SUPREME COURT OF FLORIDA

ANDRE FLADELL, ET AL. vs. PALM BEACH COUNTY CANVASSING BOARD, ETC., ET AL.

Case No. SC00-2373

DCA Case No. SC00-4145

DCA Case No 4D00-4146
Circuit Court Case Nos. CL 00-10965 AB; CL 00-10970; CL 00-10988 AB,
CL 00-11000AB

DCA Case No. 4D00-4153
Circuit Court Case No. CL 00-10992 AB

Appellants/Petitioners Appellees/Respondents

BRIEF OF PETITIONERS/APPELLANTS
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CERTIFICATE OF FONT SIZE AND STYLE

This Brief is typed using Times New Roman 13 point font.

QUESTION PRESENTED

Whether Florida Statutes §102.168 permits a Palm Beach County elector to contest the results of the Presidential election in Palm Beach County and, if so, does the Circuit Court presiding over the election contest have the authority to order a revote election or statistical reallocation.

INTRODUCTION

It is respectfully submitted that this case is about only one matter: the form of the ballot that was used in Palm Beach County. That ballot was different than that used in every other Florida county and directly contrary to the ballot prescribed by and furnished to Palm Beach County "to be used" in the election. (See Fla. Stat. § 101.151(8). In addition, the ballot violated numerous statutory mandates. It was, in short, an illegal ballot. We would respectfully submit that the ballot was so flawed - substantial non-compliance with statutes - that, without more, it casts reasonable doubt as to whether a certified election expressed the will of the voters. See Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998).

There are 19,120 ballots that were not counted in Palm Beach because, due to a confusing design and a variety of other reasons, they were punched for more than one candidate. These ballots were set aside and never counted.

DISTRIBUTION OF OVERVOTES IN FOUR PRECINCTS HAND COUNTED (PRECINCTS)

Voted for Two Candidates	...	Number
Bush, Gore	...	3
Buchanan, Gore	...	80
Gore, Browne	...	5
Gore, McReynolds	...	21
na, Buchanan	...	1
Gore, Nader	...	1
Bush, Buchanan	...	11
Bush, Browne	...	1
Gore, Harris	...	2
Bush, Harris	...	1
na, Bush	...	1
na, na	...	1
Gore, Phillips	...	2
Gore, Moorehead	...	2

Relief was sought in Palm Beach County in the form of an action for declaratory relief. The Circuit Court found that venue was correct and the vehicle of declaratory relief proper; it issued its Order of November 20, 2000 in the context of granting declaratory relief, albeit, relief that was contrary to the declaration sought by Appellants.

The Circuit Court, however, only analyzed the availability of a revote or new election; it did not concern itself with statistical reallocation - this was probably, undoubtedly due to the over-emphasis of this issue by counsel, including the undersigned. Statistical proffers were, however, made, primarily on the issue of causation of harm by the illegal ballot.

If the issue of reallocation is to be considered, and we pray that it will, all of the argument concerning the "day of election" becomes superfluous.

The Circuit Court also did not touch upon the issue of the illegality ***vel non*** of the

ballot, though such issue was pressed for determination.

This case was brought in Palm Beach County because it is the residence of all of these Plaintiffs and everything else that is relevant is here located. Assuming arguendo, that venue does not lie in Palm Beach County, then it was waived because BUSH's motion did not cite Florida Statute §102.1685.

STATEMENT OF THE CASE AND OF THE FACTS

On Tuesday, November 7, 2000, Florida voters cast votes for the President of the United States. The only county, of the sixty-seven (67) counties in Florida that chose to utilize a "butterfly" ballot for the Presidential election was Palm Beach County. As a result of the misleading and confusing format of this unique and unprecedented ballot, massive voter confusion occurred in Palm Beach County leading to votes for Reform Party candidate, Pat Buchanan and over-votes that defy statistical odds.

Appellants, three Palm Beach County voters who were the plaintiffs below in Fladell v. Palm Beach County Canvassing Commission, CL 00-10695 AB (15th Jud. Cir, Nov. 20, 2000), were the first to file suit challenging the results of the general election for President and Vice-President in Palm Beach County, Florida. Appellants seek declaratory and injunctive relief to determine whether the ballot complies with Florida law. Appellants, as electors qualified to vote in Palm Beach County, have exercised their rights under Florida Statute §102.168 to contest the election results and seek relief under the statute, including but not limited to a court-ordered revote.

Appellants submit that the voting irregularities resulting from the use of the "butterfly" ballot prejudicially affected the outcome of the election since the recently certified results, subject to pending contests, indicate that BUSH won the vote in Florida by only 537 votes. Due to the electoral count in other states, it is not disputed that the outcome of the election in Florida will determine the outcome of the Presidential election nationwide.

PROCEEDINGS BELOW

On November 13, 2000, Defendant, BUSH, filed a motion to dismiss or transfer for lack of venue arguing that the Rogers plaintiffs had joined the Election Canvassing Commission, Governor Jeb Bush and other defendants ("State defendants") and that these State defendants could only be sued at their principal headquarters in Leon County. BUSH moved to dismiss all of the cases, even though the State defendants were not named as defendants in all of the other cases, based on the claim that such defendants were indispensable parties. (SA1).[1] The motion contained no factual basis to support the claim that such defendants were indispensable parties. The Rogers plaintiffs then voluntarily dismissed their claims against the State defendants only. BUSH's motion did not seek to dismiss or transfer venue under Florida Statute §102.1685 even though the complaint filed by the Rogers plaintiffs and certain other plaintiffs sought to contest the election under Section 102.168. Plaintiffs filed a memorandum of law in opposition to the motion. On November 14, 2000, the court heard

[1] References to the Appendix refer to the Appendix to Appellants' Initial Brief filed with the Fourth District Court of Appeal and transmitted yesterday by the Fourth District via Federal Express to this Court. References to the Supplemental Appendix filed with this Brief are as follows: (SA __).

argument on the motion to dismiss or transfer for lack of venue and entered an order denying the motion. (SA2). The order denying the motion to transfer venue was only entered in the Gibbs v. Palm Beach Canvassing Board, Case No. CL 0011000AN and not in the Fladell v. Palm Beach Canvassing Board case. (SA3) While BUSH's motion to dismiss or transfer for lack of venue did not cite or address venue under § 102.1685, the lower court specifically considered this provision and properly concluded that venue was proper in Palm Beach County because the only contested election was the Presidential election in Palm Beach County.

At a hearing held on November 15, 2000 the lower court requested the parties to submit briefs on the legal issue of whether it would be possible under any circumstances for the court to order a new election or revote in Palm Beach County or whether Florida Statute 103.011 which provides for elections every four years of Electors for President and Vice-President precludes such relief. Appellee, BUSH, submitted a single case, Love v. Foster 522 U.S. 67 (1997) without any accompanying brief. Appellants submitted a "Memorandum in Support of Authority of Court to Order Re-Vote. (A4). In this memorandum, Appellants specifically requested that in the event the court determined that it could not legally order a re-vote, it should continue to take evidence and rule on the issue of whether the election should be voided, because remedies other than a re-vote, including statistical reallocation exist. (A4 at pp. 11-12).[2]

On November 17, 2000, the lower court heard oral argument on this legal issue. At that

[2] Nevertheless, the court, upon deciding that a re-vote could not be ordered denied declaratory relief and dismissed Appellants' claims.

time, the court indicated that if it determined that it had the authority to order a revote, a three-day evidentiary hearing would be held commencing on November 27, 2000.

