SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CASE NO.: SC07-2074
LOWER TRIBUNAL NO.: 2D06-4339

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.
_____/

PETITIONERS: INITIAL BRIEF

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I. STATEMENT OF CASE AND FACTS

References to the record are indicated by (R __). References to the trial transcript are indicated by (TT __). The Petitioners will be collectively referred to as ASAFE.@ The Respondents will collectively be referred to as ARespondents@, unless otherwise noted.

In 1971, the people of Sarasota County adopted a Charter and thereby became a home rule county under the provisions of the Florida Constitution. Appendix 3. Pursuant to the provisions of the Sarasota County Charter, during the summer of 2006, SAFE obtained the required number of signatures to place a proposed Charter Amendment on the ballot for the November 2006 election. The Charter Amendment (1) required Sarasota County to adopt a paper ballot voting system, (2) required limited pre-certification spot audits at selected precincts to ensure the voting machines are operating properly, and (3) required a comprehensive pre-certification manual audit if the spot audits indicated a discrepancy within specific thresholds. See Appendix 3, p. 18.

In August 2006, the Board of County Commissioners filed a pre-election suit in the Sarasota Circuit Court seeking a declaration that the proposed Charter Amendment was unconstitutional in its entirety. (R- 1). The next day, SAFE filed a mandamus action against the Board of County Commissioners (hereinafter referred to as the ABoard@) and the Supervisor of Elections (hereinafter referred to as ASupervisor Dent@) seeking an Order compelling the Board and Supervisor Dent to place the proposed Charter Amendment on the November 2006 ballot. The Board eventually added the Secretary of

State as a party to their suit, and the two actions were consolidated. (R 30). A non-jury trial on the suit was conducted by the Circuit Court on September 6, 2006. (TT 1-229). During the trial, the Board called Supervisor Dent as a witness. (TT 54-106). SAFE called as a witness Ion Sancho, the Supervisor of Elections for Leon County (hereinafter referred to as ASupervisor Sancho@). (TT 127-156). Significantly, Supervisor Dent did not testify that any portion of the Charter Amendment conflicted with state election law, nor did she testify that she could not achieve any of the requirements of the Charter Amendment without violating state law. (TT 54-106). Supervisor Dent testified that the audits described in the Charter Amendment could be achieved without violating the statutory prohibition against non-employees of the Supervisor of Elections= office touching the ballots. (TT 101).

Supervisor Sancho, testified that all of the provisions of the Charter Amendment could co-exist with all provisions of the Florida Election Code without conflict. (TT 113-114). Supervisor Sancho also testified that if Leon County had a similar charter provision, he could comply with all provisions of the Charter Amendment without violating any requirements of the Florida Election Code. (TT 121-127).

An official letter from the Secretary of State dated March 9, 2006, to the Leon County Board of County Commissioners was introduced in evidence without objection. (R 154). Contrary to the Secretary=s position on appeal, the Secretary=s letter in no

uncertain terms states that the conduct of elections and selection of a voting system is exclusively a local, rather than state, responsibility.

On September 14, 2006, Circuit Judge Robert Bennett rendered a Final Judgment. (R 166); Appendix 1. The Final Judgment rejected each of the Respondents' arguments and analyzed each section of the Charter Amendment paragraph by paragraph. The Final Judgment ordered the County to place the Charter Amendment on the November 7, 2006 ballot. The Respondents did not seek a stay of the Final Judgment, and the Charter Amendment was placed on the ballot and passed by a majority of the voters of Sarasota County on November 7, 2006. The provisions of the Charter Amendment take effect January 1, 2008.

The Respondents appealed the Final Judgment to the Second District Court of Appeal. (R 253). After oral argument, the District Court issued a split decision wherein the majority found that the Florida Election Code impliedly preempted the Charter Amendment in its entirety and, in the alternative, that every provision of the Charter Amendment directly conflicted with the Florida Election Code. Appendix 2. The majority opinion concluded that the Charter Amendment was unconstitutional in its entirety and that the trial court erred when it ordered that the Charter Amendment be placed on the ballot.

In his dissenting opinion, Judge Davis opined that the trial court properly placed the Charter Amendment on the ballot and that there was an insufficient basis to conclude that

the Florida Legislature intended to impliedly preempt the matters addressed by the Charter Amendment. Appendix 2, p. 30. Judge Davis also concluded that the Charter Amendment did not deal with a recount of votes and, except for minor provisions, otherwise did not conflict with the Florida Election Code.

