IN THE SUPREME COURT OF FLORIDA

CYNTHIA MCCAULEY,

Appellant,

vs.

MARC NOLEN, *et al.*,

Appellees.

CASE NO. SC00-2462
DCA CASE NO. 1D00-4825
Circuit Case No. CV 00-2802

BRIEF OF APPELLEES GEORGE W. BUSH, DICK CHENEY

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STATEMENT OF THE CASE

This action was commenced in Bay County before the Circuit Court for the Fourteenth Judicial Circuit. Amended Complaint, page 2, ¶2. On November 21, 2000, the Bay County Circuit Court granted the Motion of George W. Bush to transfer venue of the action to Leon County. Id. Plaintiff then filed an amended Complaint on November 29, 2000 in Leon County. Counsel for the Florida Elections Canvassing Commission filed a motion to dismiss on December 4, 2000. Plaintiff filed appropriate responses and a hearing was held before the Honorable Judge L. Ralph Smith.

On December 7, 2000, Judge Smith entered an Order of Dismissal with Prejudice of the Plaintiff's Amended Complaint. This appeal followed.

STATEMENT REGARDING JURISDICTION

This case fails to satisfy the requirement that it be a matter requiring immediate resolution. Following the United States Supreme Court's decision in *Bush v. Gore*, 531 U.S. ___ (2000), slip. op., the ultimate relief sought by the Plaintiff below, amendment of the certified returns for Bay County, is now moot.

SUMMARY OF THE ARGUMENT

Based on the facts alleged, the circuit court determined that the complaint failed to state a cause of action. While perhaps alleging a technical violation of a "directory" provision of Section 101.62 of Florida's election statutes, Plaintiffs failed to allege substantial non-compliance with elections law, nor establish an effect on the integrity

of the ballots or the integrity of the election.

The circuit court's decision is supported by federal law. Both the U.S. Constitution and federal statutes prevent the county canvassing boards, the circuit court, and this Court from denying voters the right to vote – especially in a Presidential election – based on mere technicalities in the voting process that have no relation to whether the voters who voted were qualified to do so. There is no dispute in this case that the absentee votes at issue were cast by qualified voters.

It cannot be the law that a technical error like the one alleged in this case should be allowed to disenfranchise the thousands that voted via absentee ballots.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT THERE WAS NO LEGAL BASIS TO GRANT APPELLANT ANY RELIEF.

The seminal opinion in Florida on the test for determining the validity of absentee ballots, and, in turn, for determining whether a cause of action exists to contest the validity of ballots, is this Court's decision in *Boardman v. Esteva*, 323 So. 2d 259 (1976). In *Boardman*, this Court found that in making the initial determination as to the validity of the absentee ballots, the underlying concern is "whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner." *Id*. at 269. The Court held that:

> the primary consideration in an election is whether the will of the people has been effected. In determining the effect

> of irregularities on the validity of absentee ballots cast, the following factors shall be considered:
>
> (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
>
> (b) whether there has been substantial noncompliance 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.

[1]

Because of the near-conclusive presumption of validity of election officials' performance, where there is no clear and convincing evidence that a certified election result does not reflect the will of the voters, it will not be set aside, *even where there has been substantial noncompliance with the election laws. Beckstrom v. Volusia County*, 707 So. 2d 720 (Fla. 1998); *Boardman*, 323 So. 2d 259; *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st DCA 1983). In this instance, Plaintiff failed to sufficiently allege that such substantial noncompliance occurred.

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[1]The Court also held in *Boardman* that "[t]he canvassing of returns, including absentee ballots is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots." *Id.* at 268 n.5. "Those judgments are entitled to be regarded by the county 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." *Id.*

This Court held in *Boardman* that technical omissions or irregularities will not 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." 323 So. 2d at 265. In *Boardman*, the Court expressly receded from an earlier line of cases that had required strict interpretation of the absentee voting statute. *Id*. 323 So. 2d at 264. The Court expressly rejected the argument that an irregularity on the application invalidated the ballots, stating:

> There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with?

