

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA
FOURTH DISTRICT**

CONGRESSMAN ROBERT WEXLER,

CASE NO.: 4D03-3816

L.T. Case No.CA-03-01205-AH

Plaintiff,

vs.

THERESA LEPORE, SUPERVISOR
OF ELECTIONS FOR PALM BEACH
COUNTY; GLENDA E. HOOD,
SECRETARY OF STATE OF FLORIDA,

Defendants.

**REPLY BRIEF OF APPELLANT
CONGRESSMAN ROBERT WEXLER**

On Appeal from Final Judgment of Dismissal of the
Circuit Court in and for Palm Beach County, Florida

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PREFACE

This is an appeal from a Final Order of Dismissal With Prejudice of a Complaint containing two counts, Declaratory Relief and Injunctive Relief. Appellant, Congressman Robert Wexler, will be referred to as the Plaintiff, while Appellees, Theresa LePore, Supervisor of Elections for Palm Beach County, Florida and Secretary of State of Florida, Glenda E. Hood will be referred to respectively as "Defendant, LePore", and "Defendant, Hbod". Reference to the record will be made by the symbol "R", plus page number and "Supp. R." plus page number. All emphasis will be provided by the undersigned unless otherwise stated.

ARGUMENT

A. The Statutory Scheme Supports Plaintiff's Claim

Each Defendant, both below, and in their respective briefs, selectively cite to various provisions of Florida Statutes. Their argument is not only incomplete, but significant by their omission of the most pertinent sections. What Defendants miss is that the Florida Statutory scheme requires voting systems capable of manual recounts.

The manual recounts statute, F.S. §102.166, does not have any exceptions or limitations pertinent to Palm Beach County, and the other 14 counties that utilize touch screen paperless voting systems as opposed to the remaining 52 counties.

The manual recount applies strictly to undervotes and overvotes. The Statute mandates that:

(3)(a) Any hardware or software used to identify and sort overvotes and undervotes for a given race or ballot measure must be certified by the Department of State as part of the voting system pursuant to F.S. [§101.015](#). Any such hardware or software must be capable of simultaneously counting votes. For certified voting systems, the department shall certify such hardware or software by July 1, 2002. If the department is unable to certify such hardware or software for a certified voting system by July 1, 2002, the department shall adopt rules prescribing procedures for identifying and sorting such overvotes and undervotes. The department's rules may provide for the temporary use of hardware or software whose sole function is identifying and sorting overvotes and undervotes.

(b) This subsection does not preclude the department from certifying hardware or software after July 1, 2002.

(c) Overvotes and undervotes shall be identified and sorted while recounting ballots pursuant to F.S. [§102.141](#), if the hardware or software for this purpose has been certified or the department's rules so provide.

Further, the Statute requires that:

(4) Any manual recount shall be open to the public.

(5)(a) A vote for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice.

(b) The Department of State shall adopt specific rules for each certified voting system prescribing what constitutes a "clear indication on the ballot that the voter has made a definite choice." The rules may not:

1. Exclusively provide that the voter must properly mark or designate his or her choice on the ballot; or

2. Contain a catch-all provision that fails to identify specific standards, such as "any other mark or indication clearly indicating that the voter has made a definite choice."

According to *The American Heritage Dictionary of the English Language, Fourth Edition*, manual means:

1. Of or relating to the hands: *manual skill*:
 - a. done by, use by, or operated with the hands;
 - b. employing human rather than mechanical energy: *manual labor*.

Especially in light of other statutes that define the key terms, it is respectfully submitted that the touch screen, paperless "voting system" (Fla. Stats. 97.021(38) and 101.5603(4)), "undervote" (Fla. Stat. 97.021(33)), "ballots" (Fla. Stats. 97.021(3) and 101.5603(2)), even if there is a "counting error" (Fla. Stat. 102.141(5)), were, are, and will be in future elections, incapable of being "manually recounted" which is a violation of the above statutes.

Finally, after the touch screen paperless voting system has been in use for over 2 years in Palm Beach County, especially as asserted by Plaintiff, that there have already been several elections where a manual recount was required but not accomplished. Respectfully, the Defendants themselves had a responsibility to identify, analyze, report, recommend changes to correct the problems, without any Court intervention, but apparently chose not to do so. Fla. Stat. 101.595.

