IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC 00-2346

PALM BEACH COUNTY CANVASSING BOARD,

Petitioner,

vs.

KATHERINE HARRIS, as Secretary of State, State of Florida,
and ROBERT A. BUTTERWORTH, as Attorney General of the State of Florida,
State of Florida,

Respondents,

ALBERT GORE
and the FLORIDA DEMOCRATIC EXECUTIVE COMMITTEE,

Intervenors.

AMENDED BRIEF OF INTERVENORS

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Summary of Argument

The eyes of the Nation – indeed, of the entire world – are on Florida. The outcome of Florida's Presidential election will determine who becomes President of the United States. It is therefore essential that the voters of Florida, and all of the citizens of our country, have great confidence that the individual declared the winner of the election here actually was the choice of Florida's voters.

Whatever happens in this Court and every other court of this country, the ballots cast in Florida will be counted. Historians will count them. The tragedy for our democracy will be if the count reveals that on January 20, 2001 the United States swore in the wrong candidate because the Secretary of State stopped local canvassing boards from counting votes.

The Secretary of State and the Republican party argue often that the votes have been "counted and re-counted." If only that were true. Unless this Court acts thousands of votes will never be counted because of the inability or failure of an aging machine to record accurately the voter's intent. Only a manual recount will ensure that every ballot is counted.

This election is unprecedented, the closest in our Nation's history. It therefore is not surprising that the provisions of Florida law that ensure that close elections are decided properly and accurately are being employed in a Presidential election for the

first time in modern times. Manual recounts are an essential part of Florida law. They have been applied on numerous occasions in elections for lower-level offices. But the application of these provisions in an election of this scale, with over six million votes cast, has imposed some strains on the system. The system's weaknesses should not override the voters' will.

Instead of seeking to facilitate the resolution of the inevitable issues, the Secretary of State has chosen repeatedly -- in at least five different ways -- to try to stop or delay the lawful manual recount of ballots. These efforts have included:

(1) issuance of an opinion that manual recounts are illegal except in the event of a machine break-down;

(2) a statement that no recounts submitted after 5:00 p.m. on November 13, 2000, would be considered;

(3) a statement that county canvassing boards must submit by 2:00 p.m. yesterday their explanations for continuing any recount;

(4) the petition to this Court filed yesterday morning (and denied by this Court) seeking, among other things, an order stopping the manual recounts; and

(5) Late November 15, 2000, the Secretary and the Elections Canvassing Commission added a fifth effort. Meeting in violation of Florida's Governance in the

Sunshine law, §286.011, Fla. Stat. (2000), they arbitrarily refused to consider any results filed after 5:00 p.m. November 13, 2000, because of manual counting.

The Leon County Circuit Court rejected the first and second efforts in *McDermott v. Harris*, Leon County Circuit Court Case No. 00-2700. The third effort has no precedent, no statutory authority, and is inconsistent with the Circuit Court's opinion (which the Secretary has not appealed) that the canvassing board's rationale should be submitted at the time the corrected tallies are submitted. The fourth effort was rejected by this Court. The fifth effort is unlawful, arbitrary and in direct contravention of the Leon County Circuit Court opinion. In addition, the Republican Party filed an action in the United States District Court for the Southern District of Florida to enjoin the manual recounts. The court denied the motion for a preliminary injunction (that decision is attached as Exhibit D). An appeal is now pending before the United States Court of Appeals for the Eleventh Circuit.

The Secretary purported to certify the results of the election yesterday, November 15, 2000. We believe her action to have been unlawful. It is particularly improper in view of the fact that it is the Secretary's actions that have been, and are, delaying the completion of the recount.

In order to ensure an orderly, expeditious, and uniform resolution of the pending legal issues – as well as ensure that the declared outcome of the election is

consistent with the choice of Florida's voters – Intervenors ask that this Court to decide the Petition of Palm Beach County expeditiously.

Statement of Case and Facts

Time does not permit Intervenors to follow the traditional brief format for addressing the errors in the Initial Brief's Statement of the Case and Facts. But the following must be noted. The Secretary's Statement of Case and Facts is rife with straw men. It describes the Secretary's opinion as binding. It says the Division has jurisdiction over the issues. These are all issues in dispute.

