
IN THE
SUPREME COURT OF FLORIDA

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CASE NO.

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ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS, individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

and

THE MIAMI-DADE COUNTY CANVASSING BOARD, LAWRENCE D. KING, MYRIAM LEHR and DAVID C. LEAHY as members of and as THE MIAMI-DADE COUNTY CANVASSING BOARD, and DAVID C. LEAHY, individually and as Supervisor of Elections,

and

THE NASSAU COUNTY CANVASSING BOARD, ROBERT E. WILLIAMS, SHIRLEY N. KING, AND DAVID HOWARD (or, in the alternative, MARIANNE P. MARSHALL), as members of and as the NASSAU COUNTY CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

and

THE PALM BEACH COUNTY CANVASSING BOARD, THERESA LEPORE, CHARLES E. BURTON AND CAROL ROBERTS, as members of and as the PALM BEACH COUNTY CANVASSING BOARD, and THERESA LEPORE, individually and as Supervisor of Elections,

and

GEORGE W. BUSH, Nominee of the Republican Party of the United States for President of the United States and RICHARD CHENEY, Nominee of the Republican Party of the United States for Vice President of the United States,

Appellees,

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CASE NO.

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ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Petitioners,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, and SECRETARY OF AGRICULTURE
BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS
AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF ELECTIONS,
individually and as members of and as THE FLORIDA ELECTIONS
CANVASSING COMMISSION,

Respondents.

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# PETITION FOR WRIT OF MANDAMUS OR OTHER WRIT OR, IN THE ALTERNATIVE, REVIEW OF TRIAL COURT RULINGS AND BRIEF OF APPELLANTS


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## INTRODUCTION

"The right of suffrage is the preeminent right in the Declaration of Rights, for without this basic freedom all others would be diminished." *Palm Beach County Canvassing Board v. Harris*, Nos. SC00-2346, 238, 2349, at 30. "Courts must attend with special vigilance whenever the Declaration of Rights is in issue." *Id*.

This extraordinary appeal and application is submitted by Petitioners/Appellants (Petitioners) pursuant to this holding. Dilatory actions by Respondents/Appellees (Respondents) have put fulfillment of the "right to suffrage" at risk. Petitioners call upon this Court to exercise "special vigilance" to vindicate that right, before it is lost due to delays and the dangers of a diffuse legal proceeding.

At bottom, this contest raises a single issue: Did the Defendants in this action "receive a number of illegal votes or reject a number of legal votes sufficient to change or place in doubt the result of the election." Section 102.168(c), Fla. Stat. (2000).

And this single question turns on five – and only five – issues that are almost exclusively legal in nature:

(1) Did the Secretary of State "reject a number legal votes" when she declined to accept the results of a timely, but partial, recount from Palm Beach County – and again when she declined to accept the results of a complete, but then slightly untimely, recount from that County?

(2) Did the Palm Beach County Canvassing Board "reject a number of legal votes" when it rejected ballots that reflected a clear intent of the voter to express a vote for President, but failed to meet other tests imposed contrary to law by that Board?

(3) Did the Miami-Dade Canvassing Board "reject a number of legal votes" when it refused to certify 388 votes it tabulated during a partial manual vote count?

(4) Did the Miami-Dade Canvassing Board "reject a number of legal votes" when it abandoned its "mandatory obligation," *see Miami-Dade Democratic Party v. Miami-Dade Canvassing Board*, Case No. 3D00-3318 (Fla. 3rd DCA, Nov. 22, 2000) Slip Op. at 2-3, to complete its count of approximately 9,000 unrecorded ballots from that County and thereby excluded hundreds if not thousands of legal votes?

(5) Did the Nassau County Canvassing Board "receive a number of illegal votes" and/or "reject a number of legal votes" when it withdrew its previous certification of the official (and statutorily mandated) machine recounted vote total and instead purported to certify an unofficial vote total that included additional, untabulated returns?

Of course, no serious doubt can exist that these issues concern "a number of . . . votes sufficient to change or place in doubt the result of the election." The first question concerns 189 "net" votes (or 188 "net" votes at the later deadline); the second question concerns 3,300 potential votes; the third concerns 388 votes; the fourth concerns approximately 9,000 potential votes; the fifth concerns 51 votes. In an election decided by, allegedly, 537 votes, clearly this contest concerns a number of votes "sufficient to change or place in doubt the result of the election."

The first, third, and fifth questions are entirely questions of law. The second and fourth questions are either entirely or predominantly questions of law. The "witnesses" that need to be heard from are the ballots themselves. They are the "testimony" as to the will of the voters on election day.

All election contests are urgent matters under Florida law. An effective government requires a prompt selection of office holders. Uncertainty and delay in determining the winners of elections is unacceptable. Doubtlessly, that is why Florida law provides for an "immediate" hearing in an election contest. Section 102.168(7), Fla. Stat. (2000). And it is why the courts of this state have previously held that "[p]art of the purpose of the protest and contest provisions of the election code is to effect a speedy resolution of such conflicts, with minimal disruption of the

electoral process." *Adams v. Canvassing Board of Broward County*, 421 So.2d 34, 35 (Fla. 4th DCA 1982).

In this case, however, the usual need for a "speedy resolution" of election contests is especially acute. This Court recognized at argument in *Harris*, and in its decision in that case, that the state effectively faces a deadline of December 12th for resolution of this contest. That date is now just 13 days away. Any efforts to resolve this contest that stretch beyond that date are likely to be futile. As a practical matter, Florida's electors will be determined by that date. No legal judgment can correct any error found after the electoral votes are cast: only the judgment of history will be left to be rendered on a system that was unable or unwilling to ascertain the will of the voters until after that date.

The courts of this state have long made clear that "the will of the people, not a hypertechnical reliance upon statutory provisions, should be our guiding principle in election cases." *Harris* at 8. Particularly in this instance, needless delays have the effect of risking that the will of the people will not be effectuated in this election -- irrevocably so.

This Court recognized this danger in fashioning its decision in *Harris*. While extending the period for submission of vote returns by Canvassing Boards during the pre-certification period, it recognized that even the powerful interest in allowing the

maximum time for the submission of vote returns was overcome by two competing considerations: First, the need to comply with the federal deadlines for participating in the Electoral College process, *see Harris*, *supra*, at 36, 38; and second, the need to protect a meaningful opportunity to contest the election certificate. *Id*.

Put another way, this Court found that the right to a meaningful contest is so important under Florida law – and the exigencies of the December 12th deadline so vital – that these two factors led it to place a deadline for the receipt of vote returns from the county canvassing boards.

Regrettably, that right (*i.e.*, the right to a contest) is now imperiled – as is the paramount goal this Court has always upheld "*i.e.*, to reach the result that reflects the will of the people." *Harris* at 9.

Respondents have argued to the trial court that there is not sufficient time for the court to adjudicate this dispute and that the fault lies not with their delaying tactics but with the extension of the certification deadline by this Court. In addition, in response to Petitioner's Emergency Motion to Commence Counting of Votes before the trial court, Defendants argued:

(a) that the legal standard for counting ballots was uncertain and that the trial court was required to hold an evidentiary hearing before beginning its review;

(b) that contrary to law and to Defendants' prior representations to this Court, the trial court was required to review all ballots, not just the contested ballots; and

(c) that the count of ballots by the court is not a judicial question but a question of abuse of discretion by the county canvassing board.

