Sunday, November 19, 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

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

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CERTIFICATE OF FONT

This brief and Petitioner's Initial Brief have been printed in New Times New Roman 14 point with 10 characters per inch.

This Court repeatedly has recognized that "the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding elections." *Chappell v. Martinez*, 536 So.2d 1007, 1008 (Fla. 1988); see also Initial Brief at 35-36. The Secretary of State and Governor Bush nonetheless urge this Court to construe Florida law to prevent county canvassing boards – which are charged under Florida law with primary responsibility for counting ballots – from utilizing the procedures long established in Florida law (and in the laws of many other States) to ascertain the electorate's will in close elections such as this one. This Court should reject that approach.[1]

I. THIS COURT SHOULD HOLD THAT COUNTY CANVASSING BOARDS MUST APPLY THE OBJECTIVE INTENT STANDARD TO DETERMINE WHETHER TO COUNT A BALLOT

A. THIS COURT MAY AND SHOULD EXERCISE ITS EQUITABLE POWER IN THIS CASE, GIVEN THE TIMING AND IMPORTANCE OF THIS ISSUE

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). Due to the unique and extraordinary

[1] Appellees challenge this Court's jurisdiction. As we discussed in our initial brief (at pages 25-29), ample authority establishes the Court's jurisdiction in these cases. Exercise of that jurisdiction is plainly appropriate – indeed, essential – in the extraordinary circumstances presented here.

circumstances of the current Presidential election recount, the expedited time frame in which the issue must be addressed, and the fundamental public interest in resolving this matter equitably, this Court should exercise its jurisdiction.

As discussed below, different canvassing boards have used different standards in recounting ballots and the issue has already been considered by several Circuit Courts. This issue must ultimately be resolved by this Court and we urge, in view of the desire for an expeditious resolution of the entire ballot dispute, that it be resolved now.

B. THIS COURT SHOULD HOLD THAT COUNTY CANVASSING BOARDS MUST APPLY THE OBJECTIVE INTENT STANDARD TO DETERMINE WHETHER TO COUNT A BALLOT

We agree with the Broward County Canvassing Board that this Court should provide guidance with respect to the proper standard that counting teams and county canvassing boards should use in applying Section 102.166(7) as they count individual ballots. That guidance is essential to ensure that the counties use a proper standard – and a uniform standard – as they conduct the manual recounts now underway.

For more than 80 years it has been settled Florida law that a ballot must be counted if the voter's intent is apparent from an examination of the ballot. *Darby v. State*, 73 Fla. 922, 924, 75 So. 411, 413 (1917), see also Section 101.5614(5), Fla. Stat. The manual recount statute itself provides that counting teams are to manually examine punch card ballots "to determine a voter's intent" and if they are unable to do

so "the ballot shall be presented to the county canvassing board for it to determine the voter's intent." Section 102.166(7)(b). Like all issues of compliance with voting requirements, the issue is "ultimately a judicial question." *State v. Williams*, 97 Fla. 159, 171, 120 So. 310, 314 (Fla. 1929).

Florida's objective intent standard is the standard applied in other states as well. As noted in our opening brief, the Supreme Judicial Court of Massachusetts considered the question of whether manual recounts were more reliable than machine counts and, if so, what standard should be used in a manual review of punch card ballots. In *Delahunt v. Johnston*, 423 Mass. 731, 671 N.E. 2d 1241 (1996 Mass.), a unanimous court overturned the declaration of a winner in a Congressional primary based on the court's own manual review of 956 contested ballots. The court held, "The critical question in this case is whether a discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned. The trial judge concluded that a vote should be recorded for a candidate if the chad was not removed but an impression was made on or near it. We agree with this conclusion." 671 N.E. 2d at 1243. The *Delahunt* court also ruled, consistent with Florida law, that the assessment of individual disputed ballots was ultimately a question of law for the court. *Id.*

