Supreme Court of Florida

Saturday, November 18, 2000

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

PALM BEACH COUNTY CANVASSING BOARD	vs.	KATHERINE HARRIS, ETC., ET AL.
VOLUSIA COUNTY CANVASSING BOARD	vs.	MICHAEL MCDERMOTT, ET AL.
FLORIDA DEMOCRATIC PARTY	vs.	MICHAEL MCDERMOTT, ET AL.
Petitioners/Appellants		Respondents/Appellees

JOINT BRIEF OF PETITIONERS/APPELLANTS AL GORE, JR. AND FLORIDA DEMOCRATIC PARTY

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QUESTION PRESENTED

Whether the Secretary of State and the Elections Canvassing Commission must await the conclusion of manual recounts now underway and include the results of those recounts in the "official results" that they use to "certify the returns of the elections and determine and declare who has been elected" consistent with the requirements of Florida law, including Section 102.111, 102.121 and 103.011 Fla. Stat. (2000).

STATEMENT OF THE CASE AND OF THE FACTS

The eyes of the Nation - indeed, of the entire world - are on Florida. The outcome of Florida's Presidential election will determine who becomes the next President of the United States. For that reason, it is (if possible) even more essential than in "normal elections" 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.

This election is unprecedented, the closest in our Nation's history. It therefore is not surprising that the provisions of Florida law, designed to ensure that close elections are decided properly and accurately, are being employed. Manual recounts are an essential part of the law of Florida (as in many other states). They have been applied on numerous occasions in elections for lower-level offices. The law of Florida (and of other states) providing for manual

recounts reflects the sound legislative judgment that manual recounts are the most accurate method of objectively determining voter intent. The application of the provisions of Florida law to an election of this scale, with over six million votes cast, has given rise to issues over the meaning of Florida law and of an election system that was designed with local contests in mind.

Instead of seeking to facilitate the resolution of these 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:

issuance of an opinion on November 13 that manual recounts are illegal except in the event of a machine break-down;

issuance of a statement on November 13that no recounts submitted after 5:00 p.m. on November 14, would be considered;

a November 13 directive issued to four county canvassing boards requiring that they submit by 2:00 p.m. on November 15 their reasons for needing to amend their election results;

a November 14 response letters rejecting the requests of Broward, Miami-Dade and Palm Beach Counties to amend their election returns;

the petition to this Court filed on November 15 (and denied by this Court that same day) seeking, among other things, an order stopping the manual recounts; and

a November 15 meeting of the Elections Canvassing Commission ("ECC") in violation of Florida's Governance in the Sunshine law, Section286.011, Fla. Stat. (2000), in which the ECC arbitrarily refused to consider any results of manual counting filed after 5:00 p.m. November 13.

Each of these actions was legally unjustified.

In addition, on November 10, the Bush/Cheney campaign 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 on November 13 *Siegel v. LePore*, 2000 U.S. Dist LEXIS 16333 (S.D. Fla. Nov. 13, 2000) and the United States Court of Appeals for the Eleventh Circuit also denied preliminary relief (Case. No. 00-9009-CIV-Middlebrooks, Affirmed Nov. 17, 2000).

All of these efforts have caused considerable confusion and resulted in significant delays in the manual recount process.

STATUTORY BACKGROUND

The Florida Constitution provides: "All Elections by the people shall be by direct and secret vote" and that all general elections "shall be determined by a plurality of the votes cast" (Art. VI, Section 1) (emphasis added). We ask nothing more, and the Constitution requires nothing less.

The State Elections Canvassing Commission is ultimately responsible for issuing a certificate of election for each office. By law, the Commission is required to include in that certificate "the *total* number of *votes cast* for persons for said office." Section 102.121, Fla. Stat. (2000) (emphasis added). The Commission bases its certificate on the votes certified by the counties as having been cast, either in an initial report or a corrected, supplemental or amended report submitted following proper completion of any recount deemed appropriate by the county canvassing board in discharging its duties pursuant to Sections 102.141 and 102.166, Fla. Stat. (2000).

The only deadline is the one provided for county canvassing boards to submit their first returns as they exist as of the 5:00 p.m. deadline one week following the election. Sections 102.111 and 102.112, Fla. Stat. Neither the older statute (Section 102.111) nor the more recently adopted one (Section 102.112) imposes any deadline for the submission of corrected, amended or supplemental returns deemed necessary by the county canvassing board to

ensure that the return submitted accurately and completely reflects the votes counted initially and in any recount. The statutes impose no deadline on either the Secretary or the Commission except that the identity of electors be disclosed prior to the December 18 date set by Congress. Section 103.061, Fla. Stat. By law, the Elections Canvassing Commission certificate must include the total number of votes cast for each candidate. Section 102.121, Fla. Stat. By law, the Department of State must certify as elected the presidential electors of the candidates for president and vice president who receive the highest number of votes.

The statutory provisions at issue, all of which must be interpreted in light of the Constitutional mandate, include Sections 102.111, 102.112, 102.121, 102.166, 102.168, 102.169 and 103.011. Section 102.112 requires the county canvassing board to file the county returns for the election of a federal officer with the Department of State "immediately after certification of the election results." Section 102.112(1), Fla. Stat. (2000). The statute establishes a deadline of seven days from the day following the election for filing returns, and allows that such returns "may be ignored and the results on file at that time may be certified by the department" if the returns are not received by the specified time. *Id.* To enforce compliance, the statute authorizes the department to fine each board member $200 for each day such

returns are late. Section 102.112(2), Fla. Stat. (2000). Section 102.112(3) allows those fines to be appealed to the Florida Elections Commission.

