IN THE SUPREME COURT OF FLORIDA

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

PALM BEACH COUNTY

vs.

**KATHERINE HARRIS, ET
CANVASSING BOARD**

AL.

VOLUSIA COUNTY

vs.

**MICHAEL MCDERMOTT,
CANVASSING BOARD**

**ET
AL.**

FLORIDA DEMOCRATIC PARTY **vs.**

MICHAEL MCDERMOTT,

ET AL.

FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF INTERVENOR / RESPONDENT GEORGE W. BUSH

MICHAEL A. CARVIN

BARRY RICHARD
COOPER, CARVIN & ROSENTHAL, PLLC
Florida Bar No. 0105599
Washington, DC

GREENBERG TRAURIG, P.A.
BENJAMIN L. GINSBERG
Post Office Drawer 1838
PATTON BOGGS LLP

Tallahassee, FL 32302
Washington, DC

Phone (850) 222-6891
Facsimile (850) 681-0207

ALEX M. AZAR II
WILEY, REIN & FIELDING

R.TED

CRUZ
Washington, DC

BUSH-

CHENEY RECOUNT

COMMITTEE

GEORGE J. TERWILLIGER, III

Austin,

TX
TIMOTHY E. FLANIGAN

WHITE & CASE LLP

Counsel

for Intervenor
Washington, D.C.

George

W. Bush

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STATEMENT OF THE CASE AND FACTS

On Tuesday, November 7, 2000, the citizens of Florida cast votes for their electors for the President of the United States. Since that time, the national election results have been on hold while Florida has conducted an automatic statewide recount and while selected counties have embarked upon extended manual recounts that promise to last for weeks.

On Tuesday, November 14, 2000, the Circuit Court (Lewis, J.) issued an order upholding the statutory deadline for counties to submit their certified returns, enjoining defendant Elections Canvassing Commission ("Commission") from certifying the final results of the November 7, 2000, presidential election, and directing the Secretary of State not to exercise her lawful discretion in determining the status of manual recounts conducted by plaintiff county boards without first considering all the relevant factors. *See* Order Granting in Part and Denying in Part Motion for Temporary Injunction, *McDermott, et al. v. Harris, et al.*, 2000 WL 1693713 (Fla. 2nd Cir. Ct. November 14, 2000) ("11/14/00 Order").

Later that day, the plaintiff county boards,[1] along with every other county board in the state, certified official election results with the Commission by the statutory deadline of 5:00 p.m. on Tuesday, November 14. That same evening, the Secretary of State announced that, in light of the court's order, she would consider any reasons for extending the deadline offered by plaintiff county boards in written submissions offered by 2:00 p.m. on November 15, 2000. App. 5, Ex. E.[2] In light of the Secretary of State's action, four counties offered reasons to justify ignoring the deadlines. App. 5, Ex. O. About 7 hours later, after lengthy deliberations, including consultations with her staff, the Secretary of State announced that no extraordinary circumstances justified extending the statutory deadline. App. 5, Ex. H.

The Secretary of State noted that "no express statutory standards" guide her exercise of discretion; to aid in her decision-making, however, she deemed it "appropriate" to use the analysis of the Florida courts in determining whether to overturn an election to determine, in the exercise of her discretion, whether extraordinary circumstances warranted extending the deadline. *See* App. 5, Exh. H., Letter of Katherine Harris, Secretary of State, November 15, 2000 ("11/15/00 Harris

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[1] The Volusia County Canvassing Board was initially a plaintiff, but has withdrawn from the case because it finished a manual recount in time to meet the statutory deadline for reporting election results. §102.112, Fla. Stat. The case is therefore moot as to the Volusia Board.

[2] Reference is made to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee.

Letter").[3] Those factors include: 1) whether there was proof of voter fraud that might have affected the outcome of the election; 2) whether there was substantial noncompliance with election procedures that cast doubt on whether the election expressed the will of the voters; 3) whether the election officials have made a good faith effort to comply with the statutory deadline but were prevented from doing so by extenuating circumstances beyond their control such as an Act of God, a power failure, or equipment or mechanical malfunction. *Id.* at 1-2. The Secretary of State also delineated certain factors that she believed, in the exercise of her discretion, did *not* warrant waiver of the statutory deadline. *Id.* at 2. After setting forth the factors that she would consider in guiding her decision-making, and in light of an opinion issued by the Division of Elections addressing the matter, the Secretary proceeded to consider the reasons offered by the counties to justify a waiver. She concluded that none of the justifications offered by the counties was sufficient reason for waiving the statutory deadline.

Disappointed with the Secretary of State's response, Petitioners[4] filed an Emergency Motion to Compel Compliance With and For Enforcement of Injunction,

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[3] Secretary of State Harris responded individually to the Chair of the County Canvassing Board of the four counties that sought a waiver; because each response contained similar reasoning, we cite the letter generically. The Secretary of State did respond, however, to each Board individually, based on the circumstances each presented.

[4] Throughout this Answer Brief, "Petitioners" refers to Albert Gore, Jr. and the Florida Democratic Party.

at approximately 11:00 a.m., on Thursday, November 16. App. 12. The Circuit Court convened a hearing on the motion for noon on the same day, and issued the decision under review at 10:00 a.m., on Friday, November 17. App. 13.

The Circuit Court denied Petitioners' motion. App. 13. The court held that the Secretary of State had considered all the relevant factors and had not abused her discretion in refusing to waive the statutory deadline. The Circuit Court otherwise held that the Secretary of State had complied with the 11/14/00 Order. *See* Order Emergency Motion, *McDermott, et al. v. Harris, et al.*, 2000 WL 1714590 (Fla. 2d Cir. Ct. November 17, 2000) ("11/17/00 Order").

Several hours later, Petitioners filed a notice of appeal in the District Court of Appeals. That court subsequently certified the case for review by this Court. Late in the afternoon of Friday, November 17, this Court issued an order accepting the case and setting a briefing and argument schedule.[5] That same day, this Court, *sua sponte*, enjoined the Secretary of State from recertifying the results of the election pending resolution of this case.

SUMMARY OF ARGUMENT

[5] This Court also consolidated this case with the pending matter entitled, *Palm Beach County Canvassing Bd v. Harris*, No. SC00-2346. On November 16, 2000, Intervenor filed a pleading entitled *Response of Intervenor George W. Bush to Petitioner's Emergency Petition for Extraordinary Writ*, No. SC00-2346, which reflects our position on the matters before the Court in that case.

Two statutes control this case. Section 102.111 of the Florida Statutes provides that the Elections Canvassing Commission "shall ignore[]" late-filed returns, and Section 102.112 provides that the Commission "may ignore" late-filed returns. Petitioners, in contrast, argue that the two statutes together mean that the Commission can never ignore late-filed returns, but must hold the results of a national election indefinitely pending completion of selective manual recounts in individual counties. Even if the Secretary is authorized to excuse county boards' noncompliance with the deadline in circumstances other than technical violations, she surely is not required to do so where, as here, there is serious noncompliance in circumstances directly contemplated by the legislature.

This appeal challenges the Circuit Court's refusal to enjoin the Secretary of State and Elections Canvassing Commission from rejecting late-filed supplemental returns from county boards conducting manual recounts, and from entering a final certification of the election's outcome.