The objective intent standard as expressed in Florida law and in *Delahunt* is part of an extensive and comprehensive body of law, 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. *See Stapleton v. Board of Elections*, 821 F. 2d 191 (3d Cir. 1987) ("Absent an unequivocal legislative intent to the contrary, we are compelled to uphold the voter's intent to the extent it can be ascertained."); *Democratic Party of the Virgin Islands v. Board of Elections*, 649 F. Supp. 1549 (D.RV.I. 1986) ("the intention of the elector must be paramount"); *Duffy v. Mortensen*, 497 N.W. 2d 437, 439 (S.D. 1993) (vote should not be excluded because voter's "hand was unsteady or his vision impaired" so long as intent is clear, because "a voter [that] displays a restrained enthusiasm in marking his ballot . . . should not render his effort in vain"); *Hickel v. Thomas*, 588 P. 2d 273, 274 (Alaska 1978) (unperforated punch card ballots marked by pen are counted because they reflect voter's intent); *Fischer v. Stout*, 741 P. 2d 217 (Alaska 1987); *Escalante v. City of Hermosa*, 195 Call. App. 3d 1009, 241 Cal. Rptr. 199 (1987); *Wright v. Gettinger*, 428 N.E. 2d 1212, 1225 (Ind. 1981) (ballots with partially attached chads counted because they reflect voter's intent).

Indeed, in Illinois, the Supreme Court in *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (1990) held that a manual recount was required to implement the intent of voters even though Illinois statutes (unlike those of Florida and many other states) did not expressly provide for manual recounts.

Unfortunately, among the other unusual events of the last two weeks, there has been a concerted effort to induce canvassing boards to apply a more narrow, per se standard that requires detachment of the chad. For example, the Broward County Canvassing Board adopted a rule in its initial recount that required that at least two corners of the chad be detached before a ballot would be counted. The Board reached this conclusion after being told by a lawyer that "Texas has a law that says that there must be two or more detached" corners from a chad to be counted. (R.App. 3, p. 69) The Board in announcing its standard said it wanted "the record to reflect" that its standard "comports with and is analogous to Texas statutory law." (R.App. 3, p 81)

The information supplied to the Broward Board was simply not true. Texas law expressly provides that a ballot be counted if <u>any</u> one of the following are true:

> "(1) at least two corners of the chad are detached;
> (2) light is visible through the hole;
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote;[2] or

[2] Numerous national news stories over the past ten days have reported on the inaccuracies of some ballot counting machines, including the types at issue here, and the manners in which various jurisdictions have determined voter intent. Brooks Jackson, "'Hanging Chads' often viewed by courts as sign of voter intent" and "Brooks Jackson examines mechanics of voting machines." CNN-on-line, November 16 and 17, 2000.

> (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote." (Title 8, Section 127.130(d))

Moreover, Texas statutes provide that the foregoing criteria is not exhaustive and that a ballot should be counted if there is other evidence of "any clearly ascertainable intent of the voter" (Section 127.130(e)) – which could include instances where the chad was not disturbed at all or when a voter marked a punch card ballot with a pen.

On November 17, 2000 the Circuit Court in Broward County orally instructed the Broward Board to count "pregnant chads and all this other stuff that's supposed to show the totality of the ballot and show the intent of the voter," (R.App. Ex. 2 pp. 21-23).[3] The next day the Chairman of the Board declared that "for the sake of consistency and the sake of organization" the Board would "continue to do what we have been doing with the assurance that any ballots that have to be reconsidered are segregated" until the Board received a formal order. (R.App. Ex. 4, pp. 6, 10) The Chairman of the Broward County Board acknowledged there are "hundreds of more votes in this county that will be counted" if the objective intent standard directed by the Circuit Court were employed instead of the per se "two corner" rule. (R.App. Ex. 4, p. 10)

This Court should confirm an objective intent standard that would enfranchise Florida's voters by counting the votes of all who indicated their intent on their ballots, and reaffirm the long-standing election philosophy of this state – that its election laws

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[3] The Palm Beach County Circuit Court has similarly held that Palm Beach Canvassing Commission's "present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law." *Florida Democratic Party v. Palm Beach county Canvassing Board*, No. CL 00-11078AH (Fla. 15th Judicial Circuit). (R.App. Ex. 5)

shall be interpreted to effectuate the will of the people. *See Republican State Executive Committee v. Graham*, 388 So. 2d 556 (1980 Fla.).