The trial court denied Petitioner's motion concluding that an evidentiary hearing was required before it could address Defendants' contentions, and that it would, at Defendants' request, not commence such a hearing until Saturday, December 2.[1] No date or time for commencing a count of the ballots was set -- indeed, no date or time for determining whether the circuit court will count the ballots has ever been established.

The trial court's rejection of Petitioners' Emergency Motion to Commence Counting of Votes, together with the court's subsequent scheduling, effectively cut short any meaningful right of petitioner to contest the election, because, as a practical matter, it makes a final adjudication of this dispute prior to December 12th a virtual impossibility. By delaying any substantive proceedings in this matter until December

[1] Plaintiffs requested such a hearing on Wednesday November 29. The trial court initially set the hearing for Friday December 1 and then postponed it to December 2 because Defendants' counsel told the court they wished to listen to the argument (to be made by other counsel) in the United States Supreme Court on December 1.

2nd, by rejecting an immediate review of the ballots at issue here, by declining to set any date by which the review of the contested ballots will begin, and by declining to set now (or even to consider before December 2 or thereafter) the procedures by which a review of ballots will be made, the trial court has made it virtually impossible for the will of the voters to be known before the deadline date passes.

These holdings are contrary to the teaching and the purpose of this Court's decision in *Harris*, and extinguish any meaningful adjudication pursuant to the Court's order of November 23, 2000, which dismissed petitioner's request for an order compelling a pre-certification vote tabulation in Miami-Dade Count "without prejudice to any party raising any issue presented in [that application] in any future proceeding." *Gore v. Miami-Dade Canvassing Board*, No. 00-2370.

The remedy that we seek now is that the counting of the votes commence either under the auspices of this Court or under the auspices of the trial court pursuant to directions of this Court. At a hearing on November 28th, in denying Petitioner's request that the counting begin before the December 2 hearing, the trial court said:

> We're not going to start counting on Thursday unless they tell me that I've got something else. And if they do, I hope they give me some instructions on precisely how to carry out their directions.

(App. 14, at p. 66.) We do not seek to delay or interfere with any other consideration of other issues by the trial court -- merely that the counting commence before it is too late.

## SUMMARY OF ARGUMENT

Al Gore and Joe Lieberman offer this pleading in the alternative as a Petition for an original Writ pursuant to Article V section 3(b)(7) and (8) or a Review of the trial court's decision pursuant to Article V section 3(b)(5) and (7).[2] The urgency of the issues, the press of time, and the vagaries of the procedural and jurisdictional grants involved cause us to seek alternative forms of relief. Events in the trial court occurring as this brief was written make presenting this petition for relief in the alternative more necessary. In a hearing held November 29, 2000, the trial judge refused to enter a simple order confirming the rulings made in open court the day before. Consequently, although Petitioners took an appeal to the First District Court of Appeal and filed a Suggestion to Certify with that court, it is possible the judge's refusal to enter a written order will be used to impede review of the court's interlocutory order.

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[2] Petitioners file an Appendix with this Brief. The Appendix contains excerpts from the record below and a transcript of a hearing before Judge Labarga in Palm Beach containing legal rulings.

We ask – given the shortness of time, the legal nature of the issues in this proceeding, and the great public importance to the people of this state and the nation – that the Court exercise its extraordinary jurisdiction to direct the review of the ballots in question as an original mandamus matter. In doing so, it would ensure resolution of the questions presented here on a thoughtful and timely basis, without a need for repeated interventions in a proceeding with little time to waste and little room for error. As this Court held in *Peacock v. Latham*, 125 Fla. 69, 169 So. 597 (Fla. 1936):

> The availability of a Circuit Court election contest procedure for correcting inaccuracies in the count of ballots that affect the result of an election does not oust the jurisdiction of this Court to correct the count by mandamus, since mandamus for that purpose lies irrespective of whether or not the correction of the count, when made, will change the result.

In the alternative, we ask the Court to exercise its appellate jurisdiction (on a direct or discretionary basis) to reverse the trial court's rulings and provide the trial court with clear direction on the three issues underlying its erroneous ruling; and remand to the trial court for immediate additional proceedings. The three erroneous legal rulings underlying the trial court's decision that must be expeditiously reversed by this Court for a contest proceeding to be adjudged under the correct legal standards are as follows:

- First, the trial court concluded – erroneously – that the standard for determining whether a ballot reflects a legal vote is undetermined, and can only be established after taking testimony, hearing evidence, and a proceeding of indefinite duration. In fact, that standard is a settled question of law and was articulated by this Court in *Harris* as determining the intent of the voter;

- Second, the trial court concluded – erroneously – that the question of what ballots need to be reviewed in a contest action is undetermined, and can only be established after hearing evidence in a proceeding of indefinite duration. In fact, that question is a question of law, and under Florida law, it is clear that it is the votes contested by the plaintiff in the contest -- be they excluded legal votes or included illegal votes -- that the court must review;

- Third, the trial court concluded – erroneously – that the standard for determining which votes must be counted is undetermined and could be either abuse of discretion or *de novo*, and can only be established after taking evidence in a proceeding of indefinite duration. In fact, it is a settled question of Florida law that that the issue in a contest action of which votes to count is a matter of law for the court to decide in the first instance.

To permit the trial court to conduct extensive proceedings aimed at resolving questions that are, as a matter of law, already resolved, would have two deleterious

effects. First, as discussed above, it would effectively extinguish (as a practical matter) any right of Petitioners to advance a meaningful contest of this election. Second, as a matter of judicial administration, it risks further proceedings that will ultimately need appellate review later, at a moment when time is even shorter than it is today, and the prospects for a meaningful proceeding on remand are non-existent.

We have respect and empathy for the position in which the trial court finds itself.[3] Under normal circumstances the expedition with which the trial court is acting would be regarded very fast indeed. However, these are not normal circumstances. Unless the counting of the ballots commences now, ballots will not be counted simply because time will run out.

If this Court declines to review the trial court's rulings on an interlocutory basis, we request that the Court act pursuant to its original mandamus and all writs jurisdiction.

We do not casually seek such intervention by this Court. We are here because we believe that this is the only way to insure that the precious right of Floridians to vote – and have their votes counted – will be protected. We believe that this Court's

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[3] Whether the unique time constraints imposed by the December 12 deadline have been aggravated (as we contend) by the delaying tactics of the Defendants or (as Defendants content) by the improvident extension of the date for final certification it is clear that the trial court is not responsible for the extreme need for expedition that now exists.

intervention is required because of the intransigent opposition of several of the Respondents at every turn, to one simple precept: when the outcome of an election is in doubt, no legal votes can be excluded – and any ballot that evidences a voter's intent to vote is just that: a legal vote.

In the end, this Court put it well in *Harris*: "an accurate vote count is one of the essential foundations of our democracy." *Harris*, Slip. Op. at 34. Only a decision by this Court to itself immediately commence determination of the legal votes rejected in this election -- or an order to the trial court to do so under appropriate legal guidance – can assure that "essential foundation" is strengthened by the test now weighing on it – or whether it is left permanently damaged and weakened by uncertainty and delay.