The following question was certified by the District Court as 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 decision of the District Court pursuant to Article V, ' 4(b)(4) of the Florida Constitution.

II. SUMMARY OF ARGUMENT

Implied preemption of the ability of a home rule county to select an approved paper ballot voting system and to conduct audits to confirm proper operation of the system cannot be supported on any basis. The issue of implied preemption must be analyzed within the context of Chapter 101, Florida Statutes, which addresses voting methods and procedures, and which in fact recognizes the existence of local authority in this area. The conclusion of the majority opinion that the election statutes impliedly preempt the entire Charter Amendment runs counter to the affirmative recognition of local authority described in the statutes.

Merely because the legislature has described an option of the legislature to conduct an audit does not and cannot mean that the legislature intended to prohibit charter counties from conducting any audit whatsoever, especially the limited audit described in the Charter Amendment which simply ensures that the voting machines are operating correctly. The post-certification audit described in the latest revision to the statutes neither preempts nor conflicts with the pre-certification audit described in the Charter Amendment.

The conduct of elections, and in particular the selection and administration of voting systems, has traditionally been left to local governments. Time and time again, the legislature has had the opportunity to express an intent to preempt the areas of election law addressed by the Charter Amendment, which historically has been left to local

government, but the legislature has chosen not to do so. Given the recent history of elections in Florida, the fact that the legislature did not expressly preempt local authority clearly indicates that they intended to leave such authority intact. Therefore, the majority opinion=s imputation of such intent to conclude the Charter Amendment is impliedly preempted is unwarranted. Any debate over the wisdom of Florida=s decentralized system of selecting voting systems and administering elections needs to occur in the chambers of the legislature, not in the courtrooms.

The majority opinion did not find that Section 6.2A of the Charter Amendment conflicts with state law, but rather noted that because of the enactment of Chapter 2007-30, Laws of Florida, the paper ballots required by the Charter Amendment are now required state-wide. This, if anything, is a finding of consistency, rather than conflict.

Section 6.2B of the Charter Amendment merely requires pre-certification spot audits of selected precincts in order to ensure that the voting machines are operating properly. These limited audits are not official vote counts or re-counts and in no way determine the outcome of any race.

The majority opinion finds that Section 6.2C of the Charter Amendment directly conflicts with the election statutes because it Aseems to be in tension@ with various filing deadlines in the statutes. However, a comparison of the audit timeframe in Section 6.2C of the Charter Amendment and the filing timeframes in the statutes indicates that there is no conflict.

Finally, should any provision of the Charter Amendment be impliedly preempted or in direct conflict with state law, that provision can and should be severed as required by the Sarasota County Charter. The majority opinion=s finding that the issue of severance was Amoot@ because the Charter Amendment was approved by the electorate is erroneous.

III. ARGUMENT

A. THE ISSUE BEFORE THE COURT AND STANDARD OF REVIEW.

This case involves a pre-election challenge to the constitutionality of a Charter Amendment. Pre-election challenges are limited in scope. The standard applied when evaluating a pre-election challenge, as stated by this Court in Dade County v. Dade County League of Municipalities, 104 So. 2d 512 (Fla. 1958), is

> [W]hether the proposal in its entirety contravenes [state law]. . . . [t]he courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law. Id. at 515.

Once a court determines that a proposed charter amendment is not invalid in its entirety, or if it becomes apparent that a challenge is only a piecemeal attack on the proposed amendment, the proposal must be submitted to a vote of the people. Rivergate Rest. Corp. v. Metro. Dade County, 369 So. 2d 679, 683 (Fla. 3d DCA 1979).

Judge Davis appropriately states, in his dissenting opinion below, that the issue before the trial court, and therefore before the District Court, was Avery simply whether any part of the proposed amendment was constitutional. If any portion of the amendment was constitutional, the trial court was correct in allowing the entire amendment to be placed on the ballot.@ Appendix 2, p. 29 (citing to Citizens for

Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144, 1146 (Fla. 2d DCA 2006)).