On review of a denial of injunctive relief, this Court must defer to the trial court's factual basis for determining that the Secretary acted reasonably, though its review of legal questions is *de novo*. *See Operation Rescue v. Women's Health Center*, 626 So.2d 664 (Fla. 1993), *aff'd in part and rev'd in part on other grounds*, 512 U.S. 753 (1994). Under both the facts and the law, the judgment of the Circuit Court was correct. The laws of Florida, enacted by the legislature long before the

present extraordinary circumstances confronted the State and Nation, anticipated and resolved the way in which election results in this State are determined. Even in close elections, the legislature has plainly *required* county canvassing boards to complete their work, including any recounts, within 7 days of an election and to certify their results to the Elections Canvassing Commission and the Secretary of State within that time. *See* §102.112(1), Fla. Stat. And the law just as plainly *requires* the Commission to certify final election results as soon as is practicable after 7 days from an election, and to ignore returns from county canvassing boards that fail to meet their deadline. *See* §102.111, Fla. Stat.

As we argue below, that statutory structure all but dictated that the Secretary of State conduct herself exactly as she has throughout the course of events since the election. To the extent that the laws of Florida permit her and the Commission to exercise discretion to excuse late-filed returns, *see* Section 102.112(1), the Secretary of State has reasonably exercised that discretion not to permit logistical difficulties in accomplishing a manual recount to excuse a county canvassing board's late filing of returns. The Secretary of State's conduct was reasoned and reasonable, and was perfectly consistent with (indeed, mandated by) the laws of Florida. This Court's own cases therefore require it to defer to the Secretary's judgment.

In these heated circumstances, when so much is at stake for the State and Nation, it is essential for this Court and all public officials to be faithful to the rule of

law. Under the laws of Florida, there is no possible result here but for this Court to affirm.

ARGUMENT

I .

THE INJUNCTION PETITIONERS SEEK IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND INTENT OF THE STATUTORY SCHEME.

Petitioners demand that the Secretary be required to accept election returns from manual recounts in 3 of Florida's 67 counties, even though those recounts have not been completed and will not have been submitted until long after both the mandatory deadline of November 14, established by Section 102.112, and the second deadline of November 17, required by federal law exclusively for overseas ballots.[6] *See* §102.112(1), Fla. Stat. ("The county canvassing board . . . *shall* file the county returns for the election of the federal . . . officer with the Department of State . . . by 5:00 p.m. on the seventh day following the ...general election...."). Neither the Secretary nor this

[6] The ten-day period for counting overseas ballots is the product of a consent decree between the State of Florida and the United States entered into in 1982 as a result of an action brought against the State for failure to provide adequate time for overseas military personnel to vote as required by federal law. *See* Consent Decree in *United States v. Florida*, No. TCA-80-1055 (N.D. Fla. 1982). The consent decree is incorporated into Florida law by regulation. Rule 1S-2.013(7), Fla. Admin. Code.

Court has the power to extend that November 14 deadline, because it is precisely established by the statute, and there is no allegation that this deadline violates the Florida or United States Constitutions. Petitioners seek to achieve the same result, however, by contending that the Secretary ***must*** excuse the county board's violation of an explicit state law requirement, even though the statute clearly states that the Secretary "may" refuse to excuse this legal violation. *Id*. ("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.")

While the Petitioners' argument is sometimes framed as challenging the Secretary's exercise of her discretion under the Election Code, it is, in fact, a direct challenge to the statute itself and a request for the Court to rewrite the law. Simply put, they ask this Court to revise the statute's plain directive that late-filed returns "may be ignored" to read instead that the Secretary "*may not* ignore" late-filed returns if the county board is conducting a manual recount. Petitioners are not coy about seeking a statutory revision to eviscerate the discretion vested by the plain language of the statute. *See, e.g.*, Petr. Br. at 30 ("The Secretary *has no discretion at all* to refuse to take into account the results of a manual recount.") (emphasis in original); *Id*. at 38 ("The Secretary in no circumstances has discretion to reject the results of a manual recount.").

The only reason offered by the three county boards for offering extraordinarily late election returns is that they are conducting a full manual recount, which, like all manual recounts, can only be conducted if there is an error "which could affect the outcome of the election." §102.166(3)(c), Fla. Stat. But the legislature expressly contemplated manual recounts in close elections and, with full knowledge of their potential logistical difficulties, nevertheless *required* canvassing boards to file their returns within seven days and expressly authorized the Secretary to ignore returns where they violate that mandatory duty. While it will be the rare case where the Secretary can be said to abuse her discretion to ignore late-filed returns -- because the statute does not set forth any factors or standards cabining that discretion -- she is certainly not required to accept late-filed returns when the legislature has *expressly contemplated* the county board's proffered justification for tardiness and nonetheless authorized the Secretary to ignore them. Again, the circumstance that Petitioners feature as a reason specifically justifying the manual recounts here – that the result of the election might turn – is the very predicate for conducting *all* manual recounts. Yet it defies common sense to suppose not only that the legislature silently excepted such recounts from the normal statutory deadline, but also (as Petitioners urge) that the legislature expected no deadline at all to apply.

Here, the Florida legislature knew that there would be manual recounts; it knew that they would only be conducted in close elections; and it knew that the principal

reason for missing the seven-day deadline would be these recounts. A manual recount is the only time-consuming method of certifying election returns; thus, compliance with the seven-day deadline is quite simple in all other circumstances (absent extraordinary external conditions, such as an Act of God).

In the face of this, the legislature not only expressly authorized the Secretary to reject these late-filed returns pursuant to her unfettered discretion, but *required* that the Secretary "*shall* fine each [county canvassing] board member $200 for each day such returns are late, such fines to be paid only from the board members' personal funds." §102.112(2), Fla. Stat. (emphasis added). Thus, the legislature did not excuse delay in a canvassing board's filing of election returns for any reason, even though it expressly contemplated manual recounts and knew the time pressure they would create. Indeed, we submit that it would be an abuse of discretion to accept late-filed returns in these circumstances because the Secretary would be overriding the balance struck by the legislature between finality and the desirability of manual recounts.

Petitioners' only response is to hypothesize an inherent conflict between conducting manual recounts and meeting the statutory deadline. They thus contend that the legislature simply could not have contemplated ignoring returns in counties which find it impracticable to do a manual recount within seven days. But the statute's language and structure make clear that this analysis is wrong on two basic levels.

First, the legislature perceived *no conflict* between the requirement to meet the deadline and a county board's desire to conduct a manual recount. The solution is stated by the express language of the statute: "The county canvassing board *shall* appoint as many counting teams of at least two electors as is *necessary* to manually recount the ballots." §102.166(7)(a), Fla. Stat.[7] If the county board believes that a manual recount is important to ensure an accurate vote count in a closely contested election, it has a statutory duty to appoint enough counting teams to get the job done by the deadline. If a board is unable or unwilling to do so, it should not exercise its unfettered discretion to embark on a manual recount. *See* §102.166(4)(c), Fla. Stat. ("The county canvassing board *may* authorize a manual recount."). If the county decides to embark down this road *and* then violates *both* its statutory duty to file returns within seven days and its duty to appoint enough counting teams to meet the deadline, the legislature certainly did not expect, much less require, the Secretary to ignore this dual violation. While large counties obviously have more votes to count, it is equally obvious that they have more staff, resources, and money to count those votes. There is not a scintilla of evidence that any of the three counties at issue here were *unable* to meet the Tuesday deadline – as Volusia County did. In any event,

[7] It should be noted, moreover, that a manual recount is only one of three options that county boards can use to correct an perceived error in voter tabulation. *See* § 102.166(5)(a)-(c), Fla. Stat.

there is no basis in law for requiring the Secretary is not required to provide differential treatment to small and large counties.