## STATEMENT OF THE CASE AND FACTS

This Court is well familiar with the basic facts and development at issue here.

On November 21, 2000, this Court directed that amended certifications resulting from manual counts in this election be filed with the Elections Canvassing Commission by 5:00 p.m. on Sunday, November 26, 2000, and that the Secretary of State and the Elections Canvassing Commission accept any such amended certifications. *Palm Beach County Canvassing Board v. Harris*, Consolidated Case Number SC00-2346, Slip Op. (Fla. Nov. 21, 2000).

This Court made clear that a reason for setting this deadline was to permit election contests pursuant to Section 102.168, Florida Statutes, to be filed and resolved by the December 12, 2000 deadline for the resolution of contests regarding the selection of electors. *Id*. Subsequent to this Court's decision in *Harris*, events arose in three counties that have given rise to this contest action.

Miami-Dade County

On the morning of November 22, the Miami-Dade Canvassing Board decided, in light of the certification deadline set by this Court, to focus its manual count of the approximately 10,500 ballots for which the tabulation machines did not record a vote for President. These ballots are known as "undercounts" or "unrecorded votes." As of that time, in two full days of work the board had reviewed all of the ballots from approximately 20% of the 635 Miami-Dade precincts had already been counted. The Board had found 388 legal votes that the machines had failed to tabulate. by limiting their review to the ballots for which no vote had been recorded for President the Board expected to complete its task quickly.

On November 22, supporters of George W. Bush launched a campaign of personal attacks upon Canvassing Board members and election personnel. Some news reports described the protests as a "near riot." *New York Times*, November 24, 2000.

Following a lunch break on November 23, and without notice of the intention to consider the issue, the Miami-Dade County Canvassing Board announced it would cease all manual counts. Although the reason asserted for the decision was that it was not possible to complete a full manual count of all ballots by the 5:00 p.m., Sunday deadline for amending certifications, the *New York Times* also reported on November 24, 2000: "One nonpartisan member of the board, David Leahy, the supervisor of elections, said after the vote that the protests were one factor that he had weighed in his decision." The Canvassing Board also voted to discard the 388 legal votes that had already been duly counted up to that moment.

Palm Beach County

Voters in Palm Beach County voted using Votomatic-style punch cards. Voters using this system vote by first inserting a punch card with perforated rectangles into a plastic marking unit that contains ballot pages. The voter then inserts a metal stylus into a hole in a template that corresponds to the chosen candidate. When the stylus is fully inserted into the hole, it should – but does not always -- perforate a small square on the punch card ballot known as a "chad," creating a hole in the punch card ballot. In some instances, however, the stylus only partially perforates the punch card or creates an indentation with no perforation at all.

Palm Beach Circuit Jorge Judge Labarga held a hearing on a motion on November 15, 2000, during which that court ruled from the bench that "a per se exclusion of any ballot that does not have a partially punched or hanging chad is not in compliance with the intention of the law." Transcript of Hearing Before Judge Labarga at 57-58 (11/15/00), (App.-12). In a written order on November 22, 2000, the Court clarified its oral ruling that the Palm Beach County Canvassing Board could not apply rigid rules that would result in the rejection of validly marked ballots. Judge Labarga relied in part upon *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996), which held that a "discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned."

Following Judge Labarga's decision, Palm Beach recommenced reviewing ballots. Despite the Court's rulings, the Canvassing Board excluded approximately 3,300 legal votes where the "intention of the voter" could be "fairly and satisfactorily ascertained" and where the Board had the ability to "discern the intent of the voter."

The Palm Beach Board sought an extension of the 5:00 p.m. November 26, 2000 deadline for reporting the results of its manual count, both by telephone and in writing. The Secretary of State refused to extend the deadline.

On November 26, 2000, before 5:00 p.m., the Defendant Palm Beach County Canvassing Board certified the portion of the results of its manual count that it had

completed by that point to Secretary of State Harris and the Election Canvassing Commission. Of the 637 precincts in Palm Beach County, the Palm Beach Board certified to the Secretary of State the results of its manual count of 586 precincts by the 5:00 p.m. November 26 deadline. As of that time, the manual count had identified 189 net additional votes for Gore/Lieberman. At approximately 7:30 p.m. November 26, 2000, the Palm Beach County Canvassing Board completed its manual count.

On November 26, 2000, Secretary Harris and the Elections Canvassing Commission certified the results of the election. Such certification did not include any of the additional votes for President identified during the manual count conducted in Palm Beach County, whether counted before or after 5:00 p.m. on November 26. The Elections Canvassing Board excluded all of these lawful votes.

Nassau County

On the evening of November 7, 2000, the Nassau County Supervisor of Elections informed the Department of State that unofficial returns of the general election for President and Vice President of the United States in Nassau County showed Gore/Lieberman with 6,952 votes and Bush/Cheney with 16,404 votes. On November 8, 2000, the Nassau County Canvassing Board conducted the machine recount of ballots mandated by Section 102.141(4), Florida Statutes (2000). The

statutorily mandated machine recount produced returns of 6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney, a net gain of 51 votes for Gore/Lieberman. On November 8 or 9, 2000, the Nassau County Canvassing Board certified to the Department of State returns based on the statutorily mandated machine recount, that is, 6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney.

On November 24, 2000, the Nassau County Canvassing Board met without the notice required by Section 286.011, Florida Statutes (2000). At that meeting, the Board decided to submit a new certification to the Department of State, reporting the unofficial election night returns (Gore/Lieberman 6,952 votes and Bush/Cheney 16,404 votes) rather than the returns of the statutorily mandated machine recount (6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney). The Board thus changed its certification and certified November 7 results that it had previously concluded were incorrect.

The Nassau County Canvassing Board transmitted its new certification to the Department of State on Friday November 24, 2000. This new certification was included in the results certified by the Elections Canvassing Commission.

Elections Canvassing Commission Certification

On November 26, 2000 the Elections Canvassing Commission certified the results of the November 7, 2000 Presidential Election. The results were certified without the results of the completed (or partial) Palm Beach County manual count, without the results of the partial manual count in Miami-Dade County, without additional untabulated votes in Miami-Dade County, and without the results of the statutorily mandated machine recount in Nassau County.

Election Contest

On Monday, November 27, 2000, plaintiffs filed a Complaint to Contest Election ("the contest") in Circuit Court in Leon County. Plaintiffs simultaneously filed Requests to Produce Ballots from both the Miami-Dade Canvassing Board and the Palm Beach Canvassing Board, as well as motions to shorten time, appoint special masters, place the disputed ballots in the registry of the court, count the Miami-Dade ballots, and determine whether legal and valid Palm Beach County ballots have been improperly and illegally rejected.

The case was assigned to Judge Sauls, who held a hearing on Monday afternoon. At the hearing, the Court ordered Defendants to answer the complaint two days after Plaintiffs filed their witness and exhibit lists, or Friday, whichever was

earlier. (App. - 8, at 29-30) The Court also ordered the parties to work out a proposed scheduling order to expedite the resolution of this case. (App.-8 at 32)

On Monday evening and Tuesday morning, Plaintiffs shared with opposing counsel a proposed scheduling order, pursuant to which the Court would count the ballots, or cause the ballots to be counted, on Wednesday, November 29, 2000, and complete the process by Wednesday, December 1, 2000. Defendants objected to Plaintiffs' proposal.