To conclude that the Charter Amendment is unconstitutional in its entirety, this Court must either find: (1) that the legislature has completely preempted the area of law addressed by the Charter Amendment, or (2) that all provisions of the Charter Amendment directly conflict with a state statute. Tallahassee Mem=l Reg=l Ctr., Inc. v. Tallahassee Med. Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

The legal questions concerning implied preemption and conflict are subject to *de novo* review. The facts which support the trial court=s determination that the Charter Amendment does not conflict with the election statutes are reviewed based upon the competent, substantial evidence standard. See St. Vincent=s Med. Ctr., Inc. v. Mem=l Healthcare Group, Inc., 967 So. 2d 794, 799 (Fla. 2007).

The overriding principle to be applied by the court in reviewing the constitutionality of the Charter Amendment is that Aall political power is inherent in the people and that we must, if possible, interpret the amendment as constitutional.@ Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144, 1146 (Fla. 2d DCA 2006). This Court must apply the presumption that the Charter Amendment is valid, even though a lower court has declared it unconstitutional. St. Vincent=s Med. Ctr, Inc., 967 So. 2d at 799 (Fla. 2007).

B. THE POWER OF THE PEOPLE AND COUNTY HOME RULE AUTHORITY.

The Florida Constitution recognizes that all political power belongs to the people of the state. Article I, section 1 of the Declaration of Rights of the Florida Constitution states:

> SECTION 1. Political Power. **B** All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

As such, **A**[t]here is no limitation in the Florida Constitution as to subject matter in the legislative realm which is inappropriate for referenda.@ City of Winter Springs v. Florida Land Co., 413 So. 2d 84, 87 (Fla. 5th DCA 1982).

When the Florida Constitution was amended in 1968, counties were divided into two categories: charter counties and non-charter counties. Non-charter counties **A**have such power of self-government as is provided by general or special law.@ FLA. CONST. art. VIII, **'** 1 (f). Charter counties, however, **A**have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors.@ FLA. CONST. art. VIII, **'** 1 (g). Sarasota County became a charter county in 1971.

The Florida Supreme Court has **A**broadly interpreted the self-governing powers granted charter counties under article VIII, section 1(g) of the Florida Constitution.@ State v. Broward County, 468 So.2d 965, 969 (Fla. 1985). Given 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: AThe people have said that charter county government shall have all the powers of local government unless the state government takes affirmative steps to preempt local legislation.@ Hollywood, Inc. v. Broward County, 431 So. 2d 606, 609 (Fla. 4th DCA 1983). In any event, A[t]he courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers.@ Lowe v. Broward Co., 766 So. 2d 1199, 1207 (Fla. 4th DCA 2000).

The concept of home rule envisions the possibility that state and local government will properly legislate concurrently in the same area. See City of Hollywood v. Mulligan, 934 So. 2d 1238, 1243 (Fla. 2006). The Florida Supreme Court has construed the phrase Ainconsistent with general law@ in article VIII, section 1(g) of the Florida Constitution to mean Acontradictory in the sense of legislative provisions which cannot co-exist.@ State v. Sarasota County, 549 So. 2d 659, 660 (Fla. 1989). In analyzing whether the entire Charter Amendment is unconstitutional due to conflict with the election statutes, a finding of duplication is not enough. One must instead find that all of the provisions of the Charter Amendment contradict and cannot co-exist with the statutes. Id.; Boven v. City of St. Petersburg, 73 So. 2d 232, 234 (Fla. 1954) (holding that a local enactment is not void unless it is in direct conflict with state law).

C. THE FLORIDA LEGISLATURE DID NOT EXPRESSLY OR IMPLIEDLY PREEMPT THE MATTERS ADDRESSED IN THE CHARTER AMENDMENT.

1. There is no express preemption of the Charter Amendment in the Florida Election Code.

To find express preemption, there must be specific language preempting the particular subject at issue. Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 101 (Fla. 1st DCA 1994). There is no such express preemption language in the election statutes. As such, the trial court and the District Court properly found that express preemption does not apply.

2. The Florida Election Code does not impliedly preempt the Charter Amendment.

Implied preemption of the ability of a home rule county to select an approved paper ballot voting system and to conduct audits to confirm the proper operation of the system cannot be supported on any basis.

The Sarasota County Charter Amendment approved by the voters in this case (1) requires Sarasota County to adopt a paper ballot voting system, (2) requires limited pre-certification spot audits at selected precincts to ensure the voting machines are operating properly, and (3) requires a comprehensive pre-certification manual audit if the spot audits indicate a discrepancy within specific thresholds. See Appendix 3, p. 18-19.