Defendant Hood spends significant space in her brief providing evidence on the operation of the touchscreen machines and arguing how it satisfies all legal requirements. See, e.g., Answer Brief of Appellee Hood, at 9-17, 22-24. Such an attempt to enhance the record is improper and the Circuit Court should not have considered it below. Instead, the trial court's "gaze is limited to the four corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true." U.S. Project Mgmt., Inc. v. Parc Royals E. Dev., Inc., 861 So.2d 74, 76 (Fla. 4th DCA 2003). Decisions on whether the machines operate in a manner that complies with legal requirements should await development of a proper record.

Moreover, the Defendants each argue variously that the Legislature gave the Defendant, Hood the responsibility to interpret and apply the various election statutes, and that Plaintiff is asking the Court to "micro-manage" the election process including, as the Defendant, LePore asserts in her brief: ..."make executive agency decisions which would implicate policy development and prioritizing of funding..." Such assertions are not only ludicrous, but ignore clear, established precedent in Florida. Although the Courts generally give great deference to the judgment of officials duly charged with carrying out the election process, such deference is only afforded if it is reasonable and not in derogation of the law. Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840, 844(Fla.1993).

This is in accord with the general principle that courts should not defer to the determinations of State agencies if the agencies are clearly wrong. See, for example, please see: Gonzalez v. Associated Life Insurance Company, 641 So.2d 895 (Fla. 3d DCA 1994); and Kauffman v. Mutual of Omaha Insurance Company, 681 So.2d 747 (Fla. 3d DCA 1996).

B. Plaintiff Has Standing And This Is Not A Hypothetical Claim

Defendants appear to suggest that Congressman Wexler's standing as a candidate for office has evaporated entirely because, subsequent to filing this action, no opponent filed to run against him and he is therefore deemed reelected. Such a suggestion would be wrong. Congressman Wexler is currently serving as a Member of Congress, having previously served six years in the Florida Senate. As a frequent candidate for public office who intends to run again in future years, his reelection this year does not change his interest as a candidate because the problem that is the subject of his lawsuit is a controversy "capable of repetition, yet evading review." See In re T.W., 551 So.2d 1186, 1189 (Fla.1989). In such instances, "mootness does not destroy a court's jurisdiction if the question raised is of great public importance or is likely to recur, or if the error is capable of repetition yet evading review." Kelley v. Rice, 800 So.2d 247, 250 (Fla. 2d DCA 2001)(citation omitted). There can be little doubt that the integrity of the election process, raised

in this matter, constitutes an issue of great public importance that is also likely to recur.

Defendants make the same error as the trial court in finding that Congressman Wexler lacks standing to bring this action. First, both rely on Rickman v. Whitehurst, 74 So.2d 205 (Fla. 1917) to assert that the Congressman must allege a special injury different in kind than that incurred by the general public. Here, both the Court below and the Defendants wrongly equate “general public” with voters. Obviously, all members of the general public are not voters. An injury to a member of the public’s status as a voter is a special injury sufficient to satisfy the Rickman standard. Even if it were not, it is obvious that Congressman Wexler’s status as a frequent candidate for political office provides the distinctive special injury that satisfies Rickman requirements.

Finally, an exception to the “special injury” requirement exists where a constitutional violation is alleged. Chiles v. Children A, B, C, D, E and F 589 So.2d 260, 263 n.5 (Fla. 1990). The mere allegation is sufficient to confer standing, even if ultimately the allegation proves false. Department of Administration v. Horne, 269 So.2d 659, 662 (1972). Congressman Wexler has alleged a sufficient constitutional injury in his citation to and argument about various relevant provisions of the Florida Constitution. (R 1-12). If the constitutional allegation is unclear, then Florida law holds that leave to amend the

complaint “should be liberally granted” and that it is an abuse of discretion to deny the Plaintiff that opportunity. Dimick v. Ray, 774 So.2d 830, 833 (Fla. 4th DCA 2000).

