

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

**CHRISTINE JENNINGS, nominee of the
Democratic Party for Representative in Congress
From the State of Florida's Thirteenth Congressional
District,**

Plaintiff,

v.

Case No: 2006 CA 2973

**ELECTIONS CANVASSING COMMISSION OF
THE STATE OF FLORIDA, et al.,**

Defendants.

and

ELLEN FEDDER, et al.,

Plaintiffs,

v.

Case No: 2006 CA 2996

TOM GALLAGHER, et al.,

Defendants.

**CONGRESSMAN VERN BUCHANAN'S RESPONSE IN
OPPOSITION TO MOTION TO STAY PROCEEDINGS**

INTRODUCTION

On November 20, 2006 Ms. Jennings commenced this election contest in this Court ("State Contest"). After a two-day evidentiary hearing held on December 19-20, 2006 and the subsequent order dated December 29, 2006, this Court denied plaintiffs' request for access to certain trade secrets of ES&S, including the source code used in the election at issue. Plaintiffs have appealed that ruling by means of petitions for writ of certiorari. The First District Court of Appeal has not ruled on the petitions. On December 20, 2006, pursuant to the Federal Contested

Elections Act, Ms. Jennings filed an election contest in the United States House of Representatives (“House Contest”). On January 19, 2007 Congressman Buchanan filed a Motion to Dismiss the House Contest, which remains pending. On May 2, 2007 the Task Force created to investigate the Congressional District 13 election: (i) denied Ms. Jennings’s attempt to gain access to ES&S’s source code, (ii) stated that it would not authorize discovery by the parties at this time, and (iii) requested the Government Accountability Office (“GAO”) to investigate and report upon the election.

Ms. Jennings’ motion to stay these proceedings should be denied because such delay will: (i) deprive Florida dominion over its electoral process, (ii) deny Congress a crucial tool historically relied upon in determining federal election contests, and (iii) ultimately delay resolution of a contest that hangs over the people of Congressional District 13 and clouds their representation in the House of Representatives.

ARGUMENT

The House of Representatives, in adjudicating the House Contest, is governed by several well-settled legal principles demonstrating great deference to a state’s administration, regulation and resolution of elections; for example:

- The State of Florida’s certification of Congressman Buchanan as the winner of the election constitutes prima facie evidence that the election was conducted correctly. *See* 2 Lewis Deschler, “Deschler’s Precedent” [“Deschler”], Ch. 9 §§ 36.1 (1978) (*citing, e.g. Weber v. Simpson*, H.R. REP. NO. 78-1494 (1934));
- Florida’s certification must be afforded a strong presumption of legality and correctness. *See Young v. Mikva*, H.R. REP. NO. 95-244 (1977); *Ziebarth v. Smith*, H.R. REP. NO. 94-763 (1975); *Gormley v. Goss*, H.R. REP. NO. 73-893 (1934); and

- Election results prepared by election officials appointed under the laws of the state where the election was held are presumed to be correct until they are impeached by proof of fraud or irregularity. *See* Deschler, Ch. 9 § 36.3 (*citing Clark v. Nichols*, H. R. REP. NO. 78-1120 (1943)).

Most relevant to this Court's inquiry on the instant motion, however, is the well-settled precept that -- in election contests such as this -- the House will follow state laws and decisions of state courts unless they are shown to be unsound. *See Carney v. Smith*, H.R. REP. NO. 63-202, at 2586 (1914); *see also* 6 Clarence Cannon, "Cannon's Precedents of the House of Representatives of the United States," Ch. 162 §§ 91, 92 (1935) (quoted in *Kyros v. Emery*, H.R. REP. NO. 94-760, at 6 (1975)); *accord, Roudebush v. Hartke*, 405 U.S. 15 (1972). Congress's deference applies to statutes and their construction by state courts, rulings concerning ballot interpretation, and to the final determination of the winner of an election, as well as the official actions of state elections officers and judicial review of same by state courts. *See, e.g.,* Deschler, Ch. 9 §§ 57.3, 59.1 (discussing *Oliver v. Hale*, H.R. REP. NO. 85-2482 (1958) and *Roush v. Chambers*, H.R. REP. NO. 87-513 (1961)). Congressional deference to a state's legislative, administrative and judicial processes concerning elections is so strong that "[o]nly clear and convincing evidence can provide the basis to overcome the presumption of the legitimacy of the electoral process." *Dismissing the Election Contest Against Loretta Sanchez*, H.R. REP. NO. 105-416 at 15 (1998).