Section 102.111 contains another provision directing the county canvassing board to forward results of the election to the Department of State "[i]mmediately after certification." Section 102.111(1), Fla. Stat. (2000). The statute goes on to establish a three-person Elections Canvassing Commission, which is directed to "certify the returns of the election and determine and declare who has been elected for each office" "as soon as the official results are compiled from all counties." *Id.* The provision, which was adopted prior to Section 102.112, directs that, in the event that the county returns are not received by the 5 p.m. on the seventh day from the day after the election, "all missing counties shall be ignored, and the results shown by the returns on file shall be certified." *Id.*

In the event that "any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the Commission shall so certify and shall not include the returns in its determination, canvass and declaration. The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns." Section 102.112(2), Fla. Stat. (2000).

Section 102.166 provides any candidate or political party the right to "file a written request with the county canvassing board for a manual recount." Section 102.166(4)(a), Fla. Stat. (2000). The statute goes on to authorize the county canvassing board to authorize a manual recount. Section 102.166(4)(c), Fla. Stat. (2000). "The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate." *Id.*

In the event that the partial manual recount "indicates an error in the vote tabulation which 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."

Section 102.166(5), Fla. Stat. (2000). If the officials conducting the manual recount are "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." Section 102.166(6), Fla. Stat. (2000).

Section 102.168, Fla. Stat. (2000), provides a separate procedure to contest an election after certification. There, the certification of election of President of the United States "may be contested in the circuit court by any

unsuccessful candidate for such office," or by any elector or taxpayer. Section 102.168(1). Such a contest can be initiated by filing a complaint with the circuit court "within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following [sic] a protest pursuant to s. 102.166(1), whichever occurs later." Section 102.168(2) Fla. Stat. (2000). The complaint must set forth the grounds for such a contest. Permitted grounds include:

> "Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board."

Section 102.168(3)(e). The statutory scheme also recognizes that these remedies might not be adequate in all situations. Section 102.169, Fla. Stat., makes clear: "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."

FACTUAL BACKGROUND

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 Albert Gore, Jr., 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 1,784 votes between the Republican and Democratic candidates triggered the automatic recount provisions of Section 102.141(4), Fla. Stat. (2000) (requiring a recount by county canvassing boards if there is a difference of less than .5%). The automatic recount by the county canvassing boards resulted in a difference of 300 votes.

On November 9, 2000, the Florida Democratic Executive Committee requested manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties.

On November 10, the Bush/Cheney campaign brought an action in the United States District Court for the Southern District of Florida seeking to enjoin Broward, Miami-Dade, Palm Beach and Volusia counties from manually counting ballots. The Court denied the motion for a preliminary injunction on November 13 *Siegel v. LePore,* 2000 U.S. Dist LEXIS 16333 (S.D. Fla. Nov. 13, 2000), and the Bush/Cheney campaign appealed on an emergency basis to the United States Court of Appeals for the Eleventh

Circuit. On November 17, the U.S. Court of Appeals for the Eleventh Circuit similarly denied the request for injunction. (Case. No. 00-9009-CIV-Middlebrooks, Affirmed Nov. 17, 2000)

Because of the preemptive statement by the Secretary of State issued on November 13, stating that she would strictly enforce the November 14 deadline for Counties submitting their votes (See App. 5; Ex. A), the Canvassing Board of Volusia County filed a complaint in the Circuit Court of Leon County seeking a declaratory judgment ordering that the Board certify the results of the Presidential Election after the 5:00 p.m. November 14 deadline, and a restraining order preventing the Secretary of State from ignoring results certified by the Board after the deadline. (See App. 1 and 2). Vice President Gore intervened in the action (See Appendix 3).

The Circuit Court very promptly held a hearing to consider the request of Volusia County for a temporary restraining order (See App. 4). But, in the course of that hearing, the Secretary revealed that she had just issued two new opinions. One opinion was issued to the Palm Beach County Canvassing Board (App. 5; Ex. B); it stated that the undertaking by the Board of a manual ballot recount would not excuse them from transmitting election results to the Secretary by 5:00 p.m. on November 14. The other opinion, issued to the Chairman of the Florida Republican Party (App. 5; Ex. C), asserted that the

undertaking of manual recounts is only appropriate in cases where a voter tabulation system fails to count properly marked ballots.

On November 14, 2000, the Circuit Court entered its order Granting in Part and Denying in Part Plaintiffs' Motion for Temporary Injunction (the "Injunction"). (App. 5, Ex. B) In analyzing the actions taken by the Secretary of State, the Circuit Court "Ordered and Adjudged that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Order at 8. The Circuit Court ruled that "[t]here is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored." Injunction at 7. The Circuit Court emphasized that "the Secretary cannot decide ahead of time what late returns should or should not be ignored." Injunction at 7.

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 (the "Secretary's Opinion") stating that:

> "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 by the counties by midnight on Friday. (App. 5; Ex. E)

Each of Broward, Miami-Dade and Palm Beach Counties fully complied with the Secretary's directive and filed letters with the Secretary explaining the facts and circumstances supporting their request to amend their election results. (App. 5; Ex. G)

Also on November 14, the Attorney General issued an opinion which squarely disagreed with the legal analysis and conclusion of the Secretary's November 13 advisory construing the definition of voting tabulation error. (App. 5; Ex. D)

On November 15, 2000, at approximately 9:00 p.m., just seven hours after receiving the counties' submissions, the Secretary of State released copies of her letters to the counties denying their request to amend their election returns (App. 5; Ex. H) and held a press conference to announce that she would not accept the results of any manual recount results completed after the original Tuesday, November 14 at 5:00 p.m. deadline.

The Secretary's statement was accompanied by an Official Certificate of the State Elections Canvassing Commission purporting to certify the election returns of the general election in Florida as shown by the returns then on file in the office of the Secretary of State from all the counties in Florida. Official Certificate of the State Elections Canvassing Commission (App. 5; Ex. I). The results purported to be certified at that time included the results of the completed manual ballot count in Volusia County.

