In the Supreme Court of Florida

Case No. SC20-1480

GLENTON GILZEAN, JR.,

Petitioner,

v.

LAUREL M. LEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE, STATE OF FLORIDA, AND ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

On September 19, 2020, Florida elections officials began mailing ballots to Florida voters for the 2020 General Election. § 101.62(4)(a), Fla. Stat. During the ensuing thirty-one days, millions of vote-by-mail ballots have been cast *and* counted.[1] Yesterday, October 19, 2020, early voting began in fifty-two of Florida's sixty-seven counties with approximately 350,000 ballots being cast in-person. *Id.* § 101.657(1)(d), Fla. Stat. Mandatory early voting begins statewide at the end of this week in all sixty-seven of Florida's counties. *Id.*

This is not a typical General Election, during which Florida's elections officials must ensure election integrity throughout the Nation's most significant swing state. In the best of times, it is difficult enough to manage over 14 million registered voters who are spread across two time zones and over 6,000 separate voting precincts. This year, however, the COVID-19 pandemic adds a layer of complexity that is aggravated by misinformation concerning the election.

Against this backdrop, Petitioner, Glenton Gilzean, Jr., asks this Court to revisit a six-month old decision that allowed a proposed constitutional amendment (Amendment 3) to be placed on the 2020 General Election Ballot. In so doing,

[1] The precise number of vote-by-mail ballots cast as of the filing of this brief is 2,667,266. Fla. Div. of Elections, *Vote-by-Mail Request & Early Voting Statistics*, https://countyballotfiles.floridados.gov/VoteByMailEarlyVotingReports/PublicStats (last visited Oct. 20, 2020 at 12:00 p.m.)

Mr. Gilzean asks that this Court (1) prohibit the Secretary of State from "canvass[ing] and/or report[ing]" votes cast for or against Amendment 3, (2) prevent the Florida Elections Canvassing Commission from "certify[ing] the election results," or (3) "deem[] . . . votes void." Pet. at 22. In support of his argument for this drastic relief, Mr. Gilzean offers two studies that bear no indicia of reliability, were available months ago, and are based on years-old publicly available information.

Neither the Secretary nor the Commission take a position on the merits of Mr. Gilzean's arguments or the veracity of the studies on which he relies. They need not do so. Mr. Gilzean's petition is tardy, procedurally deficient, and, if granted, would cause nothing but electoral confusion in perhaps the most important State this election cycle. For these reasons and those that follow, the Secretary and the Commission ask this Court to reject Mr. Gilzean's petition.

STATEMENT OF THE RELEVANT FACTS

On March 19, 2020, this Court rejected a challenge to Proposed Amendment 3, titled "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." *See Advisory Op. to Att'y Gen. re: All Voters Vote in Primary Elections for State Leg., Gov., and Cabinet*, 291 So. 3d 901 (Fla. 2020). According to Mr. Gilzean, "*[i]n July 2020*, two studies were released regarding the anticipated effects of this Initiative, should it become part of the organic law of Florida." Pet. at

9 (emphasis added). To reach their respective conclusions, both studies "analyze[d] publicly available election data from previous years." *Id*. And, according to Mr. Gilzean, those studies became "generally known in the public sphere" on September 8, 2020. *Id*. at 10.

Rather than analyzing this public data and submitting it to this Court during the ballot-placement litigation, bringing these studies to this Court's attention three months ago when they were first completed, or doing the same a month ago after they became "generally known in the public sphere," Mr. Gilzean waited until *after* Floridians began to cast their ballots before he filed his self-proclaimed emergency petition for a writ of mandamus. He now asks this Court to negate votes that Floridians rightly believed were validly cast. Claiming a clear legal right to force State elections officials to *not* comply with their duty of canvassing and certifying the results of votes cast for or against Amendment 3, Mr. Gilzean offers his own interpretation of the months-old studies, and nothing else.

ARGUMENT

As noted above, neither the Secretary nor the Commission has a position on the veracity or reliability of the studies cited by Mr. Gilzean, nor will they comment on the substantive arguments he uses them to bolster. Mr. Gilzean's petition is speckled with enough flaws to warrant its denial without reaching the substance. Mr. Gilzean was dilatory in bringing this petition, he has no clear legal right to force

State elections officials to *ignore* mandatory duties, he has other remedies available, his requested relief would only add to the substantial headwinds this election season, and his petition is based on untested facts submitted directly to a non-factfinding Court. For any or all of these reasons, this Court should dismiss the petition or, at a minimum, transfer it to the appropriate circuit court.

I. MR. GILZEAN'S MANDAMUS PETITION IS BARRED BY LACHES.

The case can and should end with the doctrine of laches, which requires proof of "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997) (citation and quotation omitted). The first prong is satisfied without question; by his own admission, the data used to support Mr. Gilzean's argument was available years ago. Amendment 3 was subjected to the advisory-opinion process beginning on July 26, 2019, while the studies on which he relies were based on "publicly available election data from previous years." Pet. at 9. Mr. Gilzean offers no explanation why this information could not have been submitted to this Court in time for the Court's consideration of the Attorney General's requested advisory opinion. And even if he had offered an excuse, Mr. Gilzean has no justification for failing to bring the studies to this Court's attention three months ago, or one month ago—literally any time before Floridians began casting the ballots he now asks that this Court negate.