Second, even if a county board finds it logistically difficult to conduct a timely manual recount, there is still no conflict because the decision whether to conduct the recount at all is entirely discretionary with each county canvassing board. §102.166(4)(a), Fla. Stat. Thus, in stark contrast to the affirmative and uniform duty to submit election returns within seven days, there is no "duty" to conduct a manual recount or any "right" to have one. That being so, the Florida legislature did not impose conflicting obligations on county boards which the Secretary is obliged to ameliorate. Rather, it simply gave the county boards a conditional option: a manual recount may be conducted but it must be completed within seven days. There is no inconsistency at all between an option to conduct a recount and a duty to file the returns within seven days. It simply means that the discretion to conduct a recount must be exercised in a timely manner. Indeed, Section 102.112 and the manual recount provision of Section 102.166 were enacted simultaneously. Ch. 89-338, 89-348, Laws of Fla. Surely the legislature would not have enacted two conflicting provisions at the same time. The Court's duty, of course, "is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." *Palm Harbor Special Fire Control v. Kelly,*

516 So.2d 249, 250 (Fla. 1987); *See also, State ex rel. Sch. Bd. of Martin County v. Dept. of Educ.*, 317 So.2d 68, 72 (Fla. 1975). Our construction of the statutes, in notable contrast to Petitioners', permits both sections easily to coexist. The Secretary is therefore authorized to reject the returns submitted by a county board that has decided to pursue a recount that it is unwilling to complete rather than to comply with its affirmative statutory duty to do so.

Further evidence that the legislature expected timeliness in submission of returns is found in the requirement that county board members who delay the submission of returns in order to conduct manual recounts must nonetheless be personally fined $200 per day for every day beyond the deadline. §102.112(2), Fla. Stat. As Petitioners themselves note, it is not remotely "plausibl[e]" that a legislature would fine county board members for conducting manual recounts necessary to assess the "electorate's . . . will." *Chappell v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988). Indeed, if the legislature believed that manual recounts beyond the deadline were absolutely necessary to accurately calculate the number of votes cast, it would have been extraordinarily inequitable for the legislature to *punish* board members who are simply carrying out this important constitutional and public duty. Contrary to Petitioners' assertion, however, public policy concerns do not authorize this Court to rewrite a second provision in the statute by amending "shall" be fined to "shall not" be fined. Indeed, the statutory language vividly illustrates that the Florida legislature, unlike the

Petitioners, did not either view manual recounts as essential to accurately determining the vote count or treat the endless pursuit of time-consuming manual recounts as more important than the finality and equal treatment insured by having a uniform deadline.

The essential premise of Petitioners' entire argument (Petr. Br. at 30) is that there is an overriding "public policy" in favor of accurately counting "validly cast" ballots and that the Florida legislature designated manual recounts as *the* methodology for an accurate count. We, of course, fully agree that the will of the people should be done. But it is entirely clear that the Florida legislature did not view manual recounts as a necessary ingredient in determining the will of the people. The legislature did not provide the slightest hint that whatever improved accuracy might be obtained in a manual recount overrides the values of finality and uniformity created by an even-handed deadline. If the Florida legislature had elevated manual recounts to the exalted status Petitioners imagine, it would not have made the use of this methodology wholly discretionary, and it would not have ensured that it would be performed only in *parts* of the State. Rather, it would have compelled this process throughout the State in close elections to ensure the "correct" winner. The legislature's failure to do so, in contrast to the *automatic statewide* machine recount in elections with a .5 percent margin, *see* §102.141(4), Fla. Stat., demonstrates that the legislature does not share Petitioners' devotion to this particular vote methodology.

Similarly, if the legislature believed that counting votes by some method other than a hand count was equivalent to "rejecting ballots that are conceded to have been validly cast" (Petr. Br. at 30), it would not have consigned 63 of Florida's 67 counties to this onerous fate. But the legislature, unlike Petitioners, understood that manual recounts accept all "validly cast" ballots (and reject all improperly cast ballots) only if they are conducted perfectly. Unless manual recounts are the one human activity uniquely immune from error, stress, and incorrect subjective judgment -- particularly in a highly-charged partisan environment -- then manual recounts will also reject validly cast ballots, or include improper ones. Indeed, by asking the Court to substitute the returns derived from the hand count for those returns already certified by the county boards on Tuesday, it is Petitioners who are seeking to reject the compilation of "ballots" *presumed* by Florida law to be "validly cast." *See* §102.155, Fla. Stat.; *Boardman v. Esteva*, 323 So.2d 259, 267 (Fla. 1975). Moreover, there is neither any finding by the legislature, nor a scintilla of evidence in the record, nor any other factual basis, for this Court to conclude that hand recounts are more accurate than the returns certified on Tuesday. If the Florida legislature believed that the "accuracy" of manual recounts was more important than the finality and uniformity created by the mandatory statutory deadline, it would not have imposed a mandatory deadline on *all* counties, including those conducting mandatory recounts, and required personal fines for board members who missed the deadline, including those conducting manual recounts.

Petitioners nonetheless claim that it would be "unthinkable" for the legislature to exalt finality over manual recounts because the deadline is "hypertechnical" and accuracy is more important. But the Florida legislature, like the Framers of the Constitution, understood that finality and uniformity are essential to the orderly administration of a democratic process. That is why Congress, pursuant to explicit constitutional authorization, Article II, Section 1, U. S. Constitution, established a mandatory deadline of December 18 for Florida and other states electors to meet, on pain of excluding *all presidential* votes from the State. *See* 3 U.S.C. §7. It was hardly irrational or unconstitutional for the Florida legislature to impose a deadline precisely analogous to that required by the Constitution itself, as evidenced by the fact that not even Petitioners claim that there is any constitutional impropriety in demanding that manual recounts be performed within the statutory period. This is particularly true since the consequences for non-compliance here are far less severe than those for missing the electoral college deadline. Unlike the electoral college, the counties' votes will not be excluded; on the contrary, all votes cast in those counties have already been certified and will be part of the official election results, as computed pursuant to the same methodology used in 63 other Florida counties.

Petitioners erroneously equate enforcing a deadline against someone seeking to pursue an activity with "denying" the person the right to engage in that activity. The very right to vote itself is subject to mandatory deadlines. Persons seeking to cast

their vote after 7:00 p.m. in Florida have not been "denied" the right to vote when they are excluded from the polling place. No matter how compelling the reason for the voters' tardiness, or how diligently he or she sought to meet the deadline, lateness will not be excused, because all voters must abide by the same rules. Similarly, no matter how important the counties believe it is to recount votes, the Secretary has not denied them that opportunity by enforcing the deadline -- the failure to comply is of their own doing.

Moreover, although the injunction they request is entirely open-ended and their brief does not hint at *any* endpoint, we must assume that even Petitioners agree that some deadline at some point is appropriate prior to the Inauguration itself. That being so, they are simply asking the Court to substitute a judicially-created deadline for the date selected by the legislature. But, the judiciary is without authority to do such a thing absent a determination that the legislative judgment violates the Florida Constitution or federal law.

In short, Petitioners seek to turn the process of statutory interpretation on its head. They hypothesize an absolutely overriding "public policy" -- manual recounts are the only way to ensure accurate vote tallies -- contrary to the statute's language and structure, then invoke this public policy to rewrite any statutory provisions that are contrary to the hypothesized policy. Thus, to implement Petitioners' desired policy of manual recounts at all costs, the Court is asked to (1) replace the mandatory

statutory deadline and substitute a standardless, undefined endpoint; (2) tell the Secretary that she "may *not*" ignore late-filed manual recount returns; (3) dictate that the Secretary "shall *not*" fine board members for missing a deadline; (4) transfer authority from the Secretary to the canvassing boards for challenging when it is reasonable to miss the statute's mandatory deadline; and (5) substitute the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of vote tallies. It is fundamental, however, that the Court discern public policy by examining the statute, and not by overriding the statute's plain terms.

