SUPREME COURT OF FLORIDA

Case No. SC07-2074
DCA Case No. 2D06-4339

SARASOTA ALLIANCE FOR FAIR ELECTIONS, a registered Florida political action committee, *et al.*,

Petitioners,

v.

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

Respondents.

ANSWER BRIEF OF KURT S. BROWNING, SECRETARY OF STATE OF THE STATE OF FLORIDA

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STATEMENT OF CASE AND FACTS

The statement of the case and facts are well laid out by the District Court's opinion. At issue in this case is the validity of an amendment to the Sarasota County Charter. Petitioner Sarasota Alliance for Fair Elections ("SAFE") sponsored the amendment and collected signatures sufficient to submit it to the electorate. *Browning v. SAFE*, 968 So. 2d 637, 640-41 (Fla. 2d DCA 2007). The amendment, a copy of which is attached to SAFE's initial brief, will be referred to as the "Amendment" or the "Charter Amendment." The Amendment restricts the types of voting equipment that may be used in Sarasota County, provides for certain mandatory recounts of election results, and establishes procedures for the certification of election results. *Id.* at 641-42.

On August 22, 2006, Respondent Board of County Commissioners of Sarasota County, Florida (the "Board") initiated a declaratory action, requesting a determination of the Amendment's validity. *Id.* at 642. SAFE then filed a mandamus action, seeking to compel the Board to include the Amendment on the November, 2006 ballot. *Id.* The Board subsequently amended its complaint to add the Secretary of State (the "Secretary") and the Sarasota County Supervisor of Elections as defendants. *Id.* at 642 n.1. The two actions were consolidated, and the trial court entered a final judgment ordering the Board to place the Amendment on the ballot. *Id.* at 642. Respondents appealed. After the appeal was initiated

(but before briefing) the Amendment appeared on the ballot and won approval of the Sarasota County electorate. *Id*. at 642 n.4.

On appeal, the Second District Court of Appeal reversed. It concluded that the Florida Election Code—by its pervasive regulation of the entire election process—preempted to the State the power to regulate elections, except where it expressly granted authority to local governments. *Id*. at 646-47, 649. It alternatively concluded that the various provisions of the Amendment directly conflict with the Florida Election Code and are therefore invalid. *Id*. at 649. Accordingly, the District Court held the Amendment to be unconstitutional and stated that "[w]e believe that any efforts to modify or 'fine-tune' Florida's election laws should be addressed through uniform, statewide legislation." *Id*. at 653-54.

The District Court certified the following question to this Court as a matter 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?" *Id*. at 654. SAFE subsequently filed its petition to initiate this Court's review.

SUMMARY OF ARGUMENT

The Florida Election Code uniformly regulates virtually every aspect of election administration throughout the state. The procedures employed in collecting, counting, recounting, auditing, and certifying votes are all matters of state law, and they are all matters demanding uniform application. This need for uniformity was highlighted during the disputed 2000 Presidential election, which famously yielded a chaotic process as counties applied disparate standards in obtaining election results. Following the 2000 election, the Florida Legislature substantially amended the Election Code, seeking increased uniformity and predictability. Notwithstanding a clear legislative demand for uniformity, the Sarasota County Charter Amendment imposes new local regulation—applicable only in Sarasota County—which undermines the uniformity the Florida Election Code commands.

The primary purpose of the Amendment was to end the use of paperless touchscreen voting systems in Sarasota County. By recently mandating paper ballots for substantially all voters, the Florida Legislature has rendered the Amendment's central purpose a nullity. Accordingly, what is left of this case does not rise to the level of great public importance, to which this Court's jurisdiction is reserved. This Court should decline to exercise its jurisdiction here. But even if it considers the merits, this Court should affirm because the Amendment is invalid.

First, the Amendment is preempted by state law. The Election Code—and the substantial body of rules promulgated under its authority—regulate virtually every aspect of election administration. Through its exhaustive and pervasive regulation, the Florida Legislature has fully occupied the field, and any local attempts to regulate in that area are preempted. The Election Code grants counties only limited authority and discretion in the process, and it does so expressly. The Legislature has granted counties no authority to establish their own rules regarding collecting, counting, recounting, auditing, and certifying votes.

Even absent field preemption, the Amendment is invalid because its provisions directly conflict with state law. For example, the Election Code details the limited circumstances in which recounts are permitted and the manner in which they may proceed. The Amendment establishes a conflicting set of rules for recounts. The Amendment also provides a limitation on what may be considered a "ballot"—a limitation that directly conflicts with the Election Code. Furthermore, the Amendment advances it own set of procedures for certification of results, which is in direct conflict with state law establishing uniform certification rules.

For these reasons, the District Court correctly concluded that the Amendment is invalid. This Court should affirm that decision.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION.

This case began shortly before the November 2006 general election. Since then, Florida's legal and election-related landscapes have changed dramatically. Petitioner SAFE was formed in early 2006 to combat the use of paperless touchscreen voting machines in Sarasota County, which SAFE believed were unreliable.[1] At the time, Florida law permitted boards of county commissioners to select for general use any voting system approved by the Department of State—including paperless touchscreen systems. *See* § 101.5604, Fla. Stat. (2007). That is no longer the case.