On November 20, 2000, Judge Labarga entered an order finding, as a matter of law, that he is constitutionally barred from ordering a new election or revote in the Presidential election no matter what illegality, fraud or other circumstances occurs, notwithstanding the Petitioners' pending challenge to the legality of the "butterfly" ballot.

The court's ruling was based on its conclusion that (1) the contest of election statute, section 102.168, Fla. Stat., did not apply to Presidential elections and that (2) a re-vote cannot be ordered because of statutes (federal and Florida) which provide that the general election for President and Vice President of the United States should be conducted on the Tuesday after the first Monday in November. The court erected a distinction between Presidential elections and Congressional or other federal or state elections in which a revote was permitted. Appellants respectfully submit that such a distinction, without providing a remedy is unwarranted.

Significantly, the order was entered prior to the Court conducting an evidentiary hearing to determine whether there is a factual basis for ordering a new election or revote, or a statistical re-allocation. The trial court never even issued a declaratory judgment on the issue of whether the "butterfly" ballot violated the Florida Statutes cited in Petitioner's Second Amended Complaint. Instead, it ruled purely as to matters of law.

Petitioners appealed the trial court's order to the Fourth District Court of Appeals. On

November 27, 2000, the Fourth District entered an En Banc decision certifying the order of the trial court as being one of first impression and one of great public importance requiring immediate resolution by the Supreme Court pursuant to Florida Rule of Appellate Procedure 9.125. Fladell v. LaBarga, et. al., Case Nos.D00-4145, 4D00-4146 and 4D00-4153.

ILLEGALITY OF THE "BUTTERFLY" BALLOT

Given that the trial court had an opportunity to rule on the legality of the "butterfly" ballot and declined to do so and that the determination of the legality of the ballot is a matter of law that this Court can review *de novo*, Appellants seek a ruling from this court that the format of the butterfly ballot fails to comply with Florida law. Given the extreme importance of this issue and the approaching December 12, 2000 deadline, it is in the interest of justice that this issue be expeditiously resolved.

The design of the ballot and the conduct of elections in Florida are prescribed by state law and implemented by local election officials. The Palm Beach County Supervisor of Elections, Theresa LePore, was responsible for the design of the ballot and the conduct of the election in Palm Beach County.

Florida law provides that all general election ballots "shall be in substantially the following form." §101.191, Fla. Stat. The form set forth in the statute includes the following instruction: "TO VOTE for a candidate whose name is printed on the ballot, mark a cross (X) in the blank space at the RIGHT of the name of the candidate for whom you desire to vote." Id. The form then provides spaces for the names of candidates in the following order: Democrat, Republican, minor party, no party, and write-in. See id. Florida Statutes §101.5609(2) which specifically pertains to the type of punch card ballots used in Palm Beach County provides in relevant part that "The ballot information shall, as far as practicable, be in the order of arrangement provided for paper ballots."

Another more recently enacted Florida Statute is even more specific as to the precise order of the candidates on the general election ballot:

> The names of the presidential electors shall not be printed on the general election ballot, but the names of the actual candidates for President and Vice President for whom the presidential electors will vote if elected shall be printed on the ballot in the order in which the party of which the candidate is a nominee polled the highest number of votes for Governor in the last general election. (emphasis added).

§103.021(2), Fla. Stat. Pursuant to Florida Statute 101.151(8), the Department of State is required at least sixty (60) days before a general election to mail to each supervisor of elections "the format of the ballot to be used for the general election." The Assistant Director of the Department of State, Division of Elections, in a September memo, sent sample ballots to all 67 county election supervisors which showed presidential candidates on the general

election ballot in the following, linear order: Republican, Democratic, Libertarian, Green, Socialist Workers, Natural Law, Reform and Socialist. (A1).

The ballot designed by the Palm Beach County Supervisor of Elections and used in Palm Beach County, known as the "butterfly" ballot, lists the candidates on two opposing pages of a ballot booklet, attached to each punch card voting device. In order of visual prominence, from top to bottom, the candidates are arranged in the following order: Republican, Reform, Democratic, Socialist, Libertarian, Constitution, Green, Workers World, Socialist Workers, write-in candidate and Natural Law.

In the center of the two pages is a single strip of punch holes used by the voter to mark his or her choice. The holes correspond to the candidates in order of visual prominence. The first hole corresponds to a vote for the Republican candidates. The second hole corresponds to a vote for the Reform candidates. The third hole corresponds to a vote for the Democratic candidates, and so on. The holes are to the right of the candidates on the left page of the ballot book (Republican, Democrats, etc.) and are to the left of the candidates listed on the right page of the ballot book (Reform Party, etc.). When the ballot booklet is aligned properly in the machine, a small arrow next to each presidential candidate's name points to the hole corresponding to a vote for that candidate.

No other county in the State of Florida used the butterfly ballot configuration. Rather, all of these counties found it practicable to follow the format prescribed by Section 101.191 and used ballots that listed the candidates vertically on a single page in the order prescribed by

Florida law and the Division of Elections. This substantial failure to comply with the statute is significant because the Supervisor of Elections is required by law to provide an election ballot that strictly complies with the statute and has no discretion to deviate therefrom. Nikolits v. Nicosia, 682 So.2d 663, 666 (Fla. 4th DCA 1996).

The Sample Ballot Omitted Material Information

Sample ballot booklets were distributed to certain voters in Palm Beach County prior to the election, but they did not show the punch holes. They contained only blank spaces where the punch strip would be in derogation of Florida Statute §101.20 which requires that the form of the sample ballot "be in the form of the official ballot as it will appear at that polling place on election day." A copy of the instructions and actual ballot used is attached as Exhibit "C".

Voter Confusion

The failure of the ballot to comply with Florida law suggests at least three possible sources of confusion. First, is misalignment. Media reports[3] indicate that many voters complained that the arrows in the ballot booklets did not line up with the holes on the punch strip in their voting device.[4] Second, the instructions used were misleading. Instructions accompanying both the official ballot and the sample ballot advised the voter to "[p]unch straight down through the hole to the right of the arrow by the candidate or issue of your

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[3] In the interests of time, Appellants cite media sources to document certain facts. If permitted to present evidence, Appellants will corroborate these sources with witness testimony.

[4] See, e.g., Don Van Natta, Jr. & Dana Canedy, "Florida Democrats Say Ballot's Design Hurt Gore," N.Y. Times, Nov. 9, 2000.

choice." (emphasis added). There were three punch holes to the right of the Democratic candidates. The first of these corresponds to a vote for the Reform candidates, Buchanan and Foster. Additionally, one punch hole each was placed to the right of the listed name for Democratic candidates Gore and Lieberman. Given the above-listed instructions, some voters may have mistakenly punched a hole beside each of these names, inadvertently invalidating their ballots. Third, Palm Beach is a heavily Democratic county and party line voting is a common occurrence. One of the punch holes on the ballot was to right of the "DEMOCRATIC" label. Some voters have complained to the media that they thought they were casting a party-line vote by punching that hole, when instead they were actually voting for the Reform candidates.[5]

The confusion generated by the ballot quickly became apparent on election day as evidenced by the fact that the Supervisor of Elections, Theresa LePore, sent a memo to poll workers on the afternoon of November 7 which stated:

> PLEASE REMIND **ALL** VOTERS COMING THAT THEY ARE TO VOTE ONLY FOR ONE (1) PRESIDENTIAL CANDIDATE AND THAT THEY ARE TO PUNCH THE HOLE NEXT TO THE ARROW NEXT TO THE NUMBER NEXT TO THE CANDIDATE THEY WISH TO VOTE FOR.
> (Emphasis in original)

A copy of this memo is attached hereto as Exhibit "A" to Appellants' Second Amended Complaint. (A2).

