IN THE COURT APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. : 4D00-4146
4D00-4158

L.T. No.: CL-00-10965 AB
CL-00-10992 AF
Honorable Jorge Labarga

BEVERLY ROGERS and RAY KAPLAN, etc

Plaintiffs/Appellants,

v.

THE PALM BEACH COUNTY ELECTIONS CANVASSING COMMISSION, et al.

Defendants/Appellees.
_____/

APPELLANTS' INITIAL BRIEF OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE AND OF THE FACTS

Plaintiffs have filed suit challenging the results of the general election for President and Vice President of the United States of America as held in Palm Beach County, Florida. In their Complaint, Plaintiffs have sought declaration that the "butterfly ballot" utilized in Palm Beach County, Florida violates numerous state statutes in such that it was illegal and confusing, thereby resulting in an allocation of votes to candidates different than the candidate for whom the voters intended to vote. At a hearing held on November 15, 2000, Plaintiffs sought to schedule a hearing on the legality of the ballot, alternatively seeking a hearing just on the issue of whether as a matter of law the butterfly ballot violates various statutes, and/or to present evidence (both statistical analysis and testimony of voters) in support of the claim that the ballot at issue is illegal. Plaintiffs goal was to either establish that the ballot was illegal, or at the very least to lay the necessary factual predicate for an ultimate determination that the ballot was illegal and, therefore, that a new election must be ordered, should it be necessary to do so in short order.[1] The trial court refused to hold a hearing or make a determination as to the legality of the ballot until the court first determined whether the court had the authority to order a new election if the court determined that the ballot was illegal and that as a result thereof the election results do not reflect the will of the

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1. Attached to Plaintiffs/Appellants' Memorandum of Law as Composite Exhibit A, and included with Plaintiffs/Appellants' Appendix, is a brief overview or summary of some of the evidence which Plaintiffs intend to ultimately present to the Court. Such evidence includes expert testimony by some of the most respected statisticians in the county which establishes with near absolute scientific certainty that a new election by the voters who voted in Palm Beach County, Florida on November 7, 2000, or a statistical reapportionment of the 3,407 Buchanan votes and the 19,120 discarded ballots, would result in a net gain of 11,675 votes for Al Gore. Of course, Plaintiffs/Appellants are also prepared to present the testimony of numerous voters who punched the wrong hole due to the confusing nature of the ballot, voters who spoiled ballots but were refused a replacement ballot, voters who were refused instruction, and other violations of the elections statutes which will establish that thousands of voters in Palm Beach County were denied their constitutional right to a fair vote.

people. A hearing on the court's authority to order a new election was scheduled by the court for November 17, 2000.

On November 20, 2000 the trial court entered an order in which the court found that, regardless of whether the ballot is illegal and without consideration of the evidence as to the nature and extent of the violations, it was without authority to order a new election or "re-vote" in Palm Beach County for President and Vice President of the United States of America. The court's ruling was based almost entirely upon federal and state statutes which provide that the general election for President and Vice President of the United States of America should be conducted on the Tuesday after the first Monday in November. Plaintiffs/Appellants respectfully submit that the trial court erred first in not ruling on whether the ballot is illegal as a matter of law, and further erred in foreclosing the possibility of such a remedy at this juncture, especially before the evidence has been considered.

Plaintiffs/Appellants appealed Judge Labarga's ruling and sought immediate certification from this Court under Rule 9.125, *Fla. R. App. P.* This Court declined to immediately certify the matter, instead instructing the parties submit briefs on an expedited basis. Therefore, Plaintiffs/Appellants now submit this Petition/Initial Brief and respectfully submit that the trial court erred in not first determining that the ballot is illegal, and seek a determination from this Court that the ballot is in fact illegal. In addition, the trial court erred in determining it had no authority to order a new election in Palm Beach County, as the overwhelming amount of authority shown herein establishes conclusively that the trial court in fact has the power and authority to order a new election or re-vote if it so chooses. Finally, the trial court erred in completely eliminating the possibility of a remedy short of a new election, such as a statistical reapportionment of certain ballots cast in Palm beach County.

