

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

CASE NO. SC00-2431

On Appeal from the Second Judicial Circuit

CASE NO. 1D00-4745

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,

CASE NO.

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.

BRIEF FOR APPELLANTS,
OR IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS
OR OTHER WRITS

John D.C. Newton, II
Florida Bar No. 0244538
Berger Davis & Singerman
215 South Monroe Street, Suite 705

Tallahassee, Florida 32301

Telephone: 850/561-3010
Facsimile: 850/561-3013

W. Dexter Douglass
Florida Bar No.0020263
Douglass Law Firm

211 East Call Street
Tallahassee, Florida 32302
Telephone: 850/224-6191
Facsimile: 850/224-3644

Ron Klain
c/o Gore/Lieberman Recount
430 S. Capitol St.
Washington, DC 20003
Telephone: 202/863-8000
Facsimile: 202/863-8603

Andrew Pincus
c/o Gore/Lieberman Recount
430 S. Capitol St.

Mitchell W. Berger
Florida Bar No. 311340
Berger Davis & Singerman
350 E. Las Olas Blvd, Suite

1000

Fort Lauderdale, Florida

33301

Telephone: 954/525-9900
Facsimile: 954/523-2872

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite

110

Armonk, New York 10504
Telephone: 914/273-9800
Facsimile: 914/273-9810

Jeffrey Robinson
Baach Robinson & Lewis
One Thomas Circle, Suite 200
Washington, DC 20003
Telephone: 202/833-7205
Facsimile: 202/466-5738

Mark R. Steinberg
2272 Live Oak Drive West
Los Angeles, CA 90068

Washington, DC 20003
Telephone: 202/863-8000
Facsimile: 202/863-8603

Theresa Wynn Roseborough
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996
Telephone: 404/853-8100
Facsimile: 404/853-8806

Kendall Coffey
Florida Bar No. 259861
2665 S. Bayshore Drive, Suite 200
Miami, FL 33133
Telephone: 305/285-0800
Facsimile: 305/285-0257
5989

John J. Corrigan, Jr.
896 Beacon St.
Boston, MA 02215
Telephone: 617/247-3800
Facsimile: 617/867-9224

Telephone: 323/466-4009

Joseph E. Sandler
Sandler & Reiff, P.C.
6 E Street, S.E.
Washington, D.C. 20003
Telephone: 202/43 – 7680
Facsimile: 202/543 –7686

Benedict E. Kuehne
Florida Bar No. 233293
Sale & Kuehne, P.A.
100 S.E. 2d Street, Suite 3550
Miami, FL 33131-2154
Telephone: 305/789-

Facsimile: 305/789-5987

Dennis Newman
580 Pearl St.
Reading, MA 01867
Telephone: 781/944-0345
Facsimile: 617-742-6880

COUNSEL FOR ALBERT GORE, JR. AND JOSEPH I. LIEBERMAN

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE AND FACTS 8

A. Palm Beach County 8

B. Miami-Dade County 11

C. Nassau County 14

D. Elections Canvassing Commission Certification 15

ARGUMENT 16

- I. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO DECIDE THIS CASE. 16

- II. THE APPEAL PRESENTS QUESTIONS OF LAW, NOT FACT.....17

- III. THE VOTE TOTALS MUST BE REVISED BECAUSE THEY ARE BASED ON THE “REJECTION OF A NUMBER OF LEGAL VOTES SUFFICIENT TO CHANGE OR PLACE IN DOUBT THE RESULT OF THE ELECTION”18
 - A. The Legal Votes Already Identified by the Palm Beach County Canvassing Board Must Be Included in the Vote Totals.....18

 - B. The Legal Votes Already Identified by the Miami-Dade County Canvassing Board Must Be Included in the Vote Totals..... 19

- IV. THE VOTE TOTALS FROM NASSAU COUNTY MUST BE REVISED TO REFLECT THE TOTALS THAT THE CANVASSING BOARD WAS LEGALLY REQUIRED TO SUBMIT TO THE ELECTIONS CANVASSING COMMISSION.....20