Implied preemption is not favored in Florida. Kligfeld v. State, Office of Fin. Regulation, 876 So. 2d 36, 38 (Fla. 4th DCA 2004). As a judicially imposed doctrine, implied preemption may only be applied under circumstances where Athe 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). If a court imposes implied preemption, it must be applied as narrowly as possible. See Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005).

3. There is no pervasive statutory scheme sufficient to evidence an intent to preempt the Charter Amendment.

In finding that the Charter Amendment was impliedly preempted, the majority opinion appears to have been distracted by the size of the Florida Election Code, citing the ten chapters and 125 pages as evidence of a pervasive statutory scheme. [1] The Election Code, however, addresses matters far beyond the limited scope of the Charter

[1] To the extent as found by the majority opinion that the length of a statute is relevant in an implied preemption analysis, it is interesting to note that the District Court found that the 118 pages of Chapter 163 did not impliedly preempt the Charter Amendment in Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144 (Fla. 2d DCA 2006), but that the 125 pages of the Election Code preempted the Charter Amendment *sub judice*.

Amendment, such as campaign financing and registration of voters, political parties, and candidates.

Many Florida courts have evaluated whether statutes which extensively regulate a particular area impliedly preempt local law in the same area. For example, the court, in Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144 (Fla. 2d DCA 2006), held that the provisions of Chapter 163, Florida Statutes, which govern growth policy and local land planning, did not impliedly preempt home rule charter amendments dealing with the same subject. In Lowe v. Broward County, 766 So. 2d 1199 (Fla. 4th DCA 2000), *cert. denied*, 789 So. 2d 346 (Fla. 2001), the court held that a home rule county ordinance that created the status of domestic partnership was not impliedly preempted by statutes prohibiting recognition of same sex marriage and regulating domestic relations. In Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc., 681 So. 2d 826 (Fla. 1st DCA 1996), the court evaluated a county ordinance which imposed a funding scheme for ambulance services and concluded that the ordinance was not impliedly preempted by the extensive ambulance regulatory and licensing system established in statutes. The court, in Hillsborough County vs. Florida Restaurant Ass=n., 603 So. 2d 587 (Fla. 2d DCA 1992), rejected the argument that a local ordinance requiring posting of warning signs in establishments serving alcohol was impliedly preempted by statutes that extensively regulate the field of alcoholic beverages. Id. at 591. In rejecting the application of

implied preemption, the court held that the description in the statutes of local authority addressing hours, location and operation of bars, etc., indicated that the legislature did not intend to completely regulate the field to the exclusion of local authority. Id.

In the case *sub judice*, the issue of preemption must be analyzed in the context of Chapter 101, Florida Statutes, which addresses voting methods and procedures, and which in fact confirms the existence of local authority in this area. In F.S. 101.5604 (2001), the Legislature describes the authority of a county governing body to adopt a Avoting system.@[2]

> 101.5604 Adoption of system; procurement of equipment; commercial tabulations. B The board of county commissioners of any county, at any regular meeting or special meeting called for the purpose, *may, upon consultation with the supervisor of elections, adopt, purchase, or otherwise procure, and provide for the use of any electronic or electromechanical voting system approved by the Department of State* in all or a portion of the election precincts of that county. Thereafter the electronic or electromechanical voting system *may be used for voting* at all elections for public and party offices and on all measures and for *receiving, registering* and *counting the votes* thereof in such election precincts *as the governing body directs*. A county must use an electronic or electromechanical precinct-count tabulation voting system. (Emphasis added).

The majority opinion=s conclusion that the statutes impliedly preempt the Charter Amendment runs counter to the affirmative recognition of local authority described in

[2] AVoting system@ is broadly defined in F.S. 97.021(43) (2005). F.S. 101.5604 (2001) and F.S. 97.021(43) (2005) were unchanged by the 2007 statutory revisions.

F.S. 101.5604 (2001). See Pinellas County v. City of Largo, 964 So. 2d 847, 853 (Fla. 2d DCA 2007) (recognition of county authority in annexation statute refutes argument for implied preemption); see also Florida Rest. Ass=n, 603 So. 2d at 591 (Fla. 2d DCA 1992). This contradiction between the statute and the conclusion of the majority opinion is recognized by Judge Davis in his dissent: A[T]he fact that the legislature has chosen to allow the county commissioners of each individual county to choose what type of machine will be used in that particular county indicates that the legislature has chosen *not* to preempt this area specifically or impliedly.@ (Emphasis original) Appendix 2, p. 29.

