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Federal Suit Challenges Destruction of Ballot Records By Florida SOEs – [Federal Case Filings](#)

(Miami, FL) Six Florida voters representing different areas of the state have [filed a lawsuit](#) in federal court seeking to stop Florida county supervisors of elections from unlawfully destroying key election materials.

The election materials known as ‘[ballot images](#)’ are the records created by digital voting equipment used in all but three of Florida’s sixty-seven counties. Ballot images are essential materials because they produce the actual vote counts. A federal law first passed during the civil rights era requires that all election materials and records be preserved and maintained for at least 22 months following a federal election. The law makes no exceptions. State law mirrors the federal law.

“Despite the plain language in federal and state laws, Florida election officials are failing to ensure that digital electronic ballot images created by Florida’s digital voting machines are preserved,” said Benedict Kuehne, a Miami attorney who represents the plaintiffs in this case. “This case seeks only to enforce the federal and state laws requiring election officials to preserve all election materials, including digital ballot images, for a period of 22 months following a federal election, and to require the Florida Secretary of State and Florida Election Director to instruct all county supervisors of elections of their legal obligation to do so.”

The digital scan voting machines used in 64 Florida counties are different from predecessor voting machines known as optical scanners still used in three Florida counties. Digital voting scanners automatically make a digital image of each ballot scanned. The scanner then reads and tabulates the votes from the digital image rather than the paper ballot as is the case with optical scanners.

The majority of Florida’s Supervisors of Elections have been destroying the ballot images for years, according to plaintiffs. On October 19, 2018, plaintiffs’ attorneys sent a [letter to Secretary of State Ken Detzner](#) requesting that the state instruct county supervisors of elections to preserve the ballot images. But state election officials failed to properly instruct local supervisors of elections of their legal duty to do so. The effect of this failure means that digital ballot images for the November 6, 2018, general election and subsequent statewide recounts are not being preserved.

Digital ballot images are essential for verifying the accuracy of election results. “Digital ballots can help assure that election results are legitimate and that close races have been resolved accurately,” said Susan Pynchon, a plaintiff in the case who also heads up the non-partisan [Florida Fair Election Coalition](#). “This is not a partisan issue. It is an issue of fair elections that impacts everyone.”

Pynchon added that ballot images make it difficult to tamper with election results without detection. “It doesn’t matter whether it is Russians or some local political operative who might try to fix an election, Florida has the technology to help prevent it. This lawsuit if successful would allow election administrators and the public to finally benefit from this technology.”

Ballot images are also useful for administrative review during the canvass and audits to identify anomalies such as miscounts, overvotes, undervotes or voter errors related to ballot design. They can also assist when paper ballots



have been misplaced, as occurred in the 2018 Broward County recounts. The images allow the examination of ballots without having to violate seals on election materials placed by election workers pursuant to Florida law.

Several county supervisors using digital voting technology are following the law and saving the ballot images, allowing review by election administrators and the public. The fact that some counties are preserving ballot images while others are allowing them to be destroyed leads to a second count in plaintiffs' lawsuit: The disparate treatment of these public records violates voters' rights to equal protection under the Fourteenth Amendment of the United States Constitution.

"Without the preservation of digital ballot images, plaintiffs' rights to a fair and accurate election guaranteed by federal law and the U.S. Constitution have been and will continue to be violated," Kuehne said.

Florida election officials who are allowing the destruction of ballot images often rely on inaccurate information or a misunderstanding of their legal obligations. Some officials believe it is permissible to discard the ballot images since they are saving the original paper ballots. That mistaken view ignores two critical facts. First, it is the [ballot images that are producing the vote count](#), which means that ballot images are in the chain of custody of the vote. Secondly, federal and state law does not allow for the destruction of any election materials.

"Election officials cannot pick and choose which election materials they may save," said attorney Kuehne. "All election materials from voter registration records to mail-in ballot envelopes to paper ballots to ballot images—every record that is a part of an election—must be preserved for 22 months following a federal election."

County election officials who are not preserving ballot images as required by law may also be relying on false and misleading information contained in an e-mail sent on November 1, 2018 by the Executive Director of the Florida State Association of Supervisors of Elections, [Ronald Labasky, who inaccurately](#) stated that Supervisors have a choice to "create or not create" ballot images when in fact ballot images are automatically created every time a ballot is fed through the scanner. The e-mail gave a false impression that ballot images need not be preserved if election officials did not choose to create them.

The case [seeks a preliminary injunction](#) ordering Florida supervisors of elections to protect ballot images from the November election and statewide recounts stored on hard drives from being overwritten and to preserve ballot images in all future federal elections.

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA TALLAHASSEE
DIVISION CASE NO. 4:18cv529-MW/CAS Filed on 12/26/18 (Link to Case file: <https://bit.ly/2Tuv1fN>) filed in federal court on December 26, 2018

01. DE32.Memorandum Supporting Preliminary Injunction: <https://bit.ly/2GNoyLs>
02. DE30.Motion Preliminary Injunction: <https://bit.ly/2GNoyLs>
03. DE28.Amended Complaint Complete with Attachments.12-26-2018: <https://bit.ly/2s3AnTf>
04. DE29.Motion.PHV.Sautter: <https://bit.ly/2Qb17Lu>
05. DE37.Order.PHV.Sautter: <https://bit.ly/2BMP8ys>
06. DE33A.NOF.Exhibits 1-7: <https://bit.ly/2QWyoIG>
07. De33B.NOF.Exhibits 8-10: <https://bit.ly/2RqF4VF>
08. DE34.NOF.Exhibits 11-20: <https://bit.ly/2SrDa4s>
09. DE35.NOF.Exhibits 21-30: <https://bit.ly/2EVwCHi>