

IN THE SUPREME COURT OF FLORIDA

Case No. SC00-2373

ANDRE FLADELL, et al.,

Plaintiffs-Appellants,

vs.

PALM BEACH COUNTY CANVASSING BOARD, et al.,

Defendants-Appellees

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT
PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

DCA Case No. SC00-4145

DCA Case No. 4D00-4146

Circuit Court Case Nos. CL 00-10965 AB; CL 00-10970; CL
00-10988 AB; CL 00-11000 AB

DCA Case No. 4D00-4153

Circuit Court Case No. CL 00-10922 AB

BRIEF AMICUS CURIAE OF PEOPLE FOR THE AMERICAN WAY IN
SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>TABLE OF AUTHORITIES</u>	<u>ii</u>
<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW .</u>	<u>1</u>
<u>INTEREST OF AMICUS CURIAE</u>	<u>1</u>
<u>STATEMENT OF THE CASE</u>	<u>3</u>
<u>STATEMENT OF THE FACTS</u>	<u>4</u>
<u>SUMMARY OF ARGUMENT</u>	<u>7</u>
<u>ARGUMENT</u>	<u>8</u>
<u>CONCLUSION</u>	<u>21</u>

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Beckstrom v. Volusia County Canvassing Board,</u> 707 So.2d 720 (Fla. 1998)	11, 12, 13, 15
<u>Bloomfield v. City of St. Petersburg Beach,</u> 82 So.2d 364 (Fla. 1955)	20
<u>Boardman v. Esteva,</u> 323 So.2d 259 (1975).	8
<u>Craig v. Wallace,</u> 2 Fla. L. Weekly S517a (2d Jud. Cir., Leon County, Sept. 27, 1994).	13
<u>Fladell v. The Elections Canvassing Commission of</u> <u>the State of Florida,</u> No. CL 00-10965 AB (15 th Jud. Cir., Palm Beach County, Nov. 20, 2000)	3, 20
<u>Foster v. Love,</u> 522 U.S. 67 (1997).	18
<u>Palm Beach County Canvassing Board v. Harris,</u> No. SC00-2346 (Fla. Sup. Ct., Nov. 21, 2000).	9, 15, 19
<u>Public Citizen, Inc. v. Miller,</u> 813 F. Supp. 821 (N.D. Ga.), <u>aff'd</u> , 992 F. 2d 1548 (11 th Cir. 1993).	18
<u>Siegel v. Lepore,</u> No. 00-9009-CIV-Middlebrooks (S.D. Fla., Nov. 13, 2000), <u>appeal pending</u>	17

CONSTITUTIONS

United States

Art. II, Sec. 1, cl. 4.
. 16

Florida

Art. V, Sec. 3(b)(5).
. 4, 21

STATUTES AND RULES

United States

3 U.S.C. Sec. 1
. 16

3 U.S.C. Sec. 2
. 17

3 U.S.C. Sec. 5
. 16, 17

Florida

Declaratory Judgment Act,
Sec. 86.011, Fla. Stat. (2000).
. 20

100.031, Fla. Stat. (2000).
. 15

Chapter 101, Fla. Stat. (2000).
. 9

101.101
. 13

101.151
. 4, 9, 10

101.191	
. . 4, 5, 9, 10	
101.5609.	
. 4, 10	
102.168, Fla. Stat. (2000).	
12, 13, 14, 15, 20	
102.171, Fla. Stat. (2000).	
. 14	
103.011, Fla. Stat. (2000).	
. 15	
103.021, Fla. Stat. (2000).	
. 4	
Fla. R. App. P. 9.030(a)(2)(A).	
. 4	

MISCELLANEOUS

J. Dorschner and J. Weaver, "Legally, Unchartered Waters Ahead," Miami Herald (Nov. 10, 2000)	4-5
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the circuit court erred in holding that Florida law permitting voters to contest the results of an election does not apply to elections for Presidential electors, and that neither a re-vote nor any other relief was legally permissible to remedy the violations of state election law raised by plaintiffs with respect to the November 7 Presidential election in Palm Beach County.

INTEREST OF AMICUS CURIAE

People For the American Way (PFAW) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights and civic participation, including the right to vote. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of liberty, equality, and citizen participation, PFAW now has over 300,000 members nationwide, including more than 24,000 in Florida and over 600 in Palm Beach County.