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[5] See, e.g., "In Palm Beach County, Crucible of an Election," N.Y. Times, Nov. 10, 2000 (letter to the editor of Palm Beach County resident Edward L. Resnick).

As a result, many voters, including the Plaintiffs, intending to vote for Al Gore and Joe Lieberman, mistakenly punched the punch hole on the ballot card designated for the Reform Party, Pat Buchanan and Ezola Foster (hole #2). (Second Amended Complaint at ¶17). In Palm Beach County, Reform Candidates (Pat Buchannan and Ezola Foster) received 3,416 votes, an amount dramatically disproportionate to the votes they received in other Florida counties[6], and inexplicable as anything other than the product of massive voter confusion. Id. Even Pat Buchanan himself has admitted that there must be something wrong with the vote. Id. A total of 29,500 ballot cards submitted by voters in Palm Beach County were invalidated. Of these, over 19,000 ballot cards (approximately 4.1% of the total) were invalidated as a result of two holes being punched. Not only did this percentage far exceed the error rate in other counties, but, it was more than four times the historical norm for punch-card voting machines nationwide of one percent or less.[7] Economics professor Christopher D. Carroll of John Hopkins University conducted a regression analysis of the vote in Florida and concluded that Buchanan received well over 2,000 erroneously cast votes. *Available at*

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[6] Professors Greg D. Adams of Carnegie Mellon University and Chris Fastnow of Chatlam College conducted a regression analysis of these anomalous results and concluded that "if Buchanan's unusual performance can be attributed to voters who intended to vote for Gore, then it can be claimed with a high degree of certainty that the mistakes cost Gore somewhere between 2000 and 3000 votes. Greg D. Adams and Chris Fastnow, A Note on the Voting Irregularities in Palm Beach, Florida, at <http://madison.hss.cmu.edu/.(2000). Their analysis showed that the Palm Beach Buchanan vote was unique in being statistically higher that would be expected. A copy of the graph they prepared is attached as Exhibit "A".

[7] See, e.g., Ford Fessenden, "Candidates Should Be on the Same Page, Experts Say," N.Y. Times, Nov. 10, 2000.

http://www.econ.jhu.edu/People/CCarroll/carroll.html. Charts comparing the Buchanan vote in Palm Beach County to other counties are attached as Composite Exhibit "B".

Significantly, William Rouverol, has stated to the Associated Press that when he and Joseph Harris designed the Votomatic Voting System in the early 1960s they discussed whether a two page ballot could be used with their machine and concluded that it would confuse people. "We were very set on not using both sides of the page because things that might confuse people, we felt, should have been avoided. . . The butterfly ballot? No way."[8]

SUMMARY OF ARGUMENT

The Circuit Court erred in holding that Florida law provides no method for addressing important statutory violations in the conduct of this state's elections for the Presidency of the United States. Florida's election law provides a clear and well established mechanism, with fair, commonsense standards, for challenging the outcome of an election. Nothing in the Constitution or laws of the United States or in the laws of the State of Florida suggests that this mechanism is unavailable to challenge elections for the Presidency of the Untied States. Indeed, it flies in the face of reason and fairness that Florida's procedure for challenging elections should apply to every office, high and low, state and federal, except the office that is of paramount importance to the state and national electorate – that of the Presidency of the nation. For the reasons set out in this brief, and summarized here, the ruling of the Circuit Court should be reversed.

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[8] Allen G. Breed, "Vote Machine Inventor Eyes Recount," Associated Press, Nov. 16, 2000.

The Circuit Court misinterpreted state and federal law in holding that the Courts of this state are powerless to remedy defects in the conduct of Florida's elections for the Presidency of the United States. This Court, in its recent decision in Palm Beach County Canvassing Board v. Harris, Fla. Sup. Ct. Case Nos. SC-2346, -2348 and -2349 (Nov. 21, 2000), clearly held that a candidate, elector or taxpayer may contest a presidential election under Florida Statutes Section 102.168. This section's well defined mechanism for challenging unfair elections applies by its terms to all elections, for all offices held in the State of Florida. There is no legal basis for the Circuit Court's determination that this statute is inapplicable to elections for the Presidency of the United States.

Florida's well developed body of election law sets out fair and commonsense standards governing election contests. Under the controlling case of Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998), the remedy of voiding a contested election is available to the court based on a finding of "substantial noncompliance with statutory election procedures" and "a factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters." Where elections have been voided on this basis, the courts of this state have in several instances ordered a revote to assure election results that 'express the will of the voters.'

The Circuit Court misinterpreted federal law in holding that a revote would violate the United States Constitution's requirement of a single, nationwide election day. The State of Florida held the state's election for the Presidency on November 7, the day required by the federal Constitution. Petitioner does not seek a change in the Constitutionally established election day. Rather, petitioner seeks to bring the election held on November 7th to a fair conclusion. To achieve this, a limited revote or statistical reallocation is authorized and necessary in view of statutory violations in the balloting which have led to "reasonable doubt . . . as to whether [the] certified election expressed the will of the voters" of Palm Beach County. See Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998).

Finally, we urge this Court to decide an important legal issue left unresolved the Circuit Court – the validity of Palm Beach County's "butterfly ballot." The difficult and confusing "butterfly" layout of the ballot violated Florida law, which requires that an elector's vote be indicated on the ballot to the right of the candidate's name. The ballot used in Palm Beach County, which is before the Court on this appeal, required voters to indicate their preference for a candidate to the left or right of a candidate's name, depending on which column of the ballot the candidate's name appeared in. The voting instructions provided to the voters of Palm Beach County were misleading in that they incorrectly state that votes would be made to the right of a candidate's name. These standard instructions were not adapted to assure accurate voting on the "butterfly" type Presidential ballot. There is abundant evidence that this illegal ballot caused rampant confusion among the voters of Palm Beach County. The legal issue of

the validity of this ballot should be decided by the Court on this appeal, particularly in view of the unique time constraints present in this case. Palm Beach County's "butterfly ballot" is unlawful under controlling provision of Florida law, and this Court should so hold.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION AS THIS CASE PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE

The November 26, 2000 certified Presidential election result omits and/or misallocates over 20,000 votes cast in Palm Beach County. This massive vote invalidation and misallocation is a direct consequence of the confusing, deceptive and illegal "butterfly" ballot. Further, the lower Court's Opinion deprives the disenfranchised residents of Palm Beach County of their right under Florida law to have this controversy addressed in an expeditious manner. As set forth below, this election contest must be resolved on or before December 12, 2000. Consequently, the denial of an immediate hearing and resolution of this matter is tantamount to a denial of the right to contest the election result altogether.

This Court is empowered to act expeditiously in such matters of great public importance. Article V, Section 3 (b)(5), Fla. Const. Recognizing the great public importance of this matter, the Fourth District Court of Appeals, in a 6-2 EN BANC decision, certified this case to the Supreme Court pursuant to Florida Rules of Appellate Procedure 9.125.