II. THE SECRETARY COULD NOT PROPERLY EXERCISE DISCRETION TO EXCLUDE THE RESULTS OF MANUAL RECOUNTS

The Court is presented here with two clear issues of law that can be decisively resolved on the basis of the record before it. First, whether the Secretary has discretion to reject manually counted votes. Second, if she has such discretion, whether she has applied the incorrect legal standard in exercising it.

A. THE SECRETARY DOES NOT HAVE DISCRETION TO REJECT VALID MANUALLY COUNTED VOTES AFTER THE SEVEN DAY DEADLINE

The Appellees insist that the results of recounts that last beyond seven days must be disregarded in either all or in all but the narrowest of circumstances. This argument, however, makes a hash of the relevant statutory provisions, disregards the manifest legislative intent, and misunderstands the nature of the Secretary's discretion.

Appellees' Approach Would Produce Arbitrary Results

If Appellees were correct in asserting that the results of any statutorily mandated recount that continues beyond the seven day "deadline" must be rejected, the following unintended consequences would follow:

- Full manual recounts could almost never be completed timely in Florida's larger counties;
- The counties would be obligated by law in certain circumstances to undertake full manual recounts (based upon the results of sample counts), knowing, to a certainty, that the full recount could not be completed in time for the results to be considered; and
- The provision of Section 102.166 which permits an interested party to seek a recount at <u>any</u> time prior to the Canvassing Board's certification, would be rendered a nullity.

Appellees' approach is inconsistent with the legislative intent.

Appellees contend that virtually the only imaginable circumstance in which county returns will not be forwarded to the Secretary within the seven-day period is one in which a § 102.166 recount is proceeding, and that the Legislature therefore must specifically have intended §§ 102.111 and 102.112 to apply to recounts. The Appellees' assertion, however, is demonstrably false. In fact, § 102.112 was enacted in response to *Chappell v. Martinez*, 536 So.2d 1007 (Fla. 1988), in which a county was late in filing its returns through what appears to have been an administrative oversight; the case had nothing to do with recounts. See Laws 1989, c. 89-338, § 30, eff. Jan. 1, 1990, codified at 102.112, Fla. Stat. That type of situation, and not the

wholly different circumstance of an ongoing recount, doubtless is what the Legislature had in mind in enacting the seven-day deadline.

> ***The statutory provisions can be reconciled only by reading the seven-day deadline to be inapplicable when a recount that may change the vote tabulations is proceeding***.

The Appellees' argument that the results of recounts lasting beyond seven days must be ignored rests on hyperbole and a misunderstanding of our position. We do not read Sections 102.111 and 102.112 out of the statute. Rather, our position is that the interaction of those provisions and Section 102.166 *in the particular context of recounts*, makes it improper for the Secretary to disregard properly recounted votes. Unlike any of the other situations hypothesized by the Appellees, an ongoing recount is intended to determine the proper tabulation of votes. And the undeniable fact is that the Legislature provided in Section 102.166 that manually recounted votes trump other results. To exclude votes determined in such a recount, as Appellees propose, would make a mockery of the statutory structure.

Appellees frankly offer a reading of the statute in which recounts will be meaningless even after a canvassing board detects errors in the vote tabulation that could have affected the outcome of the election, in which a canvassing board must conduct recounts that will have no effect, and in which voters inevitably will be disenfranchised. Needless to say, this approach makes no serious attempt to reconcile §§ 102.111 and 102.112 with § 102.166 – and thus takes no account of the rules of

statutory construction applied by this Court, requiring a reading the statutory structure as a coherent whole. When the proper reading is accorded the statutory structure, it is plain that is best accomplished by that §§ 102.111 and 102.112 can have no application when the vote tabulation process, in the form of a manual recount, is continuing.

