IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

AMENDED BRIEF OF APPELLEES GEORGE W. BUSH AND DICK CHENEY

From the Second Judicial Circuit Court, in and for Leon County,
Lower Tribunal No. 00-2808

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STATEMENT REGARDING DISCRETIONARY JURISDICTION

In its December 5, 2000 Order, this Court instructed the parties to brief "the issue of this Court's exercising its discretion to accept this case." In Appellee's view, the best exercise of this Court's discretion would be *not* to accept this case.

Under Article V, Section 3(b)(5) of the Florida Constitution, this Court "*[m]ay review* any order or judgment of a trial court . . . certified by the District Court of Appeal . . . to be of great public importance, or to have a great effect on the proper administration of justice throughout the state . . . ." Whether to accept a certified case, however, is within the full discretion of this Court; the fact that a case may be of great interest or importance does not require this Court to exercise its jurisdiction.[1] *See State v. Cruz*, 189 So. 2d 882 (Fla. 1966); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961), overruled in part on other grounds, 151 So.2d 439 (Fla. 1963)..

Here, the Court and the public would be better served if this Court declines to accept this appeal. None could doubt that this case is of great public interest, or even that its ultimate resolution is of great importance to Florida and to the nation. But that interest

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[1] Of course, the Court should distinguish between matters of great public *interest* and matters of great public *importance*. In 1980, Florida Constitution was amended to restrict the Court's discretionary jurisdiction from "great public interest" to matters of "great public importance," Art. V, § 3(b)(5), Fla. Const., Am. S.J.R. 20C, 1979, adopted 1980. "Importance," in this context, should be read to mean the importance of the underlying *legal* issues to be resolved, not simply the importance of the parties or the outcome in a particular case. Here, the principal legal issue implicated in this appeal – the appropriateness of the abuse of discretion standard for assessing decisions of county canvassing boards – is a matter of long-settled and heretofore unquestioned Florida law.

would be frustrated, not furthered, by prolonging these legal proceedings in this presidential election.

In the instant proceeding, the Leon County Circuit Court, on a greatly accelerated timeframe, held an extensive trial and heard evidence, expert testimony, and extended legal argument. Each side was given the full opportunity to present its case. Following that hearing, the Circuit Court for Leon County rejected Vice President Gore's contest of the 2000 presidential election.

In so doing, the Circuit Court carefully reviewed each of Vice President Gore's claims and concluded, *inter alia*, that Appellants' evidence was insufficient to meet their legal burden, that their witnesses were not credible, and that the County Canvassing Boards did not abuse their sound and duly conferred discretion in resolving the issues in this election.

If this Court declines to review that thorough and factbound determination (or, alternatively, if this Court summarily affirms its conclusion), the public interest will be served in three important respects:

First, it will allow this extended election process to come to a close, and allow the public to put to rest the attendant uncertainty and instability;

Second, as discussed in Appellee's brief submitted yesterday, it will render the other litigation on remand from the U.S. Supreme Court moot, and thus make resolution of the complex constitutional and federal issues in that case unnecessary; and

Third, it will resolve any "contest or controversy," and thus ensure that Florida's electors receive conclusive protection under 3 U.S.C. § 5 so that there is no risk of congressional deadlock and Florida's voters being disenfranchised in the 2000 presidential election.

Moreover, any further review of the Circuit Court's opinion would ultimately lead to massive uncertainty and discord. The statutory time for certifying county returns passed over three weeks ago, when all 67 Florida counties certified their results. The time provided by this Court for certifying statewide election results passed one and a half weeks ago, on November 26. And now, the time when Florida's electors would lose conclusive status in Congress is a mere six days away.

Even if Appellants were able to overturn each of the Circuit Court's many factual findings, and even if Appellants were able to advance an argument now that clears the threshold for triggering a recount (a task not remotely accomplished in the Circuit Court), any attempted remedy now – that involved yet another recount on any significant scale – would likely prove futile. To resolve the legal issues in this appeal and in the federal remand, to gather the ballots in question, to segregate any subsets to be counted, to determine who should conduct a count, to ascertain what standards govern the count, and to ensure fairness, openness, and regularity – all before December 12 comes and goes – is all but entirely unfeasible. And, even then, no doubt, the litigation would continue, key federal questions would be unresolved and subject to appeal, and the public's distrust in the ultimate outcome would grow.

Accordingly, Appellees respectfully submit, the best exercise of this Court's discretion, in Florida's interest and the nation's, would be to decline to hear this appeal and to bring an end to the many weeks of election discord and uncertainty for all the voters.

STATEMENT OF THE CASE

On November 27, 2000, Appellants Albert Gore Jr. and Joseph I. Lieberman filed their contest action in Leon County Circuit Court, pursuant to Section 102.168 of the Florida Statutes. Trial was held on December 2 and 3, 2000. On December 4, 2000, the Circuit Court issued its findings of fact and law, and entered a final judgment in favor of Appellees. On the same day, Appellants filed a notice of appeal to the District Court of Appeal, First District, which certified the matter to this Court pursuant to Article V, Section 3 (b)(5) of the Florida Constitution. Appellees file this brief, which includes the issue of this Court's discretion to accept this case.

STATEMENT OF THE FACTS

Appellants' principal claim is that the Canvassing Boards in Miami-Dade and Palm Beach Counties erred by not including "legal" votes in their certified election results, and by failing to complete manual recounts before the deadline set by this Court. The "votes" that Appellants claim were wrongly excluded are marks, indentations, and incomplete punctures of "chads" that allegedly result from defects in the use of punchcard

ballot machines. In the trial court, however, Appellants offered no evidence to support their claims.

I. Punchcard Ballot Machines and Manual Recounts

Fifteen counties in Florida used Votomatic punchcard ballot machines in the 2000 Presidential election, including both Palm Beach and Miami-Dade Counties. Tr. 202. Across the country, 31% of the voters in the 2000 Presidential election voted on punchcard ballot machines. Tr. 51. There is no evidence to suggest that the punchcard ballot machines used in Miami-Dade and Palm Beach Counties are materially different, or that they are maintained in a materially different fashion, than machines elsewhere in Florida or across the United States.

The instructions provided to voters are explicit and clear:

> Look at the back of the ballot card, then be sure all holes are cleanly punched, and then pull off any partially punched chips, . . . that might be hanging. If your punched votes have made small circular holes, return your ballot to the election official and request a new one.

Tr. 162-63.

A. Punchcard ballot machines do not lead to a systematic "undervote."

In the court below, Appellants failed to present any evidence that punchcard ballot machines like the Votomatic are responsible for causing "undervotes." An undervote (as that term is used by the experts in this case) is "any ballot that went through the machine at some point and did not register a vote" for President. Tr. 180-81. The record reflects that voters sometimes choose not to vote in every race during an election – including the Presidential race. *See* Tr. 355-56. Appellants argue that some of these undervotes were

not really non-votes, but rather failed votes that were not properly recorded. Their hypothesis is that because of poor design or maintenance of the punchcard voting machines, people who otherwise intended to cast a vote were for some reason unable to punch the chad through to properly record their vote. Appellants therefore claim that *any* mark or impression should be counted as a vote.

Appellants' statistician, Prof. Hengartner, presented a chart that purported to describe the average undervote in the 2000 Presidential election. Hentgartner suggested that the average "undervote" was .3% in those counties using optical scanner voting systems and 1.5% in those counties using punchcard voting systems. Tr. 184-85. He also testified that if one were to assume that all of these counties are indistinguishable from one another (i.e., there are no demographic, socioeconomic or other differences between the counties), then the likelihood of this difference in the undervote rates would be "very remote." Tr. 185.

There are many reasons to question the accuracy and reliability of that opinion. First, though his conclusions were based on all 67 of Florida's counties, Hentgartner testified that he received information regarding the undervote rate from only 50 of the counties. Tr. 181-82. For the other 17 counties – nearly 25% of the overall dataset – he relied exclusively upon information that he found in unidentified "newspaper sources." *Id.* Second, Hentgartner admitted that both an affidavit containing his opinions (submitted to a different Court) and a proffer virtually indistinguishable from that

affidavit (which was submitted to *this* Court) were false and misrepresented the work that he had done. Tr. 228-229.