Moreover, even after the Court has completed the extended journey of revision through the election code that Petitioners urge, we will still not have arrived at the destination which Petitioners claim equity demands: an accurate *statewide* compilation of votes for presidential candidates. If, as Petitioners claim (Petr. Br. 22, 24) (quoting §103.001, Fla. Stat.), machine reading of ballots will "predictably misread" the valid ballots cast, the Court will not know which "candidate for 'President' receive[d] the highest number of votes" even *after* the manual recounts in these three counties are completed. There will still be 63 counties which have not conducted a manual recount. And, if Petitioners are correct, it would be intolerable to allow such a close election turn on the "potentially erroneous" results produced by these machine counts. Yet Petitioners, notwithstanding their devotion to manual recounts in all circumstances, did

not request that all Florida counties conduct manual recounts, as was their right under Section 102.116. Nor do they ask this Court to order a statewide recount. That being so, under their own terms, the relief Petitioners seek will *necessarily* would produce an inaccurate tabulation of who received a "plurality of the votes cast.", Art. VI, §1, Fla. Const. If machine counts are less accurate than hand counts, then they inherently cannot produce an accurate result, since this machine methodology will be used in over 90 percent of Florida's counties. Conversely, if machine counts are as accurate or more accurate than hand counts, then replacing the machine counts with hand counts will not always improve accuracy.

Indeed, allowing these three counties, and only these three counties, to include manual recounts will inevitably *skew* the results in a partisan manner that favors Democrats. Naturally enough, the counties selected by the Democratic Party for a recount are predominantly Democratic. All else being equal, since the majority of the ballots are cast by Democrats, the predominant number of the disputed ballots included by the hand count will also be Democratic. Thus, Democrats will disproportionately benefit from any alteration of the machine count in those counties.

In a *county* election, no court would permit a recount in only four of 67 precincts, particularly if those precincts were selected by one political party and were composed predominantly of members of one party. It follows *a fortiori* that this

Court may not *require* such a partisan, skewed recount in the name of "accuracy" particularly in the face of explicit statutory requirements foreclosing such a "remedy."

Petitioners' argument, in the end, boils down to the dramatic proposition that a manual recount in selected heavily Democratic counties might affect the outcome of the election, and that the Secretary of State must extend the deadline to ensure that the "will" of the voters is done. This argument is speculative as a matter of fact, and inconsistent with the statute.[8] The simple point is that the law sets as a predicate for *even undertaking* a full manual recount that "an error in the vote tabulation could affect the outcome of the election." §102.166(5), Fla. Stat. Because the outcome must *always* be in doubt if a manual recount is proceeding, Petitioners' case again reduces to the proposition that Section 102.166's manual recount provisions supersede the rest of the lawful processes for determining the outcome of elections. The statutory provisions involved operate comfortably, however, and are certainly not in the irreconciliable conflict that would be required to find an implied repeal of

[8] We note, moreover, that each county has officially reported its results to the Secretary, and that the Commission has officially certified the results pending the inclusion of the results of overseas absentee ballots. Thus, the "official return of election" includes all the official results certified, including the results of the manual recount in Volusia County. *See* § 101.5614(8), Fla. Stat. Petitioners claim (Pet'r. Br at 34) that this statute's reference to the inclusion of the results of the manual recounts means that it is "improper to exclude such votes and certify the election before the manual recount is completed." That argument is wrong. Indeed, the fact that the Volusia County manual recount is included in the results here belies the notion that there is any tension between both certifying and conducting manual recounts within the statutory time period.

Section 102.112's deadlines by Section 102.166. *See City of St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 319, 100 So. 509, 510 (1924) ("It is familiar law that repeals by implication are disfavored ...An interpretation leading to such a result should not be adopted *unless it be inevitable.*"); *Oldham v. Rooks*, 361 So. 2d 140, 143 (1978). It is plain in these circumstances that no contrary interpretation is "inevitable."

I I .

THE LAWS OF FLORIDA ANTICIPATED THE PRESENT CIRCUMSTANCES AND THE SECRETARY OF STATE HAS FAITHFULLY IMPLEMENTED THE LEGISLATIVE DESIGN FOR DETERMINING THE RESULTS OF THIS ELECTION.

A .

This Court Must Defer to the Secretary's Discretionary Judgment That Extensions of The Statutory Deadline Are Unwarranted Because That Judgment Was Consistent With Law and Was Not Unreasonable or Arbitrary.

This Court has made clear that the Secretary of State has broad deference in implementing the State's election laws. Only if her legal judgments are clearly contrary to law, and her discretionary judgments irrational and arbitrary, is it permissible for this Court or any other to interfere. This regime of deference is well established, and is an essential component of the separation of powers. *See* Art. II, §3 Fla. Const.

The cases establish that the Secretary's formal determination of the operation of Florida law regarding the timing of reporting election returns is entitled to conclusive deference from this Court unless it can be shown to be a plainly unreasonable reading of the relevant law. In the particular context of elections, this Court has been emphatic about the need for courts to give deference to the constitutional role of the executive in conducting and certifying elections pursuant to state law. As the Court has stated:

> The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties . . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate.

Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840, 844 (Fla. 1993)(*quoting Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975)). And the Court has further emphasized that:

> the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Id.

This Court has recognized that responsible officials have wide discretion in construing statutes that they administer, and that courts are not to overturn their actions unless they are "contrary to the language of the statute" or "clearly erroneous." *Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 1, 3 (Fla. 1973). *See also, Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994); *Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146 (Fla. 2000); *Bellsouth Comm. v. Johnson*, 708 So.2d 594 (Fla. 1998); *Florida Interexchange Carriers Ass'n v. Clark*, 678 So.2d 1267, 1270 (Fla. 1996); *Republic Media, Inc. v. State of Florida Dept. Of Transportation*, 714 So.2d 1203 (Fla. 5th DCA 1998).[9]

Thus this Court has emphasized the presumption that officials have "perform[ed] their duties in a proper and lawful manner," and that "returns certified by election officials [are] correct." *Boardman v. Esteva*, 323 So.2d 259, 267 (*citing*

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[9]Other courts have noted that: "Courts cannot willy nilly strike down legislative enactments or acts of executive officers because they do not comport with judicial notions of what is right or politic or advisable." *State ex rel. Second District Court of Appeal v. Lewis*, 550 So.2d 522, 526 (Fla. 1st DCA 1989), *cited with approval, Comptech International, Inc. v. Miami Commerce Park Ltd.*, 753 So.2d 1219 (Fla. 1999).

City of Miami Beach v. Kaiser, 213 So.2d 449, 453 (Fla. 3d DCA 1958)); *Burke v. Beasley*, 75 So.2d 7 (Fla. 1954). We note as well this Court has "expressly state[d]" that "strict adherence by election officials to the statutorily mandated election procedures" is required. *Beckstrom v. Republican Party of Volusia County*, 707 So. 2d 720, 725 (Fla. 1998).

As we demonstrate above, it is plain that the Secretary's interpretation of the law here is entirely reasonable. On the most basic point, it cannot be "contrary" to Section 102.112's language to say that "may ignore" means that county board returns filed after the deadline will sometimes be ignored. Indeed, Petitioners' construction, which requires a deadline waiver any time there is a manual recount, literally rewrites the Florida code. As noted, conducting a manual recount will be the most common reason for missing the deadline because it is the only process for counting votes that potentially might take more than seven days. If the Secretary *must* treat the three late-filing county boards the same as the Volusia County Board -- which timely performed a manual recount – then the statute is literally of no legal consequence and the Secretary is obliged to preferentially treat those who fail to meet the lawful deadline. Indeed, under the Petitioners' theory, it is difficult to conceive of *any* reason that would justify the Secretary in ignoring late-filed returns. She must excuse noncompliance for reasons foreseen by the legislature (such as manual recounting); for reasons unforeseen, and in all cases of substantial compliance. Thus, the deadline is

to be converted into an aspirational goal, to be enforced only against those who willfully defy the statute for *no* reason.