In its regular session following the 2006 election, while this case was pending before the Second District Court of Appeal, the Florida Legislature substantially amended the Florida Election Code. Chief among the amendments was the addition of Section 101.56075, Florida Statutes, which requires all voting

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[1] On its webpage, SAFE describes itself this way:

> SAFE (Sarasota Alliance for Fair Elections), a nonpartisan political action committee, was formed in January, 2006, after twelve months of research, to call attention to [the] fact that our direct record electronic (DRE) touchscreen voting machines represent a huge risk to the voting process in Sarasota County, as we see from problems that have already occurred in other Florida counties and in other states. We are calling upon our elected officials to correct this situation before our votes are similarly endangered.

to take place on paper ballots beginning July 1, 2008.[2] The amendment essentially mooted the central purpose of the Charter Amendment, which was to eliminate the use of touchscreen machines. To be sure, the challenged Charter Amendment has other provisions, but its primary goal was to ensure that all electors' votes were captured on a paper record. Indeed, SAFE itself characterized the purpose of the Amendment as "the adoption of a voter verified paper ballot system in Sarasota County." (SAFE DCA Ans. Br. at 35.) The Legislature has already accomplished this goal; there is nothing left for SAFE to achieve on that front.

The Amendment's other provisions, including those regarding mandatory recounts and unique certification procedures, remain at issue. As the District Court correctly concluded, these provisions are preempted by and conflict with the Florida Election Code. Accordingly, they are invalid. But they are also ancillary. These provisions are unlike the issue of mandating paper ballots, which was the

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See SAFE Mission, *available at* http://www.safevote.org/html/mission.html.

[2] This new statute requires that "all voting shall be by marksense ballot." *Id.* "Marksense ballot" means "that printed sheet of paper, used in conjunction with an electronic or electromechanical vote tabulation voting system, containing the names of candidates, or a statement of proposed constitutional amendments or other questions or propositions submitted to the electorate at any election, on which sheet of paper an elector casts his or her vote." § 97.021(3)(a), Fla. Stat. (2007). A limited exception to this new paper ballot requirement exists for persons with disabilities, who may vote using an electronic device that is consistent with the federal Help America Vote Act of 2002, including touchscreen devices. *Id.* § 101.56075(2). By 2012, persons with disabilities must be provided an interface that allows them to cast their votes on marksense ballots. *Id.* § 101.56075(3).

subject of vigorous public debate and recent legislative action. Instead, the validity of these remaining mechanisms has been adequately resolved and requires no additional scrutiny. Therefore, what remains of this case does not rise to the level of great public importance to which this Court's jurisdiction is reserved under Article V, Section 3(b)(4) of the Florida Constitution.[3]

Notwithstanding the District Court's certification, this Court should decline to exercise its discretionary jurisdiction in this case. Although the primary issues involved in this case were once of great public importance, the Legislature's resolution of the paper ballot issue has made that no longer so.[4] *Cf. McGee v. State, Fla. Dep't of Corr.*, 935 So. 2d 62, 64 (Fla. 1st DCA 2006) (citing limited judicial resources and declining to certify question).

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[3] SAFE contends that the Amendment's "audit" provisions are merely spot-audits to ensure accuracy of the equipment for future use and not to affect election outcomes. (SAFE Br. at 23.) In reality, the Amendment's "audit" provisions amount to recounts, the conduct of which is specifically addressed by the Florida Election Code. *See* Section III(B)*, infra*. But to the extent SAFE's argument has merit, the Amendment's "audit" provisions—like its paper-trail requirement—are essentially mooted by the Election Code's recent amendment, which includes provisions for uniform, statewide post-certification audits. *See* Ch. 2007-30, §§ 8-9, Laws of Fla.; *see also* Section III(B), *infra*.

[4] SAFE's brief does not suggest otherwise. SAFE makes no effort to explain why the remaining issues are of such great importance that this Court should exercise its jurisdiction. Although jurisdictional briefs are not permitted, "the parties in cases involving certified questions of great public importance should continue to discuss in their merits briefs why the certified question is of great public importance." *In re Amendments to the Fla. Rules of Appellate Procedure*, 941 So. 2d 352, 352-53 (Fla. 2006). In this case, they are not.

II. THE CHARTER AMENDMENT IS PREEMPTED BY THE FLORIDA ELECTION CODE, WHICH FULLY OCCUPIES THE AREA OF ELECTION REGULATION.

Sarasota County enjoys home-rule legislative authority. Article VIII, Section 1(g) of the Florida Constitution provides in pertinent part that "[c]ounties 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." This Court has broadly interpreted the powers granted to charter counties under this provision. *State v. Broward County*, 468 So. 2d 965, 969 (Fla. 1985). But this authority is not without limits, and a local government may not legislate in an area that has been preempted by the Florida Legislature. *Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989). But that is precisely what the Charter Amendment would have Sarasota County do. And that is precisely why the Charter Amendment is invalid.

When intending to preempt local regulation, the Legislature may use express language. *See, e.g.*, § 24.122(3), Fla. Stat. (2007) ("All matters relating to the operation of the state lottery are preempted to the state, and no county, municipality, or other political subdivision of the state shall enact any ordinance relating to the operation of the lottery authorized by this act."). But with or without such express language, it is the Legislature's intent that controls. "[P]reemption need not be explicit so long as it is clear that the legislature has

clearly preempted local regulation of the subject." *Barragan*, 545 So. 2d at 254 Preemption exists where "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996)[5]; *accord Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96, 101 (Fla. 1st DCA 1994) ("Implied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field, creating a danger of conflict between local and state laws."). The primary questions in this case, then, are (i) whether the Florida Election Code is sufficiently pervasive to demonstrate preemptive intent, and (ii) whether considerations of public policy support a need for uniformity in

[5] Although SAFE accurately notes this standard, it also states that "[g]iven that the constitution prohibits only inconsistent home rule laws, it is debatable whether the doctrine of implied preemption should be applied to laws of home rule counties." (SAFE Init. Br. at 11.) Rather than cite specific authority for this statement, SAFE cites a case that *does* apply the implied preemption doctrine to a charter county. *See Lowe v. Broward Co.*, 766 So. 2d 1199, 1211 (Fla. 4th DCA 2000) (finding that statutory scheme impliedly preempts the area concerning marital relationships, but concluding that domestic partnership ordinance does not implicate that area). Charter counties—like all other local governments—may not legislate in a manner inconsistent with general law. Art. VIII, § 1(g), Fla. Const. Regulating in areas either expressly or impliedly preempted by the Florida Legislature, of course, is inconsistent with general law. *See The Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984) ("We base our decision on the fundamental principle that a municipality may not act in an area preempted by the legislature.").