Even if one accepts the opinions expressed by Hentgartner, they prove nothing. At most, Hentgartner has stated that there may be an *association* between punchcard machines and the undervote rate. But that does not explain *why* there might be a higher undervote in counties that use punchcard devices. Hentgartner admitted that this question – the question of *causation* – is "something else." Tr. 207. *See also* Tr. 330-334.[2]

Hengartner refused to offer any opinion as to why there is a higher incidence of undervote in punchcard counties. He also refused to offer any opinion as to whether the machines were preventing people who were attempting to vote from registering their votes. Asked if he had any opinion on these subjects, Hentgartner said: "I have many opinions, but I have no proof." Tr. 212. He further conceded that there was no "data to support" any opinions that he might have regarding causation.[3]

The testimony of Appellants' statistician is not even very strong with respect to *association*. As Dr. Laurentius Marais testified, the undervote percentages advanced by Hengartner are averages, "and the numbers that are being averaged vary quite widely."

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[2] Hengartner agreed "just because two things are related to one another, doesn't mean that you know the cause of one or the other," confirming that his testimony provides no insight into whether faulty voting devices *cause* undervotes. Tr. 209. *See also* Tr. 334 (Marais testimony agreeing that "there is not enough information . . . to draw any such conclusion").

[3] Tr. 212; Tr. 211; *see also* Tr. 353, 356 (Marais testimony that there is absolutely" no evidence to support Appellants' theory of causation).

Tr. 336. Further, there is no dispute that with respect to the undervote rate, there is a "substantial overlap between the optical and the punch card counties," with twelve of the 67 counties falling into that overlap range. Tr. 336. Finally, the undervote rate varies among punchcard counties almost as much as it does between punchcard counties and optical-scanner counties. Tr. 336-37. Consequently, it is impossible to conclude even that the undervote rate has a strong association with the type of voting method used. In fact, the record shows that one can conclude only that "there are other factors accounting for differences in the undervote rate among the counties." Tr. 337.

The record shows that there are many possible reasons for variations in the undervote rates among Florida's counties. Both statisticians who testified agreed that at least some of the difference is explained by demographic differences among counties. Tr. 198; Tr. 353-56. Hentgartner also testified that any association between the voting method used in a particular county and the undervote rate in that county might exist not because of problems with the machinery, but rather because the voting method influenced whether people actually chose to vote in a particular race. Tr. 211-12. As Marais testified, the relevant scholarly literature supports this hypothesis. Tr. 340-44.

The undisputed evidence in the record is that there are a variety of potential explanations for differences in the undervote rates among the counties. Tr. 337-40. *There is no evidence in the record at all* to support the theory that punchcard voting machines frustrated voters who intended to vote for President.

C. There is no workable standard for discerning "voter intent" from indentations, marks or "dimples" on ballots.

Many of the disputed ballots that Appellants have asked to be manually recounted bear only slight indentations, marks or other impressions. Tr. 250-51. However, Appellants have not offered any workable standard for doing so.

There are a number of different ways in which indentations, marks and "dimples" can be left on ballots. Most do not reflect a voter's intent to vote. Among other things, indentations and other impressions can result from improper or rough handling of ballots, Tr. 397-99, voters who pick at the ballots and handle them while waiting in line, Tr. 400-01, processing the ballots or removal of hanging chads, Tr. 401-03, or flaws in the paper, Tr. 397-98. In addition, repeated handling and machine processing of punchcard ballots can also cause degradation of the ballots over time. Tr. 400-02.

Appellants' own expert, Kimball Brace, admitted that indentations could be created on a ballot by accident, by a voter who did *not* intend to vote. "If you were to rub my finger across there, that could create an indentation, and that obviously shouldn't be counted as intent to the voter." Tr. 99. Mr. Brace further acknowledged that the "only indentation that even should be considered" as a vote would be one "made by a stylus against the card." Tr. 99.[4] Appellants presented *no evidence whatsoever* concerning the

[4] Mr. Brace purported to demonstrate to the Circuit Court how it was possible to create an indentation on a chad. However, Mr. Brace admitted that in this alleged experiment he was trying to make an indentation, *not* trying to *vote*. Tr. 104. He further admitted that he was using a "demonstrator" ballot that is substantially different in its manufacture than the actual ballots used in an election. Tr. 104-07. This experiment is unreliable. Far more reliable is the experiment he performed on cross-examination, when he was asked to follow the instructions on the

percentage of indentations, marks or dimples that were *actually* the result of a stylus contacting the chad.

Nor was there any evidence of the percentage of indentations made *by a stylus* that reflect a voter's intent to vote rather than a decision not to vote. The only Florida voter who testified in this case, William Rohloff, explained that he placed the stylus in the hole corresponding to his presidential candidate, rested the stylus there while he thought about whether to cast his vote, and then decided not to vote. Tr. 455-56. Mr. Rohloff followed the instructions for voting on a punchcard machine. *Id.* He intentionally voted for other candidates by punching the chad completely out. Tr. 457. He intentionally registered *no* vote for President by withdrawing the stylus without punching through the chad. Tr. 456. Mr. Rohloff intended *not* to vote for the candidate whose chad he touched with the stylus. Tr. 456; 458.

Judge Charles Burton testified that he *tried* to make dimpled chads on the voting machine used in Palm Beach County, but found it difficult to do: "[I]t was very difficult to make an indentation like that, because it seemed it was quite easy for me to pop out the chad." Tr. 258. In other words, it is difficult to make an indentation that does not dislodge the chad *even when one is trying to do so*, much less when one is trying to vote.

Votomatic machine and cast a vote for President. Tr. 109-10. In that experiment, which he performed on a 20-year old machine on which the rubber strips had never been changed, Mr. Brace had no difficulty at all removing the chad completely from the ballot. *Id.*

Appellants offered testimony from only one witness, Kimball Brace, on the subject of why indentations and other marks should be considered conclusive evidence of a voter's intent to vote. Mr. Brace did not address the numerous ways in which marks and indentations might *accidentally* be left on a ballot. Nor did he explain how a finder of fact could ascertain *which* indentations and other marks on a ballot *actually* reflect an intent to vote, instead of an intent *not* to vote.

Mr. Brace is a political scientist and demographer by trade, whose only exposure to punchcard ballot machines and their operation has been through his work as a consultant in the general field of "election administration." Tr. 49-53; 65. Mr. Brace was not tendered or qualified an expert on the manufacture or function of punchcard ballot machines. Tr. 69-70. He admitted that he had no expertise in "engineering." Tr. 66. While he purported to opine about the properties of rubber strips used in the punchcard machines, Mr. Brace admitted that he is "not a rubber expert." Tr. 121. Mr. Brace offered his opinions about the causes of indentations and dimples after inspecting only a few out of the many thousands of punchcard ballot machines used in Palm Beach and Miami-Dade counties during the 2000 Presidential election. Tr. 73. Mr. Brace did not inspect *any* of the Votomatic machines actually used in Miami-Dade County. Tr. 67.[5]

[5] He inspected two sample machines *not used* in the election. Tr. 74-75. Mr. Brace also chose *not* to inspect the Votomatic machines used in Palm Beach. Tr. 67-68. Instead, he inspected only a small number of Pollstar machines in Palm Beach. Tr. 73. His only observation, having viewed these machines, was that the templates used with the machines were "scratched" on the left-hand side. Tr. 85.

Mr. Brace could offer no opinion as to the condition of the machines actually used in the election. Instead, Mr. Brace offered his theories as to what he "imagined" or "supposed" might have caused voters to leave only indentations when they intended to vote.[6]

1. Chad Buildup

Mr. Brace first opined that indentations might be cause "chad buildup." Mr. Brace's opinion on this subject was full of qualifiers. He stated: "[I]t is also *possible* that an indentation is made *if, in fact*, the machines are not cleaned out on a regular basis, *and there's chad buildup*, and therefore, the voter *may not* be able to push down as firmly." Tr. 83 (emphasis added).