Congress has long relied upon state court and state investigative proceedings in adjudicating elections contests. *See, e.g., Dismissing the Election Contest Against Ron Packard*, H.R. REP. NO. 98-452 (1983) (dismissing contest based upon the opinion of the state superior court and report of the district attorney); *Dismissing the Election Contest Against Richard*

Howard Stallings, H.R. REP. NO. 99-290 (1985) (dismissing election contest based upon Idaho Attorney General's report that concluded there were no instances of voting irregularities); *Dismissing the Election Contest Against Charlie Rose*, H.R. REP. NO. 104-852, at p. 17 (1996) (relying extensively upon North Carolina's State Bureau of Investigations report). Such reliance was recently confirmed to the Clerk of the First DCA by the Committee on House Administration:

In contested House elections, **the House customarily relies on state legal processes to provide a full and fair airing of contested election issues** raised by the parties. This allows states the opportunity to **fully discharge their Constitutional responsibility** to conduct Federal elections. These **state proceedings ordinarily enhance the ability of the House to evaluate the merits** of any pending election contest.

Letter of Rep. Juanita Millender-McDonald to Jon S. Wheeler, dated Jan. 4, 2007 ("HAC Letter") (citing *Roudebush*) (emphasis added).

Ms. Jennings invoked the jurisdiction of this Court to dispute the certified election result as her first choice of venue. She should not now be allowed to halt the proceedings because she is displeased with the course her litigation has taken. This is particularly so because she has raised significant issues of Florida election law that must be adjudicated by this Court. State investigation and resolution of election contests have proven to be an integral component of resolving contests at the federal level. To the extent adjudication of the House Contest continues beyond the GAO investigation, the Members must -- in accordance with long-standing House precedent -- be afforded the benefit of the state's resolution of the critical issues of state election law and processes raised by Ms. Jennings.

The narrow, dispositive issue in the State Contest is whether Ms. Jennings can demonstrate the rejection of a number of legal votes sufficient to change or place in doubt the

result of the election.¹ In order to prevail, “logic dictates” -- as noted by the Florida Supreme Court -- that “the contestant **must establish the ‘number of legal votes** which the county canvassing board failed to count.” *Gore v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000), *rev’d on other grounds*, 531 U.S. 98 (2000). Ms. Jennings, however, seeks to be declared winner of the election without regard to voter intent nor what constitutes a “legal vote” under Florida law. At bottom, her claim is based upon the premise that undervotes can and should be counted as legal votes.²

Under Florida law, a “legal vote is one in which there is a ‘clear indication of the intent of the voter’” as reflected on the ballot.³ *Gore v. Harris*, 772 So. 2d 1243, 1257 (Fla. 2000), *rev’d on other grounds*, 531 U.S. 98 (2000); *see also* § 102.166(4)(a), Fla. Stat. (“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.”). “‘Undervote’ means that the **elector does not properly designate any choice** for an office or ballot question **and the tabulator records no vote** for the office or question.” § 97.021(37), Fla. Stat. (2006) (emphasis added). With respect to the iVotronic System, the word “undervote” on the ballot image for the effected race demonstrates a “clear indication that the voter made a definite choice to undervote” *See* Fla. Admin. Code R.

¹ The standard for the House Contest under the Federal Contested Elections Act is virtually the same, if not more stringent. *See, e.g., Dismissing the Election Contest against Loretta Sanchez*, H.R. REP. NO. 105-416 (1998), 1998 WL 57281 (requiring “clear and convincing evidence” of “invalid votes” in such a number that would change the result of the election); *see also* 2 U.S.C. § 383(b)(3) (providing defense based upon failure to state grounds sufficient to change result of election).