- V. THIS COURT SHOULD ORDER THE IMMEDIATE COUNTING OF THE 9,000 BALLOTS FROM MIAMI-DADE COUNTY AND THE 3,300 DISPUTED VOTES IN PALM BEACH COUNTY, AND THE INCLUSION OF ALL LEGAL VOTES IN THE VOTE TOTALS..... 22
 - A. The Trial Court Erred in Holding That Florida Law Restricts The Remedy in a Contest Action to a Statewide

Recount.....	24
B. The Trial Court Erred in Failing to Make Its Determinations De Novo and Instead Reviewing the Actions of the County Canvassing Boards Only for a “Clear Abuse of Discretion”.....27
C. The Trial Court Erred in Holding that a Plaintiff Must Establish a “Reasonable Probability That The Results of the Election Would Be Changed” Before a Court Reviews Contested Ballots.....	31
1. No Additional Factual Showing is Needed to Obtain Judicial Review of Contested Ballots Introduced Into Evidence.....	32
2. Even If, Contrary to Plaintiffs' Submission, Some Threshold Related to the Plaintiff's Chances of Prevailing on the Merits is Required to Obtain Judicial Review of Contested Ballots, that Requirement is Satisfied Here.....	35
D. The Court Should Order that the Ballots Be Counted by a Judicial Official Under this Court's Auspices	42
VI. THE DECISION BELOW INFRINGED ON THE LEGISLATURE'S POWER UNDER THE U.S. CONSTITUTION; AFFIRMANCE OF THAT RULING MIGHT STRIP FLORIDA'S ELECTORS OF THE PROTECTION OF 3 U.S.C. § 5.....45
VII. THIS COURT SHOULD ITSELF SUPERVISE THE FURTHER PROCEEDINGS IN THIS CASE PURSUANT TO ITS ALL WRITS AND MANDAMUS AUTHORITY	48
CONCLUSION.....49

TABLE OF CITATIONS

Cases

Adams v. Canvassing Bd. of Broward Cty, 421 So.2d 34
(Fla. 4th DCA 1982) 34

Atkins v. State, 23 So.2d 524 (Fla. 1945) 41

Beckstrom v. Volusia Cty. Canvassing Bd., 707 So.2d 720
(Fla. 1998) 20, 31, 32, 33, 35, 39, 43, 47

Boardman v. Esteva, 323 So.2d 259 (Fla. 1975) 34, 45

Bush v. Palm Beach County Canvassing Board, 2000 U.S. LEXIS 8087
(U.S. Dec. 4, 2000) 1, 19, 38, 43

Cannella v. Auto-Owners Ins., 2000 Fla. Lexis 1446 (July 13, 2000) 41

Carpenter v. Barber, 144 Fla. 159, 198 So. 49 (1940) 38

Chappell v. Martinez, 536 So.2d 1007 (Fla. 1988) 24

Darby v. State, 73 Fla. 922, 75 So. 411 (Fla. 1917) 35, 38, 43

Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996) 39, 44, 46

Duffy v. Mortensen, 497 N.W. 2d 437 (S.D. 1993) 39

Escalante v. City of Hermosa Beach, 241 Cal. Rptr. 199 (Cal. Ct. App.
1987) 38

Farmer v. Carson, 110 Fla. 245, 251 (Fla. 1933) 32

Fischer v. Stout, 741 P.2d 217 (Alaska 1987) 38

Flack v. Carter, 392 So.2d 37 (Fla. 1st DCA 1980) 41

Fladell v. Palm Beach Canvassing Board, Case Nos. 4D00-4145, 4D00-
4146, and 4D00-4153 (Fla. 4th DCA Nov. 27, 2000) 35

Fla. Dem. Party v. Palm Beach Cty. Canvassing Bd., CL 00-11078
AB, 36

Gore v. Harris, Case No. 1D00-4717 (1st D.C.A. Dec. 1, 2000) 42

Gore v. Harris, Case No. SC00-2385, (Fla. Dec. 1, 2000)42

Harden v. Garrett, 483 So.2d 409 (Fla. 1985) 20

Hicks v. United States, 368 F. 626 (4th Cir. 1966) 20

Hillsborough County v. Kortum, 585 So.2d 1029 (Fla. 2nd DCA 1991)20

Hornsby v. Hilliard, 189 So. 2d 361 (Fla. DCA 1966) 12, 24

Kainen v. Harris, 25 Fla. Law W. S735 (Oct. 3, 2000) 41

*In re Election of the United States Representative for the Second
Congressional District*, 653 A.2d 79 (Conn. 1994) 39

