

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

ELLEN FEDDER, LANCE JONES,
ERNEST LASCHE a/k/a MIKE LASCHE,
BARBARA KLEIN, LOIS HARMES,
JOHN MINDER, DOVIE MURRAY,
JOHN MCBRIDE, SUSAN GAAR,
GARY LAMER, CHARLES CLIFTON,

Plaintiffs,

v.

TOM GALLAGHER, CHIEF
FINANCIAL OFFICER, STATE OF
FLORIDA, and GOVERNOR JEB
BUSH, and STATE SENATOR DAN
WEBSTER, as members of and as the
FLORIDA ELECTIONS CANVASSING
COMMISSION, and SUE M. COBB,
as SECRETARY OF STATE,
STATE OF FLORIDA,

and

THE SARASOTA COUNTY
CANVASSING BOARD,
SARASOTA COUNTY JUDGE
PHYLLIS GALEN, SARASOTA
COUNTY COMMISSIONER
PAUL MERCIER, and KATHY
DENT, SARASOTA COUNTY
SUPERVISOR OF ELECTIONS,
as members of and as THE
SARASOTA COUNTY
CANVASSING BOARD, and KATHY
DENT, as Supervisor of Elections,

and

VERN BUCHANAN, Nominee of
the Republican Party of Florida for
the 13th Congressional District of Florida,

Defendants.

COMPLAINT TO CONTEST ELECTION

1. The right to vote is perhaps the most fundamental liberty enjoyed by citizens in a democratic society. The right to vote includes the fundamental right to have one's votes counted. Unfortunately, thousands of voters lost this most fundamental right in the 2006 general election for the Thirteenth District of Florida for the United States House of Representatives.

2. This is an action under Florida Statute Section 102.168(7) to contest the certification that Vern Buchanan was the winner of the November 7, 2006, congressional election in the 13th District in the State of Florida for the United States House of Representatives. The grounds for this contest are misconduct on the part of election officials (*Fla. Stat.* § 102.168(3)(a) (2006)), and rejection of a number of legal votes sufficient to change or place in doubt the result of the election (*Fla. Stat.* § 102.168(3)(c) (2006)). The vote totals reported in the Florida Election Canvassing Commission's certification of November 20, 2006 are inaccurate. They do not include legal votes cast in Sarasota County that were improperly rejected. The number of such votes is more than sufficient to place in doubt the result of the election.

3. Voters in Sarasota County, other than those voting via paper absentee ballots, were forced to use faulty and unreliable voting machines that only record votes electronically, making it very difficult, if not impossible, to determine if the machines failed to record or count legal votes and, if so, how many. By contrast, Sarasota County absentee ballot voters and voters in three other counties in the same congressional district voted on paper ballots that allowed election officials to ascertain the intent of the voters and made it possible to determine through a recount or audit if legal votes were recorded

and whether they were counted accurately. This unequal treatment offends principles of equal protection and one person, one vote that lie at the core of our democracy.

4. Plaintiffs Ellen Fedder, Lance Jones, Ernest “Mike” Lasche, Barbara Klein, Lois Harmes, John Minder, Dovie Murray, John McBride, Susan Gaar, Gary Lamer and Charles Clifton are electors who are qualified to vote in, and did, in fact, vote or attempt to vote in Sarasota County in the November 7, 2006, congressional election for the 13th District. Plaintiffs have standing under Section 102.168(1), Florida Statutes (2006).

5. Defendants Tom Gallagher, Jeb Bush and Dan Webster are and were at all relevant times members of the Florida Elections Canvassing Commission and thus necessary and proper parties to this action.

6. Defendant Sue M. Cobb is the Secretary of State for the State of Florida.

7. Defendants Phyllis Galen, Paul Mercier and Kathy Dent are and were at all relevant times members of the Sarasota County Canvassing Board. Defendant Kathy Dent is also the Supervisor of Elections for Sarasota County.

8. Defendant Vern Buchanan is certified as the successful candidate in the Thirteenth District race and thus an indispensable party to this action. These voter plaintiffs name Mr. Buchanan as a defendant only due to the statutory requirement in Section 102.168(4), Florida Statutes (2006).

