SUPREME COURT OF FLORIDA

Case No. SC07-2074
DCA Case No. 2D060-4339

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

Petitioners,

vs.

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

Respondents.

_____/

ANSWER BRIEF OF RESPONDENT KATHY DENT, AS SUPERVISOR OF ELECTIONS FOR SARASOTA COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

In the appeal and brief, Respondent, Kathy Dent, Supervisor of Elections of Sarasota County, Florida, will be referred to as "Supervisor Dent". Respondent, Kurt S. Browning, Secretary of State of the State of Florida, will be referred to as "Secretary Browning." Respondent, Board of County Commissioners of Sarasota County, Florida, will be referred to as the "Board." Petitioners Sarasota Alliance for Fair Elections, Kindra L. Muntz and Susette Bryan, will be referred to collectively as "SAFE." Reference to the record on appeal shall be followed by the volume number and page number(s), e.g. (R.I–25-26.)

This matter began with the filing of a Complaint for Declaratory Relief by the Sarasota County Board of County Commissioners (the "Board") on August 22, 2006. (R.I-1-9). That Complaint requested review of a proposed amendment to the Sarasota County Charter, submitted by a political action committee, the Sarasota Alliance for Fair Elections ("SAFE"). The Complaint named as Defendants, Kathy Dent as Supervisor of Elections of Sarasota County ("Supervisor Dent") and SAFE. The amendment proposed changes to the Sarasota County Charter to take effect on January 1, 2008, concerning the conduct of elections in Sarasota County. The Board was uncertain as to the constitutionality of the amendment and requested the trial court to make a determination concerning its constitutionality prior

to the amendment being placed before the electors in November 2006. (R.I-1-9).

On August 23, 2006, SAFE filed a Petition for Emergency Writ of Mandamus and Other Relief naming as Respondents, Sarasota County, Florida and Supervisor Dent. (R.I-30-31). The Petition for Emergency Writ of Mandamus sought the issuance of a writ of mandamus to require the Board and Supervisor Dent to place the amendment proposed by SAFE on the November 2006 general election ballot. (R.I-30-31).

On August 24, 2006, the Board moved for an Order consolidating the Complaint for Declaratory Relief and the Petition for Writ of Mandamus action. (R.I-10-12). On August 29, 2006, a hearing was held before the Honorable Robert B. Bennett, Jr., Circuit Judge, in Sarasota County, on Case Management and Status Conference; on the Board's Complaint for Declaratory Relief; and the Board's Motion to Consolidate. On August 29, 2006, the Circuit Court entered an Order granting the Motion to Consolidate the two cases filed in the Circuit Court. (R.I-30-31).

On August 29, 2006, SAFE filed an Answer to the Board's Complaint for Declaratory Relief. (R.I-32-35). On August 30, 2006, the Board also filed a Motion for Leave to Amend Complaint for Declaratory Judgment and an Amended Complaint for Declaratory Relief seeking to add as a Defendant to the case,

Florida Secretary of State Kurt Browning ("the Secretary") in his official capacity.[1] (R.I-36-49).

Defendant Supervisor Dent (Respondent in the Writ of Mandamus action), filed a Motion to Dismiss the Petition for Emergency Writ of Mandamus and Other Relief on September 1, 2006. (R.I-115-119). On September 1, 2006, Supervisor Dent filed an Answer to the Amended Complaint for Declaratory Relief. (R.I-120-123). Secretary Browning filed an Answer to the Amended Complaint for Declaratory Relief on September 5, 2006. (R.I-124-127).

On September 6, 2006, a hearing in the consolidated cases was held in Sarasota County, Florida. During the hearing on September 6, 2006, the trial court dismissed SAFE's Petition for Writ of Mandamus as to Supervisor Dent and on September 8, 2006, entered its Order granting Defendant Dent's Motion to Dismiss Petition for Emergency Writ of Mandamus and Other Relief. (R.I-166-168).

On September 13, 2006, the trial court issued a Final Judgment in this case. (R.I-169-176). The Final Judgment directed the Board to submit the proposed amendment to the Sarasota County Charter to the Sarasota County electorate, in

[1] At the time SAFE filed its Amended Complaint, Sue Cobb was the Florida Secretary of State. During the pendency of the appeal, Kurt Browning was named Florida Secretary of State. Accordingly, all references to the Secretary of State will be to Secretary Browning.

accordance with the requirements and provisions of Article VII of the Sarasota County Charter. (R.I-175).