Since the November 7 election, numerous Palm Beach County PFAW members and other County voters have contacted PFAW about the County ballot form that is the subject of this litigation. This has included voters who were literally told by poll workers to punch the wrong hole on the confusing ballot form, those who felt they had made a mistake and requested replacement ballots only to be denied such ballots by poll workers, Holocaust survivors and African- Americans whose votes were mistakenly recorded for Pat

Buchanan, and many other County residents who feel victimized by the ballot form. These voters were particularly concerned when the court below ruled not only that a re-vote could not be ordered even if the ballot form were proven to be illegal and confusing, but also that no relief whatsoever could be provided to remedy the violation of their rights. PFAW files this brief to help vindicate these voters' rights to obtain some form of remedy for the wrong they believe was committed in this case.

In addition, PFAW has been involved nationwide in efforts to enhance and protect the right to vote and citizen participation. This has included support of legislation such as the National Voter Registration Act, voter registration and turnout efforts in Florida and around the country, educational reports and projects to encourage civic participation, and litigation. Such efforts would be seriously impeded if citizens and voters were to believe that significant legal violations of the right to vote, particularly in elections as important as a Presidential election, go unremedied. Given the enormous public attention that has been focused on Florida and on Palm Beach County, this case threatens to contribute to just such a negative result if the decision below is not promptly reversed.

STATEMENT OF THE CASE

Appellants, who were the plaintiffs below, filed several complaints on behalf of County voters challenging the ballot form used by the County in the November 7 Presidential election. Various forms of relief were requested, such as a declaratory judgment that the ballot form was illegal and an injunction ordering a re-vote for those who voted on November 7. Without considering the evidence proffered by plaintiffs on the illegality of the ballot form and the confusion that resulted, the circuit court bifurcated the proceeding below and considered first only the issue of whether a re-vote or new election was permitted by law. It concluded that such relief was not permissible and, without reaching the merits, denied all plaintiffs' claims for declaratory, injunctive, and other relief. Fladell v. The Elections Canvassing Commission of the State of Florida, CL 00-10965 AB (15th Jud. Cir., Palm Beach County, Nov. 20, 2000).

Plaintiffs promptly appealed and sought certification of their appeal to this Court. Initially, the fourth district court of appeals scheduled a hearing on November 27, 2000. Subsequently, on the morning of November 27, an appeal to this Court was certified by the fourth district court of appeals pursuant to Art. V, Sec. 3(b)(5), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A).

STATEMENT OF THE FACTS

Although significant controversy continues on a number of issues relating to the November 7 election, the following important facts concerning this case are not reasonably in dispute. On November 7, 2000, voters in Palm Beach County were confronted with a Presidential ballot unique among all 67 Florida counties. Replica copies of that ballot form have been attached to the briefs submitted by parties to this appeal. The Palm Beach Presidential ballot form was unique in several important respects.

First, the Palm Beach Presidential ballot form listed Presidential candidates in a different order than they were listed on the ballot in every other county. Florida law, as well as a September, 2000 memo from the director of the Florida Division of Elections, specified that the Republican candidate George W. Bush must be listed first, followed by Democratic candidate Al Gore, followed by minor party candidates. See §§ 103.021(2); 101.5609(2); 101.191; 101.151, Fla. Stat. (2000); J. Dorschner and J. Weaver, “Legally, Unchartered Waters Ahead,” Miami Herald (Nov. 10, 2000). The Palm Beach Presidential ballot form, however, listed Republican candidate Bush first, followed by Reform Party candidate Pat Buchanan, and then Democratic candidate Gore.

In addition, the Palm Beach Presidential ballot used a “butterfly” ballot form. This was different not only from the ballot form used in all other Florida counties, but also from the ballot form used for all other election contests in Palm Beach County itself. In all other contests and counties, candidates were listed on the left, with punch holes or other notations for voting on the right. The County “butterfly” ballot form listed Presidential candidates on two facing pages of a ballot booklet, with punch holes to the right of some candidates (such as Bush and Gore) but punch holes to the left of other candidates (such as Buchanan). This is despite the fact that the “voting instructions” which accompanied the ballot in Palm Beach County specifically instructed the voter, in accordance with Florida law, to “[p]unch straight down through the hole to the right of the arrow by the candidate or issue of your choice.” Voting Instructions (emphasis added). Accord, Fla. Stat. 101.191.

