IN THE
SUPREME COURT OF FLORIDA

CASE NOS. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD ETC., ET AL.	vs.	KATHERINE HARRIS and ROBERT BUTTERWORTH
VOLUSIA COUNTY CANVASSING BOARD ET AL.	vs.	MICHAEL MCDERMOTT
FLORIDA DEMOCRATIC PARTY ET AL.	vs.	MICHAEL MCDERMOTT
Petitioners		Respondents

AMENDED ANSWER BRIEF OF THE SECRETARY OF STATE AND THE ELECTIONS CANVASSING COMMISSION

Deborah K. Kearney
General Counsel
Kerey Carpenter
Assistant General Counsel
Florida Department of State
PL-02 The Capital
Tallahassee, Florida 32399-0250
(850) 414-5536

Joseph P. Klock, Jr.
Jonathan Sjostrom
Victoria L. Weber
John W. Little, III
Donna E. Blanton
Gabriel E. Nieto
Elizabeth C. Daley
Arthur R. Lewis, Jr.
Elizabeth J. Maykut
Steel Hector & Davis, LLP
215 South Monroe Street
Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Counsel for Respondents

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I. REFERENCES

In this brief, the Vice President of the United States, the Florida Democratic Party, the Canvassing Board of Palm Beach County, the Canvassing Board of Broward County, and the Attorney General of the State of Florida (who has asked to be re-aligned with the Canvassing Board), when not referred to separately by name, will be referred to as the "Democrats." Likewise, Governor George W. Bush and Matt Butler will be referred to as the "Republicans." The Secretary of State and the Elections Canvassing Commission will be referred to as the "Secretary" and the "Commission." The Director of and the Division of Elections of the Department of State will be referred to as the "Director" and the "Division."

II. INTRODUCTION

A. PRELIMINARY STATEMENT

The Democrats' perspective is that the Election Code has to be read as mandating that each voter's intent, irrespective of whether the voter has properly punched or marked his or her ballot must take precedence over statutory deadlines, the constitutional construction of statutes, and the discretion and operative duties of executive officers. To do this, the Democrats advocate, in effect, the fashioning of a presumably common law right to manually recount votes, the creation of superclasses of voters in three counties whose votes are entitled to special

consideration and multiple counts[1] (as opposed to the voters of the other 64 counties), and the creation by this Court of administrative guidelines to determine how a human ought interpret machine ballots -- the ever expanding universe of chad issues. All of this is set against issues cropping-up by the day, such as the impact of felons who were permitted to vote, claimed irregularities in the actual manual counting in the two counties currently underway, and the disenfranchisement of overseas voters,[2] to mention just a few, as of the moment of filing. But, of course, the number of these issues expands by the day and by the hour.

The Republicans, not to be outdone, are complaining about procedures for manual re-counting and the sanctity of the machine tabulation. It is clear, that for the Democrats and the Republicans, the object is to win, and that is understandable. The stakes are very high.

The Secretary and the Commission, on the other hand, have an obligation to supervise and record the elections of this state in accordance with the statutes and

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[1] There are 72,614 out of 180, 127 Floridians who did not vote for president located in these three counties. Remarkably, the Democrats claim that "[t]here is an overwhelming interest in ensuring that every vote is counted." Gore Brief at 47.

[2] While the Democrats express concern about the need to discern, at any cost of time and money, the intentions of voters in three South Florida counties who improperly punched their ballots, soldiers abroad and other overseas citizens are to be held to the strictest standards of compliance.

the constitution of the state. As part of those duties, she is required to render opinions about election issues, when asked, and to exercise her discretion under certain circumstances. But, for the most part, she is required to adhere to statutory dictates and deadlines. For the Secretary to win, the law must be followed in a constitutional fashion.

The Secretary's actions are predicated upon the following premises:

1. The Florida Election Code places a great premium on the need to record every voter's vote, but not at the expense of disregarding statutory deadlines and not in situations where the failure to properly reflect a voter's choice is caused by the voter's failure to follow directions, as opposed to a voter who properly executes his or her ballot, only to have it mis-recorded due to some error in the tabulation process, a mechanical glitch of some type.

2. Every voter is entitled to have his or her ballot treated in the same fashion, irrespective of where he or she lives. A decision to screen votes for voter error cannot be indulged in one county, but not another.

3. Manual counting of machine ballots can only occur, where, following an automatic recount, a candidate or party requests a manual test, and that test

demonstrates a system tabulation problem of some type, in which case a manual recount is to take place.[3]

4. County returns for a statewide or federal officer must be filed by 5 p.m. on the seventh day following an election and thereafter certified by the Commission, barring an extension granted by the Secretary, after the request of a county canvassing board, in the reasonable exercise of her discretion for a legally valid reason.

What the Secretary has done is to follow the statutes and the injunctive order of the Circuit Court of Leon County.[4] She has notified the county canvassing boards to provide her with any reasons why a late amendment of the votes should be entertained, after having developed criteria drawn from case law regarding the factors for overturning an election. No objections were received from the

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[3] Naturally, an entire recount of the county is only necessary in a county-wide race. A county-wide recount would not occur where a candidate in a city race requested it. Also, since the Secretary and the Commission are not permitted to go behind a certificate from a county canvassing board, should such a board do a manual count without identifying the change in the number of votes manually counted from those machine counted and include that fact on its certification, the Secretary has no choice but to count such votes because she is not permitted to go behind the county canvassing board's certification. Fla. Sta. § 102.131 (2000)

[4] The injunction was sought against the Secretary by the Democrats, who greeted its entry with enormous public acclaim. Only after the Secretary's actions were approved by the circuit court did the order fall in their estimation.

canvassing boards or anyone else, nor extensions of time sought. Four counties submitted requests; the Secretary applied her criteria, and in the reasonable exercise of her discretion, denied the requests. She and the Commission then certified the election results as required by statute and then released that information to the public. The Democrats then rushed to Court seeking to hold her in contempt and to have the circuit court rule that she had violated its order and to set aside the Commission's certification of the election results. The circuit court rejected the challenge, specifically holding:

> On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

Democratic Party App. at 13.