There is also no legislative scheme so pervasive to evidence an intent to preempt a charter county=s ability to conduct the type of pre-certification spot audits described in the Charter Amendment. The majority opinion found that F.S. 101.591(1) (1997)[3], which provides that A[t]he Legislature, upon specific appropriation and directive, may provide for an independent audit of the voting system in any county,@ impliedly preempted the audit provisions of the Charter Amendment. However, simply because the legislature has described a mere option to conduct an audit does not and cannot mean that the legislature intended to prohibit charter counties from conducting any audits whatsoever.[4] As Judge Davis correctly observes, Asince the legislature has chosen not to provide for audits and

[3] F.S. 101.591(1) is replaced by F.S. 101.591 (2007) effective July 1, 2008.

[4] As noted by Judge Davis, Supervisor Sancho testified at trial that his office had its own internal audit procedures to check the accuracy of the vote counts. (TT 126).

has not prohibited local officials from doing so, I do not consider [F.S. 101.591(1)] to be an implied preemption of the audit issue.@ Appendix 2, p. 31 (citing to Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005)).

4. The Charter Amendment addresses areas which have traditionally been under local control and the legislature has repeatedly chosen not to interfere with such control.

Contrary to the majority opinion, the conduct of elections, and in particular the selection and administration of voting systems, has traditionally been left to local governments. Indeed, several home rule counties have provisions in their charters or ordinances addressing the administration of elections. See, e.g., ALACHUA COUNTY, FLA. CHARTER, art. I, ' 1.6 (campaign finance regulation); BROWARD COUNTY, FLA., ORDINANCES, art. I, ' 11-1, et seq. (addressing various aspects of elections); MIAMI-DADE, FLA., ORDINANCES, Ch. 12-1, et. seq. (governing various aspects of elections).

F.S. 101.5604, originally enacted in 1973, describes county authority to adopt and administer a voting system. Despite several revisions to the Election Code since 1973, the legislature has continued to affirmatively acknowledge in the statute that each county may select its own voting system. The Secretary of State, who the majority opinion cites as having the authority to interpret the election laws, has stated that the Aconduct of elections is fundamentally a local responsibility. . . . [T]he 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.@ (R-154).

The majority opinion fails to recognize that in 2001 the legislature did express an intent to restrict local authority, but only in a limited fashion, by banning punch card ballots. See F.S. 101.5606(15) (2001); 101.56042 (2001). The prohibition against punch card ballots is the only restriction the legislature placed upon the ability of a county to adopt and operate a voting system after the experience of the 2000 election. The issue of local authority over the election process was undoubtedly before the legislature when they revised the election statutes during the 2001 session. Had the legislature wished to prohibit the ability of a county to select, maintain, operate, and administer a voting system, the legislature would have certainly done so after the 2000 election.

In addition to the revisions in 2001, in 2007 the legislature again modified the Election Code and chose not to preempt or in any way restrict local control over the matters described in the Charter Amendment. The fact that the legislature did not expressly preempt or restrict local law in 2007 is especially significant. Both the Secretary of State and the SAFE representative and Petitioner Kindra Muntz appeared before the Senate Ethics and Elections Committee in January 2007, and informed the committee of the legal controversy and suit surrounding the Charter Amendment. Clearly then, had the legislature intended to preempt local law from addressing those matters described in the Charter Amendment, they would have done so in 2007.

Time and time again, the legislature has had the opportunity to express an intent to preempt the areas of election law addressed by the Charter Amendment, which historically have been left to local government, but the legislature has chosen not to do so. Given the recent history of elections in Florida, the fact that the legislature did not expressly preempt local authority clearly indicates that they intended to leave such authority intact. Therefore, the majority opinion=s imputation of such intent to conclude the Charter Amendment is impliedly preempted is unwarranted. Any debate over the wisdom of Florida=s decentralized system of selecting voting systems and administering elections needs to occur in the chambers of the legislature, not in the courtrooms.

D. THE CHARTER AMENDMENT DOES NOT CONFLICT WITH THE ELECTION CODE.

The Florida Supreme court in Boven v. City of St. Petersburg, 73 So. 2d 232 (Fla. 1954) held:

> Before a court is justified in holding that an ordinance is superseded or void because in conflict with a state law, it must appear that it is in *direct conflict* with some particular state law. (Emphasis added). Id. at 234.