It is also apparent that the law favors conferring standing on Congressman Wexler now, rather than after an election in which the touchscreen machines either did not work properly or proved incapable of submission to a manual recount. Florida law establishes that a party is estopped from voiding an election where he was on notice of the irregularity before the election. “The aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election.” Pearson v. Taylor, 159 Fla. 775, 776, 32 So.2d 826, 827 (1947). See also McDonald v. Miller, 90 So.2d 124, 129 (Fla.1956) (losing candidate, fully aware of blatant pre-election irregularities, barred from raising those irregularities as grounds to invalidate election: "One cannot stand by with full knowledge and acquiesce in this type of conduct prior to an election and then, after being disappointed by the results, successfully overturn the election."); Nelson v. Robinson, 301 So.2d 508 (Fla. 2d DCA), cert. denied, 303 So.2d 21 (Fla.1974) (losing candidate's challenge to name placement on the ballot may have been enforceable before election, but not after); Speigel v. Knight, 224 So.2d 703, 706 (Fla. 3d DCA 1969) ("A different rule applies to technical or procedural irregularities which occur and are challenged

prior to a general election than to those which are discovered and challenged after the general election, in the absence of corruption or fraud or a statutory penalty requiring an ouster of the elected official or a vacancy in the office.").

It is for these reasons that Defendant Hood's claim that the injury is too speculative cannot stand. No further example of entertaining such lawsuits pre-election and conferring standing on a plaintiff such as Congressman Wexler is needed than the Weber v. Shelley, 347 F.3d 1101, (9th Cir. 2003) case so heavily relied upon by both the court below and the defendants. If, as they contend, the Weber case is so similar to the claims made here then the absence of any dispute on the plaintiffs' standing establishes the propriety of proceeding in this matter.

Each Defendant suggested to the Trial Court and to this Court, that Plaintiff cannot claim a Constitutional violation, and that any amendment to the pleadings would be futile, based upon repeated references and flawed analysis of the recent case of Weber v. Shelley, 347 F.3d 1101, (9th Cir. 2003). Instead of repeating the analysis of Weber from the initial brief, Plaintiff would respectfully direct the Court's attention to such analysis. Instead, since defendants have reiterated the identical argument, a discussion and analysis of the case of Black v. McGuffage, 209 F. Supp.2nd 889 (N.D. III. 2002) is in order.

Black, like the instant suit, involved a suit for declaratory and injunctive relief filed by voters themselves against both State and County Voting Officials,

pertinent to voting equipment flaws and challenging State and County Voting Officials certification and approval of various voting systems. Notably, the various defendants moved to dismiss Black's complaint on similar grounds to those invoked by the Defendants herein.

In Black, as in this case, the Defendants asserted that Plaintiffs lacked standing to sue. The Defendants asserted, as in this case, that Plaintiffs failed to allege injury to their own individual rights. The Court discussed and rejected such assertions saying, at 894:

“ Defendants first argue that Plaintiffs lack standing under Article III of the U.S. Constitution because they fail to allege injury to their own individual rights... Defendants argue that Plaintiffs have asserted a generalized grievance and that the statistical likelihood of future injury is insufficient to bring standing... The ballot machinery used in the jurisdictions in which Plaintiffs vote increases the likelihood that their votes will not be counted. That ‘probabilistic injury is enough’ injury in fact...to confer standing in the Article III sense.’... Because the voting process is anonymous, it is impossible for any one voter to know with more certainty that their intended votes were not counted. If standing in cases like this one required more, then no one would have standing to challenge a system with, for example, a 20% or 30% or 60% residual vote rate, or a policy under which every tenth ballot was systematically discarded instead of counted. Such results would be contrary to both voting rights and standing law. Further, the injury here alleged, is not the State’s failure to count any one person’s vote, but the higher probability of that vote not being counted as a result of the voting systems used, i.e., vote dilution. That injury is both provable and traceable to Defendants’ actions given the facts alleged. Vote

dilution as ‘directly related to voting, the most basic of political rights, is sufficiently concrete and specific.’ *FEC v. Akins*, 524 U.S. 11, 25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998).”

