SUPREME COURT OF FLORIDA

SARASOTA ALLIANCE FOR FAIR ELECTIONS, et al.,

Petitioners,

v.

FLORIDA SECRETARY OF STATE KURT S. BROWNING, in his official capacity, et al.,

Respondents.
_____/

Case No.: SC07-2074

L.T. No.: 2D06-4339

RESPONDENT, BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA'S ANSWER BRIEF

STEPHEN E. DE MARSH, County Attorney
FREDERICK J. ELBRECHT, Deputy County Attorney
SCOTT T. BOSSARD, Assistant County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, Florida 34236
Telephone: (941) 861-7272
Facsimile: (941) 861-7267
Attorneys for Respondent, Board of County Commissioners of Sarasota County, Florida

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTION, STATUTES & RULES **PAGE(S)**

PRELIMINARY STATEMENT

Respondent, Board of County Commissioners of Sarasota County, Florida shall be identified as "County" in this appeal. Respondent, Florida Secretary of State, Kurt S. Browning, in his official capacity, shall be identified as "Browning" or "State" in this appeal. Respondent, Kathy Dent, as Supervisor of Elections for Sarasota County, Florida shall be identified as "Dent" or "Supervisor" in this appeal. Respondents, collectively, shall be identified as "Respondents."

Petitioners, Sarasota Alliance for Fair Elections, a registered Florida political action committee, Kindra L. Muntz and Suzette Bryan, both individuals, shall be identified as "SAFE" or "Petitioners" in this appeal. Additionally, Petitioners' Brief to this Court shall be identified as "SAFE Brief."

References to the Record shall be to the abbreviated title of the document, "R," followed by the volume and page numbers. (Example: "R. I. 169-176." refers to the final judgment from which the original appeal was taken, located in Volume I of the record at pages 169-176).

This court has jurisdiction of this appeal pursuant to Rule 9.030(2)(A) of the Florida Rules of Appellate Procedure because the Court has exercised its discretion under Article V, § 4(b)(4) of the Florida Constitution to take jurisdiction of a decision of the Second District Court of Appeals that identified a question of great

public importance, which is reviewable pursuant to Rule 9.120 of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

The Proceedings Below

Respondent County filed the instant lawsuit in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida. (R. I. 1-9, 39-49). In the lawsuit, which was subsequently amended, the County sought declaratory relief to determine the constitutionality of a then proposed ballot initiative ("SAFE Amendment"), which, if approved by the electorate, would amend the Sarasota County Charter, effective January 1, 2008, relative to the conduct of future elections. *Id*.

As grounds for seeking declaratory relief, the County asserted its uncertainty as to the constitutionality of the SAFE Amendment, and, thus, did not wish to enact what may be later deemed an unconstitutional ordinance, one that would authorize placing the SAFE Amendment on the ballot for the November 2006 general election. *Id*. Accordingly, the County, in good faith, and pursuant to Florida law, sought judicial review of the constitutionality of the SAFE Amendment prior to its being placed on the then upcoming election ballot so that,

should the SAFE Amendment be found unconstitutional, the County would not be required to place the SAFE Amendment on the ballot. *Id*.

Subsequently, Petitioners, Sarasota Alliance for Fair Elections, a registered Florida political action committee ("SAFE"), Kindra L. Muntz, individually, and Susette Bryan, individually, filed a "Petition for Emergency Writ of Mandamus and Other Relief," which sought, in part, an order requiring the County to initiate the process of placing the SAFE Amendment on the then upcoming November 2006 ballot. (R. I. 10-12). The County's declaratory relief action and Petitioners' mandamus action were consolidated for a single bench trial, which was conducted on September 6, 2006. (R. I. 30-31).

On September 13, 2006, the trial court entered its final judgment, initially indicating that the "sole issue" for the trial court's determination was "whether the proposed amendment is unconstitutional in its entirety." (R. I. 170). The trial court then ruled that "[t]he general law of the state does not expressly or impliedly preempt the field of elections so that Sarasota County cannot act on the proposed charter amendment," and "[t]he proposed charter amendment and the general law of Florida do not conflict such that compliance with one would result in violation of the other." (R. I. 171).

Accordingly, because the trial court concluded the SAFE Amendment was not "unconstitutional in its entirety," the County was directed to submit the SAFE

Amendment to the electorate on the November 2006 ballot.[1] (R. I. 176). The State then initiated an appeal to the Second District Court of Appeals. The County and Supervisor joined the State's appeal as Appellants. (R. II. 253-263, 276-278).

