleared for racial discrimination, the Attorney General or a private party may still challenge the statute. *See* App. 12(47-48). For example, Mississippi is a preclearance state and, although its voting statute was precleared, it was later found to be in violation of 42 U.S.C. §1971(a)(2)(A). *See Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974). Preclearance of Fla. Stat. §101.62 focused only on whether the statute was racially discriminatory; preclearance did not approve Fla. Stat. §101.62 for anything other than racial discrimination. While Fla. Stat. §101.62 may not be racially discriminatory, that does not mean it complies with 42 U.S.C. §1971(a)(2)(B), which is not limited to racial discrimination. Moreover, precleared statutes are still subject to racial discrimination challenges. Plaintiffs attempt to argue that preclearance is some sort of imprimatur of Fla. Stat. §101.62 is misplaced. Comparing preclearance of Fla. Stat. §101.62 to this case is like mixing apples with oranges.

a person validly requests an absentee ballot when the person submits a request, either in person or in writing, that substantially complies with the Florida Statutes. *See* Fla.Stat. § 101.62; *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975). In *Boardman,* a candidate for a judicial seat challenged the validity of the absentee ballots cast in the election. While the plaintiff had won the machine count, he had lost the absentee vote count and the general election. Although no fraud was alleged, there were irregularities alleged in the ballots. Like the case at hand, the irregularities complained of did not question the integrity of the ballot itself, but rather indicated a failure to follow hyper-technical statutory requirements. Similar to the case at hand, the plaintiff sought to have the absentee ballots disqualified. This Court dismissed the plaintiff's case, stating:

> In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots case, the following factors shall be considered (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing; (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

*Id.* at 265.

In *Boardman,* this Court explicitly outlined the rationale for only requiring substantial compliance by an elector in requesting an absentee ballot. The court began its analysis by stating, "we . . . reaffirm the rule adopted in *Tucker* to the effect that substantial compliance with the absentee voting laws is all that is required to give legality to the ballot." *Id*. Beginning with the principle of substantial compliance, the court reasoned that the legislature is required to specifically state that a statute must be strictly complied with in order to rebut the presumption of substantial compliance. "**Unless the absentee voting laws which have been violated in the casting of the vote expressly declared that the particular act is essential to the validity of the**

**ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory**." *Id*. at 265 (emphasis added). This Court further noted the following:

> This does not mean, however, that insignificant omissions or irregularities appearing on the application form suggested in Fla.Stat. § 101.62, F.S.A. must void the ballot where the information that does appear on the application is sufficient to determine the qualifications of the applicant to vote absentee, and the omissions or irregularities are not essential to the sanctity of the ballot.

*Id*. at 265.

The current Florida statute addressing absentee ballot requests does not contain any of the key words, or similar language, to suggest that the legislature intended for strict compliance. *See* Fla.Stat. §101.62. This Court must assume that since the legislature had clear guidelines on how to make the statute on absentee ballot requests forms subject to strict compliance, the legislature chose not to require strict. This conclusion is enhanced when one considers that it would be a violation of federal law if the Florida legislature required anything other than substantial compliance in requesting an absentee ballot. *See* 42 U.S.C. §1971(a)(2)(B). This conclusion is buttressed when comparing Fla. Stat. § 101.62(b) (absentee ballot request forms) with Fla. Stat. §101.68(2)(c)1 (absentee ballots). In the latter section, the statute expressly states that an absentee ballot is "considered illegal" if it lacks certain specified information. In the former section, the statute is silent about the validity of the application form if the listed information is lacking.

The absentee ballot requests were valid as they provided sufficient information to identify the elector (name, address, last four digits of the social security number) and to ensure that it was actually the elector who was requesting the ballot (last four digits of the social security number and signature). Thus the absentee ballot request

forms substantially complied with Fla.Stat. §101.62, and consequently, the persons submitting the requests were entitled to an absentee ballot.

Regarding absentee ballots, the Florida Statutes provide the following:

> The supervisor may accept a request for an absentee ballot from an elector in person or in writing. One request shall be deemed sufficient to receive an absentee ballot for all elections which are held within a calendar year, unless the elector or the elector's designee indicates at the time the request is made the elections for which the elector desires to receive an absentee ballot. Such request may be considered cancelled when any first-class mail sent by the supervisor to the elector is returned as undeliverable.