9. The Sarasota County Canvassing Board certified 58,632 votes for Vern Buchanan and 65,487 votes for Christine Jennings. The Supervisor of Elections also reported that no vote was recorded for any congressional candidate on approximately 18,000 electronic ballots cast on ES&S iVotronic voting machines in early voting and

Election Day voting in the Sarasota County portion of the 13th Congressional District, nearly 15 percent of all electronic ballots and approximately 13 percent of all ballots, paper and electronic. By treating these ballots as “undervotes” in the 13th Congressional District election, the Sarasota County Canvassing Board rejected thousands of legal votes sufficient to place in doubt the result of the election.

10. The Florida Elections Canvassing Commission, based on the certified results submitted by the Canvassing Boards of Charlotte, DeSoto, Hardee, Manatee and Sarasota counties, certified 119,309 votes for Vern Buchanan and 118,940 votes for Christine Jennings, a difference of 369 votes, or 0.155 percent. That difference is dwarfed by the approximately 18,000 electronic ballots cast on ES&S iVotronic voting machines in early voting and Election Day voting in the Sarasota County portion of the 13th Congressional District on which no vote was recorded for any congressional candidate. By treating these ballots as “undervotes” in the 13th Congressional District election, the Florida Elections Canvassing Commission rejected thousands of legal votes sufficient to place in doubt the result of the election.

Jurisdiction and Venue

11. This is an action to contest an election under section 102.168, Florida Statutes (2006).

12. Section 102.1685, Florida Statutes (2006), establishes Leon County as the proper venue for this action.

Common Allegations

13. On October 13, 2005, the Office of the Secretary of State certified the ES&S iVotronic direct recording electronic (DRE) voting system for use in Florida elections. At that time, Glenda Hood was Secretary of State. Defendant Cobb is her appointed successor in the office.

14. In early voting and Election Day voting for the 2006 general election, Sarasota County voters cast their ballots on the certified ES&S iVotronic voting machines, in which selections in each race were made by touching the screen's display of the name of the voter's preferred candidate. The certified results indicated that approximately 18,000 of the ballots cast in this manner, the iVotronic machines did not record a vote for any candidate in the 13th Congressional District race. This translates to an "undervote" rate of approximately 14.8 percent in the 13th Congressional District race in ballots cast on the iVotronic machines, or roughly one in every seven voters. By contrast, the undervote rate in the race for United States Senate, which immediately preceded the congressional race on the touch screen ballots, was less than 1.2 percent, and the undervote rate in the gubernatorial race that immediately followed the congressional race on the same screen was less than 1.4 percent. In fact, more people voted for Hospital Board in Sarasota County than for the United States House of Representatives.

15. Certain Sarasota County precincts had particularly high congressional undervote rates. For example, precincts 90, 105 and 118 had undervote rates in excess of 25%, or one in four voters. The congressional undervote rate in Precinct 153 was 38%, meaning that no vote was recorded for more than one in every three voters who cast votes in the U.S. Senate and Governor's races that appeared on the ballot immediately before

and after the congressional race. Overall in Precinct 153, 24 undervotes were reported (i.e., votes for the congressional race were not recorded on 24 ballots), 34 votes were recorded for the Democratic candidate Christine Jennings and 5 votes were recorded for the Republican candidate Vern Buchanan.

16. By contrast, absentee voters in Sarasota County cast their votes by hand, inking in the gap in an arrow symbol for each of their selections on paper ballots designed to be counted by scanning machines. These Sarasota paper ballot voters had an undervote rate of 2.5 percent in the 13th Congressional District race.

17. Nearly all voters in three of the four other counties in the 13th Congressional District, DeSoto, Hardee and Manatee, cast their votes in the 2006 general election on optical scan paper ballots. The undervote rate in the 13th Congressional District race in DeSoto County was less than 2.2 percent. In Hardee and Manatee counties, the undervote was less than 1 percent. In the small portion of Charlotte County that lies within the 13th Congressional District, the undervote rate on the iVotronic machines used in early and Election Day voting was 2.51 percent.