The Circuit Court attached the proposed amendment as Appendix A to its Final Judgment. (R.I-176). Effective January 1, 2008, the proposed amendment would establish requirements applicable to all elections in Sarasota County. The proposed amendment has three sections: Section 6.2A Voter Verified Paper Ballot, 6.2B Mandatory Audits, and 6.2C Certification of Election Results. (R.I-176).

On September 25, 2006, Secretary Browning timely filed a Notice of Appeal in the Second District Court of Appeal in this matter appealing the Final Judgment entered September 13, 2006. (R.II-253-263). On September 27, 2006, Supervisor Dent filed a Notice of Joinder in Appeal.

The Second District Court of Appeal issued its Opinion determining that the Florida Election Code impliedly preempted the proposed Charter amendments. In addition, the Court found that the provisions contained in the Charter amendment conflicted with the provisions of the Florida Election Code to the extent that the amendments should not have been placed on the ballot. The Court concluded that the proposed Charter amendments were unconstitutional. Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007).

In addition to its holding, the Second District Court of Appeal certified the following question of being 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?

This Court accepted jurisdiction to review the certified question from the Second District Court of Appeal.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly concluded that the SAFE amendment is preempted by the Florida Election Code. Based upon the pervasive regulatory scheme adopted by the Legislature and the public policy reasons to preserve uniformity in elections throughout the State of Florida, local government regulation such as Sarasota's proposed amendments, are not authorized. Due to that preemption, the amendment is unconstitutional.

Further, the Second District Court of Appeal correctly concluded that the provisions of the proposed Charter amendments are in conflict with sections of the Florida Election Code and to that extent that they are impermissible and unconstitutional.

Based upon the foregoing, the decision of the Second District Court of Appeal is correct and the certified question should be answered in the affirmative.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL IS CORRECT THAT PROPOSED CHARTER AMENDMENTS DEALING WITH ELECTION PROCESSES AND PROCEDURES IS PREEMPTED BY THE FLORIDA ELECTION CODE, THAT THE PROPOSED CHARTER AMENDMENTS ARE UNCONSTITUTIONAL AND THUS THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The Court's standard of review in determining whether Florida law preempts the proposed Charter amendment is *de novo*. See City of Hollywood v. Mulligan, 934 So. 2d 1238 (Fla. 2006) (stating whether a municipal ordinance is preempted by state law "is a question of law subject to *de novo* review.")

A. Express Preemption

SAFE argues that the District Court was correct when it concluded that there was no express preemption. Initial Brief at 12. Supervisor Dent submits that this ignores the direct statement contained in Section 101.041, Florida Statutes, which states as follows:

> Secret Voting.—In all elections held on any subject which may be submitted to a vote, and for all or any state, county, district, or municipal officers, the voting shall be by secret, official ballot printed and distributed as provided by this code, and no vote shall be received or counted in any election, except as prescribed by this code.

(Emphasis supplied.) While the District Court did not view the statement contained in Section 101.041, Florida Statutes, to be

sufficient to meet the requirements established by the courts concerning express preemption and clear language stating such legislative intent, Supervisor Dent submits that the language is more than sufficient to meet that requirement. The legislative statement contained in that Section has been in existence and unchanged since 1977, before the Florida courts began to recently detail how they would extend their view of legislative decisions concerning express preemption. As such, Supervisor Dent submits that the language in Section 101.041, Florida Statutes, is more than sufficient to meet the requirements for express preemption set forth in cases such as Santa Rosa County v. Gulf Power, 635 So. 2d 96 (Fla. 1st DCA 1994) and Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).[2]

B. Implied Preemption

The Second District Court of Appeal is correct that the proposed Sarasota County Charter amendment dealing with the election processes and procedures is preempted by implication by the Florida Election Code. The District Court determined that the amendments to the Sarasota County Charter proposed by SAFE, while well intentioned, are preempted and that the amendments

[2] Article VI, § 1 of the Florida Constitution provides that "elections shall . . . be regulated by law." This constitutional provision expressly directs the Legislature to enact laws regulating the election process. See AFL-CIO v. Hood, 885 So. 2d 373, 375 (Fla. 2004). This constitutional provision is consistent with the notion that the Legislature, and not local governments, shall regulate elections in Florida.

are thus unconstitutional. In presenting the issue to this Court, the District Court stated:

> We commend SAFE for its efforts to uphold the integrity of the voting process and protect each individual's vote. Nevertheless, because of the pervasiveness of the Election Code, the important public policy of election law uniformity, and the statewide and potentially nationwide consequences of enactments relating to the canvassing of votes, preemption precludes the SAFE amendment from becoming effective. Accordingly, we hold that the SAFE amendment is unconstitutional. We believe that any efforts to modify or "fine-tune" Florida's election laws should be addressed through uniform, statewide legislation.