Petitioners cite (Petr Br. at 35) a number of cases for the general proposition that the paramount concern of the State in conducting elections is to do the will of the People, and that legal technicalities should not thwart the voters' clearly-expressed will. This is why, of course, the Commission will excuse filings that are in "substantial compliance," as was the case in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). But this is not a case where the late-filed returns, whenever they are completed, will be in substantial compliance with the statutory deadline. The earliest any could be expected is next Monday or Tuesday, seven days after the time they were due, thus *doubling* the statutory time period.

B. The Secretary of State Engaged in Reasoned Decision-making By Considering All the Relevant Factors Before Deciding, and Did Not Abuse Her Discretion In Declining to Extend The Clear Statutory Deadline.

1. The Secretary of State Engaged in Reasoned Decisionmaking.

The circumstances show that the Secretary of State engaged in a reasoned process of decisionmaking that went far beyond the requirements of law. Throughout the relevant events, the Secretary of State has taken a number of steps – both before and after the Circuit Court entered the 11/14/00 Order -- to ensure that she fully

complied with the law, as well as with that court's direction, before concluding whether to accept late-filed returns:

First, the Secretary of State informed the county boards by formal opinion of her general approach to considering whether to accept county election returns beyond the statutory deadline for reporting established by Section 102.112. *See* 11/13/00 Opinion Letter. Pursuant to her statutory responsibility to provide advisory opinions as part of her execution of the election laws,[10] the Secretary of State formally opined, at the *request* of the Palm Beach County Canvassing Board chair, that conducting a manual recount of ballots would not ordinarily constitute the sort of extraordinary circumstance that would justify excusing the strict seven-day statutory deadline for reporting elections returns. *See* §§102.112, 102.111, Fla. Stat.

Petitioners are sharply critical (Petr. Br. 13, 18) of the Secretary's issuance of this opinion letter, terming it unlawful and not due any deference because of the circumstances in which it was issued. That contention is surprising, inasmuch as the laws of Florida *require* the Division of Elections to provide advisory opinions upon the request of, among others, county canvassing boards, *See* Section 106.23, and Petitioner Palm Beach County Canvassing Board's chair made such a request. 11/13/00 Opinion. Moreover, the Secretary's conduct reflects responsible administration of the laws in providing as much notice and information as possible to

[10] *See* §106.23, Fla. Stat.

those who are expected to comply with the law. *See, State Dept. of Health and Rehabilitative Servs. v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). It is odd, to say the least, for Petitioners to complain that the Secretary gave them *too* much notice of her understanding of the law and the sorts of factors upon which she would rely in exercising her discretion to extend the deadline. If she had said nothing and certified the election result without the three counties conducting recounts, they predictably would have claimed that the Secretary had engaged in post hoc adjudication without sufficient notice. Finally, the substance of the opinion was plainly correct, and is entitled to deference regardless of the timing with which it was issued. *Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994).[11]

Second, the Secretary of State sought submissions from county boards seeking a deadline waiver so that she would be aware of the particular circumstances of each county's situation. No provision of law required her to seek or accept written

[11] Petitioners spend a number of pages arguing (Petr. Br. at 13-18) that the Secretary of State's opinion letter regarding whether the manual recounts were authorized at all was mistaken. Our position on that issue is contained in our prior filing in *Palm Beach County Canvassing Board v. Harris*, No. SC002346. Contrary to the impression Petitioners apparently seek to create, however, that opinion letter is completely irrelevant to whether the Secretary of State acted unlawfully and unreasonably in refusing to waive the deadline for submission of manual recounts. The views expressed in that opinion were not a factor upon which she relied in reaching her judgment; and the results that the Commission in fact certified included the manual recount in Volusia County.

submissions, yet she did so. Petitioners seek, however, to paint this action as a sinister attempt (Petr. Br. at 2) to obstruct and delay the manual recounts. It is a strange proposition that the Secretary acted unlawfully and unreasonably in giving interested parties a complete opportunity to apprise her of the facts. And the Court can be confident that, had she not done so, petitioners would be here arguing that the Secretary unreasonably did not bother to gather the relevant information prior to making her decision.

Third, the Secretary of State provided detailed reasons for why she exercised her discretion not to extend a waiver. Again, no provision of law required such a formal statement of reasons – neither Section 102.112 nor any other statute confines the manner in which she is to make that determination -- yet she provided one.

Fourth, the Secretary of State, recognizing that the statutes of Florida provided little substantive guidance in exercising her discretion over the matter, deemed it appropriate to consider factors like the ones that the courts consider in determining whether an election should be overturned. *See* 11/15/00 Harris Letter at 2. That was entirely reasonable, and again was beyond any legal requirements imposed on the Secretary.

The Secretary of State also considered the factors explicitly mentioned by the Circuit Court as relevant to a determination whether to extend the deadline. *See* 11/15/00 Harris Letter at 2.

Finally, the Secretary of State additionally considered all the reasons offered by the counties for their delay, and responded in a reasoned fashion to those arguments. Nothing more was required.

2. The Secretary of State Did Not Abuse Her Discretion In Declining to Waive the Deadline for County Boards Wishing to Complete a Manual Recount.

In addition to engaging in a laborious process of reasoned decisionmaking, the Secretary of State's substantive reasoning for declining to exercise her discretion to waive the deadline was perfectly sound. Again, a valid excuse for a county board to miss the statutory deadline cannot be a circumstance expressly contemplated by the legislature, because the legislature simultaneously provided for manual recounts *and* a mandatory deadline. *See* §§102.166, 102.111, 102.112, Fla. Stat.

The factual circumstances confronting the Secretary of State support the conclusion that she acted reasonably in declining to extend the statutory deadline on the ground that county boards have found it logistically difficult to complete manual recounts in a timely manner. There is *no* evidence that these three boards could not count their ballots in a timely manner with sufficient resources and diligence. We note that the Volusia County Canvassing Board was able to conduct a full manual recount of about 184,000 voters in only three days. *See Fla. County Orders Manual Recount*, AP

Online, Nov. 12, 2000; *At 5 O'Clock, All's Well as Vote Tally Is Certified*, Miami Herald, Nov. 15, 2000.

Indeed, the following course of events belie any notion that the county boards could make such a case.[12] The Palm Beach County Canvassing Board – the only board still challenging the Secretary's deadline decision -- decided in the early morning hours of Thursday, November 9 to conduct a partial manual recount of four precincts. *Bush Leads Gore by 229 in Florida*, AP Online (Nov. 9, 2000). The Board then waited until midday Saturday, November 11 – a delay of approximately 60 hours – before beginning even this limited manual count. *Recount Intensifies Palm Beach Drama*, AP Online (Nov. 12, 2000). When this limited recount was completed in the early morning hours of Sunday, November 12, the Board then set a meeting for Monday, November 13, simply to discuss how next to proceed. *Fla. County Orders Manual Recount*, AP Online (Nov. 12, 2000). At that meeting, the Board decided to wait to start the actual recount until Tuesday, November 14. *Gore Joins Suit to Extend Deadline*, AP Online (Nov. 13, 2000).