On November 15, two significant court actions were commenced. The Secretary of State filed her Emergency Petition for Extraordinary Relief in this Court (App. 5 Ex. F), and Palm Beach County filed its original petition in this Court to determine whether the opinion of the Secretary of State or the opinion of the Attorney General was binding (Case No. SC-00-2346). *Palm Beach County Canvassing Board v. Harris and Butterworth*, 2000 Fla. LEXIS 2242 (Fla. S. Ct., Nov. 15, 2000).

Because of the actions taken by the Secretary of State, on November 16, an Emergency Motion to Compel Compliance with and Enforcement of Injunction was filed by the Democratic Party of Florida and Vice President Gore to enforce the November 14 Order of the Leon County Circuit Court (App. 5).

The Delay and Uncertainty Caused by the Secretary of State's Actions and Lawsuits Filed by the Bush Campaign to Enjoin Manual Recounts

The Secretary's unlawful opinion letters created tremendous uncertainty with respect to manual recounts.

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." Section102.166(5), Fla. Stat. (2000)).

On its face, the statute does not include any words of limitation - it provides a remedy for <u>any</u> type of mistake made in tabulating ballots. That plain reading comports with common sense and Article VI Section 1 of the Florida Constitution. 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.

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. Section102.166(7)(b), Fla. Stat. (2000). The statute provides: "If 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 long recognized, the Board must examine each ballot for all evidence of the voter's intent and make its determination based on the totality of the circumstances. See *Darby v. State*, 73 Fla. 922, 75 So. 411 (1917). This is consistent with the principle, well-established throughout the states, that 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).

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 "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), at p. 15 n. 9.

The Secretary of State contended that Section 102.166(5) has a much narrower scope. 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 applications of 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 argued (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 no such limitation. The relevant definition of "tabulate," the verb form of "tabulation," is "to count, record or list systematically." *Merriam-Webster's Collegiate Dictionary On-Line,* (2000). In fact, the Secretary's own argument proves the point - when the election laws refer only to tabulation <u>equipment</u> 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.

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 have invalidated any ballot that was not machine 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 recognized this inconsistency, but asserted that Section 102.166(5) overruled sub silentio the longstanding principle - reflected in this Court's decisions such as Darby, and in Sections 102.166(7) and 102.168 - that ballots reflecting a voter's intention should be counted even if the ballot was not marked in a way that could be read by machine. 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 opinion would have subjected 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). See also *State of Florida v. Martinez*, 536 So. 2d 1007, 1008 (Fla. 1988) ("the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election"). The Secretary's construction of the statute was directly inconsistent with this principle.

Finally, in previously defending her delaying actions, the Secretary argued that her opinions were due deference. The argument assumes one of the issues before the court, her authority to issue the opinions. It also misstates the deference doctrine. These advisory letter opinions, reflecting no legal analysis or application of case law, were issued in the midst of litigation to which the Secretary herself is a party. They do not rise to the level of an official opinion of a State Agency entitled to deference. *Nikolits v. Nicosia*, 682 So. 2d 663, 665 (Fla. 4th DCA 1996).

In any event, that deference to agency interpretation is inappropriate in the circumstances of this case. An agency's construction of a statute is not entitled to deference where the agency has erroneously interpreted a provision of law. *Southeast Volusia Hosp. Dist. V. National Union of Hop. & Health Care*

Employees, 429 So. 2d 1232 (Fla. 5th DCA 1983); *Pensacola Jr. College v. Public Empls. Rels. Comm'n,* 400 So. 2d 59 (Fla. 1st DCA 1981). 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). But that is precisely what the Secretary sought to do. Accord, *Florida Democratic Party v. Carroll*, No. 00-19324 CA (07) (Fla. 17th Jud. Cir. Ct. Nov. 15, 2000), slip op. 4 (the Secretary's opinion "departs from the essential requirements of law to such an extent that it would be quashed if subject to certiorari review").

Against this backdrop of opinions, directives and requests for injunctions, the members of the Canvassing Boards of Broward, Miami-Dade, and Palm Beach Volusia Counties tried diligently to determine what, if anything, they were permitted to do:

> On November 10, the Broward County Canvassing Board met and voted to undertake a partial manual recount of ballots. Pursuant to section 102.166(4)(d), Fla. Stat. (2000), a sampling of precincts representing just under 1% of all ballots in Broward County, were recounted on November 13. The result of the partial manual recount reflected an increase of four votes for Vice President Gore, and a request was made for a manual recount of all ballots pursuant to section 102.166(5)(c) Fla. Stat. (2000). The Board initially denied the

request in obedience to the Secretary of State's directives. After Judge Lewis' initial opinion, the Board voted to conduct a full manual recount. Although it has been interrupted by a separate legal challenge filed by a Republican activist, who attempted to enjoin the ballot count and who subpoenaed the Canvassing Board to a hearing (which stopped the recount), the Board is continuing to count ballots and expects to complete the count by November 20.

The Miami-Dade County Canvassing Board undertook a manual recount of ballots in a sample consisting of three of its voting precincts, representing 1% of the ballots, pursuant to Section 102.166(4)(d) Fla. Stat. (2000). The recount of those three precincts was completed at 8:00 p.m. on November 14 and resulted in an increase of six votes for Vice President Gore. The Miami-Dade Board tried to amend its election results with the Secretary of State to reflect those votes, but the Secretary flatly rejected them. After receiving rulings from various courts denying injunctions to prevent the manual ballot recount, on November 17, the Canvassing Board voted to undertake a full manual recount.

