

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FAY FRIEDMAN, ADAM J. MEYER,  
DANIEL BENHAIM,

Plaintiffs,

v.

Case No. 04-22787-civ-Seitz/Brown

BRENDA SNIPES, in her official capacity  
as Broward County Supervisor of Elections  
and member of the Broward County  
canvassing board; CONSTANCE KAPLAN,  
in her official capacity as Miami-Dade County  
Supervisor of Elections and member of the  
Miami-Dade County canvassing board;  
and GLENDA E. HOOD,  
in her official capacity as Florida Secretary of  
State,

Defendants.

**CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY  
MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY  
INJUNCTION AND REQUEST FOR AN EMERGENCY HEARING**

A TRO or preliminary injunction is appropriate where the movants demonstrate that:

- (a) there is a substantial likelihood of success on the merits;
- (b) the TRO or preliminary injunction is necessary to prevent irreparable injury;
- (c) the threatened injury outweighs the harm that the TRO or preliminary injunction would cause to the non-movant; and
- (d) the TRO or preliminary injunction would not be averse to the public interest.

*Parker v. State Bd. of Pardons and Paroles*, 275 F.3d 1032, 1034-5 (11<sup>th</sup> Cir. 2001)(citing

*Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir.1985)). Based on the severe,

irreparable harm threatened by defendants' actions and existing Florida statutes and regulations regarding counting of absentee ballots – the denial of the right to vote – plaintiffs satisfy all of these requirements and are entitled to immediate injunctive relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ACTION.

Plaintiffs, like all other Florida voters, have the right to vote by absentee ballot. That right, once granted, is subject to the protection of the Federal Constitution and statutes. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Plaintiffs have fully and timely complied with Florida law in their efforts to cast their ballots by absentee. Through circumstances beyond their control, and through no fault of their own, plaintiffs’ ballots will not be received by the supervisor of elections in the time specified by Fla. Stat. § 101.67. Plaintiffs have marked their ballots and committed them to the control of election officials; they have marked their ballots within the same time limits as other Florida voters.<sup>1</sup>

Unless protected by this Court, plaintiffs will be treated differently than two categories of Florida absentee voters who will have their votes counted: voters who received their absentee ballots in sufficient time to return them to their supervisor of elections by 7:00 p.m. on

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<sup>1</sup> There is thus no question of a voter being able to cast a ballot after learning of the results of some or all of the election returns.

November 2, 2004, and overseas voters whose votes will be counted if they similarly cast their vote by election day but whose ballots are not received by election day, but are received within 10 days thereafter. Fla. Admin. Code § 1S 2.013(7).

Plaintiffs who did not receive their absentee ballots, when compared to voters who did, are akin to voters at a precinct when a malfunction occurs before they cast their votes. If a remedial action is available, it should be taken to make sure their votes can be cast and counted. In this instance, the available remedy has been adopted by Florida for some absentee voters – count their votes if received within 10 days of the election. To fail to adopt that remedy here denies plaintiffs the equal right to vote compared to other absentee voters.

Though Fla. Stat. § 101.67 requires absentee ballots to be received by 7:00 p.m. on election day, Florida has, by administrative action, carved out an exception for overseas voters – both civilian and military. Their absentee ballots will be counted for a federal office if “postmarked or signed and dated no later than the date of the Federal election ... if received no later than 10 days from the date of the Federal election. ...” Fla. Admin. Code § 1S 2.013(7).

The history of the creation of this non-statutory exception is set out in *Harris v. Florida Elections Canvassing Comm’n*, 122 F.Supp. 2d 1317 (N.D. Fla.), *aff’d*, 235 F.3d 578 (11th Cir.), *cert. denied*, 531 U.S. 1062 (2001). The following is drawn in part from that description.

In 1976 Congress created a statutory right of all United States citizens, both civilian and military, who are located overseas to vote by absentee ballot in Federal elections. Pub. L. 94-203, 89 Stat. 1142. That Act, the Overseas Citizens Voting Rights Act, was later replaced by the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99-410, August 28, 1986, 100

Stat. 924, currently codified as 42 U.S.C. § 1973ff (referred to by the acronym “UOCAVA”).<sup>2</sup>

The federal acts did not require absentee ballots to be mailed by a certain date, but they required that if, for elections for federal office, a voter registration application and absentee ballot application was received from an absent uniformed or overseas voter by election officials not less than 30 days before the election, then those applications must be accepted and processed. 42 U.S.C. § 1973ff–1(a).