After oral argument, the Second District rendered its opinion on October 31, 2007, with two judges of a three judge panel agreeing that Florida Election Code impliedly pre-empted the SAFE Amendment in its entirety, and further, that the provisions of the SAFE Amendment conflicted with the Florida Election Code. *See Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So. 2d 637, 645-649 (Fla. 2d DCA 2007). The Second District's opinion also included its certification to this Court the following question of great public importance:

> IS THE LEGISLATIVE SCHEME OF THE FLORIDA ELECTION CODE SUFFICIENTLY PERVASIVE, AND ARE THE PUBLIC POLICY REASONS SUFFICIENTLY STRONG, TO FIND THAT THE FIELD OF ELECTIONS LAW HAS BEEN PREEMPTED, PRECLUDING LOCAL LAWS REGARDING THE COUNTING, RECOUNTING, AUDITING, CANVASSING, AND CERTIFICATION OF VOTES?

See Browning, 968 So. 2d at 654. This Court has since taken jurisdiction to review the decision of the Second District Court of Appeals pursuant to Article V, § 4(b)(4) of the Florida Constitution.

[1] The SAFE Amendment was considered and approved by the electorate in the November 2006 election. *See* County's Initial Brief to Second District Court of Appeals at 4.

Statement of Facts

In June 2006, Supervisor Dent duly notified the Sarasota County Board of County Commissioners ("Board") that her office had certified the signatures of 12,060 registered Sarasota County voters on petitions circulated by SAFE, calling for a referendum election on the SAFE Amendment. (R. I. 1-9, 39-49).

The SAFE Amendment, once effective on January 1, 2008, would amend the Sarasota County Charter to add the following provisions relative to the conduct of future elections in Sarasota County:

> *Subsection 6.2A. Voter Verified Paper Ballot.*
>
> (a) No voting system shall be used in Sarasota County that does not provide a voter verified paper ballot. The voter verified paper ballots shall be the true and correct record of the votes cast and shall be the official record for purposes of any audit conducted with respect to any election in which the voting system is used. While votes may be tallied electronically, subject to audit, no electronic record shall be deemed a ballot.
> (b) Any electronic voting machine shall allow the voter to correct his or her ballot by rejecting over-voted ballots at the time of voting, when voting in person at the polling place.
>
> *Subsection 6.2B. Mandatory Audits.*
>
> In addition to Voting System Audits allowed in F.S. 101.591, the Sarasota County Supervisor of Elections shall provide for mandatory, independent, random audits of the voting system in Sarasota County. These audits shall consist of publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts. The audits shall be conducted on Election Day or within 24 hours after the closing of the polls, in clear public view, by a reputable, independent

and non-partisan auditing firm. These audits shall be conducted for a minimum of 5% of Sarasota County precincts, for 100% of the ballot issues in the selected precincts; and for a minimum of 5% of the total ballots cast in Early Voting periods, 5% of the total Absentee ballots, and 100% of any precinct where there are highly unusual results or events. In addition, audits of 5% of Provisional ballots shall be completed by the 3rd day following the election, and audits of 5% of Military and Overseas (UOCAVA) ballots shall be completed within 24 hours of a primary election and within 10 days following a general election. The random selection of precincts to be audited shall be made in a physical, non-electronic, public drawing at the Supervisor of Elections Office only AFTER machine tallies from the precincts have been made public. This public drawing shall be made on an entirely random basis using a uniform distribution in which all precincts in the County have an equal chance of being selected. If machine counts are unavailable for any reason, the voter verified paper ballots shall be counted by hand by the independent auditors and recorded as the vote count for that precinct. Immediately upon completion of an audit, the persons conducting the audit shall furnish a copy of the audit to the Supervisor of Elections and the Board of County Commissioners and post the results for public view and copying at the Supervisor of Elections Office. The audit shall be considered a Florida public record pursuant to Florida Statute 119.

Subsection 6.2C. Certification of Election Results.

No election shall be certified until the mandatory audits are complete and any cause for concern about accuracy of results has been resolved. Any discrepancies between machine counts and hand counts greater than 1% or, if less than 1% but sufficient to change the outcome of any measure, shall initiate a comprehensive manual audit of the voter verified paper ballots in all precincts and of all Absentee, Provisional, and Military and Overseas (UOCAVA) ballots. Such comprehensive manual audit shall be completed within 5 days after the election, with the exception of comprehensive audits of Military and Overseas ballots, which shall completed within 5 days after a primary election, and within 10 days after a general election. Audits shall be completed by a reputable independent and non-partisan auditing firm as in (2) above. A copy of these audits shall be retained for public view and

> copying at the Supervisor of Elections Office in addition to being given to the County Commissioners. These audits shall be considered Florida public records pursuant to Florida Statute 119.

Id.

By letter dated July 17, 2006, legal counsel for SAFE submitted the SAFE Amendment to the Board with the intent that the Board enact an ordinance calling for a special election, which ordinance, when filed with the Supervisor of Elections, would require the Supervisor to place the SAFE Amendment on the ballot for consideration by the electorate. *Id*. On August 22, 2006, the Board considered the SAFE Amendment, and opted to file the instant complaint for declaratory relief to determine the constitutionality of the SAFE Amendment before including it on the November 2006 ballot. *Id*.