The Palm Beach County Canvassing Board undertook a manual recount of ballots of four sample precincts pursuant to Section

102.166(4)(d) Fla. Stat. (2000). The recount of sample precincts resulted in a net increase of 19 votes for Vice President Gore. The Board announced that it believed it should do a full recount but believed it could not do so in the face of the Secretary of State's directives. Following the issuance of the conflicting opinions of the Secretary of State and Attorney General, the Palm Beach Board filed its original petition in this Court and ceased counting pending this Court's decision. Following the decision of this Court, the Palm Beach Board resumed the manual recount, and has completed that count in 39 of its precincts, and is diligently continuing that effort.

PROCEEDINGS BELOW

On November 13, the Volusia County Canvassing Board filed its Complaint, in this case. *McDermott, et al. v. Harris*, in the Circuit Court, Second Judicial District (Leon County), together with a Motion for Temporary Restraining Order and Preliminary Injunction. (App. 1 and 2)

On November 13, Vice President Gore filed his Motion To Intervene. (App. 3)

On November 13, the Leon County Circuit Court held a hearing to consider the Motions for Temporary Restraining Order, and on November 14, the Circuit Court entered its Order Granting In Part and Denying In Part Motion

for Temporary Injunction. (App. 5, Ex. B) The Secretary of State noticed an appeal of the order.

On November 16, the Florida Democratic Party and Vice President Gore filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction, in Leon County Circuit Court (App. 5)

On November 16, the Circuit Court held a hearing to consider the Motion to Compel Compliance, and on November 17, that Court issued its order denying the relief sought. (App. 13) That order was appealed by the Florida Democratic Party and Vice President Gore, and a Suggestion to Certify the Issue to this Court was filed with the First District Court of Appeals. The case was certified to this Court, and this Court then issued its order finding that it had jurisdiction, and setting a briefing schedule and oral argument in this matter.

SUMMARY OF ARGUMENT

The question before this Court is as fundamental as it is straightforward: whether lawfully cast and counted ballots are to be included in a vote total that will resolve an issue of paramount national importance -- the selection of the President of the United States. The Secretary of State is seeking to reject the ballots cast by hundreds (or perhaps even thousands) of citizens of this state, before the tabulation of those votes has even been completed. She is seeking to reject some - but oddly, not all -- votes that have been tabulated through manual recounts, which are a lawful means for correcting errors in vote tallies, and thereby ascertaining the will of the voters. This Court should hold that she cannot do so.

The Secretary of State lacks discretion to selectively reject manual recounts as part of Florida's vote tally. Such a rejection is contrary to the Constitution's mandate that the election "shall be determined by a plurality of the votes cast." See Fla. Const., Art. VI, Sec. 1. It is contrary to the statutory requirement that she determine which candidate for President "receive[d] the highest number of votes." See Section 103.011, Florida Statutes (2000). It is contrary to the scheme of state statutes that authorize manual recounts, and enumerate them as part of the official election returns. It is contrary to the fundamental public policy of this state, as articulated by

this Court, which has held that a "the electorate's effecting its will through balloting, not the hypertechnical compliance with statutes, is the object of holding an election." *State of Florida on the Relation of Bill Chappel, Jr. v. Martinez,* 536 So.2d 1007, 1008 (Fla. 1988). It is contrary to a democratic system that rests on elections being determined by the will of the people, not the whim of state officials.

To the extent that her rejection of these ballots rests on her opinion that such manual recounts are available only in cases of machine breakdown, that view is wholly unsupported by statute or case law. This view -- articulated in the midst of litigation, in the heat of a political controversy, and contrary to the practice in this state for more than 150 years -- is not entitled to any deference. The contrasting legal interpretation put forward by the Attorney General of Florida is correct.

Even if the Secretary of State does have discretion to disregard authorized manual recounts in *some* circumstances, her preemptive declaration that she will, in no event, accept manual recounts in this election, was an abuse of that discretion.

It can be in no way a sound exercise of discretion to reject a result that has not yet been proffered: no real balancing can be done when the weight of one side of the scale has yet to be ascertained. The Secretary could not

lawfully exercise discretion before learning the results of the recount. Moreover, in making her determination, the Secretary of State relied upon the wrong legal standard, and usurped a role delegated under Florida law to the County Canvassing Boards.

Additionally, acceptance of the Secretary of State's rejection of the Counties' request for time to complete their vote tallies would reward her for her own wrongdoing and contribution to any "delays." Her issuance of a deadline, which was rejected by the courts of Florida; her issuance of a legal opinion directing a halt to the manual recounts, which has been rejected by two courts in Florida; asking this Court to stop the manual recounts, which it declined to do; her requirement that counties comply with newly created administrative proceedings, which is under review here, all have delayed the manual recount process. Taken as a whole, her approach has been Kafkaesque: she has tried time and again to direct the counties to stop counting - and then, once these directives have been set aside by the courts, she has sought to reject these votes because of the counties failure in obedience to her directives to complete the counts on a timely basis.

Machine reading of punch card ballots will predictably misread a certain percentage of ballots. In a close election, that percentage will affect the results of an election. The manual recount provisions of Florida law are a necessary

component of making the use of the initial machine reading of punch card ballots comport with Article VI, Section 1 of the Florida Constitution and the Equal Protection and Due Process Clauses of the United States and Florida Constitutions.

Given the Secretary of State's conduct in this matter, and the great public importance to citizens of this state - and indeed, of the nation - in having confidence that the vote totals ultimately certified in Florida reflect the will of the people of Florida, the balance of the equities tips heavily to petitioners' side. This Court should direct the Secretary of State to include the results of the three manual recounts now underway in the certified election returns, or at the very least, it should instruct her not to certify the result until those manual recounts can be completed and properly reviewed.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THESE CASES.

This Court May and Should Exercise 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 Section 3(b)(8). 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 Section102.166(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, Section 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.

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 critical.

The law offers the people of the state and Intervenors no adequate remedy other than relief from this court. 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. Once completed the results must be promptly certified to affect the electoral college vote.