A. Over 20,000 Palm Beach County Voters Have Been Deprived of Their Constitutionally Guaranteed Right to Vote.

The right to vote is the very essence of democracy. Diaz v. Board of County Commissioners of Dade County, 502 F. Supp. 190 (S.D. Fla. 1980). In fact, the right to vote and have one's name remain upon the registration lists is a right which transcends property rights. State Ex Rel. Barancik v. Gates, 134 So.2d 497 (Fla. 1961). The right to vote in a fair election and to have that vote counted are protected under both the Florida and United States Constitutions. Indeed, the right to vote is one of the most fundamental rights in our system of government. Reynolds v. Simms, 377 U.S. 533, 554 (1964). As this Court noted on November 21, 2000, "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished." Palm Beach County Canvassing Board v. Harris, 2000 WL 1725434 (Fla. Nov. 21, 2000).

On November 20, 2000, the Circuit Court ruled as a matter of law that (1) Florida's election contest statute (Fla. Stat. § 102.168) was not intended to apply to Presidential elections and, (2) regardless of the irregularities associated with the Palm Beach County Presidential Election of November 7, 2000, "it is not legally possible to have a re-vote or a new election..." Opinion at pp. 15-16. Further, the Circuit Court totally ignored the availability of other remedies, such as a statistical allocation of the votes in question, in reaching its conclusion that there is no remedy available in a Presidential election contest. In essence, the Circuit Court concluded that it was impotent to remedy any election impropriety, irregularity or other wrong associated with a Presidential election. In so ruling, the Circuit

Court not only ignored the aforementioned guaranteed rights under both federal and state constitutions, but also disregarded the clear and unambiguous state and federal law governing post-election contests. See 3 U.S.C. § 5 and Fla. Stat. § 102.168. One day after the Circuit Court concluded that Fla. Stat. § 102.168 "was not intended to apply to Presidential elections" this Court made the following ruling:

> Accordingly, in order to allow maximum time for contests pursuant to §102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof.

Palm Beach County Canvassing Board v. Harris, 2000 WL 1725434 (Fla. Nov. 21, 2000). (Emphasis added).

As a consequence of the November 26, 2000, certification of the results of the Presidential election in Florida, over 20,000 Palm Beach County voters were disenfranchised due to the confusing, deceptive and illegal "butterfly" ballot used exclusively in Palm Beach County. Absent an opportunity to be heard in accordance with established Florida election contest law, Petitioners will be forever deprived of their right to vote and have their vote counted in the November 7, 2000 Presidential election. The discretionary jurisdiction of this Court under Article V, § 3 (b)(5) Fla. Const., was clearly designed to address a matter of great public importance such as that presented here. Indeed, one can hardly imagine a matter of greater public importance than the proper determination of the winner of the election for the

Office of President of the United States.

This Court has previously exercised its discretionary jurisdiction to address matters of great public importance in accordance with Article V, § 3 (b)(5), Fla. Const., in the context of an election contest and disputes. In the very first case where this Court accepted bypass jurisdiction pursuant to the Constitutional Amendment embodied in Article V, Section 3 (b)(5), this court recognized that an election contest arising from the general election for a state representative was "a matter of great public importance requiring an immediate resolution by the Supreme Court of Florida." McPherson v. Flynn, 397 So.2d 665, 666 (Fla. 1981). In McPherson, the court accepted jurisdiction pursuant to Article V, § 3 (b)(5), Fla. Const., even though the court ultimately concluded that § 102.168 provided no right to contest a person's qualifications to hold office. This court noted that § 102.168 was designed to address election contests concerning the balloting process as distinct from the legal qualifications of the candidates. Id. at 668.

Here, Petitioners' claims below squarely attack the "balloting process" related to the Presidential election in Palm Beach County. Further, there is little doubt that the public importance of the outcome of a Presidential election transcends that of the election at issue in McPherson.

This Court has twice recently accepted such pass-through jurisdiction in a related case which also potentially affects the outcome of this Presidential election. Palm Beach County Canvassing Board v. Harris, 2000 WL 1725434, at *2 (Fla. Nov. 21, 2000); Palm Beach County Canvassing Board v. Harris, 2000 WL 1716481, at *1 (Fla. Nov. 17, 2000). Earlier this year, this Court accepted Section 3(b)(5) jurisdiction in cases concerning local electoral issues of far less magnitude. See Kainen v. Harris, 2000 WL 1459712, *1 (Fla. Oct. 3, 2000) (concerning claim that ballot language for a local option vote was fatally ambiguous under the Florida Constitution); Volusia County v. Aberdeen at Ormond Beach, 760 So.2d 126, 130 (Fla. 2000) (state constitutional challenge to application of county-imposed school impact fees to trailer park which excluded children); See also School Board of Palm Beach County v. Winchester, 565 So.2d 1350 (Fla. 1990) (state constitutional challenge to statute governing election of county school board). Indeed, this Court commonly accepts pass-through jurisdiction in time-sensitive challenges to the makeup of election ballots, even where the ballot was used only in one county. See, e.g., Smith v. American Air Lines, Inc., 606 So.2d 618 (Fla. 1992) (challenge to defective ballot summary of proposed constitutional amendment); Evans v. Firestone, 457 So.2d 1351, 1352 (Fla. 1984) (same); Askew v. Firestone, 421 So.2d 151 (Fla. 1982)(same). The above-cited cases also illustrate the propriety of Section 3(b)(5) jurisdiction where, as in the instant case, state and federal constitutional issues are raised.

In sum, this is a case of great public importance not only because it addresses the rights of thousands of disenfranchised voters, but also because the outcome of the November 7, 2000, Presidential election hangs in the balance. Absent swift and decisive action, over 20,000 innocent Palm Beach County voters will be disenfranchised and the wrong Presidential candidate will likely be placed in office.

B. The Need for Immediate Relief Supports the Court's Exercise of Discretionary Jurisdiction Under Article V, Section 3 (b)(5) of the Florida Constitution

Pursuant to 3 U.S.C. § 7 "[t]he electors of President and Vice-President of each State shall meet and give their votes on the first Monday after the second Wednesday in December ..." Consequently, in accordance with federal law, Presidential electors are to meet and cast their votes on December 18, 2000. Significantly, with respect to any "controversy" concerning a state's selection of Presidential electors, federal law provides in pertinent part, as follows:

> **§ 5. Determination of Controversy as to Appointment of Electors**
>
> If any State shall have provided ... for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination ... shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution ...

3 U.S.C. § 5.

Accordingly, federal law defers to the States for "final determination of any controversy

or contest" concerning the selection of Presidential electors. This is true regardless of whether such determination is "by judicial or other methods or procedures," and such determination "shall be conclusive". However, the federal law deferring to a State's determination of an election contest concerning the selection of Presidential electors is given conclusive effect only if such determination is made at least six days prior to the meeting of the Presidential electors. As a practical matter, any contest concerning the Presidential election in Palm Beach or any other County in Florida **MUST** be resolved on or before December 12, 2000.