Fla. Stat. §101.62(1)(a).[3]

Pursuant to statute, the "supervisor may accept a written or telephonic request of an absentee ballot from the elector, or, if directly instructed by the elector, a member of the elector's immediate family, or the elector's legal guardian." Fla. Stat. §101.62(1)(b). In this case, Plaintiffs have not, and cannot, present any evidence that the request for an absentee ballot came from any person other than an elector, a member of the elector's immediate family, or the elector's legal guardian. Instead, Plaintiffs narrowly focus on the nine items which state that the person making the request must disclose.[4] Plaintiffs ignore Fla. Stat. §101.62(3), which states that for

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[3] Florida law permits and facilitates mass mailing of unsolicited absentee ballot request forms. Division of Elections Opinion DE 90-31. When that was done here by Republicans, and then the form turned out to be missing one item of information, it makes no sense for the law to say that the missing information cannot be supplied by the party who mailed out the form. Indeed, for the law to not permit the supplying of the voter ID number will result in some voters innocently thinking they had properly requested an absentee ballot when they had not. This could lead to the disenfranchisement of innocent voters.

[4]The requester must disclose (1) the name of the elector for whom the ballot is requested; (2) the elector's address; (3) the last four digits of the elector's Social Security number; (4) the registration number on the elector's registration identification card; (5) the requestor's name; (6) the requestor's address; (7) the requestor's Social Security number and, if available, driver's license number; (8) the requestor's

"each request for an absentee ballot received, the supervisor shall record the date the request was made, the date the absentee ballot was delivered or mailed, the date the ballot was received by the supervisor, *and such other information he or she may deem necessary.*" (emphasis added). The phrase "such other information he or she may deem necessary" means that the nine enumerated items under Fla. Stat. §(1)(b) are merely directive in nature, not mandatory. *See* Florida House Committee Report on CS/HBs 3743, 3941 (passed as CS/SB 1402) May 12, 1998. Indeed, the nine items in §101.62(b) are neither inclusive nor exclusive. The intent of §101.62(b) is to prohibit voter fraud. So long as the Supervisor of Elections has enough information to identify the voter, the voter is entitled to an absentee ballot.[5] In practice, if a voter appears in person to request an absentee ballot, he or she may present a driver's license, at which time the Supervisor of Elections may pull up the data on a computer database. On the database, the Supervisor of Elections may obtain the voter identification number. Indeed, if a voter lost his or her voter identification card, then said voter would either call for a new card, write for a new card, or appear in person. In this case the voter would not know the identification number. It would be illogical to exclude the voter from obtaining an absentee ballot solely because he or she may not know the voter identification number.

If the absentee ballot is requested by mail, the essential items necessary to

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relationship to the elector; and (9) the requestor's signature (written request only). *See* Fla. Stat. §101.62(1)(b).

[5] Assume, for example, that an absentee ballot applicant had failed to supply her zip code, and that an election office employee, using the given street address, looked up the six-digit code in the local telephone directory. While §101.62 requires the "elector's address," would the zip code addition be regarded as a felonious alteration under § 104.047? We doubt it. In this example, the addition of a zip code to a ballot application is no different than supplying a voter ID number.

identify the voter include a written signature, and some other piece of information such as an address. Using this information, the Supervisor of Elections may pull up the computer database and find the identification number. If the request is made telephonically, the voter must give sufficient information so that the Supervisor of Elections can identify the caller. Such information may include the last four digits of the Social Security number and the physical address. If the voter appears in person, a driver's license would be sufficient. The voter identification number is not critical to applying for an absentee ballot whether in person, telephonically, or through the mail. To suggest that absentee ballots should be rejected because an identification number was not on the request form is ludicrous. Moreover, if the voter identification number is not critical to identify the voter as qualified to vote, then it is even more ludicrous to suggest that absentee ballots (which did contain the correct information) should be rejected because a volunteer inserted the number on an application form, which number is unnecessary in the first place. Even if the application forms did not originally contain all the information listed in §101.62(b), the absentee ballots did contain all the necessary information as specified in §101.68(c)1. The intent of the statute to prevent voter fraud has been substantially complied with by the voters and by the Supervisor of Elections.