A court contest under section 102.168 will take time. Unless the manual count is conducted there will be no way to craft a remedy before December 18, 2000. The other remedy available, a petition under section 120.569, Florida Statutes (2000) is likewise flawed. It too requires that the votes be properly counted to provide a meaningful remedy. And it also is too time consuming.

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.

Quo Warranto is one of the forms of relief Petitioners and Intervenors seek. The statute recognizes the relief is appropriate. The Court should exercise its jurisdiction.

Cases cited by Intervenors George Bush in its brief in Case No. SC 00-2346 recite black letter law that is not applicable to this unique situation. *St. Paul Title Insurance Corp v. Davis*, 392 So. 2d 1304 (Fla. 1989) resolved an effort to resurrect "record proper" review after the constitution was amended

to eliminate it. George Bush's reliance upon *Chiles v. Public Employees Relations Commission*, 630 So. 2d 1093 (Fla. 1994) is misplaced because it overlooks appellate court jurisdiction over agencies created by Florida's Administrative Procedure Act.

The Court in *Kinsella v. Florida State Racing Commission*, 20 So. 2d 258 (Fla. 1944) issued a Writ of Mandamus to a commission which, like the Elections Canvassing Board and the Secretary was not a court. It relied in part upon the lack of adequate remedy at law, as the Petitioner and Intervenors do here. *Butterworth* v. *Kenny*, 714 So. 2d 404 (Fla. 1998) issued a writ of quo Warranto because an agency was exceeding its statutory authority as Secretary Harris is.

Furthermore the consolidation of the Palm Beach Canvassing Board's original action with the appeals from the Second Judicial Circuit moot the jurisdictional argument. This court's jurisdiction in Case Numbers SC 00-2348 and SC00-2349 is unquestionable. Art. V, Section3(b)(4); Fla. R. App. Pro. 9.030(a)(2)(B).

II. THE SECRETARY CAN NOT PROPERLY EXERCISE DISCRETION TO REJECT THE RESULTS OF THE ONGOING MANUAL RECOUNTS

Secretary Harris has justified her unlawful attempt to stop the recount of votes in Broward, Miami-Dade and Palm Beach Counties as an exercise of her "official" discretion. She turns for support to the opinion of Judge Lewis, which states that "the Secretary of State may ignore [county returns filed after 5:00 p.m. of November 14, 2000,] but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate facts and circumstances." App. 5, Ex. B Order Granting in Part and Denying in Part Motion for Temporary Injunction, Leon County Circuit Court Case No. 00-2700, at 2-3.

The heart of the Secretary's claim is her current assertion that she has the discretion to reject vote totals determined by a manual recount if the recounted returns are submitted more than seven days after election day - and that she may exercise that asserted discretion virtually without constraint. This position is an astounding one: it would reject ballots that are conceded to have been validly cast, and that were identified in a properly initiated and conducted recount, simply because they reached the Secretary later than a deadline so short as to preclude the completion of the recounts provided for by statute. This conclusion is the more remarkable, of course, because much of the delay that the Secretary now finds objectionable is attributable to the Secretary's own actions. Such an extraordinary attempt to

disenfranchise Florida voters has no basis in the statute and runs counter to the public policy of this State. It should be rejected.

A. The Secretary Has No Discretion To Reject The Results Of A Manual Recount

At the outset, there is a fundamental defect in the Secretary's position and in the analysis used by Judge Lewis: in the circumstances of this case, the Secretary *has no discretion at all* to refuse to take into account the results of a manual recount. In arguing to the contrary, the Secretary necessarily is contending that she may disregard properly cast votes, or may halt the tabulation of votes, even if ongoing recounts are in the process of demonstrating that valid ballots were not tabulated *and that the wrong candidate is being certified as the winner*. Not surprisingly, this approach is not compelled by the statutory language, is flatly inconsistent with the statutory structure, and is precluded by the fundamental purposes of Florida election law.

1. The Secretary's view that Section 102.111 or Section 102.112, Fla. Stat. (2000), allows her to exclude manually recounted votes - and to permit certification while a manual recount is pending - cannot be reconciled with the basic statutory structure. The law expressly contemplates that the results of a manual recount will trump a machine vote tabulation. See Section

102.166(5)(c), Fla. Stat. (2000) (when sample shows errors, county-wide manual recount may be ordered). The Secretary appears to recognize as much. She does not deny that she must include manually recounted votes that are tabulated *prior* to 5 p.m. of the seventh day following the election; indeed, she certified the results of a manual recount in Volusia County. Official Certificate of Election Results, App. 5, Ex. I. Instead, her position is that, although manually recounted votes ordinarily are controlling, she has discretion to exclude those votes if they are returned to her office after that time.

This position, however, makes no sense at all. Florida law provides that a request for a manual recount may be filed at any time prior to certification of the election results (Section 102.166(4)(b)); in addition, by providing that a manual recount may be limited to sample precincts before a county-wide manual recount is authorized (Section 102.166(4)(d), 5(c)), the Legislature plainly contemplated that some time might go by before the recount was conducted. Indeed, the Legislature surely knew that, where large counties are concerned, it may be *inevitable* that it will take more than a week for a manual recount to be requested, authorized, and completed. Against this background, it simply cannot be the case that the Legislature provided for full manual recounts to determine the accurate and controlling

vote tally, while allowing the Secretary to certify a winner prior to when the recount could be completed.

Moreover, county canvassing boards order full manual recounts when they find, based on a review of a sample of the county's precincts, "an error in the vote tabulation which could affect the outcome of the election." Section 102.166(5), Fla. Stat. (2000). It would make no sense for the Legislature to allow the Election Canvassing Commission to certify the winner of an election based upon vote counts found to be potentially erroneous at the very time that corrected vote counts were being produced.