LEGAL ARGUMENT

The Florida Supreme Court held only two years ago 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 in an election contest brought pursuant to Section 102.168, Florida Statutes (1997), is to void the contested election even in the absence of fraud or intentional wrongdoing." *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720, 725 (Fla. 1998). The circuit court in this case disregarded this fundamental principle of Florida law.

I) THE CIRCUIT COURT ERRED IN DECIDING WHETHER TO ORDER A PARTICULAR REMEDY BEFORE DETERMINING THE EXISTENCE OF A WRONG

At the hearing held on November 15, 2000, the trial court, over Plaintiffs' objections, "bifurcated" the issues raised by Plaintiffs' Complaints. Under the lower court's "bifurcated" procedure, the court first considered "only the question of the legality of permitting a re-vote or new election for the Presidency and Vice Presidency of the United States." November 20, 2000 Order at 2. The court contemplated that, if it were determined that a re-vote or new election was legally permissible, an evidentiary hearing would then be held in order to decide whether there was substantial noncompliance with statutory election procedures and "reasonable doubt" that the election expressed the voters' will. This bifurcated procedure was legally inappropriate on two distinct grounds: first, the lower court should have decided the existence of a wrong before determining an appropriate remedy; and second, the existence of substantial noncompliance can and should be decided in this case as a matter of law, without the necessity of an evidentiary hearing.

A. The Circuit Court Should Have Decided Whether A Wrong Has Been Committed Before Deciding on an Appropriate Remedy

The lower court's procedure in this case put the cart before the horse. Under *Beckstrom*, the question of whether an election should be voided arises only **after** the court has determined two subsidiary questions: (1) whether there was substantial noncompliance with statutory election procedures; and (2) whether there is "reasonable doubt" that an election expressed the will of the voters. The existence of a remedy becomes an issue only after a court has decided that there is a legally cognizable wrong. Once a wrong has been found, the law encourages judicial flexibility and creativity by mandating that "[f]or every wrong there is a remedy." *Holland v. Mayes*, 19 So.2d 709, 711 (Fla. 1944). In bypassing the existence of a wrong and proceeding directly to the constitutionality of one particular remedy, the circuit court turned legal process on its head. To the extent that the Court determines that mandamus would be appropriate and declines to decide here the legality of the ballot, Plaintiffs request that this Court order the trial court to immediately schedule a hearing on the legality of the ballot.

B. The Legality of the Butterfly Ballot Must Be Decided as a Matter of Law

In truth, given the national implications of this case, and the fact that the determination of the legality of the ballot is really a matter of law that this could review *de novo*, Plaintiffs seek a ruling from this court that the butterfly ballot is illegal as a matter of law. Certainly it is unique that an issue would be decided in the first instance on appeal, but again, given the extreme importance of this issue, and the deadlines which are fast approaching for the tabulation of electoral college votes, we are presented with a situation where the interests of justice compel this court to determine the legality of the ballot in this appeal, with a remand to the trial court as to the appropriate remedy (including the possibility of a new election).

Voting methods and procedures in this state are exhaustively and meticulously regulated by statutory law. Chapter 101 of the Florida Statutes contains provisions governing virtually every aspect of an election, including the form and design of ballots, instructions for electors and poll workers, the placement and use of ballot boxes and voting booths, and many other issues. Sections 101.5601 through 101.5615, *Fla. Stat.*, represent more recent additions to Chapter 101 and deal with electronic and electromechanical voting systems. Electronic and electromechanical voting systems are systems of capturing votes by the use of devices which allow votes to be tabulated on automatic tabulating equipment or data processing equipment. When such equipment is used, section 101.5609(2) requires that the information contained on the ballot "shall, as far as practicable, be in the order of arrangement provided for paper ballots."

As we demonstrate below, on their face the "butterfly ballots" used in Palm Beach County violate numerous provisions of Florida statutory law.[2] First, the names of the candidates were presented in the wrong order. Second, some of the voting boxes or punch holes appeared to the right of the candidate's name and some to the left rather than all to the right or all to the left. And third, the Palm Beach County ballot did not have the format designed and mandated by the Secretary of State. These illegalities represent purely matters of law which this court can consider *de novo* and rule upon accordingly.