Id. The Court expressly established the bright line rule that is the law today:

> **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, [p]rovided such irregularity is not calculated to affect the integrity of the ballot or election.**

Id., 323 So. 2d at 265 (emphasis added). Although the absentee voting provisions were amended recently, the Legislature specifically adopted the *Boardman* standard when it did so.

[2]

Case law, as well as an express directive from the Legislature, confirms that the requirements in Section 101.64 and 101.647, are "directory," not "mandatory." The failure to follow a directory procedure is not cause to reject a vote. *McLean v. Bellamy*, 437 So. 2d 737, 744-745 (Fla. 1st DCA 1983); *see also Jolley v. Whatley*, 60 So. 2d 762 (Fla. 1952). In *McLean*, absentee ballots were issued without requests being made at all. *McLean*, 437 So. 2d at 742-43. As the court stated, however, the failure to follow the letter of the provisions of Section 101.62 does not result in the "invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee." *Id*. at 743-44.

This principle has been longstanding law in Florida, and continues today. In *Jolley*, 60 So. 2d 762, there were a number of irregularities in requests for absentee ballots. Nevertheless, this Court refused to invalidate the ballots cast, stating, "[I]t may well be doubted, whether an irregularity in the filling out of the application would invalidate the ballot, unless it appeared that the voter was not entitled to receive the ballot." *Id*. at 766. And this Court recently held in the context of irregularities in ballots themselves:

As a general rule, a court should not void an election for ballot form

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[2]*See Comm. on Election Reform*, H.R. 99-339, Final Analysis on H.B. 281 at III.A. (Fla. July 15, 1999) (citing *Boardman*, 323 So. 2d at 265).

> defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements. When considering a petition alleging a violation in the form of the ballot, "a vital consideration guiding the courts in determining whether an election should be voided is the reluctance to reach a decision which would result in the disfranchisement of the voters. Indeed, as regards defects in ballots, the courts have generally declined to void an election unless such defects clearly operate to prevent that free, fair and open choice."

Fladell v. Palm Beach County Canvassing Bd., Nos. SC00-2373 & SC00-2376 (Dec. 1, 2000) (internal citations omitted).

In this case, as in *Boardman*, *Jolley*, and *McLean*, there is no sustainable allegation "that the absentee ballots in question were illegally cast or that they were cast by voters who were unqualified to vote absentee." *Boardman*, 323 So. 2d at 268. Relying on the important principle that the will of the voters is paramount, Florida courts (and other courts in similar cases) have consistently refused to invalidate absentee ballots when the voters were qualified electors.

[3] The circuit court properly refused to do so as well.

In the Plaintiff's Complaint, only technical violation of election laws were alleged. The Complaint contains no reference to a statute which expressly declares that its violation is a cause for invalidating an absentee ballot. Instead reference is made to violations of Sections 101.64 and 101.647, Florida Statutes. However, neither

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[3] *See, e.g.*, *id.*; *Jolley*, 60 So. 2d at 767; *State ex rel. Titus*, 470 So. 309, 309 (Fla. 1936); *McLean*, 437 So. 2d at 746; *accord Prado v. Johnson*, 625 S.W.2d 368, 370 (Tex. Civ. App.—San Antonio 1981, writ dism'd); *Attorney Gen. ex rel. Miller v. Miller*, 253 N.W. 241, 246 (Mich. 1934).

provision expressly declares that failure to comply with the acts it proscribes will cause a ballot not to be counted. Absent such a provision, or reference to any *mandatory* statute, the Plaintiff's Complaint fails to state a cause of action. The directory, rather than mandatory, nature of the laws cited by the Plaintiff is apparent upon review of their legislative history.