When a Supervisor of Elections receives a request for an absentee ballot which does not contain the voter's identification number, the Supervisor has several options to substantially comply with the statute. First, the most reasonable option is for the Supervisor to accept the application without the voter identification number. The voter identification number is not an essential part of the absentee request in order to properly identify the voter to determine whether the voter is qualified to vote. Indeed, if the voter lost his or her identification number, the voter would receive the actual identification number from the Supervisor of Elections office at the same time the voter

applied for the absentee ballot.

The second option for a Supervisor to substantially comply with the statute would be for a member of the Supervisor's office to look up the voter identification number within the county's database. The third option, if the Supervisor's office is understaffed, is to hire temporary staff for the sole purpose of looking up the identification number upon telephonic or in person requests. If the request was made through the mail, the temporary staff person could call the voter to request the information if the staff member did not have access to the Supervisor's computer database. The final option for a Supervisor to substantially comply with the Florida Statutes is to allow a volunteer to come to the Supervisor's office using the volunteer's own database in order to insert the voter identification number. This is exactly what occurred in this case. It is irrelevant that the volunteer is a member of the Republican Party. Indeed, any person that the Supervisor would bring into the office, as a paid staffer or as a volunteer, would be a member of some political party. In this case, the Republican volunteer actually operated in a nonpartisan manner by inserting forty to fifty voter identification numbers on Democratic request forms that were submitted on the Republican request forms. The Supervisor of Elections substantially complied with the statute by allowing a volunteer from the Republican Party to insert a voter identification number on Republican and Democratic request forms. This point is underscored even more clearly when one considers that the voter identification number is not material to determining the identity of the voter and whether the voter is qualified to vote under state law.

Although all election laws were substantially complied with as they related to the absentee ballots, Florida law states that even if the Supervisor of Elections had not substantially complied with the election laws, the votes should still not be cast out if the will of the people can be ascertained through the votes. *See Beckstrom v. Volusia*

*County Canvassing Board*, 707 So.2d 720 (Fla. 1998). This Court stated,

> We recognize that underlying this question is the direct fundamental issue as to whether a trial court can sustain a certified election result after the court has found substantial noncompliance with the election statutes, but the court has also found that this result reflects the will of the people despite the substantial noncompliance. We answer the question in the affirmative.

*Id.* at 725.

In *Beckstrom*, a candidate for sheriff contested an election where the absentee ballots were marked over with a black felt tip pen. The election official in charge of receiving the votes used a black felt tip pen to "write over" the actual marking so as to make it easier for the machine to read the vote. *Id*. at 723. The problem arose because a person could not see under the black mark to ascertain the original mark. *See id*. Consequently, the situation was ripe for fraud as the election official could create a vote on any ballot where a contested matter did not contain a vote. Despite the potential for great fraud in the election, the trial court dismissed the case, stating that while there was opportunity for fraud, the plaintiff could not prove that fraud actually occurred. *See id.* at 725. The Florida Supreme Court stated, "We hold that there is a necessary distinction between an election contest with a judicial determination of fraud and an election contest with a judicial determination of substantial noncompliance with statutory election procedures, even if the noncompliance is determined to be a result of gross negligence by election officials." *Id.*

In the case at hand, there has been no proof of fraud. Neither has there been any showing of favoritism of one political party over the other. All that Plaintiffs have alleged is that a Republican party official inserted voter identification numbers on absentee ballot request forms that were submitted *by* the actual voter. There has been no allegation that the Democratic party tried to insert voter identification numbers and were denied. There has been no allegation that the Republican party bought votes.

There has been no allegation that the votes cast represented anything other than the will of the people. Plaintiffs want this Court to assume some fraudulent act occurred, in spite of the fact Plaintiffs have presented no evidence to even suggest fraud.