This Court ordered that the supplemental certification for overseas ballots be stayed pending its review of these cases.

The Secretary's actions are legal; the exercise of her discretion as a constitutional officer of the Executive Branch has been reviewed and approved by the circuit court. Her actions are in accordance with the law of Florida. Yet, she has been pilloried and criticized for her failure to accommodate the Democrats'

desire for a manual re-count of votes in three counties that they have selected to correct voter error, a remedy that does not exist in the laws of Florida.

The Democrats claim that the Secretary has interrupted and delayed their manual recount project. This is not true. They first complain about her November 13 opinion, claiming that it ruled manual recounts "illegal except in the event of a machine breakdown . . ." and that it "direct[ed] a halt to manual recounts." (Democratic Party's Brief at 2, 24). Neither statement is correct, and the Democrats fail to point out that Palm Beach County asked for the opinion, and that the Division thus had to give it.[5] (Of course, Broward chose to start after the deadline,[6] and Miami-Dade may start tomorrow.)

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[5] The Wall Street *Journal* reported that, during a press conference held in the early hours of Sunday, November 12, it became clear that the Chair of the Palm Beach County Canvassing Board suggested that the Board seek an opinion clarifying Florida law from the Department of State. The Board subsequently voted to seek an opinion, which the Division of Elections issued on November 13. Secy. State App. at 8.

[6] For their part, the Broward County Canvassing Board states that on November 13, 2000, the Board decided not to proceed with a countywide manual re-count after consideration of an opinion issued by the Division to the Republican Party. (Broward brief at 3.). They then acknowledge that no opinion was ever requested or issued to their Board by the Division. Id. As such, they could never have been in doubt about whether they were bound by any of the advisory opinions at issue here.

Next, they complain of the Secretary's "statement that no recounts after 5:00 p.m. on November 14, would be considered." (Democratic Party's brief at 2.). Their dispute is not with the Secretary, however. It is with the Legislature who mandated it. Fla. Sta. §102.111 (2000). They also complain of the Secretary's message of November 14, asking the canvassing boards to "submit by 2:00 p.m. on November 15 their reasons for needing to amend their election results." Id. As well, they complain of her letters back to each of the four who asked for exceptions. Both actions, of course, were in compliance with Circuit Judge Terry Lewis's order directing her to consider the facts and circumstances supporting any county's late-filed election results. And, Judge Lewis specifically approved her conduct in his Second Order.

Finally, Petitioners complain that the Secretary filed a petition to this Court on November 15 seeking, among other things, an order stopping the manual recounts. (Democratic Party's brief at 2). In fact, the Secretary sought to invoke the all writs jurisdiction of this Court for purposes of ultimately expediting, not delaying, the resolution of the disputes regarding acceptance of late-filed returns so that the elections can be timely completed. (Democratic Party's Appendix, 5. F), a result accomplished several days later as a result of filings by the Democrats.

It is clear that any delays were not caused by the Secretary, but rather were caused by either inaction or legal strategy on the part of the canvassing boards or others.

The Democrats have criticized her actions as "Kafkaesque." The state of affairs initiated and being pursued by others has rendered the entire voting process just short of anarchy. The Court should release its stay and affirm Judge Lewis's order.

B. QUESTIONS PRESENTED

Petitioners seek to raise any number of issues in the consolidated proceedings which are before this Court.[7] Respondents, the Secretary, the Commissioner of Agriculture, and the Director, sitting as the Commission suggest that there are two central questions:

1. Whether the lower Court erred when it ruled that the Secretary did not abuse her broad discretion in refusing to accept after the statutory deadline results

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[7]The question as presented by the Florida Democratic Party and Al Gore, Jr. ("Democratic Party"), suggests that this Court revisit anew issues presented and decided by the trial court, rather than review the trial court's decisions by applying the traditional standard of review. Conversely, the Broward County Canvassing Board and Broward County Supervisor of Elections ("Broward County") want this Court to give as to the validity of the "two-corner" rule without a record or written order. Broward County Brief at 5, 7-8.

from manual recounts, based upon the criteria she applied to the facts and circumstances presented to here.

2. Whether, as was determined in the Division of Elections' formal advisory opinion DE 00-13, the Florida Election Code precludes manual recounts based on voter error in some, but not all, counties in Florida in a statewide election.

If the Court answers the first question in the negative, as we believe it should, the Court need not reach the second question.

III. STATEMENT OF THE CASE AND FACTS

A. The Case

Petitioners seek to have this Court overrule two temporary injunction orders of the Circuit Court in and for the Second Judicial Circuit: Order Granting in Part and Denying in Part Motion for Temporary Injunction, Case No. CV-00-2700h November 14, 2000 (Sec'y State App. at 1)[8] and Order Denying Emergency Motion to Compel Compliance with and for Enforcement of Injunction, Case No CV-00-2700h November 17, 2000 (Decocratic Party App. at 13).

[8] Documents in the Appendix to this brief will be cited herein by reference to the Tab and page number. For example, App. 1, p. 3, would refer to page 3 of the document at Tab 1 of the Appendix.

Both orders address the circumstances under which it is appropriate for the Secretary to accept or reject election returns filed after the deadline set forth in section 102.111, Florida Statutes. Additionally, Petitioner Palm Beach County Elections Canvassing Board ("Palm Beach") has petitioned for a determination on two conflicting advisory opinions issued by the Secretary and Florida Attorney General on the issue of when a local election canvassing board may conduct a manual recount of ballots.[9]

The Secretary is the State's Chief Election Officer. § 97.102, Fla. Stat. Within the Department of State, the Division , is the agency allocated subject matter jurisdiction over the Florida Election Code. § 102.111, Fl. Stat. The Commission, composed of the Secretary, the Director, and the Governor (or, in this case, the Director's designee, the Agriculture Commissioner), is the independent body responsible for certifying the final Florida results of the presidential election. § 102.111, Fla. Stat. To assist the Court in understanding the facts of these cases,

[9] Palm Beach County has filed no independent brief in the consolidated actions, choosing instead to rely on the arguments in its Emergency Petition for Extraordinary Relief in Case No. 00-2346. No other Petitioner has asked for relief on the issue of the conflicting opinions. However, to the extent the Court chooses to pass on that issue, the Secretary relies on the Response to Palm Beach's Emergency Petition filed in Case No. 00-2346 on November 16, 2000.

