

SUPREME COURT OF FLORIDA

SARASOTA ALLIANCE FOR FAIR
ELECTIONS, a registered Florida
political action committee; KINDRA
L. MUNTZ, individually; and SUSETTE
BRYAN, individually,

Petitioners,

vs.

CASE NO.: SC07-2074
LOWER TRIBUNAL NO.: 2D06-4339

FLORIDA SECRETARY OF STATE,
KURT S. BROWNING, in his official
capacity; KATHY DENT, as Supervisor
of Elections for Sarasota County, Florida;
and BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,

Respondents.

PETITIONERS' REPLY BRIEF

Thomas D. Shults, Esquire
Florida Bar No. 0363219
Zachary L. Ross, Esquire
Florida Bar No. 0028351
KIRK ■ PINKERTON, P.A.
Attorneys for Appellees
50 Central Avenue, Suite 700
Sarasota, Florida 34236
(941) 364-2400

TABLE OF CONTENTS

TABLE OF CITATIONS.....	iv
I. ARGUMENT.....	1
A. Jurisdiction	1
B. Preemption.....	2
C. Conflict.....	10
1. Section 6.2A.....	10
2. Section 6.2B	11
3. Section 6.2C.....	13
D. Severence.....	14
II. CONCLUSION.....	15
CERTIFICATE OF SERVICE	15
CERTIFICATE OF COMPLIANCE	15
APPENDIX	
1. Charter Amendment	

TABLE OF CITATIONS

Florida Supreme Court

<u>Board of County Commissioners of Dade County v. Wilson</u> 386 So. 2d 556 (Fla. 1980)	8, 9
<u>City of Hollywood v. Mulligan</u> , 934 So. 2d 1238 (Fla. 2006)	8

Florida District Courts

<u>Browning v. Sarasota Alliance for Fair Elections, Inc., et al.</u> 968 So. 2d 637 (Fla 2d DCA 2007).....	3, 4, 7, 11, 14
<u>Citizens for Responsible Growth v. City of St. Pete Beach</u> 940 So. 2d 1144 (Fla. 2d DCA 2006).....	5
<u>One Beacon Ins. v. Agency for Health Care Admin.</u> 958 So. 2d 1127, 1129 (Fla. 1st DCA 2007).....	13
<u>Phantom of Clearwater, Inc. v. Pinellas County</u> 894 So. 2d 1011 (Fla 2d DCA 2005).....	6, 8, 11, 14
<u>Pinellas County v. City of Largo</u> , 964 So. 2d 847 (Fla. 2d DCA 2007)	5

Constitutions

FLA. CONST. art. VIII, § 1(d).....	6
------------------------------------	---

Florida Statutes

F.S. 97.012 (2005)	6
F.S. 97.021(3)(a)	10
F.S. 97.021(43)	4
F.S. 97.021(43) (2005).....	1, 4

F.S. 101.048(1) (2007).....	12
F.S. 101.5603	1
F.S. 101.5604	2, 5, 9
F.S. 101.5604 (2001)	1, 4
F.S. 101.56042 (2001)	3
F.S. 101.5606(15) (2001).....	3
F.S. 101.56075(3) (2007).....	10
F.S. 101.572	13
F.S. 101.572 (2005)	13
F.S. 101.591	7
F.S. 101.657(1)(d) (2005)	12
F.S. 102.112(2).....	14
F.S. 102.112(2) (2007).....	13, 14
F.S. 102.141(4) (2007).....	12
Chapter 163, Florida Statutes.....	5

Other Sources

<u>County Council for Montgomery Co. v. Montgomery Assoc., Inc.</u> 333 A. 2d 596 (MA 1975)	8
Fla. Admin. Code R1S-2.013(7).....	13

Lazano v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. PA 2007)8

Public meeting for the people of Florida to voice concerns and comments concerning the 2006 elections, Before the Senate Comm. on Ethics and Elections, Jan. 20077

"Voting System; County Voting System Information ." Florida Department of State, Division of Elections. 2008. State of Florida, Department of State. <http://election.dos.state.fl.us/votemeth/systems/countysys.asp>2, 5, 10

I. ARGUMENT¹

A. **Jurisdiction.**

Contrary to the Secretary's argument,² the 2007 amendments to the Election Code did not moot the issues herein. The District Court in fact analyzed the Charter Amendment in the context of the 2007 amendments and found that the issues raised by its decision were of great public importance. Likewise, this Court was also aware of the 2007 amendments when it accepted jurisdiction of this matter on November 29, 2007.