SUMMARY OF THE ARGUMENT

Initially, the Second District correctly concluded the SAFE Amendment is unconstitutional in its entirety because the SAFE Amendment would have the County regulate in an area in which the state has impliedly pre-empted local legislation; the regulation of elections. In the Florida Election Code and Division of Elections Rules, the state legislature has completely "occupied the field" of election regulation with an exhaustive set of laws and rules. Coupled with compelling public policy reasons and an express purpose to preserve uniformity in its application, it does not follow that the state would permit local governments to craft their own unique local election codes, thereby undermining the state's express purpose of preserving uniformity in election law.

Additionally, the Second District correctly concluded the last two subsections of the SAFE Amendment are unconstitutional because compliance with those subsections of the SAFE Amendment requires a violation of state law or vice-versa, thereby creating an unconstitutional conflict between state law and local regulation. Accordingly, because those subsections cannot co-exist with state election law, the last two subsections of the SAFE Amendment must fail.

Thus, as will be shown, because portions of the SAFE Amendment implicate subjects that are pre-empted to the state for regulation or, alternatively, are in conflict with existing state law, the SAFE Amendment is unconstitutional.

Accordingly, the certified question should be answered in the affirmative and the majority opinion below otherwise affirmed because election regulation is impliedly pre-empted to the state and because the SAFE Amendment conflicts with state law to the extent that compliance with one results in violation of the other.

STANDARD OF REVIEW

Having accepted jurisdiction of a decision of the Second District Court of Appeals that certified a question of great public importance, this Court's review is not limited to review of that question, but allows review of the Second District's decision for any alleged error. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 912 (Fla. 1995).

The order reviewed by the Second District was a final order from a declaratory judgment action. Such orders are generally accorded a presumption of correctness on appellate review. *See Reform Party of Florida v. Black*, 885 So. 2d 303, 310 (Fla. 2004); *see also Collier v. Parker*, 794 So. 2d 616 (Fla. 1st DCA 2001). However, this Court has instructed, "to the extent that the decision rests on a question of law, the order is subject to full, or *de novo*, review on appeal." *Reform Party* at 310, citing *Smith v. Coalition to Reduce Class Size & Pre-K Comm.*, 827 So. 2d 959, 961 (Fla. 2002) and *Sancho v. Smith*, 830 So. 2d 856, 861 (Fla. 1st DCA 2002); *see also Collier*, 794 So. 2d at 618.

Specifically, the determination of the constitutionality of a proposed amendment to a county charter is subject to *de novo* review. *See Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So. 2d 977 (Fla. 3d DCA 2006). At bar, the declaration sought by the County was one addressing that very question of law, i.e., a declaration as to the constitutionality of the SAFE Amendment. Thus, because the decision below rests on conclusions of law as to the constitutionality of the SAFE Amendment, this Court may, under *Reform Party*, *Citizens for Reform* and *Leisure Resorts*, review the decision below *de novo*.

ARGUMENT

I. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE AND THE DECISION BELOW AFFIRMED BECAUSE THE SAFE AMENDMENT REGULATES IN AN AREA IN WHICH THE STATE HAS PRE-EMPTED LOCAL LEGISLATION AND IS THEREFORE UNCONSTITUTIONAL IN ITS ENTIRETY.

The certified question should be answered in the affirmative and the majority opinion below affirmed because the majority below correctly concluded the SAFE Amendment is unconstitutional in its entirety. As will be shown, the Second District correctly concluded the SAFE Amendment initially fails because it would have the County regulate in an area in which the state has pre-empted local legislation; the regulation of elections.

The County adopts those portions of the brief of the State addressing this issue, briefly supplemented as follows:

The majority below correctly observed that, aside from the limited instances where local discretion is expressly provided within parameters set by the state, it is clear that the who, what, where and when of Florida elections are explicitly, exhaustively and exclusively set forth by state law through the Florida Election Code and Division of Elections Rules.[2] *See Browning*, 968 So. 2d at 646.

[2] Indeed, after reviewing the regulatory reach of the Florida Election Code into "every aspect of the electoral process," the majority opinion below expressed surprise that the Florida Election Code did not include *express* pre-emption language. *See Browning*, 968 So. 2d at 643-646.

In their brief, SAFE surmises that the majority's conclusion below was unduly influenced by the mere number of pages devoted to the Florida Election Code. *See* SAFE Brief at 13-14. However, a careful review of the majority opinion reveals that the nature of the regulated activity, not merely the number of pages devoted to the regulated activity, was the key consideration. The majority below distinguished issues like fireworks sales and sand dune rehabilitation, which can present different issues for differently sized and situated communities, from elections. *See Browning*, 968 So. 2d at 646.

In elections, extensive state and federal regulation and case law underscore the necessity of having one vote in one community be received and counted in the same manner as any other vote is received and counted in another community anywhere in the state, and in national elections, anywhere in the nation. Thus, any purported need for special local election regulation rings hollow where the law expects all votes to be handled in a particular manner, regardless of the size or setting of the community where each vote is cast.