It is also beyond dispute that thousands of County voters have complained that they were confused or misled by the County ballot form and that their ballots were recorded contrary to their intent. This includes voters who state that their votes were mistakenly recorded for Reform candidate Pat Buchanan rather than for Democratic candidate Al Gore, voters who mistakenly punched the

hole for the Reform candidate and then tried to fix the error, and voters who mistakenly thought that they had to punch one hole for Al Gore and another for Vice-Presidential candidate Joseph Lieberman.

The overall significant effect of these problems is also clear. Approximately 3,400 County votes were recorded for Pat Buchanan, almost 2,400 more than in any other Florida county, even though Palm Beach County has fewer than 400 registered Reform party voters. Many of these 3,400 votes were in predominantly Jewish and African-American precincts. In addition, more than 19,000 ballots in the County were thrown out because voters punched two holes in the Presidential race, roughly double the “overvote” rate in the County in 1996 and five times the rate in the County this year in other statewide races. Plaintiffs proffered evidence below to demonstrate that the ballot law violations and resulting confusion clearly cost candidate Gore more than 11,000 votes. This figure dwarfs the difference in Florida votes between the two major Presidential candidates in Florida. For the voters in Palm Beach County, as well as for the state and the nation as a whole, there can be no question of the significance of the issues presented by this case.

SUMMARY OF ARGUMENT

This case presents issues of great public importance warranting immediate resolution by this Court. As this Court unanimously reaffirmed only last week, ensuring that elections reflect “the will of the people is the paramount consideration.” For the voters of Palm Beach County, immediate review of the decision below is crucial to accomplishing this objective. As a matter of law, the County Presidential ballot was illegal. Without a prompt opportunity to present evidence on the confusion and other effects that resulted from that illegality, plaintiffs and other County voters will be unable to vindicate the critical rights at stake here. This necessitates immediate review of the decision below.

The court below clearly erred in ruling that Florida’s statutory provisions for election contests do not apply to elections for Presidential electors and that a re-vote cannot be ordered under any possible circumstances. This Court made clear a week ago that these provisions do apply to Presidential elections, and the relevant statutes were invoked just yesterday by Vice-President Gore. State and federal laws specifying the date of election day, moreover, do not interfere with the Florida courts’ broad authority to order necessary election relief, including a re-vote where necessary and appropriate.

In addition, the court below made a crucial error in ruling that absolutely no relief whatsoever can be accorded to plaintiffs. Even if a re-vote is not necessary or appropriate, other remedies can be considered that would provide important relief to County voters with respect to this and future elections. By precluding any such relief altogether, the circuit court consigned County voters to suffering serious legal wrongs concerning their fundamental right to vote without any possibility of remedy.

ARGUMENT

I. THE ILLEGALITY OF THE PALM BEACH COUNTY PRESIDENTIAL BALLOT PRESENTS ISSUES OF GREAT PUBLIC IMPORTANCE THAT SHOULD BE IMMEDIATELY REVIEWED BY THIS COURT

As this Court explained a quarter of a century ago, the “real parties in interest” in elections and election cases “are the voters,” who have a fundamental right to vote and “to be heard.” Boardman v. Esteva, 323 So. 2d 259, 263 (1975). For the plaintiffs and other voters of Palm Beach County, that right is in serious jeopardy. The same is true of the fundamental principle that “the will of the people is the paramount consideration” when it comes to an election. Palm Beach County Canvassing Board v. Harris, No. SC00-2346 (Fla. Sup. Ct., Nov. 21, 2000), Slip

Op. at 9. Plaintiffs have alleged that the County presidential ballot was clearly illegal, an illegality that resulted in voter confusion, directly affected the outcome of the election, and prevented the will of the people from prevailing. Yet the court below precluded any relief whatsoever, without even considering the merits of plaintiffs' liability claims. Given the time constraints on the Presidential election of which this Court is quite aware, immediate review by this Court is crucial if plaintiffs are to have any opportunity to obtain any relief with respect to this election.

As a matter of Florida law, it is clear that the County Presidential ballot form was illegal. Chapter 101 of the Florida Statutes imposes mandatory rules for ballots that are intended to prevent voter confusion. The required form for paper ballots is prescribed by 101.151, Fla. Stat.

Section 101.191 provides that in structuring a ballot for President, the ballot must be in "substantially" the form provided therein. Palm Beach used punch card ballots as part of an electro-mechanical voting system, which are required "as far as practicable, [to] be in the order of arrangement provided for paper ballots." Section 101.5609, Fla. Stat.