This Court in *Beckstrom* stated that the will of the people must trump a failure to follow statutory directives. "[A] trial court's factual determination that a contested certified election reliably reflects the will of the voters outweighed the court's determination of unintentional wrongdoing by election officials in order to allow the real parties in interest - the voters - to prevail." *Id.* at 725. This Court defined unintentional wrongdoing as:

> [N]oncompliance with statutory mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or, as we find occurred in this election, the election officials' erroneous understanding of the statutory requirements. . . . In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election only if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

*Id.*

This Court cautioned that its decision does not give a green light for election supervisors to be careless in their duties or that they do not need to follow the statute in fulfilling their duties. If an election supervisor did not properly follow the statutory requirements in fulling her duties, she might be subject to sanctions. *See id.* "It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to faithfully perform their duties." *Id*. at 726. This Court simply concluded that the voters should not have to pay the heavy price of disenfranchisement for the failure of an election official to follow her statutory duties if "the will of the voters can be determined." *Id.*

Even if this court deems Supervisor's actions to not be in substantial

compliance with Florida Statutes, the absentee ballots should not be voided as there is no question that the certified election reflects the will of the voters. This is not a situation where hanging or dimpled chads are being over-analyzed in an attempt to interpret the mind of a voter to decipher his or her intent. There has been no challenge as to whether the absentee ballot requests, or the ballots themselves, were submitted by the people in question. Indeed, there was sufficient information on all of the ballots to insure the integrity of the requests and the ballots. There has been no evidence that any person's signature was forged. There has been no allegation that the ballots were not properly witnessed. Consequently, all election laws were substantially complied with, and the votes should not be thrown away and discarded.

## V. PLAINTIFFS' PROPOSED REMEDIES ARE UNPRECEDENTED, DRACONIAN, AND PUNISH INNOCENT VOTERS.

### A. Plaintiffs' Proposed Remedy Is Factually Unprecedented and Without Legal Authority For A Presidential Election In Florida Or Any Other Jurisdiction In The United States.

The facts surrounding this lawsuit are historically unprecedented. After a careful and diligent search of case law throughout Florida and throughout the rest of the country, we have been unable to locate a single case where in a Presidential election, or even in a state wide election for that matter, an entire group of voters from one section of the total voting constituency were disenfranchised due to actions of a supervisor of elections. Plaintiffs' proposed brazen remedy is without legal precedent or authority under the circumstances of this case. Neither Florida Statutes nor case law create a legal basis for Plaintiffs' requested remedy.

Plaintiffs' request to throw out unquestionably legitimate votes under these circumstances is without a legal basis for presidential elections in Florida or any other jurisdiction in the United States. Because of the uncharted legal waters this claim proceeds under, and the gravity of the underlying matter involving the exercising of a priori constitutional right, this Court should proceed with great circumspection and great caution in considering Plaintiffs' requested remedies.

The claimed statutory basis for Plaintiffs' remedy and stated cause of action is entirely misplaced. Plaintiffs allege the Defendants violated Fla. Stat. §104.047(2), which provides that "any person who requests an absentee ballot on behalf of an elector is guilty of a felony in the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, unless the absentee ballot request is made as provided in s. 101.62 or s. 101.655." Yet, Plaintiffs do not show one instance where an absentee ballot request on behalf of an elector was signed by someone other than the actual

elector. All of the disputed requests were submitted by the electors and were signed by the electors. In addition, the ballots upon which voters exercised their most basic constitutional rights were never handled by the Republican party representatives. There is no allegation that the actual ballots themselves were mishandled or compromised in any way that would violate §104.047.

In *Pearson v. Taylor*, 32 So.2d 826 (Fla. 1947), this Court held that the relief which a court may afford a party which contests an election cannot exceed the scope of the statute which authorizes the election contest itself. "Courts of equity do not ordinarily possess jurisdiction to entertain suits regarding election contests in the absence of statute. In this state such jurisdiction is granted by statute hence the relief afforded will not exceed the scope of the statute." *Id.* at 827 (citations omitted).

In *PAC for Equality v. Department of State, Florida Elections Commission*, 542 So.2d 459 (2nd DCA 1985), the court refused to sanction the parties, stating that the legislature has not fashioned a sanction for untimely notification of a lack of activity, and thus daily fines could not be constitutionally imposed. Similarly, Fla. Stat. §101.62, which addresses absentee ballots *request forms*, does not provide for penalties against the voter or requestor for failure to include a voter ID number. If someone other than the voter, the voter's legal guardian or member of the immediate family obtains an absentee ballot, then the penalty is to punish the perpetrator under Fla. Stat. §104.047. The remedy is not the disenfranchisement of innocent voters. While the remedy sought by the Plaintiffs is unwarranted for the ballots cast where the request forms did not contain the voter identification numbers, the remedy is particularly unwarranted and harsh as it seeks to disenfranchise thousand voters who strictly complied with every statutory directive.

