

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

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Case No. \_\_\_\_\_

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American Federation of Labor and Congress of Industrial Organizations; American Federation of State, County and Municipal Employees, AFL-CIO; Service Employees International Union; Florida Public Employees Council 79, AFSCME, AFL-CIO; and SEIU 1199Florida,

Petitioners,

v.

GLEND A. HOOD, in her official capacity as Secretary of State of the State of Florida; ION SANCHO, in his official capacity as Leon County Supervisor of Elections and member of the Leon County 2004 Fall Election Canvassing Board; and AUGUSTUS D. AIKENS and JANE SAULS in their official capacities as members of the Leon County 2004 Fall Election Canvassing Board,

Respondents.

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**PETITION FOR WRIT OF MANDAMUS  
(Original Action)**

**EXPEDITED CONSIDERATION SOUGHT**

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## INTRODUCTION

Following the election of 2000, and “numerous reports of voters presenting themselves at the polls only to find that their names were not on the precinct register,” the Florida Legislature enacted legislation permitting voters whose eligibility cannot readily be determined to cast “provisional ballots.” *See* Florida Senate, Committee on Ethics and Elections, *Review of the Voting Irregularities of the 2000 Presidential Election* (Report Number 2001-201) (hereinafter “Florida Senate Report”) at 5, 46; Senate Staff Analysis and Economic Impact Statement on CS/SB1118 (March 24, 2001) at 1; Ch. 2001-40, §35, Laws of Fla. The provisional ballot procedure permits a voter “to cast a ballot, but for the votes not to be counted until the person’s eligibility can be conclusively verified.” Florida Senate Report at 24. The underlying purpose of provisional ballots is to ensure that eligible voters are not denied the right to vote due to no fault of their own, such as errors in voter registration lists. *Id.* (purpose of provisional ballots is “to assure that everyone who is entitled to vote is given that opportunity”).

Due to no fault of voters, it is also very easy for voters to appear on election day at a precinct other than that to which they have been technically assigned. In light of such factors as significant population growth, it is a matter of public record that counties throughout Florida have both vastly increased the total number of

precincts and substantially changed precinct lines. As discussed below, in Broward County, 125,000 registered voters have been affected by precinct changes in 2004; in Miami-Dade County, the total number of precincts has increased from 614 to 744 in the last four years. As enacted by the Florida Legislature, however, the provisional ballot statute requires a voter to appear at the *precinct* to which the voter has been assigned in order to be even eligible to cast a provisional ballot and, moreover, if for some reason a voter casts a provisional ballot outside the designated precinct, the ballot will be rejected and the vote will not be counted. §§101.048(1), (2), Fla. Stat. (Supp. 2004).

The Florida Constitution, Article VI, §2, sets forth the State's exclusive qualifications for suffrage. These qualifications do not include a requirement that a vote be cast in a particular voting precinct, and the Constitution explicitly makes voters "elector[s] of the *county* where registered." Art. VI, §2, Fla. Const. (emphasis added). Florida's provisional ballot statute, by invalidating ballots if they are cast outside the *precinct* to which the voter is assigned, denies the right to vote to electors who meet all constitutional qualifications for suffrage – in violation of settled precedent that the Legislature may not modify the qualifications for voting in the Constitution.

Petitioners seek relief from Section 101.048 of the Florida Statutes to the extent that it denies the right to cast a valid vote, or indeed any vote at all, to constitutionally qualified, properly registered electors who seek to cast or actually cast “provisional ballots” in their county of residence, but do so in a precinct other than that designated by local elections officials. The Court should intercede now to rule on this issue and order a remedy that will take effect before the November 2004 election. Otherwise, potentially outcome determinative provisional ballots that would have been cast in compliance with the Florida Constitution may never even be cast. Further, some that have been cast will not be counted because of the unconstitutional provisional ballot statute – and the Court would then be called upon to resolve this legal issue in haste in the days immediately following the election.

### **STATEMENT OF JURISDICTION**

This Court has original jurisdiction to issue writs of mandamus pursuant to Article V, §3(b)(8) of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. *See, e.g., Florida League of Cities v. Smith*, 607 So.2d 397, 398 (Fla. 1992) (accepting original jurisdiction to consider legality of ballot summary of proposed constitutional amendment); *Greenbaum v. Firestone*,

455 So.2d 368, 369 (Fla. 1984) (accepting original jurisdiction regarding Secretary of State's certification of judicial candidate).

## **FACTS**

1. Petitioner American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) is a federation with 60 member national and international unions (the “affiliate unions”) with a total membership of approximately 13 million working men and women, including in excess of 500,000 members in the State of Florida. The objects and principles of the AFL-CIO, as set forth in its Constitution, include: “To protect and strengthen our democratic institutions, to secure full recognition and enjoyment of the rights and liberties to which we are justly entitled, and to preserve and perpetuate the cherished traditions of our democracy,” and “to encourage workers to register and vote, to exercise their full rights and responsibilities of citizenship, and to perform their rightful part in the political life of the local, state and national communities.” The affiliate unions have members in every county of Florida who both meet the constitutional qualifications to vote in the 2004 general election – in that they are citizens of the United States, at least eighteen years of age, permanent residents of the State of Florida, and registered to vote – and who desire to have their votes counted. The AFL-CIO brings suit on behalf of itself, its members, its affiliates, and their

members, in order to ensure that all of its members who are constitutionally qualified to vote are not denied the right to vote.

2. Petitioner American Federation of State, County and Municipal Employees, AFL-CIO (“AFSCME”) is a labor organization affiliated with the AFL-CIO that represents approximately 1.4 million working men and women, including in excess of 110,00 workers in the State of Florida. The AFSCME International Constitution provides: “Union members are both workers and citizens.” The Constitution further provides: “For unions, the work place and the polling place are inseparable, and the exercise of the awesome rights and responsibilities of citizenship is equally required at both.” AFSCME has members in every county of Florida who both meet the constitutional qualifications to vote in the 2004 general election – in that they are citizens of the United States, at least eighteen years of age, permanent residents of the State of Florida, and registered to vote – and who desire to have their votes counted. AFSCME brings suit on behalf of itself and its members, in order to ensure that all of its members who are constitutionally qualified to vote are not denied the right to vote.