Thus, the majority below aptly recognized the uniformity uniquely required in election law. Indeed, as Respondents demonstrated below, the Florida Election Code establishes the Secretary of State as the state's chief election officer, and includes among the Secretary's extensive set of powers and duties the following: obtain and maintain *uniformity* in the application, operation and interpretation of

the election laws; and provide *uniform* standards for the proper and equitable implementation of the registration laws. *See* § 97.012, Fla. Stat. (2006).

Additionally, the majority below appropriately recognized that the position of the Secretary of State, who is charged with administering the Florida Election Code, is entitled to great weight. *See Browning*, 968 So. 2d 648. As shown, both below and before this Court, the State's position is that election law is a vital subject where uniformity is of paramount importance, and one where implied pre-emption should apply.

Thus, in light of the breadth and depth of the Florida Election Code and Division of Elections Rules, the question becomes if a system that has uniformity as its express purpose, where the goal is for all votes to have equal effect regardless of where that vote is cast, and is pervasive, detailed, and affects such a fundamental aspect of the functioning of the state's political institutions fails to meet the criteria for implied pre-emption, can any statutory or regulatory system be considered so pervasive and fully occupying of the field to be found to establish implied pre-emption? Indeed, if the state's election law fails to establish implied pre-emption, implied pre-emption effectively becomes a legal fiction, and nothing short of express pre-emption will suffice.

However, if the concept of implied pre-emption is to be given effect, as the majority below correctly recognized it should, the state's election law is precisely

the type of regulatory scheme representative of the type contemplated when the current concept of implied pre-emption developed. *See Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).

Thus, the state's election code and regulations completely occupy the field of election law. Moreover, the office charged with administering the state's election code acknowledges its vital purpose in maintaining uniformity. Lastly, the need for uniformity is underscored by the nature of elections, which aspire to the well established one person, one vote standard regardless of the size or setting of the community where each vote is cast.

Accordingly, because the SAFE Amendment encroaches upon an area of law pre-empted to the state, this Court should answer the certified question in the affirmative and otherwise affirm the majority opinion below.

II. THE DECISION BELOW CORRECTLY HELD THAT THE SAFE AMENDMENT IS UNCONSTITUTIONAL BECAUSE IT IS IN CONFLICT WITH THE FLORIDA ELECTION CODE.

In addition to pre-emption, the majority below correctly held the SAFE Amendment is unconstitutional because compliance with the last two subsections of the SAFE Amendment requires a violation of state law or vice-versa, thereby creating an unconstitutional conflict between state law and local regulation. *See Browning*, 968 So. 2d at 649-653. Accordingly, because the last two subsections of

the SAFE Amendment cannot co-exist with state election law, the SAFE Amendment must fail for this mutually exclusive reason, and this Court should affirm the decision below.

Article VIII, § 1(g) of the Florida Constitution describes the home rule powers of charter counties, like Sarasota County, relative to state authority, as follows:

> Charter government. Counties operating under county charters shall have all powers of local self-government **not inconsistent with general law**, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances **not inconsistent with general law**. The charter shall provide which shall prevail in the event of a conflict between county and municipal ordinances.

See Art. VIII, § 1(g), Fla. Const. (emphasis added); *see also Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002)(discussing county home rule powers). Florida courts have consistently interpreted Article VIII, § 1(g) as permitting counties to exercise home rule power or to produce local legislation so long as the exercise of local authority can coexist with existing state law, i.e. so long as compliance with local law does not cause violation of a state law, or vice-versa. *See, e.g., Hillsborough County v. Florida Restaurant Ass'n, Inc.*, 603 So. 2d 587 (Fla. 2nd DCA 1992); *see also F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d 583 (Fla. 5th DCA 1997); *see also Phantom of Clearwater*.

Indeed, the test is "whether one must violate one provision in order to comply with the other." *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. 4th DCA 2000), citing *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661 (Fla. 3rd DCA 1976). Thus, local legislation that "supplements a statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail." *See City of Miami Beach v. Rocio Corp*., 404 So. 2d 1066, 1070 (Fla. 3rd DCA 1981); *see also Metro. Dade County v. Chase Fed. Housing Corp*., 737 So. 2d 494 (Fla. 1999).

Accordingly, review of the SAFE Amendment requires a determination of whether the County must violate state law in order to comply with the SAFE Amendment or vice-versa. As will be shown, compliance with one requires a violation of the other, and accordingly, the conflicting subsections of the measure cannot co-exist with state election law, and must fail.

1) Subsection 6.2A

As the majority below acknowledges, the chief issue addressed in Subsection 6.2A, the requirement of having a voter verified paper ballot, has been addressed by the state legislature. With the enactment of Chapter 2007-30, Laws of Florida, the state legislature required that all voting in Florida must be on paper ballot, effective July 1, 2008.