In at least two respects, the County presidential ballot form unmistakably violated these statutory provisions. First, Florida law clearly provides that Governor Bush's name was required to appear first on the ballot, with Vice-President Gore second, and then followed by "[m]inor [p]arty [c]andidates." Sections 101.151(5), 101.151(4), 101.5609, Fla. Stat. But the Palm Beach County ballot form illegally

listed the name of the Reform candidate, Pat Buchanan, above and to the right of Gore's name, rather than following Gore's name as required by law. Indeed, the ballot explicitly numbered the candidates as Bush #3, Buchanan #4, and Gore #5. This clearly violated Florida law.

Based on the sample ballot contained in §§ 101.191 and on 101.5609, moreover, the law requires that all the punch holes or other notations for voting be on only one side of the candidates' names. This was in accord with the County's own instructions to voters that they should punch through the hole "to the right" of the candidate of their choice. Even though all of the candidates for non-presidential races on the County's ballot were listed on the left side of the ballot, with the respective punch holes directly to the right, the County Presidential ballot form improperly used the "butterfly" method. That method placed the candidates' names on facing pages and placed punch holes for Bush, Gore and a number of minor party candidates on the right, with the punch holes for Buchanan and other minor party candidates on the left. This was clearly illegal under Florida election law.

In the court below, plaintiffs proffered evidence that these violations of Florida law directly resulted in confusing and misleading County voters who sought to vote for Gore, which in turn frustrated the will of the voters with respect to the election's outcome in the County, and in turn in the State and the Nation. As this Court made clear in Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720, 725 (Fla. 1998), where statutory election procedures have been violated and

there is “reasonable doubt” that certified election results express the “will of the voters,” voiding the election results and other relief is the proper remedy. At a minimum, plaintiffs here should have the chance to meet the Beckstrom standard. Without immediate review by this Court, they will not even get that chance.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT SECTION 102.168 DOES NOT APPLY TO PRESIDENTIAL ELECTIONS AND THAT STATE AND FEDERAL LAW PRECLUDE THE ORDERING OF A RE-VOTE TO REMEDY VOTER DISENFRANCHISEMENT CAUSED BY THE ILLEGAL PALM BEACH COUNTY BALLOT

The Complaints filed in the various actions before this Court seek relief pursuant to, inter alia, § 102.168, Fla. Stat. (2000), which governs the contest of elections. Section 102.168 authorizes "the circuit judge to whom the contest is presented [to] 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."

Section

102.168(8) (emphasis added). This broad grant of authority to the court to fashion any appropriate relief in a successfully contested election, including an election in which "a person other than the successful candidate was the person duly nominated or elected to the office in question," § 102.168(3)(e), is unlimited and thus clearly includes the ordering of a re-vote when circumstances warrant.

Indeed, given this Court's recent decision in Beckstrom, supra, there can be no question that a court

has the authority under § 102.168 to order a re-vote in appropriate circumstances. In that case, this Court held that when 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 expresses 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, 707 So.2d at 725 (emphasis added). Implicit in the voiding of an election is the ordering of a re-vote.¹ In fact, in Craig v. Wallace, 2 Fla. L. Weekly S517a (2d Jud. Cir., Leon County, Sept. 27, 1994), the circuit court ordered a re-vote as the appropriate remedy after setting aside an election.² _

In the instant case, the circuit court did not read § 102.168 as prohibiting re-votes in some elections in appropriate circumstances. Rather, the circuit court's holding that no re-vote can be ordered as a remedy in

¹ This conclusion follows also from § 101.101, which provides for a "special election" when, inter alia, "no person has been elected at a general election to fill an office which was required to be filled by election at such general election."

² As the briefs of the parties make clear, such a remedy is also consistent with numerous decisions of other state and federal courts in contested elections.

this case was premised on its conclusion that § 102.168 simply does not apply at all in the case of Presidential elections. This holding was erroneous. By its own terms, the contested election statute applies to "the certification of election . . . of any person to office. . . ." Section 102.168(1) (emphasis added.) The only exclusion identified in § 102.168 is that "provided in s[ection] 102.171," which pertains to the contest of elections for state legislative offices, and which gives the legislature, rather than the courts, jurisdiction to determine contested elections. Under the black letter principle of inclusio unius est exclusio alterius, it must be concluded that the legislature's specific inclusion of one exception from the otherwise all-inclusive election contest provisions of § 102.168 excludes all other exceptions, and that the statute therefore applies to all elections except those for state legislative offices.