II) THE BUTTERFLY BALLOT IS ILLEGAL

Chapter 101, *Fla. Stat.*, governs voting methods and procedures, and contains provisions for nearly every aspect of an election, including the form and design of ballots,

2. A copy of the butterfly ballot is attached to this brief as Exhibit 1.

instructions for electors and poll workers, regulation of the ballot boxes, and voting booths, and numerous other issues. Sections 101.561 – 101.5615, *Fla. Stat.*, represent more recent additions to Chapter 101, *Fla. Stat.*, and deal with electronic voting systems. Electronic or electromechanical voting systems are systems of capturing votes by the use of voting and marking devices and the counting of ballots with automatic tabulating equipment or data processing equipment. However, under Section 101.5609(2), *Fla. Stat.*, even ballots to be utilized as part of an electronic or electromechanical voting system are required to be in the order of arrangement **provided for paper ballots**, as far as practicable. Moreover, Section 101.5609(1), *Fla. Stat.*, references the use of paper ballots in connection with the electromechanical voting systems. The reference to paper ballots in Section 101.5609, *Fla. Stat.*, brings into play all other provisions of Chapter 101 concerning ballots, including Sections 101.011, 101.151 and 101.191, *Fla. Stat.*

Initially, paper ballots were marked by a voter with an "X" placed after the name of the candidate of the voter's choice. However, Section 101.011(2), *Fla. Stat.*, provides that no paper ballot shall be voided or declared invalid by reason of the fact that the ballot is marked other than with an "X," thereby allowing other marks, including the hole punch method. So long as there is a clear indication on the ballot to election officials that the person making such ballot **has made a definite choice**, and provided further that the mark placed on the ballot with respect to any candidate by any such voter is located in **the** blank space on the ballot opposite the candidates name, the ballot is valid. As shown below, the butterfly ballot used in Palm Beach County did not give voters a fair opportunity to make a definite choice for President and Vice President, and their use violates numerous other provisions of Florida statutory law.

A. The names of the candidates appeared in the wrong order

First, the names of the candidates appeared in the wrong order. Section 101.151, *Fla. Stat.*, provides specifications for general election ballots, including the order for listing of candidates by party, and is made applicable by virtue of Section 101.5609(2), *Fla. Stat.* Under Section 101.151(4), *Fla. Stat.,* the names of candidates are to be listed in the following order: the names of candidates of the party which received the highest number of votes for governor in the last election in which a governor was elected shall be placed first under the heading for each office, together with an appropriate abbreviation of party name; and the names of candidates of the party which received the second highest vote for governor shall be second under the heading for each office, together with an appropriate abbreviation for the party name. The statute goes on to provide: "Minor political candidates and candidates with no party affiliation shall have their names appear on the general election ballot following the names of recognized political parties, in the same order as they were certified." §101.151(5), *Fla. Stat.* On its face, the butterfly ballot violates these statutory provisions. While the names of the Republican candidates (the candidates of the party receiving the highest number of votes for Governor) appear first on the ballot, the names of the Democratic candidates (the party receiving the second-highest number of votes) do not appear second; instead, the names of the Reform Party candidates appear second on the ballot. Moreover, the Reform Party candidates (candidates nominated by a "minor" political party) obviously do not "follow" the names of the recognized political parties. The record shows that these very deficiencies caused massive voter confusion in Palm Beach County.

B. The voting boxes appear on alternate sides of the candidates' names

As noted earlier, Section 101.5609(2), *Fla. Stat.*, mandates that, as far as practicable, ballot information contained on machine-tabulated ballots shall be "in the order of arrangement provided for paper ballots." So that there would be no doubt or confusion as to the form of the ballot, the legislature enacted Section 101.191, *Fla. Stat.*, which is entitled "Form of General Election Ballot." The statute on its face applies regardless of whether the "old fashioned" paper ballots or the newer electromechanical voting systems are utilized. The statute provides that the general election ballot shall be in the **substantially the form shown in the statute**, and expressly provides that voting marks shall appear to the "RIGHT" of the candidates' names. Section 101.5609(6), *Fla. Stat.*, relaxes this requirement slightly in connection with machine-tabulated ballots, providing that voting squares "may be placed in front of or in back of the names of candidates."