² *See, e.g.,* (Am. Comp. ¶ 1, 32, 34, 36 (allegations in Amended Complaint); 12/19/06 Tr. 86:24-87:6, 12/19/06 Tr. 85:8-86:2, 12/19/06 Tr. 105:8-11, 12/19/06 Tr. 109:6-11) (testimony of Professor Stewart, Ms. Jennings’ expert, advocating for statistical apportionment of votes despite (i) the lack of any evidence of machine malfunction, (ii) his inability to determine voter intent, and (iii) his inability to determine the number of “excess” undervotes))

³ Professor Stewart conceded below that a “legal vote,” as he defines it, is one that is determined “legitimate” pursuant to applicable state law. *See* 12/19/06 Tr. 99:20-100:7.

1S-2.031(4)2.a. Congressman Buchanan submits that the excess undervotes cannot be “allocated” as legal votes for either candidate because, under Professor Stewart’s construct and as a matter of Florida law, they reflect a clear indication that the voter made a definite choice to undervote that particular race. Regardless, the state court must resolve issues of statutory construction and application, and ultimately must determine whether Ms. Jennings can overturn the certified election result despite her inability to offer any evidence of machine malfunction, voter intent, nor a means to quantify the number of legal votes she claims were lost or otherwise not counted for her.

By this motion Ms. Jennings seeks to avoid state court review and adjudication of these issues. Granting a stay here would deprive the State of Florida the ability to legislate, regulate, and administer its electoral process, as well as to apply its laws in resolving the State Contest. It also deprives Congress the benefit of a significant, historical tool used to adjudicate contests in the House -- guidance that the Committee on House Administration specifically solicited here. *See* HAC Letter, discussed above. Without such guidance, there is the risk that the certified election result will be overturned without due consideration of the state statutory, regulatory and administrative scheme governing Florida’s electoral process. Statutory terms, legal standards, other provisions and authority may well be ascribed differing definitions and legal effect, if not nullified, when applied to elections to the House of Representatives. The Florida courts must be allowed to do their job and offer the guidance the House of Representatives expects and seeks.

The House Contest is at the very early stages. Congressman Buchanan’s motion to dismiss has not been heard and the recently appointed Task Force has not authorized the parties to conduct discovery, as is required by the Federal Contested Elections Act. Instead, the Task Force rejected Ms. Jennings’ request for access to the ES&S source code and directed the GAO

to investigate the election result and post-election testing by the State. The Task Force did not dictate a specific scope of inquiry nor deadline for completion. While the Task Force indicated that the GAO will review the State of Florida's parallel testing, voting systems audit and independent source code review, no decision has been made with respect to specific areas of inquiry nor is it clear that GAO will conduct its own review and testing of the machines and source code at issue. There is nothing to conclude that the GAO's investigation will result in a quicker resolution of the House Contest nor that such investigation is mutually exclusive of the State Contest.⁴

The mere fact that the Task Force has requested the GAO to investigate in no way limits nor obviates the need for adjudication of state law issues in the State Contest. To the contrary, the House has regularly (and in this case) announced its desire to obtain the benefit of "state legal processes to provide a full and fair airing of contested election issues." A stay of the proceedings here will only deprive Florida dominion over, and ensure that the House will be denied the benefit of, the state's elections laws and processes.

⁴ Citing Article I, section 5 of the U.S. Constitution, Ms. Jennings argues that the House "bears the ultimate constitutional responsibility to judge the disputed election" and to "determine whether Ms. Jennings or Mr. Buchanan . . . is entitled to the seat as Representative" Motion, p. 3. Thus, she urges the Florida courts to "defer" further rulings and proceedings in favor of the House investigation. This is merely an attempt to avoid further adverse rulings in the State Contest that she knows will be afforded great deference by the House and, perhaps, used to dispose of her House Contest. Under Ms. Jennings' construct, it is meaningless to ask the Florida courts to defer pending the House investigation because Congress will have the last word upon concluding the investigation and deciding the House Contest. There will be nothing left for the state courts to decide and the myriad state law issues raised by Ms. Jennings will be left unresolved and, depending upon the House's actions, potentially in a state of conflict. Ms. Jennings' motion presupposes that the state court proceedings are a nullity; if that is truly her position then she should dismiss the state proceedings entirely and with prejudice rather than burden the courts with litigation that she has no intention of pursuing nor interest in completing.

CONCLUSION

For all of the foregoing reasons, the instant motion should be denied in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail this 17th day of May, 2007 to counsel of record on the attached service list.

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