In 1980 the Attorney General of the United States sued Florida to compel compliance with federal law. Florida, because of the lateness of its primary, was “not sending the absentee ballots until at most 20 days before the election and in some cases not until only several days before the election.” *Harris v. Fla. Elections Canvassing Comm’n*, 122 F.Supp. 2d at 1321. The Attorney General of the United States alleged that “this lateness threatened to deprive these voters of their right to vote by making it impossible for them to mail in their overseas absentee ballots in time to meet the 7 p.m. election day deadline in Fla. Stat. § 101.67(2).” *Id.* The resolution of that litigation, as described in the *Harris* opinion, resulted in the current administrative regulation by which overseas ballots are counted if received within 10 days after the election. The plaintiffs in *Harris* challenged that exception to the election day deadline contained in Fla. Stat. § 101.67(2). The district court rejected the challenge, and the Court of Appeals affirmed, noting that changing the rules would disenfranchise voters “who, to cast their ballots, just did what they were told by Florida's election officials.” 235 F.3d at 580.

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<sup>2</sup> The 1976 Act, formerly codified as 42 U.S.C. § 1973dd, was repealed by UOCAVA. Likewise, a related Act, the Federal Voter Assistance Act, formerly codified as 42 U.S.C. § 1973cc, which guaranteed the right of members of the Armed Forces and Merchant Marine located abroad to vote by absentee in the state of their residence, was repealed and replaced by UOCAVA.

Thus Florida election officials modified the time requirement of the statute as one way to comply with a federal statute which protects the right to vote. Other choices were available to Florida, one of which, moving back the primary election, was rejected by the Legislature. 122 F.Supp.2d at 1322. In short, Florida's interest in having all absentee ballots received by election day is not enforced equally as to all citizens and it is an interest that is subject to modification in order to protect the equal right to vote enjoyed by Florida voters.

Florida's duty to treat all citizens equally under the First and Fourteenth Amendments, and to comply with 42 U.S.C. § 1971(a)(2)(B) is at least equal to its duty to comply with the federal statutory protection embraced by UOCAVA.

Florida's Supreme Court recognizes that limitations on the franchise must be no more restrictive than necessary. That Court has continually acknowledged and embraced that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights" in Florida's Constitution. *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1236 (Fla. 2000), *vacated on other grounds*, 531 U.S. 70 (2000). In enforcing and protecting the right of citizens to vote, that Court has held that "[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage ... Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote." *Id.* (Internal quote and citation omitted.)

Additionally, the Supreme Court of Florida holds that "substantial compliance with the absentee voting laws is all that is required to give legality to the ballot." *Boardman v. Esteva*, 323 So.2d 259, 264 (1975). *Boardman* points out that the relevant concerns are whether any

requirements affect the integrity of the ballot of the election. Because Florida has decided that some ballots voted by election day and received within 10 days thereafter shall be counted, these factors are not in doubt here and are not a legitimate basis for rejecting plaintiffs' ballots.

Because Florida has acknowledged that its interest, as set forth in Fla. Stat. § 101.67(2) must in some circumstances be modified in order to protect the right to vote, there can be no argument that a similar modification must be adopted to protect the right to vote in the circumstances presented here. The administrative rule adopted pursuant to the 1980 suit were precautionary, adopted to avoid the possibility of vote denial. The circumstances here are that the right to vote is being denied; there is no possibility that these votes could arrive on time. There is no legitimate state reason for extending the time to receive ballots from one category of absentee voters but not to plaintiffs.

II. THE REJECTION VIOLATES PLAINTIFFS' RIGHT TO VOTE GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The U.S. Supreme Court has recognized that the right to vote is "a fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, "[t]he 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." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The right to vote is protected by the First Amendment, as applied to state officials by the Fourteenth Amendment. *See Anderson v. Celebrezze*, 460 U.S. 780, 786-7 and footnote 7 (1983).

The Supreme Court applies a sliding scale to challenges to election laws which restrict the right to vote. In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the Court said:

[A]s the full Court agreed in *Anderson*, 460 U.S., 780, 788-789, 1(1983) (REHNQUIST, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *Anderson*, 460 U.S. at 788, n. 9.

(Internal citations omitted.)