Respondents have created a chronology of relevant events that can be found at the Secretary's Appendix at 6.

IV. SUMMARY OF THE ARGUMENT

In his Initial Order, Judge Terry P. Lewis properly interpreted the Florida Election Code to "balance the desire for accuracy with the desire for finality." (Sec'y. State App. at 9.) Likewise, the Secretary has properly interpreted the Florida Election Code to balance accuracy and finality. In doing so, she correctly determined that an ongoing manual recount, based solely on voter error, is not a sound basis for ignoring a statutory deadline to report election results. The Division correctly interpreted section 102.166, Florida Statutes, as permitting a manual recount if the vote tabulation system fails to count <u>properly marked or properly punched</u> ballots-- not if voter error is the cause of some possibility that the outcome of the election would be affected by a manual recount. This administrative interpretation of the law is entitled to deference. It is a reasonable and logical interpretation of the statute reading the Florida Election law as a whole. This interpretation is supported by the context and legislative history attendant to the statute.

After reviewing the Secretary's responsibilities under the election law, Judge Lewis ordered her to withhold determination of whether to waive the statutory deadline for filing returns until she gave due consideration to all relevant facts and circumstances consistent with the exercise of sound discretion. She responded accordingly. In his Second Order, the trial judge correctly concluded that the Secretary had obeyed his Initial Order. Judge Lewis disagreed with the Petitioner's assertion that the Secretary acted arbitrarily in deciding not to waive the statutory deadline simply because some counties were still conducting manual recounts. The trial judge correctly determined that the Secretary "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." (Democratic Party App. at 13.)

In reaching these conclusions, Judge Lewis acknowledged the mandatory statutory deadline for filing returns, coupled with the discretion granted to the Secretary, as the State's Chief Elections Officer, to accept late-filed returns under limited circumstances. The trial court properly deferred to the Secretary's discretion. Pursuant to the trial court's order, the Secretary properly rejected the late-filed returns based upon criteria drawn directly from decisions of this Court and the various district courts of appeal. Those criteria were developed in recognition of

the principle that the real parties in interest in an election dispute are the voters and that election results should not be disturbed absent fraud or other purposeful irregularities if there has been substantial compliance with the election procedures.

Voter error is not a basis for selective manual recounts. The statutory deadline for reporting election returns should not be ignored absent extraordinary circumstances. Therefore, the trial judge did not abuse his discretion in entering the two orders on appeal, and the Secretary did not abuse her discretion in refusing to waive the statutory deadline to accept late results arising from voter error. Thus, the orders of the lower court should be affirmed, the temporary stay imposed by this Court should be lifted, and the Commission should be allowed to finally certify the properly-cast votes of the people of Florida.

V. ARGUMENT

A. THE TRIAL COURT CORRECTLY FOUND THAT THE SECRETARY HAD NOT VIOLATED ITS NOVEMBER 14, 2000, INJUNCTION.

Judge Lewis' November 14, 2000, Order directed the Secretary to exercise great care in determining whether to allow late-filed certifications, requiring her to fully consider the reasons given and evaluate them according to reasonable objective criteria. Judge Lewis first recognized the Secretary's power to exercise reasonable administrative discretion in determining whether to accept late-filed amendments:

> Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing [the decision to file a late amendment], considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results.
>
> Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly execute her discretion in making a decision on the returns, but I cannot enjoin the secretary to make a particular decision. . . .

In light of this holding, his Order directed the Secretary to:

> withhold determination as to whether or not to ignore late-filed returns, if any from Plaintiff Canvassing Boards, until the consideration of all relevant facts and circumstances consistent with sound exercise of discretion.

Thus, the Circuit Court's injunction recognized that the Secretary was to allow local boards to explain why they wished to file late returns, carefully consider each such request, and, based upon the reasons provided, determine wether or not to accept the late return.

The Secretary did exactly as directed. Upon the expiration of the statutory deadline for election returns to be filed, the Secretary directed each county canvassing board that may wish to amend its election returns to file reasons explaining why such a late filed amendment would be necessary and proper. The Secretary carefully considered the submittals from the local canvassing boards

against criteria established in prior judicial decisions involving contested elections. For the reasons set forth in the Secretary's letters to each board, the information submitted was found inadequate to justify the late-filing of returns and delay fo state-wide certification. Therefore, as no local canvassing board submitted a valid request for delay, the statewide returns were certified on November 15th, subject only to the tabulation of overseas absentee ballots timely received.

As Judge Lewis correctly held, the Secretary's actions fully complied with the Circuit Court's injunction. The Secretary withheld "determination as to whether or not to ignore late-filed returns, if any from Plaintiff Canvassing Boards, until the consideration of all relevant facts and circumstances consistent with sound exercise of discretion." She then exercised that discretion in light of settled Florida election law principles, and found that there was no justification for avoidance of the statutory deadline for filing election returns. Judge Lewis therefore agreed that the Secretary had fully compiled with his directives:

> Florida law grants the Secretary, as the Chief Elections Officer, broad authority to accept or reject late-filed returns. . . . On the limited evidence presented it appears that the Secretary has exercised here reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My Order requires nothing more.

Thus, the Secretary has complied with her duties under state law and exercised her discretion to reject the late filings based on reasonable and appropriate criteria. Her decision is entitled to deference and must be upheld.

B. FLORIDA LAW DOES NOT ALLOW FOR MANUAL RECOUNTING MERELY TO CORRECT VOTER ERROR.

The Division of Elections correctly construed section 102.166(5), Florida Statutes, to apply solely to the case in which a sample recount indicates a counting error in a voting tabulation system such that it fails to count properly marked ballots.