The County, throughout this action has recognized the importance of fostering voter confidence in the machines used to record and tabulate votes, and submits to this Court that the County recognizes the state legislature has acted in furtherance of those interests in legislating a paper ballot requirement for all future elections in Florida, which, in turn, renders any discussion of the propriety of one type of voting system over another as moot.

Indeed, in the lower courts, the County has consistently indicated it would not argue for or against the use of any type of voting machine. Rather, the County's focus in this brief continues to be on those parts of the SAFE Amendment, the second and third subsections, that address the methods in which votes are to be counted and recounted and in which voting machines are to be audited.

Notably, the majority below observed that the state legislature's taking the initiative and addressing the same issue as Subsection 6.2A of the SAFE Amendment provides further support for the pre-emption of election regulation to the state. Indeed, the selection of voting systems and technology, while a local decision, is a decision that is made within the field of choices established solely by the state. *See* §§ 101.5604-101.5606, Fla. Stat. (2007). Thus, because the state has legislated on the same subject, Subsection 6.2A is reduced to redundant, surplus language having no legal effect.

2) Subsection 6.2B

Subsection 6.2B provides for independent audits and audit procedures, which the majority below correctly recognized presented significant conflicts with state law, focusing on the exercise of powers not statutorily granted to counties and county officials and the compromising of ballot security, a paramount concern of the Florida Election Code and Division of Elections Rules. The initial clause of Subsection 6.2B introduces the conflicts.

> SAFE Amendment: In addition to Voting System Audits allowed in F.S. 101.591, the Sarasota County Supervisor of Elections shall provide for mandatory, independent, random audits of the voting system in Sarasota County.
>
> Amended Florida Election Code: Immediately following the certification of each election, the county canvassing board or the local board responsible for certifying the election shall conduct a manual audit of the voting systems used in randomly selected precincts. *See* § 8, Chapter 2007-30, Laws of Florida, effective July 1, 2008.

As was the case with Subsection 6.2A of the SAFE Amendment, the state legislature has acted on its own initiative and amended Section 101.591 to include mandatory audits, a subject addressed in Subsection 6.2B of the SAFE Amendment. Two significant differences between the amended Section 101.591 and the SAFE Amendment are when the audits are to be conducted and by whom.

The audits under the amended Section 101.591 are to be conducted *after* the certification of election results, and are to be conducted by the same local canvassing board that certified the election results. Subsection 6.2B of the SAFE

Amendment requires pre-certification audits performed by an independent auditing body. Thus, the SAFE Amendment endeavors to regulate an issue that the state legislature has squarely addressed with recent legislation, which raises a central issue relative to conflict; the ability of local government to regulate on the same issue where the state has enacted legislation addressing that issue.

It is a well established rule of statutory construction that "when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." *See Gay v. Singletary*, 700 So. 2d 1220, 1221 (Fla. 1997) ("under the principle of statutory construction *expressio unius est exclusio alterius* the mention of one thing implies the exclusion of another); *see also Moonlit Waters Apts., Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996).

Here, the amended Section 101.591 expressly and *exclusively* provides the state legislature with the authority to require local canvassing boards to conduct the post-certification audit of voting systems.[3] The SAFE Amendment characterizes the authorization to conduct audits as in addition to those permitted by state law, but Section 101.591 only authorizes the state legislature to provide for such audits.

[3] Similarly, the soon to be former Section 101.591 expressly and *exclusively* provides the state legislature with the discretion to provide for the independent audit of voting systems.

Under the rule of statutory construction *expressio unius est exclusio alterius*, because Section 101.591 mentions only the legislature as having the authority to require audits, other entities, including local governments, are not granted the authority to conduct audits. SAFE, however, continues to refuse to acknowledge the plain statutory language of the Florida Election Code and asks this Court to read into Florida law additional words that simply aren't there, and allow the SAFE Amendment to co-exist in conflict with Florida law.

Conversely, the County appropriately asks this Court to simply review the plain language of the Florida Election Code and Division of Elections Rules and observe the conflicts the majority below recognized between Florida law and the SAFE Amendment. Thus, review of the plain language of the Florida Election Code will show the SAFE Amendment purports to authorize local government officials to do what the statute allows only the legislature to do, which results in an unconstitutional conflict between the SAFE Amendment and state law.

Moreover, the SAFE Amendment placing the authority to provide for audits with the Supervisor of Elections is a grant of authority not otherwise provided by Florida law. Indeed, Florida law recognizes that the powers of county officers are only those expressly granted by statute, or local law consistent with statute. *E.g.*, *Amos v. Matthews*, 126 So. 308 (Fla. 1930). No such authority has been given to the Supervisor of Elections, and, thus, none may be created by any entity other

than the state legislature. Indeed, the amended Section 101.591 specifies the local canvassing board as the only party assigned to conduct the statutory post-certification audits. The unconstitutional authority granted to conduct the audit, when exercised, presents additional conflict.