Florida's election regulation. The District Court correctly answered both questions in the affirmative.

A. The Florida Election Code's Pervasive Statutory Scheme Occupies the Entire Area of Election Regulation.

1. The Florida Election Code is Complex, Thorough, and Designed to Promote Uniformity.

The comprehensive Florida Election Code and its emphasis on uniformity clearly demonstrate that the Legislature intended to preempt the area of election regulation except in the limited circumstances in which it expressly provides for local authority. The Election Code comprises ten chapters, authorizes substantial rulemaking by the Secretary, and provides comprehensive regulation for virtually every component of the election process. It controls voter eligibility and registration, including a new requirement for a uniform statewide voter registration system. §§ 97.041, 97.052, 97.053, Fla. Stat. (2007). It establishes the process for election of the supervisors of elections, and it provides for their compensation, responsibilities, and duties. *Id.* § 98.015. It designates the Secretary as the chief election officer of the state and outlines his duties. *Id.* § 97.012. It sets rules for candidate eligibility and qualification. *Id.* §§ 99.012, 99.061. And it includes comprehensive regulation of campaign financing and expenditures. *Id.* §§ 106.011-106.36. It even provides enforcement provisions, including criminal and civil penalties for Election Code violations. *Id.* §§ 104.011-104.43.

Most importantly, the Election Code extensively and pervasively regulates the *conduct* of elections, including voting, canvassing of votes, recounts, audits, and certification—all of the areas purportedly regulated by the Charter Amendment. State law dictates the dates for general elections, *id.* § 100.031, what times the polls are open, *id.* § 100.011(1), and how local officials must arrange their ballots, *id.* § 101.151. The Election Code tasks the Department of State with establishing security and other guidelines for the implementation of voting equipment, *id*. § 101.015, and it establishes within the Division of Elections a Bureau of Voting Systems Certification, *id*. § 101.017. It dictates when recounts are required and when they are not. *Id.* §§ 102.141(7); 102.166. It provides uniform procedures for post-election audits of voting systems. *Id.* § 101.591; Ch. 2007-30, §§ 8-9, Laws of Fla. And it establishes detailed procedures for the canvassing and certification of election results. *Id.* §§ 102.071; 102.131; 102.141; 102.151.[6]

The Florida Election Code amounts to a substantial, detailed, and comprehensive set of election regulations, designed to promote uniformity in the elections process. *See Palm Beach County Canvassing Bd. v. Harris,* 772 So. 2d

[6] The District Court's opinion includes a detailed examination of the Florida Election Code and its various components. *Browning*, 968 So. 2d at 643-44. Based on the Code's pervasive nature, the Court found it "[s]urprising[that] the Election Code does not contain explicit language setting forth express preemption." *Id.* at 9. It concluded instead that implied preemption existed.

1273, 1282 (Fla. 2000) ("[T]he Florida Legislature in 1951 enacted the Florida Election Code, contained in chapters 97-106, Florida Statutes (2000), which sets forth *uniform criteria* regulating elections in this state . . . .") (emphasis added). And where the Election Code does not reach, the substantial body of rules promulgated by the Secretary under specific statutory authority does. *See* Fla. Admin. Code R. 1S-2.0001-1S-2.038; *see also Browning*, 968 So. 2d at 644 ("[P]ursuant to section 97.012(1), which grants the Secretary of State authority to 'adopt by rule uniform standards for the proper and equitable interpretation and implementation' of the Election Code, the Department of State has adopted thirty-five rules related to the conduct of elections.").[7]

The State's comprehensive regulation is entirely consistent with its constitutional mandate to regulate the election process. The Florida Constitution states that "elections shall . . . be regulated by law." Art. VI, § 1, Fla. Const.

[7] SAFE's suggestion that the District Court was "distracted" by the length of the Florida Election Code is, itself, merely a distraction. (SAFE Init. Br. at 13-14.) The District Court correctly noted that "[t]he Election Code's ten chapters and 125 pages extensively regulate the conduct of elections." *Browning*, 968 So. 2d at 643. But the Court did not base its decision on the Election Code's length. Rather, it observed the Code's "pervasive regulatory scheme and the public policy mandate for uniformity." *Id.* at 646. Regardless, the Election Code's length is consistent with its complexity and pervasiveness. The District Court also explained that the Code's length provided an obvious distinction from *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005), on which SAFE relied. The statute in that case regulates the sale of fireworks, is only three pages long, and does not represent a pervasive statutory scheme. *Id.* at 1020.