Palm Beach seeks to have this Court invalidate a binding opinion of the Division (the "Division Opinion") regarding the use of manual recount in the absence of a failure in the automated vote tabulation system. The Democrats similarly ask this court to fashion relief that would facilitate manual recounting in three selected counties where Vice President Gore received strong electoral support. The Division, the agency allocated subject matter jurisdiction over such issues under section 106.23(2), Florida Statutes, has held that manual recounts may not be employed in areas that have adopted an automated tabulation system absent some failure of that system to function properly. The Florida Attorney General, who does not have regulatory authority over elections, has issued a contrary advisory opinion.

Both the plain language and legislative history of Florida's election statutes indicate that the Division correctly found that a manual recount of the ballots is proper only when there has been a failure of the vote tabulation system. §102.166(5), Fla. Stat. Amended Response of Katherine Harris, III.D. and E. at 13-19. More specifically, failure of certain voters to properly execute their ballots is not a basis for conducting a manual recount.

The Division's interpretation properly construes the term "vote tabulation" in the context of tabulation machines and is consistent with the statute as a whole. Moreover, it is within the permissible range of statutory interpretation and should therefore be upheld based on the well established principle of deference to administrative statutory interpretations. See Smith v. Crawford, 645 So. 2d 513, 521 (Fla. 1st DCA 1994) and Amended Response of Katherine Harris, (III.C. at 11-13.) Because there has been no "error in the vote tabulation," as that term is defined by the Division, there is no valid basis for any canvassing board to conduct such a recount, much less for the Commission to delay certification of the election while a recount is ongoing.

The legislative history, which was expressed fully in Amended Response of Katherine Harris, as Secretary of State, to the Emergency Petition for Extraordinary Writ filed by the Palm Beach County Canvassing Board indicates that the statute was

intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function properly. The legislature never intended for the result of a manual recount to be the very cause for its conduct, putting the proverbial cart before the horse. Nor does legislative intent indicate that a manual recount should be used to evaluate ambiguous ballots that voters failed to properly execute.

Interpreting section 102.166, Florida Statutes, to allow individual counties to selectively order manual counting of ballots to correct voter error in selected counties, within the context of a national election and without adherence to any uniform standards, invites a constitutional due process challenge to the statute.

The Division is the state agency allocated ultimate jurisdiction over election procedures. § 97.012, Fla. Stat. As such, it is charged with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." § 97.012(1), Fla. Stat. Under section 106.23(2), Florida Statutes, if requested by a person with standing, the Division has the specific power and duty to determine, under section 102.166(5), Florida Statutes, the circumstances under which a manual recount of ballots is authorized. Pursuant to this authority, the Division has issued its opinion based on its reading of the statutory language and its specialized knowledge and understanding of the legislative history and intent. This

Court should defer to the Division's interpretation and find that Florida law does not allow for the proposed recounting.

Florida law authorizes the use of electronic voting systems. A voter must comply with the instructions provided concerning ballot completion so that the ballot will be read and counted by an electronic system. If a voter fails to comply with these instructions, and his or her vote cannot be counted as valid by the electronic system as a consequence, no violation of Florida law has occurred. Sections 102.166(4) and (5) were not enacted to authorize county-wide manual recounts -- with all the attendant delay, added expense, and potential for fraud and abuse -- for the purpose of locating any possible instance that a voter might have somehow marked a ballot to indicate intent to cast a vote that could not be discerned by a properly operating electronic vote tabulation system. If that were the case, electronic systems would have no purpose. The statutory provisions at issue were written to promote and facilitate the use of electronic systems, and not to frustrate their use through mass county-wide manual recounts in the absence of evidence of the failure of an electronic system to operate as it was designed to do.

C. FLORIDA LAW PROVIDES STRICT STATUTORY DEADLINES FOR CERTIFICATION OF ELECTION RESULTS TO WHICH THE SECRETARY PROPERLY ADHERED.

1. Florida Law Imposes Mandatory Deadlines on Election Certification.

The Democrats suggest that the Secretary lacks discretion to waive the statutory deadline. They may be right, but if they are, then the Secretary has no discretion to waive the deadline and had, under no circumstances, any obligation to waive the deadline.

Section 102.112(1), Florida Statutes, regulates local elections canvassing boards. It strictly requires the boards to file returns for the election of a federal officer with the Department of State within seven days of the general election:

> The *county canvassing board* or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

§ 102.112(1), Fla. Stat. Thus, certification of the November 7th general election was required to occur on November 14th. There are no exceptions in the statute. Indeed, the statute imposes harsh financial penalties for non-compliance, that must be paid out of board members' personal funds.

Section 102.111(1) governs the Commission and requires it to promptly certify election results based solely on the returns filed by the seven-day deadline. Once again, performance of the duty is mandatory and there are no exceptions set forth:

> The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. . . . If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties ***SHALL*** be ignored, and the results shown by the returns on file shall be certified.

§ 102.111(1), Fla. Stat. (emphasis added).

Together these statutes direct local canvassing boards to file election returns within seven days of the election ("returns must be filed by 5 p.m. on the 7th day") and the Commission to immediately certify the election results and declare a winner based on the county returns filed within this seven day time frame. The statute specifies no circumstances that would require that late filing be tolerated.

The mandatory nature of the statutory deadline was clearly recognized by this Court in Chappell v. Martinez, 536 So. 2d 1007, 1009 (Fla. 1988), where it held that Flagler County was required to comply with this deadline. In effect, Chappell held that the requirement that the returns be "filed" was met by the telephonic submission of returns, but did not waive the mandatory deadline for their submission.

To the extent it can be argued that the Secretary is without discretion as the Democrats now contend for the first time on appeal, the statutes can only be read to be mandatory and provide for no discretion to waive the deadline. The history of the statutory provisions makes this conclusion abundantly clear. Until 1989, the deadline for certification of returns to the Secretary was contained in section 102.111(1). In 1989, the Legislature enacted chapter. 89-338, Laws of Florida, directing county canvassing boards to file election returns within seven days of the election and putting them on notice that late filed results could be ignored. § 102.112(1), Fla. Stat. Although the new statute used the phrase "may be ignored" when referring to the rejection of late results, this provision was not necessarily intended to change the mandatory nature of the Commission certification deadline. Section 102.112(1) does not regulate the Commission, whose governing statute is section 102.111, it regulates only local boards.