The Court also rejected a ripeness argument similar to that asserted by the Defendants herein, saying at 895:

“Defendants argue that the PBC 2100 (the current error detection technology used for punch card ballots) must be used in an election and shown to be inadequate before the Court can grant an injunction prohibiting the technology. According to the Defendants, until the PBC 2100 is used in an election, it would be sheer speculation to claim that the error notification capabilities are inadequate... Because the PBC 2100 will more than likely be used in upcoming elections in which Plaintiffs will cast votes we find that this case is sufficiently ripe under Article III. Plaintiffs do not have to wait for yet another opportunity for their votes not to be counted before bringing suit.”

As in the instant case, the Defendants in Black argued that there is no right to a perfect, error free voting system, also citing Burdick v. Takishi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245, (1992). The Black Court rejected that argument as well at 899:

“... However, in Bush the Court held that while the individual citizen has no federal constitutional right to vote for electors for the president of the United States unless and until the state Legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college, once the state legislature vests the right to vote for president in its people, the right to vote, legislatively prescribed as it is, is nevertheless a fundamental right. The question before

us is whether or not such a fundamental right can be treated arbitrarily with the resulting vote dilution impacting disproportionately on two groups defined by legally suspect criteria....

Plaintiffs in the case at bar appear to be alleging a similar dilution of the voting rights of certain citizens. There is, of course, a difference in that the complained of legislative action is not a law aimed at any one group or, intended to affect directly the weight given to a single vote or a class of voters. **Rather before us is a statute that is essentially administrative and regulatory in nature and which seeks to establish allowable voting procedures from which local officials may choose in order to provide a mechanism for citizens to vote in their respective voting districts.** Nevertheless, it would appear that the right to vote, the right to have one's vote counted, and the right to have one's vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States. If Plaintiff's complaint is true, these rights are being substantially, adversely and arbitrarily affected by the challenged statutory scheme. . . .

.... the case at bar is not one of an accidental malfunction or unforeseen error in counting or failing to count a particular group of ballots. What is challenged by the Plaintiffs' complaint is not an unforeseen human or mechanical irregularity which results in a diminution of someone's voting rights, but rather a statutory scheme which, depending upon the choices made by local election jurisdiction officials, will necessarily result in the dilution of an entire group of citizens' right to vote. Unless all election officials make the same choice of vote counting processes, the votes cast in some districts will have a significantly greater chance of being counted than the votes cast in neighboring election districts. If so, then, like the *Griffin* Court, we are confronted with an officially sponsored vote counting procedure which, in its

basic aspect is flawed because it irrationally allows local election officials, by the choice of vote counting procedures, to assign greater importance and weight to the votes cast by one portion of the electorate. Such a situation does rise to the level of a constitutional violation. Furthermore, what Plaintiffs allege is not a question of mistakes or irregularities which can be addressed by an adequate state corrective procedure, but rather it is the state procedure itself which is alleged to cause a fundamental unfairness. The crux of the matter it appears to us is not that the Plaintiffs seek to mandate a certain level of accuracy, but rather that a law that allows significantly inaccurate systems of vote counting to be imposed upon some portions of the electorate and not others without any rational basis runs afoul of the due process clause of the U.S. Constitution. Therefore, Defendants' motion to dismiss Plaintiff's substantive due process claim is denied. Plaintiffs have alleged a violation of their substantive due process rights.”(emphasis added).

As does LePore in the instant case, the election supervisors in Black also maintained that they were not proper defendants, to which the Black Court in part said, at 897:

“Defendant County Clerks Gould, Aiello, and Patton also argue that claims against them should be dismissed because the complaint does not allege any facts specific to them. However, the complaint sufficiently alleges that all named officials were involved in the selection of voting equipment and, as such, the Voting Rights Act claims against them can stand”.

It is respectfully submitted that the Black case is virtually on all fours with the instant case. At a minimum, the Trial Court erred in dismissing the complaint with prejudice, finding that any further amendment would be futile. Dimick,

supra. Rohatynsky v. Kalogiannis, 763 So.2d 1270, 1272 (Fla. 4th DCA 2000); World Class Yachts v. Murphy, 731 So.2d 798, 800 (Fla. 4th DCA 1999); Life General Security Ins. Co. v. Horal, 667 So.2d 967,969 (Fla.4th DCA 1996); Hansen v. Central Adjustment Bureau, Inc., 348 So.2d 608 (Fla. 4th DCA 1977).