This reading is confirmed by longstanding practice.

The Secretary in the past has repeatedly accepted the results of recounts that extended beyond seven days. See, *e.g. Ballots To Be Manually* Recounted, Orlando Sentinel Tribune (Nov. 10, 1998); *Board Okays Race* Recounts, St. Petersburg Times (Apr. 24, 1992). Nor are we aware of any prior case in which the Secretary purported to exclude such results or to fine a county canvassing board for submitting them late (even though appellants' position appears to be that such fines are mandatory).

If we are incorrect in our view that Sections 102.111 and 102.112 have no bearing here, and those provisions are thought to give the Secretary discretion to exclude recounted results in some circumstances, the Appellees plainly are wrong in their assertion that the seven-day deadline is absolute. The Appellees' argument on this point rests entirely on the assertion that the word "shall" always imposes mandatory obligations. In fact, this and other Courts have held repeatedly that examining the context and applying common sense may lead to the conclusion that the statutory use of "shall" is *not* mandatory. See, *e.g., McLean v. Bellamy*, 437 So. 2d

737 (Fla. 1983). In the setting of elections in particular, as held in a number of cases cited in our opening brief, the literal language of a statute should not be applied so as to thwart the electorate's will. Indeed, this Court in *Chappell* rejected the very assertion advanced by the Appellees here: 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." 536 So.2d at 1008.

B. TO THE EXTENT THE SECRETARY MAY HAVE DISCRETION, SHE HAS ABUSED IT

If the Secretary does have discretion, the crucial question becomes the nature of the standards she must apply. As explained in our opening brief, the Secretary's articulated standards, which she purportedly derived from case law under section 102.168, are inapplicable here because this situation does not involve a contested election. And because the Secretary's standard appears to be inconsistent with her prior practice, it is due no deference. Cf; *Nordheim v. Dept. of Environmental Protection*, 719 So.2d 1212, 1214-1215 (Fla. Dist. Ct. App. 1998). But the Secretary's decision cannot stand even if the Appellees are right in arguing that § 102.168 is relevant. The Secretary borrowed only a *portion* of the standards that apply to contested elections statute that deal with fraud or illegality. But § 102.168 also provides that an election will be set aside if enough legal votes are rejected to

place the outcome in doubt. We will not know whether this provision applies here until the recount is complete. At a minimum, under even her own standard, the Secretary abused her discretion in ruling prematurely.

At bottom, any discretion that the Secretary may have must be exercised in light of the policies expressed in § 102.166. And given that the Secretary is making an administrative decision declining to count validly cast votes, she must have a "compelling reason" to do so. *Chappell*, 536 So.2d at 1008. Here, the only arguably relevant reason articulated by the Appellees for ignoring the recounts is that the canvassing boards supposedly delayed excessively in initiating them. As the "Time Line" appended to this Reply as Ex. 1 demonstrates, however, most, if not all of the delay in this extraordinary case was due to the actions of the Secretary herself, not by any lack of diligence by the canvassing boards. For the Secretary to exercise her discretion to exclude the results of a valid recount in such circumstances is the very definition of capriciousness.

The claim for essentially unreviewable discretion by the Secretary of State is particularly inappropriate – and, indeed, would raise serious Constitutional issues – since she is personally a participant in the controversy to be resolved as a manager of the campaign her purported exercise of discretion benefits. The unprecedented interpretation of law for which the Secretary argues would give her the effective power

to determine who would win close elections by deciding when to cut off the recount process.