This opinion as to what is "possible" is not based on any expertise, it is purely speculative, and it has no basis in fact. Appellants offered no evidence that any of the machines "in fact" are not well maintained, or that there was "in fact" chad buildup sufficient to prevent a voter from successfully removing the chad from only the Presidential race. And Mr. Brace himself could offer no opinion on this subject because he is not an expert on the maintenance of the machines, and in any event did not examine even a reasonably large sample of the machines at issue.

Even if there *were* evidence to support Mr. Brace's theory that there is "chad buildup," he offered only his *speculation* that chad buildup would cause a voter to leave

[6] *See, e.g.*, Tr. 110 ("I imagine that people could hit the funnel."); Tr. 112 ("imagine[d]" that styluses "could" scratch the template); 117 ("supposition was

only an indentation instead of a clean vote. Mr. Brace said only that "it is possible" that a voter "may not" be able to cast a vote because of a build up of chad. Tr. 83. Mr. Brace's "chad buildup" theory also would not explain why voters would be unable to punch through chads *only* in the Presidential election, and not in other races.

The only competent testimony on the "chad buildup" theory came from John Ahmann. Tr. 416-23. Mr. Ahmann invented the Votomatic machine that is currently in use in Miami-Dade and Palm Beach Counties, and he has been working in the voting machine industry for over 34 years. Tr. 387-92. Mr. Ahmann explained that chad buildup would *not* cause indentations. Tr. 417.[7]

2. Hardening Rubber

Mr. Brace's second theory is that the rubber strips used to capture the chad as it is punched out by the stylus might become hard and brittle through repeated use, thereby preventing a voter from completely punching out the chad. Tr. 83. Mr. Brace hypothesized that the rubber strips on the far left of the device (under the Presidential race) would get more wear than the strips under the rest of the ballot. Tr. 119-20. As with the "chad buildup" theory, Mr. Brace's opinion on this subject was heavily qualified. Tr. 83 ("The third reason is that those rubber strips, *if they're not properly maintained*

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that rubber on the left-hand side is more frequently used").

[7] Appellants made much of a patent application by Mr. Ahmann for a new stylus that would better dislodge chad if in fact chad buildup were to take place. The application specified, however, that the problem that could potentially result from chad building was "hanging chad," not a dimpled chad. The application never mentioned dimples as a possible consequence of chad buildup. Tr. 440.

may become old, brittle, hard and keep a voter . . .") (emphasis added); Tr. 87 ("It is *possible* that hardening of the rubber *could* have a problem.") (emphasis added). By his own admission, Mr. Brace is "not a rubber expert." Tr. 121. He also admitted that he has no expertise in engineering. Tr. 66. He lacks the expertise, therefore, to opine that the rubber used in the left-hand column of these punchcard ballot machines would become hard and brittle.

Mr. Brace also pointed to no evidence that the rubber strips *in fact* were not properly maintained, and admitted that he had "not tested" this theory. Tr. 120. On cross-examination, Mr. Brace acknowledged that he did not know the name of the machine that would be used to conduct such a test. Tr. 120-21. Indeed, he acknowledged that he did not know what kind of material was used in the machines at issue, or whether that material would become harder through repeated use. Tr. 121-24. Like the "chad buildup" theory, Appellants' "rubber" theory was pure speculation.

The only competent testimony on the "hard rubber" theory came from Richard Grossman, a chemist with over 43 years of experience in the field. Mr. Grossman explained that the composition of rubber like that used in the T-strips of the punchcard voting machines, was designed to avoid problems with hardening. Tr. 296-303. He also testified that rubber would react consistently across the machine. Tr. 298-99. Mr. Ahmann, an expert on punchcard ballot machines, confirmed that he had never encountered a problem with hard rubber in the field, and in a particular that he had never

known the rubber used in the T-strips to harden under only the Presidential part of the ballot. Tr. 417.

3. Angling Stylus

Mr. Brace's third theory was that a voter might try to vote by inserting the stylus into the template of the machine at an angle. Tr. 84. Mr. Brace supposed that "if you put the stylus in on a slight angle, instead of straight up and down," a indentation might result. *Id.* Like Mr. Brace's other theories, this theory has no basis in fact. The voting instructions clearly state that the stylus should be inserted "straight down." Dfts Ex. 531; Tr. 159-61. Mr. Brace did not offer any basis for his supposition that voters fail to follow that instruction, or that inserting the stylus at an angle would lead to a dimple. Mr. Brace stated only that he "imagined" this could happen. Tr. 110. This opinion from Mr. Brace was, again, pure speculation.

4. Ballot on Top

Mr. Brace's fourth theory was that a voter might create indentations by placing the ballot *on top* of the template on the machine, instead of inserting the ballot into the throat of the template as instructed. Tr. 78-79. Mr. Brace testified that if a voter were to do this, contrary to the instructions for voting, Tr. 80, he could leave a dimple instead of removing the chad. Tr. 78-79. Mr. Brace offered no testimony as to the *number* of voters that attempt to vote this way, and as the Circuit Court itself found in considering this theory, "if somebody is not going to follow the instructions . . . there's no telling who they voted for." Tr. 82.

Many of the "undervote" ballots that were not counted as votes, and which Appellants have challenged, contained indentations *only* in the left-hand column. Tr. 251-52. Mr. Brace admitted that if a voter were to place the ballot on top of the template and to attempt to vote in the fashion he described, one "would see the indentations or dimples on the other offices, and not just President." Tr. 115. As Mr. Brace admitted, "you would expect that those indentations continued down the ballot." Tr. 116.

II. The Manual Recount In Palm Beach County.

Judge Charles Burton explained the manual recount conducted by the Palm Beach County Canvassing Board ("PBCCB"), and the procedures that were followed. On November 15, 2000, Judge Labarga issued an order instructing the PBCCB to apply a totality of the circumstances standard during its full manual recount to determine voter intent. Dftt's Ex. 39. The PBCCB began its manual recount on November 16. Tr. 248. Prior to beginning the manual recount, the PBCCB reaffirmed in writing the standard that it would apply in judging whether "indentations" should be counted as votes. Tr. 246-47; Dfts Ex. 40.

Throughout the manual recount, the PBCCB allowed a ballot having only one corner punched or a dimple to "be counted as a vote if there is clear evidence of a voter's intent to cast a vote." Tr. 247; Dfts Ex. 40. The Board "looked at each ballot in total" to determine whether, based on the totality of the circumstances, they could discern the intent of the voter. Tr. 267-68.

On November 20, the Florida Democratic Party filed a renewed motion before Judge Labarga challenging the standard applied by the PBCCB. Tr. 264-65. At the hearing on that motion, Judge Burton explained the standard that the PBCCB was applying. Tr. 250. Judge Labarga subsequently issued a written order reaffirming the standard he had previously set forth in his November 15 order. Dftt's Ex. 42. In that order, Judge Labarga did not question the standard applied by the PBCCB. *Id.*

The Florida Supreme Court set November 26 at 5 p.m. as a firm deadline for Canvassing Boards to submit amended certifications including the results of any manual recount. Complaint ¶ 14. Between the start of the manual recount on November 16 and the November 26 deadline, Judge Burton was called into court to testify on the motion to clarify filed by the Florida Democratic Party, Tr. 264-65; 284, the Board took a break for Thanksgiving, Tr. 284, and the Florida Democratic Party asked for a hearing before the board to present the testimony of three witnesses on the standard that the Board should apply in reviewing "dimpled" chads. Tr. 269-70.

The Secretary of State's office was open on November 26, but the PBCCB did not file an amended certification before 5 p.m. on that day. Complaint ¶ 14; Tr. 272. As pointed out by the Circuit Court, the time devoted to court hearings and the taking of testimony may well have prevented the PBCCB from completing its manual recount on time. Tr. 284.

Judge Burton explained that in the final few hours of the manual recount, the PBCCB stopped attempting to segregate out ballots for which objections had been stated.