None of these provisions, either singly or collectively, authorize a ballot in which the voting squares for **some** candidates appear to the right of the candidate's name and the voting squares for **other** candidates appear to the left—the situation created by the butterfly ballot here. Very simply, Palm Beach County could have utilized a ballot with all voting squares appear to the right or **all** voting squares appear to the left, but not both used alternatively. This error was especially compounded by the use of instructions which told voters to place **a mark to the right of the name of the candidate** for whom they intended to vote. This ballot form unquestionably violates Florida law.

C. The butterfly ballot is not the ballot mandated by the Secretary of State

Section 101.151(8), *Fla. Stat.*, ensures state-wide uniformity in ballot format by providing that "[n]ot less than 60 days prior to a general election, the Department of State

shall mail to each supervisor of elections the format of the ballot to be used for the general election." In this case, the Department of State mailed to each county supervisor, including the supervisor for Palm Beach County, a ballot format in which the names of the candidates appear in a single linear list and in which voting boxes appear to the **right** of each candidate's name.[3] The supervisor of elections for Palm Beach County violated this statute by replacing the ballot mandated by the Secretary of State with an idiosyncratic and illegal butterfly ballot.

In short, the Circuit Court should first have determined as a matter of law that the butterfly ballot is inconsistent with Florida law, and then conducted an evidentiary hearing to determine whether there is "reasonable doubt" that the election expressed the will of the voters. Only after both of those questions had been answered should the Court have considered the question of an appropriate remedy. As we show next, there is no question that, if the court were to find both substantial noncompliance and "reasonable doubt," a new election or a re-vote is a constitutionally permissible remedy.

III) FLORIDA LAW SPECIFICALLY PROVIDES FOR THE SETTING ASIDE OF AN ELECTION AND ORDERING A NEW ELECTION OR RE-VOTE

This action was filed under Section 102.168, *Fla. Stat.*, which allows for the contest of elections. Section 102.168(8), *Fla. Stat.*, provides that the circuit judge to whom a contest lawsuit is presented "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."** Indeed, this provision is consistent with Article I, Section 21 of the Florida Constitution which

3. A reduced copy of this ballot format is attached as Exhibit 2.

deals with access to the courts and which provides that the court shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. Again, in Florida the law provides that "for every wrong there is a remedy." *Holland v. Mayes, supra.* Thus, not only does the election contest statute give the trial court discretion to "provide any relief appropriate under such circumstances," the Florida Constitution has been interpreted to provide that for every wrong there must be an appropriate remedy.

The remedy of a new election or re-vote is sought in this case because of the numerous statutory violations with regard to the use of the butterfly ballot shown above. As briefly mentioned above, the seminal case in Florida jurisprudence on the issue of election contests or protests is *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998). In many ways, *Beckstrom* is factually analogous to the case at bar. *Beckstrom* involved the dispute over the county's absentee ballots, which were critical in that the plaintiff received the majority of votes in the precincts but the incumbent received a sufficient majority of the absentee votes to overcome the plaintiff's precinct vote margin of victory. The Florida Supreme Court held that a finding of fraud is not necessary to set aside the results of an election. Rather, where a court in an election contest under Section 102.168, *Fla. Stat.*, finds substantial noncompliance with the statutory election procedures which creates reasonable doubt as to whether a certified election expresses the will of the voters, **the court must void the contested election** even in the absence of fraud or intentional wrongdoing. *Beckstrom*, 707 So. 2d at 725. The Florida Supreme Court went so far as to specifically disapprove of a statement made by the trial court that it did not "have jurisdiction to set aside this election." *Id.* at 727.

The Florida Supreme Court had issued a similar decision in *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984). Again, the Court reviewed unlawful election practices regarding absentee ballots and the sale of votes. The Court held that where fraud or wrongdoing has occurred which clearly affects the sanctity of the ballot and the integrity of the election process, **"courts must not be reluctant to invalidate those elections to ensure public credibility in the electoral process."** *Bolden*, 452 So. 2d at 566. The Court did not require proof of mathematical certainty of the effect that misconduct may have had on the outcome of the election, but merely required a showing that the misconduct in the case was not inconsequential and was so blatant that it permeated the entire election process. The Court held that where such misconduct occurs "the election must be declared void." *Id*. at 567. The Court's holding was based on the longstanding principle that **a fair election is the paramount consideration whenever there is an election contest.** *Id.* at 566, citing *Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975).