Browning, supra at 653-654.

As the Second District Court of Appeal found, the Florida Election Code is a pervasive regulatory scheme dealing with all methods by which candidates qualify, with the voting procedures to be employed, how elections are conducted and the results ascertained. See Chapters 99, 100, 101 and 102, Florida Statutes. This Court has recognized that the Florida Election Code establishes uniform criteria regulating elections in the State. See generally Palm Beach Canvassing Board v. Harris, 772 So. 2d 1273, 1282 (Fla. 2000). The District Court, in reaching the conclusion that implied preemption applies in this case and in reaching its decision, concluded:

> Our review of the provisions of the Election Code and the proposed SAFE amendment leads us to conclude that the Election Code impliedly preempts the SAFE amendment given the Election Codes pervasive regulatory scheme and public policy mandate for uniformity.

Browning, supra at 646. Therefore, pursuant to well-settled law, the District Court concluded that this matter was preempted by implication.

This Court has previously reached a similar decision in Tribune Co. v. Canella, 458 So. 2d 1075 (Fla. 1984), when it reviewed issues concerning the Florida Public Records Law and concluded that a municipality could not adopt ordinances in that area since it was preempted by the Florida Legislature. This Court stated:

> Under the preemption doctrine, a subject is preempted by a senior legislative body from the action by a junior body if the senior body's scheme of regulation of a subject is pervasive and if further regulation by the junior body would present danger of conflict with pervasive regulatory scheme.

Section 97.012, Florida Statutes, of the Florida Election Code, provides that one of the principal responsibilities of the Secretary of State is to obtain and maintain uniformity in the interpretation and implementation of the election laws. In Bush v. Gore, 536 U.S. 98 (2000), the United States Supreme Court made clear that the uniformity in the casting and counting of votes is essential to the conduct of constitutional elections processes. This Court acknowledges the critical importance of this concern in the Palm Beach Canvassing Board, supra.

SAFE's proposal to amend the Sarasota County Charter would result in the Sarasota County Charter having certain provisions dealing with voting equipment, procedures concerning the processing and counting of ballots, and time restraints on the

certification of election results. This intrusion on the pervasive regulatory scheme established by the Florida Legislature and its negative impact is easily demonstrated when it is realized that there are numerous multi-county elections in Sarasota County dealing with not only federal congressional races, but races involving the Florida Senate and the Florida House of Representatives. The result of the proposed amendments would have Sarasota County following certain procedures related to the processing and counting of ballots, that vary significantly from other counties in those multi-county races. For instance, Senate District 23 encompasses Charlotte, Manatee and Sarasota Counties, Senate District 21 encompasses Charlotte, DeSoto, Lee, Manatee and Sarasota Counties, House District 67 encompasses Sarasota, Manatee and Hillsborough Counties and House District 69 encompasses Manatee and Sarasota Counties. Clearly, the effort to obtain uniformity in the casting and counting of votes and the procedures undertaken by the Supervisors of Elections and County canvassing boards, would be negatively impacted by the charter amendment and the pervasive regulatory scheme and the public policy mandate for uniformity would be infringed upon.

Therefore, the Second District Court of Appeal was correct when it observed as follows:

> Strong public policy reasons exist for finding preemption in the filed 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. See Allied Vending, Inc., 631 A.2d at 77; County Council, 333 A.2d at 602. 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. See Allied Vending, Inc., 631 A.2d at 77. Thus, the need for uniformity in the application and implementation of election laws cannot be overemphasized.

Browning, supra at 647.

SAFE argues that the District Court became overwhelmed with the length of the Florida Election Code in reaching its conclusion and therefore reached an incorrect decision. The importance however, is not the length of the Florida Election Code, but the pervasiveness of the regulatory scheme as it relates to the topics addressed by the SAFE amendment. SAFE cite Citizens for Responsible Growth v. City of St. Pete Beach, 947 So. 2d 1144 (Fla. 2d DCA 2006), which involves Chapter 163, Florida Statutes, where the Court concluded that Chapter 163's 118 pages did not impliedly preempt the respective charter amendment. However, SAFE misinterpret the Court's decision in

Citizens for Responsible Growth, supra, because a reading of the provisions of Chapter 163, Florida Statutes, clearly indicates that Chapter 163 specifically allowed the proposed amendment to the St. Petersburg Charter. In this case, there is no language contained in the Florida Election Code which opens the door or allows for the Charter amendments that are proposed as was allowed for or existed in Citizens for Responsible Growth and Chapter 163, Florida Statutes.