***1. Plaintiffs' proposed remedy is fundamentally unfair as it seeks to throw out and disenfranchise thirteen-thousand voters who***

***strictly complied with every statutory directive.***

The remedy sought by the Plaintiffs is fundamentally unfair, as it seeks to throw out legitimate votes where the will of the voter can be clearly and unquestionably ascertained. At worst, the conduct of adding numbers to a request form in order to assist a citizen to exercise their right to vote was a harmless administrative error. Thousands of absentee voters of unquestioned legitimacy should not be thrown out because a computer printing "glitch" neglected to print out the voter identification numbers, which were subsequently added in good faith to the request forms. The voters themselves had no knowledge of the actions taken on their behalf by members of their own party prior to the election.

Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizen's right to vote. *See Palm Beach County Canvassing Board v. Harris*, Nos. SC00-2346, SC00-2348, & SC00-2349, 32 (Nov. 21, 2000) *remanded on other grounds*, 531 U.S. ____ (2000). This Court need look no further for direct authority in opposition to Plaintiffs' proposed remedy than the recent decision by this Court in *Harris*:

> Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of a citizen whose right to vote may tend to restrict and in doing so to prevent disenfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter. Courts must not lose sight of the fundamental purpose of election laws: the laws are intended to facilitate and safeguard the right of each voter to express his or her will and the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right. In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.

*Id.* at 31-32.

To summarily disenfranchise thousands voters based upon the hyper-technical

violation of a statutory provision where the legislature provided no penalty at all is unreasonable, unnecessary, and violates the longstanding law of Florida.

### *2. Plaintiffs' proposed remedy seeks to punish innocent voters.*

Plaintiffs' proposed remedy seeks to penalize innocent voters. Plaintiffs allege that the upstanding citizens of their own county are felons who should be punished. Some absentee voters, unbeknownst to them, merely received assistance in preparing their request forms from members of their own political party. These voters, along with those who made application through other methods, should not be disenfranchised.

Further, even if this Court were to find that the election officials violated provisions of the Election Code, Plaintiffs' proposed remedy seeks to punish the voters and does not attach to the alleged wrongdoers. Among the forms of relief requested by Plaintiffs, none of them seek to directly penalize the Supervisor of Elections, or the Elections Canvassing Board. Plaintiffs instead seek to punish the voters.

The case of *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998), is quite instructive to the instant case.

> Neither *Boardman* nor this case concerns potential sanctions for elected officials who fail to faithfully perform their duties. It's for the legislature to specify what sanctions should be available for enforcement against election officials who fail to faithfully perform their duties. We simply can not conclude that the court should not frustrate the will of the voters if the failure to perform official election duties is unintentional wrongdoing and the will of the voters can be determined.

*Id*. at 723.

Pursuant to the Election Code, any election official who willfully refuses or neglects to perform his or her duties as prescribed by the Code, is guilty of a misdemeanor of the first degree under Fla.Stat. § 104.051(2). Oddly enough, Plaintiffs' do not even cite to the very section of the Florida Statutes in which the legislature has authorized the punishment of the alleged wrongdoer. Instead, Plaintiffs

seek to punish thousands of innocent voters.

As was recently held by this Court in *Harris*:

> The clear import of the penalty provision of § 102.112 is to deter boards from engaging in dilatory conduct contrary to statutory authority. This deterrent purpose is achieved by the fines provided for in § 102.112, which are substantial and personal and are levied on each member of a board. The alternative penalty, i.e., ignoring the county's returns, punishes not the board members themselves, but rather the entire country's electors, for it in effect disenfranchises them.

*Id.* at 33; *Cf. Boardman v. Esteva*, 323 So.2d 268-269 (Fla. 1975) (when the voters have done all that the statute has required them to do, they will not be disenfranchised solely on the basis of the failure of the election officials to observe direct statutory instructions).