"Under this provision, the Legislature is directed to enact laws regulating the election process." *AFL–CIO v. Hood*, 885 So. 2d 373, 375 (Fla. 2004); *see also Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st DCA 1992) (under the Constitution, "as provided by law" means as passed "by an act of the legislature"). Furthermore, the Legislature's comprehensive regulation is consistent with its stated goal of uniformity. The Legislature designated the Secretary as the chief election officer of the state, making it his responsibility to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." § 97.012(1), Fla. Stat. (2007). This legislative goal of uniformity, coupled with the exhaustive and overarching regulatory scheme, demonstrates that the Legislature has completely occupied the area of election administration and did not intend to invite additional local regulation, except in the limited areas in which it is expressly permitted.[8]

[8] The pervasive nature of comprehensive state election codes has been recognized in other states as well. *See, e.g., County Council for Montgomery County v. Montgomery Association, Inc.*, 333 A.2d 596, 602 (Md. App. 1975) ("This pervasive state administrative control of the election process, on both the statewide and local levels, is a compelling indication that the General Assembly did not intend that local governments should enact election laws, but rather intended that the conduct and regulation of elections be strictly a state function."); *Steinkamp v. Teglia*, 210 Cal. App. 3d 402, 404 (Cal. App. 1989) (finding preemption of local regulation on candidate eligibility because "[n]umerous Government Code provisions also affect eligibility for local offices").

2. The Florida Election Code Allows for Local Regulation Only In the Limited Areas in Which It Specifically Grants Authority.

The legislative intent to preempt the area of election regulation is further illustrated by the Legislature's express grant of authority to local governments in very limited areas. For example, local officials are responsible for hiring and training poll workers and other employees. § 102.014(1), Fla. Stat. (2007). But the training procedures are established and maintained by the Secretary. *Id*. The Election Code also expressly tasks local officials with creating and assigning local precincts—an inherently local matter. *Id*. § 101.001(1) And it grants the supervisors of elections authority to draft procedures to ensure accuracy and security in their respective counties based on their local needs, but subjects these procedures to the Secretary's review. § 101.015(4)(b-c), Fla. Stat. (2007). Notwithstanding these very specific grants of authority to local officials—all of which contemplate the unique needs and circumstances of Florida's sixty-seven counties—the Legislature has granted *no* authority for counties to regulate in the critical and sensitive areas of counting or casting votes, auditing or recounting ballots, and certifying results. These areas are not dependent on local conditions; they demand statewide uniformity.

As support for its argument against preemption, SAFE points to the fact that at the time this litigation began, the Election Code granted counties the authority to

select their own voting equipment, including touchscreen equipment. (SAFE Init. Br. at 15.)[9] Hardly supporting SAFE's argument, this fact clearly demonstrates preemption. If there were no preemption of local election regulation, the Legislature would have had no need to expressly provide that "[t]he board of county commissioners of any county . . . may, upon consultation with the supervisor of elections, adopt, purchase, or otherwise procure, and provide for the use of" approved voting systems. § 101.5604, Fla. Stat. (2007). If there were no preemption, this express grant of authority would be meaningless. *Cf. Johnson v. Feder*, 485 So. 2d 409, 412 (Fla. 1986) ("To interpret the statute as respondent urges would make meaningless much of the content of both statute and rule."). Indeed, the statute does not expressly state that counties "may not" select *unapproved* voting systems, but application of the Election Code (and common sense) rejects a conclusion that they may. The logical, correct conclusion is that the Florida Election Code, by granting specific, limited, authority to local governments, reserved to itself all other regulation of the election process. This conclusion finds support not only through an examination of the Election Code itself, but also in the public policy considerations supporting it.

[9] The Legislature still expressly grants local authorities the ability to select the particular equipment used, but it has since restricted the use of touchscreen systems. *See* Section III(A), *infra*.

B. Florida's Public Policy Demands Uniformity in the Conduct of Elections.

Florida's public policy counsels against a regime allowing sixty-seven differing sets of election regulations. Instead, it demands uniformity throughout all Florida counties. This imperative was best highlighted by the disputed 2000 Presidential election, which gave way to thirty-six days of extraordinary national uncertainty. As an anxious nation looked on, courts throughout Florida considered various challenges to the manner in which votes were cast, counted, and recounted. *See, e.g.*, *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000); *Fladell v. Labarga*, 775 So. 2d 987 (Fla. 4th DCA 2000); *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000); *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000); *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000).

In the wake of those unprecedented events, Congress and the Florida Legislature, recognizing the critical need for increased uniformity in the election process, reacted quickly. Florida substantially revised its Election Code (more than once), and Congress enacted new and complex election legislation. The purpose of these revisions was to provide additional uniform standards applicable to elections. For example, the Help America Vote Act ("HAVA"), enacted by Congress after the 2000 election, provides that "[e]ach State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will

be counted as a vote for each category of voting system used in the States." 42 U.S.C. § 15481(a)(6). HAVA also dictates a single, uniform, statewide registration database to promote uniformity in voter registration. *Id.* § 15483(a).

For its part, Florida passed the Florida Election Reform Act of 2001, Ch. 2001-40, Laws of Fla., which, among other things, established uniform procedures for poll-worker training, uniform procedures regarding manual recounts, and uniform procedures regarding the certification of election results. *Id.* §§ 41, 42, 64 (amending or creating §§ 102.141, 102.166, 102.014, Fla. Stat., respectively). It also added new standards for certification of voting systems. *Id.* § 6 (creating § 101.015, Fla. Stat.). Two sessions later, the Legislature enacted additional substantial reforms, including the implementation of a statewide on-line voter registration database. Ch. 2003-415, § 9, Laws of Fla. Further comprehensive reforms, in part to implement HAVA, followed in 2005, *see* Ch. 2005-278, Laws of Fla., and in 2007, *see* Ch. 2007-30, Laws of Fla.