In 1998, the Legislature, after reviewing changes in the law relating to absentee ballots and applications for absentee ballots, stated, "Although the statutes emphasize the importance of all the instructions**, only the voter's signature and the signature and address of the attesting witness [on the absentee ballots themselves] are mandatory; all other provisions are directory in nature**." *Comm. on Election Reform*, H.R. 99-339, Final Analysis on H.B. 281 at III.A (Fla. July 15, 1999) at 8 (citing *Boardman*, 323 So. 2d at 265)(emphasis added). The Legislature expressly quoted and relied upon the bright line rule established in *Boardman* as the proper interpretation of the current statute.

Recently, this Court adopted the same reasoning in *Jacobs v. Seminole County Canvassing Board*, SC 00-2447 (Fla. Dec. 12, 2000). In *Jacobs*, this Court adopted the reasoning of the lower court which decided that irregularities in the handling of absentee ballots applications would not cause absentee ballots to be invalid: "**Unless a statutory provision also specifically states that the lack of information voids**

the ballot, the lack of the information does not automatically void the ballot." *Jacobs,* slip op. at page 5, quoting lower court, which cited Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HB Sections 3743, 3941 at page 8 (passed as CS/HB 1402) on May 12, 1998.

The Court compared Section 102.68(2)(c), Florida Statutes, which requires that a voter's name, address and signature must be included on an absentee ballot, less the ballot be declared invalid. No such mandate is included in the statutes allegedly violated in *Jacobs,* nor in the statutes put at issue by the Plaintiff in this case. The Court found that the statute at issue in *Jacobs,* which requires that absentee ballot requests "must" disclose certain items, does not constitute a definitive statement by the Legislature that requests lacking such information are illegal or void. The same is true of Section 101.64 and 101.647. *Id.*; *see also Taylor v. Martin County Canvassing Board*, Case No. SC00-2448 (Fla. Dec. 12, 2000) (adopting the same reasoning as cited in *Jacobs*).

Florida's election statutes expressly identify the circumstances under which an absentee ballot will be considered illegal, and failure to follow the procedures for submitting an absentee ballot is not among them. Section 101.68(2)(c)(1) provides that an absentee ballot shall be considered illegal if it does not include the signature and

the last four digits of the social security number of the elector, and either (a) the subscription of a notary or (b) the signature, printed name, address, voter identification number, and county of registration of one attesting witness. § 101.68(2)(c)(1), Fla. Stat. In this case, there was no allegation that any voted ballot lacked these requirements. Thus, there is absolutely no basis under the statute to declare any absentee ballot illegal, or grant relief in this cause.

Both before and after changes in the law occurred in 1998, an "absent elector" was defined as, among other possible definitions, as a person unable to attend the polls on election day. Prior to 1998, the legislative history of this definition demonstrated that it was very broad in nature:

> Section 97.021, F.S. redefines an "absent elector" by removing the reasons a person may vote absentee. So long as a person is unable to attend the polls on election day, regardless of the reason, he or she may vote by absentee ballot.

Senate Staff Analysis and Economic Impact Statement, SB2252 (Companion bill to HB233, March 14, 1996, at page 3).

When the definition of an "absent elector" was changed in 1998, via Chapter 98-129, Section III, 1998 Laws of Florida, the "unable to attend" language was transformed into the more liberal language which allows absentee voters to include those who simply "may not be in the precinct of his or her residence during the hours

the polls are open for voting on the day of the election." § 97.021(1)(d), Fla. Stat. Despite a new list of other specific reasons to claim an absentee ballot under the new law, one still *may* vote absentee solely because they *may* be absent on election day. Nothing in this law requires that absentee electors *must* be absent on election date, lest their ballots become illegal votes.

