IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2373

BEVERLY ROGERS, et. al. **v.** **THE ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA, et al.**

Petitioners/Appellants **Respondents/Appellees**

4TH DCA CASE NOS. 4D00-4145, 4D00-4146 and 4D00-4153

FROM THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO.:CL 00-10992 AB

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

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioners 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, Petitioners sought declaration that the "butterfly ballot" utilized in Palm Beach County, Florida violates numerous state statutes 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, Petitioners 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. Petitioners 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 it even had the authority to order a new election, assuming the

1. Attached to Petitioners' Appendix as Composite Exhibit A is a brief overview or summary of some of the evidence which Petitioners 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 at least 7,000 votes for Al Gore. Of course, Petitioners 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.

ballot was illegal and the election results did not reflect the will of the 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. The court's ruling was based almost entirely upon federal and state statutes which provide that the general election for President and Vice President should be conducted on the Tuesday after the first Monday in November. Petitioners 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 a re-vote at this juncture, especially before the evidence has been considered.

Petitioners appealed Judge Labarga's ruling and sought immediate certification from the Fourth District Court of Appeal under Rule 9.125, *Fla. R. App. P.* Unfortunately, the Fourth District declined to immediately certify the matter, instead instructing the parties to submit briefs on an expedited basis and setting oral argument, only to finally decide *en banc,* after the case was pending for six (6) days, that the case required immediate review by this Court. Petitioners now seek a determination from this Court that the ballot is in fact illegal and a determination that the trial court erred in determining it had no authority to order a new election in Palm Beach County. Alternatively, Petitioners seek a determination that 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.

SUMMARY OF THE ARGUMENT

Considering the extraordinary nature of this case and its far reaching ramifications, it is inconceivable that a court would preclude any potential remedy. It is likewise offensive to the constitutional right to a fair and accurate vote that, where an election is tainted by violation of election statutes or fraud to such an extent that the results of the original election have been voided, a court presiding over an election contest under Florida law would be powerless to order a new election. Such a conclusion dishonors the guiding principle of any election or election contest - to ensure that the will of the people has been honored. The order under review violates these principles and potentially disenfranchises thousands of voters who were denied there right to a fair and accurate election by virtue of the form and design of the butterfly ballot utilized in Palm Beach County.

Without taking any evidence as to the nature of the violation, the trial court erred in ruling that it was without power or authority to order a new election. The court further erred in not conducting an immediate hearing as to the legality of the butterfly ballot. Given the extremely urgent nature of these proceedings and the need for immediate action, Petitioners seek a ruling from this court that the butterfly ballot is illegal, coupled with a reversal of the trial court's order precluding the possibility of a new election. These rulings are necessary to effectuate the will of the voters in Palm Beach County and to reflect that will in the results of the statewide Presidential election.

LEGAL ARGUMENT

This 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) THIS COURT SHOULD ACCEPT JURISDICTION UNDER ARTICLE V, SECTION (b)(5) OF THE FLORIDA CONSTITUTION

The Fourth District Court of Appeal has certified this case as being one of great public importance which requires immediate resolution by this Court pursuant to Rule 9.125, *Fla. R. App. P.* That certification was absolutely necessary, and this Court should immediately accept jurisdiction over this case due to the important state and national implications of this case, the need for immediate relief, and the exigent nature of the relief sought in the form of a potential new election or re-vote in Palm Beach County, Florida.

As will be more fully set forth below, this case represents a challenge to the butterfly ballot utilized in Palm Beach County, Florida. Without even determining whether the ballot violates Florida law, the trial court determined that it had no authority to order a new election, regardless of whether the ballot was illegal and whether that illegality permeated the entire election in Palm Beach County, Florida such that the will of the people was not reflected in the election results. This Court is intimately familiar with the Presidential elections conducted in Florida and has already reviewed numerous cases arising therefrom, each time granting immediate review. This

case is no different and, in fact, is in greater need of immediate resolution given the time constraints involved should a new election be ordered.