3. Petitioner Service Employees International Union, AFL-CIO (“SEIU”) is a labor organization affiliated with the AFL-CIO with more than 1.6 million members, including in excess of 30,000 members in the State of Florida.

The SEIU Constitution expresses the beliefs that “workers’ voices [must be] heard at every level of government” and that “unions must participate in the political life of our society.” The Constitution further provides that in order to “benefit [SEIU’s] members and improve their conditions by every means,” SEIU will “engag[e] in . . . civic, . . . political, legal, . . . and other activities.” SEIU has members throughout the state of Florida who both meet the constitutional qualifications to vote in the 2004 general election – in that they are citizens of the United States, at least eighteen years of age, permanent residents of the State of Florida, and registered to vote – and who desire to have their votes counted. SEIU brings suit on behalf of itself and its members, in order to ensure that all of its members who are constitutionally qualified to vote are not denied the right to vote.

4. Petitioner Florida Public Employees Council 79, AFSCME, AFL-CIO, is a labor organization and an affiliate of AFSCME. AFSCME Council 79 represents more than 110,000 workers in the State of Florida, including workers in every county in the State. AFSCME Council 79 has members in every county of Florida who both meet the constitutional qualifications to vote in the 2004 general election – in that they are citizens of the United States, at least eighteen years of age, permanent residents of the State of Florida, and registered to vote – and who desire to have their votes counted. A substantial number of AFSCME Council 79

bargaining unit members who are lawfully entitled to vote have reported that their names do not currently appear on the voter rolls in their county and as such will cast provisional ballots in the upcoming elections. AFSCME Council 79 brings suit on behalf of itself and its members, in order to ensure that all of its members who are constitutionally qualified to vote are not denied the right to vote.

5. Petitioner SEIU 1199Florida is a labor organization and an affiliate of SEIU. SEIU 1199Florida has over 3,000 members throughout the State of Florida. SEIU 1199Florida has members throughout Florida who both meet the constitutional qualifications to vote in the 2004 general election – in that they are citizens of the United States, at least eighteen years of age, permanent residents of the State of Florida, and registered to vote – and who desire to have their votes counted. SEIU 1199Florida brings suit on behalf of itself and its members, in order to ensure that all of its members who are constitutionally qualified to vote are not denied the right to vote.

6. Respondent Glenda E. Hood is sued in her official capacity as the Florida Secretary of State. Respondent Hood, as head of the Department of State, maintains custody of the Florida Constitution and statutes and supervises the administration of election laws. §15.01, Fla. Stat (2003); §15.13, Fla. Stat. (2003). The Secretary of State is Florida's chief election officer. §97.012, Fla. Stat. (Supp.

2004). Respondent Hood has a mandatory duty to obey the Constitution of the State of Florida. Art. II, §5(b), Fla. Const. Respondent Hood also has a mandatory duty to “[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws,” “scrutinize the effectiveness of election laws,” “[p]rovide technical assistance to the supervisors of elections on voter education and election personnel training services,” and “[p]rovide voter education assistance to the public.” §§97.012(1), (3), (4), (6), Fla. Stat. Respondent Hood also has specific duties with respect to the implementation of the provisional ballot statute, in particular, she has the mandatory duty to “prescribe the form of the provisional ballot envelope” that is used statewide. §101.048(1); *see also* Rule 1S-2.037 (“The Department of State, Division of Elections, is required to establish a Provisional Ballot Envelope to be used statewide”). Respondent Hood has promulgated a Provisional Ballot Envelope to be used statewide, which provides: “YOUR BALLOT WILL NOT COUNT IF YOU DO NOT VOTE IN THE CORRECT PRECINCT.” Form DS DE 49 (effective February 2, 2004).

7. Respondent Ion Sancho is sued in his official capacity as the Supervisor of Elections of Leon County, Florida and as a member of the Fall 2004 Election Canvassing Board. As the Leon County Supervisor of Elections, Respondent Sancho is responsible for the administration of elections in Leon

County. As the county elections supervisor, he has a mandatory duty to obey the Constitution of the State of Florida. Art. II, §5(b), Fla. Const.; *see also* §98.015(1), Fla. Stat. (2002). Respondent Sancho has a mandatory duty to appoint and oversee all county election workers and is responsible for the “diligent performance of his . . . duties” by those workers. §102.012, Fla. Stat. (2002). Respondent Sancho has the mandatory duty to train all poll workers on “their duties and responsibilities as election officials,” including, *inter alia*, “balloting and polling place procedures.” §102.014(1), Fla. Stat (2002). Those polling place procedures include the provisional ballot statute’s requirement that voters are not eligible to cast provisional ballots unless, *inter alia*, they claim to be “eligible to vote at the precinct in the election.” §101.048(1), Fla. Stat. Finally, included in Respondent Sancho’s mandatory duties as Supervisor of Elections is service as a member of the Leon County Election Canvassing Board. §102.141(1), Fla. Stat. (Supp. 2004).