On Tuesday morning, November 28, 2000, Plaintiffs filed a Motion to Enter Expedited Scheduling Order. (App. - 6)Plaintiffs also filed a witness and exhibit list, which included just two witnesses. Plaintiffs also filed an Emergency Motion to Commence Counting of Votes (App.-7), in which Plaintiffs requested injunctive relief and set forth the legal arguments for immediately beginning a count of the ballots from Palm Beach and Miami-Dade County.

The Court held a hearing on Plaintiffs' motions at 5:30 p.m. on November 28, 2000. At the hearing, the Court refused to grant both Plaintiffs' Motion to Enter Expedited Scheduling Order and their Emergency Motion to Commence Counting of Votes. The Court ordered that Miami-Dade and Palm Beach comply with the Request to Produce Ballots by Friday, December 1, 2000, at noon if feasible, or close of

business.[4] The Court further ordered that Appellees answer the complaint by 5:00 p.m. on Thursday, November 30. The court set a hearing on legal and factual issues for Saturday, December 2, 2000. (App.-14)

In denying our Emergency Motion to Commence Counting, the trial Court rejected the injunctive relief that Petitioners had requested: an order to direct the immediate counting of ballots, by the court or other appropriate judicial officer, pursuant to this Court's decision in *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720, 722 (Fla. 1998). The trial Court failed to render a written opinion embodying its order.

The trial court instead directed that a hearing be held on Saturday, December 2, to consider various questions of law and to begin the taking of testimony. The trial court made this decision notwithstanding Petitioners' repeated argument that failing to order the injunctive relief requested would do irreparable harm to petitioner's rights to an effective contest, *(*App.-14, at 53, 63), and – due to time constraints – would ultimately render ineffective any subsequent decisions by the trial court (or this Court) to review these legally excluded votes.

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[4] The defendants Miami-Dade and Palm Beach had said that they could deliver the contested ballots by Wednesday night or Thursday morning.

On November 29, 2000, Petitioners filed a notice of appeal of the Circuit Court's denial of the Emergency Motion to Commence Counting of Votes.

## ARGUMENT

### I. THIS COURT SHOULD EXERCISE ITS MANDAMUS JURISDICTION TO COMMENCE THE COUNTING OF EXCLUDED VOTES SO AS TO PRESERVE A MEANINGFUL OPPORTUNITY FOR RELIEF IN THIS CONTEST

This petition commences a limited original action within the Court's jurisdiction as conferred by the people in Article V of the Florida Constitution. That Article vests this Court with the broad authority to "issue writs of mandamus and quo warranto to state officers and state agencies," *Id.* § 3(b)(8), and to "issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction," *Id.* § 3(b)(7). Mandamus is a proper remedy. *Kainen v. Harris*, 25 Fla. Law W. S 735 (October 3, 2000) is the most recent example of this Court's exercise of its All Writs jurisdiction to resolve election issues requiring immediate and final resolution.

Petitioners seek a writ of mandamus or other writ to immediately commence counting the contested ballots. They ask this Court to count the ballots itself, or to order that the ballots be counted by appropriate judicial officers designated by the Court under its direct supervision. Petitioners are not asking this court to take over the entire action – simply to count the ballots so that effective relief will not be

precluded. In *State ex rel. Peacock* v. *Latham*, 125 Fla. 793, 803-04, 170 So. 475, 479 (1936), this Court held that it had jurisdiction to itself count the votes and correct the vote count by mandamus even during the pendency of a circuit court review of contest claims.

A. This Court Should Accept Jurisdiction and Order an Immediate Counting of the Ballots to Ensure that the Election Contest May be Concluded Before the Deadline for Certification of the State's Electors

Time is of the essence in this matter. This contest action must be resolved by December 12 to prevent "precluding Florida voters from participating fully in the federal electoral process." *Harris*, Slip Op. at 38; *see also* 3 U.S.C. § 5 (December 12 deadline for resolution of state judicial proceedings).

If the office at issue was not the Presidency and if the federal statutory deadline did not exist, delaying ballot counting until after all other issues are resolved would not be such irremediable and egregious error. The dispute could even be resolved after the official took office because a Judgment of Ouster is an available remedy. §102.1682, Fla. Stat. (2000).[5]

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[5] The saga of Wakulla County Judge Evelyn Flack is one example. In November of 1978 incumbent County Judge Evelyn R. Flack received two more machine votes than her challenger. After canvassing the absentee ballots the Wakulla County Canvassing Board certified that the challenger won with a margin of two absentee votes. Judge Flack contested the election. *Flack v. Carter*, 392 So. 2d 37 (Fla. 1st DCA 1980). On September 1, 1982 the First District Court of Appeal affirmed a final judgment ordering that Evelyn Flack should be certified as the

But, since the Presidency is the office and there are federal and Constitutional deadlines at stake, any delays in the counting process may mean denial of meaningful relief in this action. A victory for Petitioners in circuit court (or on later appeal from a circuit court decision) will be meaningless if it comes too late for counting the unlawfully rejected ballots before the December 12th deadline.

Just last week, this Court emphasized the "fundamental purpose of election laws. . . to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy." *Harris*, Slip Op. at 32 (footnote omitted). This Court's intervention is now essential to ensure that the failure to begin counting and the December 12 deadline do not eliminate this fundamental guarantee. This Court should issue its Writ causing the immediate counting of the ballots by the Court (or its designee). It can do so without prejudice to the question of whether such tabulated votes should be added to the legal vote tallies. In their motion to the trial court, Petitioners asked that the vote counting be done either by the clerk of the appropriate court (as this Court approved in *Beckstrom*, 707 So.2d at 722) or by judges of the Circuit Court of Leon County.

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election winner and commissioned in office. A Florida court cannot grant the same relief when the office is President of the United States.

To delay counting will frustrate the statutory election contest scheme and this Court's November 21, 2000 Order. This Court recognized in *Harris* the time constraints facing the parties due to the December 12, 2000 deadline. This Court required that amended certifications be filed by November 26 "in order to allow maximum time for contests pursuant to section 102.168." Harris, Slip Op. at 40. "Part of the purpose of the protest and contest provisions of the election code is to effect a speedy resolution of such conflicts, with minimal disruption of the electoral process." *Adams v. Canvassing Board of Broward County*, 421 So. 2d 34, 35 (Fla. 4th DCA 1982). *See also McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981) (the central purpose of Section 102.168 is ensuring prompt and effective adjudication of conflicts as to balloting and counting procedures). Section 102.168(7) reflects the goal of expeditious resolution. It requires an "immediate hearing"[6] and gives the

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[6] In considering other Florida laws using the phrase "immediate hearing," courts have consistently held that this statutory command must be taken literally. For example, the Florida Public Records Act requires courts to provide an "immediate" hearing on actions under the law. (§119.11[1], Fla. Stat.[2000]: "Whenever an action is filed to enforce the provisions of this chapter, the court shall set forth an immediate hearing, giving the case priority over all other pending cases.") In *Salvador v. Fennelly*, 593 So.2d 1091 (Fla. 4th DCA 1992), the court emphasized that the word "immediate" means what it says: prompt and urgent action is necessary. The city, whose denial of records was challenged, argued that Section 119.11(1) required only a hearing in a "reasonable time." The court, however, dismissed this argument as "patently unreasonable." *Id*. at 1093. The court declared: "The fact that the statutory mandate for an early hearing may be difficult to accommodate does not mean, however, it must not be done."

judge discretion to limit the time to be consumed in taking testimony with a view to the circumstances of the matter. Under Section 102.168, the Court has the power to "fashion such orders as . . . necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances." Section 102.168(8). This Court should expedite the counting to ensure prompt completion of the contest without risking disruption of the electoral process.