At every turn, the Legislature has taken steps to promote the needed uniformity in election regulation. As the District Court explained:

> Strong public policy reasons exist for finding preemption in the field of election laws, given past history and the potential statewide and nationwide consequences of voting, counting, recounting, certification, and canvassing of votes. It is difficult to imagine an area with stronger public policy reasons for finding preemption. The regulation of voting cannot be given unequal application in different parts of the state. Allowing local governments to draft their own laws regarding the conduct of elections; the counting, recounting, or

> auditing of votes; or the certification of elections would contradict the Election Code's stated goal of obtaining and maintaining "uniformity in the interpretation and implementation of the election laws." § 97.012(1). Moreover, if the SAFE amendment were upheld, a dual system of regulating the counting, recounting, auditing, and certifying of votes would exist in Sarasota County. Such a two-tiered process would invite chaos and confusion. The chaos and confusion would be compounded if other counties enacted their own local laws relating to the counting, recounting, auditing, and canvassing of votes. Thus, the need for uniformity in the application and implementation of election laws cannot be overemphasized.

Browning, 968 So. 2d at 647.

Unlike the cases cited by SAFE, *this* case presents substantial public policy considerations supporting a finding of implied preemption. In *Tallahassee Memorial Regional Medical Center v. Tallahassee Medical Center*, 681 So. 2d 826 (Fla. 1st DCA 1996), the court rejected the argument that a local regulation regarding ambulance fees was preempted. *Id.* at 831-32. In doing so, it specifically noted that "there is no public policy reason for precluding the county from subsidizing [ambulance services] through an equitable fee; to the contrary, the subsidization of this required service would appear to be a public necessity." *Id.* at 832. In *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1020 (Fla. 2d DCA 2005), which dealt with local regulation of fireworks, the court similarly found "no strong public policy reason that would prevent a local government from enacting ordinances in this area so long as they do not directly conflict with the provisions of [the fireworks statute]." And in *Hillsborough*

County v. Florida Restaurant Association, 603 So. 2d 587 (Fla. 2d DCA 1992), a local ordinance required establishments to post signs warning of the risks of consuming alcohol. *Id.* at 588. Plaintiffs claimed that Florida's statute regulating the manufacturing, distribution, and sale of alcohol impliedly preempted this notice requirement. The court concluded that since the notice requirement was "founded on a public health concern about alcohol consumption in certain circumstances, it has not been impliedly preempted by the state's interest in the conduct, management and operation of the manufacturing, packaging, distributing and selling aspects of alcohol." *Id.* at 590. None of these cases presented the substantial public policy concerns and the need for uniformity that exist with election regulation. Indeed, there are few areas of law requiring the level of uniformity that the Election Code demands.

C. The Charter Amendment Threatens the State's Interest in Uniformity.

In the face of the legislative mandate for greater uniformity and certainty, SAFE sponsored the Charter Amendment, which establishes separate—and conflicting—election standards for Sarasota County, paving the way for a return to the disparate election procedures that were so disruptive in the 2000 election. Those disparate procedures ultimately resulted in intervention of the United States Supreme Court, which held that the lack of uniform rules "led to unequal evaluation of ballots in various respects." *Bush v. Gore*, 531 U.S. 98, 106 (2000).

As the District Court explained, the Charter Amendment will lead to chaos and confusion if allowed to stand. *Browning*, 968 So. 2d at 647.

Because the Amendment ventures into areas completely occupied by the Florida Legislature, and because it conflicts with the established public policy of the State, it is preempted and invalid. But even absent implied preemption, the Amendment is invalid because it expressly conflicts with various provisions of Florida law.

III. THE CHARTER AMENDMENT IS INVALID BECAUSE ITS PROVISIONS CONFLICT WITH THE FLORIDA ELECTION CODE.

Because the Florida Election Code preempts all areas in which the Amendment purports to regulate, no consideration of conflict preemption is necessary.[10] But even if it were not impliedly preempted, the Charter Amendment would nonetheless be invalid. It is well established that no local regulation may specifically conflict with a state statute. *See, e.g., City of Casselberry v. Orange County Police Benevolent Ass'n*, 482 So. 2d 336, 340 (Fla. 1986). "Although legislation may be concurrent, enacted by both state and local governments in areas

[10] The District Court did not certify the question of conflict preemption—only field preemption. *Browning*, 968 So. 2d at 654. The Secretary is mindful that this does not limit the Court's discretionary jurisdiction under Article V, Section 3(b) of the Florida Constitution. *See Tillman v. State*, 471 So. 2d 32, 34 (Fla. 1985). But it is nonetheless noteworthy that the District Court's certification was limited.

not preempted by the state, concurrent legislation by municipalities may not conflict with state law. If conflict arises, state law prevails." *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1147 (Fla. 2d DCA 2006) (quoting *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs of the City of W. Palm Beach*, 448 So. 2d 1212, 1214-15 (Fla. 4th DCA 1984)). Therefore, even if this Court concludes that the Election Code does not completely preempt the regulation of elections, the Charter Amendment is nevertheless invalid to the extent it conflicts with the Election Code.

A. Section 6.2A of the Charter Amendment Conflicts With Current State Law By Prohibiting the Use of Voting Machines Approved By Law.

Under the Charter Amendment, "[n]o voting system shall be used in Sarasota County that does not provide a voter verified paper ballot." (Amendment § 6.2A(1).) In stark contrast, the Election Code authorizes "[t]he board of county commissioners of any county . . . , upon consultation with the supervisor of elections, [to] adopt, purchase or otherwise procure, and provide for the use of *any* electronic or electromechanical voting system approved by the Department."[11] § 101.5604, Fla. Stat. (2007) (emphasis added).