The 2007 amendments did nothing to impair the authority of the counties recognized in F.S. 101.5604 (2001); counties still have the authority to select "voting systems" which include "the procedures for casting and processing votes". See F.S. 101.5603 and 97.021(43) (2005). Because of the paper ballot requirement in Section 6.2A of the Charter Amendment, Sarasota County is presently the only county in the State of Florida that is using a verified paper ballot system for the disabled, even

¹ The Charter Amendment contains three sections identified as Sections 6.2A, 6.2B and 6.2C in the District Court decision and Briefs. The codified version of the Amendment identifies the three sections as 6.2A(1), 6.2A(2) and 6.2A(3). For the sake of consistency, SAFE will continue to identify the sections as 6.2A, 6.2B, and 6.2C.

² The Secretary is the only Respondent who challenges the jurisdiction of this Court.

though counties are not otherwise required to adopt such a system until 2012.³ Therefore, the use of the paper ballot system under the Charter Amendment is not rendered moot by the 2007 amendments to the Election Code.

The Secretary's assertion that the 2007 amendments dampen the importance of this case is unfounded because he ignores the far-reaching consequences of the majority opinion — local governments, including charter counties, are impliedly preempted from enacting election laws, including any law providing guidelines which define the field of acceptable voting systems within the parameters of F.S. 101.5604, and are further barred from taking steps to confirm those voting systems are functioning properly.⁴ The importance of the majority opinion's decision and certified question is amplified considering that it represents the first time in the history of Florida jurisprudence that a home rule county charter has been held unconstitutional due to implied preemption.

B. Preemption.

³ See <http://election.dos.state.fl.us/votemeth/systems/countysys.asp>.

⁴ The Secretary's citation to SAFE's webpage on page 5 of its Answer Brief is incomplete. See <http://safevote.org> to view complete mission statement of

The Respondents argue that the legislature had an unexpressed intent to preempt local election law when drafting various provisions of the Election Code.

The most obvious deficiency in the Respondents' argument and majority opinion's conclusion on this point is the fact that the legislature on several occasions was presented with issues of local control and had the opportunity to express an intent to preempt such control, but did not.

The Respondents describe the 2000 election as the watershed event that made the need for state preemption of local election law obvious. If one accepts this statement as accurate, then the legislature was squarely faced with the issue of whether to expressly preempt local authority when revisions to the Election Code were made in 2001. Instead of preempting the exercise of the local authority, which Respondents suggest caused the confusion in 2000, the legislature merely banned what it viewed to be the real culprit: punch card ballots. See F.S. 101.5606(15) (2001); F.S. 101.56042 (2001).

The majority opinion below expressed surprise that the legislature did not expressly preempt local authority. Browning v. Sarasota Alliance for Fair Elections, Inc., et al., 968 So. 2d 637, 645 (Fla 2d DCA 2007). The majority's surprise and

SAFE, including promotion of audits.

belief that the matters addressed in the Charter Amendment “should be addressed through uniform state-wide legislation” do not equate to implied preemption. *Id.* at 654. Merely because a court finds it wise and feels that the legislature should have done so, does not give a court authority to write into a statute something which is simply not there.

The Respondents’ argument that the scheme of regulation in the Election Code is so pervasive that the legislature must have had an unexpressed intent to preempt local authority ignores the fact that the Election Code has a built-in, decentralized local system of selecting voting systems and administering elections. Despite the experience of the 2000 election and several revisions to the Election Code thereafter, F.S. 101.5604 (2001) continues to recognize that a county may adopt its own “voting system”, which is defined under F.S. 97.021(43) to include “the procedures for casting and processing votes”. The decentralized authority acknowledged in the Election Code permits each county to select its own voting system and procedures, and explains why voting systems in Florida have never been uniform and continue to vary from county to county across the state.⁵ In fact, a county may adopt different systems

⁵ As of January 2008, the Secretary of State approved three manufacturers of voting systems. Collectively, these manufacturers produce not less than six voting systems which may be adopted by counties. 32 counties have adopted systems manufactured by ES&S, 31 (including Sarasota) have adopted systems manufactured by Premier Election Solutions (f/k/a Diebold). The remaining four

in different precincts within the county itself. See F.S. 101.5604 (counties may adopt a voting system “in all or a portion of the precincts of that county”). The acknowledgment of local authority and the absence of express preemption in the Election Code foreclose any argument that local authority in the area was impliedly preempted by the legislature. See Pinellas County v. City of Largo, 964 So. 2d 847, 853 (Fla. 2d DCA 2007) (statute which by its language recognizes local involvement in an area rebuts arguments for express or implied preemption in that area).