> SAFE Amendment: These audits shall consist of publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts. The audits shall be conducted on Election Day or within 24 hours after the closing of the polls, in clear public view, by a reputable, independent and non-partisan auditing firm.
>
> Florida Election Code: No persons other than the supervisor of elections or his or her employees or the county canvassing board shall handle any official ballot or ballot card. *See* § 101.572, Fla. Stat. (2007); *see also* § 119.07(5), Fla. Stat. (2007).

As the express language of the two provisions set forth above shows, the SAFE Amendment calls for an independent firm to conduct the audit, which includes "observable hand counts." However, the Florida Election Code expressly and specifically restricts the authority of persons to physically handle ballots to the Supervisor of Elections or his or her employees or the county canvassing board." *See* § 101.572, Fla. Stat. (2006); *see also* § 119.07(5), Fla. Stat. (2006). Thus, the SAFE Amendment plainly permits individuals other than those listed in Sections 101.572 or 119.07(5) to physically handle ballots, placing the SAFE Amendment in conflict with those provisions of Florida Statutes.

SAFE continues to suggest that independent auditors may conduct the audits without physically handing ballots if employees or the Supervisor of Elections

perform the tasks that involve the physical handling of ballots. However the SAFE Amendment does not provide for employees of the Supervisor of Elections to assist in conducting an audit. Indeed, the SAFE Amendment authorizes only a "reputable, independent and non-partisan" auditing firm conduct an audit. Again, as shown, *supra*, with respect to what party is authorized to initiate an audit, the express authorization of one party to conduct the audit implies that other parties, including the employees of the Supervisor of Elections, are not authorized to participate in the actual conducting of the audit.

Additionally, it continues to be asserted that Sections 101.572 and 119.07(5) apply only in specific situations. Under Section 119.07(5), ballots are inspected pursuant to a public records request and under Section 101.572, ballots are inspected after being received from election boards and removed from absentee ballot envelopes during the canvassing of returns. Based on these statutory references, the argument follows that in all other instances, ballots may be handled by individuals other than employees of the Supervisor of Elections.

However, consistent with the earlier discussion of audits, *see* pp. 18-21, *supra*, if the legislature wanted to allow additional individuals or groups to handle completed ballots, the legislature would have included them. Thus, where the legislature has authorized a particular group of individuals to physically handle ballots, that authorization is exclusive.

Curiously, SAFE, which is presumably concerned with ballot security and having exhaustive checks placed on election processes, continues to support permitting individuals other than those authorized in Sections 101.572 & 119.07(5) to physically handle ballots. Indeed, Section 119.07(5) specifically mentions candidates but does not permit candidates or their representatives to physically handle ballots. *See* § 119.07(5), Fla. Stat. (2007). The issue of ballot handling further bolsters the conclusion that pre-emption should apply to election regulation.

Indeed, allowing local governments to effectively undermine the state's clear direction as to who may physically handle ballots would surely lead to the "chaos and confusion," the majority below cautioned against relative to issues of ballot access, ballot tampering, fraud allegations in close races, and ultimately a decline in voter confidence in the election process.

With conflicts tainting the authority to order the audits and identity of those who conduct the audits, conflicts also appear in connection with the manner and timing in which the audits are to be conducted under the SAFE Amendment.

> SAFE Amendment: In addition, audits of 5% of Provisional ballots shall be completed by the 3rd day following the election, and audits of 5% of Military and Overseas (UOCAVA) ballots shall be completed within 24 hours of a primary election and within 10 days following a general election.
>
> Division of Elections Rules: With respect to the presidential primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal Election shall be counted if received

> no later than 10 days from the date of the Federal Election as long as such absentee ballot is otherwise proper. *See* Rule 1S-2.013, Fla. Admin. Code. (2007).

The SAFE Amendment conflicts with state law relative to the counting of overseas absentee ballots. As to overseas ballots, the SAFE Amendment calls for an audit of 5% of military and overseas ballots within 24 hours of a primary election and within 10 days following a general election. However, overseas absentee ballots may still be received in the same 10 day period within which the audit of the same votes is to be done.

Notably, Florida law places a strict deadline on counties to certify and transmit election results to the state for inclusion in the official total. Beyond the timing problems presented by the SAFE Amendment, the SAFE Amendment now establishes a second set of post-election procedures that must also be completed with the timeframe the state has established to complete the statutory post-election required procedures.

Thus, the SAFE Amendment would have the County expend twice the time and resources in a time frame that contemplates only one set of post-election procedures. Thus, the majority below again cautioned that having two sets of post-election procedures operating simultaneously would "create the potential for chaos and confusion." *See Browning*, 968 So. 2d at 651.

Consequently, such a result would impair the County's ability to meet its certification deadline under Florida Statutes Section 102.112, the twelfth day after an election, and consequently, may impact whether the votes cast in Sarasota County would be counted in an election. Moreover, such a result underscores the need to affirm the decision below in holding that the election regulation is pre-empted to the state because duplicating procedures already provided for under state law would be, at best, superfluous and wasteful of public time and resources, and, at worst, an invalidation of thousands of otherwise lawful votes and erosion of voter confidence in the election process.