The Statement also seeks to have this court make a factual determination about the Palm Beach ballots. That is inappropriate for this sort of proceeding and unnecessary to resolving the legal issues presented.

On November 7, 2000, the State of Florida conducted a general election for the President of the United States. On November 8, 2000, the Division of Elections for the State of Florida reported that Governor Bush, the candidate for the Republican Party, received 2,909,135 votes and that Vice President Al Gore, the candidate for the Democratic Party, received 2,907,351 votes. Candidates other than the Republican and Democratic candidates received 139,616 votes.

The difference of 1784 votes between the Republican and Democratic candidates triggered the automatic recount provisions of §102.141(4) Florida Statutes

(2000) (requiring a recount by county canvassing boards if there is a difference of less than .5%). The recount by the county canvassing boards resulted in a difference of 300 votes.

On November 9, 2000, the appropriate committees of the Florida Democratic Party requested manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties. Volusia County has completed a full manual recount. Broward County has completed a sample recount and is currently conducting a full manual recount of all precincts. Broward County's recount was delayed for several days by the Secretary's legal opinion.

The Palm Beach County Canvassing Board voted to conduct a full manual recount. But Palm Beach has now suspended its recount pending the Court's consideration of this case. Dade County has completed a sample recount in which the sample of three precincts (out of more than 600) resulted in six additional net votes for Vice President Gore. Although the Dade County Canvassing Board initially decided not to conduct a full recount, it is reconsidering that decision on November 16.

On November 13, 2000, L. Clayton Roberts, Director, Division of Elections sent a letter opinion, number 00-11(Ex. - A.), to Mr. Al Cardenas, Chairman Republican Party of Florida. That letter stated that:

> "error in the vote tabulation" [in section 102.166(5)] means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. * * * The inability of a voting systems to read an improperly marked marksense or improperly punched punchcard ballot is not a "error in the vote tabulation" and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102.155(5)(a) through (c), Florida Statutes.

Letter Opinion DE 00-13 to the Palm Beach County Canvassing Board makes similar pronouncements. (Ex. E.) The result of those opinions is that Palm Beach County and other counties that wish to conduct manual recounts because their voting systems did not properly read ballots that the machine deemed improperly marked have been advised by Secretary Harris that they may not conduct manual recounts.

The very next day, the Attorney General issued Opinion 00-65, which concludes that these letter opinions ignore the plain language of the statute and ignores longstanding case law holding that the intent of the voters as shown by their ballots should be given effect. The Attorney General's opinion concludes that

> I must express my disagreement with the conclusions reached in Division of Election Opinion 00-11. Rather I am of the opinion that the term "error in voter tabulation" encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes.

Op. Att'y Gen. Fla. 73-178 (2000)

On November 14, 2000, Judge Lewis issued an Order Granting in Part and Denying in Part Motion for Temporary Injunction in *McDermott v. Harris*, Leon County Circuit Court Case No. 00-2700. That order interpreted the election results certification time lines established in §§ 102.111 and 102.112, Florida Statutes (2000). The Order held that the Elections Canvassing Commission may not categorically refuse to accept and count the results of manual recounts submitted after the deadline of 5:00 p.m. on the seventh day after the election established by §102.112(1) Fla. Stat. (2000).[2]

On November 14, 2000 L. Clayton Roberts, Director of Division of Elections issued a Memorandum to the Supervisors of Election of Broward, Miami-Dade and Palm Beach County stating that:

> In order to properly exercise that discretion [to accept manual recount vote tallies after the deadline], the Secretary requires that you forward to her by 2 p.m. Wednesday, November 15, 2000 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, composed of the tallies received by 5 p.m. today, plus the total of the votes received from overseas ballots received by the counties by midnight on Friday.

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[2] Volusia County has appealed that Order to the First District Court of Appeal. That case has been assigned Case No. 1D4467.

On November 15 at approximately 9:00 p.m., just seven hours after receiving the counties' submissions, the Secretary of State announced that she would not accept any manual recount results.

This Court May and Should Exercise its All Writs Jurisdiction

This court has broad authority under the Florida Constitution to issue all writs necessary and proper to the complete exercise of its jurisdiction. Article V, Section 5, Florida Constitution. See *Monroe Education Assoc. v. Clerk, District Court of Appeal, Third Circuit*, 299 So. 2d 1 (Fla. 1974) (". . . certain cases present extraordinary circumstances involving great public interest where emergencies are involved that require expedition."); See also, *Blore v. Fierro*, 636 So. 2d 1329 (Fla. 1994).