### B. Plaintiffs' Proposed Remedy Has Only Been Granted By Courts In Local Elections Involving Blatant Fraud.

No set of facts alleged by Plaintiffs constitute election fraud as defined by this Court. The evidence merely establishes that there was an unintended printing error on some absentee ballot request forms, and that some registration numbers were added to the request forms so that the previously requested forms could be sent to the voters. It is a common practice for election officials to try to "fix" absentee ballot requests that they deem to be incomplete.[6] This is usually done by a phone call. The sanctity of the ballot, and indeed the sanctity of the election process, was wholly preserved. No ballot was compromised or altered, and certainly there has been no evidence to suggest that fraud or corruption existed to the extent that it permeated the

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[6]It is important to note that while the Supervisor thought that the absentee ballot requests missing the voter identification numbers were invalid, a review of Florida case law indicates that the requests were valid as they substantially complied with Fla.Stat. § 101.62. *See Beckstrom*, 707 So. 2d at 725. In any event, her decision to allow a Republican official to add in the voter identification numbers substantially complied with her statutory job duties.

election process. As such, this Court must not interfere with the election process and may not, as a consequence, throw out these absentee ballots, or void the election. *See Bolden v. Potter*, 452 So.2d 564, 566 (Fla. 1984) (courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct where there has been substantial compliance with the absentee voting requirements and there was no interference with the sanctity or integrity of the ballot). To hold otherwise would, "effectively and unnecessarily disenfranchised voters." *Id.*

Plaintiffs have not alleged, nor identified any facts that would support an allegation of fraud, gross negligence, or intentional wrongdoing that would have adversely affected the sanctity of the ballot or the integrity of the election process. Rather, Plaintiffs' allegations focus on the request for an absentee ballot, and the inclusion of a number on a request card prior to the issuing of that ballot. There is absolutely no claim that any ballot was sent to anyone other than a legitimate elector. This Court should follow *Boardman*, which stated that courts should not decide elections, but should condone a "certain level of incompetence" by election officials. *See Boardman*, 323 So.2d at 268; *see also Beckstrom*, 707 So.2d at 723.

In *Beckstrom*, an election contest was based on the re-marking of absentee ballots (not ballot requests) by the Supervisor of Elections office. This Court found that re-marking the ballots by election officials amounted to gross negligence, and substantial noncompliance with the election laws. *Beckstrom*, 707 So.2d. at 725. Even with actions that impacted the ballot, and amounted to gross negligence and substantial noncompliance with the election laws, this Court upheld the election, and the inclusion of the absentee ballots. *Id.*.

This Court went a step further. It defined gross negligence and made a clear distinction between election contests with a finding of fraud, and those of substantial noncompliance involving mere gross negligence. To be sure, allegations of fraud were

leveled in the *Beckstrom* case, and with apparent good cause as marks were placed on the actual ballots themselves. Nothing so severe has transpired in this case, however, as the allegations involve the requests for the ballots. The sanctity of the ballots and the resultant choice of the voter were in fact preserved. No credible claim to the contrary has been raised by the plaintiff. Even still, as in *Beckstrom*, where gross negligence, was found to have occurred, the proper remedy is not throw out the votes absent a showing of fraud attacking the integrity of the election. *Beckstrom*, 707 So.2d at 725.

Where the will of the people can be readily determined, and has been expressed at the polls and the absentee ballots, this Court should not "frustrate the will of the voters" by voiding the election or throwing out the absentee ballots as plaintiff requests. The Court should respect the clear voice of the electors, the "real parties in interest" and allow them to prevail. *Id.* In fact, the court's hands tied to act in such a manner as the Supreme Court has found that, "It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to faithfully perform their duties." *Id.* at 725-26.

In *Bolden v. Potter*, 452 So.2d 564, 566 (Fla. 1984), the election involved a local school board race in Liberty County. *See id.* at 566. Liberty County was, at that time, the smallest county with regard to population in Florida, and the absentee ballots in question represented 126 out of 381 absentee votes cast in that school board election. The fraud in *Bolden* was obvious and contaminated the entire election process. Seventy-five witnesses testified at trial about corrupt election practices including the sale of votes. *See id*. at 565. Forty-six electors admitted that their ballots had been bought and that seventy additional ballots were witnessed by the same persons who had witnesses the bought ballots and conducted the vote-buying operation. *See id*. *Bolden* is clearly distinguishable from the case at hand.