Lastly, the SAFE Amendment calls for an audit of 100% of ballots cast at a precinct where there are "highly unusual results or events." What is considered "highly unusual" and who makes that determination are not clear from the language of the SAFE Amendment. *See generally Bouters v. State*, 659 So. 2d 235, 238 (Fla. 1995) (legislation is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application").

Thus, because Subsection 6.2B requires unauthorized audits by unauthorized parties, permits unauthorized parties to physically handle ballots, and requires the audit of absentee votes within the same time period in which such votes may still be received, the majority below correctly concluded the SAFE Amendment "does

not parallel or complement the Election Code, but rather conflicts with it." *See Browning*, 968 So. 2d at 653. Accordingly, this Court should affirm the decision below.

3) Subsection 6.2C

Subsection 6.2C provides for election certification and recount standards and procedures, and similar to the defects of Subsection 6.2B, *supra*, the SAFE Amendment conflicts with the detailed recount and certification standards and procedures set forth in the Florida Election Code and Division of Elections Rules.

Indeed, despite SAFE's continued protests to the contrary, the majority below correctly observed that the SAFE Amendment's requirement of having the certification of election results restrained until the completion of its mandatory audits was questionable. If the mandatory audits were intended solely to act as an audit, why would the SAFE Amendment not mirror the state's recent amendment to Section 101.591, which requires audits to be conducted *after* the election results are certified? The answer is simple, because the audit is a recount. Because recounts are specifically addressed in the Florida Election Code, and no other recounts are authorized by the Florida Election Code, the SAFE Amendment fails. The SAFE Amendment cannot accept an invitation the state has not expressly extended to conduct its own recount.

Thus, by having certification restrained by the completion of the "audit" process, the SAFE Amendment invites the "chaos and confusion" described by the majority below by unnecessarily opening the door to having the two simultaneous processes generating different results. Indeed, because the audited ballots become the "official ballots" under the SAFE Amendment, the "audit" decides what will be certified to the state as election results.

> SAFE Amendment: Any discrepancies between machine counts and hand counts greater than 1% or, if less than 1% but sufficient to change the outcome of any measure, shall initiate a comprehensive manual audit of the voter verified paper ballots in all precincts and of all Absentee, Provisional, and Military and Overseas (UOCAVA) ballots.
>
> Florida Election Code: A manual recount cannot be ordered, however, if the number of overvotes, undervotes and provisional votes is fewer than the number of votes needed to change the outcome of the election. *See* § 102.166, Fla. Stat. (2007).
>
> Division of Elections Rules: All recounts are to be ordered by the respective county canvassing board or canvassing commission responsible for certifying the results of the race or races being recounted. See R. 1S-2.301, Fla. Admin. Code (2007).

The SAFE Amendment's comprehensive manual recount threshold is plainly different from the recount threshold established in the Florida Election Code. First, manual recounts under the Florida Election Code occur only where a one-quarter of one percent or less margin *decides a ballot question*. *See* § 102.166, Fla. Stat. (2007). Despite the requirement of an election-determinative discrepancy, the SAFE Amendment calls for recounts if the machine and hand counts reveal a

discrepancy of 1% or more, *regardless of whether the discrepancy would affect the result of a ballot question*.

For example, a ballot question decided by an extreme majority of 90% to 10% would be recounted, and delay the final certification of election results, if the machine and hand counts are off by a mere 1%. Further, while the Florida Election Code's recount threshold is one-quarter of one percent, the SAFE Amendment expands the threshold from one-quarter of one percent to anywhere up to one percent, a 300% increase in the manual recount threshold.

The differing recount thresholds lend themselves to potentially chaotic results. For example, two separate recount processes can, in a particularly close race, create a result where one process says one candidate wins the race and the other process declares the other candidate won the race. Consequently, the question becomes this: which result is to be certified to the state? Regardless of how the issue is resolved, just by having to determine which of the two results is the official one, some level of damage would be done to the electoral process and voter confidence when such conflicting results would likely generate an election contest or controversy.

Notably, the dissent below underestimates how comprehensive the SAFE audit is in comparison with a recount under Florida law. *See Browning*, 968 So. 2d 655-656. The dissent below notes "that all votes in selected precincts be hand-

counted as a type of spot check sampling to determine the accuracy of the electronic voting machines." *Id*. at 655. However, the SAFE Amendment states that in the event of certain levels of discrepancy, a "comprehensive manual audit of the voter verified paper ballots *in all precincts*," as well as all absentee, provisional and military and overseas ballots. Respectfully, the County submits that a manual audit of every vote cast constitutes more than a mere "spot check" of the voting apparatus. Indeed, such a comprehensive review of all votes, no matter what it may be called, operates as a recount.