SAFE herein argue that the Secretary of State, in March of 2006, in a letter to another Florida county stated as follows:

> We remind you that the conduct of elections is fundamentally a local responsibility. Although the Department of State is responsible for evaluating, testing and certifying voting systems that may be used in any election, the Department is not responsible for purchasing or otherwise selecting the voting system to be used by a local jurisdiction. That responsibility lies exclusively with the local board of county commissioners. . . Respectfully, Sue M. Cobb, Secretary of State.

(R.I-154.)

This letter supports the position of the District Court and its decision. Clearly, the Florida Statutes provide the duties of the Supervisors of Elections, the Canvassing Board and any other parties who are involved in carrying out those State responsibilities at the local level. Primarily responsible for those is the Supervisor of Elections in the respective county who is an elected, independent constitutional officer, with the statutory directives provided to manage and conduct elections in

that respective county. Therefore, the statement that elections are a local responsibility, merely points out that the Florida Election Code provides and defines all the duties of the responsible constitutional officer, the Canvassing Board, the County Commission or other parties specified in the Florida Election Code who are responsible for carrying out elections in the county. However, those responsibilities are directed by State statute and demonstrate the pervasive scheme to create uniformity throughout the counties in the State.

SAFE has interjected in its brief statements concerning alleged testimony of various individuals before the Legislature in the 2007 Legislative Session, which is not in the record and clearly is not relevant for consideration in the discussion in this case. Initial Brief at 19.

Finally, SAFE argues that the Charter amendment merely addresses areas that are traditionally under local control. In making this argument, SAFE fails to note any particular authorizations to counties to take charge of the elections in the county. The District Court, in Browning at 644, stated:

> Notably, no section of the Election Code grants counties authority to establish their own procedures regarding the counting, recounting and auditing of votes or for certification of elections.

Again, the Court observed in Browning at 647-648, as follows:

> Furthermore, the SAFE amendment attempts to regulate in an area where no local control has traditionally been allowed. Issues associated with counting, recounting,

> auditing, canvassing and certification of votes are not issues that affect different counties differently. Therefore, there is no public policy reasons for local governments to address voting issues differently in different parts of the State.

The Legislature has provided limited authority of that nature to municipalities in Section 100.3605, Florida Statutes, which allows for municipalities to make provisions in their charters on election matters that are not otherwise specified in the Election Code to apply to municipalities and which do not conflict with the Election Code. There is no such authorization provided to counties and, as such, SAFE's argument is totally unfounded.

The District Court of Appeal correctly observed the pervasive regulatory scheme adopted by the Legislature and the Florida Election Code, which clearly preempts the Charter amendments proposed by SAFE. Based upon that preemption, the Charter amendments are unconstitutional and the decision of the District Court should be affirmed.

II. THE SECOND DISTRICT COURT OF APPEAL IS CORRECT THAT THE PROVISIONS OF THE PROPOSED SARASOTA COUNTY CHARTER AMENDMENT CONFLICT WITH THE FLORIDA ELECTION CODE AND THAT THEY ARE INVALID.

The District Court of Appeal went to great length, even after determining that Charter amendments are preempted by the Florida Election Code, and examined the respective provisions of the Election Code related to the SAFE amendment. The Court correctly concluded that the SAFE amendment conflicts with the

Election Code to the extent that those amendments are invalid. SAFE's proposals herein basically deal with three subject areas; Section 6.2A Voter Verified Paper Ballot; 6.2B Mandatory Audits and 6.2C Certification of Election Results. (R. I-176.)

A. As the District Court correctly observed, the Provisions of Section 6.2A, which require a "Voter Verified Paper Ballot" directly conflict with the provisions of the Florida Election Code.

The provisions of the proposed Charter amendment in 6.2A(1) provide "no voting system shall be used in Sarasota that does not provide a voter verified paper ballot." This provision clearly conflicts with the statement in Section 101.5604, Florida Statutes (2007), which provides that the Board of County Commissioners, upon consultation with the Supervisors of Elections, may choose a voting system that is approved by the Department of State. Removing the authority of the Board of County Commissioners to select an appropriate voting system after consultation conflicts with the legislative directive that is provided therein. Furthermore, in Sections 101.5604, 101.5605 and 101.5606, Florida Statutes (2007), the Legislature has specifically provided the authority for those State approved voting systems, which may be chosen or used by the county commissions throughout the State.