Section 3(b)(8)of the Florida Constitution grants this Court original jurisdiction to "issue writs of mandamus and quo warranto to state officers and state agencies," Fla. Const. Art. 5 § 3(b)(8). That this Court has the power to issue a writ to the Secretary of State under section 3(b)(8) is manifest – on at least two occasions this Court has accepted jurisdiction over cases where that was the precise relief sought. *See Thompson v. Graham*, 481 So.2d 1212 (Fla. 1986); *Hoy v. Firestone*, 453 So.2d

814 (Fla. 1984). In fact, *Hoy* arose in the elections context – John Hoy petitioned for a writ ordering the Secretary of State to place him on a ballot.

The Court also has jurisdiction over the petition under section 3(b)(7), under which the Court "[m]ay issue * * * all writs necessary to the complete exercise of its jurisdiction." See *Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982); see also Kogan & Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova. L. Rev. 1151, 1261-67 (1994). The Court has jurisdiction to determine the correct interpretation of §102.166(5), Florida Statutes, under section 3(b)(7) because the resolution of this issue will determine whether a writ of mandamus will be appropriate under section 3(b)(8). For example in *Florida Senate*, which involved a challenge to a time limit the governor imposed on a special apportionment session of the legislature, this Court determined the correct interpretation of Article 3, § 16(a) of the Florida Constitution because the apportionment dispute would eventually be before the Court. See *Florida Senate*, 412 So.2d at 361. As discussed above, jurisdiction in this Court under section 3(b)(8) is plain, and thus the Court should likewise interpret the legal provision at issue here.

While the exercise of original jurisdiction under either of these constitutional provisions is discretionary, this case is typical of those where this Court routinely

asserts jurisdiction. For example, in *Chiles v. Phelps*, 714 So.2d 453 (Fla. 1998), the Court explained that it "historically has taken jurisdiction of writ petitions where one branch of government challenged the validity of actions by members of another branch." *Id.* at 456 (citations omitted). A dispute between a county government and the state government is likewise an appropriate one for jurisdiction, particularly where time is of the essence. This Court explained its decision to assert jurisdiction in *Florida Senate* as being based on the fact that "[t]he question presented [was] a matter of law, there being no factual disputes to be resolved[, and was] ***a matter that require[d] prompt resolution*** to avoid mootness and prevent an adverse effect on the function of government," 412 So.2d at 360 (emphasis added, citation omitted). Further evidence that this is an appropriate case for an assertion of jurisdiction comes from this Court's description last year of where it would *decline* jurisdiction: the description is of a case exactly opposite to the instant one. In *Harvard v. Singeltary*, 733 So.2d 1020 (Fla. 1999), the Court explained that it would decline jurisdiction in cases that "raise substantial issues of fact[,] present individual issues that do not require immediate resolution by this Court, or are not the type of case in which an opinion from this Court would provide important guiding principles for the other courts of [the] State." This case raises no issues of fact and desperately needs

immediate resolution, and the courts of this State need instruction in the correct interpretation of Section 102.166(5).

The law offers the people of the state and Intervenors no adequate remedy other than relief from this court. Each passing minute is critical. The electoral college meets to vote, one way or the other, December 18, 2000. If local canvassing boards do not continue their manual recounts and conduct them properly, the passage of time, the size of the task due to the volume of votes, and the time required for other avenues of relief make other options inadequate.

A court contest under section 102.168 will take time. Worse yet stopping the counting deprives the court hearing the election contest of the opportunity to consider a record that includes the results of the manual count. Unless the manual count is conducted there will be no way to craft a remedy before December 18, 2000.