A provision of a local law is not unconstitutional due to conflict merely because it addresses a matter that is also addressed in a statute dealing with the same subject. Id. ALegislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. . . . [T]he sole test of conflict for purposes of

preemption is the impossibility of co-existence of the two laws.@ Bennett M. Lifter, Inc. v. Metro. Dade Co., 482 So. 2d 479, 483 (Fla. 3d DCA 1986).

Contrary to the majority opinion, home rule counties are permitted to pass laws that duplicate state law pursuant to their concurrent authority. FLA. CONST. art. VIII, ' 1 (g) (Acounty charters shall have all powers of local government not inconsistent with general law@). A charter amendment does not conflict with a statute simply because it addresses matters also addressed by the statute. A charter amendment can supplement state law and even impose additional burdens beyond those imposed by statute. Phantom of Clearwater, 894 So. 2d at 1020.

1. Section 6.2A of the Charter Amendment co-exists with state law.

Paragraph 1 of Section 6.2A of the Charter Amendment states:

> (1) 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.

The majority opinion did not find that Section 6.2A of the Charter Amendment conflicted with state law. Rather, the majority merely found that because Chapter 2007-30, Laws of Florida, required paper ballots, Athe touchscreen voting machines sought to

be eliminated by the SAFE Amendment will no longer be permitted in Florida.@ Appendix. 2, p. 19. This, if anything, is a finding of consistency, rather than conflict.[5]

Paragraph 2 of Section 6.2A of the Charter Amendment states that any electronic voting machine will permit a voter to correct a ballot by rejecting overvoted ballots at the time of voting. As found by the trial court, this provision mirrors the state statute on the subject, F.S. 101.5606(3) (2005), and therefore does not conflict. The majority opinion does not find otherwise.

2. Section 6.2B audits are not recounts and do not otherwise conflict with the Election Code.

This Court must look to the plain language of the Charter Amendment in evaluating whether the majority opinion erred when it found conflict between the audit provisions of Section 6.2B of the Charter Amendment and the statutory recount described in F.S. 102.141(7) (2007). If the language of the Charter Amendment is clear and unambiguous, it must be given its plain and ordinary meaning. See Fla. Dep=t of Ed. v. Cooper, 858 So.

[5] Judge Davis addresses Section 6.2A in his dissent and correctly concludes that A[b]ecause the legislature has chosen not to preempt this area of election law and because the amendment does not contradict state law regarding the selection of voting machines, I would conclude that the amendment provision dealing with the choice of voting machines is not unconstitutional.@ Appendix 2, p. 30.

2d 394, 396 (Fla. 1st DCA 2003). The Charter Amendment calls for Aaudits of the voting system in Sarasota County.@ Webster=s defines Aaudit@ as Ato examine and check.@ WEBSTER=S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE: SECOND COLLEGE EDITION 91 (David B. Guralnik ed., Simon and Schuster 1986). On the other hand, Arecount@ is defined by Webster=s as Ato count again.@ Id. at 1187.

Section 6.2B of the Charter Amendment merely requires pre-certification spot audits of selected precincts in order to ensure that the machines are operating properly. These limited audits are not official vote counts or recounts and in no way determine the outcome of any race. As found by Judge Davis, in his dissenting opinion, this process is merely Aa type of spot check sampling to determine the accuracy of the electronic voting machines.@ Appendix 2, p. 31. On the other hand, the recounts described in F.S. 102.141(7) (2007) and 102.166 (2005) are official tabulations by the canvassing board to determine the winner of specific races.

Audits are in fact contemplated by F.S. 101.5606(13) (2005), which requires that voting systems be Acapable of providing records from which the operation of the voting system may be audited.@ The Help America Vote Act (HAVA) of 2002, 42 U.S.C. ''15301, et seq., is incorporated in the Florida Election Code and contemplates the

occurrence of audits without limiting the status of those who may conduct an audit or the circumstances under which an audit will take place. See 42 U.S.C. ''15481(B).[6]

The majority opinion also mistakenly finds conflict between Section 6.2B of the Charter Amendment and the optional audit that the legislature may fund under F.S. 101.591(1) (1997). Judge Davis, in his dissent, correctly concludes that the legislature=s mere mention of the possibility that it Amay@ provide for an audit is insufficient evidence of a pervasive legislative scheme to imply preemption of a local audit. See Appendix 2, p. 31-32. Clearly, an audit that the legislature may or may not fund or conduct does not directly conflict with the type of post-election, pre-certification spot audits described in Section 6.2B to the extent that the statute and Charter Amendment cannot co-exist.