8. Along with Respondent Ion Sancho, Respondents Augustus D. Aikens and Jane Sauls are sued in their official capacities as members of the Leon County Fall 2004 Elections Canvassing Board. §102.141(1), Fla. Stat. (canvassing board composed of supervisor of elections, county court judge, and chair of board of county commissioners). The members of the Leon County Fall 2004 Elections Canvassing Board have the mandatory duty to obey the Constitution of the State of

Florida. Art. II, §5(b), Fla. Const.; *see also* §98.015(1). As members of the Fall 2004 Election Canvassing Board, Respondents Sancho, Aikens, and Sauls also have a mandatory duty to implement the provisional ballot statute. §101.048, Fla. Stat.; §102.141(2), Fla. Stat. Specifically, Respondents Sancho, Aiken, and Sauls have a mandatory duty to examine each provisional ballot and to determine whether the individual was entitled to vote, and if so, to count the ballot. §101.048(2), Fla. Stat. If Respondents Sancho, Aiken, and Sauls determine that a voter was not “entitled to vote at the precinct where the person cast a vote,” they have a mandatory duty to reject the provisional ballot, to return the ballot to the provisional ballot envelope, and to mark the envelope “Rejected as Illegal.” §101.048(2)(b)(2), Fla. Stat.

9. Article VI, §2 of the Florida Constitution sets forth the constitutional qualifications for voting: “Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.”

10. As part of the electoral reform following the 2000 election, the Florida Legislature enacted a statutory scheme governing provisional ballots. *See* §101.048, Fla. Stat; §101.049, Fla. Stat. (Supp. 2004). Voters are eligible to cast a provisional ballot in certain circumstances, for instance when they appear at the

polls but their eligibility to vote cannot be verified. *See, e.g.*, §101.048(1), Fla. Stat. The provisional ballot scheme has the salutary purpose of ensuring voters are not disenfranchised due to clerical errors and other circumstances beyond the voters' control. Petitioners do not challenge the underlying statutory scheme that allows voters to cast provisional ballots or most of the statutory provisions governing provisional ballots.

11. The portions of the statutory scheme for counting provisional ballots that Petitioners challenge provide that constitutionally qualified electors, who pursuant to Article VI, §2 of the Florida Constitution are “elector[s] of the county where registered,” will only be eligible to cast provisional ballots or to have any such ballots counted, if the ballots are cast at the precinct to which the electors are assigned:

(1) At all elections, a voter claiming to be properly registered in the county *and eligible to vote at the precinct in the election*, but whose eligibility cannot be determined, and other persons specified in the code shall be entitled to vote a provisional ballot. Once voted, the provisional ballot shall be placed in a secrecy envelope and thereafter sealed in a provisional ballot envelope. The provisional ballot shall be deposited in a ballot box. All provisional ballots shall remain sealed in their envelopes for return to the supervisor of elections. The department shall prescribe the form of the provisional ballot envelope.

(2)(a) The county canvassing board shall examine each provisional ballot envelope to determine *if the person voting that ballot was entitled to vote at the precinct where the person cast a vote*

*in the election and* that the person had not already cast a ballot in the election.

(b)1. If it is determined that the person was registered *and entitled to vote at the precinct where the person cast a vote in the election*, the canvassing board shall compare the signature on the provisional ballot envelope with the signature on the voter's registration and, if it matches, shall count the ballot.

2. If it is determined that the person voting the provisional ballot was not registered *or entitled to vote at the precinct where the person cast a vote in the election*, the provisional ballot shall not be counted and the ballot shall remain in the envelope containing the Provisional Ballot Voter's Certificate and Affirmation and the envelope shall be marked "Rejected as Illegal."

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

12. In the event of a close election, the difference between provisional ballots acceptable under the Constitution – all votes cast in the county where a voter is registered – and those acceptable under the statutory scheme – only votes cast in the precinct designated by elections officials – could be outcome determinative.

### **NATURE OF THE RELIEF SOUGHT**

Petitioners request that this Court (1) rule that Section 101.048 is unconstitutional to the extent it denies constitutionally qualified electors the opportunity to cast provisional ballots and disqualifies the votes of constitutionally qualified electors who cast provisional ballots in their county of residence, solely

because of the voters' precinct assignment, and (2) order that constitutionally qualified electors who attempt to cast provisional ballots in their county of residence will not be denied their right to vote and that their votes will be counted.

## **ARGUMENT**

### **I. The Court Should Hear This Original Mandamus Action To Prevent The Unconstitutional Denial Of The Right To Vote In The November 2004 Election**

#### **A. Original Jurisdiction Is Appropriate Due To The Importance Of This Action**

The Court should exercise its discretion to hear this important original mandamus action, which unquestionably presents a critical matter affecting the entire State that must be resolved before voters go to the polls on November 2, 2004. The issue in brief is that Florida's statutory scheme provides that constitutionally qualified, registered voters who attempt to cast provisional ballots at precincts other than the precinct to which the voter is assigned will either be denied a ballot or will have their cast ballot not counted and "marked 'Rejected as Illegal.'" §§101.048(1), (2), Fla. Stat. The State Constitution, on the other hand, sets forth the following, exclusive list of qualifications for suffrage: (1) United States citizenship, (2) eighteen years of age, (3) permanent residence in the State of

Florida, and (4) registration to vote. Art. VI, §2, Fla. Const. Persons who satisfy these qualifications are “elector[s] of the county where registered.” *Id.*

We explain in Part II why, as a pure matter of law, the statutory provisions cannot stand in light of the Constitution because under settled case law the Legislature is powerless to disqualify electors who are *constitutionally entitled to vote*. That being so, the portions of Florida statutory law that disallow the provisional ballots of electors who are otherwise constitutionally entitled to vote in their counties of residence – simply based on the precinct where those electors attempt to cast their ballots – impermissibly abridge the right to vote. Mandamus will lie to enforce clear and certain rights such as the constitutional right at stake here. *Florida League of Cities*, 607 So.2d at 400.

This Court should exercise its original mandamus jurisdiction to address the constitutional question and implement a remedy because of the importance of the issue raised by this Petition to the administration of the November 2004 election and to the legitimacy of the electoral process in this State. *See Mitchell v. Moore*, 786 So.2d 521, 523 (Fla. 2001) (accepting original jurisdiction “due to the importance of the constitutional issue raised in this case”); *State ex rel. Volusia County v. Dickson*, 269 So.2d 9, 10 (Fla. 1972) (“We have accepted jurisdiction

because this cause clearly raises questions of constitutional construction and is an important public controversy.”).