Contrary to the Respondents’ arguments and the holding of the majority opinion, the existence of statutes which establish a framework implementing a statewide policy on a subject is not enough to support a finding of implied preemption. In Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144 (Fla. 2d DCA 2006), the district court found that even though Chapter 163 established a pervasive statutory framework, the Charter amendments and statute could coexist and held that “the citizens of the City of St. Pete Beach are entitled to express their views on how their City Commission should handle land use problems, *despite a pervasive statutory framework implementing a statewide policy on growth and redevelopment*”. Id. (Emphasis added). Do not the citizens of Sarasota County

counties have adopted systems manufactured by Sequoia. At present, Sarasota County is the only county in Florida which uses a paper ballot system for the disabled. See <http://election.dos.state.fl.us/votemeth/systems/countysys.asp>.

have a similar right to express their views on what type of voting system their county commissioners should select and to establish measures to ensure the system is operating properly?

Respondents argue, and the majority opinion found, that the language of F.S. 97.012 (2005), which charges the Secretary with the duty to “maintain uniformity in the interpretation and implementation of the election laws,” indicates the legislature’s intent to preempt local authority, even though the language falls far from expressly preempting such authority. The Respondents argument misses the point that all general laws should, of course, be applied and interpreted uniformly. A legislative statement of uniformity of application or purpose does not, therefore, provide sufficient evidence to support a conclusion that the legislature intended to preempt local law. See Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005) (holding that language stating “[t]his chapter shall be applied uniformly throughout the state” did not support a finding that local law on the subject was impliedly preempted by the legislature).

The Respondents’ view that the administration of elections must be uniform in all counties also does not square with the fact that counties can eliminate the office of Supervisor of Elections and create a new office for that purpose or transfer those responsibilities to another office. See Article VIII, § 1(d), of the Florida Constitution

(permitting the people of any county to abolish the office of Supervisor of Elections entirely or change the office from an elected to an appointed position). This local option flexibility recognized in our constitution is a far cry from the lock-step uniformity that the Respondents argue is present in our law.

On the issue of audits, there is no language under either the old or new versions of F.S. 101.591 which suggests that local officials cannot conduct precertification audits to ensure the proper operation of the voting systems. Under the 1997 version of the statute, the language merely states that the legislature upon specific appropriation “may” provide for an “independent audit” of a voting system. As found by Judge Davis in his dissent, this language is clearly insufficient to establish a persuasive legislative scheme to the extent it impliedly preempts the ability of counties to conduct audits. Browning, supra 655. Moreover, there is no suggestion in the five paragraph, 325-word 2007 amendment of F.S. 101.591 which suggests that the postcertification audit described in the 2007 statute bars local officials from conducting the

precertification audit described in the Charter Amendment.⁶

The majority opinion and Respondents cite to several cases from other jurisdictions to support their conclusion that the Charter Amendment is preempted by implication. Those jurisdictions, however, employ preemption standards which differ from ours in Florida. The reliance placed on County Council for Montgomery Co. v. Montgomery Assoc., Inc., 333 A. 2d 596 (MA 1975) is misplaced because unlike Florida under the Maryland Constitution charter counties only have the authority to legislate in areas specifically defined by the legislature. Id. at 598. The court in Lazano v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. PA 2007) discussed federal field preemption under the Supremacy Clause, which can invalidate state laws that

⁶ The absence of preemptive language in the 2007 amendment of F.S. 101.591 is even more significant considering that in January 2007, before the amendment was adopted, the Secretary of State and SAFE representative and Petitioner Kindra Muntz appeared before the Florida Senate Ethics and Elections Committee and informed the committee of the legal controversy surrounding the Charter Amendment. Public meeting for the people of Florida to voice concerns and comments concerning the 2006 elections, Before the Senate Comm. on Ethics and Elections, Jan. 2007.

duplicate federal laws. Id. at 521. The case *sub judice* does not involve the application of the Supremacy Clause or federal field preemption concepts, but rather involves the application of Florida constitutional home rule authority, which permits concurrent state and local legislation. See City of Hollywood v. Mulligan, at 1243; see also Phantom of Clearwater, supra at 1020 (a charter county ordinance conflicts with a statute only when the two cannot coexist).