As noted above, this Court's November 21, 2000, Opinion specifically recognized the need to conclude the Presidential election vote recount effort sufficiently in advance of December 12, 2000, in order to permit the filing and resolution of an election contest under Fla. Stat.§ 102.168. In accordance with this Court's Order, the Secretary of State certified Florida's Presidential election results on November 26, 2000. Under federal law, Petitioners have until December 12, 2000 to (1) obtain relief from the Circuit Court's erroneous legal rulings, (2) present evidence at a hearing conducted pursuant to § 102.168 and, (3) obtain and effectuate appropriate relief if granted by the Circuit Court. In order to give any meaning to Florida's election contest law this process must move swiftly.

In Dept. of Insurance, et al. v. Teachers Insurance Co., 404 So.2d 735 (Fla. 1981) this Court accepted jurisdiction pursuant to Article V, § 3 (b)(5) of the Fla. Const. The Court accepted jurisdiction in order to determine the propriety of a circuit court judgment holding

a statute unconstitutional as retroactively applied. In a dissenting Opinion, Justice England questioned the Court's acceptance of jurisdiction in light of the legislative history of the 1980 Constitutional Amendment that created the Court's discretionary jurisdiction under Article V, § 3 (b)(5) of the Fla. Const. Justice England observed as follows:

> This case does not possess any indicia of immediacy, as did the only case so far accepted and decided under this provision. See, McPherson v. Flynn, 397 So.2d 665 (Fla. 1981). That case, it will be recalled, brought to us, just days before the 1981 Legislature commenced, a challenge to the seating of one of its members.

Id. at 736. After analyzing the legislative history of the Court's discretionary jurisdiction under § 3 (b)(5) of Article V, Justice England further concluded as follows:

> In my view, the framers of § 3 (b)(5) designed this procedure only to deal with disruptions to the system by which justice is administered in the state or to resolve important questions effecting governmental operations. The two examples mentioned frequently during the evolution of the 1980 Constitutional Amendment, and the Flynn case, bear this out.

Id. at 738. (Emphasis added).

The questions presented by Appellants herein address the resolution of important questions affecting governmental operations. With a December 12, 2000 deadline fast approaching there can be no question that this case meets the "immediacy" requirement

precedent to the Court's exercise of its discretionary bypass jurisdiction under Article V, § 3 (b)(5), Fla. Const.

II. THE TRIAL COURT PROPERLY DENIED BUSH'S MOTION TO DISMISS OR TRANSFER FOR LACK OF VENUE

C. The Trial Court Properly Retained Venue in Palm Beach County Under Florida Statute §102.1685

The trial court specifically considered and rejected a transfer based on section 102.1685 in the Gibbs v. Palm Beach County Canvassing Board case even though the contest had not yet ripened and BUSH's motion to dismiss or transfer venue failed to even raise this statute. Significantly, the "election" that is referenced in the statute is the election that is being "contested". Indeed, the first sentence of the statute states: "The venue for contesting a nomination or election . . ." (Emphasis added). Here, as the trial judge recognized in denying BUSH's motion, the grounds asserted by the plaintiffs to contest the election are peculiar to Palm Beach County because only Palm Beach County used the illegal "butterfly" ballot.

In order to arrive at a correct interpretation of Section 102.1685, the Court must first determine whether the Legislature, which used the disjunctive "or" in section 102.1685 meant that the plaintiff could choose venue in any of the proper counties listed in the statute or whether Leon county is exclusive for statewide elections. Almost every other venue provision in Chapter 47 (§47.011 being the main one) is written disjunctively, giving plaintiff a choice of where to sue. There is no reason to believe that section 102.1685 is any different. The statute expressly permits venue in the county where the "contestant" qualified. Under Section

102.168 any elector "qualified" to vote in the election may contest the election. The statute refers to such elector as the "contestant". Florida Statutes §102.168(2). Plaintiffs are the "contestants" in this case and they **qualified** to vote in **Palm Beach County** where they all reside.

In Harden v. Garrett, 483 So.2d 409 (Fla.1985) the Florida Supreme Court noted in dicta that because more than one county was involved in the "contested election", the Okaloosa County circuit court had transferred the cause to its proper statutory forum, Leon County, pursuant to § 102.1685, Fla. Statutes. Here, only one county is involved in the "contested" election as plaintiffs have only contested the results of the election in Palm Beach County. It is true that if additional votes are obtained as a result of the contest, such votes will affect the outcome of the statewide election. But the grounds asserted for the contest – an illegal "butterfly" ballot -- only exist in Palm Beach County. Furthermore, the plaintiffs, witnesses and evidence are all located in Palm Beach County. Therefore, the only reasonable construction of the statute is that the election being contested does not involve more than one county.

Since venue is meant to provide a geographically convenient forum for the defendant, an exclusive venue provision that forces both the Palm Beach County voters in this action as well as the Defendant, Palm Beach County Canvassing Board to travel to Leon County is illogical. It has been held that the primary purpose of venue statutes is to require that litigation be instituted in "that forum which will cause the least amount of inconvenience and

expense to those parties required to answer and defend the action," and that "[t]he granting or refusal of the application for change of venue is within the sound discretion of the trial court and will not be disturbed upon review absent a demonstration of a palpable abuse or grossly improvident exercise of discretion." See, Gallagher v. Smith, 517 So.2d 744 (Fla. 4th DCA 1987) quoting Gaboury v. Flagler Hospital, Inc., 316 So.2d 642, 645 (Fla. 4th DCA 1975).

Venue Is Also Proper Under Fla. Stat. §47.011

Under Florida law, actions may be brought "in the county where the defendant resides" or "where the cause of action accrued." Florida Statute §47.011. The PALM BEACH COUNTY CANVASSING BOARD, one of the Defendants in this action, is required by law to be and is composed of a Palm Beach County Court Judge, the Palm Beach County Supervisor of Elections and the chair of the Board of County Commissioners for Palm Beach County. Since the Board "resides" in Palm Beach County, Florida Plaintiffs properly filed their complaint for declaratory and injunctive relief in Palm Beach County.

A plaintiff's selection of venue will not be disturbed as long as the selection is among statutory alternatives; plaintiff's decision is presumptively correct and a party challenging venue has the burden to show any impropriety in choice. Berdos v. Dowling, 544 So.2d 1129 (Fla. 4th DCA 1989). Here, BUSH has not met such burden. Accordingly, venue should remain in Palm Beach County.

D. The Trial Court Properly Denied A Transfer of Venue

No motion was ever made to dismiss or transfer venue with respect to any subsequent amended complaints filed by Plaintiffs prior to a final order being entered. (SA3) The issue then is whether, under Plaintiffs' initial single count complaint seeking declaratory relief as to the legality of the "butterfly" ballots used solely in Palm Beach County, the trial court abused its discretion in not transferring venue to Leon County.

Florida Statute §102.1685 was not raised in BUSH's motion to dismiss and in any event is not dispositive of venue as to Plaintiff's declaratory judgment claim. In addition, it appears that the order denying the motion to transfer venue was only entered in the Gibbs v. Palm Beach Canvassing Board, Case No. CL 0011000AN.

Even with respect to Plaintiff's Second Amended Complaint which contains a count for declaratory judgment and a count seeking relief under Section 102.168, venue is also proper in Palm Beach County as to the declaratory judgment count. See, Gallagher v. Smith, 517 So.2d 744 (Fla. 4th DCA 1987);Windsor v. Migliaccio, 399 So.2d 65 (Fla. 5th DCA 1981)(venue in declaratory judgment action proper in county where invasion of plaintiff's legal rights occurred); See also, Florida Statute §47.011 (venue proper where defendant resides).