This Court has repeatedly exercised its original jurisdiction to consider challenges to laws related to upcoming elections in light of the fundamental importance of questions related to the right to vote and the administration of elections. *See, e.g., Kainen v. Harris*, 769 So.2d 1029 (Fla. 2000); *Florida League of Cities*, 607 So.2d 397 (Fla. 1992); *Greenbaum v. Firestone*, 455 So.2d 368 (Fla. 1984); *Republican State Executive Committee v. Graham*, 388 So. 2d 556 (Fla. 1980); *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So.2d 561 (Fla. 1980); *Smith v. Smathers*, 372 So.2d 427 (Fla. 1979); *Bayne v. Glisson*, 300 So.2d 79 (Fla. 1974); *State ex rel. Shevin v. Stone*, 279 So.2d 17 (Fla. 1973); *Beller v. Adams*, 235 So.2d 502 (Fla. 1970).

This case directly implicates the right to vote of constitutionally qualified electors. There can be no question about the fundamental importance of the right to vote. *See, e.g., Gore v. Harris*, 772 So.2d 1243, 1293 (Fla. 2000) (“This essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court.”). Accordingly, original jurisdiction is appropriate over this important matter.

**B. Original Jurisdiction Is Appropriate Because This Action Needs To Be Resolved Now**

Resolution of the issue the Petition presents is needed in advance of the November 2004 election for two reasons. First, voters attempting to cast constitutionally permissible provisional ballots may well be turned away from the polls for failure to comply with the unconstitutional statute and thus never be given the opportunity to cast a provisional ballot – a serious violation that can never be remedied. *Cf.* Florida Senate Report at 24 (“No one knows for sure how many people were turned away from the polls and did not vote because their names were not on the precinct register for the 2000 General Election”). The reason for this is that the statute provides that “a voter *claiming* to be properly registered in the county *and* eligible to vote at the precinct in the election, but whose eligibility cannot be determined” is entitled to a provisional ballot. §101.048(1), Fla. Stat. (emphases added). Thus, voters who claim to be properly registered in the county but who are confused about their assigned precinct – perhaps because of changes in precinct lines as discussed below – will not be entitled to cast provisional ballots under the statute. Unless the Court acts before the November election, those voters may not have the opportunity to vote at all – for instance, because poll workers lack the time, resources, or training to direct votes to their assigned precincts.

Second, if the constitutionality of Florida’s provisional ballot statute is left unresolved, voters will cast ballots in November that will be rejected as “illegal” under the statute because they have not been cast in the precinct designated by elections officials, even though all constitutional prerequisites for voting have been met. Although it is unknown how many ballots will be rejected, it is certain that there will be some. In the event of a close election, whether or not the rejected ballots are counted could determine who prevails. The Court would then be called upon to address the constitutionality of the provisional ballot statute in the chaotic days following the election and determine whether the rejected ballots should be counted. This Court should exercise its jurisdiction now while there is still time to ensure that the issue will not instead need to be decided quickly while an election hangs in the balance. *Cf. Kainen*, 769 So.2d at 1035 (Pariente, J., concurring) (“Certainly a resolution of the issue of whether the ballot summary is misleading *before* the election is vastly preferable to an after-the-fact challenge.”).

**C. Original Jurisdiction Is Appropriate To Prevent Likely Disenfranchisement Of A Large Number Of Voters**

The provisional ballot statute not only will certainly result in the disenfranchisement of some voters as discussed above – which alone is enough to merit the Court acting now – but is likely to result in the disenfranchisement of a

*substantial number* of constitutionally qualified, properly registered voters in the November 2004 election for two reasons.

First, voter confusion surrounding precinct lines is likely to be great. The number of different precincts in the State is immense. For instance, in the 2000 general election, Miami-Dade County alone had 614 separate geographic precincts.<sup>1</sup> Leon County, with a total population of only 245,000 currently has 180 precincts.<sup>2</sup> It is very easy to end up at a precinct other than that to which a voter has been assigned when there may be several within a short distance of a voter's residence.

Moreover, the November 2004 election is the first presidential election to occur following the redrawing of district and precinct lines after the 2000 census. The number of voters subject to precinct changes since the last large-turnout election in 2000 is substantial. For instance, in Miami-Dade County, the number

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<sup>1</sup> See Website of Miami-Dade Supervisor of Elections, available at <http://elections.miamidade.gov/ele00312/CNTPREC.HTML>.

<sup>2</sup> See Website of Leon County Supervisor of Elections, available at <http://www.leonfl.org/elect/images/2004pollist.pdf>; Website of Leon County, available at <http://www.leonfl.org/aboutus.asp>.

of precincts has increased from 614 to 744.<sup>3</sup> In Broward County alone, 125,000 registered voters have been affected by precinct changes in 2004.<sup>4</sup> In Leon County, approximately two-thirds of precincts have undergone changes between the 2000 election and the upcoming 2004 election.<sup>5</sup>

Given these changes, a significant number of voters will likely and understandably appear on election day at precincts other than those to which they have recently been assigned. One scholar has written that “due to its steady population increases, Florida will have many new precincts for voters in 2002 and 2004.” Paul M. Schwartz, “Voting Technology and Democracy,” 77 NYU L. Rev. 625, 693 (2002). As a result, “faithful Florida voters who attempt to vote where they have always done so may be disappointed on future election days” because of the provisional ballot statute. *Id.*

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<sup>3</sup> See Website of Miami-Dade Supervisor of Elections, available at <http://elections.miamidade.gov/ELE04069/countywide-d.pdf>.

<sup>4</sup> See Website of Broward County Supervisor of Elections, available at [http://www.browardsoe.org/news.php3?Article\\_ID=0075&Cat=](http://www.browardsoe.org/news.php3?Article_ID=0075&Cat=); see also Website of Hillsborough County Supervisor of Elections, available at <http://www.votehillsborough.org/newsrelease.aspx?id=121> (discussing increase in number of precincts following 2000 Census).