Read together, Sections 102.112 and 102.166 are most naturally understood to dictate that all manually recounted votes be tabulated and that certification be delayed pending the completion of a manual recount that was requested on a timely basis. See *Acosta v. Richter*, 671 So.2d 149, 153-154 (Fla. 1996) (a statute must be interpreted to give effect to all of its clauses "and to accord meaning and harmony to all of its parts"). To instead read Section 102.112 as permitting the Secretary to exclude votes because a manual recount is not final within one week of the election would run afoul of the black-letter rule that a "statute must be read with reference to its manifest intent and spirit and cannot be limited to the literal meaning of a single word.

It must be construed as a whole and interpreted according to the sense in which the words are employed, regard being had to the plain intention of the Legislature." *Werhan v. State*, 673 So.2d 550, 554 (Fla. App. Dist. 1996). See *Las Olas Tower Co. v. City of Fort Lauderdale*, 724 So.2d 308, 312 (Fla. DCA 1999) ("a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity"), *rev. granted*, 761 So.2d 330 (Fla. Mar. 20, 2000). In fact, Sections 102.111 and 102.111 plainly are meant to apply in the ordinary case when a recount is not proceeding; read in context, these provisions appear intended only to penalize unreasonably dilatory county canvassing boards and not to disenfranchise the voters in such jurisdictions. This point is further suggested by Section 102.112(2), which provides that members of County Canvassing Boards may be fined $200 for each day that returns are late. Although the provision states that the Elections Canvassing Commission "shall" fine members, it cannot plausibly be suggested that fines are appropriate when certification is delayed for reasons beyond the members' control - for example, during the pendency of a statutorily mandated recount. Indeed, even when a recount is not pending these provisions do not preclude the late submission of ballots; this Court has held that "we do not find that section 102.111's 'all missing counties'

language turns the certification process into 'an imperative, ministerial duty, 'involving no judgment on the part of the state canvassing commission.'" *State of Florida on the Relation of Bill Chappell, Jr. v. Martinez*, 536 So.2d 1007, 1008 (Fla. 1988).

Other provisions of the statute confirm that the Secretary's approach is illegal. The statutory provision dealing with certification of elections states that the Elections Canvassing Commission is to certify the returns "as soon as the *official results* are compiled." Section 102.111, Fla. Stat. (2000) (emphasis added). And by statute, the "official return of the election" - the only other use of the word "official" in the election law - includes "[t]he return printed by the automatic tabulating equipment, *to which has been added the return of* write-in, absentee, and *manually counted votes*." Section 101.5614(8) (2000), Fla. Stat. (emphasis added). It therefore is clear that the "official" results that are used in certifying the election include manually counted votes - making it improper to exclude such votes and certify the election before the manual recount is completed.

2. In addition, the Secretary's position is shockingly inconsistent with "the public policy of Florida" (*Bayne v. Glisson*, 300 So. 2d 79, 82 (Fla. App. 1974)) and the essential purpose of the State's election laws: effectuating the will of the electorate. This Court has held repeatedly that,

"[b]y refusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1976). This means that

> the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "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?"

Chappell, 536 So.2d at 1008-1009 (citation omitted).

Given the force of this principle, it is not surprising that this and other Florida courts have held time and again that even the literal terms of a statute must yield when necessary to effectuate the electorate's will. See, *e.g.*, *Boardman*, 323 So.2d at 266 ("What is important . . . is . . . that the will of the people was affected.").

Of course, that conclusion necessarily applies *a fortiori* in this case where, as we explain above, the various provisions of law, when read together, do not allow the exclusion of manually recounted votes. Yet against this basic policy, the Secretary evidently asserts that the convenience of a quick certification may justify ignoring lawfully cast votes that are being

identified in the manual recount. With respect, we submit that the Secretary's position reflects a manifest disregard for the public policy of Florida.

3. The Secretary also cannot justify her approach by asserting that the exclusion of recounted votes somehow is immaterial because a voter or candidate may attempt to challenge a certified result after the fact pursuant to the contest procedure in Section 102.168, Fla. Stat. (2000). By definition, votes that are added in a manual recount are validly cast votes that should have been counted in the first place. Yet the statutory contest procedure places a substantial burden on voters or candidates who want those votes to count: they must initiate suit and pay a filing fee, and also face the possibility of delay while the other candidate claims to be the victor. Because all valid votes are of equal value, it would be patently unfair, wholly without a statutory basis, and inconsistent with public policy to place candidates (or voters supporting candidates) at a special disadvantage when they are supported by wrongfully disregarded votes that were identified in a manual recount.

Section 102.168 highlights the error in the Secretary's approach. That provision states that a certification by the Election Canvassing Commission may be set aside on the basis of "rejection of a number of legal votes

sufficient to change or place in doubt the result of the election." Section 102.168(3)(c), Fla. Stat. (2000). Especially given the standard for initiating a manual recount ("an error in the vote tabulation which could affect the outcome of the election" (section 102.166(5), Fla. Stat. (2000)), that any certification that fails to take into account the results of an ongoing manual recount could be set aside immediately under this standard. The Legislature could not have intended to create a situation in which an election certification was almost certainly invalid; the only logical conclusion is that the Secretary and the Elections Canvassing Commission are barred from certifying at all prior to completion of the manual recount.

Any potential for undue delay in completing recounts, of course, is discouraged directly through the availability of fines on dilatory county canvassing board members pursuant to Section 102.112, Fla. Stat. (2000). And in extreme cases, mandamus proceedings would be available to compel action by a recalcitrant canvassing board. In this setting, it surely could only be in the most extraordinary case, if at all, that the Secretary could punish a canvassing board's lackadaisical behavior by disenfranchisng its county's citizens. This case, of course, could not possibly call for such treatment. There has in fact been no unreasonable delay on the part of the county canvassing boards here; to the contrary, as we explain above, the delay in the

completion of the recounts in this case is almost entirely attributable to the Secretary's own energetic attempts to obstruct and interfere with a manual recount process mandated by law.