[6] See 101.56063 (2002) which states, A[i]t is the intent of the Legislature that all state requirements meet or exceed the minimum federal requirements for voting systems and polling place accessibility.@

The enactment of F.S. 101.591 (2007)[7] also leads the majority to find irreconcilable conflict between the statute and the Charter Amendment. The majority, however, fails to recognize a vital distinction between F.S. 101.591 (2007) and Section 6.2B of the Charter Amendment. The provisions of F.S. 101.591 (2007) describe post-certification audits of selected races, while Section 6.2B of the Charter Amendment describes limited pre-certification audits in selected precincts to confirm the proper operation of the machines. The limited pre-certification spot audits under the Charter Amendment can clearly co-exist with the post-certification audits of selected races described in F.S. 101.591 (2007). Both audits can occur without conflict.

The majority also incorrectly finds that the audit timeframe in Section 6.2B of the Charter Amendment conflicts with the timeframe in F.S. 101.048(1) (2005). Appendix 2, p. 23. Section 6.2B states that the spot audits of provisional ballots shall be completed by the third day following the election. F.S. 101.048(1) (2005) requires provisional voters to present evidence supporting their eligibility by 5:00 p.m. on the third day following the election. Therefore, under the 2005 version of this statute, there was a 7 hour timeframe within which to complete the Section 6.2B spot audit of the provisional ballots.

In 2007, F.S. 101.048(1) was amended to shorten the timeframe for provisional voters to present evidence to 5:00 p.m. on the second day. Therefore, under the 2007

[7] Effective July 1, 2008.

amendment, the timeframe to complete the Section 6.2B spot audit of the provisional ballots has been extended to 31 hours.

The majority opinion also erroneously concludes that the audit provisions of the Charter Amendment violate the provisions of F.S. 101.572 (2005)[8] because the independent auditors purportedly would have to handle the ballots. This conclusion fails for two reasons. First, it is questionable whether the prohibition against handling of ballots even applies to circumstances other than the Apublic inspections@ described in F.S. 101.572. Second, even if the provisions of that statute applied to the audits described in the Charter Amendment, Supervisor Dent testified at trial that the audits could take place without the auditors handling the ballots. The Supervisor=s employees would simply handle the ballots during the auditors= inspection.

> Mr. Shults, Q: The inspector comes in, they look at the ballot and when they=re through looking at it, they tell the employee to please turn the page to the next ballot?
>
> Supervisor Dent, A: Yes.
>
> . . .
>
> Mr. Shults, Q: *And that way the inspector can actually look at and audit the results of each ballot without touching it; correct?*
>
> Supervisor Dent, A: *Yes.*

(TT-101). (Emphasis added).

[8] F.S. 101.572 states that no persons other than the supervisor or his or her employees or the canvassing board can handle ballots during a public inspection.

The majority also contends that Section 6.2B conflicts with F.S. 102.071 (2007), 102.112 (2007), and 102.151 (2007). A comparison of these statutes and Section 6.2B, however, reveals no conflict between them.

F.S. 102.071 (2007) addresses posting of election results, drawing the certificate of election results, and transferring the ballots, ballot boxes, and other materials used in the election to the supervisor=s office. Section 6.2B does not touch upon any of these areas.

F.S. 102.112 (2007) discusses the filing of returns with the Department of State. Nothing in the Charter Amendment governs the filing of returns.

F.S. 102.151 (2007) discusses duplicate canvassing board certificates and transmission of lists containing the names of all county and district officers nominated or elected. Section 6.2B does not address these areas.

Another conflict erroneously found by the majority was that the Charter Amendment conflicts with general law because the independent auditors are not required to follow the administrative rules adopted by the Secretary of State. Appendix 2, p. 26. Nowhere in the Charter Amendment are the independent auditors instructed not to comply with the administrative rules. Courts, when interpreting two laws on the same subject, are to interpret them in a manner which gives effect to both. Boven v. City of St. Petersburg, 73 So. 2d 232, 234 (Fla. 1954). As such, the Charter Amendment need not require the auditors to comply with the administrative rules. As long as the Charter Amendment does not prohibit the independent auditors from complying with the

administrative rules or does not affirmatively authorize the independent auditors to not comply with the administrative rules, there is no conflict.