<sup>5</sup> From information posted at Website of Leon County Supervisor of Elections, available at <http://www.leonfl.org/elect/images/conversionlist.pdf>.

Second, Florida has a complicated set of qualifications to determine who is allowed to cast a provisional ballot. *See* §101.048(1), Fla. Stat. (“At all elections, a voter claiming to be properly registered in the county and eligible to vote at the precinct in the election, but whose eligibility cannot be determined, and other persons specified in the code shall be entitled to vote a provisional ballot.”), §101.043(3), Fla. Stat. (Supp. 2004) (“If the elector . . . is a first-time voter who registered by mail and has not provided the required identification to the supervisor of elections prior to election day, the elector shall be allowed to vote a provisional ballot.”), §101.045(2)(c), Fla. Stat. (2002) (if elector completes change of address or name form and “the elector’s eligibility to vote cannot be determined, he or she shall be entitled to vote a provisional ballot”), §101.049(1), Fla. Stat. (“Any person who votes in an election after the regular poll-closing time pursuant to a court or other order extending the statutory polling hours must vote a provisional ballot.”), §101.69, Fla. Stat. (Supp. 2004) (if “elector who has received an absentee ballot, but desires to vote in person . . . [and] elector does not return the ballot and the election official . . . [c]annot determine whether the supervisor has received the elector’s absentee ballot, the elector may vote a provisional ballot”), §101.111(3)(b), Fla. Stat. (Supp. 2004) (“If the challenged person refuses to complete the oath or if a majority of the clerk and inspectors doubt the eligibility of

the person to vote, the challenged person shall be allowed to vote a provisional ballot.”).

Poll workers are likely to be faced with high voter turn-out on election day in 2004, and may well lack the time required to comply with these complicated provisional ballot requirements, let alone to help individual voters who are not on precinct lists to find the assigned precinct. Because it is the easiest path, poll workers may simply provide provisional ballots when a voter is not on the registration list. *See* Schwartz, 77 NYU L. Rev. at 692-93 (“One danger [of Florida’s provisional ballot statute] is that harried poll workers simply will hand out provisional ballots to voters who are not in their database rather than telling them the correct precinct.”). Under these circumstances, voters who are technically assigned to different precincts will leave the polls with the mistaken impression that they have voted, when in fact the result under current law will be their provisional votes will be cast but not counted.

**D. Original Jurisdiction Is Appropriate Because The Issue Presented Is Purely Legal**

Finally, original mandamus jurisdiction is appropriate here because the constitutional question presented requires no factual development. *Cf. Harvard v. Singletary*, 733 So.2d 1020, 1022 (Fla. 1999) (discussing Court’s reluctance to

accept original jurisdiction over matters raising substantial issues of fact). The factual matters discussed immediately above are relevant only to the importance of the case, not the legal question involved. The merits of this case involve a straightforward analysis of whether a statute violates the Florida Constitution. That question can be resolved by referring to the relevant provisions of the law. Lower court proceedings are not necessary to create a record, resolve factual disputes, or narrow the issues.

## **II. The Provisional Ballot Statute Violates The State Constitution**

### **A. The Legislature May Not By Statute Modify The Constitutional Qualifications For Voting**

Article VI, §2 of the Florida Constitution provides: “Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector *of the county where registered.*” (Emphasis added.) The Constitution thus sets forth elector qualifications relating to citizenship, age, and residency, and also requires electors to register. Upon meeting these qualifications, a person becomes an elector of the county; there is no constitutional qualification or requirement relating to the precinct at which an elector must vote.

It is well established that the Legislature is forbidden from “plac[ing] [statutory] restrictions on the qualification of electors which will prohibit any of those electors who may be qualified to vote in such elections under the provisions of the Constitution from participating in such election.” *State ex rel. Landis v. County Bd. of Pub. Instruc. of Hillsborough County*, 188 So. 88, 89 (Fla. 1939). In *Landis*, this Court held unconstitutional a statute that limited the right to vote in special tax school district elections to those voters who had voted in the prior general election because the statute prohibited constitutionally eligible voters from participating in such elections on the basis of criteria not contained in the Constitution (having voted in the prior general election). *Id.*; *see also Ervin v. Richardson*, 70 So.2d 585, 587 (Fla. 1954) (“where the Constitution has conferred the right to vote, the legislature is powerless to impose regulations in a primary or general election that will unduly limit the right”); *Bowden v. Carter*, 65 So.2d 871, 873 (Fla. 1953) (“It is universally recognized that where the constitution prescribes the qualifications for suffrage, the legislature is powerless to modify such qualifications.”); *Riley v. Holmer*, 131 So. 330, 331 (Fla. 1930) (“Where the Constitution in terms prescribes qualifications for suffrage, the Legislature is powerless to modify these qualifications.”); *State ex rel. Lamar v. Dillon*, 14 So. 383, 387 (Fla. 1893) (“Where a constitution has conferred the right, and prescribed

the qualifications of electors, it, of course, is paramount until amended, and the legislature cannot change or add to them in any way.”).

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

The rationale underlying the prohibition against legislative modifications of elector qualifications is that “when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional

provision.” *Thomas v. State ex rel. Cobb*, 58 So.2d 173, 179 (Fla. 1952) (internal quotation marks, citations omitted).<sup>6</sup>

## **B. The Provisional Ballot Statute Places Unconstitutional Restrictions On Voting**

Citizens aged eighteen and older, who are residents of Florida and who have registered to vote in their county of residence, are constitutionally entitled to be “elector[s] of the county where registered.” Art. VI, §2, Fla. Const.<sup>7</sup> To prevent administrative errors or other circumstances beyond an individual elector’s control

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<sup>6</sup> The Florida Constitution has always contained a clause setting forth elector qualifications. *See* Art. VI, §1, Fla. Const. (1838); Art. VI, §1, Fla. Const. (1861); Art. VI, §1, Fla. Const. (1865); Art. XIV, §1, Fla. Const. (1868); Art. VI, §1 Fla. Const. (1885); Art. VI, §2, Fla. Const. (1968). The Constitution has never required electors to cast their vote in their *precinct* of residence. The first three versions of the Constitution appear to have required electors to cast their vote in their *county* of residence. *See* Art. VI, §1 Fla. Const. (1838) (requiring elector to be resident of “*County* in which he may offer to vote” for six months prior to election) (emphasis added); Art. VI, §1, Fla. Const. (1861) (same); Art. VI, §1, Fla. Const. (1865) (same). When the people of the State of Florida desire to place restrictions on where an elector may vote, they have done so in the Constitution.