In *Bolden*, the trial court found that the organized vote-buying operation was so fraudulent, illegal, conspicuously corrupt and pervasive that it had tainted the entire absentee voting procedure in the election. *See id*. at 565-66. Still the high court reiterated its position that "courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct" and that a "fair election is the paramount consideration." *See id.* at 566.

In the present case, and unlike in *Bolden*, there is no colorable claim for fraud or interference with the sanctity or integrity of the ballot. No organized vote-buying scheme was present, nor has any alleged improper activity risen to the requisite level so that it permeates the entire absentee ballot process. In *Bolden*, this Court noted that, "Seldom is there a more obvious case of pervasive corruption where over ten percent of the absentee voters admit that their votes were bought (46 out of 381)." *Id.* at 567. Had this case involved such blatant and impermissible conduct, this Court's decision might be easier; however, no such conduct may properly be ascribed to the defendants. The most recent case where absentee ballots were thrown out involved the 1997 Miami mayoral race in Miami-Dade county. As in *Bolden*, blatant fraud and corrupt practices reigned in the absentee ballot process. The fraud was so pervasive that the trial court specifically found that "massive absentee voter fraud which affected the electoral process" was uncovered that "literally and figuratively, stole the ballot from the hands of every honest voter in the City of Miami" *In re the Matter of the Protest of Election returns and Absentee Ballots*, 707 So.2d 1170, 1172 (Fla. 3rd DCA 1998) (hereafter, "*Protest of Elections*")

The contesting candidate in *Protest of Election* presented expert testimony that the "results" of the absentee ballots were so improbable (5000 to 1) that it was reasonable that the ballot results were fraudulent. *See id.* An expert document examiner concluded that 225 illegal ballots were cast, and an FBI agent with over

twenty-six years of experience identified 113 false voter addresses. *See id.* Fourteen ballots were stolen, and another 140 ballots were falsely witnessed. *See id.* Finally, no less than 480 ballots were procured or witnessed by twenty-nine so-called "ballot brokers" who invoked a privilege against self-incrimination and testified live at trial. *See id.*

The absentee ballot voter fraud scheme in *Protest of Election* is of interest principally as it stands in stark contrast to the activities involved in our case. Based on such blatantly fraudulent conduct that in fact altered the outcome of the election, it seems obvious why the court chose the remedy that it did. However, this remedy is not available in our case. In *Protest of Election*, the absentee ballots themselves were illegal. *See id.* No such allegation has been raised in the case at hand, and there is no question but that the actual ballots tendered by the voters reflected the will of the individual elector and, as such, were legal.

In the present case, the electors were sent the ballot request forms, which, due to a printing mistake, did not contain some or all of these voter's registration number. Relying on the request form, the voter's innocently returned the cards requesting a ballot and, presumably cast a vote for some candidate. Even the court in *Protest of Election* recognized that such a circumstance would not lend itself to disenfranchising voters of their constitutional rights. In citing to the federal case of *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994), the court indicated that it would be impermissible to invalidate all absentee ballots because the voters there had been given incorrect advice. *See Protest of Election*, 707 So.2d at 1174 (*citing Marks,* 19 F.3d at 875) (stating that where voters were wrongfully told that they could vote absentee as a matter of convenience and that advice was incorrect under Pennsylvania law, it was impermissible to invalidate all absentee ballots because, *inter alia*, had the voters been given correct advice, they may have gone to the polls and voted in person). To

penalize these innocent voters would be tantamount to sending a message to the electorate that its vote does not matter, and that the process is not concerned with ensuring a free and honest election, which is the cornerstone of democracy.