In Gallagher, the Broward County Circuit Court transferred all counts of a four count complaint to Duval County because venue there was mandatory under Chapter 607 as to the plaintiffs' corporate dissolution claim and the other claims were based on common questions of law and fact. In reversing, this Court held that the trial court could not properly transfer the

other counts to Duval County unless it made a finding that Duval county would be a more convenient forum for the parties and witnesses as to such other counts. Id. at 748. Likewise, even if BUSH had moved to dismiss or transfer venue as to the statutory election contest count of the Second Amended Complaint, the trial court could not properly transfer the declaratory judgment count unless it made a finding that Leon County is a more convenient forum for the parties and witnesses. Such a finding would be impossible in this case because the Plaintiffs and numerous other voters who were misled by the ballot all reside in Palm Beach County, the canvassing board and Supervisor of Elections are located in Palm Beach County and the ballots and other physical evidence are all located in Palm Beach County. On the other hand, none of the witnesses or any evidence is located in Leon County.

Plaintiffs are aware that there is authority to the effect that if a trial court improperly denies a motion for change of venue, all subsequent proceedings are void. Kolodish v. South Florida State Hospital, 536 So.2d 287 (Fla. 4th DCA 1989). However, there is also contrary authority which relies on Florida Supreme Court precedent. See, In re: Guardianship of Mickler, 163 So.2d 257 (Fla. 1964); Bambrick v. Bambrick, 165 So.2d 449 (Fla. 2d DCA 1964) (allegations showing improper venue but not lack of jurisdiction of county judge to appoint guardian who resided in another county were insufficient to establish that order appointing guardian was void). The fact that the defense of improper venue can be waived also suggests that improper venue does not deprive the trial court of jurisdiction. However, Plaintiffs submit that for the reasons set forth herein, the trial court properly denied the

motion to dismiss or transfer venue and/or that the issue of venue under Section 102.1685 was waived.

E. BUSH Waived Any Venue Privilege under Florida Statute Section 102.1685, by Failing to Rely upon this Statute in His Motion to Dismiss or Transfer for Lack of Venue

The defense of venue can be waived, even as applied to governmental entities. See, County of Volusia v. Atlantic International Investment Corp., 394 So.2d 477 (Fla. 1st DCA 1981) (County waived venue privilege by failing to raise defense of improper venue in its motions to dismiss). Here, BUSH's motion to dismiss or transfer for lack of venue only raised the common law venue privilege applicable to state agencies and did not assert a venue privilege under section 102.1685. Given that the Rogers plaintiffs had included Section 102.1685 in their complaint and at least one other plaintiff in another case (i.e., Horowitz v. LePore) had included this section in their complaint, BUSH's failure to assert section 102.1685 constitutes a waiver of any venue privilege. Nor did BUSH raise the issue of venue in the brief filed by him with the Fourth District Court of Appeals.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT FLORIDA STATUTE §102.168 DOES NOT APPLY TO PRESIDENTIAL ELECTIONS

In its order dismissing Appellants' claims, the trial court stated "that §102.168 was not intended to apply to Presidential elections." (Order at 10). The trial court made it clear that it was not addressing the factual basis of any of Appellants' claims, but merely ruling on an issue of law. Where, as here, the lower tribunal's rulings are strictly questions of law, a de

novo standard of appellate review applies. Reinish v. Clark, 765 So.2d 197(Fla. 1st DCA 2000).

It is respectfully submitted that the trial court's legal conclusion that Section 102.168 does not apply to Presidential elections is both erroneous and contrary to this Court's recent opinion in Palm Beach County Canvassing Board v. Harris, 2000 WL 1725434 (Fla. Nov. 21, 2000). There, it was clearly contemplated that section 102.168 applies to Presidential Elections because this Court set the deadline for amended certifications to be filed within a time period that would allow "contests pursuant to section 102.168." Id. at pp. 40. Indeed, this Court clearly held that a candidate, elector or taxpayer may contest a presidential election under Section 102.168:

> Because the right to vote is the pre-eminent right in the Declaration of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168 . . .

Id. at 38.

By its terms, 102.168 applies generally to all election contests, for all offices, for all elections held in the State of Florida. See 102.168(1) (application to the "election or nomination of any person to office") (emphasis added). It is undoubtedly true that Presidential elections are unique in some respects, and require expedited treatment. As the

lower court recognized (Opinion, at 10-11), because of the statutory deadline to certify Presidential Electors, Presidential election contests need to be held on an expedited basis, so the normal deadlines for filing the complaint and answer need to be compressed. But this is consistent with the notion that Section 102.168 was intended as a general election contest statute applying to "any ... office," including President. The fact that it is the only election contest statute supports this conclusion. The circuit court inserts an exception for Presidential elections completely unsupported by the statute's plain language and in contravention of the legislative intent.

Indeed, in oral argument before this Court in the Harris case, both counsel for BUSH and counsel for GORE, consistently took the position that the contest of election statute applies to Presidential elections. Accordingly, the trial court's finding that Section 102.168 does not apply to presidential elections should be reversed.

VI. FLORIDA PERMITS THE SETTING ASIDE OF AN ELECTION AND THE ORDERING OF A REVOTE UNDER THE CONTEST OF ELECTION STATUTE, SECTION 102.168, FLA. STAT.

Appellants' Second Amended Complaint specifically requests relief under Section 102.168, Fla. Stat., which allows for the contest of elections. Section 102.168 Florida

Statutes, sets forth various grounds for contesting election results, including but not limited to:

> * * *
>
> (e) Any . . . cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or the outcome of the election . . . was contrary to the result declared by the canvassing board or election board.

The relief authorized under this statute is broad. Subsection (8) provides that the court "may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined or checked, to prevent or correct any alleged wrong, **and to provide any relief appropriate under such circumstances**." Appellants seek relief under this statute, including without limitation, a revote, because of the numerous statutory violations that have resulted from the unauthorized use of a butterfly ballot in Palm Beach County. In the landmark case of Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998), this court held that if a court finds "substantial noncompliance with statutory election procedures and also makes a factual determination that **reasonable doubt** exists as to whether a certified election expressed the will of the voters, then the court ... is to void the contested election **even in the absence of fraud** or intentional wrongdoing." Id. at 725. In so holding, this Court specifically expressed disapproval of the statement made by the trial court, similar to the conclusion reached by the trial court here, that it did not "have jurisdiction to set aside this election." Id. at 727. If the results of an entire election (as

opposed to only some ballots) are to be set aside, there can only be one remedy - a revote.

Similarly, in Nelson v. Robinson, 301 So.2d 508, 511 (Fla.2nd DCA 1974), the court also held that the applicable legal standard in a post-election challenge was whether there was "a reasonable probability that the results of such election would have been changed except for such irregularity."

The power to order a revote was also recognized and applied by a trial court in Craig v. Wallace, 2 Fla. L. Weekly S517a (2d Jud. Cir. 1994). In Craig, the court concluded that errors and irregularities in the election process prevented a full, fair and free expression of the public will in the election. The court voided the election results and ordered a limited re-vote for the precincts in question. Because the margin of victory was so slim, the court found that the deprivation of these voters' rights permeated the entire election process and affected the integrity and sanctity of the election. Furthermore, the court held that the failure to grant injunctive relief would cause irreparable harm to the voters as they would be deprived of their right to vote and no adequate remedy at law existed. See also, Juri v. Canvassing Board of Hialeah, No. 93-21848 (04) and No. 94-04341 (04) (Fla. Dade County Ct. Nov. 7, 1994).[9]

[9] This case is summarized in 54 U. Miami L. Rev. 625, 648, April, 2000, William T. McCauley, "Comment Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy."