Tr. 280-81. He also explained that applying a different standard to the approximately 3,300 ballots that were not counted, and for which objections were stated, would result in a different standard being applied to those ballots than had been applied to the remaining 600,000 or so ballots cast in Palm Beach County. Tr. 281. The PBCCB did not submit any official statement of the results of its manual recount on November 26. The PBCCB later submitted amended election results suggesting a net gain for Appellants. Dfts Offer of Proof, Dec. 4, 2000. The PBCCB has subsequently conducted a complete audit of the manual recount results, and reported yet a different result. The *audited* results reflect a net gain of only 176 votes for Appellants. *Id.*

III. The Miami-Dade County Canvassing Board Carefully Considered Ballot Recount Issues and Certified the November 8 Machine Recount

Between the date of the election on November 7, and its decision on November 22 to terminate all manual recount efforts, the Miami-Dade County Canvassing Board met no less than three times to consider its options. On each occasion, the Board took into account the information available to it as well as its past experience in election matters. The Board's decision on November 22 to certify the November 8 machine recount was correct, and certainly was not an abuse of discretion.

On November 14, the Board met and conducted a three-precinct manual recount in the presidential race. Tr. 465-66. The three precincts selected for the manual recount were some of the most heavily Democratic precincts in Miami-Dade County. Tr. 466. Nonetheless, that manual recount revealed only six net additional votes for Appellants even though those precincts voted 10 to 1 for Appellants. Tr. 467. Based on that result,

the Board determined that a full manual recount was unnecessary. As Elections Supervisor David Leahy explained:

> I have a lot of experience with this system. I've been here since '74 in the election process. I've been with this particular system since '78. I've been involved in numerous re-counts and several hand counts. Based on that experience, it would be my belief that if you counted every ballot by hand in the County, that you would get an equal, proportional share of increased votes for both candidates. I do not believe anything I've seen tonight, warrants us to proceed with an examination of the undercounted votes or calls for a manual recount, so my vote is no.

Tr. 471-72; *see also* Defendant's Exhibit 61 at 352:10-24.

When the Canvassing Board again met on November 17 to consider the Democratic Party's second request for a manual recount, it determined that—while a partial manual recount would be unlawful—it would initiate a full manual recount.[8] Tr. 473-74. That recount began with a ballot sorting on November 19, and continued through November 21. Tr. 501-02. On November 22, the Canvassing Board—having counted 15-20% of the precincts in Miami-Dade County—met again to consider its options in light of this Court's November 21 ruling. By a 3-0 decision, the Board decided to terminate the manual recount. At that point, the only precincts that had been counted were heavily Democratic—in other words the very precincts where Vice President Gore would be expected to pick up the most additional votes. *See* Tr.480-41.

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[8] Judge King of the Canvassing Board specifically stated that he believed the statutory provisions governing manual recounts "requires this council to consider a full recount of all ballots in the county if we're going to consider a ballot at all." Plaintiff's Exhibit 23 at 104:5-14; *see also* Tr. 476-77. The other Board members concurred. Plaintiff's Ex. 23 at 104:5-14.

After lengthy deliberations, the Board decided to terminate the manual recount and to certify the election results as they stood on November 8. Pltfs Ex. 31 at 27:6 to 30:11. This decision was based on concerns about the Canvassing Board's ability to complete the recount and out of concern that ballots in later precincts—which included precincts with significant Cuban and Hispanic populations and precincts which tended to vote Republican—would not be counted. *See* Tr. 471-72; Pltfs Ex. 31 at 27:6 to 27:20. Judge King, a member of the Board, explained:

> We cannot meet the deadline of the Supreme Court of the State of Florida, and I feel it incumbent upon this Canvassing Board to count each and every ballot and to not do a hand recount [that] would potentially . . . even under the proposed plan of this morning, could disenfranchise a segment of our community.

Pltfs Ex. 31 at 27:11 to 27:20. As he had in the past votes, and in deciding to certify the November 8 machine recount, Supervisor Leahy opined on November 22 that a full manual recount had never been "warranted" in Miami-Dade County. Pltfs Ex. 31 at pg. 29. His judgment is especially significant because, in the 15-20% manual recount that the Miami-Dade County Canvassing Board had conducted on November 20 and 21, Supervisor Leahy reviewed numerous ballots including the undervote ballots Appellants asked the Court below to count. Taking all factors into account, both Supervisor Leahy and the Board acted within their discretion in declining to count any additional ballots and by including in the official vote certification none of the undervotes found during the manual recount of November 20 and 21. *See* Pltfs Ex. 31. Pg. 28-29.

IV. Significant Ballot Degradation Occurred in Miami-Dade County Making the Miami-Dade County Undervote Uncertain and Unreliable.

Unavoidably, the various machine and hand recount efforts undertaken by the Miami-Dade County Canvassing Board resulted in significant degradation of those ballots and in an inability to segregate the undervotes. Ballots were run through tabulation machines at least three times.

Thomas Spencer, a Republican Party observer, became involved with the Miami-Dade County Canvassing Board's recount efforts on November 8. *See* Tr. 462. By that time, the County's ballots had already been counted once the night before. Tr. 463. Mr. Spencer then personally observed the machine recount on November 8. *Id*. This recount involved running all of the County's ballots through the vote tabulation machines a second time. Mr. Spencer also testified that all the ballots were run through the machines yet again on November 19, in an attempt to separate undervote ballots from the rest of the ballots. Tr. 478-79. Mr. Spencer described in detail the significant stress this separation effort placed on the ballots. Tr. 484-85. Mr. Spencer also observed that an entire precinct tray of ballots was dropped on the floor of the counting room. Tr. 485. Another Republican observer noted that the machine sorting effort on November 19 resulted in the separation of numerous new chads from the ballots. *See* Tr. 505-06. Approximately one thousand new chads were observed as the result of the machine sorting effort. Tr. 506. Similar handling issues arose during the manual recount itself. Ballots were fanned, rubbed, and twisted during this counting effort by both County employees and by the

Canvassing Board. *See* Tr. 507-09. The Republican observer saw that more chads were separated from the ballots due to this handling. Tr. 508-09.

Finally, Republican observer Marc Lampkin, testified that County employees engaged in extensive ballot handling on November 29 in an effort to reconcile conflicting undervote tallies in Miami-Dade County. Tr. 546-548, 552-54. According to Mr. Lampkin, County employees discovered that the undervotes in certain precincts did not match earlier noted totals. Tr. 547-48. In fact, over 150 of the 614 precincts apparently had undervote totals on November 29 that varied from those earlier reported, with 120 precincts containing fewer undervotes than had been previously thought, and 34 containing more undervotes than had previously been thought. Tr. 549-50; Tr. 466. Multiple precincts were run through tabulation machines yet a fourth time in an effort to resolve these numerous discrepancies, and many ballots were again manually counted. Tr. 553-54. This resulted in still more chads being separated from the ballots. Tr. 554.

These efforts did not, however, resolve the conflicting undervote counts, and Miami-Dade County officials were never able to provide Mr. Lampkin with an explanation of the discrepancies. Tr. 550. From his day of observing County employees attempting to ascertain the number of undervotes present in that County, Mr. Lampkin concluded that the undervote total was "shifting." Tr. 552.

This testimony is particularly significant because Appellants offered no evidence to establish the integrity of the ballots or to demonstrate that the ballots containing undervotes in Miami-Dade County had either already been reliably identified or that such

ballots *could* be reliably identified. Instead, Mr. Lampkin's testimony demonstrates that the undervote totals for particular Miami-Dade County precincts on November 29 were inconsistent with, earlier undervote totals. Tr. 548-49.