[11] As defined in the statute, the term "Electronic or electromechanical voting system" includes touchscreen systems. § 101.5603(4), Fla. Stat. (2007).

As discussed in the opening section of this brief, the Legislature recently turned the Charter's one-time fundamental purpose into a nullity. At the time this litigation commenced—and during the time SAFE advocated for paper ballots—Sarasota County employed touchscreen voting machines. At that time, the Legislature perceived potential benefits in employing different types of voting systems in different counties, and it allowed county commissions to select touchscreen voting systems if they (after consultation with the supervisor of elections) so chose. *Id.*; *see also Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) ("Indeed, 'local variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.'") (quoting *Bush v. Gore*, 531 U.S. 98, 134 (2000) (Souter, J., dissenting)) (alterations in original), *cert. denied*, 127 S. Ct. 934 (2007).

Last session, the Florida Legislature modified the Election Code to require the use of paper ballots for nearly all voters, effective July 1, 2008. § 101.56075(1), Fla. Stat. (2007). Following this legislative modification, Section 6.2A of the Charter Amendment serves little purpose. Nonetheless, a conflict remains between it and the Election Code. Even after July 1, 2008, the Election Code will continue to permit the use of paperless touchscreen machines for voters with disabilities. *Id.* § 101.56075(2). This leaves an obvious, direct conflict. The Charter Amendment prohibits what the statute specifically authorizes—the use of

touchscreen systems without a "voter verified paper ballot." The statute authorizes the use of *any* approved electronic equipment, and the Department has approved electronic equipment that does not include a voter verified paper ballot—including the equipment purchased by the Sarasota County Board of County Commissioners and formerly employed by the Sarasota County Supervisor of Elections. (R. I—183-85, 88; R. III—156-57.)[12] Under the Florida Election Code, the Board could elect to use this equipment for voters with disabilities; under the Charter Amendment, it may not. This conflict invalidates Section 6.2A of the Amendment.

[12] The Sarasota County Board of Commissioners remains free to select any voting equipment approved by the Secretary. But that decision is expressly granted to the Board, and the Board's authority may not be restricted by the Charter Amendment. Had the Legislature intended to allow county charters or initiative petitions to control this decision-making process, it could have said that a "county" may select equipment. This broader language could arguably permit the equipment selection by the county commissioners or another means, such as by referendum. Instead, it said that "[t]he board of county commissioners of any county . . . upon consultation with the supervisor of elections" may do so. In *Board of County Commissioners of Dade County v. Wilson*, 386 So. 2d 556 (Fla. 1980), this Court invalidated a proposed citizen referendum prior to its election. *Id.* at 560. In that case, a Dade County citizen promoted an initiative setting the county's millage rates. *Id.* at 558. The Court concluded that the initiative's enactment would have provided a direct conflict between state law and local regulation. *Id.* at 560. The relevant statute provided that "[t]he [millage] rates are to be set . . . *by the governing body of the county*," not by initiative petition. *Id.* (quoting § 200.191, Fla. Stat. (1980)). Because the initiative petition, if passed, would have set the millage rate outside of this statutory process, the proposal was unconstitutional. *Id.* at 561; *see also Ellis v. Burk*, 866 So. 2d 1236 (Fla. 5th DCA 2004). The same is true here.

B. Section 6.2B of the Charter Amendment Conflicts With State Law by Mandating Conflicting Procedures for Counting and Recounting Votes.

The Charter Amendment includes numerous specific procedures for counting and recounting votes. These counting procedures—which would apply only in Sarasota County—conflict directly with Florida law. The Election Code declares the procedures for counting votes, and "no vote shall be received or counted in any election, except as prescribed by [the Election] code." § 101.041, Fla. Stat. (2007). It does so, moreover, pursuant to a federal mandate of uniformity in the tabulation of votes. *See* 42 U.S.C. § 15481(a)(6) (directing states to "adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote"). Sarasota County may not establish its own procedure for counting votes.

The Election Code provides for a two-stage recount procedure—but only in certain close elections. If the margin of victory is no greater than one-half of one percent, the Election Code requires a machine recount. *Id.* § 102.141(7)(a). This first recount need not occur if the losing candidate requests that it not go forward. *Id.* § 102.141(7). If there is a machine recount, and if the results of that machine recount indicate a margin of victory of one-quarter of one percent or less, officials conduct a manual recount of all overvotes and undervotes. *Id.* § 102.166.

The recount procedures in the Election Code conflict with the Amendment in several ways. The Amendment requires a "mandatory" recount in every election for a portion of all votes, regardless of the outcome of the election. (Amendment § 6.2B.) The Election Code, on the other hand, authorizes recounts only in elections with razor-thin margins. *Id.* § 102.141(6). Furthermore, contrary to the Amendment, the Election Code prohibits manual recounts "if the number of overvotes, undervotes, and provisional ballots is fewer than the number of votes needed to change the outcome of the election." *Id.* § 102.166(1). SAFE contends that these distinctions are not conflicts, but merely supplements to state law. But Florida law must specifically authorize any recount because, as stated above, "no vote shall be received or counted in any election, except as prescribed by this code." *Id.* § 101.041; *see also id.* § 102.166(1) (manual recount "may not be ordered" if overvotes, undervotes, and provisional ballots are insufficient in number to change election outcome).