Moreover, the applicability of § 102.168 to Presidential elections was confirmed by this Court's November 21, 2000 decision in the lawsuits concerning the inclusion of manually recounted votes in the certified Presidential election results -- a decision issued one day after the court below ruled in the instant

matter and thus not before that court in terms of precedent. In the manual recount cases, this Court held that it would be inappropriate for the Florida Department of State to exclude a county's Presidential election returns unless those returns were submitted so late that their inclusion would "preclud[e] a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168. . . ." Palm Beach County Canvassing Board v. Harris, Nos. SC00-2346, et al. (Fla. Sup. Ct., Nov. 21, 2000), Slip Op. at 33 (emphasis added). Thus, this Court clearly recognized that § 102.168 does apply to Presidential elections. That being the case, the court below erred in holding otherwise and thus in concluding that the remedy of a re-vote, authorized by that statute, is unavailable here as a matter of state law.³

The court was equally incorrect in holding that federal law does not permit a re-vote in a Presidential election. First, nothing in the

³ The Circuit Court's related holding that only § 103.011 can determine the date of a Presidential election in Florida ignores § 100.031, which sets the same November date for the general election for all state and municipal offices. Obviously, such laws cannot be interpreted to preclude post-election day relief pursuant to § 102.168, including the voiding of elections and the ordering of re-votes when necessary, or Beckstrom would be effectively overruled.

Constitution requires a uniform, national Presidential election day, but only a uniform day on which the members of the "Electoral College" cast their votes for President and Vice President. See Art. II, Sec. 1, cl. 4 ("The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States"). Clearly, the word "Day" in this provision refers to the "Day" on which the Electors vote, not the day on which the voters choose the Electors.

Second, while it is true that Congress in 3 U.S.C. § 1 has provided for a national Presidential election day on which the electors for President and Vice President are "appointed," that is, elected by the voting public, Congress has also enacted a statutory procedure for Presidential elections that expressly contemplates that there may be state law contests to Presidential votes, i.e., to the "appointment" of the electors, after that date in a particular state, and that expressly authorizes each state to resolve any such "controversy or contest . . . by judicial or other methods or procedures." 3 U.S.C. § 5 (emphasis added). This statute further specifies that, so long as the resolution of such contests is determined at least six days before the

meeting of the Electors (in this year, by December 12 in time for the December 18 "meeting" of the Electoral College), then that determination "shall be conclusive, and shall govern in the counting of the electoral votes. . . ." 3 U.S.C. § 5 (emphasis added). Thus, federal law expressly leaves to state law the resolution of contests concerning Presidential elections, and makes those resolutions determinative, so long as they are completed by the specified date. Given the plain language of 3 U.S.C. § 5, United States District Judge Donald M. Middlebrooks held earlier this month in a lawsuit brought by Governor Bush seeking to prohibit manual recounts authorized by Florida law that "federal law gives states the exclusive power to resolve controversies over the manner in which Presidential electors are selected." Siegel v. Lepore, No. 00-9009-CIV-Middlebrooks (S.D. Fla., Nov. 13, 2000), Slip Op. at 10, n.3, appeal pending.⁴ Thus, it is clear that the Florida courts must look to Florida law to determine whether a re-vote can be

⁴ The court below misread the word "appointment" in 3 U.S.C. § 5 as pertaining solely to the provisions of 3 U.S.C. § 2 (regarding the "appointment" of the electors by the state legislature), when in fact the same word is used in 3 U.S.C. § 1 plainly to refer to the election of the Presidential and Vice Presidential electors by the public. Thus, contrary to the circuit court's interpretation, 3 U.S.C. § 5 does embrace post-election day contests over the election by the public of the Presidential electors.

ordered here. For the reasons already discussed, Florida law permits a court to order a re-vote in a contested Presidential election when the circumstances warrant.