There can be no doubt that courts are obligated to count disputed ballots. *State v. Peacock*, 125 Fla. 810, 170 So. 309 (1936) (recount conducted under the "Order of this Court"); *State v. Latham*, 125 Fla. 788, 170 So. 472 (1936); *Hornsby v. Hilliard*, 189 So. 2d 361 (Fla. 1966) (court-ordered recount). *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 722 (Fla. 1998), compellingly validated that obligation with the manual count of the disputed ballots – in that case, over 8,000 thousand absentee ballots. In *Beckstrom*, this Court approved the power of the trial judge to direct manual recounting and the decision by that Judge to direct the Clerk to execute that tabulation, noting that "appellant moved the court to order a manual recount of the absentee ballots. The court granted the motion, and the clerk of the

circuit court conducted a re-count, which was observed by representatives for both candidates." *Beckstrom*, 707 So. 2d at 722.[7]

Counting ballots takes time. One of the lessons of this election is that counting ballots can take considerable time. Petitioners seek the counting of approximately 9,000 uncounted Miami-Dade County ballots and 3,300 contested uncounted Palm Beach County ballots. The question whether these votes should be added to the certified totals obviously depends upon resolution of the merits of Petitioners' contest claim. But there is no reason to delay counting the contested ballots even one day. Counting now ensures that the results will be available when the circuit court or this Court determine how the vote totals should be adjusted. Merely counting ballots prejudices no party. Not counting them makes the election contest remedy chimerical.

It is essential that this Court act now to ensure that the counting of ballots occurs expeditiously. Imagine the disarray if the circuit court or this Court determined that adjustment of the vote totals is required under Florida law but there was no time to finish the counting before December 12. The resulting controversy about the legitimacy of the President would be destructive for our country. Counting

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[7] This Court's decision in *Palm Beach Canvassing Board v. Harris* last week overwhelmingly vindicated the primacy of manual counting.

the ballots now preserves the Court's jurisdiction to implement its decision in *Palm Beach County Canvassing Board v. Harris* and of the judiciary to protect the rights created by section 102.168.

Petitioners contend that thousands of votes actually cast in this Presidential election by the citizens of Florida were, through error or accident, improperly excluded. Many of those votes have never been counted; hundreds of those votes have been counted but contested. Petitioners now turn to this Court to ensure that the ballots are promptly counted judicially in order to preserve the right to effective relief and to ensure that the will of the people can be truly ascertained and carried into effect.

As this Court proclaimed two generations ago, under the law of Florida "the vote actually cast determines the rights of the candidates. If the vote actually cast is through error or fraud, by accident or design, incorrectly returned so that a candidate may be deprived of his rights, *it is difficult to understand how it can reasonably be urged that no power exists to correct the error. We hold that the power does exist to correct the error.*" *State ex rel. Peacock v. Latham*, 125 Fla. 793, 803-04, 170 So. 475, 479 (1936) (emphasis added) (granting writ of mandamus); *see also State ex rel. Peacock v. Latham*, 125 Fla. 779, 170 So. 469 (Fla. 1936) (court has jurisdiction to correct the vote count by mandamus "irrespective of whether or not the correction of

the count, when made, will change the result"); *Ex parte Beattie*, 124 So. 273, 275 (Fla. 1929) ("Petitioner in a mandamus proceeding had a clear legal right to a correct and accurate count of the votes cast . . . and mandamus was a remedy available to him to enforce this right.); *State ex rel. Titus v. Peacock*, 170 So. 309 (Fla. 1936) (mandamus to canvassing board to compel validation of votes in case of recount); *State ex rel. Barris v. Pritchard*, 111 Fla. 122, 149 So. 58 (Fla. 1933). These principles clearly establish that mandamus is a proper remedy to achieve a proper and complete count of the votes cast in an election.[8]

B. This Court Has Jurisdiction Under Its Writ Authority

Because the mandatory obligation is clear, the only real issue is whether this Court's decision in *Harris*, which strove to ensure that all of the votes legally cast in this election would be tallied and included in the result, is to be frustrated by the delayed judicial proceedings. "Courts must not lose sight of the fundamental purpose of election laws: the laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.

[8] A further reason for this Court to exercise its jurisdiction is to exercise control over this case before it gets totally unwieldy. Judicial Watch just filed a Motion for Intervention, and others may do so as well. Petitioners oppose joining parties not specified in Section 168, Fla. Stat., as necessary parties because they will likely preclude effective, timely relief in this contest action.

Technical statutory requirements must not be exalted over the substance of this right." *Harris*, 2000 WL 1725434, at *13.

It has become increasingly clear that no alternative proceedings will suffice to safeguard the principle that election laws "are intended to facilitate the right of suffrage" and "must be liberally construed in favor of the citizens' right to vote." *Id.* If counting does not commence immediately, it will be impossible for Petitioners to obtain relief before the circuit court, allow for any appeal, and ultimately finalize an accurate determination of the election to ensure that the proper electors are certified to the Electoral College before the December 12 deadline fixed by Federal law.

This Court has jurisdiction of this proceeding, and the task of counting and determining the validity of the questioned ballots is itself a matter for judicial determination. As the Court held long ago in *State ex rel. Nuccio v. Williams*, 97 Fla. 159, 171, 120 So. 310, 314 (1929), issues about "the legality of the vote being for judicial determination, if duly presented in appropriate proceedings." When a voter has sufficiently indicated an intent to vote for a particular candidate "is ultimately a judicial question," and is "subject to judicial procedure in which the courts may determine whether the vote . . . should be counted." *Id.*

This Court has also expressly held that the pendency of an action in a circuit court under the election contest statutes is no bar to this Court exercising its original

jurisdiction over matters raised in a proper petition. When confronted with this very argument – it is "contended that, because there is a contest suit pending in the circuit court . . . this court is without power to issue its peremptory writ of mandamus" controlling the same election controversy – this Court concluded: "We cannot agree that the power of this court to proceed to final judgment . . . may be frustrated by the mere pendency of a suit in the circuit court." *State ex rel. Peacock v. Latham*, 125 Fla. at 808, 170 So. at 481. As this Court emphasized, "an accurate vote count is one of the essential foundations of our democracy." *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434, at *14 (Fla. Nov. 21, 2000). Nothing less than that essential foundation, as determined within the rule of law, is at stake here. Moreover, Petitioners are not asking this Court to take over the entire election contest; they are only asking that the Court count the contested ballots cast. The merits of the contest remain before the circuit court for its initial determination.