Under either version of the statute, there is no requirement that the elector be actually absent from the county on election day as a precondition of voting absentee. It is sufficient for the elector to certify that he or she is unable to attend the polls on election day, regardless of the reasons. Clearly the legislature could not have intended that the law be mandatory. The law allows for the mailing of ballots and the numerous intermediary steps, and handlers, mailing entails. §101.647, Fla. Stat. Absentee ballots sent by mail filter through many hands and are certain to be delivered in groupings of more than two, by persons bearing no special written permission. This scenario did not trouble the legislature; it certainly may not serve as a basis for disenfranchising so many voters.

There Has Been No Adverse Effect On The Sanctity Of The Ballot Or The Integrity Of The Election.

In the absence of a statutory provision expressly declaring a particular act or omission to be grounds for invalidating an absentee ballot, the ballot may only be invalidated if the error represents substantial noncompliance with election laws *and*

adversely affects the sanctity of the ballot or the integrity of the election. *Boardman*, 323 So. 2d at 265; *Wilson v. Revels*, 61 So. 2d 491, 492 (Fla. 1952); *Gilligan v. Special Road & Bridge Dist. No. 4*, 77 So. 84, 85 (Fla. 1917). The allegations in Plaintiff's Complaint showed that neither the sanctity of the ballots cast nor the integrity of the election was compromised by any irregularities alleged at trial.

In addition, there was no evidence in the record that the alleged irregularities affected the integrity of the election or "place[d] in doubt the result of the election." *See* § 102.168(3)(a), Fla. Stat.; *Boardman*, 323 So. 2d at 269;

[4]

There Was No "Fraud, Gross Negligence Or Intentional Wrongdoing."

There Was No Allegation of Actual Fraud

Contrary to Plaintiff's unsubstantiated and vague reference to "gross negligence," the Complaint failed to sufficiently allege facts supporting such a conclusion. Where, as here, there is not even an allegation that fraud contaminated

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[4]In *Gore v. Harris*, Nos. SC00-2431, Slip op. at 20-23, this Court recently rejected the "reasonable probability" standard lower case for determining the Appellant's burden under Section 102.168, which had been followed consistently by Florida courts prior to this election. Instead, the Court held that Appellant need only show that their allegations, if true, would "place in doubt" the results of the election. *Id*. Appellees object to this standard for the reasons set forth in their Amended Brief of Appellees, at 42-43, n.25 and the Clarification of Argument, submitted in that case. However, regardless of the standard applied, Appellant in this case did not sufficiently allege a cause of action under either standard.

actual votes, the election results should stand. *See Bolden*, 452 So. 2d at 566 ("courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct."). It is the will of the voters that is paramount, and in the absence of any allegation that fraud thwarted the voters' will, the election results should not be overturned. *See Bolton*.

[5]

An alleged "possibility" of fraud is not sufficient

As this Court has squarely held, where noncompliance with election laws creates the mere opportunity for fraud, but no actual fraud, the results of an election will nevertheless stand. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998). In *Beckstrom*, the opportunity for fraud relating to the absentee ballots themselves was far more egregious than in the speculative allegations here, and still this Court denied the election challenge. *Id*. at 722.

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[5]Rejection of Appellant's claims on these allegations was even more appropriate given the extreme relief sought: disenfranchising thousands of voters. *See Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (holding that public's interest "is not served by arbitrarily ignoring the absentee vote, a substantial but undetermined portion of which was either legally cast or came from voters who would have gone to the polls but for the [erroneous advice]"); *cf. In re Protest*, 707 So. 2d at 1174 (distinguishing *Marks*, in which voters were erroneously allowed by election officials to vote absentee from situation involving massive voter fraud).

[6] In *Beckstrom*, this Court found that county officials had been substantially noncompliant with Florida election procedures, and that their actions, particularly the re-marking of ballots, created a striking opportunity for fraud. *Id*. at 726. Nonetheless, this Court sustained the election result, because in spite of the opportunity for fraud, no fraud had been shown to occur. *Id*. This Court stressed that it would be unfair to allow the acts of county officials to affect an election that was otherwise the "full and fair expression of the will of the people."