B. If The Secretary Does Have Discretion To Reject Manual Recounts In Appropriate Circumstances, She Abused That Discretion Here

For the reasons explained above, the Secretary in no circumstances has discretion to reject the results of a manual recount. Even if we are wrong in that conclusion, however, the Secretary did not properly exercise her discretion in this case. *First*, whatever the nature of the constraints on her discretion, she could not exercise that discretion properly prior to the completion of the recounts. *Second*, it is plain as a matter of law that the Secretary in fact applied an improper legal standard in exercising her discretion. And *third*, on this record and under the proper standard, any decision to disregard the recount would be an abuse of discretion. For all of these reasons, the Secretary's decision cannot stand.

1. *The Secretary Abused Her Discretion By Deciding To Ignore The Results Of The Manual Recounts Even Before She Received Them*

Whatever the precise contours of the Secretary's asserted discretion to disregard late-filed election returns, she clearly abused it when she decided to ignore the results of manual recounts *before they even were completed*.

As even the Circuit Court recognized, "the exercise of discretion, by its nature, contemplates a decision based upon a weighing and consideration of *all attendant facts and circumstances.*" Slip Op. at 6 (emphasis added). Indeed, under Florida law, "making a premature decision based on an insufficient study of the relevant factors" constitutes an abuse of discretion. *Pasco County* v. *Franzel*, 569 So. 2d 877, 879 (Fla. App. 1990).

Without knowing the result of the manual recount, the Secretary prematurely announced in advance that the recounted votes submitted by the county canvassing board could not satisfy what she believed to be the controlling criteria. But even under the standards that the Secretary herself identified, she could not properly make that determination on the existing record. In the Secretary's view, a waiver of the statutory deadline is *inappropriate* "[w]here there is nothing 'more than a mere possibility that the outcome of the election would have been effected [*sic*].'" App. 5, Ex. H (citation omitted). It naturally follows from this conclusion that a waiver must be *appropriate* when there is a probability (or certainty) that the results of the manual recount *would* affect the outcome. Indeed, it could hardly be otherwise. Section 102.168 - which, as we explain below, the Secretary improperly uses as the basis for her standard - expressly provides that even a certified election must be set aside when enough legally cast votes were

improperly excluded from the tabulation "to change or place in doubt the outcome of the election." Section 102.168(3)(c). It therefore must be the case that the Secretary abuses her discretion when she excludes properly cast ballots that could have changed the result.

The Secretary will not be in a position to determine whether the recounted votes satisfy that standard until those votes are tabulated and returned.

At bottom, the underlying flaw in the Secretary's approach may be that she is confusing her role with that of the county canvassing boards. Although the Secretary's letters anticipatorily rejecting the manual recounts do not quite say this expressly, the criteria she applies suggests that her real contention is that the county canvassing boards should not have initiated manual recounts in the first place. But as we explain elsewhere in this brief, Section 102.166 commits that determination, in the first instance, to the discretion of the county canvassing boards; the Secretary has no role to play in that process.

2. The Secretary Plainly Employed The Wrong Legal Standard In Exercising Her Discretion

Even if the Secretary is correct that she has discretion - and she does not - she committed reversible error by employing the wrong legal standards

in making her decision. The Secretary was again explicit in articulating the source of the criteria that she applied: "I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election." App. 5, Ex. H. Thus, expressly drawing upon and citing the case law governing election *challenges*, the Secretary explained that manual recounts will be allowed only where there is a showing of fraud, substantial noncompliance with election procedures coupled with reasonable doubt as to whether the certified results expressed the will of the voters, or an act of God that prevented the counties from complying with the statutory deadlines. Id.

As the Secretary freely admitted, she derived the legal standards controlling her exercise of discretion from the case law addressing the question "whether or not to uphold a challenged election." For this reason, the cases cited by the Secretary were decided under Section 102.168, Fla. Stat. (2000), which governs the "[c]ontest of election[s]." As the Secretary explained, those cases have articulated a stringent test: in the interest of finality, the courts are not to set aside a final and certified election pursuant to a post-certification statutory contest unless it appears clear that there is a

reasonable probability that the outcome of the election did not express the will of the people. See, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So.2d 720 (Fla. 1998).

These decisions, however, are concerned with the power of the *courts* to overturn a final election pursuant to Section 102.168. They have absolutely nothing to do with the power of an *election official*, during the course of the statutory election certification process, to refuse under Section 102.112 to accept a manual recount conducted pursuant to Section 102.166. The solid policy rationale underlying the strict standard governing Section 102.168 - that elections should be decided by the people, not the courts, and therefore that the courts should refuse to set aside a final election absent a clear indication that the will of the people was not done - is immaterial in this context. Instead, the very different question confronting the Secretary was which tabulation, the manual or the machine count, should be used in determining the will of the people. There is absolutely no reason to import the Section 168 test to govern the Secretary's discretion in this instance.

Moreover, in the context of a Section 112 decision whether to accept a manual recount conducted pursuant to Section 166, a county canvassing board must necessarily base its decision whether to conduct a full manual recount on the incomplete information that extrapolation from a partial

recount can provide. By contrast, in the context of a Section 168 contest, a court considers a challenge to election results based on a full recount. Given the more complete evidence available to the court in the Section 168 context, it is reasonable that the Legislature would have established a more stringent standard for determining whether to go forward with the challenge.