V. THE TRIAL COURT CONCLUSION THAT A REVOTE IS PROHIBITED BY FEDERAL AND STATE DESIGNATION OF A UNIFORM ELECTION DAY IS ERRONEOUS

The circuit court recognized that the right to vote is one of the most fundamental rights in our system of government. Reynolds v. Sims, 377 U.S. 533, 554 (1964). The right to vote is entitled to special constitutional protection because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights." Id. Indeed, because of the preferred place that the right to vote occupies in our constitutional scheme, "any illegal impediment to the right to vote . . . would by its nature be an irreparable injury. " Harris v. Graddick, 593 F.Supp. 128, 135 (M.D. Ala. 1984); Elrod v. Burns, 427 U.S. 347, 373 (1976) (same).

Notwithstanding its recognition of the importance of fair and reliable elections, and the fact that the irregularities that occurred were alleged to be sufficient to place the outcome of the election in doubt, the circuit court concluded that it lacked authority to order a new election or revote because Congress has provided that elections be held for the president "on the Tuesday next after the first Monday in November." Opinion at 5, quoting 3 U.S.C. §1. Since the court made no determination as to the factual validity of Appellants' claims, this Court in its de novo review of the circuit court's legal conclusion, should assume those allegations to be true. Significantly, the reasoning of the circuit court would apply even if thousands of ballots were stolen and destroyed. As discussed below, nothing in the state and federal law supports such an undemocratic result.

A. The Trial Court Erroneously Construed Art. II, Sec. 1, Clause 4 of the U.S. Constitution

The circuit court began its analysis by citing to Article II, Section 1, Clause 4 of the Constitution, which provides the day of choosing presidential electors "shall be the same throughout the United States." But the only thing that the Constitution requires is that the day on which the members of the electoral college meet to vote (i.e., December 18) be uniform throughout the United States. There is no constitutional requirement of a single election day as evidenced by the fact that, beginning with our very first national election, elections were held on various days throughout the United States.

When Congress adopted (by 3 U.S.C.A. §5) the uniform national election day of the first Tuesday following the first Monday in November, it specifically provided for the possibility that a state might not choose its electors on that date, and therefore permitted the states to have a supplemental mechanism. The trial court in its order concluded that the State of Florida had not created such a supplemental mechanism and rejected Petitioner's claim that the election contest statute, Section 102.168, provides such a mechanism. In part, this conclusion was based on the trial court's erroneous conclusion that Section 102.168 does not apply to presidential election contests.

B. Florida Statute §103.011 Does Not Preclude the Relief Sought

In rendering its order, the trial court also relied upon Florida Statute §103.011 which

provides in relevant part:

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

Simply because a date certain for the presidential election is set out by statute, does not mean that a re-vote could not be ordered in Palm Beach County based on errors and irregularities in the election process. Such irregularities in elections have often resulted in re-votes for the purpose of clarifying voters' intentions in the voided original election. Hence, a "new" election is not sought, but rather a completion of the voided portion of the November 7, 2000 general election.

3 U.S.C. § 2 provides:

> **§ 2 Failure to make choice on prescribed day**
>
> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct. (Emphasis added).

In the event that the lower court determines that the November 7, 2000, Presidential election in Palm Beach County was so flawed due to ballot irregularities that the certified result fails to reasonably reflect the will of the voters, and based thereupon, the court voids the election and orders a limited re-vote, Florida will have "failed to make a choice on the day prescribed by law." 3 U.S.C.A. §2.

Under such circumstances "the electors may be appointed on a subsequent day in such a manner as the legislature" of Florida directs. Id. Obviously, federal law contemplates circumstances where selection of Presidential electors on a date other than federal election day is appropriate. Further, federal law vests in the State legislatures the authority for directing the means by which such subsequent selection procedures are implemented.

The meaning of the term "failure to elect" was explored by the district court in Busbee v. Smith, 549 F.Supp. 494, 525 (D. D.C. 1982). The court in Busbee addressed this exact question at some length. In that case, defendants made precisely the sort of argument raised here–namely, that because the date for the normal election was set out by statute, the court had no authority to order a special election to remedy voting rights violations. 549 F. Supp. at 523. The court rejected this argument, stating that "Although states ordinarily should conduct congressional elections on the date established . . . those elections may, under certain circumstances, be held at other times." Id. at 524. Construing a related federal statute allowing congressional elections at other times to fill a vacancy or where there is a "failure to elect," the court noted that an invalidated election resulted in one such "failure to elect," allowing for a special election to be held at a different date than the one prescribed. Id. at 525.

Similarly, in Public Citizen, Inc. v. Miller, 992 F.2d 1548 (11th Cir. 1993), the plaintiffs, who challenged a run-off election for the United States Senate in Georgia, made substantially the same argument espoused by the circuit court here – that federal law prohibited an election being held at any time other than the first Tuesday following the first Monday in

the November preceding the expiration of the incumbent senator's term. The Eleventh Circuit, in the context of determining whether Georgia's majority vote statute violated this statute, explained the difference between holding an election on a different day (as is discussed in Love v. Foster 522 U.S. 67 (1997) relied on by the trial court) and an incomplete election:

> The statute respects section 7's formula for determining the date for general elections, and does not permit the state to circumvent holding an authentic general election on that date. Furthermore, the results of that election are fully binding upon the state. It is the interpretation of those results, however, that is influenced by the statute. The statute ensures that elections held on the the federally-mandated days put into effect the will of the majority of voters. Accordingly, the statute deems an election resulting in a mere plurality vote to be a completed election. To remedy such incompletion, the statute requires that the election continue into a run-off. Although the run-off takes place on a separate day, it does not negate section 7's [2 U.S.C. §7] effect. The run-off does not reschedule the earlier election general election, nor does it negate that election's outcome. (emphasis added)

Id. at 1548. (Emphasis added).

Here, Section 102.168 is clearly designed to ensure that elections held on the federally mandated days put into effect the will of the majority of voters. Although the revote takes place on a separate day, it does not negate 3 U.S.C.A. §5's effect. A revote based on confusion caused by the failure of the ballot to substantially comply with Florida Statutes does not reschedule the earlier general election. Nor does it negate the election's outcome, since such outcome cannot be accurate when, as here, there is overwhelming evidence that over 19,000 voters double punched the ballots in the mistaken belief that they were voting for Gore and Lieberman and over 3,000 voters (a virtual statistical impossibility) in Palm Beach County

voted for Buchanan.

The Florida Election Code contemplates that an election will be held, that the results of the election may be protested to the county canvassing board and that upon certification, an elector or a losing candidate may contest the election results.

Therefore, even though §103.011 provides that "Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4," they are not actually "elected" until the statutory election process has been completed. If a contest of election is successful and a re-vote is ordered, the electors will not be legally "elected" until such re-vote has taken place.