The legislative history of the 1989 legislation confirms that there was no intent to weaken the deadline. The Senate Staff Analysis of SB111, which became chapter. 89-338, repeatedly refers to the time period in sections 102.111(1) and 102.112(1) as a "deadline." (Sec'y State App. at 7.) Deadline is commonly defined as "the time after which copy is not accepted for a particular issue of a publication." Merriam

Webster's Collegiate Dictionary 295 (10th ed. 1997). The analogy to the election statutes is clear; election results will not be accepted after the "deadline" has passed.

The Petitioners argue that the deadlines in sections 102.111(1) and .112(1) are not mandatory based on Chappell. However, that decision merely states that alternative means of compliance (i.e., phoning in results, as opposed to providing them in writing) will be allowed. This is what "substantial compliance" means. The Petitioners would pervert this holding to sanction "no compliance," disregarding the deadline altogether. The mandatory words used by the statute would be rendered meaningless if an unambiguous seven day deadline could be transformed, as if by alchemy, into a mandatory and indefinite extension of time. As this court recently clarified in Beckstrom v. Volusia County Canvassing Board, the election standards must be strictly followed:

> We expressly state that our decision in Boardman [v. Esteva, 323 So. 2d 259 (Fla. 1975)] is not to be read as condoning anything less than strict adherence by election officials to the statutorily mandated election procedures. Such adherence is vital to safeguarding our representative form of government, which directly depends upon election officials' faithful performance of their duties. Neither Boardman nor this case concerns potential sanctions for election officials who fail to faithfully perform their duties. It is for the legislature to specify what sanction should be available for enforcement against election officials who fail to faithfully perform their duties.

707 So. 2d 720, 725 (Fla. 1998). Nothing less than the same "strict compliance" should be required here -- particularly since the purpose of evading the deadline is to perform a manual recount only in counties selected for partisan advantage.

2. Sound Practical and Policy Reasons for the Deadline Exist.

The legislature had good reasons to set strict time limits for the certification of elections. Likewise, the Secretary's respect for those time frames. The time period allows for finality in an election. It provides that certificates of election may be issued so that, for example, the Legislature can meet at its organizational session as required by the state constitution fourteen days after the election. Art. III, § 3(a), Fla. Const. Importantly, the time for filing an election contest commences upon certification. § 102.168(1), Fla. Stat.

If the certification of presidential electors is contested pursuant to a state's statutory election contest procedures, the determination made as of six days prior to the meeting of the electoral college--at whatever stage the contest proceeding is in, is conclusive. 3 U.S.C. § 5. To delay certification affects the ability to have an election contest heard and possibly appealed and to implement whatever remedy the court might fashion. Each day that certifications are not made and the right to contest is not triggered, the likelihood of a court's ability to effectively deal with a legitimate election failure is adversely affected. If an election contest cannot be heard

by a court through contest proceedings and the results are not certified, there will be no appointment of the presidential electors short of extraordinary legislative intervention. 3 U.S.C. § 2.

There is no common law right to contest an election. The Legislature has created a statutory procedure to do so. § 102.168, Fla. Stat. Section 102.168(3) establishes an orderly process through which any of the grounds for setting aside the results of an election may be raised . Once the results of the election are certified, there is a 10-day period during which the certification may be contested. § 102.168(1), Fla. Stat. Adherence to the statute clarifies several cogent concepts. First, it becomes clear that venue would be proper in this statewide election only in the circuit court in Leon County. § 102.1685, Fla. Stat.

Second, it becomes obvious the subject election is, indeed, a statewide election and not a Palm Beach County or Broward County or Miami-Dade County election. This allows a Leon County circuit judge to consider the election as a whole, to determine whether there is any cause or allegation raised which, if sustained, would show that the certification of persons other than the certified presidential electors was contrary to the result declared by the election board. § 102.168(3)(e), Fla. Stat. This further would allow for the presiding judge to fashion any appropriate relief.

While petitioners complain that the canvassing boards have been hampered by the Secretary in performing manual recounts, in fact they have made every effort to prevent the certification that would allow any legitimate claim to proceed as contemplated by the Florida Legislature. In order to obtain an injunction or other equitable relief to prevent the certification of the results of an election, a party must show that it has no other adequate remedy. In fact, what that party is permitted to do if allowed to proceed, is to prevent the triggering of the statutory remedy that would otherwise be available. And, in doing so, the party has subjected the protest statute to questionable validity by suggesting that the intention of the voters in some counties is more important than the intention of the voters in others counties within the same statewide election. The only exception to the exclusive nature of this remedy is that the remedy of quo warranto, not cirdent in this case, was not abrogated or abridged. § 102.169, Fla. Stat.

As expressed above, a manual recount is provided as a means of being able to discern the intention of the voters when, because of the failure of a voting system, their intentions cannot otherwise be discerned. Any other interpretation, when not considered in respect to the entire statewide election, cannot be fathomed.

3. To the Extent Florida Law Allows Late-filed Certification, it Places the Discretion to Accept or Reject the Late Filing with the Secretary.

As discussed, it is the Secretary's interpretation that the time limits in sections 102.111(1) and .112(1) are mandatory. However, to the extent Florida law allows any possibility of a late filing, the decision to accept or reject such a filing is within the sound discretion of the Secretary.

Florida law vests in the Secretary, a constitutional officer, the authority and responsibility of this state's Chief Elections Officer. § 97.012, Fla. Stat. It also charges her with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." § 97.012(1), Fla. Stat. She is clearly the officer afforded the authority to grant or deny requests for late filing, assuming any such authority exists at all.

The Petitioners repeatedly argue, citing no supporting authority, that the Secretary had no discretion to refuse to accept late filed returns. To the contrary sections 102.111 and .112 appear to require the opposite, expressly directing the Secretary to reject any late filed returns. Indeed, the Petitioners argument, if true, would essentially repeal the filing deadlines. If the Secretary and Commission were required to accept all election returns, no matter when filed, certification of statewide elections could be delayed indefinitely If, for example, only one local board refused to file on-time. This is clearly contrary to the express intent of a statute that both directs boards to file within seven days (subjecting the individual board members to

quasi-criminal fines for not doing so) and requires the Commission to certify results in that time and to reject any unfiled local returns.