The Amendment also conflicts with Florida law regarding who conducts the recounts. The Election Code specifically assigns this sensitive task to accountable election officials, *id.* § 102.141(7)(a-b), but the Amendment *prohibits* election officials from participating. It states that all recounts "shall be conducted . . . by a reputable, independent and nonpartisan auditing firm." (Amendment § 6.2B.)

Like the other provisions, this directly conflicts with state law and is therefore invalid.

SAFE attempts to evade these obvious conflicts by characterizing the "mandatory audits" as something other than recounts. This purported distinction overlooks both the language of the Amendment and its clear purpose. All "audits" required by the Amendment must take place before certification. Indeed, "[n]o election shall be certified until the mandatory audits are complete and any cause for concern about the accuracy of the results has been resolved." (Amendment § 6.2C.) The pre-certification nature of the "audits" distinguishes them from the audits already provided for by the Election Code. Section 101.591, Florida Statutes, authorizes the Legislature to "provide for an independent audit of the voting system in any county." But unlike the "audits" required by the Amendment, the audits authorized under Section 101.591 are not a component of determining election results—they serve to provide an additional layer of scrutiny *after* an election to avoid problems in future elections.[13] Reports under that section are not due until thirty days after completion of the audit—long after election results are certified. *See* § 101.591(1), Fla. Stat. (2007).

[13] SAFE contends that the "limited audits are not official vote counts or recounts and in no way determine the outcome of any race." (SAFE Init. Br. at 23.) This suggestion, though, is belied by the fact that the Amendment conditions certification of election results on successful resolution of the "mandatory audits."

Effective July 1, 2008, Section 101.591 is amended to include additional, mandatory, post-certification audits, which will likewise conflict with the Amendment's provisions. Under the new provisions, local officials must conduct a manual audit of the voting systems used in randomly selected precincts. Ch. 2007-30, § 8, Laws of Fla. Like the Election Code's existing audit provisions, these new provisions provide *post-certification* audits and therefore do not interfere with (or delay) certification. *Id*. They provide for a manual tally of votes cast in one randomly selected race. *Id.* Within fifteen days of the audit's completion, local officials must provide a written report to the Secretary detailing the audit, describing any problems, and recommending "corrective action with respect to avoiding or mitigating such circumstances in future elections." *Id.*[14] In addition, the new provision will grant the Secretary—not the counties—the authority to promulgate rules to implement the new audit responsibility. *Id.* § 9. And not

[14] Even if the Amendment's pre-certification "mandatory audits" do not constitute recounts, they are nonetheless invalid because they conflict with the Election Code's new audit provisions in several ways. In addition to the pre-certification versus post-certification conflict, the Election Code's audit requires examination of just one randomly selected race; the Amendment calls for a recount of a percentage of *all* ballots. The percentage of ballots to be examined also conflicts; the Election Code specifies a maximum of two percent, but the Amendment calls for a *minimum* of five percent—and 100% in certain circumstances. Another conflict exists as to who performs the audit—the Election Code tasks local officials, and the Amendment requires a private concern. *Compare* Ch. 2007-30, § 8, Laws of Fla. *with* Amendment § 6.2B&C.

surprisingly, detailed audit procedures implemented under the Secretary's rulemaking authority "shall be uniform to the extent practicable." *Id*.

C. The Charter Amendment Conflicts With State Law by Defining "Ballot" in a Conflicting Manner.

Along with its requirement that electronic voting systems provide a voter-verified paper ballot, the Amendment states that "no electronic record shall be deemed a ballot." This directly conflicts with the Electronic Voting Systems Act, under which a "ballot" is "the card, tape, or other vehicle upon which the elector's choices are recorded." § 101.5603(2), Fla. Stat. (2007); *see also id.* § 97.021(3) (when used in reference to electronic voting systems, "ballot" means "a ballot that is voted by the process of electronically designating, including by touchscreen, or marking with a marking device for tabulation by automatic tabulating equipment or data processing equipment."). Although beginning later this year, Florida will require paper ballots in nearly all circumstances, touchscreen voting will still be permitted for voters with disabilities. *Id.* § 101.56075(2).

Thus, the Election Code expressly authorizes electronic records to be considered ballots, which the Amendment prohibits. As explained above, the Secretary has a responsibility to ensure uniform interpretation of the election laws. *Id.* § 97.012(1). And if local governments and interest groups are invited to define essential election terms such as "ballot" differently, that uniformity will be impossible to maintain. Furthermore, by restricting the definition of "ballot" in

conflict with state law, more than mere definitions would be affected. It is clear that a local government may not enact legislation in direct conflict with state law. And the Amendment's prohibition against treating electronic records as ballots directly conflicts with the Election Code.

D. The Charter Amendment Conflicts With State Law by Authorizing Outside Agents to Handle Ballots.

The Election Code states that "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." § 101.572, Fla. Stat. (2007).[15] But the Amendment requires an unaccountable "independent and non-partisan auditing firm" to conduct a hand recount of ballots in every election. (Amendment § 6.2B.) Thus, the Amendment authorizes (and indeed requires) what the Election Code prohibits. SAFE suggests that the audit could take place even without the auditors physically handling the ballots. (SAFE Init. Br. at 26.) But in addition to defeating the purpose of the Amendment's provision—which was to ensure that the audits were "conducted" by an "independent" firm—common sense informs that the

[15] SAFE suggests that this provision might only apply to "public inspections" described in § 101.572, Fla. Stat. (2007). (SAFE Init. Br. at 25.) But the statute is entirely unambiguous: "[N]o 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." *Id.* There are no limitations as to when this restriction is effective. And there is no reason to believe that the Legislature would have intended the restriction to be ineffective at the most critical time—before certification of results.

mandatory "hand counts" of the ballots require *handling* the ballots. The Amendment itself states that "ballots shall be counted by hand by the independent auditors." (Amendment § 6.2B.) An obvious conflict exists.