C. This Court Should Grant the Petition

Accordingly, Petitioners ask that this Court issue a writ of mandamus to immediately commence counting the contested ballots that have never been counted. The Court may decide to count the ballots itself, or to designate others – judges or court clerks, for example -- to do the counting. In counting the ballots, the Court should of course apply the standard it articulated last week in *Harris* -- to determine

the intent of the voter and give it effect. *Palm Beach County Canvassing Board v. Katherine Harris*, 2000 WL 1725501 (Fla. Nov. 21, 2000), quoting *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (Ill. 1990) regarding review of chads.[9]

## II. IN THE ALTERNATIVE, THIS COURT SHOULD REVERSE THE TRIAL COURT'S RULINGS AND DIRECT IT TO IMMEDIATELY COMMENCE COUNTING OF THE CONTESTED BALLOTS[10]

### A. This Court Should Review the Trial Court's Erroneous Rulings Because of the Need for Urgent Resolution of the Issues

The circuit court's denial of Petitioners' Emergency Motion to Commence Counting of Votes effectively denies the opportunity for meaningful relief in their election contest action. As set forth above, this contest action must be resolved by December 12 to ensure that Florida voters are not precluded from "participating fully

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[9] A "discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned." *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996); *see also Florida Democratic Party* v. *Palm Beach Canvassing Board*, Case No. CL00-11-78AB (Cir. Court. of the 15th Judicial Cir., Nov. 22, 2000) (Order on Plaintiff's Motion to Clarify Declaratory Order of Nov. 15, 2000), at p. 5 (App. 13).

[10] Due to the trial court's refusal to enter a written order stating its oral rulings on the hearing transcript, these issues may not come before the Court on a certified appeal. If that is the case, Petitioners ask the court to treat the argument on these issues as a further petition for relief. The certified results of the Palm Beach County manual count do not need to be counted since Defendants have accepted the appropriateness of the count and the only question is whether these concededly legal votes can be rejected. The 388 votes counted by Miami-Dade before prematurely terminating its manual count do not need to be counted unless Defendants contend those votes are defective in some way.

in the federal electoral process." *Harris*, Slip Op. 38. This Court's intervention now is essential to ensure that the circuit court's delay and the December 12 deadline do not eliminate this fundamental constitutional guarantee in this contest action.

By denying the Motion to Commence Counting, the circuit court frustrated the statutory election contest scheme and this Court's November 21, 2000 Order. There is no question that the circuit court had the authority to order an immediate counting of the contested ballots:

> The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances.

§102.168(8), Fla. Stat. (2000). Indeed, the circuit court has an obligation to expedite the counting to ensure that the contest may be completed without risking any disruption to the electoral process.

This Court should reverse the circuit court's denial of the Motion under Section 102.168 and Florida Rule of Civil Procedure 1.161 to count the ballots or order them counted, and order the trial court to immediately commence counting the contested ballots.

In addition, in denying Petitioners' motion, the trial court rested its decision on three erroneous legal rulings which should be reversed when this Court orders the trial court to commence counting the ballots now.

B. The Circuit Court's Rulings Were Based on a Legally Erroneous View of the Legal Standard for Counting Ballots -- The Standard of Determining the Voter's Intent is Well Established

The circuit court ruled that the proper standard for determining whether ballots were legal and wrongfully rejected was an open question requiring an evidentiary hearing. That ruling is wrong and should be reversed. The law of Florida is that punchcard votes must be counted according to an objective standard that looks to the intent of each voter as expressed in the marking of the ballot. Only last week in its election decision, this Court stated clearly:

> [A]n accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:
>
> The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law . . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those laws are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent,

> simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters should not be disenfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

*Palm Beach County Canvassing Board v. Katherine Harris,* 2000 WL 1725501 (Fla. Nov. 21, 2000), quoting *Pullen v. Mulligan*, 561 N.E. 2d 585, 611 (Ill. 1990) (citations omitted).

This was not a new rule of law in Florida. For more than 80 years this Court has adhered to this very standard for adjudging ballots. *See, e.g.*, *Darby v. State*, 73 Fla. 922, 924, 75 So. 411, 413 (Fla. 1917). The purpose of the standard is expressed in this Court's longstanding doctrine that the voters of this state are "possessed of the ultimate interest and it is they to whom we must give primary consideration." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975).

Florida's election code makes the objective intent standard luminously clear. Section 101.5614(5) provides: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter . . . ." Subsection (6) of the same section

states the corollary: " . . . if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office . . . ." This provision is most telling. Only the impossibility of determining the voter's choice justifies rejecting a ballot. The manual recount statute itself provides that counting teams are to manually examine punchcard 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." §102.166(7)(b), Fla. Stat. (2000).

Under this objective intent of the voter standard the court must, as a matter of law, count all ballots that contain a discernable indentation or other mark, at or near the ballot position for the candidate, unless other evidence on the face of the ballot clearly indicates a voter's intention not to vote for that candidate. Even absent any physical perforation of the chad, as a matter of law, a discernible indentation on the ballot constitutes objective evidence of the voter's intent to vote for the chosen candidate. This is especially true where the voter has marked no other box for the office of President. Thus, where the ballot contains an indentation, it should be interpreted as evidence of intent to vote for the chosen candidate, not intent to abstain. See *Darby v. State*, 73 Fla. 922, 75 So. 411 (Fla. 1917) (an "x" marked on the wrong side of the ballot question did not make the vote improper; "x" reflected

the plain intent of the voter and must be counted). *Darby* is closely analogous to the present situation.

The Supreme Judicial Court of Massachusetts held that "a discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned." *Delahunt v. Johnston*, 423 Mass. 731, 733, 671 N.E.2d 1241, 1243 (1996). The South Dakota Supreme Court adopted the same standard in *Duffy v. Mortensen,* 497 N.W. 2d 437, 439 (S.D. 1993), holding: "Only if it is impossible to determine the voter's intent is a part of a ballot void and not counted. We presume every marking found where a vote should be to be an intended vote unless the contrary is clear." The Illinois Supreme Court's decision in *Pullen v. Mulligan*, 561 N.W.2d 585 (Ill. 1990), upon which this Court recently relied, applied to instances in which "the chad did not completely detach from the ballot, but the voter instead punctured a round hole in the chad, partially dislodged the chad or made a strong indentation in the chad." *Id*. at 609. And Texas statutory law clearly requires a punchcard vote to be counted if "an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or . . . the chad reflects by other means a clearly ascertainable intent of the voter to vote." Texas Elections Code §127.130(d)(3) and (4). These cases, and many others throughout the United States, require close manual inspections of ballots to

determine the voters' intent. *See, e.g., 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.R.V.I. 1986) ("the intention of the elector must be paramount"); *Hickel v. Thomas*, 588 P.2d 273, 274 (Alaska 1978) (unperforated punchcard ballots marked by pen are counted because they reflect voter's intent); *Wright v. Gettinger,* 428 N.E.2d 1212, 1215 (Ind. 1981) (ballots with partially attached chads counted because they reflect voter's intent); *McCavitt v. Registrars of Voters of Brockton*, 383 Mass. 833, 836-39, 434 N.E.2d 620, 623-25 (1982).