The only permissive language in the entire statute is the use of the word "may" when discussing the rejection of elections returns in section 102.112(1). As previously discussed that provision does not govern the Secretary (it applies to local boards) and therefore does not allow her to waive the deadline. However, if the term "may" in section 102.112 were found to grant additional powers to the secretary, such authority would obviously be discretionary. One simply cannot read a statute that states in one provision that "all missing counties shall be ignored" and in another warns county boards that if returns are not filed on time they may be ignored, to mean that the Secretary must accept any and all late-filed returns. This would in essence rewrite the directive that the secretary shall and/or may reject late returns to mean that she shall not or may not reject the returns. This construction turns the statute on its head and should not be adopted.

Reading section 102.112 to allow extension of the deadline in some instances, Judge Lewis entered an order on November 14, 2000, finding that this would necessarily be a discretionary action of the agency:

> I find that the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of

> any pending manual recount, and may thereafter file supplemental or corrective returns. The Secretary of State may ignore such late filed returns, but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate facts and circumstances.

Sec'y State App. at 9, p.2-3. Thus, at the very least, section 102.111 gives the Secretary the discretion to accept or reject late-filed returns based on appropriate criteria. And, as discussed below, that is just what she did.

Because rejection of the late returns was either absolute requirement or a discretionary act of the Secretary, the only issue before the Court is whether there was any basis to consider a late return, and, if so, whether the Secretary's exercise of discretion was within the bounds of law. The standard of review for such decisions is very limited: "'It is well established that courts have the right to review and grant relief from administrative action which is arbitrary, capricious, unreasonable, discriminatory, or oppressive, or which constitutes an abuse of discretion.'" Martin Memorial Hosp. Ass'n v. Department of Health & Rehabilitative Servs., 584 So. 2d 39, 40 (Fla. 4th DCA 1991) (quoting 1 Fla. Jur. 2d Administrative Law § 169 (1977)).

To determine the propriety of an agency's exercise of discretion, Florida courts have generally looked at: (1) whether the exercise was outside the range of discretion delegated to the agency by law; (2) whether it was inconsistent with agency

rule; (3) whether it was inconsistent with officially stated agency policy or a prior agency practice (and, if so, whether deviation therefrom was explained by the agency); and (4) whether the exercise of discretion was otherwise in violation of a constitutional or statutory provision. See, e.g., Environmental Coalition of Florida, Inc. v. Broward County, 586 So. 2d 1212, 1215 (Fla. 1st DCA 1991).

In sum, Judge Lewis' determination that the decision as to whether to accept late filed election returns was within Secretary Harris's discretion was correct and should be upheld.

4. The Secretary Properly Rejected The Proposed Late-Filings.

(a) In response to the circuit court order, the Secretary developed appropriate criteria for evaluating requests for late-filing approval.

The order below held that the Secretary may reject late-filed returns, "but may not do so arbitrarily." Sec'y State App. at 9, pp. 6-7. According to that Order, the Secretary was to consider late filings and accept or reject them "by the proper exercise of discretion after consideration of all appropriate facts and circumstances." Id. Recognizing that administrative agencies are afforded the discretion to construe and apply the statutes within their jurisdiction, and that such decisions are afforded a strong degree of deference by the courts, Judge Lewis correctly left it to the Secretary to develop the criteria by which to evaluate the local canvassing boards'

requests for late filing. He also correctly found that this evaluative process was a matter of administrative discretion. Id,

Judge Lewis' Order thus directed the Secretary to allow local canvassing boards to submit their reasons for late filings, and then make a reasoned decision on whether to accept each proposed filing. Id, at 7. Immediately after Judge Lewis entered this order, the Secretary directed any local canvassing boards that wished to submit returns after the November 14th deadline to provide, by 2:00 PM the next day, a "written statement of the facts and circumstances that cause you to believe that a change should be made to what otherwise would be the final certification of the statewide vote."[10] The Miami-Dade, Broward, Palm Beach and Collier County canvassing boards filed these responses within the time frame set by the Secretary. These four canvassing boards, along with the boards from Florida's 63 other counties, also filed certified election returns by the November 15th deadline.

To determine whether the factual allegations and arguments presented by the local canvassing boards justified late filing of election results, the Secretary developed and applied a set of evaluative criteria. First, a set of factors that could justify a late filing was developed. The existence of one or more of these factors,

[10] No canvassing board objected to this request.

which were drawn from Florida elections case law, could have justified an allowance of late-filing. These factors (and their supporting case law) were:

- Whether there is any indication of voter fraud that could affect the outcome of the election. In re: Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Board v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

- Whether there was substantial noncompliance with statutory election procedures, causing reasonable doubt to exist as to whether the certified results express the will of the electorate. Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998)

- Whether election officials had made a good faith effort to comply with the statutory deadline, but were prevented from doing so by an act of god or similar circumstance beyond their control.

The Secretary next determined, again based on a review of the pertinent case law, that the following election irregularities would not constitute a sufficient reason for violating the statutory deadline:

- Noncompliance with statutory election procedures and/or voter error, where there is a reasonable expectation that the results express the will of the voters. Beckstrom, 707 So. 2d at 725.

- The use of a ballot design that was confusing to some voters because of the location and alignment of candidates names, so long as a reasonable voter could make his or her choice by exercising reasonable time and study. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974).

- Any other situation that presented "nothing more than a mere possibility that the outcome of the election would have been [a]ffected." Hogan, 607 So. 2d 508, 510 (Fl. 4th DCA 1992).

As before, the Secretary's decision was based primarily on reported election cases, which found similar circumstances to be insufficient to justify interference with certified election results.