What is more, by providing for manual recounts in close elections, Florida law (like Texas law, see Tex. Elec. Code Section 212.005(d) ("[a] manual recount shall be conducted in preference to an electronic recount")), expresses a preference for manual counts over machine counts. Such manual counts are presumptively more accurate. Thus, it would be contrary to Florida law to limit the use of the preferred means of counting to only the circumstances governing a Section 168 challenge.

For these reasons, the Secretary erred in employing the stringent Section 168 test in exercising her discretion. It is, by definition, an abuse of discretion for a decisionmaker to employ the wrong legal standard in exercising her discretionary authority. See, *e.g.*, *Bayonet Point Regional Med. Ctr.* v. *Department of Health & Rehabilitative Servs.*, 516 So.2d 995 (Fla. DCA 1987) (agency abused discretion in making decision based on misunderstanding of the governing rules); *Kremer* v. *Kremer*, 595 So.2d 214, 218 (Fla. DCA 1992) ("We must take care to avoid a mechanical application

of the abuse of discretion test to shrink from reviewing the incorrect application of clear legal standards or *the application of the wrong standard* . . . . To do so is to have the rule absorb the whole of judicial review - to have the branch assimilate the tree.") (emphasis added; internal quotation marks omitted). Accordingly, for this reason alone the Secretary's decision cannot stand.

3. Applying The Proper Legal Standard, The Secretary's Refusal To Accept The Recounts Was An Abuse Of Discretion As A Matter Of Law

Because the Secretary applied the wrong legal standard, she paid no real attention to the record in this case; she essentially confined herself to asking whether the county canvassing boards had justified their request for late filing by pointing either to fraud, to a statutory violation, or to a hurricane. Viewed under the proper standard, however, the particulars of the record are relevant, and they point to a clear conclusion: it would be an abuse of discretion for the Secretary *not* to accept the recounted vote tabulations as a part of the official returns.

Recounts and the submission of recounted ballots are governed by Section 102.166 rather than Section102.168, and it is the former provision that accordingly must provide the standards that bear on the exercise of the

Secretary's discretion regarding recounted ballots (assuming, again, that she has any discretion to apply on the subject). Under that provision, it is committed to the county canvassing board's discretion to determine whether to initiate a manual recount, once a written request containing a statement of reasons has been submitted. Section 102.166(4)(b), (c), (d). In cases - like this one - where the board chooses to recount only sample precincts, "[i]f the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*" take specified steps, which may include "[m]anually recount[ing] all ballots." Section 102.166(5)(c) Fla. Stat. (2000) (emphasis added).

If the Secretary is to exercise discretion regarding the question whether the conduct of this process permits exclusion of manually recounted ballots, the criteria she applies must be derived from the governing statute; this means that she must look to such considerations as whether the reasons propounded for the recount were impermissible ones, or whether the result of the sample recount reasonably supported the conclusion that county-wide errors could have affected the outcome. Here, those considerations conclusively support the conclusion that there were legitimate grounds for the conduct of the manual recounts - meaning that the Secretary had no basis to exclude the recounted vote tabulations.

There has been no suggestion by the Secretary that any relevant consideration would make inclusion of the recounted totals in the official results inappropriate. To the contrary, letters submitted to the Secretary by both Palm Beach and Broward Counties explained that their sample recounts revealed errors that could well affect the outcome of the election. App. 5, Ex. G There is absolutely no reason to doubt the accuracy of these submissions. Indeed, Palm Beach County offered considerable factual support for its belief that errors could have affected the result of the election, including a significant net gain for Vice President Gore in its sample recount and a county-wide total of approximately 10,000 undervotes. Id. On this record, initiation of the manual recounts plainly was appropriate, and there can be no justification for excluding validly cast votes that are identified in the recount. If the Secretary found otherwise, she would abuse her discretion as a matter of law.

One additional point bears mention: to the extent that delay in the completion of manual recounts bears on whether the Secretary has discretion to exclude the recounted totals - and we believe that it does not - exclusion on that basis in this case would be a manifest abuse of discretion. Broward County explained in considerable detail the reasons for its delay in completing the recount, noting, among other things, the enormous voter

turnout, the size of the County, and the large number of ballots. Id. And most fundamentally, of course, any delay by any of the Counties is in large part attributable *to the Secretary herself*. There is no need here to recount the Secretary's efforts to delay the recount. But it cannot be the case that a state agency may deny relief by pointing to a disability that the agency itself imposed on the applicant. For the Secretary to prevail in this effort would make her actions not only arbitrary and unlawful, but also positively Kafkaesque. For these reasons, it would be an abuse of discretion for the Secretary to exclude the recounted ballots.

CONCLUSION

We therefore ask this Court to issue an order directing the Secretary and the Elections Canvassing Commission not to declare the winner of the Presidential election until they receive the results of manual recounts now underway and then include those results in the "official results" (Section 102.111).

The starting point in assessing the propriety of this relief is the extraordinary nature of this case. The right to vote is at the core of our democracy and the President is our nation's head of state. There is an overwhelming interest in ensuring that every vote is counted.

There is a similarly weighty interest in avoiding uncertainty or confusion regarding the identity of our President-elect. It is critical that the Elections Canvassing Commission's decision be made on the basis of the most accurate vote count possible, in order to eliminate the possibility that the identity of the winner will change - or even be called into question - by the outcome of the manual recounts. Not just within our country, but all around the world, that confusion would likely generate considerable instability that, in turn, would produce irreparable injury.

These injuries could be avoided if the Secretary and the Elections Canvassing Commission simply waited for the results of the manual recounts

and then took those results into account in determining the winner of the Presidential election.

That approach is appropriate for another reason. As discussed above, much of the delay in the manual recount resulted from the repeated efforts of the Secretary of State to stop those efforts. In these circumstances, it is appropriate to ensure that the county canvassing boards will have an appropriate time to finish their work.

Respectfully submitted this 18th day of November, 2000.

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