18. During early voting, which ran from the 15th day before the November 7, 2006 election through the 2nd day before the election (i.e., October 23, 2006, through November 5, 2006), numerous Sarasota County voters such as Ernest “Mike” Lasche complained orally to poll workers at early voting sites, and in writing to the Sarasota County Supervisor of Elections office, of difficulties in casting their vote in the 13th Congressional District race on the iVotronic touch screen machines.

19. Many voters, such as Plaintiffs Ellen Fedder, Lance Jones, Barbara Klein, Dovie Murray and Lois Harnes reported that the congressional race was easy to miss

because of its placement at the top of the second screen of choices, above a colored header introducing the state office races that followed, beginning with governor, and that the ballot layout and design were thus unclear and confusing. Some reported being certain nonetheless that they entered a vote in the congressional race when it first appeared on the second screen of the ballot, only to find when they reached the summary screen at the end of the ballot that no CD 13 candidate's name appeared and no "x" was shown in the box next to the title of the office. Some reported that they were able to return to the selection screen and enter a vote, but had doubts as to whether the machine had actually recorded that vote, since the machine had missed it the first time.

20. Other voters, such as Plaintiffs John McBride and Ernest "Mike" Lasche reported seeing the congressional race and the names of the candidates for the first time only when they reached the summary screen, with the screen indicating by a text message and an arrow that they had not entered a selection in the race. Still others reported requiring multiple attempts before a vote would register for their candidate in the race, but had doubts as to whether the machine actually recorded that vote.

21. Despite the complaints during early voting, Defendant Dent did little or nothing to rectify the situation. To the contrary, she accused some complainants, such as Plaintiff Ellen Fedder in writing of having a political agenda to undermine confidence in electronic voting machines and attempting to disrupt the election process. In a November 2, 2006, e-mail response to several complainants, including Plaintiff Ellen Fedder and Ernest "Mike" Lasche who had offered detailed descriptions of the voting machine irregularities they had encountered in early voting, Supervisor Dent was dismissive of the reports. Her concluding words were: "With Election Day almost upon us, I hope we can

stop looking for ways to disrupt the process and disenfranchise voters. I invite you all to work with us to ensure a smooth election process. This office has always been and will continue to be responsive to valid concerns and even criticism. The political strategy of attacking the process has become so vicious that it is destroying the very process that makes it possible to have confidence in the electoral process.”

22. In particular, among her other failures to act, Defendant Dent failed even to seek to change the ballot layout with respect to the congressional race, failed to post signs or other warning notices to voters concerning the problem, and failed to provide timely and sufficient instructions to pollworkers about the problem.

23. On Election Day, November 7, 2006, starting soon after voting commenced at 7:00 a.m. and continuing throughout the day, voters from dozens of precincts throughout Sarasota County had similar problems voting, and some lodged similar complaints, orally and in writing, with poll workers and with the office of the County Supervisor of Elections. By their own accounts and the accounts of poll workers, they described the same problems early voters had complained of while voting or after attempting to vote in the 13th Congressional District race on the iVotronic voting machines.

24. Plaintiffs Ellen Fedder, John Mindler, Lois Harmes, Dovie Murray and Barbara Klein also saw their CD 13 votes register on the original selection screen. When they reached the summary screen, the box for the congressional race contained no “x” but, unlike Plaintiff Jones’ experience, no text alert appeared. Ellen Fedder and John Mindler were able to return to the selection screen and enter a vote that was shown on the summary screen when they returned there. Lois Harmes, John McBride and Dovie

Murray entered their votes directly from the summary screen without returning to the selection screen, something the iVotronic should not permit if operating properly.

Barbara Klein had a particularly difficult experience. She scrolled back page-by-page to the selection screen for CD 13, made her selection and saw the vote register an “x.” She returned to the summary screen, only to find again no text warning and a box with no “x.” Scrolling back to the selection screen a second time, she tried three times to press her candidate’s name before the screen registered a vote, a vote which was finally also displayed on the review screen. All of these plaintiffs are concerned as to whether the machine actually recorded and counted their vote.

25. Other Election Day voters, like Plaintiff John McBride, did not see the congressional race until they reached the review screen but were able, like Plaintiffs Lois Harnes and Dovie Murray, to enter a vote in the race directly from the summary screen, something that should not have been possible if the iVotronic worked as designed. Each is uncertain as to whether the vote was recorded and counted accurately.