The Secretary's citation to the case of Board of County Commissioners of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980) in support of the argument that the people of Sarasota County cannot provide guidelines to their county commissioners in the selection of a voting system is unavailing. In Wilson, the court dealt with a statute that clearly delineated what types of taxes "shall be set by the county commission" and what category of taxes "shall be set upon approval of the voters." Id. at 560. In contrast, F.S. 101.5604 does not contain such a delineation or division of authority between a commission vote and a referendum vote. Moreover, the Charter Amendment does not select the voting system to be used in Sarasota County, it merely describes several attributes which must be present in any voting system that the county commission selects pursuant to F.S. 101.5604.

The Respondents' argument begs the question: During which legislative session was the preemptive intent present, but not expressed? In 1951? In 2001? In

2005? In 2007? Because a judicial finding of an unexpressed legislative intent to preempt local law writes into legislation an expression of intent which is not otherwise there, this Court should refrain from finding implied preemption where, as here, the evidence of such legislative intent is either absent, uncertain, or contradicted by the language of the statute itself. The belief expressed by the majority opinion and Respondents that state law should preempt the Charter Amendment cannot substitute for evidence of an unexpressed desire of the legislature to preempt. The majority opinion's conclusion that public policy demands uniformity and divestment of local authority is more in the nature of a recommendation to the legislature, rather than a finding of unexpressed legislative intent.

C. Conflict.

1. Section 6.2A

The Secretary continues to argue that the statement in Section 6.2A that “no electronic record shall be deemed a ballot” conflicts with the Election Code, despite acknowledging that the 2007 amendments to the Election Code require a paper ballot. This language of Section 6.2A is consistent with the paper ballot requirements of the Election Code and the definition of an official paper ballot (“Marksense ballot”) in F.S. 97.021(3)(a).

Sarasota County presently uses a Section 6.2A charter compliant, state

approved paper ballot voting system and has done so since January 2008.⁷ This charter compliant system includes a state approved paper ballot system for the disabled, even though state law does not require the use of a paper ballot system for the disabled until 2012. See F.S. 101.56075(3) (2007). The fact that Sarasota County has, pursuant to the Charter Amendment, adopted an approved paper ballot system for the disabled prior to the 2012 deadline should be commended, rather than challenged as unconstitutional by the Secretary of State. Not only is there no direct conflict between Section 6.2A of the Charter Amendment and the Election Code, the provisions of the Charter Amendment and the Election Code can and are co-existing in Sarasota County. See Phantom of Clearwater, supra at 1020.

2. Section 6.2B

At the outset, it is important to be aware that the Charter Amendment describes two distinct types of precertification audits. Section 6.2B describes a limited postelection, precertification spot audit to ensure the voting machines are operating properly. Section 6.2C describes a comprehensive precertification manual audit

⁷ As of January 2008, Sarasota County is the only county using a paper ballot system (AutoMark VAT) for the disabled. See <http://election.dos.state.fl.us/votemeth/systems/countysys.asp>.

which would only occur, if ever, if the spot audits described in 6.2B indicate a discrepancy within specific thresholds.

The Respondents' mischaracterization of the limited spot audit described in Section 6.2B as a "count" or "recount", and the majority opinion's unfortunate acceptance of that mischaracterization, simply cannot withstand scrutiny. It is clear, after reading Section 6.2B and the count and recount provisions contained in the Election Code, that the 6.2B audits have nothing to do with a count or recount. Judge Davis in his dissent correctly concluded, "I reject the [Respondents] argument that the audit provisions are in essence recount provisions. To the contrary, the Amendment provisions are truly audit provisions that are to be implemented to assure the accuracy of the electronic voting machines, not to affirm the certification of the winner of a race." Browning, *supra* at 655.

A review of the time frames set forth in Section 6.2B for the conduct of the spot audit and the various time frames set forth in the Election Code reveals that there is no conflict between them. The Section 6.2B audit of 5% of the precincts will be completed after the machine tallies are made public and within twenty-four hours after closing the polls. Under F.S. 102.141(4) (2007) the canvassing board submits any preliminary results it has received by 11:59 p.m. on election night. Because the preliminary results will be submitted by 11:59 p.m., the machine tallies will be public

with plenty of time left for the 6.2B audits to be completed within twenty-four hours after closing the polls. Further, because early voting ballots are completed two days before an election under F.S. 101.657(1)(d) (2005), the Election Code presents no conflict in completing the 6.2B Charter audit of the early voting ballots.