III. SECTION 102.166(5) PROVIDES THAT ANY TYPE OF MISTAKE IN VOTE TABULATION DISCOVERED DURING A MANUAL RECOUNT OF SAMPLE PRECINCTS MAY JUSTIFY A MANUAL RECOUNT OF ALL BALLOTS

The Secretary contends that all of the manual recounts now underway are unlawful because they are inconsistent with the Secretary's opinion letters adopting a restrictive reading of Section 102.166(5). That argument is meritless. As the Attorney General demonstrated in his brief and opinion letter, and as we discuss in our opening brief (at pages 13-19), the Secretary's position is completely inconsistent with Florida law.

The argument advanced (without the citation of any authority) by the answering briefs that the results of manual recounts can be rejected in their entirety because they correct only "voter error" is

(A) inconsistent with the undisputed fact that machines make a predictable number of errors regardless of "voter error"

(B) inconsistent with the Florida statutory direction to employ a manual recount "to determine the intent of the voter," and

(C) inconsistent with the unbroken line of authority in Florida and elsewhere that where a voter's intent can be ascertained, that intent, and not the rigid compliance with any method for expressing that intent, controls.

(D) inconsistent with the secretary's inclusion of manual recount results from several other counties in her certification of this election

This Court should hold the Section 102.166(5) permits a full manual recount to be ordered on the basis of any type of mistake in vote tabulation that "could affect the outcome of the election."

IV. FLORIDA'S MANUAL RECOUNT LAWS COMPLY WITH THE UNITED STATES CONSTITUTION

Governor Bush's brief contains a lengthy attack on manual recounts in general and on the conduct of the recounts now underway. There is no merit to any of these contentions. Manual recounts are an essential element of election laws all around this nation. There is no basis for the novel contention that this long-established process is unconstitutional on its face. Indeed, we submit that the federal Constitution would be violated if Florida election officials failed to faithfully apply these provisions of Florida law.

A. MANUAL RECOUNTS ARE A LONG-ESTABLISHED, BROADLY-ACCEPTED MEANS OF ENSURING THAT ELECTION RESULTS ARE ACCURATE

The question of whether machines are more or less accurate than other methods is not before this Court. That question has already been decided by the Florida legislature in favor of manual recounts. Section 102.166(4)(c), Fla. Stat. specifically authorizes a county canvassing board to conduct a manual recount in response to a written protest by a candidate or political party. See also Section 102.166(5), Fla. Stat. (2000). Prior to its enactment in 1989, no manual recount could be authorized except on the order of a court. See Letter dated May 18, 1989, of Dorothy W. Joyce, Division Director, Division of Elections, to the Honorable Ann Robinson, Supervisor of Elections, Indian River County. (R.App. Ex. p. 11) Addressing county supervisors of elections, the then-Secretary of State indicated his understanding that the new provision would provide local canvassing boards the authority to conduct a manual recount in the event that an election was close and results contested. Memorandum dated April 27, 1989, of Jim Smith, Secretary of State, Florida Department of State, to Supervisors of Elections. (R.App. Ex. 12)

Underlying the addition of a provision for manual recount is an understanding that the process is *more* accurate than machine counts, not less. "In fact, the very premise of a manual recount after an electronic tabulation, as in the case here, is to provide an additional check on the accuracy of the ballot count." Siegel, 2000 WL 1687185, at *19. Contrary to Respondents' argument, machine voting was not introduced to eliminate errors from the ballot counting process. It was introduced

because it is faster and more efficient. Respondents complain of "human error" in manual counts. But many studies demonstrate that machine counts of punch card ballots produce significant inaccuracies. See, e.g., Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying*, U.S. Dept. of Commerce, National Bureau of Standards (1988).[4]

Strict machine counts can miss many marks made by a voter that the human eye would readily perceive as indicating the voter's clear intent – for example, circling or