V. The Nassau County Certification

On November 7, 2000, all ballots cast for President in Nassau County were counted. Tr. 568. On November 8, 2000, an automatic machine recount was conducted and the results were certified by the Nassau County Canvassing Board. Tr. 568-70 On November 9, 2000, the Nassau County Supervisor of Elections realized that 218 ballots were not run through the machine in the automatic recount, because they were inadvertently left in the transport cases. Tr. 570-73, 581. On November 24, 2000, after proper notice, the Canvassing Board held a meeting to address the problem. Tr. 579-81. Nassau Stipulation ¶ 7. Because Mr. Dave Howard was unable to attend, Ms. Marianne Marshall was selected as a substitute member of the Board. Tr. 578.[9] At the meeting, the Canvassing Board voted unanimously to amend its certification to reflect the accurate November 7 count, rather than the erroneous November 8 recount. Tr. 580-81.

SUMMARY OF THE ARGUMENT

[9] Ms. Marshall was not a "candidate" for any elected office, because although she had been a candidate for Supervisor of Elections, she had already won and been sworn into office. Tr. 579. Moreover, Ms. Marshall was not involved in the canvassing of the returns for her own election, as the recount was limited to the presidential election. Tr. 568-70.

On November 7, 2000, the people of Florida and the nation cast their votes for President of the United States. One month later, after lawsuit upon lawsuit and recount after recount, the nation's future leader remains in doubt. At no time in our nation's history has a presidential race been decided by an election contest in a court of law. To prevail under Florida law, an election contestant must conclusively demonstrate that county canvassing boards abused their duly conferred discretion, and that either illegal votes were counted or legal votes were not counted in sufficient numbers to overturn the results of the election. This is an imposing burden, and one that Appellants have never met.[10]

Their *sole* evidence consisted of testimony from two experts: a political scientist and a statistician; beyond those two experts, Appellants offered the court below nothing to support their case. Although the court would certainly have allowed more time for presentation of Appellants' case, they chose to rest after their two experts opined on hypothetical possibilities. They offered not a single witness from Palm Beach County,

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10 As the Circuit Court properly determined, a plaintiff cannot contest a certification merely by alleging that ballots cast in an election, tabulated, and recorded as "no votes" somehow are rejected legal votes. Where votes are actually processed through vote tabulation equipment and recorded in the number of ballots cast, the votes themselves (whether undervotes, votes for a candidate, or overvotes) cannot be said to have been rejected. In such a case, all the votes are accepted. To hold otherwise would be to throw open for contest every election where the margin between the candidates is less than the total number of "no votes" (undervotes and overvotes) cast. In this case, that would mean any margin less than the total number of "no votes" recorded would force the Court to manually recount every no vote cast in the state. There is no basis for that construction of section 102.168(3)(c).

Miami-Dade County, or Nassau County. They presented no testimony whatsoever that those counties did anything to abuse their discretion; indeed, they presented no testimony about *anything* those counties did. Unsurprisingly, the court expressly found their witnesses – the hypothesizing political scientist and the statistician who admitted to filing the false affidavit – not to be credible. The Circuit Court found that Appellants had failed to prove their case. Those factual determinations are plainly correct.

As a matter of law, the Circuit Court made five independent findings, each of which standing alone, is sufficient to support the verdict:

First, the Circuit Court determined that Appellants had failed to establish a legal basis for ordering a recount. This failure is unremarkable: their legal theory throughout has been that no such basis is necessary. But it is not the case that a contestant, merely by asking is entitled to a recount. That would make the contest proceedings under Section 102.168, perversely, more permissive than the protest proceedings under Section 102.166, and would transform the ordinary counter of ballots in close elections from the county canvassing boards to the Circuit Courts in Florida.

Second, the Circuit Court found that "there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different." This factual finding, based on direct assessments of the credibility of Appellants' witnesses, should be fully honored on appeal.

Third, the Circuit Court found that none of the county canvassing boards had abused their discretion. This finding – a direct result of Appellants' decision to introduce no evidence at all about the county canvassing boards' conduct – is likewise not clearly erroneous.

Fourth, the Circuit Court held that there was no authority in Florida law for a partial manual recount – Appellants' sole requested remedy – in a statewide election contest. There is no provision of Florida law that permits – let alone requires – the local canvassing boards to certify or the Elections Canvassing Commission to accept such partial returns and no authority to include returns submitted past the deadline established by the Florida Supreme Court in this election.

And *Fifth*, the Circuit Court noted that any post-election change in applicable standards for counting ballots – such as any newfound "dimple" standard, contrary to Palm Beach County's pre-existing standard – could constitute a change in law under 3 U.S.C. § 5 and therefore endanger Florida's electors. And, if ballots in one county were reviewed under a standard different than that applied in other counties, significant disparities could arise among in the impact of individual votes creating a situation that would violate federal constitutional standards.

At the end of the day, Appellants seek to overturn an appropriate decision of the Miami-Dade County Canvassing Board not to conduct a full manual recount due to time limitations, the sound discretion of the Palm Beach County Canvassing Board not to count "rogue" dimples as clear evidence of voter intent, the correct certification by the

Nassau County Canvassing Board of the election night results, and the Secretary of State's decision not to accept statutorily unauthorized partial recounts not completed by this Court's stated deadline of 5:00 p.m. November 26, 2000. They seek to do so without demonstrating the substantial factual or legal predicate necessary to overturn a certified election. These heavily fact-laden determinations were made by a trial court that heard all the witnesses, weighed all the evidence, and was in the best position to resolve these factual disputes. This Court should not second-guess its judgment.

STANDARD OF REVIEW

"Evidentiary findings and conclusions of the trier of facts where supported by legally sufficient evidence should not be lightly set aside by those possessing the power of review." *Florida Bar v. Abramson*, 199 So. 2d 457, 460 (Fla. 1967). Factual conclusions are "clothed with a presumption of correctness."[11] This court cannot review evidence *de novo*, substituting its own opinion of the facts and credibility of the witnesses for that of the trial court. Rather, this Court "must indulge every fact and inference in support of the trial court's judgment, which is the equivalent of the jury verdict." *Smiley*, 704 So. 2d at 205.

The judgment of the trial court "will be upheld if there is any basis which would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731

[11] *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204, 205 (Fla. 5th DCA 1998). *Accord Lee v. Lee*, 563 So. 2d 754, 755 (Fla. 3rd DCA 1990) (refusing to reweigh evidence on appeal, stating that trial court's findings of fact will not be set aside unless "totally unsupported by competent and substantial evidence").

So. 2d 638, 644-45 (Fla. 1999) (citing numerous decisions). In this Court, any disputed issues of fact must be reviewed in the light most favorable to the prevailing party, and the findings and rulings of the Circuit Court should be affirmed unless they are unsupported by any basis in the record. *See Woodlands Civic Association, Inc. v. Darrow*, 765 So. 2d 874, 876 n.3 (Fla. 5th DCA 2000).

ARGUMENT

I. The Circuit Court Correctly Held There Was No Factual Or Legal Basis To Order A Manual Recount.

A. The Circuit Court Correctly Held That Actions Of County Canvassing Boards Are Reviewed Under The Abuse Of Discretion Standard.

Under Florida law, "returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1976). "This is because the canvassing of returns . . . is vested in canvassing boards . . . who make judgments on the validity of ballots." *Id.* As the Circuit Court correctly held, "[t]he local boards have been given broad discretion, which no court may overrule, absent a clear abuse of discretion." Circuit Court Decision in *Gore v. Harris*, No. 00-2808, Transcript dated December 3, 2000 at 10 ("Findings"). "Although Section 102.168 grants the right to a contest, it does not change the discretionary aspect of the review procedures outlined in Section 102.166."[12] Under that standard, "[i]f reasonable men could differ as to the

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[12] *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992). *See also Quinn v. Stone*, 259 So. 2d 492, 494 (Fla. 1972) (applying abuse of discretion standard).

propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. *Ashcraft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1313 (Fla. 1986) (citing *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980)).