The other remedy available is likewise flawed. That remedy is a petition for formal hearing under Florida's Administrative Procedure Act. The Election Canvassing Commission's decision to certify the results will not be final until 21 days after it meets and acts. The Commission is an Agency as defined by Florida's

Administrative Procedure Act. §120.52(1)(b)4, Fla. Stat. (2000).[3] This makes its action subject to challenge under section 120.569 and 120.57, Florida Statutes (2000). The rights provided by those statutes include the right to request a formal evidentiary hearing before an impartial hearing officer when facts are in dispute. Any affected party may file a petition for a hearing within 21 days of officially receiving notice of the proposed agency action. Fla. Admin. Code 28-106.111(2). Until that 21 day period passes, whatever action the Commission takes affecting certification or which ballots will be considered is not final. If any party files a 120 challenge the Commission decision will not be final until that challenge, which will include an evidentiary hearing is concluded. Again the process and the time required make the remedy inadequate.

Section 102.169, Florida Statutes recognizes that an election contest may not be adequate relief. It provides:

> Nothing in this code shall be construed to abrogate or abridge any remedy that may now exist by quo warranto, but in such case the proceeding prescribed in s. 102.168 shall be an alternative or cumulative remedy.

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[3] An Agency means a "[c]ommission, .. when acting pursuant to statutory authority derived from the Legislature." §120.52(1)(b)4, Fla. Stat. (2000).

Quo Warranto is one of the forms of relief Petitioners and Intervenors seek. The statute recognizes the relief is appropriate.

The Secretary's arguments citing the Court's jurisdiction to issue Advisory Opinions to the Governor and Attorney General is a red herring. This action proceeds under the Court's All Writ's jurisdiction not under the Advisory Opinion jurisdiction. It presents a real and critical case and controversy actively and ably advocated by many parties.

The Court should exercise its jurisdiction.

This Court Should As Soon As Possible Hold The Secretary of State's Opinion Invalid

The Secretary's unlawful opinion letters have created tremendous uncertainty with respect to manual recounts; for example, delaying for several days the start of the full recount in Palm Beach County. This Court should invalidate those letters and uphold the county canvassing boards' authority to conduct manual recounts in order to obtain an accurate vote.

> Section 102.166(5), provides:
>
> If the manual recount indicates an error in the vote tabulation that could affect the outcome of the election, the county canvassing board shall:

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
> (b) Request the department of State to verify the tabulation software; or
> (c) Manually recount all ballots.

§102.166(5), Fla. Stat. (2000). The issue in this case is what types of errors may give rise to a manual recount of all of a county's ballots, which turns upon the meaning of the phrase "error in the vote tabulation" in this section.

On its face, the statute does not include any words of limitation – it provides a remedy for any type of mistake made in tabulating ballots. That plain reading comports with common sense. An accurate vote count is one of the essential foundations of democracy; it ensures that the peoples' expressed views are properly reflected in the outcome of elections. It is important to provide a broad remedy to enable citizens to redress any flaw in that count.

This interpretation of the statute is also compelled by the provision of Florida law governing manual recounts, which states that it is the duty of a Canvassing Board and its counting teams "to determine the voter's intent" in casting the ballot. §102.166(7)(b), Fla. Stat. (2000). The statute provides that "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."

As this Court has recognized, the Board must examine each ballot for all evidence of the voter's intent and makes its determination based on the totality of the circumstances. See *Darby v. State*, 73 Fla. 922, 75 So. 411 (1917). If a voter has marked a ballot in a manner that cannot be read by a machine, but the voter's intent can be discerned from the ballot, that ballot must be counted. *Delahunt v. Johnston*, 423 Mass. 731, 733-34, 671 N.E.2d 141, 1243 (1996) (the mere "presence of a discernible impression made by a stylus" is "a clear indication of a voter's intent" even if the chad remains entirely in place on the punchcard); *Pullen v. Mulligan*, 138 Ill.2d 21, 80, 561 N.E.2d 585, 611 (1990); *Hickey v. Alaska*, 588 P2d. 273, 274 (Alaska 1978).[4]

Since the statute requires canvassing boards to count these ballots, manual recounts must be available under Section 102.166(5)(c) to allow such ballots to be counted. As the United States District Court observed,

> One of the main rationales behind a manual recount system is to observe whether an imprecise perforation, called a

[4]Following a contested hearing, the Palm Beach County Circuit Court held that "the Palm Beach Canvassing Commission has the discretion to utilize whatever methodology it deems proper to determine the true intention of the voter and it should not be restricted in the task. To that end, 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. The Canvassing Board has the discretion to consider those ballots and to accept them or reject them." Florida Democratic Party v. Palm Beach County Canvassing Board, No. CL 00-11078AH (Fla. 15th Judicial Circuit).