This Court, as all these other state courts and legislatures have decided, should affirm that a failure to count indented ballots as votes would improperly disregard voter intent. Courts properly reject the unwarranted and fanciful contention that "many voters started to express a preference in the . . . contest, made an impression on a punch card, but pulled the stylus back because they really did not want to express a choice on that contest." *Delahunt*, 423 Mass. at 733, 671 N.E.2d at 1243. Petitioners contend that no further confirmation of the legal principle that indentations on punch cards reflect voter intent is required. However, to the extent that any further confirmation is required, that confirmation is provided from the

undisputed evidence of the votes cast in Election 2000. In Florida counties using punch card ballots, the percentage of unrecorded votes for President is 350% higher than the percentage of unrecorded votes in Florida counties using optical ballots. (See App. 1-5.) Manual counts of punch card ballots reduce (but do not eliminate) this differential.

C. The Circuit Court's Rulings Rested on an Erroneous Legal Ruling Regarding the Ballots to be Counted -- The Only Ballots Relevant in a Circuit Court Contest Action Are Those Claimed to be Legal Ballots Wrongly Rejected or Illegal Ballots Wrongly Received

The Complaint identifies the contested ballots to be counted. They are: (a) approximately 3,300 contested ballots from Palm Beach County (which must be recounted); and (b) approximately 9,000 ballots from Miami-Dade County (which must be counted for the first time).[11] No other votes or ballots cast in Florida on November 7 are disputed by any party in this case or subject to any contest action. Responding to Appellees/Respondents arguments, the circuit judge held that whether to review and count ballots other than those in dispute was an evidentiary issue. The

[11] There is no request to count disputed votes in Nassau County only a dispute about the Canvassing Board's refusal to certify the results of its mandatory automatic recount.

suggestion that all ballots must be reviewed – whether contested or not – is nothing less than a defense delay tactic.[12]

Petitioners brought the action below pursuant to Section 102.168, Florida Statutes (2000). The statute sets forth the procedures for contesting an election. This action proceeds under subsection 102.168(3)(c) which identifies the "receipt of a number of illegal votes or the rejection of a number of legal votes" sufficient to change or place in doubt the result of an election as a ground for contesting an election. Section 102.168 establishes broad authority for the courts to fashion a remedy. That includes the authority to count votes that are in dispute and subject to a contest action.

Nothing in the statute permits ballots that are uncontested to be subject to review and investigation, and the statute certainly does not require *every* ballot cast in an election to be reviewed because a few have been challenged. The fallacy of counting all ballots cast in an election because some are contested is apparent. The

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[12] It is wholly disingenuous for the Defendants, who have taken every step to prevent the counting of ballots, to now claim simultaneously that (1) no ballots should be counted and (2) all ballots should be counted. The Plaintiffs offered the Defendants the opportunity to undertake a statewide manual recount of all votes while there was still time for it to be completed. As observed by this Court in footnote 56 of its opinion, the same offer was made to Defendants by this Court at argument in *Harris v. Palm Beach County Canvassing Board.* All such offers have been rejected out of hand by the Defendants. The Court should now reject this transparent and deceptive attempt to further delay these proceedings.

dispute is about a discreet, specifically identified group of ballots. There is no question that they were rejected. The only questions are: (a) are they legal, and (b) if they, are how many are for each candidate. Answering those questions does not require review of any other ballots.

Out of the 1,000,000 ballots cast in Palm Beach and Miami-Dade less than 14,000 are the subject of any dispute in this matter. These ballots, and only these ballots, are rightfully the subject of this contest action. Petitioners argued below that the court may not count the contested ballots unless it does so in the context of a full manual count the remaining 1,000,000 legal and valid ballots cast by voters in Florida's November 7 election. Those million ballots that have been counted are wholly irrelevant to determining whether the 15,000 uncounted ballots are legal votes that have been rejected or illegal votes which have been received.

The Court's role under Section 102.168 is to resolve disputes about accepted and rejected ballots. It is not to begin an original investigation of the election process. In the context of a protest under Section 102.166, the remedy prescribed by the Florida legislature is a full manual recount of all ballots cast. No such remedy or right of review is set forth in Section 102.168. Rather, that post-certification process is a limited one that allows a losing party to challenge the certified outcome of an

election by contesting specific votes – those legal votes rejected or illegal votes received.

*Beckstrom v. Volusia County Canvassing Board*, 707 S. 2d 720 (Fla. 1998),[13] resolved an appeal of judgment in a contest action challenging the handling of absentee ballots which had been marked in a certain manner so that they could be read by electronic scanning machines. The opinion offers no suggestion by the court or the parties that any ballots other than absentee ballots be reviewed in the contest action. Indeed, the *Beckstrom* court limited its review to only absentee ballots. In *Delahunt v. Johnston*, 423 Mass. 731 (1986), the court examined 956 ballots to determine whether there was a discernible impression made by a stylus, and thereby determine whether those ballots should be counted or rejected. In *Pullen v. Mulligan*, 138 Ill. 2d. 21 (1990), the Illinois Supreme Court case quoted at length in *Harris*, the court exercised its discretion to determine how many – and which – ballots it would

[13] In other contest cases brought in this state, the court has needed to review uncontested ballots only where the challenged ballots were not identifiable and segregated from the other ballots. In this case, the disputed uncounted ballots from Miami-Dade and Palm Beach Counties have been segregated from other, undisputed ballots. There is therefore no need to review any other ballots in order to determine whether legally valid votes have been rejected in Palm Beach or Miami-Dade. In similar cases where the disputed ballots have been segregated from undisputed ballots – such as a contest over absentee ballots – there has been no need for any review of uncontested ballots.

review. The *Pullen* court visually reviewed only 27 disputed ballots out of thousands cast to determine the voters' intent. In neither *Delahunt* nor *Pullen* case, did the parties nor the court consider reviewing all uncontested ballots in order to determine the validity of the contested ballots.

Here, fewer than 14,000 ballots are at issue; there is no reason for the Court to review millions of undisputed ballots in order to resolve the issues raised.

D. The Circuit Court's Rulings Rested on an Erroneous Decision Regarding the Standard for Reviewing the Issues Before It; In An Original Action Under Section 102.168 the Court Must Decide in the First Instance What Intent of the Voter the Ballot Manifests.

The court below ruled that whether the decision in the contest proceeding was an initial review of the ballots or a review of the canvassing board's decision was an open issue, possibly one of fact. (App.-14, at 42) That is incorrect. Reading the statute demonstrates the error. A certification of election "may be contested in the circuit court . . . ." §102.168(1), Fla. Stat. (2000). The action begins with a complaint. §102.168(2), Fla. Stat. (2000). Defendants must be served and must serve answers. §102.168(6) An election contest is clearly an original action before the circuit court not some sort of appellate review. The action in trial court is not common law certiorari, nor is it appellate review under Florida Rule of Appellate

Procedure 9.030(c). As in any original action the court must make the initial decision.

