

**DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF FLORIDA**

AMERICAN CIVIL LIBERTIES UNION OF
FLORIDA, INC. (ACLU-FL), SOUTHWEST VOTER
REGISTRATION EDUCATION PROJECT (SVREP),
COMMON CAUSE FLORIDA (CCF), FLORIDA
SOUTHERN CHRISTIAN LEADERSHIP
CONFERENCE CHAPTER (FSCLC), and the
FLORIDA VOTERS LEAGUE, INC. (FVL),

Petitioners,

vs.

Case No. _____

FLORIDA DEPARTMENT OF STATE,

Respondent.

PETITION TO DETERMINE THE INVALIDITY OF RULES

Petitioners, American Civil Liberties Union, Inc. (ACLU-FL), the Southwest Voter Registration Education Project (SVREP), Common Cause Florida (CCF), the Florida Southern Christian Leadership Conference Chapter (FSCLC) and the Florida Voters League, Inc. (FVL), petition the Division of Administrative Hearings, pursuant to §120.56(3), Fla. Stat. (2003), to declare invalid a rule of the Respondent, Florida Department of State (DOS), as an invalid exercise of delegated legislative authority.

Petitioners allege as follows:

1. The American Civil Liberties Union of Florida, Inc. (ACLU-FL), is an affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members. ACLU-FL is comprised of approximately 21,000 members in the State of Florida, dedicated to defending the

principles of liberty and equality embodied in the Constitution, and in the nation's civil rights laws. As part of that commitment, ACLU-FL has been active in defending the rights of all persons to participate in the electoral process, and in insuring that every vote is appropriately counted. ACLU-FL subscribes to the view that it is essential to the integrity and legitimacy of the electoral process that the results of close elections be subject to a manual verification which is transparent to the electorate. In addition, on appropriate occasions, ACLU-FL supports or opposes ballot initiatives in furtherance of its organizational purposes.

2. The Southwest Voter Registration Education Project (SVREP) is a nonprofit, nonpartisan Latino civic education organization, founded in 1974 in San Antonio, Texas. The SVREP has extended its reach from California to Florida in the last 20 years. SVREP is currently concentrating its voter education efforts in central and south Florida, with active projects in Hillsborough, Polk, Orange, and Pinellas counties, with plans to expand its activities in the immediate future. SVREP is dedicated to educating Latino communities about democratic processes, the importance of voter registration and participation, and to promoting increased civic engagement in the American electoral system through exercising the fundamental right to vote. SVREP subscribes to the view that it is essential to the integrity and legitimacy of the electoral process that the results of close elections be subject to a manual verification which is transparent to the electorate. In addition, on appropriate occasions, SVREP may support or oppose ballot initiatives in furtherance of its organizational purposes.

3. Common Cause Florida (CCF) is a nonpartisan political organization, founded in 1974, with more than 9,000 members throughout the State of Florida.

Promoting the integrity of our electoral processes by advocating election reform is among the strongest of CCF's organizational purposes. CCF played a major role in working with then-Governor Rubin Askew to advocate and pass the "Sunshine Amendment"; it has strongly advocated campaign contribution limits, open government laws, and public financing of political campaigns. It has worked to promote election reform in the wake of the flawed 2000 presidential election. CCF subscribes to the view that it is essential to the integrity and legitimacy of the electoral process that the results of close elections be subject to a manual verification which is transparent to the electorate. In addition, CCF supports or opposes ballot initiatives in furtherance of its organizational purposes.

4. The Florida Southern Christian Leadership Conference Chapter (FSCLC) is an affiliate of the Southern Christian Leadership Conference, founded by Dr. Martin Luther King, Jr., Rev. Fred Shuttlesworth, and Rev. Dr. Ralph D. Abernathy, who organized and spearheaded civil rights movements in the United States of the 1950s and 1960s, and which led to the 1964 Civil Rights Act and the 1965 Voting Rights Act. Among the most important organizational purposes of the FSCLC is the protection of fundamental voting rights of all Americans. FSCLC subscribes to the view that it is essential to the integrity and legitimacy of the electoral process that the results of close elections be subject to a manual verification which is transparent to the electorate. In addition, on appropriate occasions, supports or opposes ballot initiatives in furtherance of its organizational purposes.

5. The Florida Voters League, Inc. (FVL), is a statewide nonprofit, nonpartisan organization, which has promoted political responsibility through an informed and active electorate since it was organized more than 45 years ago. The FVL

was founded in 1958 and became a nonprofit corporation in 1965. The FVL promotes its goals through voter registration and education projects and advocacy. The FVL has approximately 20,000 members throughout Florida, in local Voter Leagues and in an at-large membership. FVL subscribes to the view that it is essential to the integrity and legitimacy of the electoral process that the results of close elections be subject to a manual verification which is transparent to the electorate. In addition, on appropriate occasions, FVL may support or oppose ballot initiatives in furtherance of its organizational purposes.

6. Respondent's Rule 1S-2.031(7), Florida Administrative Code, constitutes an invalid exercise of delegated legislative activity, as that term is defined by §120.52(8), Fla. Stat. (Supp. 2004), in the following respects:

(a) The rule subsection specified above exceeds the Respondent's grant of rulemaking authority, citation to which is required by §120.54(3)(a)1. The rule cites as its rulemaking authority §102.166, Fla. Stat., and §102.166, Fla. Stat., as the law implemented. Neither provision authorizes the Respondent to adopt the rule identified above.