26. Plaintiffs Lance Jones and Ernest “Mike” Lasche saw the congressional race when it first appeared on the second screen on the ballot. Each entered a vote for his preferred candidate. When they reached the summary screen, however, the box for the congressional race contained no “x” mark and a text message advised that no selection had been made. Both returned to the selection screen, re-registered the vote, and finally saw it reflected on the summary screen. Each is uncertain as to whether the machine actually recorded and counted his vote.

27. Election Day voters, such as Plaintiffs Lance Jones and Barbara Klein, and poll workers, such as Plaintiff Susan Gaar, also reported that Sarasota County iVotronic

machines displayed unexpected, irregular screens after some voters completed casting their ballots, pushed the final “vote” button, and the machine displayed its standard “Thank you for voting” message. The irregular screens indicated that the voter had not finished voting. Plaintiff Susan Gaar, a poll inspector, saw the irregular message “continue” on an otherwise blank iVotronic screen after plaintiff Gary Lamer had voted on the machine, and called him back. In some cases, poll workers instructed the voter to push the final “vote” button again, after which no “Thank you for voting” message appeared, leaving the voter, such as Plaintiff Lamer, uncertain as to whether he or she had in fact cast one ballot, two, or none.

28. In Florida counties that do not lie within the 13th Congressional District, ES&S iVotronic voting machines also produced extraordinarily high undervote rates. Sumter and Lee counties had undervote rates of 21 percent and 22 percent in the state Attorney General’s race, which, unlike the 13th Congressional District race in Sarasota County, was not displayed at the top of an iVotronic screen. Charlotte County, only a small part of which lies within the 13th Congressional District, reported an undervote rate in the Attorney General’s race of 18 percent.

29. In addition to high undervote rates, iVotronics in Sarasota County Precinct 22 did not provide “zero tapes” prior to the commencement of voting on Election Day, a step required as an indication that the machine does not contain any votes prior to the official start of voting. Also on Election Day in Precinct 22, the internal clock in at least one iVotronic machine was set for a date other than November 7, 2006.

**Count I, Section 102.168(3)(a) (Sarasota
County Supervisor of Elections Kathy Dent)**

30. Plaintiffs reallege paragraphs 1 through 29.

31. Supervisor of Elections Kathy Dent has a duty under Section 102.141(8)(a)(1) to identify and report all voting system equipment or software malfunctions at the precinct level, and the steps taken to address the malfunctions.

32. Supervisor of Elections Dent has a duty under Section 102.141(8)(a)(2) to identify and report all election definition errors that were discovered after the logic and accuracy test, and the steps taken to address the errors.

33. During the early voting period, Defendant Kathy Dent personally received multiple complaints from voters and poll workers concerning voter difficulty in registering their vote on iVotronic machines in the 13th Congressional District election, as described at length above. Similar complaints were made to employees of the Supervisor of Elections and to poll workers sworn in to run the early voting sites. These complaints pointed to equipment or software malfunctions, “election definition” (i.e., ballot layout and design) errors, or a combination thereof.

34. On information and belief, Defendant Dent took no or insufficient steps to investigate or to identify and report equipment malfunctions, software malfunctions or election definition errors in the iVotronic touch screen voting machines that led to the complaints. Instead, Defendant Dent and many of her employees were dismissive and condescending toward voters and poll workers who lodged the complaints. Defendant Dent went so far as to suggest in a television interview the night before the election that the proponents of a county charter referendum to require voter verifiable paper ballots were falsely generating the complaints concerning the iVotronics to bolster the likelihood of the referendum’s passage. She also accused some complainants in writing of having a

political agenda to undermine confidence in electronic voting machines and attempting to disrupt the election process.

35. Ten days after the election, Defendant Dent, notwithstanding her duties under Sections 102.141(8)(a)(1) and 102.141(8)(a)(2), publicly stated that she planned to answer “no” to questions on a state-mandated form reporting whether voting equipment malfunctioned or affected the outcome of the race.