The tasks the contest statute charges the court with also demonstrate that the Florida Legislature intended the courts to reach their own independent determinations of voter intent in reviewing ballots. Some of the grounds for an election contest refer specifically to errors or misconduct by members of the canvassing board. *See, e.g.,* §§102.168(3)(a), (d), Fla. Stat. (2000) In addition to those provisions, however, the statute authorizes a challenge based on "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." §102.168(3)(c), Fla. Stat. (2000) By its terms, this provision requires proof merely that a potentially decisive number of valid votes were not counted, and focuses solely on the votes themselves; it neither calls for "review" of the Canvassing Board's decisions, nor suggests that the Board's decisions might be owed any deference.

Indeed, in a closely analogous case, this Court treated as a matter of law the legal validity of ballots that featured various markings by voters:

> [T]he inspectors should count and return the vote and ballot as cast whatever may be the name or the mark used, *the legality of the vote being for judicial determination, if duly presented in appropriate proceedings*. . . . Where the statutes require a vote to be cast in a certain way, as by placing an X mark to the left of or before the name of the

> person intended to be voted for, the statute should be substantially complied with, or the vote should not be counted among the votes that are properly cast. *What is a substantial compliance with the requirements of the statute is ultimately a judicial question.* Where a ballot contains an X mark after a name on the ballot when the statute requires the X mark to be placed before the name, or when there is a mark that has no semblance of an X mark before a name on a ballot, such irregular votes should be separately counted, tabulated, and returned, *and the ballots should be duly preserved, subject to judicial procedure in which the courts may determine whether the vote so irregularly cast should be counted with those that were properly and regularly cast.*"

*State v. Williams*, 97 Fla. 159, 120 So. 310, 314 (Fla. 1929) (emphasis added, internal citation omitted).

Just as the test for determining voter intent is a judicial question, so too must its application of that test to particular ballots. In adjudicating a contest action, the court reviews the ballots themselves, not the canvassing board's assessment of the ballots:

> where the returns and certificates of the election have been duly challenged, and facts have been shown in evidence or are admitted by pleadings, which impeach the reliability of such returns and certificates as evidence, because of some substantial failure on the part of the election officers to proceed according to the law in making or arriving at their returns and certificates, *the ballots themselves then become the best evidence of how the electors voted, and such ballots may be examined by the court as original evidence, when necessary to verify the accuracy of the returns.*

*State v. Smith*, 107 Fla. 134, 144 So. 333, 336 (Fla. 1932) (emphasis added).

Decisions from other state courts confirm that ballots must be inspected on an original basis when a candidate contests election results and seeks a recount. *See, e.g., McIntyre v. Wick*, 558 N.W.2d 347, 357 (S.D. 1996) (in reviewing election recount, "this Court's scope of review is de novo, . . . since review of a ballot involves construing a document, a question of law which does not require the Court to weigh evidence."); *Fischer v. Stout*, 741 P.2d 217, 220 (Alaska 1987) ("we hold that our obligation under [state statute] is to review any and all questioned ballots cast in the election at issue . . . ."); *Escalante v. City of Hermosa Beach*, 241 Cal. Rptr. 199, 201 (Cal. Ct. App. 1987) (applying *de novo* review standard to ballots unless interpretation requires extrinsic evidence), *review denied* (1988); *Wright v. Gettinger,* 428 N.E.2d 1212, 1223-25 (Ind. 1981) (deciding, on *de novo* basis, the legal standard for counting punch card ballots).

In line with this approach, appellate courts review *de novo* a trial court's assessment of ballots to determine the voters' intent. *See Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996) ("Our review of a voter's intent is a question of law that we decide de novo."); *In re Election of the United States Representative for the Second Congressional District*, 653 A.2d 79, 108 (Conn. 1994) ("we must determine *de novo* the voter's intent in casting or marking an absentee ballot. We have employed such a plenary standard in our appellate review of a trial judge's finding

regarding a voter's intent in casting an absentee ballot."). For instance, in *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) – a decision cited by this Court in last week's *Harris* ruling – the Illinois Supreme Court declared the legal standard for judging punch card ballots; the state Supreme Court itself proceeded to review disputed ballots and declared that the winner of the election was the challenger who had filed the election contest action. *See id.* at 609-14. That is precisely the approach (and the result) that this Court should adopt in the instant matter.

In addition, the law of many other states, including Defendant Bush's home state of Texas, supports Petitioners' position on this point. For instance, in an election contest raising a challenge to write-in statements on ballots, the appellate court ruled that, as a matter of law, certain write-in names should count for a candidate "because the voter's intent to vote for him is clearly ascertainable." *Guerra v. Garza*, 865 S.W.2d 573, 577-78 (Tex. Ct. App. 1993). The court remanded the case and instructed the trial court to apply this legal standard in conducting a manual recount. *See id.* at 579. Nothing in the court's decision suggests that local election officials' analysis of the ballots would be accorded any deference. In another case applying the Texas contest statute – which is substantially similar to Florida's contest provision – the Court of Appeals held that where a contestant shows that legal votes were not counted, the trial court must "ascertain the true outcome of the election."

*Tiller v. Martinez*, 974 S.W.2d 769, 772 (Tex. Ct. App. 1998). These decisions from other states, including Texas, underscore that the determination of a voter's intent based on ballot markings is an issue of law to be judged *de novo* by the courts in an election contest.

## III. CONCLUSION AND PRAYER FOR RELIEF

Petitioners pray that this court take immediate emergency action to preserve the right to contest an election under section 102.168, Florida Statutes (2000). They request that the action include:

A. Cause the approximately 9,000 uncounted ballots cast in Miami-Dade County for President and Vice President of the United States to be manually counted by or under the direction of this Court, counting each ballot cast unless it is impossible to determine the intent of the voter, in order to determine the true and accurate returns of the general election for President and Vice President from Miami-Dade County;

B. Cause the approximately 3,300 disputed ballots cast in Palm Beach County for President and Vice President of the United States to be manually counted by or under the direction of this Court, counting each ballot cast unless it is impossible to determine the intent of the voter, in order to determine the true and

accurate returns of the general election for President and Vice President from Palm Beach County;

C. Reverse the circuit court's decision, and order the court to immediately commence counting ballots. We propose three alternative ways for the count to take place:

(1) A count by the Circuit Court Clerk. In *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 722 (Fla. 1998), the Court approved a procedure whereby "the clerk of the circuit court conducted a re-count, which was observed by representatives of both sides." In the present case, such a count could be conducted either:

a) by the clerk of Leon County; or,

b) by the clerks of Miami-Dade and Palm Beach Counties (which would eliminate the delay and other issues raised by transferring the ballots to the circuit court).

(2) A count by other judges of the Circuit Court of Leon County. Section 102.168(8) grants the court broad powers to enter whatever orders are required to decide this contest within the time set by this Court. Respondents have objected to Petitioners' proposal for the appointment by the circuit court of a Special Master, or Special Masters, to conduct the count on the ground that such a count is a judicial

determination. Respondents can hardly object to the appointment of Circuit Court judges to conduct the count. Either of these procedures would be acceptable to Respondents.

D. On remand order:

1. That only the ballots contested in the Complaint be examined and counted;

2. That the contested ballots be reviewed using the legal standard that the voters intent must be honored unless it is impossible to determine the intent and that an indentation on a chad be recognized as an expression of voter intent; and

E. Grant such other relief as the Court deems just and proper.

Respectfully submitted this _____ day of November, 2000.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, hand delivery or facsimile transmission this _____ day of November, 2000 to the following:

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