The burden on plaintiffs’ rights is total denial of the right to vote in this federal election. Total denial contrasted with allowing other absentee votes to count though received after election day is subject to strict scrutiny. But even if Florida would have a compelling reason in requiring all votes to be received by November 2nd, the unequal application of that interest defeats any argument that the rejection of plaintiffs’ votes is either necessary or narrowly tailored. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). There can be no heavier burden upon the right to vote than the outright denial of that right. Whatever the state’s interest in requiring that votes cast by legal voters by election day be received by election day, that interest is less than compelling because it has been adjusted in order to comply with a federal statutory protection of the right to vote. The standards applied to the overseas voters which assure the bona fides of their votes is capable of being applied equally to plaintiffs. Plaintiffs’ claim arises because of an unusual, and unexplained event – the disappearance of thousands of absentee ballots. Under the balancing test

outlines in *Burdick*, the state's interest can be fully protected consistent with plaintiffs' right to vote.

Application of § 101.67(2) to plaintiffs' ballots will violate plaintiffs' First Amendment right, applicable to defendants through the Fourteenth Amendment, and plaintiffs are substantially likely to succeed on the merits of their claim.

III. THE REJECTION VIOLATES PLAINTIFFS' RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Plaintiffs properly and timely met the requirements for voting by absentee ballot.

Through no fault of their own, current Florida law and administrative rule reject their ballots.

Other voters, who were fortunate enough to receive their absentee ballots in time to return them to the supervisor of elections by election day will not lose their right to vote. Overseas voters, who are protected by separate federal statutory law, will have their votes counted if their ballots are received 10 days later. The reason for counting the overseas which arrive after election day is the recognition that it is likely that overseas voters will have additional difficulties, compared to stateside absentee voters, in getting their ballots timely returned. Here the reality is – that through no fault of plaintiffs – there was an impossibility of getting their ballots returned. The same equitable consideration should be applied: both categories of ballots should be counted whether cast from overseas or from within the United States.

It is clear that equal protection clause of the Fourteenth Amendment prevents the “arbitrary and disparate treatment” of similarly situated voter registration applicants. *Bush v. Gore*, 531 U.S. at 104. *See also Wesberry v. Sanders*, 376 U.S. 1, 17-8 (1964) (“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. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.”).

Thus, plaintiffs have a substantial likelihood of success on the merits of their claim.

#### IV. THE REJECTION VIOLATES THE CIVIL RIGHTS ACT OF 1964.

Section 1971 of the Civil Rights Act of 1964 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). Defendants had the duty to timely deliver absentee ballots to plaintiffs but plaintiffs did not receive their ballots in a timely fashion. Section 1971 is a “no fault” statute – the cause of the failure, the responsibility for the failure, does not matter. The failure to receive a ballot is covered by the Act as “an error or omission ... or other act requisite to voting” that “is not material in determining whether [plaintiffs are] qualified under State law to vote.” Id. The word “vote” in § 1971 “includes all action necessary to make a vote effective including ... having such ballot counted and included in the appropriate totals of votes cast ... .”

42 U.S.C. § 1971(e). Additionally, the Eleventh Circuit has made clear that §1971(a)(2)(B) prohibits denials of the right to vote through innocent errors. *Schweir v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003).<sup>3</sup>

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<sup>3</sup> In *Schweir v. Cox*, the Eleventh Circuit specifically held “that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under Section 1983.” 340 F.3d at 1296-7.

Thus, plaintiffs are substantially likely to succeed upon the merits of their claim.

V. DEFENDANT HOOD HAS THE POWER AND THE DUTY TO IMPOSE A UNIFORM STANDARD THAT COMPLIES WITH FEDERAL LAW

The Secretary of State, as the “chief election officer of the state,” is responsible for “provid[ing] uniform standards for the proper and equitable implementation of the registration laws.” Fla. Stat. § 97.102. *See also Bush v. Gore*, 531 U.S. at 119 (Rehnquist, J., concurring) (Florida Secretary of State “is authorized by law to issue binding interpretations of the statutes”). Yet the Secretary of State has failed to do so with regard to the acceptance of absentee ballots. She has promulgated one standard for one set of voters (overseas voters and voters who timely receive an absentee ballot) but has not set a similar standard for voters in plaintiffs’ situation.

In order to comply with 42 U.S.C. § 1971(a)(2)(B), and the First and Fourteenth Amendments to the U.S. Constitution, defendant Hood must ensure that no ballot sent by November 2, 2004, and received by November 12, is not counted. The Secretary of State may do so by issuing a formal Advisory Opinion, which has binding effect, or by any other means within her power. *See Fla. Stat. § 106.23(2)*.