Our Florida Supreme Court spoke with great passion in *Beckstrom* and *Bolden* about the need to invalidate or void elections when certain misconduct or statutory violations have occurred. If the results of an entire election (as opposed to just some ballots) are to be voided or set aside, there reasonably can be only one remedy – a new election. This appears to be what this Court contemplated in *Beckstrom* and *Bolden*, as it is hard to imagine any other fair remedy. For example, if an incumbent committed fraud such that he or she was able to retain an elected position, and the results of that entire election were voided, no reasonable person would argue that the candidate committing the fraud should be rewarded by that activity such that they would keep their seat by default, without having to at least face another election or a re-vote. Indeed, such a reward to the benefactor of fraud was

commented upon by the Third District Court of Appeal in the Miami mayoral race case (*See, In Re: the Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami*, 707 So. 2d 1170 (Fla. 3d DCA 1998)). Although in *Bolden* this Court spoke of instances of fraud, in *Beckstrom* the Court clarified the issue by holding that intentional misconduct or fraudulent activity need not be proved in order to set aside an election. Rather, if a court finds substantial noncompliance with the statutory election procedure and also finds that reasonable doubt exists as to whether a certified election expresses the will of the voters, the court must void the contested election. Given the constitutional principle that for every wrong there must be remedy, and the Florida Supreme Court's mandate that elections must be voided where a substantial noncompliance with voting statutes has occurred, there really can be no dispute that a Florida trial court has within its powers the ability to order a new election or a re-vote.

In fact, the Florida legislature has specifically authorized trial courts to order a re-vote in certain instances. As mentioned above, Section 102.168(8), *Fla. Stat.*, provides that the circuit judge to whom a contest lawsuit is presented "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."** The term "any relief" was not limited or clarified in any way, thus indicating authority for a new election. Chapter 101 of the Florida Statutes deals with general, primary and special elections. Under Section 101.111(5), *Fla. Stat.*, the legislature has provided that "in the event of **unforeseeable circumstances** not contemplated in the general election laws concerning the calling and holding of special primary elections and special elections resulting from court order or other **unpredictable circumstances**, the

Department of State shall have the authority to provide for the conduct of orderly elections." This statutory provision is far-reaching and certainly describes the current state of affairs. The spirit of the rule clearly indicates a broad range of discretion regarding the remedies where "unforeseeable circumstances not contemplated in the general election laws" occur, and where relief is necessary to deal with "other unpredictable circumstances." Certainly county officials did not foresee or predict the circumstances with which we are now faced by virtue of the use of the butterfly ballot, and the aforementioned statute clearly provides authority for a special election to deal with such circumstances.

The power to order a new election or a re-vote was recognized and applied by a trial court judge in Leon County, Florida. In *Craig v. Wallace*, 2 Fla. L. Weekly S517a (2d Jud. Cir., Leon County, September 27, 1994) (Appendix Exhibit B), election officials and/or poll workers breached their statutory duty to provide all eligible voters their right to vote in a primary by failing to provide pages containing the description of a race in numerous voting booths where eligible voters were directed to vote. Because the margin of victory was so slim, the trial court found that the deprivation of these voters' rights permeated the entire the election process and effected the integrity and sanctity of the election. The court further found that both the voters and the losing candidate would be irreparably harmed absent injunctive relief requiring a new election. Therefore, the trial court set aside the results of the election in the particular precincts at question and ordered a new vote.