E. The Charter Amendment Conflicts With State Law by Delaying Certification Until After the "Mandatory Audits."

Under the Amendment, no election may be certified until the mandatory audits are completed by a private firm and until "any cause for concern about accuracy of results has been resolved." (Amendment § 6.2C.) This prohibition conflicts with several specific provisions of the Election Code that establish the procedures and timing for certification.

The mandatory audit provisions require that five percent of all provisional ballots must be recounted by the third day following the election. (Amendment § 6.2B.) But the Florida Election Code allows provisional voters until the second day following the election to provide evidence of their eligibility to vote. § 101.048(1), Fla. Stat. (2007).[16] Then, the county canvassing board must examine the provisional ballot certificate to determine whether the provisional ballot should be counted. *Id.* § 101.048(2). The Amendment's requirement that the provisional ballot recount take place no later than three days after the election cannot practically comport with the Election Code's timeline. The mandatory recount

[16] The Legislature recently amended this deadline, which was previously three days. § 101.048(1), Fla. Stat. (2006).

would take place during the same time as (and interfere with) the county's critical determination of the validity of provisional ballots.

The Amendment's audit provision also requires that five percent of overseas ballots be recounted within ten days of a general election, but within only twenty-four hours of a primary election. (Amendment § 6.2C.) Florida's election regulations require such ballots to be counted if they are received within ten days of an election, including a presidential preference primary. Fla. Admin. Code R. 1S-2.013(7). The Amendment also requires, in certain circumstances, a hand recount of *all* ballots. (Amendment § 6.2C.) This provision requires the county to recount *all* military and overseas ballots within ten days of a general election (the same deadline by which these ballots must be received) and five days after a primary election (five days *before* the deadline by these ballots must be received in a presidential preference primary). These provisions cannot coexist.

Finally, Section 102.112(2), Florida Statutes, requires returns to be filed within seven days of a primary election and within twelve days[17] of a general election. These returns "must contain a certification by the canvassing board." *Id.* § 102.112(1).[18] By postponing certification until after the Amendment's new (and

[17] Until January 1, 2008, this deadline was eleven days. § 102.112(2), Fla. Stat. (2006).

[18] SAFE incorrectly asserts that Section 102.112 is not applicable. (SAFE Init. Br. at 26) ("F.S. 102.112 (2007) discusses the filing of returns . . . Nothing in

ambiguous) criteria are satisfied, the Amendment introduces a substantial risk that Sarasota County voters will not have their votes counted at all. If election results are not certified and submitted to the Division of Elections within the statutory deadlines, "such returns shall be ignored." *Id.* § 102.112(3). Therefore, in addition to expressly conflicting with state law, the Charter Amendment's certification provisions jeopardize the value of Sarasota County votes by conditioning their validity on the promptness of a private auditing firm.

IV. THE SECRETARY'S INTERPRETATION OF THE FLORIDA ELECTION CODE IS ENTITLED TO DEFERENCE.

The issue of whether a local regulation is preempted by state law is a purely legal one, subject to *de novo* review. *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1241 (Fla. 2006).[19] Even so, the District Court appropriately considered the

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the Charter Amendment governs the filing of returns."). Section 102.112 establishes deadlines for returns, which follows certification. The Amendment, on the other hand, sets forth mandatory delays for certification, which could lead to conflict with the statutory deadlines.

[19] For this reason, the various facts and testimony cited by SAFE have no bearing on this case. For example, Supervisor Sancho's and Supervisor Dent's testimony regarding their interpretation of the Charter Amendment—cited by SAFE—is immaterial, (SAFE Init. Br. at 2-3), as is the letter from Former Secretary Cobb to Supervisor Sancho, also referenced by SAFE, *id.* at 3. Nonetheless it bears pointing out that—contrary to SAFE's argument—the letter is entirely consistent with the Secretary's position. The letter related to a dispute with Supervisor Sancho regarding Leon County's selection of a certified voting system. (R. I-154). The letter did not address the counting, recounting, or certification of votes—it dealt only with the selection of equipment. That

Secretary's interpretation of the election laws at issue. "[T]he judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law." *Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 844-45 (Fla. 1993); *accord Cobb v. Thurman*, 957 So. 2d 638, 643 (1st DCA 2006) ("Recognizing the unique nature of the election process, Florida courts have traditionally shown deference to the judgment of election officials."). As the court below explained, "[i]f election laws are to be uniformly applied throughout the State, the Secretary's position regarding local efforts to intervene in election laws must be considered." *Browning*, 968 So. 2d at 649.

CONCLUSION

This Court should decline to answer the certified question, which is no longer one of great public importance. Alternatively, this Court should affirm on the merits. The Florida Legislature, through extensive regulation of the election process, established the statewide uniformity of election laws necessary to protect the electorate and the elective process. The Amendment to the Sarasota County Charter would destroy that uniformity by imposing new and conflicting requirements that apply only in Sarasota County. The Amendment would regulate

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responsibility is expressly vested in local officials, subject to express limitations. § 101.5604, Fla. Stat. (2007).

in areas fully occupied by the Florida Legislature, and it is therefore preempted by state law. But even without the bar of field preemption, the Amendment is invalid. Substantially every provision of the Amendment directly conflicts with state law, and a county may not legislate in a manner inconsistent with state law.

For these reasons, this Court should affirm the decision of the District Court.

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I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

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