36. Through misconduct, incompetence, gross negligence, lack of care or an erroneous understanding of the statutory requirements, Defendant Dent failed to investigate and to identify and correct the equipment malfunctions, software malfunctions or ballot layout errors responsible for the faulty operation of the iVotronic voting machines. As a result, she failed to substantially comply with her statutory duty under Section 102.141(8)(a)(1) & (2). On information and belief, equipment malfunctions, software malfunctions or ballot layout errors or a combination thereof in the iVotronic voting machines caused the county result in the 13th Congressional District election certified by Defendant Sarasota County Canvassing Board to include false, grossly excessive undervote figures and the rejection of thousands of legal votes. Thousands of voters were disenfranchised in the congressional election as a result. A reasonable doubt exists as to whether the certified election result expresses the will of the voters, and the Court must void the election.

Count II, Section 102.168(3)(a) (Secretary of State Sue M. Cobb)

37. Plaintiffs reallege paragraphs 1 through 36.

38. Defendant Sue M. Cobb is the Secretary of State for the State of Florida.

39. Section 101.5606, Florida Statutes (2006), provides that no electronic voting system shall be approved by the Department of State unless it is so constructed that, *inter alia*, it permits each elector to vote at any election for all persons and offices for whom and for which the elector is lawfully entitled to vote (*id.*, §101.5606(2)), it is capable of correctly counting votes (*id.*, §101.5606(5)), and, for machines that register votes electronically, it will permit each voter to change his or her vote for any candidate appearing on the official ballot up to the time that the voter takes the final step to register his or her vote and to have the vote computed (*id.*, §101.5606(12)).

40. On October 13, 2005, Defendant Cobb's predecessor in the Office of Secretary of State certified the ES&S iVotronic voting machine, firmware, software and election management software for use in Florida elections.

41. When the Secretary of State certified the iVotronic, it was widely known among Florida elections officials that key components of ES&S voting systems suffered from serious defects and had experienced serious failures in multiple elections in multiple jurisdictions. By way of example, an eGovernment specialist for Miami-Dade County, Florida, discovered and then reported in June 2003, that defects in ES&S Events Log Reports and Vote Image Reports meant that they could not be used to recount, audit or certify election results. ES&S systems in other states were known to have lost votes and attributed votes to the wrong candidates.

42. Disregarding these warnings concerning the reliability and trustworthiness of ES&S voting systems, the former Secretary of State certified the iVotronic, thereby substantially failing to comply with the statutory requirements for electronic voting system certification in section *Fla. Stat.* § 101.5606 due to a lack of care or an erroneous

understanding of the statutory requirements. On information and belief, this substantial noncompliance left uncorrected a defect or defects in the hardware, firmware and/or software of the iVotronic voting machines that caused the certified results of the 13th Congressional District election to include false, grossly excessive undervote figures, resulting in the rejection of thousands of legal votes. As a result, thousands of voters were disenfranchised in the congressional election, far more than enough to cast doubt upon the result of the election. A reasonable doubt exists as to whether the certified election result expresses the will of the voters, and the Court must void the election. *Fla. Stat.* 102.168(3)(a) and (c); *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (1998).

Count III, Section 102.168(3)(c) (Sarasota County Canvassing Board)

43. Plaintiffs reallege paragraphs 1-42.

44. Defendants, Phyllis Galen, Paul Mercier and Kathy Dent are and were at all relevant times members of the Sarasota County Canvassing Board.

45. On information and belief, equipment malfunctions, software malfunctions, ballot layout errors or a combination thereof in the iVotronic voting machines caused the county result for the 13th Congressional District election certified by Defendant Sarasota County Canvassing Board on November 18, 2006, to include false, grossly excessive undervote figures and the rejection of thousands of legal votes. Thousands of voters were disenfranchised in the congressional election as a result. A reasonable doubt exists as to whether the certified election result expresses the will of the voters, and the Court must void the election.

Count IV, Section 102.168(3)(c) (Florida Elections Canvassing Commission)

46. Plaintiffs reallege paragraph 1 through 45.

47. On November 20, 2006, the Elections Canvassing Commission issued a written certificate of the result of the 13th Congressional District election.