IV) THE FEDERAL STATUTES WERE MISCONSTRUED BY THE TRIAL COURT, AND FEDERAL AND STATE LAW SPECIFYING THE DATE OF THE PRESIDENTIAL ELECTION IS CONSISTENT WITH THE COURT'S AUTHORITY TO ORDER A RE-VOTE OR OTHER POST-ELECTION DAY REMEDY

A. The Statutes and Constitutional Provisions Relied Upon by the Trial Judge Pertain Only to the Electoral College

The trial court misinterpreted Article II, Section 1, Clause 4 of the United States Constitution, when it interpreted the language therein to mean that "it was the clear and unambiguous intention of the framers of the Constitution of the United States that the presidential elections be held on a single day throughout the United States" (now the first Tuesday following the first Monday in November). In fact, the clause requires no such thing. Instead, it requires that the day on which the members of the electoral college meet to vote be uniform throughout the United States (now the first Monday after the second Wednesday in December, under 3 U.S.C. Section 7). For the first half-century of the republic, in fact, there was no uniform election day, but there has always been a single day on which the members of the electoral college meet and cast their ballots. The Constitution requires nothing more, and in no way restricts a court's ability to fashion a re-vote remedy.

First, the text reads, "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The last clause, beginning "which Day" refers back to the previous instance of the word "Day" as "the Day on which they shall give their votes." The word "they" refers to "the Electors" (members of the electoral college), meaning that the electors, meeting as the electoral college, must all vote on the same day. It is only the first clause which refers to the popular election, as the date of "chusing the electors," but its language is permissive and not mandatory. Congress has the power to set a uniform national election day for the popular election, but there is no constitutional requirement that it do so.

Second, it should be apparent that there is no constitutional requirement of a single election day from the fact that, beginning with our very first national election, elections were held on various days throughout the United States. Indeed, many of the states did not even have elections for presidential electors; members of the electoral college were chosen by state legislatures, and those legislatures met on different days. Congress' own contemporaneous interpretation of the Constitution should be entitled to great weight in this respect. The 1792 statute regulating presidential elections required that states hold their processes for appointing presidential electors "within thirty-four days preceding the first Wednesday in December". Act of March 1, 1792, ch. 8, §1. The act further provided that the "electors shall meet and give their votes on the said first Wednesday in December . . . ." *Id.* §2. If Congress had thought that the recently-drafted Constitution required a uniform election day, then it would have provided for one; instead, it provided for a flexible 34-day window for election days and one uniform electoral college day.

Finally, when Congress adopted (by statute) 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 identified this supplemental mechanism in its opinion, and opined that the State of Florida had not created such a supplemental mechanism. This represents a matter of statutory construction, but the Constitution nowhere prohibits the state from having a second election. The statute simply said that "when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide." Act of Jan. 23, 1845, ch.1. The debates in

the Congress on the adoption of this statute support this conclusion as well. This provision is now codified at 3 U.S.C. Section 2.

B. Even if the Foregoing Applies to the Date of the Popular Election, the Trial Court Erred in Determining that Election Tuesday is the Only Date Upon Which a Presidential Election May be Held

The trial court's decision was predicated almost entirely upon a very literal reading of Section 103.11, *Fla. Stat.*, which governs the timing of the presidential election in Florida. Federal law contains a similar provision in 3 U.S.C. Section 1. Analysis of these provisions makes clear that they control simply the date of the election **intended** to result in the final selection of presidential electors, and do not interfere with a trial court's authority to order post-election day relief necessary to correct violations of state law and fairly reflect the "will of the voters." *Beckstrom, supra*.

The state statute cited above and referred to by the trial court follows federal directives. With respect to federal law, 3 U.S.C. Section 1, like Section 103.11, *Fla. Stat.*, designates the Tuesday following the first Monday in November for the presidential election. But federal law goes on specifically to authorize each state to resolve "any controversy or contest concerning the appointment of all or any of the electors....**by judicial** or other methods or procedures." 3 U.S.C. §5. As long as the resolution of such post-election day contests occurs at least six days before the date fixed for the meeting of the electoral college (in this year, December 12 prior to the scheduled December 18 meeting), the statute requires that the state's determination "shall be conclusive, and shall govern in the counting of the electoral votes". *Id.*

The court erred by ignoring the provisions of 3 U.S.C. Sections 2 and 5, which specifically envision situations where the election of Presidential electors meant to be final

on the stated Tuesday is not finalized on that date. In such instances states are to finalize the selection of the electors in a manner established under state law, and to be finalized after the stated Tuesday. Here, the manner specified by the Florida legislature is an election contest under Section 102.168, *Fla. Stat.* Thus, the state statutes do not conflict with the United States Code, and in fact the state statutes were enacted under the authority given to the Florida legislature by the United States Congress. As such, the federal statutes in no way mandate that the final election and selection of electors must, without exception, be completed by the Tuesday following the first Monday in November, and the trial court erred in so holding.