Based upon those provisions, the Florida Legislature has clearly made very specific directions as to what voting equipment may or may not be used in each and every county in the State of Florida, and therefore the SAFE amendment is clearly in

conflict with the specific directions of the Florida Legislature. Furthermore, the amendments to the Florida Statutes by Chapter 2007-30, Laws of Florida, will conflict with the Charter amendment, in light of the fact that the Florida Legislature has directed that in certain instances voting equipment other than what would be required by the SAFE amendment in 6.2A, will be utilized for handicapped or disabled voters. (See Section 101.56075, Florida Statutes, effective July 1, 2008). Based upon such conflict, the provisions of 6.2A must fail.

B. The District Court correctly concluded 6.2B, which provides for mandatory independent random audits and 6.2C which provides for certification of election results, conflict with the directives contained in the Florida Election Code.

The District Court correctly concludes that the audit requirements conflict with Section 101.591(1), Florida Statutes, of the Florida Election Code that were in effect in 2006. Browning, supra at 650. That section provides:

> Voting system audit.—
>
> (1) The Legislature, upon specific appropriation and directive, may provide for an independent audit of the voting system in any county. Within 30 days after completing the audit, the person conducting the audit shall furnish a copy of the audit to the supervisor of elections and the board of county commissioners.

As the District Court correctly concluded, the Election Code provides for the Legislature to decide whether an

independent audit of the county's voting system should be undertaken. Therefore, the proposed SAFE amendment would conflict with the 2006 version of the Florida Statutes.

As the District Court further observes, however, during the 2007 Legislative Session, the Florida Legislature revised Section 101.591, to provide for audits to be conducted by the county canvassing board. A comparison to the provisions of the SAFE amendment, which require audits by independent auditors of a percentage of a selected number of precincts, and certain number of ballots during a certain amount of time, in "any precinct where there is a highly unusual results or events" conflict with the recently amended provisions of Section 101.591, Florida Statutes. As the District Court correctly concludes, the conflict is not capable of being reconciled and the provisions proposed by the SAFE amendment must fail due to their conflict with Florida Statutes. Browning, supra at 650-651. SAFE's argument that the Court is incorrect is simply ignoring the legislative statements.

Finally, with respect to amendment 6.2C the District Court correctly points out that the proposed Charter amendments conflict with Section 101.572, Florida Statutes, dealing with who may handle official ballots. The SAFE amendment places that audit responsibility in a "reputable, independent, non-partisan auditing firm." While this entity, and the terms used are irreconcilably vague, the amendment clearly provides a responsibility to an entity to handle the ballots in conflict with Section 101.572, Florida Statutes. Also, as the District

Court correctly concludes, the timeframes, which are established by the proposed SAFE amendment in 6.2B and C, conflict with the Election Code certification timeframes (see Section 102.141, F.S.) and create time constraints, which will potentially cause chaos and confusion. Based upon those conflicts, the amendment must fail. (Browning, supra at 651-52).

The District Court went to great length to analyze the conflicts that exist in the proposed SAFE amendment and the Florida Election Code and, also, extended that examination to the rules that the Florida Department of State, Division of Elections, have adopted or are authorized to adopt with respect to ensuring uniformity in the elections and proper operating procedures. The Court again correctly concludes that the proposed SAFE amendments conflict with the existing rules of the Department of State or with the authorities given to it.

As the District Court correctly states, similar purposes will not preclude the finding of a preemption or conflict and if a conflict arises, state law prevails. Browning, supra at 653. Based upon the inconsistencies and the conflicts with general law, and the Florida Election Code the amendments are invalid in their entirety and the decision of the District Court should be affirmed.

CONCLUSION

The Second District Court of Appeal was correct in its decision that the Charter amendments proposed by SAFE are preempted by the Florida Election Code and that the provisions contained in the amendment conflict with general law and the Florida Election Code. To that extent they are invalid and are unconstitutional. Based upon the foregoing, the certified question should be answered in the affirmative and the proposed Charter amendments declared invalid.

Respectfully submitted this 15th day of January, 2008.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 15th day of January, 2008, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that this Answer Brief of Supervisor Dent was generated using Courier New, not a proportionately spaced font, and has a typeface of 12 points.

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Ronald A. Labasky