3. The Section 6.2C audit does not conflict with the Election Code.

The majority opinion is concerned that in the event a Section 6.2C audit occurred, it could delay the filing of returns with the Department of State and Aseems to be in tension@ with the 12-day general election filing deadline of F.S. 102.112(2) (2007). Appendix 2, p. 24-25. A conflict would occur, however, only under circumstances where: (1) a Section 6.2C audit was necessary, and (2) the audit took more than 12 days to complete.

Section 6.2C requires the audit to be completed within 10 days, 2 days before the filing deadline. There is, therefore, no conflict between the timeframes. Speculative hypotheticals are not enough to override the principle that the court must construe the provisions of the Charter Amendment and the statute in a manner to bring each in harmony with the other. Boven, 73 So. 2d at 234. A belief that a hypothetical, which may never occur, could create tension between the requirements of Section 6.2C and F.S. 102.112(2) (2007) is insufficient to support a declaration of unconstitutionality based upon conflict.

The trial court, moreover, has not reached a final conclusion regarding Section 6.2C and, therefore, whether a conflict exists is not ripe for appellate review. Under the provisions of the Declaratory Judgment Act, F.S. 86.061 (1967), the trial court continues

to have jurisdiction to evaluate Section 6.2C, if and when it is ever applied in the future. Until the trial court reaches a determination under those circumstances, any challenge to Section 6.2C is premature.

E. ALL LANGUAGE OF THE CHARTER AMENDMENT IS SEVERABLE.

Should any provision of the Charter Amendment be impliedly preempted or in direct conflict with state law, that provision should be severed as required by the Sarasota County Charter.

The majority opinion erred when it found that Athe issue of severability of portions of the proposed amendment . . . was rendered moot when the proposed amendment was presented to the electors.@ Appendix 2, p. 5, FN 3. To the contrary, it is the fact that the Charter Amendment became law when approved by the electorate that makes the issue of severability ripe for determination in the event this Court finds that any provision suffers from an infirmity.

A finding of invalidity of any phrase, sentence, or section of the Charter Amendment cannot invalidate the remaining provisions of the Amendment. The Sarasota County Charter contains a comprehensive severability clause:

Sarasota County Charter

Section 8.5 Severability Clause.

> If any article or any part thereof, or any section or part thereof of this Charter as it now exists or as it may be amended is held by any court of competent jurisdiction to be invalid or unconstitutional, such holding shall not invalidate or impair the validity, force or effect of any other article or part thereof or any other section or part thereof unless it clearly appears that such other article or part thereof or section or part thereof is wholly or necessarily dependent for its operation upon the article or part thereof or section or part thereof held to be invalid or unconstitutional. Appendix 3, p. 21.

This severability clause constitutes persuasive authority to support the severability of the Charter Amendment if necessary. This Court in State v. Champe, 373 So. 2d 874 (Fla. 1978) concluded A[w]e have a duty to uphold the validity of legislative enactments to the extent possible, and the expression of a legislative preference for the severability of voided clauses, although not binding, is highly persuasive.@ Id. at 880. Accord Phantom of Clearwater, Inc. 894 So. 2d at 1021 (severability clause in ordinance constituted persuasive authority resulting in severance of invalid portion of ordinance).

IV. CONCLUSION

The Court should answer the certified question in the negative. Further, this Court should hold that the majority opinion erred when it found that all provisions of the Charter Amendment directly conflicted with state statutes.

SAFE respectfully requests this Honorable Court to quash the decision of the District Court, find that the Charter Amendment is constitutional, and remand this case to the lower court for further proceedings consistent with the decision of this Court.

SAFE also requests that the costs of this appeal be awarded and assessed against Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Stephen E. DeMarsh, County Attorney, and Frederick J. Elbrecht, Assistant County Attorney, Office of the County Attorney, 1660 Ringling Boulevard, Sarasota, Florida 34236; Ronald A. Labasky, Esquire, Young Van Assenderp, P.A., 225 S. Adams Street, Suite 200, Tallahassee, Florida 32301-1700; and Peter Antonacci, Esquire, and Allen C. Winsor, Esquire, Gray Robinson, P.A., P.O. Box 11189, Tallahassee, Florida 32302-3189 on this _____ day of December, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the font requirements of Fla. R. App. P. 9.210.

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