In addition to applying the above criteria, the Secretary evaluated the statements made by the local canvassing boards in light of numerous additional election law cases, including: Wadhams v. Board of County Com'rs of Sarasota County, 567 So. 2d 414, 418 (Fla. 1990); Wilson v. Revels, 61 So. 2d 491, 491-92 (Fla. 1952); Boardman v. Esteva, 323 So. 2d 259, 267-68 (Fla. 1975); Marler v. Board of Public Instruction of Okaloosa County, 197 So. 2d 506, 508 (Fla. 1967); Anderson v. Canvassing Bd. of Gadsen Co., 399 So. 2d 1021 (Fla. 1st DCA 1981); McLean v. Bellamy, 437 So. 2d 737 (Fla. 1st DCA 1983); Spradley v. Bailey, 292 So. 2d 27, 28-29 (Fla 1st DCA 1974); In re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Calhoun v. Epstein, 121 So. 2d 828 (Fla. 2d DCA 1960). These and the many other cases reviewed were found to support the Secretary's determination or be irrelevant to the issues presented.

The criteria applied by the Secretary were thus drawn directly from the existing case law. To the extent the cases did not speak to a particular issue, the Secretary made discretionary decisions based upon her interpretation of the Florida election statutes within her jurisdiction. For example, the Secretary found that requests based

solely on an expressed desire to conduct manual recounting were insufficient to justify delay where there was no contention that (i) the tabulating equipment was malfunctioning, (ii) ballots had been damaged so as to be unreadable by tabulating equipment, or (iii) there was any reason to believe that properly executed ballots would not be tabulated by the equipment. This decision was based on the Secretary's reasoned interpretation of the Florida statutes governing manual recounting as not allowing for a recount in such a circumstance.[11]

Similar determinations, discussed in more detail below, were applied to the other circumstances presented by the local canvassing board. In each instance, the Secretary's decision was well reasoned and proper, and should not be interfered with by the courts.

The Petitioners assert, without citing any legal authority, that the Secretary must postpone the certification of this statewide election until completion of manual recounts in selected counties. This assertion is illogical and inconsistent with the statute. Petitioner has confused a pre-certification election protest (section 102.166) with a post-certification election contest (section 102.168). Because of their confusion over these two distinct and different processes, the Petitioners mistakenly

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[11] Because the Secretary's interpretation is reasonable, it must be afforded deference. Pershing Industries, 591 So. 2d at 993.

argue that the Secretary must wait until "all attendant facts and circumstances are known." This is illogical because such facts and circumstances are usually discovered and raised in a contest action that cannot begin until after the election is certified. The Legislature imposed a deadline for certification because of the short time frame within which to begin and conclude an election contest. Petitioners are, in effect, asking this Court to delay the commencement of election contest actions, if any, by improperly using the protest procedures to contest the election before certification. Because the facts and circumstances concerning the voter error and ballot design in Palm Beach County are more properly raised in a contest action, these facts were not relevant to the Secretary's decision to certify the election. Her decision triggered the time for bringing any election contest actions. The Secretary acted within her discretion to certify this election on the deadline that was obviously deemed important by the Florida Legislature.

(b) Based on these criteria, the Secretary found that no local canvassing board had provided an acceptable basis for allowing late-filing of election results.

Applying the evaluative criteria described above, the Secretary determined that no local canvassing board had provided a sufficient reason to justify delaying

certification beyond the statutory deadline. The letters submitted by the boards argued that late filing should be allowed because of the following circumstances:

- The local canvassing board having decided to manually recount votes (Miami-Dade, Palm Beach);
- A discrepancy between the total number of votes counted by the tabulating machines and the total number counted by hand (Palm Beach);
- A discrepancy in voting results between a machine tabulation and hand count performed for approximately one-percent of the votes cast (Palm Beach);
- The inadvertent omission of ballots from the certified totals (Collier);
- The failure of certain persons that desired to vote and showed up at polling places to have properly registered to vote (Collier);
- Large voter turnout, the size of the electorate and/or the large number of votes cast leading to a need for additional tabulation time (Broward);
- The existence of various "distractions" to the counting process, such as the filing of lawsuits regarding the election, conflicting opinion letters regarding the legal effect of manual counting and the vacation of a board member (Broward).

As discussed below, none of these reasons justified the Secretary shirking her statutory duty to certify the election results based on the November 14th submittals. Each requested late-filing was therefore denied by the Secretary.

The fact that some discrepancies between manual and machine counted ballots may exist, or that the local canvassing board has for this or some other reason

decided to proceed with manual recounting is an insufficient reason to allow the late filing of results. There is no contention that the automated tabulation system of any county had malfunctioned or otherwise failed to operate as intended, within normal parameters.[12] As previously discussed, Florida law does not authorize a local canvassing board that has chosen to employ automated tabulation equipment to order a manual recount when the equipment is operating as intended. To the extent that the local boards are conducting such recounts, they are acting outside the scope of their statutory delegations of authority. Certainly, the Secretary was reasonable in not compounding this error by ignoring a statutory deadline to allow the local boards more time to conduct the inappropriate recounting.

Moreover, even if Florida allowed manual recounts in the circumstances presented, there was no indication that the recounts would change the results of the elections -- all that was the speculative possibility that they could affect the outcome of the election. More is clearly required. *See Hogan*, 607 So. 2d 510 (rejecting the contention that a speculative possibility of a change in result justified invalidation of

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[12] All local canvassing boards that experienced technical difficulties during the election were required to note the problems in a Report on Conduct of Election filed with the Division of Elections by the deadline for certification of election results. § 102.141(6), Fla. Stat. No local board reported a malfunction of the tabulation system. All that filed the report answered the following question in the negative: "Did you have any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location?"

election results). It is also not clear that the manual counting requested would accurately reflect the will of the voter. Manual counting of ballots that were designed to be counted by a computer necessarily interjects an element of subjectivity into the counting process and creates a significant potential for human error.[13] The possibility for human error and bias, coupled with the lack of any uniform and objective standards, makes the proposition that manual counting will increase accuracy dubious at best. Additionally, the selective recounting of ballots only in selected counties, all of which overwhelmingly supported the same presidential candidate has the potential to skew the election results unfairly.[14] Based on these considerations it was determined that, on balance, the desire of the local

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[13] This potential for error is exacerbated by the recent order of the Palm Beach County Circuit Court allowing the counting of ballots with "dimpled chads," meaning ballots where no candidate for President was indicated by the perforation of the ballot. Sec'y State App. at 10. It is now up to the counting personnel and local canvassing boards to determine, without any objective standards to guide them, whether any indentation or other ambiguous mark indicates a choice for a candidate.