To overcome the presumption of the validity of certified election results, Appellants were required to prove, by clear and convincing evidence, (1) "substantial noncompliance" with a *mandatory* statutory duty by the Canvassing Boards, and (2) that there was a "reasonable probability" that such alleged noncompliance would affect the outcome of the certified election results.[13] It was not enough for Appellants to identify a specially selected group of ballots and allege that they should have been counted. Under the Florida Constitution, the Court *cannot* intervene to overturn the judgment of the Canvassing Boards *unless* Appellants prove "clear, substantial departures from essential requirements of law." *Boardman*, 323 So. 2d at 268 n.5. Absent a clear violation of law, the Canvassing Board's judgments "should be upheld rather than substituted by the impression[s]" of this Court. *Id.*[14]

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[13] *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998); *Hogan*, 607 So. 2d at 510; *Burke v. Beasley*, 75 So. 2d 7, 8 (Fla. 1954). *Accord* Findings at 9.

[14] *See Beckstrom*, 707 So. 2d at 724 ("It is clear that the controlling authority in Florida is the *Boardman* decision and that, in *Boardman*, the Supreme Court intended to circumscribe the Court's involvement in the electoral process.").

In the Circuit Court, Appellants failed to present *any* evidence that the Canvassing Boards abused their discretion. Instead, Appellants based their entire case on the proposition that the Canvassing Boards' decisions are irrelevant, arguing instead that the ballots are the "best evidence" and that the Circuit Court should have conducted a de novo review of those ballots. Appellants relied on several Florida cases, including *State v. Smith*, 144 So. 333 (Fla. 1932), which actually *contradicts* their position, as the Circuit Court properly recognized. Findings at 8. *Smith* holds that the Circuit Court may examine ballots to verify the accuracy of returns *only* if the certified returns have been shown to be unreliable "because of some substantial failure on the part of the election officers to proceed according to the law in making or arriving at their returns and certificates." *Smith*, 144 So. at 336. Thus, under *Smith*, to obtain the relief they seek, Appellants must first establish that the actions of the Canvassing Boards were contrary to law.[15]

[15]None of Appellants' other cases even mention the appropriate standard of review for ordering a manual recount, nor do they involve the discretion of Canvassing Boards. *See Beckstrom*, 707 So. 2d at 725 (recognizing necessity of finding that election officials substantially failed to comply with statutory election procedures to void election); *Hornsby v. Hilliard*, 189 So. 2d 361, 363 (Fla. 1966) (holding that "blank, spoiled, or irregular ballots" cannot be considered, but not addressing what standard the trial court should follow); *State v. Latham*, 170 So. 472, 473-74 (Fla. 1936) (discussing admissibility into evidence of ballots only after plaintiffs establish integrity of ballots); *State v. Peacock*, 170 So. 309, 309 (Fla. 1936) (holding that when voters comply with all requirements, their votes should be counted despite error by election official, but not addressing voter error absent statutory noncompliance by election officials). *See* Findings at 10.

Appellants' argument that they must be granted a recount in a contest action simply because they allege the possibility that legal votes were not counted, is also contrary to the statutory scheme. As this Court has held

> Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. *See Pearson v. Taylor*, 159 Fla. 775, 32 So. 2d 826 (Fla. 1947). The statutory election contest has been interpreted as referring only to consideration of the balloting and counting process. *State ex rel. Peacock v. Latham*, 125 Fla. 69, 169 So. 597 (Fla. 1936); *Farmer v. Carson*, 110 Fla. 245, 148 So. 557 (1933).

McPherson v. Flynn, 399 So. 2d 665, 668 (Fla. 1981).

In *Hogan*, the court held that a judicial manual recount of ballots is appropriate only if the Canvassing Board abused its discretion or engaged in irregularities. In that case, a city council candidate lost by three votes, and after the required machine recount was behind by five votes with 42 undervotes. *Id*. at 509. The Canvassing Board denied the candidate's request for a manual recount because the difference in vote counts was likely due to voter error. *Id.* In the post-certification contest, the trial court granted Appellants' request for a manual recount, but the Fourth District Court of Appeal reversed, stating:

> Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The *statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board*.

Id. at 510 (emphasis added). The court concluded:

> All that should have been considered by the lower court was whether [the county canvassing board] *failed to perform some mandatory statutory act or*

> *whether there were any electoral improprieties* which had, not possibly might have, an influence on the ultimate choice of the voters. [The board] acted within its discretion in this case . . . .

Id. (emphasis added).

Thus, even in an extremely close election, where the number of undervotes attributable to voter error easily exceeds the margin of victory, a court may not order a manual recount under Section 102.168 unless the Appellant *first* establishes that the Canvassing Board failed to perform a mandatory statutory act. As the *Hogan* Court observed, "[i]t is understandable that an individual losing an electoral race" by such a close margin "would look upon the results with some consternation," and that an order for a manual recount might "mollif[y] the disgruntled candidate," but these "are not the controlling factors in the statutory scheme." 607 So. 2d at 510.[16]

B. The County Canvassing Boards Did Not Abuse Their Discretion.

1. The Miami-Dade Canvassing Board did not abuse its discretion in deciding not to complete a manual recount.

The Circuit Court held that the Miami-Dade County Canvassing Board "did not abuse its discretion in any of its decisions in its review and recounting processes." Findings at 10. Appellants were not entitled to a manual count of the ballots by the Circuit Court.

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[16] *See also In re Contest Election*, 444 N.E.2d 170, 183 (Ill. 1983) ("[A]ppellants must show more than a mere desire to have a recount of the votes and a reexamination of the ballots which they hope will show a different result than officially proclaimed").

At Appellants' request, the Miami-Dade County Canvassing Board exercised its discretion under Section 102.166 to conduct a sample manual count. After sampling three highly-Democratic precincts containing approximately 5,000 votes, the Board found a net effect of only six votes for Vice President Gore. Tr. 465-67. The Board found that the minor discrepancy in the results was not attributable to a vote tabulation error, and that even assuming there was such an error, the correction of any error would not have affected the outcome of the election. *See* Tr. 471-72, D. Ex. 61 at 352. Having failed to make the requisite finding, the Board had no statutory authority to conduct a manual recount. *See* § 102.166, Fla. Stat.

The Circuit Court properly held that Appellants failed to prove abuse of discretion. Notice of Appellants' expert witnesses contradicted the Board's decision. Their testimony *confirmed* the Board's decision that a county-wide manual recount would *not* change the result of the election. Statement of Facts, *supra*. Appellees' evidence confirmed this fact. Tr. 324, 326-28.

The Board did not abuse its discretion by suspending its manual count in light of the November 26 deadline established by this Court in *Harris*. The decision was properly based on the Board's conclusion that it was not physically possible to complete the recount by the mandatory deadline imposed by the Court. P. Ex. 31 at 27-29. A governmental body need not engage in a futile act. *See International Fidelity Ins. Co. v. Prestige Rent-A-Car, Inc.*, 715 So. 2d 1025, 1028 (Fla. 5th DCA 1998).

2. Miami-Dade Canvassing Board's decision not to certify its partial manual recount was not an abuse of discretion.

Appellants argue that the results of a partial recount conducted by the Miami-Dade Canvassing Board should have been included in the final certification. However, as the Canvassing Board recognized, certification of a partial recount would contravene Florida law. The Circuit Court agreed, finding "there is no authority under Florida law for certification of an incomplete manual recount of a portion of, or less than all ballots from any county by the state elections canvassing commissioner." Findings at 9. The Board's decision was clearly correct as a matter of law, and was an appropriate exercise of its discretion.

Once the Board decides to conduct a manual recount, it is required to recount *all*, not just *some* of the ballots. *See* § 102.166(4)(d); Fla. Stat. § 102.166(5)(c) ("county canvassing board *shall*," among other options, "[m]anually recount *all* ballots.") (emphasis added). The Board thus had no authority to recount or certify only a <u>portion</u> of the ballots.[17]

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[17] In addition, the Miami-Dade's partial recount disproportionately included votes for Appellants, due to the way the recount was conducted. Appellants received approximately 52% of the vote in Miami-Dade, while Appellees received just over 46%. *See* Tr. at 327. When the Board made its decision to stop the manual recount, it had counted only 137 of 614 precincts in the county. Notwithstanding the closeness of the race countywide, the 137 precincts that the Board had chosen to count first voted overwhelmingly for Appellants, by more than 3 to 1. However, other precincts in Miami-Dade, which the Board had chosen not to count, voted heavily for Appellees.[17] It is obviously not "appropriate" or fair to accept the results of a partial recount that *included* precincts that Appellant carried

Finally, the relief Appellants seek would raise serious issues under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because only five of the approximately 199 predominantly Hispanic communities in Miami-Dade County were included in the partial manual recount. As counsel for Appellees argued before the Canvassing Board, certification of partial results would have had the effect of diluting the votes of Hispanic voters in Miami-Dade County. *See* P. Ex. 30 at 16, 27-28; P. Ex. 31 at 26-27. The Miami-Dade Canvassing Board did not abuse its discretion in rejecting ballots that evidenced no votes.