Section 6.2B requires that the spot audit of provisional ballots be completed by the third day following the election. F.S. 101.048(1) (2007) permits a provisional voter to evidence his or her eligibility by 5:00 p.m. on the second day following the election. If provisional voters wait until 5:00 p.m. on the second day, there is still more than twenty-four hours available to audit those ballots, assuming that would be necessary to reach the 5% minimum.

Section 6.2B requires 5% of military and overseas ballots be audited within twenty-four hours of a primary and within ten days following a general election. F.S. 102.112(2) (2007) states “returns must be filed by 5:00 p.m. on seventh day following a primary and by noon on twelfth day following a general election”. The audit is, therefore, completed well before the returns are due.⁸

⁸ The Secretary’s argument (Answer Brief, p. 31) that Fla. Admin. Code R1S-2.013(7) conflicts with the audit time frames of Section 6.2B misses the fact that the 10 day window in the Rule for the acceptance of overseas primary election ballots directly conflicts with the seven day primary filing deadline in F.S. 102.112(2) (2007). The conflict between the rule and the statute renders the rule invalid. See e.g. One Beacon Ins. v. Agency for Health Care Admin., 958 So. 2d 1127, 1129 (Fla. 1st DCA 2007).

Finally, the Respondents continue to ignore Supervisor Dent's testimony that the Section 6.2B audit can be completed by an independent auditor without the auditor handling the ballots. (TT-101). Under F.S. 101.572 (2005), candidates and members of the public can conduct an audit of ballots after the polls close. These audits can be completed without violating F.S. 101.572. Likewise, assuming the statute applies, a Section 6.2B audit can be completed without violating F.S. 101.572.

3. Section 6.2C

The majority opinion and Respondents are concerned that in the event a 6.2C audit occurred, it could delay the filing of returns with the Department of State and "seems to be in tension" with the twelve day general election filing deadline of F.S. 102.112(2) (2007) . Browning, supra at 652.

A Section 6.2C audit may never occur, but if one did occur under Section 6.2C it must be completed within ten days, two days before the F.S. 102.112(2) deadline. Speculation as to what would happen if a 6.2C audit occurred and was not completed within ten days is insufficient to support a finding of unconstitutionality of Section 6.2C because of conflict. A county charter impermissibly conflicts with a statute only when the two cannot coexist. The test is whether compliance with Section 6.2C would necessarily result in a violation of F.S. 102.112(2). See Phantom Fireworks, supra at 1020. While a section 6.2C audit would impose additional requirements on

the Supervisor of Elections, “the fact that an ordinance imposes additional requirements on a person or business is not evidence of a conflict”. Id.

D. Severance.

The Respondents do not contest the severability of the Charter Amendment. Accordingly, if any provision of the Charter Amendment suffers from a constitutional infirmity it can and should be severed by this Court.

II. CONCLUSION

The Court should answer the certified question in the negative and hold that the majority opinion erred when it found that all provisions of the Charter Amendment directly conflicted with state statutes. This Court should quash the decision of the District Court, find that the Charter Amendment is constitutional, and remand this case to the lower court for further proceedings consistent with the decision of this Court. SAFE also requests that the costs of this appeal be awarded and assessed against Respondents.

CERTIFICATE OF SERVICE/CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail and e-mail to Frederick Elbrecht, Assistant County Attorney, 1660 Ringling Blvd., Sarasota, FL 34236; Ronald Labasky, Esq., 225 S. Adams St., Suite 200, Tallahassee, FL 32301-1700; and Peter Antonacci, Esq., P.O. Box 11189, Tallahassee, FL 32302-3189 on this 4th day of February, 2008.

I HEREBY FURTHER CERTIFY that the foregoing Brief complies with the font requirements of Fla. R. App. P. 9.210.

Respectfully submitted,
KIRK ■ PINKERTON, P.A.
Attorneys for Petitioners
50 Central Avenue, Suite 700
Sarasota, Florida 34236
Tel: (941) 364-2425

By: _____/s/_____
Thomas D. Shults, Esquire
Florida Bar No. 363219
Zachary L. Ross, Esquire
Florida Bar No. 0028351