### C. Plaintiffs' Proposed Remedy Undermines The Will Of The People As Expressed Through Their Legitimate Votes.

Plaintiffs have not alleged, nor could they identify any facts that would support, an allegation of fraud, gross negligence, or intentional wrongdoing that would have adversely affected the sanctity of the ballot or the integrity of the election process. Rather, Plaintiffs' allegations focus on the request for an absentee ballot, and the inclusion of a number on that request card prior to the issuing of that ballot. There is absolutely no claim that any ballot was sent to anyone other than a legitimate Seminole County elector, or that any one of the thousands of ballots mailed back by these electors demonstrated anything other that their clear choice for President.

The ballots themselves reflect a full and fair expression of the will of the people. This Court has made it quite clear that in contested elections such as this one, where the results of the election reliably reflect the will of the voters, a trial court does not have the power to void that election. *See Boardman*, 323 So.2d at 264 (Fla. 1976); *see also Beckstrom*, 707 So.2d at 725-26 (presence of substantial noncompliance by canvassing board in re-marking on the actual ballots did not allow for voiding of election where the election results reliably reflected the will of the voters).

Thus, as the full and fair expression of the will of the people may be ascertained, this Court must not void the election by disallowing the absentee ballots. Such a decision would thwart the clear intent of the electors, and would punish them, as innocent parties, by disenfranchising each person who cast an absentee ballot.

In *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st DCA 1983), the First District Court of Appeals addressed an absentee ballot issue where an unsuccessful candidate

for city commissioner brought an action against the canvassing board members and the elected candidate. Despite the fact that the contested absentee ballots failed to comply with the requirements of the election law, the court held that they should not be invalidated and stated that "the failure to conform to the requirements of Section 101.62 [Request for Absentee Ballots] are not the kind of irregularities as should result in the court's invalidation of the subject absentee ballots." *Id.* at 743 (emphasis added).

Central to the resolution of the fate of these absentee ballots was the determination that the statutory requirements of §101.62, were directory rather than mandatory, and that substantial compliance was all that was required. In placing heavy reliance on *Boardman,* the appellate court stated, "we find no declaration in Section 101.62, implied or explicit, that strict compliance with its provisions is essential to the validity of the ballot or that the failure to strictly follow any of its provisions will cause the ballot not to be counted." *McLean*, 437 So.2d at 744. As in this case, where there has been substantial compliance with the requirements of §101.62, the subsequent inclusion of the missing or incomplete registration number, especially where cards were returned that are otherwise in full compliance with the election laws, would be nothing more than an effort to ensure that the voter's constitutional rights were in fact protected and that the will of the electorate was preserved. *See id.* at 741 (*citing Boardman*, 323 So.2d at 263) ("We first take note that the real parties in interest here . . . are the voters. . . . By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.").

The touchstone, and fundamental inquiry of the *Boardman* court, as with the *McLean* case, and certainly in the instant case, is "whether or not the irregularity complained of has prevented a full, fair and free Expression of the public will." *See*

*McLean*, 437 So.2d at 741 (*citing Boardman*, 323 So.2d at 265). No ballots were tampered with, and all votes that were cast were done so by registered electors. Clearly then, no one can be heard to complain that the statute has not been literally and absolutely complied with as such compliance does not guarantee the purity of the ballot. By attempting to nullify the voters' constitutional rights by throwing out their vote in a desperate attempt to alter the federal presidential election is nothing short of pathetic and for the court to consider this purely political request would be a travesty to justice and a devastating blow to our system of democracy. *See, e.g., McLean*, 437 So.2d at 742 (*citing Boardman*, 323 So.2d at 268) (no voter should be "disenfranchised" of his or her constitutional right to vote "solely on the basis of the failure of the election officials to observe directory statutory instructions.").

While Plaintiffs question the judgment of the Supervisor of Elections, this Court has directed that these officials should be given the benefit of the doubt and are afforded some discretion in their decision-making. In *Boardman*, this Court stated: "[A]s a general rule elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary ... and also that there is a presumption that returns certified by election officials are presumed to be correct." 323 So.2d at 268.

The canvassing of returns, including absentee ballots, is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots. Those judgments are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate. It is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to

overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law. *Id.* at 268, n. 5; *see also Anderson v. Canvassing and Election Board*, 399 So.2d 1021 (Fla. 1st DCA 1981).

## CONCLUSION

For all of the forgoing reasons, this Court should affirm the judgment below.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion was delivered via facsimile this 11th day of December to:

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