[14] The primary purpose of the recounting, as expressed in the Initial Brief of Vice President Gore and the Democratic Party is to count improperly executed ballots that cannot be read by a machine. This will necessarily result in a greater number of votes being counted in the county than would have previously occurred. By recounting only heavily populated counties that strongly favor one candidate in the election, the results of the election are unfairly skewed in favor of that candidate. A recount could be fair, if at all, only if all counties in the state were recounted according to uniform criteria.

canvassing boards to conduct manual recounting even though there had been no technical failure in the counting apparatus did not justify violation of the statutory deadline.

The other reasons given, which include alleged difficulties in achieving a count, failure of certain voters to register before the election, and inadvertent omission of a small number of ballots and were no more availing. The first of these excuses, the allegation by the Broward board that the size of the electorate and large voter turnout prevented a count from being completed is nonsensical given that Broward had competed both an initial count and recount before it certified its results. Obviously Broward was able to carry out its duties by the deadline, as were the other counties that are more populous than Broward. Similarly, the failure of certain voters to register before the election is irrelevant to the issue of whether there should be a delay in counting, as this circumstance would not delay or impede the counting process.

The Canvassing Boards cannot assert that any action of the Secretary or Division delayed them in any way. First, Palm Beach did not even vote to commence a manual recount until two days before the deadline. Broward and Miami-Dade did not vote to commence a manual recount until after the deadline had already passed. And, of course, Palm Beach could have avoided the inconvenience of the Division's advisory opinion by the simple expedient of refraining from asking

for it. Moreover, despite the Secretary's request for "all facts and circumstances" justifying exceeding the deadline and explicit reliance on Judge Lewis's order, none of the counties even attempted to estimate when the Secretary might hope to receive the manually recounted returns and the election might finally be certified.

VI. CONCLUSION

For the reasons expressed, Respondents respectfully request that this Court affirm the Orders of Judge Lewis, lift the temporary stay imposed by this Court, and permit the Commission to certify the votes of the people of Florida.

VII. CERTIFICATE OF FONT SIZE

This Answer Brief is typed using a Times New Roman 14-point font.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP

_____ By:

_____

Deborah K. Kearney
General Counsel
Florida Bar No. 0334820
Florida Department of State
Tallahassee, Florida 32399-0250
(850) 414-5536

Joseph P. Klock, Jr.
Fla. Bar No. 156678
Jonathan Sjostrom
Fla. Bar No. 816108
Victoria L. Weber
Fla. Bar No. 0266426
Donna E. Blanton
Fla. Bar No. 948500
215 South Monroe Street Suite 601
Tallahassee, Florida 32301
(850) 222-2300

Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery, mail or fax on this 19th day of November, 2000 to the following:

Frank B. Gummey, III
Assistant County Attorney
123 West Indiana Avenue
DeLand, Florida 327204613

Daniel D. Eckert
Volusia County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613

Tura Schnebly
Assistant County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613

Mark Herron, P.A.
301 South Bronough Street
Suite 200
Tallahassee, Florida 32301

Michael D. Crotty
Crotty & Bartlett, P.A.
1800 W. International Speedway Blvd.
Building 2, Suite 201
Daytona Beach, Florida 32114

Douglas A. Daniels
523 North Halifax Avenue
Daytona Beach, Florida 32118

Dexter Douglass
211 East Call Street
Tallahassee, FL 32302-1674

Barry Richard
Greenburg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32302-1838

Bill Bryant
Katz Kutter Et Al
106 East College Avenue, Floor 12
Tallahassee, FL 32301

Harold McLean
Florida Dept. of Agriculture &
Consumer Serv.
515 Mayo Building
407 South Calhoun Street
Tallahassee, FL 32399-0800

Karen Gievers
524 East College Avenue, Suite 2
Tallahassee, FL 32301

John D.C. Newton, II
215 South Monroe Street
Suite 705
Tallahassee, FL 32301

Ronald G. Meyer
Meyer and Brooks, PA
2544 Blairstone Pine Dr.
Tallahassee, FL 32301

Deborah Kearney
Florida Department of State
PL02
Tallahassee, FL 32399

Mitchell Berger
Berger Davis & Singerman
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301

Harold Mardenborough
McFarlain Wiley Et Al
215 South Monroe Street, Suite 600
Tallahassee, FL 32301

17th Judicial Circuit of Florida
In and for Broward County
Chief Judge Dale Ross
201 SE 6th Street
Ft. Lauderdale, Florida 33301

15th Judicial Circuit of Florida
In and for Palm Beach County
Palm Beach County CourthouseChief Judge Walter N. Colbath, Jr.
205 North Dixie Highway
West Palm Beach, Florida 33401

11th Judicial Circuit of Florida
In and for Dade County
Chief Judge Joseph P. Farina
Dade County Courthouse
73 West Flagler Street, Room 511
Miami, Florida 33130

Dade County Canvassing Board
Miami, Florida

Palm Beach County Canvassing Board
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida 33401

Broward County Canvassing Board
Fort Lauderdale, FL

Bruce Rogow
Beverly A. Pohl
Bruce Rogow, P.A.
Broward Financial Centre
500 East Broward Blvd., Suite 1930
Fort Lauderdale, Florida 33394

Edward A. Dion
County Attorney for Broward County
Government Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301

Samuel S. Goren
Michael D. Cirullo
Josias, Goren, Cherof Et Al
3099 East Commercial Blvd., Suite 200

Fort Lauderdale, Florida 33308

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, New York 10504

Lawrence A. Gottfried
11211 S. Military Trail, Apt. 1224
Boynton Beach, Florida 33436

Denise D. Dytrych
Palm Beach County Attorney
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401

Robert A. Butterworth
Attorney General
George Waas
Assistant Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050

_____

Jonathan Sjostrom

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