3. The Palm Beach County Canvassing Board did not abuse its discretion in rejecting ballots that evidenced no votes.

Appellants argue that the Circuit Court should have conducted a *de novo* review of approximately 3,300 ballots, which the Palm Beach County Canvassing Board has already reviewed and determined did not reflect a voter's clear intent to vote. Appellants, however, presented no evidence to indicate that the Canvassing Board had abused its discretion. Instead, as the Circuit Court correctly held, based on the uncontradicted testimony of Judge Charles Burton, Chairman of the Canvassing Board, that the Canvassing Board "did not abuse its discretion in its review and recounting process," and therefore there is no basis to overturn the decisions of the Board. Findings at 11.

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by large margins, but *excluded* precincts that Appellee carried by equally large margins. *See* § 102.168(8), Fla. Stat.

Under Florida law, a ballot can only be counted if the intention of the voter is *clear* from the face of the ballot. The Florida Election Code expressly provides that a ballot will be considered valid "if there is a *clear indication* of the intent of the voter." § 101.5612(5), Fla. Stat. Conversely, if the voter's intent cannot be ascertained with "reasonable certainty" from the face of the ballot, no valid vote has been cast. *See* § 101.5614 (5), (6), Fla. Stat.

On November 15, 2000, after the Canvassing Board began its recount, Judge LaBarga of the Palm Beach County Circuit Court, at the request of the Democratic Party, entered a Declaratory Order, which held that "the present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law," and that the "Canvassing Board has the discretion to consider those ballots and accept them or reject them."[18] *Florida Democratic Party v. Palm Beach County Canvassing Board*, No. CL00-11078 AB slip op. at 1 (Fla. 15th Cir. Ct. Nov. 15, 2000) (emphasis added). Subsequently on November 22, after Judge Burton testified at length on what the standards the Board was applying, Judge LaBarga declined to overrule the

[18]The Palm Beach Board's 1990 Guideline provides that "a chad that is fully attached, bearing only an indentation, *should not be counted as a vote.* An indentation may result from a voter placing the stylus in the position, but not punching through. Thus, an indentation is not evidence of intent to cast a valid vote." Palm Beach County Canvassing Board, Guidelines on Ballots with Chads not Completely Removed, Nov. 2, 1990 (emphasis added). That standard had been in place, unchanged, for ten years.

Board's decisions and reaffirmed his prior November 15 Order.[19] As the court below recognized, the Palm Beach County Canvassing Board "acted in full compliance with the order of" Judge LaBarga. Findings at 11.[20] Appellants presented *no* evidence at trial that the Board abused its discretion in making its factual determinations as to voter intent.[21]

Appellants complain that the Board did not count *all* the dimpled ballots as votes. However, as the uncontradicted testimony of Judge Burton repeatedly demonstrated, a mere indentation on a punchcard ballot, without something more, does not provide any

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[19] *Florida Democratic Party v. Palm Beach County Canvassing Board*, No. CL00-11078 AB, Order on Plaintiff's Emergency Motion (Fla. 15th Cir. Ct. Nov. 15, 2000).

[20] Having complied with the order of the Circuit Court, Palm Beach County is protected from further challenge by Appellants to its recounting standards under principles of collateral estoppel, which prevent parties in privity from re-litigating in a second cause of action the same points and questions that were settled in an earlier cause of action. *See Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). Although Appellants were not named parties in the earlier suit, they satisfy the privity requirements of Florida law because they succeeded the Florida Democratic Party in interest following the entry of judgment in the suit. Once the Circuit Court's order was entered, the Appellants, not the Florida Democratic Party, stood to gain office by virtue of additional votes gained through the application of those standards. *See Zeidwig v. Ward*, 548 So. 2d 209, 213 (Fla. 1989). Also, this Court has long recognized an exception to the mutuality requirement when the doctrine is used defensively and the facts of the case are compelling. *See Stogniew*, 656 So. 2d at 919 (recognizing an exception to mutuality in prior caselaw "in a defensive context and then only under the compelling facts of th[e] case"). Both such requirements are met here.

[21] Although Appellees reserve their objection to the standards applied by the Board, based on 3 U.S.C. § 5, Appellees agree that the Board complied with the November 15 Order and therefore did not abuse its discretion.

clue, much less "a clear indication" of voter intent. Tr. at 258; *see also* § 101.5614(5), Fla. Stat. Rather, it is as consistent with a decision *not* to vote as it is with an intention to vote. [22]

No Florida court has ever held that dimpled ballots must be counted as votes during a manual recount. In its initial *Harris* opinion, relying in part on Appellants' representations, this Court quoted *Pullen v. Mulligan* for the proposition that, where the intention of the voter can be ascertained with reasonable certainty from the ballot, that intention should be given effect. *Harris*, Nos. SC00-2348, *et al.*, slip op. at 34. However, contrary to Appellants' assertion, the *Pullen* case does not stand for the proposition that all dimpled ballots should be counted as votes. The Supreme Court of Illinois found that the procedures adopted by the trial court were proper and that 19 out of 27 votes in question were *disregarded* entirely because the intent of the voter could not reasonably be ascertained. These 19 votes had dimples or other marks. The 8 votes that were counted were *perforated, not dimpled* ballots, or ballots that contained dimples consistently throughout the ballot. The transcript of the trial court on remand in *Pullen* reads strikingly like the transcripts of the deliberations by the Palm Beach Canvassing Board regarding the approximately 15,000 ballots. *See Pullen v. Mulligan*, No. 90-00-00115,

[22] "Equivocal" evidence is legally insufficient to justify inclusion of such ballots as valid votes. *See, e.g., Escalante v. Hermosa Beach*, 195 Cal. App. 3d 1009 (1987) ("equivocal ballot" is "not countable"); *Fair v. Hernandez*, 116 Cal. App. 3d 868 (Cal. App. 1981) ("Ballots are not to be counted as to offices as to which they are equivocal."); *Adams v. McMullen, 184 Minn.* 602 (Minn. 1931) ("uncertain and equivocal" ballot "should be rejected").

Transcript of Hearing on Sept. 17, 1990, at 136-153 (Ill. Cir. Ct. Ch. Div., Sept. 18, 1990) (relevant pages attached as Ex. 1). *Pullen* does not stand for the proposition that "rogue dimples" or other dimples can be counted, unless the voter cast dimple ballots consistently throughout the punchcard and no other chads were successfully punched.

Because the approximately 15,000 separate factual determinations of the Palm Beach County Canvassing Board comply with the law established by the Florida courts in this election, there could be no abuse of discretion. As this Court held in *Boardman*, the Circuit Court had no authority to substitute its own judgment as to whether, as a matter of fact, individual ballots indicated the intent of the voters. 323 So. 2d at 268 n.5.

4. Palm Beach County's partial recount results could not be included in the final certification.

The Circuit Court correctly held that there is "no authority under Florida law for certification of an incomplete manual recount." Findings at 9. The Circuit Court also correctly held that there is no authority to include any returns submitted by the Palm Beach Board "past the deadline established by the Florida Supreme Court in this election." *Id*. at 9-10.

There is no authority for the Elections Canvassing Commission to accept the late returns submitted by the Palm Beach County Canvassing Board after the 5:00 p.m. deadline on November 26 imposed by this Court in *Harris*. In *Harris*, this Court commanded that

> amended certifications *must* be filed with the Elections Canvassing Commission by 5:00 p.m. on Sunday, November 26, 2000 and the Secretary

> of State shall accept any such amended certifications received by 5:00 p.m. on Sunday, November 26, 2000.