[7]

Under *Beckstrom*, votes cannot be disqualified in this case on the basis of Appellant's speculation or even a bare inference of fraud or gross negligence. The draconian relief requested by Appellant – invalidation of thousands of votes cast by qualified and properly registered voters – is only appropriate in the face of dramatic

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[6]In *Beckstrom*, there were also other alleged irregularities in the handling of absentee ballots, among them that absentee ballots were left unattended and accessible at the office of the elections supervisor; that ballots were opened outside the presence of any member of the canvassing board; that individuals who were not employees of the elections supervisor participated in the opening of absentee ballots; and that election officials failed to compare the signature on the voter's certificate with the signature in the voter registration records. *See* 707 So. 2d at 723.

[7]*Id*. at 725-727; *see also Carn v. Moore*, 76 So. 337, 340 (Fla. 1917) ("[T]he courts should not set aside an election because some official has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, unless fraud has been perpetrated or corruption or coercion practiced to a degree to have affected the result.").

and pervasive fraud.

[8] Here, where there is not even an allegation of fraud in the actual casting and counting of ballots, this remedy should not be granted.

In *McLean*, 437 So. 2d 737, a losing candidate argued that he was adversely affected when unsolicited absentee ballots were sent to persons who had voted absentee in the primary election because absentee voters in the primary had preferred his opponent by a margin of 153 to 40, and therefore the clerk's procedure made voting easier for his opponent's supporters than for his supporters. *Id*. at 743.

The court refused to void the absentee ballots. *Id*. at 743-44. As to the losing candidate's concern about his opponent having benefited from the error, the court said:

> We have found no authority which suggests that in such a situation, the proper resolution would be to throw out the absentee ballots cast by qualified electors because of the highly speculative effect of certain electors not having received absentee ballots. . . . There is no indication that any of them contacted the election office or otherwise complained of not having received a runoff absentee ballot. The inference which McLean suggests that the City's failure

[8] *See, e.g., In re the Matter of the Protest of the Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami,* 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (invalidating all absentee ballots where there was clear and convincing evidence of massive absentee voter fraud); *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) (invalidating all absentee ballots where there was clear and convincing evidence of substantial fraudulent vote-buying). In both of those cases, the Court found extensive fraud and corruption was both pled and proven.

> to mail absentee ballots to the 89 primary non-voters somehow skewed the runoff absentee balloting in Chapman's favor is highly speculative and conjectural.

Id. at 744. Similarly, Appellant's assertion that not informing other voters that they could correct errors or omissions on their requests – especially when they never asked – somehow skewed the absentee voting is highly speculative and completely conjectural.

Plaintiff seeks this Court to reverse the dismissal of its cause in order to begin discovery in an attempt to prove its allegations. However, as this Court has held, "the election contest statutes are not to be regarded as mere fishing licenses for contestors to ascertain the correctness or incorrectness or their statements of contest." *Burke v. Beasley*, 75 So.2d 7, 9 (Fla. 1954), citing *Gray v. Huntley*, 238 P. 53 (Colo. 1925). Plaintiff must first establish a sustainable cause of action and has failed to do so.

Allegations Concerning Use of the State Seal Do Not Constitute a Election Contest Cause of Action

Plaintiff finally alleges that absentee ballots should be invalidated because the Republican Party made use of the state seal for partisan purposes in violation of Section 15.03, Florida Statutes. There are two important reasons why such a claim does not support an election contest cause of action. First, violation of this statute, or error in the manner of soliciting votes, is not a basis for an election contest pursuant to Section 102.168, Florida Statutes. Second, there is no private right of action

created under Section 15.03 which might grant standing to the Plaintiff to complain of its violation.