*In re The Matter of the Protest Election Returns and Absentee Ballots in the
November 4, 1997, Election for the City of Miami*, 707 So.2d 1170 (Fla. 3rd
DCA 1998) 33

McIntyre v. Wick, 558 N.W.2d 347, 357 (S.D. 1996) 38

McPherson v. Flynn, 397 So. 2d 665 (Fla. 1981) 20, 34, 46

*Miami-Dade County Democratic Party v. Miami-Dade County Canvassing
Board*, Case No. 3D00-3318, Slip Op. at 3 (Fla. 3rd DCA, Nov. 22,
2000) 16

Morse v. The Dade County Canvassing Board, 456 So.2d 1314 (Fla. 3rd
DCA,1984) 28

Palm Beach County Canvassing Board v. Harris, Nos. SC00-2346, 238,
2349 (Fla. November 21, 2000)*passim*

Pullen v. Mulligan, 561 N.E. 2d 585(Ill. 1990) 40

<i>Schweinberg v. Click</i> , 627 So.2d 548 (Fla. 5 th DCA 1993)	20
<i>Spradley v. Bailey</i> , 292 So.2d 27 (Fla. 1 st DCA 1974)	34
<i>State v. Latham</i> , 125 Fla. 788, 170 So. 472 (1936)	32
<i>State v. Peacock</i> , 125 Fla. 810, 170 So. 309 (1936)	32
<i>State v. Smith</i> , 107 Fla. 134, 144 So. 333 (Fla. 1932)	32, 38, 44, 45
<i>State v. Williams</i> , 97 Fla. 159, 120 So. 310 (Fla. 1929)	32, 37
<i>State ex rel. J.R. Carpenter v. J.K. Bake</i> , 198 So. 49 (Fla. 1940)	26
<i>State ex rel. Millinor v. Smith</i> , 107 Fla. 134, 144 So. 333 (Fla. 1932)	40
<i>State ex rel. Nuccio v. Williams</i> , 97 Fla. 159, 120 So. 310 (1929)	31, 37, 38
<i>State ex rel. Peacock v. Latham</i> , 125 Fla. 793, 170 So. 475 (1936)	43
<i>State ex rel. Whitley v. Rinehart</i> , 140 Fla. 645, 192 So. 819 (1940)	27
<i>Wheeler v. State</i> , 472 So.2d 847 (Fla. 1 st DCA 1985)	20
<i>Wiggins v. State</i> , 106 Fla. 793, 144 So. 62 (1932)	37, 38
<i>Wright v. Gettinger</i> , 428 N.E.2d 1212 (Ind. 1981)	38

Florida Statutes

Section 101.5614(5)	35
Section 102.14..	5
Section 102.141(4)	8, 16, 27, 28
Section 102.166	6, 8, 35, 40
Section 102.166(4)	15, 40
Section 102.166(5)	40
Section 102.166(5)(c).	8, 10

Section 102.166(7)(b)	36
Section 102.168	6, 21, 32, 25, 38, 39, 44
Section 102.168(1)	35
Section 102.168(11)	41
Section 102.168(2)	35
Section 102.168(3)(a)	36
Section 102.168(3)(c)	4, 7, 21, 22, 25, 30, 36, 43, 47, 53
Section 102.168(3)(d)	36
Section 102.168(6)	35
Section 102.168(7)	34
Section 102.168(8)	31, 35
Section 102.1682	41
Section 102.66	26
Section 113.011	47

Florida Constitution

Article V	40
Article V, Section 3(b)(5)	19
Article V, Section 3(b)(7)	40
Article V, Section 3(b)(8)	40