After this Court issued its November 16 order, the Board finally commenced its county-wide manual recount at 7:00 in the evening. It is expected to complete that

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[12] The facts we describe here are not part of the record. In light of Petitioners' choice to rely upon extra-record factual assertions, without citations of any sources, we concluded that it was appropriate to bring a fuller picture of the facts on the public record (as referenced in media reports) to this Court's attention. We note that we requested an evidentiary hearing ion these issues in the Circuit Court.

recount as early as Tuesday, November 21. *Count Expected to Take Six Days,* Miami Herald (Nov. 17, 2000). Plainly, though, if the Board can conduct a full recount between the afternoon of Thursday, November 16, and Tuesday, November 21, it could have, with little extra diligence, conducted the recount between Thursday, November 9, and the statutory deadline of Tuesday, November 14.

Similarly, the board in Broward County commenced its full recount (after a partial recount of 1% of the precincts) on the afternoon of Wednesday, November 15, and, according to Petitioners, "expects to complete its work by November 20" — this Monday. Petr. Br. at 19. Again, if a full recount can be completed between last Wednesday afternoon and Monday, there is no reason to believe it was not possible to begin on Thursday, November 9, and end on Tuesday, November 14. Yet Broward decided to wait until Monday, November 13 even to begin the 1% partial recount, because a board member went on vacation and Friday, November 10 was a federal holiday. App. 5, Ex. G.

The Miami-Dade County Canvassing Board has engaged in extraordinarily dilatory conduct since the election. That Board did not even meet to consider conducting a full recount until November 14, *the day the returns were due under the statute*. *Latest Developments in the Presidential Recount,* Miami Herald (Nov. 16, 2000). At that meeting, the Board decided not to authorize a full manual recount. *Id.* Finally, on November 17 – three days after the statutory deadline – the Miami-Dade County

Board decided to conduct a full manual recount. *See* Notice of Miami-Dade to the Supreme Court of Florida (filed Nov. 18, 2000); Petr. Br. at 20. The Board then waited another full day to meet to establish procedures, and did not start the recount until Sunday, November 19. *See* Notice of Miami-Dade, *supra*. Election officials have predicted that this recount will take *26 to 30 days to complete*. *Dade Decides to Recount: Process Could Take Weeks*, Miami Herald (Nov. 18, 2000). This means, of course, that Miami-Dade will not be through until approximately the deadline for appointing electors to the electoral college. Since even Petitioners agree that the Secretary may ignore returns from "unreasonably dilatory" boards – and this would include, one would imagine, those boards whose delay could cause the entire State to be disenfranchised from the presidential election – they must concede that the Secretary and the Nation cannot be forced to await the day when, or if, Miami-Dade decides to finish its recount.

In light of these three counties' conduct, Petitioners' assertion that "any delay by any of the Counties is in large part attributable *to the Secretary herself,*" is demonstrably untrue. Petr. Br. at 46. Each action of the Secretary that supposedly kept the three counties from completing their manual counts on time took place either on the 13th or the 14th of November. Petr. Br. at 24. But Palm Beach County would not have started its manual recount until November 14, Broward County waited until the evening of November 13 even to decide whether to conduct a full recount (and

then decided not to), and Miami-Dade County similarly waited until November 14 to consider whether to perform a full recount (it too decided against doing so). Thus, excusing the counties' non-compliance with the statutory deadline would only "reward [them] for [their] own wrongdoing and contribution to any 'delays.'" Petr. Br. at 24.

Finally, Petitioners have suggested no standard by which a court – when it does stand in the shoes of the responsible administrator – is to determine when a county board has had enough time for a third recount. If not by the statutory deadline, when is the administrator entitled to say that enough is enough? After an additional week? A month? In fact, Petitioners seem to assert that the importance of manual recounts means that *no* deadline for their completion is lawful.[13] But again the courts have no basis for disagreeing with the legislature's or Secretary's judgment, based on an "impression by a particular judge or panel of judges" that a different deadline seems more "appropriate." *Krivanek v. Take Back Tampa Political Committee*, 625 So.2d 840, 844 (Fla. 1993)(internal quote and citations removed.)[14]

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[13] Petitioners claim (Petr. Br. 43) that manual recounts are preferred to machine recounts in close elections. That is not true, of course, inasmuch as Florida law requires an automatic *machine* recount in elections with a margin of .5 percent or less, *see* § 102.141(4), Fla. Stat.; it *never* requires a manual recount, *see* § 102.166(4), Fla. Stat.; it requires a protester seeking a manual recount to show that a mistake occurred, not merely that the election was close, *see* § 102.166(1), (5), Fla. Stat.; and it sets out a full manual recount as the *last* of three options for the county board if it believes that there was error in the vote tabulation.

[14] Other states have similarly imposed strict election deadlines to protect the important interests of finality and predictability. *See, e.g.*, *Giambrone v. Alberica*, 579 N.Y.S.2d 268 (N.Y. App. 1992) ("[T]ime limits set forth in the Election Law are clear and

3. Petitioners' Contentions Are Otherwise Without Merit.

Petitioners make a number of additional arguments that we refute in turn:

a. Petitioners contend (Petr. Br. 40-44) that the Secretary of State committed legal error in choosing to exercise her discretion in part by reference to factors that courts have looked at in determining whether to overturn elections in contests under Section 102.168. Petitioners are mistaken.

First, petitioners misstate the nature of the Secretary's reliance on those factors. Rather than relying exclusively on the factors that might justify overturning the election, the Secretary of State merely deemed it appropriate to consider those factors, among others. *See* 11/15/00 Harris Letter. The Secretary also referred to a number of other criteria suggested by the Circuit Court's order, *id.*, and had earlier provided still more

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unambiguous and cannot be changed by the court."); *State ex rel. Shroble v. Prusener*, 517 N.W.2d 169 (Wis. 1994) (candidate failing to request a recount within 3-day statutory time limit was precluded from challenging canvassing mistake); *In re April 10, 1984 Election of East Whiteland Township*, 483 A.2d 1033 (Pa. App. 1984) (mandatory language in election laws with respect to deadlines must be respected); *State ex. rel. Underwood v. Silverstein*, 278 S.E.2d 866 (W.V. 1981) (specific time restraints set forth in election statutes are obligatory and necessary to the orderly conduct of public elections, which require the determination as promptly as possible of those who have been lawfully elected in order that they may fulfill their official duties unfettered by the prospect of lengthy litigation).

detail. *See* 11/13/00 Opinion. Petitioners' attempt to paint the Secretary as viewing herself as in the position of a judge determining whether to overturn an election is therefore wrong.

Second, petitioners are wrong in claiming that the Section 102.168 factors are inapposite as a matter of law. Section 102.112 does not specify *what* factors the Secretary is to consider in determining whether to waive the statutory deadline, and the Secretary has appropriately concluded that, absent substantial compliance, only extraordinary circumstances justify substituting certified results with the results of late-filed manual recounts. The extraordinary circumstances that would justify overturning an election contest were therefore, as a rough proxy, appropriate to consider in determining whenever an election result is so flawed that an extension would be warranted.

Contrary to petitioners' contention (Petr. Br. 43) that the Secretary employed the "wrong legal standard" in exercising her discretion, it is plain that Section 102.112 directed her to employ no particular standard. In the absence of a governing standard, the Secretary cannot have employed the wrong one. And it surely is not irrelevant in determining whether to relax the legislature's rules of finality and uniformity to consider whether the situation is one that might call for a court to overturn an election.

b. Petitioners contend (Petr. Br. 38-40) that the Secretary of State must wait until any county board

that wishes to conduct a manual recount finishes its work before making a judgment as to whether the results would be accepted. This argument is contrary to law and all reason.