Regulatory and penal statutes do not create a private cause of action absent evidence in language or legislative history of legislative intent to create such a private cause of action. *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994). Plaintiffs can cite to no such language or legislative history which would support the judicial creation of a new cause of action for violation of Section 15.03. A similar allegation was made in against the Republican Party and dismissed in *Florida Democratic Party v. Jeb Bush*, Case No. 00-2554 (Fla. 2nd Cir. Ct. 2000) (Ex. 4 to the Secretary of State's Motion to Dismiss). This Court should similarly find no basis for Plaintiff's claims.

In *Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st DCA 1982), the First District Court of Appeal affirmed the dismissal with prejudice of an amended complaint for an election contest. In a case remarkably similar to the one at issue here, a disappointed candidate filed an election contest under Section 102.168 alleging violations of various subsections of Chapter 104 and 106, Florida Statutes. As in the present case, the petitioner in *Tynes* made a "bald allegation" that the technical violations alleged were sufficient to produce a different result in the election. However, the trial court found, and the First District agreed, that the law requires more than a mere allegation that such a violation could produce such a different result; it must shown that such violations

would produce a different result. *Tynes*, 412 So.2d at 926.

It is true that the Plaintiff tracked the statutory language requiring that an election contest "place in doubt" the outcome of an election. However, such a bald allegation is not enough. In *Intercargo Internacional de Carga, S.A. v. The Harper Group, Inc.*, 659 So. 2d 1208 (Fla. 3rd DCA 1995) a plaintiff simply tracked statutory language and alleged some vage activity in order to obtain long-arm jurisdiction over a proposed defendant. The District Court of Appeal found that, without more, a cause of action could not be sustained and a motion to dismiss was appropriate. Likewise in *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490 (Fla. 3rd DCA 1994), the court found that a plaintiff did not state a cause of action by alleging in conclusive form, and tracking the language of a statute, acts which lack factual allegations and merely state bear legal conclusions. This is the exact situation this Court is presented with by Plaintiff's Complaint. Although the number of absentee ballots cast and tallied in Bay County is mentioned in the Complaint, no allegation is made as to the number of votes cast illegally or whether that number of votes is sufficient to "place in doubt" the outcome of the election.

Appellant Is Barred From Bringing A Post Election Challenge To Pre-Election Irregularities On Grounds Of Estoppel, Waiver and Laches.

Appellant is barred by estoppel, waiver, and laches from attempting to invalidate

these votes. A party is estopped from bringing a post-election challenge to irregularities that were discoverable before the election. As this Court has long held, an "aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." *Pearson v. Taylor*, 32 So. 2d 826, 827 (1947). The time for Appellant to challenge absentee ballot request forms was before the election, when any error could have been cured without depriving Bay County voters of their votes. Because Appellant delayed until after the election, principles of equity bar his suit.

A party who was on notice of irregularity before an election is clearly estopped from challenging it afterwards. In *McDonald v. Miller*, 90 So. 2d 124 (Fla. 1954), the losing candidate who had been aware before the election of certain irregularities in the requests for absentee ballots, but did not object until after the election, complained that the ballots were illegal and that because they had been intermingled with validly cast absentee ballots, *all* absentee ballots must be rejected. *Id*. at 128. This Court refused to allow the candidate's challenge, holding that after standing by and allowing the errors to occur and the ballots to become intermingled, the candidate was estopped from seeking to invalidate the absentee ballots.

[9]

[9]*See also Winterfield v. Town of Palm Beach*, 455 So. 2d 359, 362 (Fla. 1984) ("a party is estopped from voiding an election where he was on notice of the irregularity

Similarly, Appellant is estopped from challenging the absentee ballots. He remained silent when the Supervisor issued ballots in response to what the Appellant now alleges to be invalid request forms, and he remained silent when the absentee voters, who relied on their receipt of ballots as evidence that their requests had been valid, cast their votes. Had she complained at the time, voters could have made other arrangements, by either requesting another ballot or voting at the polls. Appellant cannot now be heard to complain that those votes are void.