Acceptance of pass through jurisdiction in this case would be consistent with the earlier 2000 Presidential election cases, and is likewise consistent with earlier Florida precedent. For example, in *Harden v. Garrett*, 480 So. 2d 409 (Fla. 1986), Harden filed an election contest under Section 102.168, *Fla. Stat.*, challenging the election of James Ward to the District 5 seat of Florida's House of Representatives. The *Harden* case, like this one, involved an election which was "fraught with manifest election law irregularities." This Court accepted jurisdiction under Article 5, Section 3(b)(5) of the Florida Constitution and Rule 9.125, *Fla. R. App. P.* Likewise, in *McPherson v. Flynn*, 397 So. 2d. 665 (Fla. 1981), another case involving an election contest for state representative, this Court again accepted jurisdiction under Article 5, Section 3(b)(5), recognizing it to be a case of great public importance requiring immediate resolution by this Court. Consistent with that precedent and the precedent established in the 2000 Presidential election cases, this Court should likewise accept jurisdiction of this case as a case of great public importance requiring immediate resolution by this Court.

Petitioners are not unmindful of the incredible amount of attention and public scrutiny which has been cast upon these election cases and upon this Court in particular. Certainly, there is a great deal of interest in all of these cases as the entire country is waiting the results of the election in Florida. Petitioners are confident that this Court will not be swayed or inhibited from accepting jurisdiction based upon the caustic and vitriolic public relations campaign undertaken by some, and instead will properly exercise its discretion and performance of its vital constitutional role of accepting for review matters of great public importance which require

immediate resolution. With the election of the President hanging in the balance, this case certainly meets that definition.

In this regard Petitioners ask that the Court be mindful of the words of Justice Adkins, who once said, "[I]t is incumbent upon this Court to maintain the independence of the judiciary so that every county court judge, circuit judge, and appellate judge may make judicial and administrative decisions without thought or fear of possible retribution or reprisal....In expressing my sincere belief that all judges should conduct their court without any possibility of outside intimidation, I have some idea of the emotional and practical problems facing John Adams as he defended the British soldiers accused in the Colonial court for their involvement in the Boston massacre. **Devotion to the betterment of the judicial system by insulating the independence of the judiciary should not be determined, swayed, or guided by public opinion or political pressure."** *The Florida Bar v. McCain,* 330 So.2d 712 (Fla. 1976). Likewise, the United States Supreme Court has held that, "Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost." *Rhodes, Governor of Ohio v. Chapman,* 452 U.S. 337, 101 S. Ct. 2392 (1981).[2] This Court has already shown that

2. In discussing the possibility of overruling *Roe v. Wade,* the Court in *Planned Parenthood of Southeastern Pennsylvania, et. al. v. Casey*, 505 U.S. 833, 844; 112 S. Ct. 2791 (1992), stated that "**Liberty finds no refuge in a jurisprudence of doubt."** The Court further held that, "Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. **A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by**

it is mindful of these principles and has exhibited an admirable fealty to the law and the Court's role in our constitutional structure, and Petitioners are confident it will continue to do so.

II) THE CIRCUIT COURT ERRED IN DECIDING THAT, REGARDLESS OF THE WRONG COMMITTED IN THIS ELECTION, THERE CAN BE NO REMEDY

At the hearing held on November 15, 2000, the trial court, over Petitioners' objections, "bifurcated" the issues raised by Petitioners' 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." (Appendix Ex. A - 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 never have foreclosed any remedy without first having determined that an election law violation had occurred; 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.

Before addressing the merits of the trial courts decision and procedure, Petitioners first will address a practical concern which may have been a driving force behind the trial court's

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which it did that. It is true that diminished legitimacy may be restored, but only slowly. **Unlike the political branches**, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must the character of a Nation of people who aspire to live according to the rule of law....**If the court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.** The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible. At page 867-868.

decision - that is, whether a new election or "re-vote" could be conducted in Palm Beach County in sufficient time to tabulate the results, allow for a contest and assign the results for consideration by the electoral college. Attached as Appendix Exhibit B is an affidavit by J. Stanley Blumin attesting to the fact that, as of November 28, 2000, an election could be conducted via paper ballot and the results counted and tabulated by December 1, 2000. This would provide sufficient time for a contest under Section 102.168, *Fla. Stat.*, and consideration and accreditation of the results by the Electoral College.

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 proverbial cart before the horse. Under *Beckstrom*, the question of whether an election should be voided arises only **after** the court has determined two predicate 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 well-intentioned circuit court turned the legal process on its head. To the extent that this Court determines that mandamus would be appropriate and declines to decide here the legality of the ballot, Petitioners request that this Court order the trial court to immediately schedule a hearing on the legality of the ballot. Should the court find that there exists a substantial noncompliance with election laws which permeated the entire Presidential election in Palm Beach County it is,

quite frankly, inconceivable that there could be no remedy. Indeed, the notion that no remedy exists does violence to our democratic principles.