First, there is no requirement in law that the Secretary of State must wait for such results before certifying election returns – indeed, the legislature has made it clear that she *may* ignore results that are not submitted on time *without waiting for their submission*. *See* §102.112(1), Fla. Stat. It would obviously defeat the entire purpose of allowing tardy results to be ignored to insist that the responsible administrator wait for them to be submitted before acting to certify the election. Indeed, far from being unreasonable to refuse to extend on this basis, it would have been both unreasonable and unlawful for the Secretary of State to decide otherwise. To conclude that the Secretary *must* wait for a manual recount to be completed before reaching a judgment about whether the *circumstances causing it to be late* may be excused would prevent the Commission from discharging its statutory responsibility to certify election results as soon as possible after receiving the certified results from each county. *See* §102.111, Fla. Stat. And no finality would be available until the last recounting county – which already has certified returns on file – tells the Secretary of State that it is finished. Such a system makes no sense, and is plainly contrary to the statutory scheme.

The Secretary of State, moreover, went out of her way to ensure that any circumstances justifying a late manual recount were before her prior to making her determination. Thus she received letters detailing the reasons from interested county boards. She reasonably concluded that insofar as the tardiness of the manual recounts is concerned, permitting the recounts pointlessly to proceed would be inappropriate. Thus, she reasonably informed the county boards that a waiver of the firm statutory deadline would not be permitted, and that the already-certified election results would be used. Petitioners cannot point to a single word in any statute or other authority which would require the Commission to delay final election certification until such time that a county board conducting a manual recount finishes its work.

Rather than acceding to Petitioners' desperate attempt to have this Court substitute its judgment for the Secretary of State's, we submit that the Secretary of State deserves this Court's commendation. The Secretary of State has acted, in the most difficult of circumstances, in a reasoned fashion that is consistent with the law and with uniform past practice in certifying elections in the State of Florida.

I I I .

IT WOULD HAVE BEEN UNLAWFUL FOR THE SECRETARY OF STATE TO EXTEND THE STATUTORY DEADLINE ON THE GROUND THAT SOME COUNTY BOARDS WISH TO COMPLETE A MANUAL RECOUNT.

Although the Court need not reach the issue, the Secretary is without authority to accept returns after the statutory deadline under Section 102.111(1), Florida Statutes, which provides:

> 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*. (emphases added)

Section 102.111 thus sets a hard and specific deadline for final returns – "5 p.m. on the seventh day following an election." Once that time is reached, "the returns on file *shall* be certified." *Id.*

It would be wrong to interpret Section 102.112's language stating that election returns from a tardy county "may be ignored" as revoking the mandatory nature of Section 102.111's instructions to the Commission. First, the legislature did not repeal Section 102.111 when it enacted Section 102.112, and it is a well settled principle of statutory interpretation that implied repeals are disfavored. *See City of St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 319 (1924)("[i]t is familiar law that repeals

by implication are disfavored . . . . An interpretation leading to such a result should not be adopted *unless it be inevitable.*"); *Oldham v. Rooks*, 361 So.2d 140, 143 (Fla. 1978) It is plain in these circumstances that no contrary interpretation is "inevitable."

Section 102.111 defines the obligations of the *Commission*, and it specifies that it "shall certify." Section 102.112 defines the obligations of the *county* canvassing boards. It states that "[r]eturns *must be filed* by 5 p.m. on the 7th day," and that, if they are not, they "may be ignored." The word "may" need not, and should not, be interpreted as authorizing a general discretion to the Commission; rather, it can be interpreted as describing the risks to a county board if their returns are tardy. And Section 102.112 plainly requires county boards to meet the deadline regardless of whether their returns will be ignored if they are late.

The decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), illustrates why it is merely a risk and not a certainty that a county board's failure to certify in time will result in the disregarding of its returns. In *Chappell*, the Court held that the Commission had not erred in refusing to disregard a county's returns – even though the county board had failed to mail in its certification within the deadline – because those returns had been conveyed over the telephone and that constituted "substantial compliance." Thus, Section 102.112, which was enacted in the wake of the decision in *Chappell*, clarified that in some circumstances a county's returns may or may not

be ignored, depending on whether there is substantial compliance with the board's certification obligation. But neither the decision in *Chappell* nor the subsequent enactment of Section 102.112 altered the underlying obligation on the *Commission* pursuant to Section 102.111 that it shall certify the results as soon as possible after the statutory seven-day deadline.

The drafting background and legislative history of Section 102.112 strongly supports the conclusion that the Secretary of State is required to ignore results from counties that miss the seven-day deadline. On May 31, 1989, the Florida House passed a bill, Fla. HB 1362 (1989), that added the new section 102.112, which includes the provision that "[i]f the returns are not received by the department by 5 p.m. on the 7th day after an election and such returns may be ignored and the results on file at that time may be certified by the department." 1989 Senate Journal, p. 819. The Senate bill incorporated the new Section 102.112 but *also* amended the last sentence of the then-existing section 102.*111* to read as follows: "If the county returns are not received by the Department of State by 5 p.m. of the *thirteenth* day following an election, all missing counties *may* be *omitted*, and the results shown by the returns on file certified." (emphasis added). *Id*. Thus, the Senate bill as proposed would have explicitly and unambiguously repealed the mandatory requirement to ignore late returns and replace it with a discretionary option.

On June 2, 1989, however, the House took up the bill again. House Amendment to Senate Amendment, 1989 House Journal, p. 1320. The House agreed to the Senate bill's modifications to Section 102.112, but *rejected* the Senate's modifications to the last sentence of Section 102.111. The bill was then reconsidered by the Senate that same day, and the Senate agreed to the House version. Chapter 89-338 §30 at 2162, Laws of Florida.

The House and the Senate thus both specifically considered a modification to Section 102.111 that would have weakened the requirement that the Secretary of State "shall . . . ignore[]" returns from counties that have failed to meet the seven-day deadline. That is the exact reading of the statute urged by Petitioners in this case. It was rejected by the Florida Legislature and should be rejected by this Court.

Thus both the text and history of the relevant statutes indicate that the only reasonable construction of Section 102.111 and Section 102.112's interaction is to recognize that the deadline imposed upon the Commission by Section 102.111 is firm and unyielding absent extraordinary circumstances analogous to those in *Chappell*. Even if that were not the case, however, and the statutes were open to other reasonable interpretations, it would nonetheless be the "court's obligation . . . to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both." *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *See also,*

State ex rel. School Board of Martin County v. Department of Education, 317 So.2d 68, 72 (Fla. 1975).

State law also requires the Secretary to ensure uniformity in the administration of the election laws. *See* §97.012(1), Fla. Stat. Florida law (and election law generally) reflects the strong value that voters within a jurisdiction are to be treated equally and uniformly. Thus, all voters are required to vote on (or by, in the case of absentee voters) the same date; their votes are to be counted by the same process; and according to the same timetable. To be sure, Florida has tempered its goal of uniformity by providing for selected manual counts, *see* §102.166, Fla. Stat. but it has emphatically not provided that the timing by which those results are certified is to vary from the timing applicable to the rest of the votes in the state.

In the present context, *federal* law also places additional constraints on courts that require them strictly to adhere to the legislature's prescribed manner for conducting an election to choose the State's presidential electors. Under 3 U.S.C. §5, a State is required to select its electors "by laws enacted *prior* to" election day. *See* 3 U.S.C. §5 (emphasis added). The purpose of the statute is to ensure that neither the Legislature, nor the Executive, nor the courts can change the applicable rules once the voters have gone to the polls. Florida law on November 7, 2000, unambiguously required county canvassing boards to count, and recount if necessary, and manually

recount if they chose, within the time prescribed by law. Under Section 102.112 the Secretary of State was given discretion sometimes not to ignore late results. But no provision of state law in effect prior to the election, however, granted *courts* equitable power to disregard both the deadline and the Secretary's exercise of reasoned discretion.[15] It would also violate the United States Constitution for the Secretary of State to permit the 3 counties to complete its manual recount and certify those results. The selective manual recounts authorize county boards to engage in arbitrary and unequal counting of votes, and result in the disparate treatment of Florida voters based solely on where within the state they happen to reside.