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[4] See also National Bureau of Standards Report, *Effective Use of Computing Technology in Vote-Tallying* (1988) ("It is generally not possible to exactly duplicate a count obtained on pre-scored punch cards.) In addition, numerous media reports in recent days have cited expert opinion that punch card ballot voting systems are notoriously inaccurate. See e.g. Brooks Jackson, *CNN Breaking News – the Florida Recount*, Nov. 15, 2000 ("Machine counts infallible? Forget about it. The kind of p unch card ballot used in Palm Beach is notorious for inaccuracy and has been for years…"); Ford Fessenden, "Counting the Vote," *N.Y. Times*, Nov. 17, 2000, *at A1* (citing many voting machine manufacturers who say that machine inaccuracy ranged from 34,500-3,450 votes in Florida on November 7, and quoting industry officials who state "the most precise way to count ballots is by hand"); David Beiler, "A Short in the Electronic Ballot Box," *Campaigns & Elections*, July/August, 1989, at 39; Tony Winton, "Experts: Machine Counts Inaccurate," *AP Online*, Nov. 11, 2000 (noting that "officials in England and Germany consider manual counts to be more accurate than automated ones" and quoting computer scientists for the proposition that "problems with automated vote-counting equipment, especially the computer card punch type used in south Florida, have been well documented" and that error rates of 2 percent to 5 percent are routine); Marlon Manuel, "Recounts: Democratic Official Defends Method That Bush Opposes," *Atlanta J. & Const.*, November 17, 2000, at A11 (quoting president of company that "sells ballot software to 12 Florida counties, including . . . Palm Beach, Miami-Dade and Broward" for the proposition that "[i]f they're trying to determine a voter's intent, they're not going to get it off our machine or any machine").

marking an "x" next to the desired candidate's name, or writing in a candidate's name without placing a mark to indicate that he or she was writing in a candidate. Given these inaccuracies, manual recounts to check the results of a machine count are certainly an appropriate, and may be the only way to ensure accuracy. See, e.g., Ford Fessenden, "Counting the Vote," *N.Y. Times*, Nov. 17, 2000, *at A1* (quoting industry officials who state "the most precise way to count ballots is by hand"); Tex. Ele. Code Section 127.201 ("To ensure the accuracy of the tabulation of electronic voting system results, the general custodian of election records shall conduct a manual count of all the races in at least one percent of the election precincts or in three precincts, whichever is greater.") Indeed, Governor Bush signed into law a Texas statute providing that where both an electronic and manual recount are requested, "[a] manual recount shall be conducted in preference to an electronic recount . . ." *See* Tex. Elec. Code § 212.005(d).[5]

B. GOVERNOR BUSH'S CHALLENGE TO FLORIDA'S MANUAL RECOUNT LAWS SHOULD BE REJECTED

[5] As discussed above (at page 4), numerous other jurisdictions have adopted a similar approach.

Despite the manifest need for manual recounts, the Respondents' claims that Florida's manual recount provision violates U.S. Constitutional protections of equal protection, due process and the First Amendment lacks any substance.

First, the claim that voters in some of Florida's counties will suffer vote dilution in violation of the Equal Protection Clause as a result of a manual recount in other counties is demonstrably unsound. *All* qualified voters have a constitutionally protected right to have their votes counted, including those whose ballots were erroneously missed in the automated tabulation. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Moreover, the manual recount provisions of the statute are applicable to all counties and thus all voters. In a case related to the present proceedings, a U.S. District Court found that the manual recount statute was generally applicable and non-discriminatory. *Siegel*, 2000 WL 1687185, at *6. Contrary to Respondents' claims, the vote of a citizen of one county is not "diluted" by a process which ensures that all properly cast votes in another county are actually included in the final vote count.