Harris, Nos. SC00-2346, slip op. at 40 (emphasis added). Because the results of Palm Beach County's manual count were not submitted within that deadline, the Election Canvassing Commission properly excluded those results.

5. There Is No Factual Or Legal Basis To Reject The Official Certification Of The Nassau County Canvassing Board.

Appellants argue that the final amended certification submitted by the Nassau County Canvassing Board should be rejected in favor of an admittedly erroneous machine recount. As with the Miami-Dade and Palm Beach, the Nassau Board did not abuse its discretion in certifying the original count.

Based on the evidence at trial, the Circuit Court determined that the Nassau Board's certification of results of the November 8 automatic recount improperly rejected legal votes and that the accurate count of election returns was the original certification filed November 7. The Circuit Court's determination was based on the trial testimony of Shirley King and the other evidence presented at trial.

Appellants argued below that the Nassau Board has no discretion under Section 102.141(4), but is required to certify machine recounts, even when it *knows* the recount results to be erroneous. However, the statute does not require certification of an incomplete or irregular return. *See* § 102.111(1). The language of Section 102.141(4) contemplates that automatic recounts must include *all* of the ballots. The November 8 certification, which rejected the legal votes of 218 Nassau County citizens, was facially

inaccurate and therefore was irregular and false. Because it was undisputedly erroneous, the November 8 machine recount could not be properly certified under Section 102.141(4) and the Board acted within its discretion.[23]

Appellants argue that Florida's "sunshine" law requires that governmental bodies give notice of their meetings and conduct those meetings in public. *See* FLA. STAT. ANN. § 286.011. In this case, the evidence at trial established that the Board's November 24 meeting was lawfully conducted. The public notice of the meeting was given by several means: it was posted at the courthouse and public buildings and was published in the newspaper. Tr. 579. Finally, the substitution of new member Marianne Marshall was not improper, and in any event, could not have been anything more than harmless error. Ms. Marshall's involvement was merely to vote, and her vote was unnecessary, because the three-member Board's vote was unanimous.[24]

C. Appellants Did Not Prove That the Election Results Would Be Different.

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[23] Appellants' citation of *Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (3rd DCA Fla. 1984), was properly rejected. Appellants argued that *Morse* requires that Canvassing Boards use only the recount tallies when a recount has been conducted under Section 102.141(4). But that proposition *presumes* that the recount was properly conducted.

[24] *See Vans Agnew v. Davidson*, 156 So. 7, 9 (Fla. 1934) (finding in an election case that "'[a] certificate signed by a majority of the inspectors is a valid return. The omission of one to perform his duty is not even an irregularity in the return'") (quoting *Brisbee v. Board of State Canvassers*, 17 Fla. 29 (1879)).

The Circuit Court correctly found that Appellants must demonstrate "reasonable probability" that the results of the election statewide would have been different. A showing of a mere "reasonable possibility" is not sufficient. Tr. at p. 9, lines 7-11. As the Florida courts have held:

> It is established that in order to contest election results under [section 102.168], the challenger must show that, but for certain irregularities, the result of the election would have been different and he or she would have been the winner. It is not enough to show a reasonable possibility that election results could have been altered by the irregularities; *a reasonable probability that the results would have been changed must be shown*.

Smith v. Tynes, 412 So. 2d 925, 926-27 (Fla. 1st Dist. Ct. App. 1982) (emphasis added) (citing *McQuagge v. Conrad*, 65 So. 2d 851 (Fla. 1953), and others).[25] Appellants argument that they are entitled to a court recount simply by alleging the statutory ground in Section 102.168(3), without any proof, ignores that case law and the evidence in the Record.

The Circuit Court made a factual finding that there was "no credible statistical evidence and no other competent substantial evidence to establish by a preponderance a

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[25] Although the Florida Legislature amended Section 102.168 after *Smith*, the legislative history makes clear that the Legislature did not intend a "comprehensive reform," *see* Comm. on Judiciary, H.R. 99-339, Analysis on H.B. 281 at V., (Fla. Mar. 22, 1999), but merely codified existing contest case law, *see* Comm. on Election Reform, H.R. 99-339, Final Analysis on H.B. 281 at III.A. (Fla. Jul. 15, 1999) (citing cases). The "reasonable probability" standard was part of the existing case law, and continued in effect after the amendment. *See Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d Dist. Ct. App. 1984) (citing cases).

reasonable probability that the results of the statewide election in the state of Florida would be different...." Findings at 9. The evidence in the record, discussed in the Statement of Facts above, clearly supports the Circuit Court's finding.

D. A Statewide Contest Would Require Statewide Recount.

In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168. As the Circuit Court correctly found:

> [U]nder Section 102.168 of the Florida Statutes to contest a statewide federal election, the Plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount on all ballots, and all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred.

Findings at 12-13. To prove that the outcome of the election would be different, Appellants must establish that they received a majority or plurality of *all* votes cast in the state.[26] Appellants cannot meet that burden by selecting to count only three predominantly Democratic counties that are "likely to yield results favorable to them." *In*

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[26]*See, e.g., Farmer v. Carson*, 148 So. 557, 560 (Fla. 1933); *Hornsby v. Hilliard*, 189 So. 2d 361 (Fla. 1966); *accord Hennessy v. Porch*, 247 Ill. 388 (1910) (object of contest is to ascertain who received majority of votes, and when court undertakes to count ballots it "will count them all"); *Louden v. Thompson*, 275 N.E.2d 476 (Ill. App. 1971) (purpose of contest is "to ascertain how many votes were cast for or against a candidate, or for or against a measure"); *cf. State ex rel. Clark v. Klingensmith*, 121 Fla. 297 (1935) (In quo warranto proceeding, "the burden is on the relator not only to demonstrate by his allegations and proof that

re Contest, 444 N.E.2d at 183. The same factors are present in this case, to a much greater degree, and this Court's conclusion should be the same.

In *In re Contest*, the Supreme Court of Illinois addressed the issue of whether to allow a contest when a statewide recount would be required. There, the court struck a petition for an election contest in a statewide election for Governor emphasizing the magnitude of a statewide election contest and noting that the court would need to count nearly every ballot cast. *Id*. at 183. Important in this determination was that the Appellants had selected only precincts favorable to them for review: "[A]n election contest, however, is not a one-way street." *Id*. If the contest were permitted to go forward, "it is conceivable that every ballot cast in the election held … would have to be examined." *Id*. The court was unwilling to impose such delay and cause political turmoil and uncertainty. *See id*. at 179. This price was too high to pay; and in light of the cost and damage a statewide recount would impose -- and Appellants' reliance on projections of what they expected a recount to reveal -- the court dismissed the contest. *Id*. at 182-83.

II. THERE ARE FEDERAL CONSTITUTIONAL AND STATUTORY CONSIDERATIONS THAT APPLY TO THIS CASE AND THAT REQUIRE AFFIRMATION OF THE CIRCUIT COURT'S DECISION.

The Circuit Court found as a factual matter that the standard of vote counting in Palm Beach County that existed on November 7, 2000 was that embodied in a written 1990 guideline: that indentations or dimples will not count as votes. The court further noted that any change in that standard may, in turn, be contrary to 3 U.S.C. § 5. Indeed,

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respondent was not elected, but that relator himself was the candidate lawfully

for a court in a contest proceeding to now apply a standard that counts dimples as votes in selective counties would be directly contrary to 3 U.S.C. § 5, and it would also violate Article II, Section I of the U.S. Constitution. In addition, a change in the deadline for certification for election returns, along with a change in the time period for contesting an election, would likewise violate Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5. Finally, the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution. As Florida's Attorney General recently opined, "[a]s 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 United States and the state constitutions." Findings at 12.

CONCLUSION

For the foregoing reasons, Appellees request that the Judgment of the circuit Court be affirmed.

Respectfully submitted,

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chosen by the voters for the office in dispute.").

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