> "hanging chad," exists on the physical ballot. If the blunt-tipped voting stylus strikes the ballot imperfectly, the chad, the rectangular perforation designed to be removed from a punch card when punched, can remain appended to the ballot (although it is pushed out), and an automated tabulation will record a blank vote.

Siegel v. Lepore, Case No. 00-9009-Civ-Middlebrooks, Order on Plaintiffs' emergency Motion for Temporary Restraining Order and Preliminary Injunction (U.S. D. Ct., S.D., Fla, November 13, 2000), page 15 note 9.

The Secretary of State contends that Section 102.166(5) has a much narrower scope. The Secretary's opinion letters asserted that manual recounts are permissible Only to remedy "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots"; she asserts that "[t]he inability of a voting systems [sic] to read an improperly marked marksense or improperly punched punchcard ballot is not a 'error in the vote tabulation.'" The Secretary of State's opinion letters provided no justification for her constricted interpretation of the statute. Nor could she. There simply is no precedent or support for her approach. Indeed, prior cases considering the manual recount provisions of Florida law have not artificially limited the terms "error in the vote tabulation" to machine breakdowns.

First, the language of Section 102.166(5) provides no justification for narrowing the reach of the provision. The Secretary argues (Resp. 20-21) that the term "tabulation" is inherently limited to the use of electronic or electro mechanical equipment to count votes. But the dictionary definition of the word has not such limitation: The relevant definition of "tabulate," the verb form of "tabulation," is "to count, record or list systematically." *Miriam-Webster's Collegiate Dictionary On-Line,* http://www.m-w.com/cgi-bin/dictionary (2000). In fact, the Secretary's own argument proves the point -- when the election laws refer only to tabulation equipment or program, those words of limitation are included in the statutory language. The absence of those terms from Section 102.166(5) confirms the provision's breadth.[5]

Second, as discussed above, Florida law clearly provides that ballots must be counted even if they are not marked in a manner that may be read by a machine. But the Secretary of State's approach would invalidate any ballot that was not machine

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[5]Although it is true that two of the three remedies specified in that section relate to machine defects, the third remedy – "manually recount all ballots" – is not tied in any way to a defect in the tabulation system. That makes clear that the Court has observed that "the word 'or' is generally construed in the disjunctive when used in a statute or rule … . The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended." *Sparkman v. McClure,* 498 So. 2d 892, 894 (Fla. 1986) (emphasis added, citations omitted).

readable, because there would be no recount remedy for such ballots. That is squarely inconsistent with the statutory requirement that such ballots be counted.

Remarkably, the Secretary recognizes this inconsistency, but asserts (Resp. 23-27) that Section 102.166(5) does overrule the longstanding principle -- reflected in this Court's decisions such as Darby and in Section 102.166(7) -- that ballots reflecting a voter's intention should be counted even if the ballot was not marked in technical compliance with the rules. There is no basis in the statute or its history for such a revolutionary change in Florida law, a change that would disenfranchise many thousands of Florida voters and is inconsistent with the laws of numerous other States that, as discussed above, apply an intent standard.

Third, the Secretary's interpretation would subject voters to the very sort of technical requirements that are strongly disfavored under Florida law. "If two equally reasonable constructions might be found, this Court in the past has chosen the one which enhances the elective process by providing voters with the greater choice in exercising their democratic rights:" *Republican State Executive Com. v. Graham*, 388 So 2d 556, 558 (Fla. 1980).

Chappell v. Martinez, 536 So. 2d 1007 (Fla. 1988) applies that standard of construction to interpret Section 102.111. Then, as now, that statute stated that the Commission should certify returns at 5:00 p.m. on the seventh day after the election.

Then, as now, the statute stated the results of all missing counties should be ignored. This court relied upon the principle articulated in *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975) that ensuring a citizen's vote is counted is much more important than unyielding adherence to statutory scripture. It rejected the argument that the "shall" wording of the statute turned the certification process into a ministerial duty involving no judgment on the part of the Commission. It required acceptance of results that had only been delivered by telephone before the deadline. This decision occurred before the creation of Section 102.112, which states that results submitted after the deadline may be ignored.[6] This emphasizes the importance of construing the elections statutes in favor of counting votes, not enforcing rigid deadlines.[7]

As this Court has repeatedly held, "the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election." *State of Florida v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988).