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

Given the national implications of this case, and the fact that a determination by the trial court as to the legality of the ballot is a matter of law that this could review *de novo*, Petitioners 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 important deadlines which are fast approaching, we are presented with a situation where the interests of justice compel this court to both determine the legality of the ballot in this appeal, and address the legality and appropriateness of a new election or, at least, remand to the trial court for a determination as to the appropriate remedy (including the possibility of a new election). Such a ruling would be consistent with a long line of cases which hold that upon acceptance of a case of great public importance requiring immediate resolution by this Court, the Court is free to consider any error in the record. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So. 2d 911 (Fla. 1995); *Lawrence v. Florida East Coast Railway Co.,* 346 So. 2d 1012 (Fla. 1977).

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 its face the butterfly ballot used in Palm Beach County violate numerous provisions of Florida statutory law.[3] 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 now in the first instance (much like a *de novo* review) and rule upon accordingly.

III) 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, 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**

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

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 Section101.5609(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. It

must be noted here that the Secretary of State sent approved ballot forms to the counties in the weeks prior to the election, but for some unexplained reason Palm Beach County is the only one of 67 counties in Florida which decided to forego the Secretary of State's ballot for the butterfly ballot (*see, infra*).

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.[4] The Supervisor of

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

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 have first 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.

IV) 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 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. This 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. This 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 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. This 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).

This 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 this 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 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 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.

V) 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 REMEDIES

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, 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. In most instances (although an exception exists on this point as well), 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 provides 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 date 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 date. 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 the court ordered to be held after federal election day where no candidate in initial election received majority required by state law. This holding appears to be based upon a long standing principle, recognized recently by Judge Middlebrooks, that "federal law gives states the exclusive power to resolve controversies over the manner in which presidential electors are selected." *Siegel v. Lepore*, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), *affirmed,* 2000 WL 1718741 (11th Cir., Nov. 17, 2000). Such controversies, virtually by definition, will need to be resolved after election day.

In fact, federal law expressly contemplates that even 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." The "manner" codified by the Florida Legislature is an election contest under Section 102.168, *Fla. Stat.* This is clearly consistent with 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 United States 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, 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. 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, including an additional election if necessary, where appropriate to comply with state law and to reflect the will of the voters.

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 any way from their ambit the United States Presidential election. Indeed, if the trial 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.

The statutes and cases discussed above evince 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. For the same reasons, Judges Klein and Warner's dissenting opinion is incorrect.

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, this Court recently reminded us yet again 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,* 2000 WL 1725434 (Fla. Sup. Ct., 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. Because the election in Palm Beach County clearly does not reflect the will of the people, it is invalid as a matter of law. 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." This 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.

Petitioners realize that a new election or re-vote in a Presidential election is unprecedented. However, at this point it appears that, at least as to Palm Beach County, there are only two choices - go back to the results of a flawed process and conclude that the results thereof represent the will of the people (when clearly they do not), or provide for a new election. While a new election may not be an ideal solution, it is the best of many less than desirable alternatives. Certainly reliance on flawed results is the least desirable alternative, and one that this Court has consistently rejected where it would not reflect the true will of the people. The record submitted shows that a new election can be conducted in time to accredit the results thereof, although there is a slight possibility that any remedy may require an alteration of dates. Certainly the voters of Palm Beach County should not be forced to accept results which do not reflect their will merely to meet an artificial deadline. Indeed, our Congress specifically envisioned such an alteration of deadlines when it drafted 3 U.S.C. Section 2, entitled "Failure to make choice on prescribed day."

At the end of the day, Judge LaBarga's ruling places greater importance on the timing and date of the election than on the sanctity of it. Indeed, under Judge LaBarga's reasoning, a re-vote would not be required in this situation even if it could be demonstrated that thousands of ballots were stolen or discarded, or if a hurricane hit Florida on election day. Petitioners respectfully submit that any judicial determination that places more importance on form and technicalities than on preserving the sanctity of our democracy cannot stand.

To summarize, 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, Petitioners respectfully request that the Court reverse the trial court's order precluding the possibility of a new election, and determine de novo,

or in the first instance, whether the butterfly ballot is illegal under Florida law, after which the Court could either determine whether a new election is appropriate or 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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