The possibility of another election after a specified federal statutory election day has also been approved by the United States Supreme Court. In Foster v. Love, 522 U.S. 67 (1997), the Court considered a federal law calling for a uniform election day in November for congressional elections, a law analogous to that providing for a national Presidential election day. In that case, the Court struck down a Louisiana law that called for elections that effectively selected the winner of congressional elections in October. The Court stated 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 Court specifically recognized that actions affecting the final selection of office holders, including another election, could lawfully take place after the federal election day, such as when a runoff is required by a state law mandating that the winner must receive a majority of all votes cast. Id. at 71 and n.3. See also Public Citizen, Inc. v. Miller, 813 F. Supp. 821

(N.D. Ga.), aff'd, 992 F. 2d 1548 (11th Cir. 1993) (upholding legality of runoff election held after federal election day when no candidate in initial election received majority required by state law).

As this Court reaffirmed on November 21, “[w]e consistently have adhered to the principle that the will of the people is the paramount consideration. Our goal today remains the same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be.” Palm Beach County Canvassing Board v. Harris, Nos. SC00-2346, et al. (Fla. Sup. Ct., Nov. 21, 2000), Slip Op. at 9. Absent an appropriate remedy, a remedy to be fashioned under state law, the “will of the people” in Palm Beach County will have been thwarted by the illegal ballot.

III. THE COURT BELOW ERRED IN PRECLUDING
ANY RELIEF WHATSOEVER FOR PLAINTIFFS
AND OTHER VOTERS OF PALM BEACH COUNTY

The various Complaints filed by the plaintiffs below raise claims for other forms of relief in addition to requesting a re-vote. Some requested a declaratory judgment that the Presidential ballot form was illegal. Some sought injunctive relief, such as a statistical readjustment of the votes in Palm Beach County. An injunction against future illegal

"butterfly" ballots could also be appropriate. However, once Judge Labarga held that he did not have the legal authority to order a re-vote, he not only failed to rule on the illegality of the Palm Beach County ballot, he also summarily denied all of the plaintiffs' claims for relief, without even considering whether other remedies beyond a re-vote would be appropriate in this case. This was error.

Indeed, as the circuit court itself recognized, declaratory relief is "a proper vehicle to resolve election disputes and to determine compliance with election laws." Fladell v. The Elections Canvassing Commission of the State of Florida, No. CL 00-10965 AB (15th Jud. Cir., Palm Beach County, Nov. 20, 2000), Slip. Op. at 3, citing, inter alia, Bloomfield v. City of St. Petersburg Beach, 82 So.2d 364 (Fla. 1955). In addition to the broad grant of authority given to the circuit courts by § 102.168(8) to fashion any appropriate relief in a case such as this, separate and independent authority is given to the courts by the Declaratory Judgment Act, § 86.011, Fla. Stat. (2000), to declare the rights of the parties "whether or not further relief is or could be claimed."

Even if it is judicially determined that a re-vote is not necessary or appropriate in this case, other

remedies, such as a statistical readjustment, can be considered that would help ensure that this election "reflects the will of the voters." This could include specific remedies limited to the particular voters who have filed sworn affidavits that their intended votes for Gore were mistakenly cast for Buchanan or that election worker denied them a replacement ballot when they discovered and sought to correct their mistakes.

Moreover, even if it is determined that no relief that would affect the outcome of this particular election is appropriate, remedies could be ordered that would still provide important relief to County voters. For example, given the circumstances of this case and the enormous publicity it has generated, it would be of enormous value to the voters of Palm Beach County to have a judicial declaration that the use of the confusing "butterfly" ballot violated Florida election law governing the form of the ballot, and an injunction prohibiting election officials from using such an illegal ballot in the future. The court below plainly erred in precluding even the consideration of any remedy other than a re-vote.

CONCLUSION

For all of the reasons discussed above, this Court should immediately consider this case pursuant to its

authority under Art. V, section 3(b)(5) of the Florida Constitution, it should reverse the order of the circuit court dismissing this case, and it should direct the prompt consideration below of plaintiffs' claims on the merits along with appropriate relief.

Respectfully submitted,

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CERTIFICATION OF FONT

I hereby certify that the foregoing Motion for Reconsideration of Order Precluding Amicus Curiae Filings and for Leave to File Brief Amicus Curiae and the appended Brief Amicus Curiae of People For the American Way on Behalf of Appellants were typed in Microsoft Word using Courier New typeface, font size 12.

Judith E. Schaeffer

CERTIFICATE OF SERVICE

I hereby certify that on this
28th day of November, 2000, I caused a true and complete
copy of the foregoing Motion for Reconsideration of Order
Precluding Amicus Curiae Filings and for Leave to File
Brief Amicus Curiae of People For the American Way,
Proposed Order, and appended Brief Amicus Curiae of
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