(b) The rule enlarges, modifies and contravenes the specific provisions of law implemented. Section 102.166, Fla. Stat. (Supp. 2004), provides that:

102.166. Manual recounts

(1) If the second set of unofficial returns pursuant to s. 102.141 indicates that a candidate for any office was defeated or eliminated by one-quarter of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-quarter of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-quarter of a percent or less of

the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure.

(2)(a) If the second set of unofficial returns pursuant to s. 102.141 indicates that a candidate for any office was defeated or eliminated by between one-quarter and one-half of a percent of the votes cast for such office, that a candidate for retention to judicial office was retained or not retained by between one-quarter and one-half of a percent of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by between one-quarter and one-half of a percent of the votes cast on such measure, any such candidate, the political party of such candidate, or any political committee that supports or opposes such ballot measure is entitled to a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure, provided that a request for a manual recount is made by 5 p.m. on the third day after the election.

Id. (emphasis supplied). Although §102.166, Fla. Stat., expressly requires and authorizes a “manual recount of the overvotes and undervotes”, Respondent’s rule 1S-2.031(7) expressly provides that when a touchscreen voting system is used, “no manual recount of the undervotes and overvotes cast on a touchscreen system shall be conducted....”

(c) The rule is arbitrary and/or capricious, because it has been adopted without necessary supporting facts and is illogical, and/or the rule has been adopted without genuine reason or thought. The Respondent’s rationale for the rule, expressed in its opinions, is premised upon the flawless operation of technology known to malfunction and to be subject to malicious tampering.

7. Rather than follow the clear and unambiguous language of the statute, the Respondent’s rule purports to construe statutory language which is not subject to construction by the Respondent. Where the Legislature uses clear and unambiguous

language, neither the courts nor an agency may second guess the wisdom of a statute, or resort to rules of construction to modify the import of clear legislative language. In addition, the Respondent's rationale for the rule's contravention of the statute is premised upon flawless operation of technology known to malfunction and to be subject to malicious tampering.

8. Touch screen voting systems are used in 15 counties in Florida, including many of our most populous counties, where more than 50 percent of Florida voters reside. These voting systems are used in Miami-Dade, Broward, Palm Beach, Hillsborough, Collier, Lee, Sumpter, Charlotte, Lake, Martin, Nassau, Pasco, Sarasota, Indian River, and Pinellas Counties.

9. Touch screen voting systems are subject to mechanical, electronic, and programmatic errors in their functioning. They are also vulnerable to tampering through all of these means. Where a voting machine malfunctions or is the object of malicious tampering, it may permit an overvote, fail to record a vote – resulting in an undervote – or record a vote entirely differently from the touch screen executed by the voter. Such machines could have such effects on attempted votes of large numbers of voters. The manual recount requirement of §102.166(1) and (2), Fla. Stat., provides a means for determining whether the touch screen vote cast by the voter was accurately recorded by the voting system, and also serves as a means of identifying voting systems that have malfunctioned or have been the objects of tampering. The transparency of the manual recount also serves to engender and promote confidence in the electorate in the legitimacy of the electoral process.

10. The Respondent's rule 1S-2.031(7) prohibits Supervisors of Elections, and other election officials, from taking steps to protect the integrity of the electoral process in ways that comply with the statutory command that such officials shall, by some reasonable means, conduct a "manual recount of the overvotes and undervotes cast...." §§102.166(1) and (2)(a), Fla. Stat. Unless Supervisors of Elections and other election officials are freed from the prohibition of Respondent's rule 1S-2.031(7), and take immediately action to protect the integrity of the electoral process, Petitioners, their membership, and all Florida citizens may be irreparably injured. Unless action is quickly taken, voting information will not be preserved upon which a credible and transparent verification or recount of election results can be accomplished in close elections. The legitimacy of the election results on every ballot initiative and every candidate for every office, local, State and federal, is potentially and irreparably at risk.

11. Each of the Petitioners are adversely affected by Respondent's rule 1S-2.031(7), Florida Administrative Code. The rule adversely affects each Petitioner's organizational purposes of:

- (a) promoting the legitimacy of and participation in the electoral process;
- (b) insuring the integrity of the electoral process by insuring that every vote is appropriately and correctly counted; and,
- (c) in the event of voting machine errors, insuring that it will be possible to conduct a credible recount of votes by means that are transparent to and understandable by the electorate.

12. In addition, the Respondent's rule adversely affects Petitioner's substantial interest by prohibiting, and by failing to provide for a manual recount of overvotes and undervotes in close elections with respect to candidate and ballot initiatives supported and opposed by Petitioners.

13. In Petitioners' representative capacities, the Respondent's rule adversely affects the substantial interest of a substantial number of Petitioners' respective members, who share Petitioners' goals, interests and concerns. See, *NAACP, Inc., etc., et al. v. Florida Board of Regents*, 863 So.2d 294 (Fla. 2003).

14. Petitioners are entitled to an award of attorneys' fees and costs pursuant to §120.595(3), Fla. Stat. (Supp. 2004).

FOR THE FOREGOING REASONS, the Petitioners request the Division of Administrative Hearing through its assigned Administrative Law Judge to:

1. Declare the agency statement described above to constitute an invalid exercise of delegated legislative authority under §120.56(3), Fla. Stat., for the reasons set forth above.

2. Award Petitioners their reasonable attorneys' fees and costs, pursuant to §120.595(3), Fla. Stat. (2003).

Respectfully submitted,

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