48. On information and belief, a defect or defects in the hardware, firmware and/or software of the iVotronic voting machines caused the certified results of the 13th Congressional District election to include false, grossly excessive undervote figures and the rejection of thousands of legal votes. As a result, thousands of voters were disenfranchised in the congressional election. A reasonable doubt exists as to whether the certified election result expresses the will of the voters, and the Court must void the election.

Prayer for Relief

WHEREFORE, Plaintiffs pray that the court hear this matter on an expedited basis pursuant to Florida Statute Section 102.168(7), and that:

As to All Counts:

A. Order that the 13th Congressional District election results certified by the Sarasota County Canvassing Board and the Florida Elections Canvassing Commission are void.

B. Order Defendant Kathy Dent, in her capacity as Sarasota County Supervisor of Elections, to conduct as soon as practicable a new election for the Thirteenth Congressional District of Florida in which only those official candidates appear on the ballot who appeared on the ballot at the 2006 general election for the Thirteenth Congressional District; in which only those eligible Sarasota County electors who voted on iVotronics are permitted to vote; and in which only paper ballots are used

except to the extent necessary to accommodate voters for whom paper ballots present an accessibility problem.

C. Order Defendant Dent to include in the canvass of the new 13th Congressional District election the votes cast in the new election and the absentee ballot votes cast and previously canvassed in the original election.

D. Order Defendant Sarasota County Canvassing Board, following the canvass of the votes cast in the new 13th Congressional District election, to certify the results.

E. Order Defendant Florida Elections Canvassing Commission, upon receipt from the Sarasota County Canvassing Board of its certified result from the new 13th Congressional District election, to combine those results with the official canvass results submitted by the other counties in the 13th Congressional District following the general election and certify the overall result.

F. IN THE ALTERNATIVE, Plaintiffs pray that the Court grant the relief prayed for in paragraphs A through E above, except that the Court also order the Supervisors of Elections of Charlotte, DeSoto, Hardee and Manatee counties to conduct a new election and canvass consistent with paragraphs B and C above, order the County Canvassing Boards of Charlotte, DeSoto, Hardee and Manatee counties to certify the result of the new election consistent with paragraph D above, and order the Florida Elections Canvassing Board to certify the overall result consistent with paragraph E above.

G. Grant such other relief as the Court deems right and just.

Respectfully submitted this 21st day of November, 2006.

COUNSEL FOR PLAINTIFFS

Lowell Finley, Esq.
(Pro hac vice application to be filed)
VOTER ACTION
1604 Solano Avenue
Berkeley, California 94707
Telephone: 510-318-2248
Fax: 415-723-7141

By: _____
Lowell Finley

Elliot M. Mincberg, Esq.
Judith E. Schaeffer, Esq.
(Pro hac vice applications to be filed)
PEOPLE FOR THE AMERICAN WAY
FOUNDATION
2000 M Street N.W. #400
Washington, D.C. 20036
Telephone: (202) 467-4999
Facsimile: (202) 293- 2672

Reginald J. Mitchell, Esq.
Florida Bar No.0621293
PEOPLE FOR THE AMERICAN WAY
FOUNDATION
1550 Melvin Street
Tallahassee, FL 32301
Telephone: (850) 877-0307
Facsimile: (850) 402-1999

By: _____
Reginald J.Mitchell

Muslima Lewis, Esq.
Director – Voting Rights Project
Florida Bar No. 0158305
Randall C. Marshall, Esq.
Legal Director
Florida Bar No. 181765
ACLU FOUNDATION OF FLORIDA,
INC.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
Telephone: 786-273-2729
Facsimile: 786-363-1448

Rebecca Harrison Steele, Esq.
Fla. Bar No. 067326
Zeina N. Salam, Esq.
Florida Bar No. 653632
ACLU FOUNDATION OF FLORIDA,
INC.
West Central Florida Office
P.O. Box 18245
Tampa, FL 33679-8245
Telephone: 813-254-0925
Facsimile: 813-254-0926

By: _____
Rebecca Harrison Steele

Cindy A. Cohn, Esq.
Matthew J. Zimmerman, Esq.
(Pro hac vice applications to be filed)
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, California 94110
ph: (415) 436-9333 x127
fax: (415) 436-9993

By: _____
Matthew J. Zimmerman, Esq.