Moreover, by making recounts mandatory, the SAFE Amendment does not provide for a recount to "not be made" where a losing candidate requests in writing that no recount be made, as is provided for in the Florida Election Code. *See* § 102.141, Fla. Stat. (2007). In addition to under what circumstances recounts are to be conducted, the SAFE Amendment conflicts with state law relative to the manner in which the recounts are to be conducted.

> SAFE Amendment: Such comprehensive manual audit shall be completed within 5 days after the election, with the exception of comprehensive audits of Military and Overseas ballots, which shall completed within 5 days after a primary election, and within 10 days after a general election.
>
> Division of Elections Rules: All machine and manual recounts conducted pursuant to this rule must be completed in such a manner as to provide the county canvassing board sufficient time to comply with the provisions of § 102.112, Fla. Stat. *See* Fla. Admin. Code R. 1S-2.031(1)(f) (2007).

As shown, *see* p. 25, *supra*, Florida law places a strict deadline on counties to certify and transmit election results to the state for inclusion in the official total. The SAFE Amendment establishes a second set of post-election deadlines that must also be met within the timeframe the state has established to complete the statutory post-election required procedures. The SAFE Amendment again places the County in the position of expending twice the time and resources in a time frame that contemplates only one set of post-election procedures. Such a result would impair the County's ability to meet its certification deadline under Section 102.112, the twelfth day after an election.

Indeed, the required audits under the SAFE Amendment must effectively be completed within 10 days, the same time period within which the County may receive absentee ballots, *see* R. 1S-2.013, Fla. Admin. Code, leaving two short days for the County to complete and certify its election results so those results may be included in the state's tabulation.

As shown with respect to Subsection 6.2B, such a result underscores the state having pre-empted local election legislation because duplicating procedures already provided for under state law would be, at best, superfluous and wasteful of public time and resources, and, at worst, an invalidation of thousands of otherwise lawful votes.

> SAFE Amendment: Audits shall be completed by a reputable independent and non-partisan auditing firm as in 6.2B above.

> Florida Election Code: No persons other than the supervisor of elections or his or her employees or the county canvassing board shall handle any official ballot or ballot card. *See* § 101.572, Fla. Stat. (2007).

Similar to the conflict between state law and Subsection 6.2B, the SAFE Amendment calls for an independent firm to conduct the comprehensive manual audits, while the Florida Election Code expressly and specifically restricts the authority of persons to physically handle ballots to the Supervisor of Elections or his or her employees or the county canvassing board." *See* § 101.572, Fla. Stat. (2007). Thus, the SAFE Amendment again plainly permits individuals other than those listed in Section 101.572 to physically handle ballots, and further reassigns the statutory authority to appoint individuals to conduct manual recounts, placing the SAFE Amendment in further conflict with state law.

Thus, the third subsection, like the second subsection presents a duplication of procedures already established under state law, different standards for initiating and completing those procedures, and the assigning of parties other than those assigned by state law to perform those procedures. Accordingly, because the majority below correctly concluded the final subsection, like the previous subsection, unconstitutionally conflicts with state law and must fail, this Court should affirm the decision below.

CONCLUSION

Wherefore, for all of the foregoing reasons, the County respectfully requests this Court answer the certified question in the positive, affirm the majority opinion below, which held the SAFE Amendment unconstitutional, and grant any other such relief deemed just and appropriate.

RESPECTFULLY SUBMITTED,

STEPHEN E. DE MARSH, COUNTY ATTORNEY
FREDERICK J. ELBRECHT,
DEPUTY COUNTY ATTORNEY
SCOTT T. BOSSARD,
ASSISTANT COUNTY ATTORNEY
Office of the County Attorney
Attorneys for Respondent Board of County Commissioners of Sarasota County
1660 Ringling Blvd., Second Floor
Sarasota, Florida 34236
Telephone: (941) 861-7272
Facsimile: (941) 861-7267

By: _____
Frederick J. Elbrecht
Deputy County Attorney
Florida Bar No. 0314609
(Direct all subsequent mailings in this matter to Attorney Elbrecht)

By: _____
Scott T. Bossard
Assistant County Attorney
Florida Bar No. 0038407

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief has been furnished by U.S. Mail to: Peter Antonacci, Esq. and Allen C. Winsor, Esq., Gray Robinson P.A., 301 South Bronough Street, Suite 600, Tallahassee, Florida 32301; Ronald A. Labasky, Esq., Young Van Assenderp P.A., 225 South Adams Street, Suite 200, Tallahassee, Florida 32301; and Thomas D. Shults, Esq., Kirk Pinkerton, 720 South Orange Avenue, Sarasota, Florida 34236 this 9th day of January 2008.

By: s/Frederick J. Elbrecht
Frederick J. Elbrecht
Deputy County Attorney
Florida Bar No. 0314609

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

By: s/Frederick J. Elbrecht
Frederick J. Elbrecht
Deputy County Attorney
Florida Bar No. 0314609

{ 06-44553-00133468.DOC;1}