In *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975), this Court reversed a long line of cases that required strict compliance with absentee ballot requirements in order to have the ballots counted. The Court held:

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[6] Ch. 89-38, §30, Laws of Florida.

[7] In different times the Secretary of State has recognized this principle. Duties of the Secretary of State, DE 98-12 (August 6, 1998).

> Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.
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> * * *
>
> By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

(323 So. 2d at 263)

That principle applies directly to the facts of this case.

This Court emphasized *Boardman* that, "the real parties in interest here, not in a legal sense but in realistic terms, are the voters" (323 So. 2d at 263). The Court went on to note:

> There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with? Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot.

(323 So. 2d at 267)

The Court also quoted with approval this Court's earlier decision in *Titus v. Peacock*, 170 So. 309 (Fla. 1936) that:

> "In short, a fair election and honest return should be considered as paramount in importance to minor requirements which prescribe the formal steps to reach that end, and the law should be so construed as to remedy the evil against which its provisions are directed and at the same time not to disenfranchise voters further than is necessary to attain that object."

(323 So. 2d at 264 n.3).

The Secretary's construction of the statute is directly inconsistent with this principle. Indeed, the Secretary acknowledges that her construction would disenfranchise voters who fail to comply with technical rules for executing ballots. That is precisely the approach to statutory construction that this Court has rejected in the past and that should be rejected again here.

The effect of the Attorney General's well reasoned opinion is that the local canvassing boards may conduct full manual recounts as they determine is required in their wisdom under the law properly interpreted. Secretary Harris's opinion letters to the Republican Party and to the Palm Beach County Canvassing Board should be invalidated.

The Secretary's unlawful opinion letters have created tremendous uncertainty with respect to manual recounts; for example, delaying for several days the start of

the full manual recount in Palm Beach County and deterring other county canvassing boards from proceeding with full recounts. In these circumstances, it is appropriate to ensure that following this Court's resolution of the legal issue, the county canvassing boards will have an appropriate time period to finish their work. We do not believe this time period should be unlimited; seven days from this Court's decision should be sufficient to allow the recounts to be concluded. Accordingly, this Court should bar the Secretary and the Elections Canvassing Commission from "certify[ing] the returns of the election and determin[ing] and declar[ing] who has been elected" (Section 102.111(1)) for the offices of President and Vice-President of the United States until that time. (The statute itself does not impose any deadline for this action.) That will allow the determination of the winner in Florida to be based upon the actual choice of the people of Florida as reflected in accurate vote counts, rather than upon vote counts that the county canvassing boards themselves have concluded contain inaccuracies that could affect the outcome of the election.

The Secretary's Opinion Is Due No Deference

The Secretary argues that her opinions, issued in the midst of litigation are due deference. The argument assumes one of the issues before the court, her authority to issue the opinions. It also misstates the deference doctrine. It is only an advisory letter opinion reflecting no legal analysis or application of case law issued

presumptively in the midst of litigation. It does not rise to the level of an official opnion of a State Agency entitled to deference. *Nikolits v. Nicosia*, 682 So. 2d 663, 665 (Fla. 4th DCA, 1996)

Beyond that Agency deference is limited. An agency has no power to declare a statute void or otherwise unenforceable. *Palm Harbor Special Fire Control District v. Kelly*, 516 so. 2d 249 (Fla. 1987). That is precisely what the Secretary seeks to do here.

The Court Should Determine the Standard to be Applied by a County Canvassing Board in Deciding Whether a County-Wide Manual Recount is Mandated

This Court should determine the standard to be applied by a County Canvassing Board in deciding whether a county-wide manual recount is mandated because an error in the vote tabulation "could affect the outcome of the election" within the meaning of §102.166(5), Fla. Stat. (2000).

While the threshold determination to begin with a partial manual recount of three precincts or one percent is discretionary, §102.166(4)(c), Fla. Stat. (2000) ("may authorize"), *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992), once that discretion is exercised, the next phase is controlled by §102.166(5), Fla. Stat. (2000). The provision for determining whether to proceed to a full manual recount is predicated upon the actual manual recount results from the

sampling. *Id*. With those results available to shape further decision, the transition to a full manual recount encompasses a non-discretionary standard and a mandatory duty. §102.166(5). As a result, the duty to perform a full manual recount of all votes is activated if the sampling demonstrates that a manual recount "could affect the outcome of the election." *Id*.