VI. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT THEIR REQUESTED EQUITABLE RELIEF.

Plaintiffs in this case seek to vindicate their voting rights, rights that rank among the most fundamental in our society. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. at 562; *Yick Wo v. Hopkins*, 118 U.S. at 370. “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. at 17.

Unless this Court enjoins defendants, plaintiffs will be denied their fundamental right to vote. The deprivation of that right is irreparable as plaintiffs will permanently lose the right to vote in the November 2004 election. This represents a quintessential form of irreparable harm, one that courts regularly address through the issuance of preliminary injunctive relief. *See, e.g., Suster v. Marshall*, 149 F.3d 523 (6<sup>th</sup> Cir. 1998)(approving preliminary injunction preventing enforcement of judicial canon setting spending limits in judicial elections); *Homans v. City of Albuquerque*, 264 F.3d 1240 (10<sup>th</sup> Cir. 2001)(granting injunction pending appeal, on same standard as would be used for preliminary injunction, where mayoral candidate challenged constitutionality of municipal campaign finance law; court excused appellant from requirement of bringing his motion first in district court because “only a short time remain[ed]” before the election); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (reversing denial of preliminary injunction in challenge to constitutionality of state statute governing filing of nominating petitions by candidates seeking placement on general election ballot, because “[i]f the plaintiffs lack an adequate opportunity to gain placement on the ballot in this year’s election, this infringement on their rights cannot be alleviated after the election”); *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 578 (7<sup>th</sup> Cir. 1973)(“The preliminary injunction properly protected [Spanish-speaking plaintiffs’] rights in the 1972 general election by requiring the election commissioners to provide voting assistance in Spanish.”).

VII. A PRELIMINARY INJUNCTION WOULD NOT HARM DEFENDANTS AND WOULD SERVE THE PUBLIC INTEREST.

Unlike the threatened injury to plaintiffs – who may lose their fundamental democratic rights to vote in the current election – the potential harm a preliminary injunction would cause defendants is non-existent. Defendants have no interest in treating voters differently. There is no public interest served by insisting votes be received by some but not all absentee voters as of election day.

The public interest also is clearly advanced by granting the requested equitable relief. The public interest weighs strongly in favor of ensuring that all eligible voters are allowed to cast a ballot.<sup>4</sup> In contrast, defendants' interest in limiting the right of plaintiffs to have their votes counted frustrates the purpose of the Civil Rights Act of 1964 and violates the First and Fourteenth Amendments.

VIII. NO BOND SHOULD BE REQUIRED.

Plaintiffs request that they not be required to post any cash bond. In spite of the literal language of Rule 65(c) of the Federal Rules of Civil Procedure, this Court clearly has the discretion to issue a preliminary injunction without requiring plaintiffs to give security. *See, e.g., Caterpillar, Inc. v. Nationwide Equipment*, 877 F.Supp. 611, 617 (M.D. Fla. 1994); *Baldree v. Cargill, Inc.*, 758 F.Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991).

Because plaintiffs are voters who seek only to vindicate their fundamental right to vote,

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<sup>4</sup> Other similarly situated applicants would also benefit from a determination that the Florida's requirement and exception to its requirement violates federal law. Presumably, having been told that they cannot apply the policy to plaintiff, they would remedy other similar violations. Thus, the public would be better served by equal treatment of voters. There is no public interest in denying qualified voters the right to vote.

this case implicates the public interest and the balance of hardships tips sharply in favor of plaintiffs. Therefore this Court should not require plaintiffs to give security. *See Pharmaceutical Soc'y of N.Y. v. Dep't of Soc. Serv.*, 50 F.3d 1168, 1174 (2d Cir. 1995); *Crowley v. Local 82 Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehouseman and Packers*, 679 F.2d 978, 999 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984).

IX. CONCLUSION.

Plaintiffs, who complied with the requirements for receiving absentee ballots but who did not receive them through no fault of their own, should have their votes counted if they cast a ballot by transmitting it to election officials by election day, provided the ballot is received within 10 days of election day.

Respectfully submitted,

/s Randall C. Marshall  
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CERTIFICATE OF SERVICE

I certify that the forgoing document will be hand delivered to all parties at the status conference to be held on Wednesday, November 3, 2004.

/s Randall C. Marshall

Randall C. Marshall