Since there exists a similar set of laws governing United States Congressional elections (mandating a uniform voting day on the Tuesday following the first Monday in November), those cases provide great guidance. The Court is respectfully referred to *Public Citizen, Inc. v. Miller,* 992 F.2d 1548 (11th Cir. 1993) for an example close to home. In Miller, the Eleventh Circuit upheld the legality of runoff election ordered held after federal election day where no candidate in initial election received majority required by state law. As Judge Middlebrooks recently recognized, "federal law gives states the exclusive power to resolve controversies over the manner in which presidential electors are selected," controversies which, virtually by definition, will need to be resolved after election day. *Siegel v. Lepore*, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), *affirmed,* 2000 WL 1718741 (11th Cir., Nov. 17, 2000).

In fact, federal law expressly contemplates that the final selection of electors may not be complete on the specified national election day. 3 U.S.C. Section 2 is entitled "Failure to make choice on prescribed day," and provides that "[w]henever 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 manner as the legislature of such State may direct." This is clearly consistent with the Florida legislature's direction, as reflected in decisions like *Beckstrom* and *Craig*, that voiding an election and ordering remedies such as a re-vote should occur where necessary to remedy violations of state election law which permeated the entire election process and in order to reflect the will of the voters.

The possibility of another election after a specified election day is also reflected in Supreme Court case law. In *Foster v. Love*, 522 U.S. 67 (1997), the Court considered an analogous federal law concerning the November date for congressional elections. The Court invalidated a Louisiana law that called for elections that effectively selected the winner of congressional elections in October. The Court explained that an "election" in that context referred to actions "**meant** to make a final selection of an officeholder," and that Louisiana had violated federal law by concluding the selection "before the federal election day." *Id.* at 71-72. But the Supreme Court specifically recognized that actions affecting the final selection of officeholders, including another election, could permissibly take place **after the federal election day**, such as where a runoff is required by a state law mandate that the winner must receive a majority of all votes cast. *Id.* at 71 and n.3; *See also Public Citizen, Inc. v. Miller, supra.*

In this case, therefore, Palm Beach County held the election on the date required by law, but due to the nature of the ballot a final and definite selection of the winner was not accomplished, and it is therefore clearly permissible for post-election day relief to be granted, including another election if necessary, to comply with state law. The same conclusion

follows under state law. State law provides that the election of federal electors is to occur on the first Tuesday after the first Monday in November. §103.11, *Fla. Stat.* But state law also specifies the same date for elections for all other federal, state, county, and district officials. §100.031, *Fla. Stat.* Such laws cannot be interpreted to preclude post-election day relief, including voiding elections and ordering re-votes where necessary, or *Beckstrom, Craig*, and Sections 101.111(5) and 102.168, *Fla. Stat.*, would be effectively overruled or repealed. As with federal law, the proper interpretation of the state law election date statutes is that the election "meant to make a final selection of an officeholder" must occur on the date specified, but post-election day relief can be ordered where appropriate to comply with state law and to reflect the will of the voters, including an additional election if necessary.

The trial court in this case erred by mechanically applying a very literal reading of Section 103.11, *Fla. Stat.*, to the point of nullification of *Beckstrom, Craig*, and Sections 101.111(5) and 102.168, *Fla. Stat.* Essentially, the trial court ruled that since Section 103.11 did not specifically reference a run-off election or special election, then none was available to resolve any dispute over the results or conduct of a Presidential election. This was error, as the court should have read Sections 103.11, 101.111 and 102.168 in *para materia*, thereby giving effect to each statute. Chapters 101 and 102 of the Florida Statutes do not exclude in nay way from their ambit the United States presidential election. Indeed, if the court's ruling were correct, then there could never be any election for the United States Senate or Congress after the Tuesday following the first Monday in November. We know this is not true given the cases cited herein where United States congressional seats were finally decided by a special or run-off election conducted after the Tuesday date. Even the United