<sup>7</sup> Voter registration is linked to an elector’s county of residence. *See* Art. VI, §2, Fla. Const. (citizens age eighteen and older who are permanent residents of Florida and, “if registered as provided by law, shall be an elector of the *county where registered*”) (emphasis added); §97.041(1)(a)(4), Fla. Stat. (2002) (“[a] person may become a registered voter only if that person . . . [is] a legal resident of the county in which that person seeks to be registered”); *see also* §97.052(2)(e), Fla. Stat. (Supp. 2004) (“uniform statewide voter registration application must be

from interfering with the constitutional right to vote, a voter “whose eligibility cannot be determined” at the polls on election day – for instance, because of errors in precinct registers – is entitled to cast a “provisional ballot.” §101.048(1), Fla. Stat. But if “the person voting the provisional ballot was not registered or entitled to vote *at the precinct* where the person cast a vote in the election, the provisional ballot shall not be counted and the ballot . . . envelope shall be marked ‘Rejected as Illegal.’” §101.048(2), Fla. Stat. (emphasis added).

Even though electors may have satisfied all of the constitutional qualifications for suffrage – age, citizenship, residency in Florida, and registration, *see* Art. VI, §2, Fla. Const. – Section 101.048(2) nevertheless disallows the votes of electors – who were otherwise constitutionally entitled to vote in a particular *county* – because of the *precincts* in which they attempt to cast their provisional ballots. Like the statute in *Landis*, Section 101.048(2) prohibits constitutionally eligible voters from participating in elections on the basis of criteria not contained in the Constitution (here, attempting to cast a ballot in a particular precinct). That being so, it “contravenes, and is repugnant to, the standard of qualifications

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designed to elicit information from the applicant . . . [relating to] [c]ounty of legal residence”).

established by . . . the Constitution and is, therefore, of no force and effect.”

*Landis*, 188 So. at 89.

### **III. The Court Should Order A Remedy That Protects Electors’ Constitutional Right To Vote And To Have Their Votes Count**

To safeguard the right to vote, the Court should hold Section 101.048 unconstitutional to the extent that it prevents constitutionally qualified, properly registered voters who attempt to cast a provisional ballot in their county of residence from having their votes counted. A peremptory writ should issue ordering Respondents to carry out their duties to ensure a valid election process in which the votes of constitutionally qualified, properly registered electors who attempt to cast provisional ballots in their county of residence are not rejected, and instead uniformly counted.

Mandamus may be used to “enforce a right that is both clear and certain.” *Florida League of Cities*, 607 So.2d at 400. As set forth in Part II, Petitioners have a clear and certain constitutional right to vote in their county of residence. That right may not be abridged by statute. Petitioners are therefore entitled to relief from Section 101.048 to the extent that it disqualifies the votes of constitutionally qualified, properly registered electors who attempt to cast provisional ballots in their county of residence, but who do so at a precinct other than that designated by

local elections officials. *See Citizens Proposition for Tax Relief*, 386 So.2d at 562-63 (in original mandamus proceeding, granting writ to petitioners seeking relief from unconstitutional regulation).

**A. The Court Should Hold The Offending Portions Of The Statute Unconstitutional**

The election process will not be valid if electors are unconstitutionally disenfranchised. As an initial matter, the Court should therefore hold that Section 101.048 is unconstitutional to the extent that it denies the right to vote to constitutionally qualified electors who attempt to cast provisional ballots in their county of residence, but in a precinct other than that designated by local elections officials. *See Citizens Proposition for Tax Relief*, 396 So.2d at 567 (in original mandamus proceeding, holding portion of rule unconstitutional); *Moreau v. Lewis*, 648 So.2d 124 (Fla. 1995) (in original mandamus proceeding, striking down provision of appropriations act as unconstitutional).

In so doing, the Court should not strike down the constitutional provisions of Section 101.048, which permit voters whose eligibility cannot be ascertained to cast provisional ballots. Rather, the Court should retain in force the constitutional provisions of the statute, and only hold Section 101.048 unconstitutional to the extent that it denies constitutionally qualified voters the opportunity to cast

provisional ballots solely on the basis of the voters' precinct assignment and nullifies the ballots of constitutionally qualified voters who cast provisional ballots within their county of residence but at polling places outside the voters' assigned precincts. *See Citizens Proposition for Tax Relief*, 386 So.2d at 567 (holding rule invalid only to extent it unconstitutionally imposed time limitations on submission of initiative petitions, but retaining in force remaining provisions of regulation governing, *inter alia*, verification of petitions). Such an approach will ensure that a provisional ballot procedure remains in effect. *See Smathers*, 372 So.2d at 429 (holding statute unconstitutional "only to the extent" it unconstitutionally eliminated procedure for write-in candidacies, and reviving prior statutory provisions for write-in candidacies "to provide a procedure . . . in future elections until properly changed by the legislature").