It is precisely because of the potential prejudice to voters, who are "the real parties in interest" in any election contest, *Boardman,* 323 So. 2d at 263, that Florida law generally requires errors discoverable before the election to be challenged before the election—whether or not Appellant was on actual notice. "A different rule applies to technical or procedural irregularities which occur and are challenged prior to a general election than to those which are discovered and challenged after the general election, in the absence of corruption or fraud."

[10] A party who is not vigorous about protecting his rights at a time when it would do

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before the election"); *Greenwood v. City of Delray Beach*, 543 So. 2d 451, 452 (Fla. 4th DCA 1989) (holding that one who challenges the "result of an election based upon improper notice thereto . . . must show that he was not aware of the deficiencies prior to the election").

[10] *Speigel v. Knight,* 224 So. 2d 703 (Fla. 3d DCA 1969); *see also State ex rel. Robinson v. N. Broward Hosp. Dist.*, 95 So. 2d 434 (Fla. 1957) (same); *Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1947) (same); *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d DCA 1974) (same).

the least harm to voters forfeits his ability to bring a challenge at a time when it would do voters the most harm.

II. Federal Law Prohibits This Court From Disenfranchising Qualified Voters Who Properly Cast Their Vote Based On Procedural Issues That Have No Bearing On A Voter's Qualifications

Not only does state law mandate that the certified count of this election stand, but federal law mandates the same result – indeed, it prevents any other result. For a state court to disenfranchise absentee voters would violate federal law and amount to a denial of due process under the United States Constitution.

A. 42 U.S.C. § 1971 Prevents The Court From Denying Any Individual Vote Because Of Any Error Relating To An Absentee Ballot Application When The Defect Is Not Material To Determining Whether The Voter Is Qualified.

The voters whose votes are in question here were qualified to vote under Florida law and did, in fact, cast and have counted valid votes. Neither federal statutory law nor the federal constitution will permit a state court to override that vote, in a Presidential election, based on procedural technicalities such as those alleged here. Title 42 of the United States Code, Section 1971 provides 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). All that is required for a voter to be qualified to vote is that he be 18 years old, a citizen of the United States, a legal resident of Florida and the county in which he or she is registered pursuant to the Election Code, and not mentally incapacitated or convicted of a felony. § 97.041(1)(a) & (1)(b)(2), Fla. Stat. The alleged "irregularity" in this case can have no material relationship to determining the qualifications of a voter. Indeed, the court found that "[t]here was no allegation or evidence that any of the absentee votes counted were not 'cast by qualified, registered voters.'" Final Order at 8.

Article II, Section 1 has long been interpreted "to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections." *Association of Community Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). Thus, Congress has the power to regulate Presidential elections.

[11] This power extends to the regulation of

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[11] *See Burroughs v. United States*, 290 U.S. 534, 547 (1934) ("The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."); *see also Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997) (citing *Burroughs* in finding that "Congress has been granted authority to regulate presidential elections"); *Condon v. Reno*, 913 F. Supp. 946, 961 (D.S.C. 1995) (finding that Article I, Section 4 applies

the process of registering voters. *ACORN*, 56 F.3d at 793-94 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932) and other cases).

Moreover, Section 1971 acts to protect fundamental constitutional rights of voters. The right to vote, and the right to have one's vote counted are protected by the United States Constitution. *Ex parte Yarborough*, 110 U.S. 651 (1884) (right to vote).

[12] Congress has specifically protected these rights of absentee voters through other statutes, as well. Under Title 42 of the United States Code, Section 1973aa-1, Congress requires the states to "provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State . . . ." In Section 1973aa-1(a), Congress found that the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections "denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President," as well as rights of free movement across state lines, the privileges and immunities guaranteed

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to elections for President and Vice President, and that Congress has additional power to regulate elections under Article I, Section 8, cl. 18 ("necessary and proper" clause), Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment).

[12] *United States v. Mosley*, 238 U.S. 383 (1935) (right to have vote counted); *see also Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1977) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted").

to citizens under Article IV, section 2, clause 1 of the Constitution, and "due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment." 42 U.S.C. § 1973aa-1(a) (1994).