States Supreme Court has recognized the validity of a post-Tuesday federal election, in the form of a run-off election, in *Foster v. Love, supra.*

Moreover, in *Donohue v. Board of Elections of the State of New York,* 435 F. Supp. 957 (E.D. N.Y. 1976), the court specifically considered a request for an injunction to prohibit the certification of presidential election results in the State of New York. The court rejected the defendants argument that "ordering a new presidential election in New York State is beyond the equity jurisdiction of the" court. *Donohue,* 435 F. Supp. at 967. Although the burden of proof on a contesting party is a heavy one, the court refused to preclude the possibility of a new presidential election in New York, since foreclosing such a remedy "would invite attempts to influence elections by illegal means, particularly in those states where no statutory procedures are available for contesting general elections." *Id.* Because the protection of "the integrity of elections particularly Presidential contests is essential to a free and democratic society," the court ruled that the "fact that a national election might require judicial intervention, concomitantly implicating the interests of the entire nation, if anything, militates in favor of interpreting the equity jurisdiction" of the court to include post-election day challenges to Presidential elections. *Id.* at 968. The court ordered an evidentiary hearing to determine whether a new Presidential election in New York was necessary.

In the case at bar, the statutes and cases discussed above reveal the legal authority for consideration of a new Presidential election on a local basis. In *Donahue*, the court conducted an evidentiary hearing on the issue, and ultimately declined to order a new election but only because of the stringent standard to be applied in a civil rights election challenge. The trial judge in this case erred in ruling that he did not have equitable

jurisdiction to consider a new election, especially where the court refused to hear evidence as to the nature of the violation. For example, the nature of the illegality involved here - the form of the ballot utilized in all of Palm Beach County - permeated the entire election and was not limited to a small segment of ballots. Thus, the trial court erred in two ways - by ruling that it had no jurisdiction or power to order a new Presidential election in Palm Beach County, and by making such a ruling without a necessary factual predicate.

CONCLUSION

An election is a vehicle by which a selection of a winning candidate is to be achieved. The will and intent of the people is the primary focus in any election challenge. Indeed, as this brief was being prepared the Florida Supreme Court reminded us that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be [this court's] guiding principle" in an election case like this. *Palm Beach County Canvassing Board v. Harris,* Fla. Sup. Ct. Case Nos. SC00-2346, -2348 and -2349, slip op. at 8-9 (Nov. 21, 2000). Where that goal is not achieved in an initial election, courts must have available to them a remedy to achieve a fair outcome. The remedies available must be flexible in order to account for unforeseeable or unpredictable circumstances not contemplated in the general election laws. In this regard, courts must be vested with a tremendous amount of discretion to effectuate whatever equitable relief is necessary to give voters a further chance, in a fair election, to express their views.

Given the foregoing legal principles and statutory pronouncements, trial courts must have the power and ability to order new elections if necessary. Various statutes speak to unforeseeable and unpredictable circumstances by which new or special elections may be ordered, and in the various statutes under which this lawsuit was brought, the legislature

empowered a circuit court judge to fashion such orders as the judge deems necessary and to "provide any relief appropriate under such circumstances." The Florida Supreme Court has repeatedly held that election results may be invalidated or voided. One of the only practical and fair remedies which exists when an election is voided or invalidated is to conduct a new election. As such, the trial court erred in applying a "hyper-technical reliance" on statutory provisions regarding the date of the Presidential election, and ruling, prior to determining the legality of the subject ballot, that under no circumstances could the trial court order a new election. Rather, the trial court should have first determined the legality of the ballot as a matter of law, or should have conducted an evidentiary hearing to determine whether the butterfly ballot violates Florida election laws, only thereafter to determine whether the court must invalidate and void the Presidential election results in Palm Beach County, Florida, and order a re-vote or new election.

Again, because of the significant nature of this case, the need for a prompt resolution, and the possibility that whatever relief is deemed appropriate will need to be determined almost immediately upon remand, Appellants respectfully request that the Court determine de novo, or in the first instance, whether the butterfly ballot is illegal under Florida law, after which the Court can remand the case to the trial court for further proceedings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 2000, a true copy of the foregoing was furnished by facsimile to: SEE ATTACHED SERVICE LIST.

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