This standard, consistent with *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992), means that Petitioner must demonstrate "more than mere possibility" that the election would be affected by the manual recount.[8] Obviously, by selecting the term "could," a word of possibility, rather than "would," a reference to probability, the Legislature opted to sharply reduce the necessary showing. Further confirmation of the Legislature's intent to make full manual recounts available is the fact that the applicant has the right to make its own selection

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[8] The standard for a manual recount, which merely provides for further accuracy, verification and enfranchisement concerning an election, is manifestly less demanding than the criteria for an election contest, which invalidates an election, and disenfranchises voters. See §102.168, Fla. Stat. (2000). Even with the far more demanding criteria of an election contest, however, Florida law seeks an increasing level of reliability concerning electoral outcomes. Traditionally, Florida required a swing of a sufficient number of invalid ballots to "change the result of the election . . ." *Peacock v. Wise*, 351 So. 2d 1134 (Fla. 1st DCA 1977). More recently, this test was transformed to a "reasonable doubt" standard based on the necessity of safeguarding the reliability of election outcomes and protecting the free expression of the will of the people. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998).

of the three precincts. §102.166(4)(d), Fla. Stat. (2000). Therefore, the statutory structure affirmatively facilitates an applicant's ability to generate results that upon extrapolation indicate whether a full manual recount "could" change the outcome of an election.

Because the statute speaks to changing the "outcome of the election," and since Presidential electors are selected through state-wide balloting, it is plain that "the election" for §102.166(5) purposes is Florida's election of its twenty-five electors. In the present case, far more than a mere possibility is established by the one percent samples that demonstrated a 19-vote Gore gain in Palm Beach, a 6-vote differential in Miami-Dade and a 4-vote Gore enhancement in Broward. Standing in isolation, these totals show that any single county, by itself, generated a differential in a one percent sampling that "could" affect the outcome of an election with a state-wide margin (based on Secretary Harris' most recent statements) of three hundred votes. When the change in an individual county's sampling is examined in conjunction with prospective changes in two other major counties, the aggregate potential for change in the electoral outcome of Florida is overwhelming.[9]

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[9] This issue has arisen in Dade County, where the "test" manual recount revealed an additional eight votes for Vice President Gore and an additional two votes for Governor Bush. Despite the fact that the additional six votes, replicated throughout Dade County's 613 precincts, plainly would change the outcome of the election – especially in view of the recounts pending in Broward and Palm Beach

WHEREFORE, Albert Gore and the Florida Democratic Executive Committee ask this Court to declare that the Republican Party Opinion Letter (DE 00-11) issued by the Division of Elections is an erroneous interpretation of Florida's election law and is not binding upon any county Canvassing Board in the State of Florida; that the Secretary of State should not seek to enforce that Opinion; that the Secretary of State should not issue further advisory opinions on this matter that would have the effect of preventing county canvassing boards from complying with §§102.166(4) & (5), Florida Statutes, during the pendency of this controversy; and granting such other and further relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted this 16th day of November, 2000.

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Counties – the canvassing board refused to initiate a county-wide manual recount, apparently because of uncertainty over the legal standard. This Court should act to clarify that standard.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original of foregoing has been furnished by hand delivery or facsimile to Deborah Kearney, General Counsel, Florida Department of State, 400 South Monroe Street, PL 02, Tallahassee, Florida 32399, Barry Richard, Greenberg Traurig, 101 East College Avenue, Tallahassee, Florida 32302, and Joseph P. Klock, Jr. and Donna E. Blanton, Steel Hector & Davis, 215 South Monroe Street, Suite 601, Tallahassee, Florida 32301-1804; and by facsimile to Bruce Rogow, Bruce S. Rogow, P.A., 500 East Broward Blvd., Suite 1930, Fort Lauderdale, Florida 33394 and Robert A. Butterworth, Office of the Attorney General, Plaza Level 1, The Capitol, Tallahassee, Florida 32399-1050 on this _____ day of November, 2000.

_____
Attorney