Second, Respondents assert that the measure of discretion given to county canvassing boards in approving recounts and in the conduct of recounts somehow renders the Florida statute so arbitrary and capricious that it constitutes a denial of Respondents' due process rights. Respondents' principal complaint here seems to be that in the case of a manual recount in Florida, there are no precise standards for the examination of a punch card ballot and the determination of the voter's intent. That

claim is false. The statute does indeed provide standards and safeguards for the process. Most importantly, the examination is directed to "determine the voter's intent." § 102.166(7). The recounts are open to the public, § 102.166(6), and the counting teams of at least two electors including, when possible, members of at least two political parties. When the bipartisan team cannot determine the voter's intent, the ballot is presented to the canvassing board for its review under the same standard. Moreover, this is precisely the type of vote counting matter that the federal courts uniformly leave to the States, *Roudebush v. Hartke*, 504 U.S. 15 (1972).

Respondents also try to fashion a Constitutional claim based on the discretion given to county canvassing boards to decide whether to order a manual recount. As an equal protection argument, this is addressed above. For due process purposes it is sufficient that the basic standard established by § 102.166(5) is reason to believe that there has been "an error in the vote tabulation which could affect the outcome of the election." But perhaps even more important are the consequences of the points made above—a manual recount can only make the counting of the votes more inclusive and more accurate, not less so.

Third, Respondents appear to argue that, because First Amendment rights may be touched by regulatory aspects of the voting process, any discretion afforded to a state election official in the administration of voting laws necessarily violates that constitutional right. This argument also is without merit.

C. U.S. AND FLORIDA CONSTITUTIONS PROHIBIT THE DISENFRANCHISEMENT OF VOTERS BASED ON THE OPERATION OF A DEADLINE NOT WITHIN A VOTER'S CONTROL

It is well established that machine tabulation of votes fail to capture votes cast by a large number of voters, particularly when the number of votes cast is substantial – almost six million in the case of Florida's Presidential election. Machine tabulation of these votes, without some additional process for counting the votes that the machines fail to tabulate, results in the disenfranchisement of countless voters.

This Court need not face here the question whether the U.S. or Florida Constitution requires some sort of protection against this random disenfranchisement of voters, because the State of Florida has established a procedure to correct this potential harm: the manual recount in cases where the an error in vote tabulation is established. See Fla. Stat. Section 102.166 (2000).

However, this Court does need to address whether a state official such as the Secretary of State, through the establishment of a deadline for the submission of manual recounts, can disenfranchise those voters whose votes have not yet been tabulated at the expiration of that deadline. This is particularly so when the failure of the voter's vote to be included in the tally rests not on some action of the voter him or herself, but upon the pace of the County Canvassing Boards, laboring under obstacles imposed by the Secretary of State, in tallying those votes.

While deadlines are a part of the electoral process – there are deadlines for absentee ballots, and even limited hours for voting on election day – a voter's loss of franchise due to a failure to comply with these deadlines is something within that voter's control. At the same time, it is well established that it is violative of the U.S. and the Florida Constitutions to deprive someone of a legal right based on the expiration of a deadline due – not to that person's action or inactions – but based on the inaction of a state or local official. See *Logan v. Zimmerman*, 455 U.S. 422, 433-438 (1982); *Meola v. Department of Corrections*, 732 So.2d 1029, 1035-1037 (Fla. 1998).

If the circuit court's order stands, hundreds or perhaps thousands of Floridians will lose the right to have their ballots tabulated, not by virtue of their own action or inaction, but by virtue of the failure of their local Canvassing Boards to comply with an arguably unlawful timetable set by the Secretary of State. Depriving these citizens of their right to have their votes counted by virtue of the actions or inactions of either county or state officials (or both) is violative of the U.S. Constitution's Due Process and Equal Protection Clauses, and the similar provisions of the Florida Constitution. See U.S. Const., Art. XIV; Fla. Const. Art. I, Sec. 2; Fla. Const., Art I., Sec. 9.

CONCLUSION

This Court should enter an order (1) Confirming that the objective intent standard remains the law in the State of Florida; (2) directing the Secretary and the

Elections Canvassing Board 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); (3) declaring the Secretary's opinion letters are invalid; and (4) denying all relief requested by Respondents/Appellees.

Respectfully submitted this 19th day of November, 2000.

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