The prejudice to the State, in turn, is self-evident. The 2020 General Election is underway with voting concluding—not beginning—in early November. Across the State, elections officials have enlisted platoons of individuals to ensure that, during a year presenting unique challenges, Floridians have the opportunity to cast their ballots safely and effectively. Millions of ballots have been cast *and* canvassed. The stakes are at their apex, and the room for error is at its nadir. Indeed, according to the U.S. Supreme Court, "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Naturally, "[a]s an election draws closer, that risk will increase." *Id.* at 5. When an election is already underway, the risk becomes intolerable.

Considering both Mr. Gilzean's unjustified delay and the confusion unleashed by his requested relief (up to and including negating validly cast ballots and diverting critical election-year resources away from running this year's election to canvassing, reporting, and certifying only *portions* of validly cast ballots) Mr. Gilzean's petition is well-suited for denial on the basis of laches. This Court should do so expeditiously, allowing the State's elections officials to focus their attention and vanishingly small time on Florida's electorate.

II. MR. GILZEAN HAS NOT SATISFIED THE STRICT PREREQUISITES FOR ISSUANCE OF A WRIT OF MANDAMUS.

Under this Court's precedent, Mr. Gilzean may only secure mandamus relief if he demonstrates that (1) he has "a clear legal right to" the relief he requests; (2) the Secretary and the Commission have "an indisputable legal duty" that has gone derelict; and (3) Mr. Gilzean has "no other adequate remedy available." *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) (citation and quotation omitted). He has not made even a colorable showing that he has, or can, satisfy any of these elements.

First, there is no clear legal right to the relief he requests—forcing both the Secretary and the Commission to *ignore* their non-discretionary duties under Florida's election code. For decades, this Court has maintained that a writ of mandamus "will not be allowed in cases of doubtful right," *Permenter v. Younan*, 31 So. 2d 387, 390 (Fla. 1947), but a "doubtful right" is all Mr. Gilzean can hope to muster. To grant his requested relief, this Court must accept as true the veracity and reliability of the materials he offers—one of which is a legal memorandum—then conclude that this information justifies (1) revisiting its previous advisory opinion and (2) finding that Amendment 3's ballot title and summary should be kept off the ballot. Succeeding on any of these legal and factual arguments remains far from clear, which negates any suggestion that Mr. Gilzean has a "clear" right to relief.

Second, neither the Secretary nor the Commission have an "indisputable legal duty" that remains unfulfilled. *Pleus*, 14 So. 3d at 945. For her part, the Secretary has no relevant duty whatsoever for purposes of Mr. Gilzean's petition. She neither counts nor canvasses votes at all; instead, that responsibility falls to Florida's sixty-seven County Canvassing Boards, none of whom Mr. Gilzean named as a respondent. The Commission, in turn, has a "specific imperative ministerial duty" to ensure that ballots are canvassed, and election results certified, *Tyson v. Fla. Bar*, 826 So. 2d 265, 268 (Fla. 2002) (emphasis added), but nothing in Florida's election code imposes a ministerial duty on the Commission to *refrain* from counting or canvassing votes. Mr. Gilzean's attempt to transmogrify an *affirmative* ministerial duty to canvass ballots into a *negative* ministerial duty to *refrain* from counting ballots fails as a matter of law and logic.

Third, Mr. Gilzean plainly has other remedies available, short of the drastic writ for which he petitions. If Amendment 3 does adversely affect African Americans in the electoral process, and if the voters of Florida approve Amendment 3 during the 2020 General Election, Mr. Gilzean can explore remedies under state and federal law. Mr. Gilzean can then pursue these remedies in an adversarial proceeding where he can develop a factual record before a trier of fact.

Simply put, Mr. Gilzean cannot satisfy the three requirements for issuance of mandamus relief. These three strikes mean that his petition must be denied.

III. PRUDENCE DEMANDS DENIAL OF MR. GILZEAN'S MANDAMUS PETITION.

"[E]ven if" Mr. Gilzean had a "clear legal right" to the requested relief—and he does not—this Court should nonetheless deny the writ if it would cause "confusion and disorder, or an injury to the public that outweighs the [petitioner's] individual right to the relief sought." *State ex rel. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970) (quotation and citation omitted). A writ of mandamus is "an extraordinary remedy" and should be issued "not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles.'" *Id.* at 844 (citation and quotation omitted). For all the reasons offered in support of the laches defense, equity compels denial of Mr. Gilzean's mandamus petition.

IV. THIS COURT IS NOT THE APPROPRIATE FORUM FOR MR. GILZEAN'S MANDAMUS PETITION.

Even if this Court refrains from dismissing Mr. Gilzean's petition outright, it should nonetheless decline to exercise jurisdiction over it. Mr. Gilzean's arguments are premised entirely on his own fact-bound assessment of two documents that have not yet gone through the crucible of circuit-court review, and this Court has historically "declined to exercise its jurisdiction over extraordinary writ petitions raising substantial issues of fact." *Harvard v. Singletary*, 733 So. 2d 1020, 1022 (Fla. 1999). Instead, it "has dismissed without prejudice or transferred such cases to the appropriate circuit court." *Id*. At a minimum, then, this Court should do just that.

CONCLUSION

This Court is not a factfinder of first resort. With the 2020 General Election underway, the voters are for now the best judge of Mr. Gilzean's arguments. For the foregoing reasons, this Court should deny Mr. Gilzean's petition.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with the Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

I certify that on this 20th day of October, 2020, the foregoing was filed electronically via the Florida Court's E-Filing Portal, which will send a copy of this filing to the following:

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