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[15] Indeed, by operation of the Supremacy Clause, Article VI, U.S. Constitution, federal law incorporates by reference whatever processes a state establishes by law for choosing electors. The United States Constitution provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen, Article II, Section 1 U.S. Constitution and Congress has provided in federal law that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November" in an election year. 3 U.S.C. § 1. Congress has further provided that if a State "has failed to make a choice on the day prescribed by law," it falls to the legislature of the State to determine how the electors will be appointed. 3 U.S.C. § 2. In the present case, the day prescribed by law was Tuesday, November 7, and the State of Florida held an election on that day *subject to the procedures, including reporting procedures and deadlines, established by state law*. It follows, therefore under the relevant federal statutes and the Supremacy Clause that all actors at the state level - including judges -- are bound to respect the choices made by the Florida legislature as to the process of selecting the state's presidential electors. It would therefore violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature's* judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors.

This scheme, as applied, violates the United States Constitution in three respects. First, it dilutes the votes of Florida voters, both within and without the counties that are manually counted, by counting their votes differently based upon where they reside, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Second, because the manual recount statute prescribes no meaningful standards for officials conducting such recounts, it permits the invasion of the liberty interest in voting in an arbitrary and capricious manner. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). Finally, because the right to vote directly implicates the right of association under the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), it falls squarely within the principle that state actors cannot exercise unconstrained discretion over the implementation of laws that touch upon First Amendment rights. *See City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 763 (1988). For these reasons, allowing the manual recounts to proceed would violate the United States Constitution.

I V . PETITIONERS ARE NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE THEY FAILED TO MAKE THE NECESSARY SHOWING OF IRREPARABLE HARM AND BALANCE OF THE EQUITIES.

Petitioners are also not entitled to the relief they seek for the independent reasons that they have an adequate remedy at law, and that an injunction is plainly not in the public interest.

First, Petitioners have an adequate alternative remedy because Florida law provides for contests to be filed after-the-fact by unsuccessful candidates or qualified electors. *See* §102.168, Fla. Stat. The contest mechanism provides an adequate and therefore exclusive avenue for relief if Petitioners are correct that the Secretary of State was legally bound to accept late-filed returns.

Second, Petitioners failed to show that the public interest calls for the entry of injunctive relief. As noted, petitioners have not acted with the sort of dispatch in performing the manual recounts that would remotely justify this Court's holding that it was literally impossible for them to comply with the legislature's statutory deadline.[16] It would be highly inequitable to keep the State and Nation on hold to finish a manual

[16] The Miami-Dade County Canvassing Board, which is not a party to this litigation but which, according to public reports is currently conducting a manual recount, did not even *meet* to vote on a manual recount until Tuesday, November, 14, the deadline set by the legislature.

recount when the responsible officials failed expeditiously even to begin the process.

The unprecedented events that have brought us to this point are obviously of the highest public interest. Extraordinary times call, however, for courts to adhere steadfastly to the rule of law. The rule of law is indispensable if the right of the people to pick their leaders, through a full and fair process according to rules applicable to all, is to be vindicated.

CONCLUSION

For the foregoing reasons, this Court should dissolve the injunction entered on Friday, November 17, 2000, and affirm the judgment of the Circuit Court.

BARRY RICHARD

Florida Bar No. 0105599

Greenberg Traurig, P.A.

Post Office Drawer 1838

Tallahassee, FL 32302

Phone (850) 222-6891

Facsimile (850) 681-0207

Counsel for Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following on this 19th day of November, 2000.

W. DEXTER DOUGLASS

Douglass Law Firm

211 East Call Street

Tallahassee, FL 32302

Fax (850) 224-3644

DAVID BOIES

Boies, Schiller & Flexner, LLP

80 Business Park Drive, Ste. 110

Armonk, New York 10504

Fax (914) 273-9810

MITCHELL W. BERGER

Berger, Davis & Singerman

350 East Las Olas Boulevard, Ste. 100

Ft. Lauderdale, FL 33301

JOHN D.C. NEWTON, II

Berger, Davis & Singerman

215 South Monroe Street, Ste. 705

Tallahassee, FL 32301

Fax (954) 523-2872

Fax (850) 561-3013

BRUCE ROGOW,

DENISE D. DYTRYCH

BEVERLY A. POHL

Palm Beach County Attorneys

Bruce A. Rogow, P.A.

JAMES C. MIZE, JR.

Broward Financial Centre

ANDREW J. McMAHON

500 East Broward Blvd., Ste. 1930

GORDON SELFRIDGE

Ft. Lauderdale, FL 33394

301 North Olive Avenue, Ste. 601

West Palm Beach, FL 33401

KAREN GIEVERS

LYN UTRECHT

Karen A. Gievers Prof. Ass'n

524 East College Avenue
Tallahassee, Florida

(850) 222-2153

ERIC KLEINFELD
Ryan, Phillips, et al
1133 Connecticutt Avenue, N.W., Suite 300

Washington, D.C. 20036

Fax:

(202) 778-4007

ANDREW J. PINCUS

KATHERINE HARRIS, Sec. of State
RONALD A. KLAIN

DEBORAH KEARNEY, Gen. Coun.
c/o Gore/Liberman Recount Committee
Department of State
430 South Capital Street

Florida

The

Capitol, PL-02

Washington, D.C. 20003

Tallahassee, FL 32399-0250
Fax: (202) 383-5414

Fax(850)

487-2214

JOSEPH P. KLOCK, JR.

ROBERT A. BUTTERWORTH,
Attorney General

DONNA E. BLANTON

T h e

Capitol, PL-01
Steel, Hector & Davis

Tallahassee, FL 32399-1050
215 South Monroe Street, Ste. 601

Fax(850)

410-2672
Tallahassee, FL 32301
Fax (850) 222-8410

EDWARD A. DION

SAMUEL S. GOREN
ANDREW J. MEYERS

MICHAEL D. CIRULLO, JR.

TAMARA M. SCRUDDERS

Josias,

Goren, et al.
JOSE ARROJO

3099

East Commercial Boulevard
Broward County Attorneys

Fort

Lauderdale, Florida 33308
Government Center, Suite 423

Fax (954)

771-4923
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
(954) 357-7641

_____

BARRY

RICHARD

Courtesy copies have been provided to the following counsel by fax, and *pro se* litigant, involved in related litigation:

Cecile Dykas, Assistant Attorney General

(954)
712-4707
Kendall Coffey, Esq., for Florida Democratic Party

(305)
285-0257
William R. Scherer, Esq. and Mark Wallace for
Florida Republican Party

(854)
463-9244
Gary M. Farmer, Jr., Esq. for Rogers plaintiffs

(954)
771-9880
Henry B. Handler, Esq., for Fladell plaintiffs

(561)
997-5280
Marcos D. Jimenez, Esq., for Siegel plaintiffs

(301)
358-5744
Benedict P. Kuehne, for Florida Democratic Party plaintiff

(305)
789-5987
Patrick W. Lawlor, Esq., for Elkin plaintiffs

(954)
481-3631
Mark A. Cullen, Esq., for Horowitz plaintiffs

(954)
989-9660
Andrew Meyers, Chief Appellate Counsel for Broward County (954)
357-7641
Lawrence A. Gottfried, *pro se*
1121 S. Military Trail, Apt. #1224, Boynton Beach, FL 33436 By U.S. Mail