**B. The Court Should Order Respondents To Take Action To Ensure Provisional Ballots Of Constitutionally Qualified Voters Are Counted**

**1. Secretary of State Hood**

In addition to clarifying the scope of Section 101.048's unconstitutionality, this Court should also compel the Secretary of State to carry out her mandatory duties. Respondent Secretary of State, as "the chief election officer of the state," has the duty to safeguard the validity of the election process and to ensure that the

elections laws are uniformly and properly implemented. §97.012, Fla. Stat. In particular, she has the statutory duty to “[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws,” to “[a]ctively seek out and collect the data and statistics necessary to knowledgeably scrutinize the effectiveness of election laws,” to “[p]rovide technical assistance to the supervisors of elections on voter education and election personnel training services,” and to “[p]rovide voter education assistance to the public.” §§97.012(1), (3), (4), (6), Fla. Stat. Of course, Respondent Hood has a mandatory duty to obey the Constitution of the State of Florida. Art. II, §5(b), Fla. Const. And as this Court has repeatedly made clear, “[t]he secretary of state, in [her] executive capacity, ha[s] the duty and obligation to ensure . . . a valid election process.” *Smith v. Coalition to Reduce Class Size*, 827 So.2d 959, 963 (Fla. 2002) (quoting *Citizens Proposition for Tax Relief*, 386 So.2d at 566-67).

Respondent Hood should be ordered to ensure that the votes of all constitutionally qualified electors who attempt to cast provisional ballots in their

county of residence are not rejected, and are instead counted.<sup>8</sup> Specifically,

Respondent Secretary of State should be ordered to take the following measures:

First, Respondent Hood must immediately rescind and replace, if necessary via an emergency rulemaking pursuant to §120.54(4), Fla. Stat. (Supp. 2004), the provisional ballot envelope that she issued earlier this year. Pursuant to her mandatory duty to “prescribe the form of the provisional ballot envelope,” *see* §101.048(1), Fla. Stat., she has issued an envelope that unconstitutionally disqualifies constitutionally eligible voters based on a criterion not set forth in the

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<sup>8</sup> There can be no doubt that it is entirely feasible to allow a voter to cast a provisional ballot in a precinct other than that designated by local elections officials and for that ballot to be counted, as evidenced by the provisional ballot schemes of other states. *See, e.g.*, Ga. Code §21-2-419(c)(2) (“If the registrars determine after the polls close . . . that the person voting the provisional ballot timely registered and was eligible and entitled to vote in the primary or election but voted in the wrong precinct . . . [t]he superintendent shall count such person’s votes which were cast for candidates in those races for which the person was entitled to vote but shall not count the votes cast for candidates in those races in which such person was not entitled to vote”); Cal. Elec. Code §14310(c)(3) (“The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official . . . (B) [i]f the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in his or her assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in his or her assigned precinct.”). Moreover, even Florida’s current statutory scheme does not require voters, under certain circumstances, to cast ballots in their designated

Constitution – the precinct in which voters cast their votes. *See* Form DS DE 49 (effective February 2, 2004) (“YOUR BALLOT WILL NOT COUNT IF YOU DO NOT VOTE IN THE CORRECT PRECINCT”). This provisional ballot envelope is “to be used statewide.” Rule 1S-2.037. Respondent “has no authority to adopt by rule” different constitutional voter qualifications than those set forth in the constitution. *See Citizens Proposition for Tax Relief*, 386 So.2d at 567 (granting original writ and holding unconstitutional Secretary of State’s rule that imposed a “limitation upon the initiative process” not set forth in Constitution). Respondent must also rescind any and all other materials that she has previously promulgated, issued, or published that state that a provisional ballot is invalid if it is cast outside a voter’s designated precinct, or that a constitutionally qualified voter should be denied the opportunity to cast a provisional ballot if it is determined that the voter is not at the assigned precinct. Those materials must be replaced with materials that correctly describe voters’ constitutional rights, in particular, that constitutionally qualified, properly registered voters may cast a provisional ballot at any precinct within their county of residence and any such ballot cast will be counted. As the State’s “chief election officer,” Respondent has a duty not to

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precinct. *See, e.g.*, §101.657, Fla. Stat. (Supp. 2004) (early voting at central location in county).

facilitate a constitutional violation of voters' rights and moreover to ensure that the voters are not misinformed about their rights. *See* Art. II, §5(b), Fla. Const. (duty to obey Constitution); *Coalition to Reduce Class Size*, 827 So.2d at 963 (“duty and obligation to ensure . . . a valid election process”); §97.012(6), Fla. Stat. (duty to “[p]rovide voter education assistance to the public”).

Second, in light of the unconstitutionality of portions of Section 101.048, Respondent Hood must immediately issue uniform instructions to all county supervisors of elections and canvassing boards not to deny constitutionally qualified voters the opportunity to cast provisional ballots solely because of the voters' precinct assignment, and also to count the ballots of constitutionally qualified voters who cast provisional ballots at polling places within their county of residence, regardless of whether the provisional ballot is cast in the designated precinct. *See* §97.012(1), Fla. Stat. (Secretary of State has duty to “[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws”).

Third, Respondent Secretary of State must monitor whether local elections officials in each county have taken the necessary steps to comply with Respondent's instructions that constitutionally qualified voters be given the opportunity to cast provisional ballots at polling places within their county of

residence, and to count provisional ballots cast by constitutionally qualified voters within their county of residence. *See* §97.012(1), Fla. Stat. (duty to ensure uniformity), §97.012(3), Fla. Stat. (duty to “[a]ctively seek out and collect the data and statistics necessary to knowledgeably scrutinize the effectiveness of election laws”). To ensure that the Secretary of State is able to monitor and analyze each county’s capacity to comply at upcoming elections and therefore fulfill her own duties, the Court should order the Secretary of State to collect a written status report from each county no later than 30 days prior to the general election of 2004 and to provide a full report on the status of each county to the Court no later than 21 days prior to the 2004 general election. These measures will ensure that any problems can be addressed prior to the election.