Other Citations

United States Constitution, Article II	38, 39
3 U.S.C. § 57,	19, 42
Florida Rule of Civil Procedure 1.140	45
Florida Rule of Civil Procedure 1.510	45
Florida Rule of Appellate Procedure 9.030(c)	36
Texas Elections Code 127.130(d)(3) and (4)	44
House of Representatives, Comm. on Election Reform, Final Analysis, HB 281, Ch. 99-339 Laws of Florida (July 15, 1999)	40
Attorney General Legal Opinion AGO 2000-65	9
Laws of Florida, Ch. 99-339 (1999)	41

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an election contest action pursuant to Section 102.168, Florida Statutes. This is the election contest that this Court held in *Palm Beach County Canvassing Board v. Harris*, 2000 Fla. Lexis 2311 (Fla. Nov. 21, 2000) *vacated and remanded*, *Bush v. Palm Beach County Canvassing Board*, 2000 U.S. Lexis 8087 (Dec. 4, 2000) (per curiam) (“*Harris*”) that Plaintiffs had a right to bring; the contest action that caused the Court in *Harris* to set the mandatory acceptance time for November 26 in order to permit this action to be completed by December 12; the contest action that Defendants' counsel told this Court in *Harris* was the right way for Plaintiffs to challenge the failure to count the ballots at issue.

Plaintiffs brought this action on November 27, 2000, following the November 26 certification by the Election Canvassing Commission and the Secretary of State of the Presidential election. At the first hearing before the trial court on November 27, and virtually every day thereafter, Plaintiffs urged the trial court to begin a review of the contested ballots. The court repeatedly refused to do so. The trial took place on December 2 and 3, during which the disputed ballots were admitted into evidence. Nonetheless, on December 4, the trial court dismissed the contest without ever reviewing even one of the contested ballots. Transcript of Judge Sauls' Ruling Case No. 00-2808 (Cir. Ct. Leon County 12/4/00) (“Ruling Tr.”) at 13.

The trial court found “voter error, and/or less than total accuracy, in regard to the punchcard voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years.” (Ruling Tr. at 10) This finding was supported, indeed compelled, by:

(a) The evidence given by Plaintiffs' witness Kimball Brace that a manual review of punchcard ballots was required in close elections because of the many ways in which punchcard ballots might be marked due to defects or limitations in the machines, or by the failure of the voter to completely follow instructions, such that a machine would not register a vote that the voter intended to cast. Trial Tr. I: 78-83, 89-90, 95: 10-20.

(b) The evidence given by Defendants' expert witness John Ahmann that a manual review of punchcard ballots was necessary in very close elections because of limitations in the accuracy of machine counts—and that Miami-Dade had rejected a new stylus that he had proposed to the county to reduce the inability or failure of voters to dislodge chads; that the build-up of chad in machines can prevent voters from dislodging a chad;

that machines need to be cleaned regularly; and that Miami-Dade's machines had not been cleaned in eight years. Trial Tr. III: 441:22-24; 442:22-24; 442:13-16; 443:10; 439:7-17; 440: 4-6; 440: 14-17.

(c) The evidence given by Plaintiffs' statistician that counties using punchcard ballots were five times as likely to have a ballot register as an undervote or blank vote when run through a machine than were counties using optical ballots, and that there was no explanation for this other than differences in machines. Trial Tr. II:183: 17-184:12.

(d) The evidence given by Defendants' statistician that the difference between punchcard ballot and optical ballot results could not be explained by chance and that he was unable to identify any factors other than the characteristics of the machines that fully explained the difference. Trial Tr. III: 354: 14-19;

(e) The testimony of Judge Burton that the Palm Beach Canvassing Board, in actions that the trial court expressly approved, was able to identify a net gain of 215 additional votes for Vice President Gore where the Board could identify the voter's intent but the machine would not register a vote. Trial Tr. II: 278: 8-279:1.