These same constitutional rights that were sought to be protected by Section 1973aa-1 were targeted by Section 1971 as well, and the power of Congress to protect the constitutional rights of the citizens or particular states under the Fourteenth Amendment is well established. *See, e.g. United States v. Raines*, 362 U.S. 17, 25 (1960) (upholding Section 1971 and stating that "[it] is . . . established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments"). Section 1 of the Fourteenth Amendment provides that "[n]o Statute shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States," and under Section 5 of the Fourteenth Amendment, Congress has the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. This broad provision empowers Congress, through Section 1971, to assure that voters will not be disqualified through the omission of immaterial information from their applications.

[13] Even if the power to seek affirmative relief under the statute is

[13] *See also Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congress's power to provide for absentee balloting in presidential elections, with four justices finding power under Section 5 of the Fourteenth Amendment, three finding power under Congress's right to protect travel, and one finding power under Congress' power to regulate

reserved for the attorney general, the court could not fashion a remedy in this case which would directly violate a federal statute. Applying Section 1971 to prohibit the remedy Appellant sought would be entirely consistent with the numerous Congressional efforts to encourage absentee voting. *See, e.g., Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776-77 (5th Cir. 2000) (citing numerous federal statutes as evidence that "Congress looks with favor on absentee voting"), *cert. denied*, 120 S. Ct. 2660 (2000).

B. The United States Constitution And Other Federal Laws Prohibit The Invalidation Of These Absentee Ballots.

Federal constitutional protections of the right to vote are well-recognized. The right to vote, and the right to have one's vote counted, are protected by the United States Constitution. *See, e.g., Griffin*, 570 F.2d at 1074. In the context of an election of this magnitude—to elect the electors who will vote for the President and Vice President of the United States—this right is considered to be so important that Congress has enacted specific statutes governing the opportunities for absentee voting in that particular election. *See* 42 U.S.C. § 1973aa-1 *et seq.* Confirming the constitutional importance of the right to vote in this election, Congress has provided that the lack of sufficient opportunities for absentee registration "denies or abridges the inherent constitutional right of citizens to vote for their President and Vice

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national elections).

President." *Id*. § 1973aa-1(a)(1).

In *Griffin v. Burns*, the First Circuit held that the invalidation of absentee ballots was effectively a disenfranchisement of those absentee voters. There, the state court invalidated all absentee ballots cast in a primary election because it decided that, under state law, absentee voting was not allowed in a primary election. 570 F.2d at 1067-68. The disenfranchised absentee voters challenged the state court's action in federal court, and the First Circuit held that those voters' due process rights had been violated. *Id*. at 1079-79. Government officials had sent voters absentee ballots, and thus the voters had every expectation that their ballots were valid and would be counted. *Id*. at 1075-1076. Nullifying those votes after the fact, when voters had detrimentally relied on the implicit representation that they would be able to vote absentee, was unfair and had the effect of denying their right to vote.

Similarly, those voters who received absentee ballots from the Supervisor were entitled to presume that their applications had been valid; when they cast their ballots in the election, they had every expectation that those votes would count. (Stip. ¶ 32.) They never had notice or opportunity to otherwise cast their vote by correcting the mistake on the application or going to the polls. To invalidate those votes now would deny those voters their due process rights. The time for Appellant to seek redress for any perceived errors in the pre-election process was *before* the election, when a ruling

in her favor would not have foreclosed absentee voters' right to vote. *Cf. Griffin*, 570 F.2d at 1069 (noting that electors would have arranged to vote at the polls had they known that their absentee ballots would not count). This Court cannot grant the relief Appellant requests now, after the fact, without violating the federal due process rights of absentee voters.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the Court decline to exercise jurisdiction over this appeal. In the alternative, Appellee requests that the Final Order of the circuit court be affirmed.

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I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

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