Fourth, Respondent Hood must also issue uniform instructions to all local elections officials instructing them immediately to rescind and replace any materials that they have published that state that a provisional ballot may not be cast or is invalid outside a voter’s designated precinct. As discussed above, those materials must be replaced with materials that correctly describe voters’ constitutional rights. *See* §97.012(1), Fla. Stat. (duty to ensure uniformity), §97.012(6), Fla. Stat. (duty to “[p]rovide voter education assistance to the public”).

Fifth, Respondent Hood must provide assistance and training to the supervisors of elections in order to ensure that poll workers understand the Court's decision in this case, the extent to which it invalidates the provisional ballot statute, and the procedures that must be followed to ensure that constitutionally qualified electors are permitted to cast provisional ballots at polling places outside their assigned precinct but within their county of residence. *See* §97.012(4), Fla. Stat. (duty to “[p]rovide technical assistance to the supervisors of elections on . . . election personnel training services”).

Sixth, Respondent Secretary of State must embark on an affirmative voter education campaign, informing voters of their right to cast provisional ballots at polling places outside their assigned precinct but within their county of residence, in order to cure the harm and confusion caused by the unconstitutional statute. *See* §97.012(6), Fla. Stat. (duty to “[p]rovide voter education assistance to the public”).

## **2. Leon County Officials**

This Court should compel Respondents Sancho, Aiken, and Sauls to ensure that the votes of all constitutionally qualified electors who attempt to cast provisional ballots in Leon County are not rejected, and are instead counted.

Respondent Sancho has a mandatory duty to oversee the administration of the upcoming election at the county level and the proper implementation of

election laws. *See* §102.012, Fla. Stat. In particular, Respondent Sancho also has the mandatory duty to train all poll workers on “their duties and responsibilities as election officials,” including, *inter alia*, “balloting and polling place procedures.” §102.014, Fla. Stat. Those procedures include the requirement that registered voters are not eligible even to cast a provisional ballot unless, *inter alia*, they claim to be “eligible to vote at the precinct” at which they seek to cast their votes. §101.048(1), Fla Stat. However, Respondent Sancho also has a mandatory duty to comply with the Florida Constitution. Art. II, §5(b), Fla. Const.; *see also* §98.015(1), Fla. Stat.

Respondents Sancho, Aikens, and Sauls, as members of the Leon County Canvassing Board, have a mandatory duty to implement the provisional ballot statute, including the duty to determining the validity of provisional ballots and whether provisional ballots will be counted. §101.048, Fla. Stat. However, Respondents Sancho, Aiken, and Sauls also have the mandatory duty to obey the Florida Constitution. Art. II, §5(b), Fla. Const.; *see also* §98.015(1), Fla. Stat.

The Court should order the Leon County officials to take the following measures to comply with their mandatory duties:

First, Respondent Sancho, as the Supervisor of Elections, should provide training so that all poll workers understand their responsibilities with respect to this

Court's decision and provisional ballot procedures, and in particular, to ensure that poll workers in Leon County do not deny constitutionally qualified voters the opportunity to cast provisional ballots solely because of the voter's precinct assignment. *See* §102.012, Fla. Stat. (responsibility to oversee poll workers in diligent performance of duties); §102.014, Fla. Stat. (duty to train poll workers in balloting and polling place procedures). This includes rescinding and replacing any materials that have been published that state that a provisional ballot may not be cast or is invalid outside a voter's designated precinct.

Second, Respondents Sancho, Aiken, and Sauls, as the Leon County Fall 2004 Election Canvassing Board, should be ordered to count all provisional ballots cast in Leon County by constitutionally qualified voters properly registered in Leon County, regardless of whether the voters cast the provisional ballots in the assigned precincts. *See* §101.048(2), Fla. Stat. (duty to count provisional ballots).

## **CONCLUSION**

For the foregoing reasons, Petitioners request that this Court hear the Petition on the merits and hold that Section 101.048 is unconstitutional to the extent that it denies the right to vote to constitutionally qualified electors who attempt to cast provisional ballots in their county of residence.

Petitioners further request that this Court order Respondent Secretary of State to (1) rescind and replace all materials stating that a provisional ballot is invalid if it is cast outside a voter's designated precinct, including but not limited to the Provisional Ballot Envelope, Form DS DE 49, (2) issue uniform instructions to all county supervisors of elections and canvassing boards not to deny constitutionally qualified voters the opportunity to cast provisional ballots solely because of the voters' precinct assignment and to count provisional ballots cast by constitutionally qualified voters within their county of residence, (3) monitor compliance of local elections officials, collect a written status report from each county no later than 30 days prior to the general election of 2004, and report on the status of each county to the Court no later than 21 days prior to the 2004 general election, (4) instruct local elections officials to rescind and replace all materials that state that a provisional ballot may not be cast or is invalid outside a voter's designated precinct, (5) provide assistance and training to the supervisors of elections in order to ensure that poll workers know that constitutionally qualified electors are permitted to cast provisional ballots at polling places outside their assigned precinct but within their county of residence, and (6) provide voter education on the right to cast provisional ballots at polling places outside a voter's assigned precinct but within the county of residence.

Petitioners further request that the Court order Respondent Sancho to train poll workers with respect to constitutional provisional ballot procedures – in particular, to ensure that poll workers in Leon County do not deny constitutionally qualified voters the opportunity to cast provisional ballots solely because of the voter’s precinct assignment – and to rescind and replace all materials that have been published that state that a provisional ballot may not be cast or is invalid outside a voter’s designated precinct.

Petitioners also request that the Court order Respondents Sancho, Aiken, and Sauls to count all provisional ballots cast in Leon County by constitutionally qualified registered voters.

Finally, Petitioners request that the Court award Petitioners their costs.

Respectfully submitted,

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By: \_\_\_\_\_  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by hand delivery this 17<sup>th</sup> day of August, 2004, to the Respondents and to the Attorney General of Florida as follows:

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Tallahassee, Florida 32301

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Jerry G. Traynham

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure, I certify that the foregoing uses Times New Roman 14-point font.

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Jerry Traynham