This case is therefore unlike Foster v. Love, 522 U.S. 67 (1977), relied upon by the circuit court, where the state of Louisiana set a date for congressional elections to being in October of a federal election year. Foster does not address the present situation. No election contest was involved. Neither the constitutional right to vote nor the disenfranchisement of thousands of voters were at issue. Rather, Foster involved state action prior to federal election day and the Court held that such state action was specifically preempted. Post-election state action, on the other hand, is specifically contemplated and expressly authorized by federal statute.

Similarly, nothing in Foster upsets the longstanding rule that courts may order special elections to remedy electoral and voting rights violations. LaCaze v. Johnson, 310 So.2d 86,

89 (La.1974) (state trial court annulled a federal congressional election because one voting machine malfunctioned, resulting in only 144 missing votes); Vera v. Bush, 933 F.Supp. 1341, 1350-1353 (S.D. Tex. 1996) (three-judge court) (ordering new congressional elections because of constitutional violations in districting); Busbee v. Smith, 549 F.Supp. 494, 525 (D. D.C. 1982) (three-judge court) (ordering new congressional election because of statutory violations in districting); Lowenstein v. Larkin, 288 N.E.2d 133 (N.Y. 1972) (state court setting aside congressional election and ordering a new election because of errors by polling place officials who wrongly turned away some voters and allowed others to vote).

Notably, the Supreme Court in Foster favorably cited the Busbee opinion on a related point. If it believed that the Court's decision in Foster foreclosed a court-ordered special congressional election, it would not have cited Busbee, or else the Court would have cited Busbee and made clear its disagreement on this point. For all these reasons, the lower court's reliance on Foster, as well as 2 U.S.C. § 7, is misplaced.

Again, to adopt the trial court's reasoning in this case would mean that in any case where a Presidential election was tainted by rampant fraud or ballot stuffing a revote could never be ordered. Failing to conduct a new election or revote or provide other remedies to the voters of Palm Beach County would disfranchise these voters and render their right to vote illusory. Accordingly, the circuit court clearly erred in holding that "it is not legally possible to have a re-vote or new election for Presidential electors in Florida." Opinion at 16.

VI. PRECEDENT EXISTS FOR THE REMEDY OF STATISTICAL REALLOCATION

Courts have often held that where votes are affected by election officials misconduct or other illegality - - such as the clear noncompliance alleged by plaintiffs - - one remedial option available is to statistically adjust the election totals based on examination of the overall election returns. In Curry v. Baker, 802 F.2d 1302, 1318 (11th Cir. 1986) the Eleventh Circuit held that the district court properly used expert statistical and survey testimony in the voting election contest " . . . as the most reliable evidence available to protect the fairness of the election process . . .")

Similarly, in Hammond v. Hickel, 588 P.2d 256 (Alaska 1978), the Supreme Court of Alaska endorsed just such a procedure in its discussion of how lower courts should deal with election contests. The Court explained that the determination of whether electoral irregularities could have changed the election result depends on whether the irregularities introduced "bias" into the system. Id. at 260. The Court explained:

> If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the results of the election would be changed. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates. Boucher v. Bomhoff, 495 P. 2d 77 (Alaska 1972). Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a random fashion, those votes should be either counted or disregarded, if they can be identified, and the results tabulated accordingly. Finally, if the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast. (citing cases).

Similarly, if a specified number of votes should have been counted but are no longer

available for counting, they should be added to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted. Id. Thus, the Court recognized that, depending on the facts of each case, a court may choose between awarding disputed votes to the disfavored candidate altogether, scheduling a special election, or making a proportional adjustment of the vote totals. Regarding the latter "pro rata" approach, the Court added that if the local election returns were such "as to render this method unsuitable based on a statistical approach," the court should adjust the vote totals based on the statewide ratio of the candidates' votes. Id. The Court added that "[t]he remedy of a re-election may be required under certain circumstances." Id., citing Finkelstein & Robbins, "Mathematical Probability in Election Challenges", 73 Columbia Law Review, 241 (1973) (describing how statistical formulas can assist courts faced with close election challenges). See also, Krauss, "Analyze This: A Physicist on Applied Politics," The New York Times, November 21, 2000.

Nor is this flexible approach allowing statistical readjustment of vote totals limited to Eleventh Circuit and Alaska law. See, e.g., Thornton v. Gardner, 195 N.E. 2d 723, 724 (Ill. 1964)(deducting illegal votes cast from each side in proportion to the total vote); Grounds v. Lowe, 193 P.2d 447, 453 (Ariz. 1948)(same); Russell v. McDowell, 23 P. 183, 184 (Cal. 1980)(making findings as to some disputed votes based on testimony, and adjusting the remaining votes on a pro rata basis); see also Singletary v. Kelley, 51 Cal. Rptr. 682, 683 (Cal. 1st DCA 1966)(deducting illegal votes from each candidate in proportion to the total vote).

Courts in other states have used a more intuitive, informal mathematical approach in other election contest cases to determine whether the outcome was reasonably in doubt. See, e.g., Ippolito v. Power, 241 N.E. 2d 232, 294 (N.Y. 1968)(ordering new election where there were 101 suspect votes and declared winner had only 17-vote margin out of 2827 total votes cast); Santucci v. Power, 252 N.E. 2d 128 (N.Y. 169) (same, where suspect votes totaled 650 and margin of victory was only 95 votes). While these cases often involve simple calculations of ratios based on total vote, courts have used more sophisticated statistical techniques to discern what adjustment to the vote would be appropriate. See, e.g., Cellar v. Larkin, 335 N.Y.S. 2d 791 (Sup. Ct.) aff'd mem, 288 N.E. 2d 135 (N.Y. 1972)(in congressional election challenge, court relied on statistical probability analysis to show that the number of suspect votes would have to be over 2.5 times as large to create even a one-in-a-thousand probability of changing the outcome). In LaCaze, supra, even the dissenting justice noted that one alternate remedy (to a re-vote or special election) available to the Court would have been to do a statistical analysis of the results and conclude that a sufficient number of the missing votes would have been cast for the challenger to make him the winner. 310 So.2d at 87-88.

The significance of the above cited authority is that the hands of the judiciary are not tied in fashioning remedies due correct election irregularities - - in fact legal precedent indicates that judicial involvement in rectifying such illegalities was expressly envisioned.

CONCLUSION

For all of the foregoing reasons, the Appellants request that the Court exercise its

discretion to accept jurisdiction, reverse the trial court's order and direct the trial court to expeditiously proceed under Section 102.168, or in the alternative, issue a writ of mandamus directing Judge LaBarga to proceed with an evidentiary hearing and exercise his discretion and authority to fashion an appropriate remedy to include a revote or new election or a statistical reallocation.

Respectfully Submitted this **28th** day of November, 2000.

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SUPREME COURT OF FLORIDA

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Case No. SC00-2373

DCA Case No. SC00-4145

DCA Case No 4D00-4146
Circuit Court Case Nos. CL 00-10965 AB; CL 00-10970; CL 00-10988 AB,
CL 00-11000AB

DCA Case No. 4D00-4153
Circuit Court Case No. CL 00-10992 AB

Appellants/Petitioners Appellees/Respondents

APPENDIX TO BRIEF OF PETITIONERS/APPELLANTS
ANDRE FLADELL, ALBERTA MCCARTHY and LILLIAN GAINES

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1. Motion of George W. Bush To Dismiss or Transfer for Lack of Venue

2. Order on Motion Filed by George W. Bush To Dismiss or Transfer For Lack of Venue

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