C. It Is Déjà Vu All Over Again

At the tail end of the 2000 election debacle, upon the remand of Bush v. Gore, 531 U.S. 98, 121 S.Ct.525, 148 L.Ed.2d 388 (2000), from the United States Supreme Court, the Florida Supreme Court issued it's decision, Gore v. Harris, 773 So.2d 524 (Fla. 2000). A review of Justice Pariente's prescient concurring opinion is disturbing in light of the current state of affairs as alleged in Plaintiff's complaint, and the present status of this case. Justice Pariente began at pp 530:

“I concur fully with the majority opinion. However, I write separately to discuss several concerns with Florida's present Election Code and the use of different voting systems in place in Florida's sixty-seven counties, particularly in light of the United States Supreme Court decision in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). ...

Whatever the reason, we now know that not every vote intended to be cast for a candidate in this November 7, 2000, presidential election in Florida was tabulated and counted as a vote. Further, although manual recounts were completed in several counties, in other counties the ballots for which the machine did not register a vote--the "undervotes"--were never examined manually to ensure that all legal votes were counted. ...

It is essential to our great democracy that all citizens

have confidence in the integrity and reliability of the electoral process. As the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts expressly declared:

Recounts are an integral part of the election process. *For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted.* The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted. *Id.* at 15 (emphasis supplied) (footnotes omitted). As we have stated most forcefully, this Court remains committed to the principle that:

the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. ...

.... Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right. ...

... In a case where a manual recount is sought in several counties based on the identical assertion, as occurred in this presidential election, there are additional constitutional concerns raised if a manual recount is conducted and completed in some but not all the counties

where the recount is requested. [FN20]

FN20. ... A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida *includes figures generated from this two-tier system of differing behavior by official canvassing boards, the state will incur a legal jeopardy, under both the U.S. and State constitutions.* This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President....

.... However, before the November 7, 2000, election, this State had a patchwork of different voting systems and ballots selected on a countywide basis and necessarily approved by the Secretary of State. If the Secretary's restrictive view of "legal votes" and manual recounts is ultimately adopted through amendments to the Election Code, there are potential constitutional implications, especially if the different voting systems continue to remain in operation. Simply put, the failure to allow for a manual recount would have a disparate effect on those counties that employed punch card systems. [FN33]

FN33. As Justice Stevens points out, carried to its logical conclusion "Florida's decision to leave to each county the determination of what balloting system to employ-- *despite enormous differences in accuracy*-- might run afoul of equal protection." Bush, 121 S.Ct. 525, at 541 (Stevens, J., dissenting) (emphasis supplied). ...

....Therefore, if the safeguard of a manual recount is not

available to protect the integrity and reliability of the electoral process or if a "legal vote" is narrowly defined, voters in punch card counties would be treated unequally as compared to voters in counties that utilize more reliable voting machinery, such as optical scanning technology.

[FN34] Until there is modernization and uniformity of voting systems that will minimize the likelihood of a vote not being recorded and until punch card systems are retired from use, statewide disparity in voting systems could operate to disenfranchise a number of otherwise eligible voters based upon their county of residency. This disparity, based only on one's county of residence, might have constitutional implications.
[FN36]

FN36. See *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1(1969) (invalidating a county-based procedure that diluted the influence of citizens in larger counties in the nominating process).” (emphasis added).

CONCLUSION

Accordingly, it is respectfully submitted, that this Court should reverse the Trial Court's Order dismissing this case. Even if this Court finds that an Amendment to the Complaint is necessary, such an amendment is not futile, and this case should be remanded for further proceedings below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this May 24, 2004 to: PAUL HUCK, ESQ., Office of Attorney General, 110 Southeast 6th Street, Fort Lauderdale, FL 33301, Attorney for Defendant, Glenda E. Hood; GEORGE L. WAAS, ESQ., Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050 and BERNARD A. LEBEDEKER, ESQ., Burman, Critton, Luttier & Coleman, 515 N. Flagler Drive, Suite 400, West Palm Beach, FL 33401.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), Fla. R. App. P., the undersigned attests that this Initial Brief is being submitted in Times New Roman 14 point font.

Dated: May 24, 2004.