(f) The undisputed evidence that, before the Miami-Dade Canvassing Board prematurely terminated its manual recount, it had (again, by actions the trial court expressly approved) identified 436 additional votes (from 20% of the county's precincts, representing 15% of the votes cast) where the voter's intent was clear but the machine would not register a vote. App. 8; PX 6 (Interrogatory Answers); and

(g) The undisputed evidence that both the Broward County and Miami-Dade County Canvassing Boards were able through manual recounts to identify the voter's intent on between 22% and 26% of the punchcard ballots which the machine had recorded as "no-votes." Trial Tr. II: 188:18-25.

Thus, the undisputed evidence shows that experts from both sides concluded that a manual review of contested ballots was necessary to ascertain the voter's intent; that both sides' statisticians agreed there was a 500% disparity between unregistered votes in counties using punchcard devices compared to counties using optical scanners; and that when unregistered ballots were in fact manually reviewed, county canvassing boards, acting pursuant to standards the trial court approved, were able to find the clear intent of the voters with respect to many hundreds of ballots which the machines did not count.

Plaintiffs' contest is based on five instances where the official results certified involved "receipt of a number of illegal votes" or "rejection

of a number of legal votes” §102.168(3)(c). These are:

- (1) The rejection of 215 net votes for Vice President Gore identified by the Palm Beach Canvassing Board – in a manual count the trial court expressly approved – as reflecting the clear intent of the voter;
- (2) The rejection of 168 net votes for Vice President Gore, identified by the Miami-Dade County Canvassing Board in its partial recount – a recount the trial court expressly approved as proper;
- (3) The receipt and certification after Thanksgiving of the election night returns from Nassau County in place of the statutorily mandated machine recount tabulation—in violation of §102.14—resulting in an additional 51 net votes for Governor Bush;
- (4) The rejection of an additional 3300 votes in Palm Beach County, most of which Democrat observers identified as votes for Vice President Gore but which were not included in the Canvassing Board's certified results; and
- (5) The refusal to review approximately 9000 additional Miami-Dade ballots—the majority of which came from precincts carried by Vice President Gore in the election—which the counting machine registered as non-votes and which have never been manually reviewed.

The November 26, 2000 certified results showed a 537-vote margin in favor of Governor Bush. Reducing that margin by 428 (215 from Palm Beach, 168 from Miami-Dade, and 51 from Nassau) results in a margin of 103 before a single one of the 3300 ballots from Palm Beach or the 9000 ballots from Miami-Dade is examined. All of those ballots were offered and received in evidence and are now in the possession of this Court. Although Plaintiffs' contest is expressly based on the rejection of those ballots, the trial court reached its decision denying the contest without even looking at this evidence.

The trial court's decision to do so was based on three fundamental errors of law. Specifically:

- (1) The trial court held that in an election contest, the court cannot review *only* the contested ballots, but must review *all* ballots cast, or *no* ballots at all —contrary to the plain mandatory language of §102.168; contrary to a consistent line of authority in which this court and lower courts have limited their review to the contested ballots only; and without the citation of any statutory or case authority.
- (2) The trial court held that the county canvassing boards' decisions had to be reviewed for “a clear abuse of discretion” (Ruling Tr. at 10) — contrary to consistent precedents in this and other states that the review of contested ballots is a matter of law for the court's *de novo* review; in the

absence of any reference to discretion in §102.168 (as contrasted to §102.166's grant of discretion to the canvassing boards to decide whether to undertake a sample manual recount); without the citation of any case interpreting §102.168; despite the fact that §102.168 provides for an original judicial proceeding to contest the rejection or receipt of particular ballots; and despite the fact that the 9000 Miami-Dade ballots have never been reviewed, and no "discretion" as to what they mean has ever been exercised.

(3) Finally, the trial court held that the plaintiff must establish a "reasonable probability that the results of the election would have been changed" before it could look at the contested ballots—contrary to the express standard of §101.168(3)(c), requiring only that the inclusion or exclusion of the contested votes "will change *or place in doubt* the result of the election"; and despite the fact that the ballots, which the trial court declined to examine, are the best evidence as to whether the results of the election would change. (Plaintiffs also submit that, whatever the standard necessary to entitle Plaintiffs to a review of ballots, the undisputed evidence at trial more than met that standard.)

This Court and other courts have heard a great deal about 3 U.S.C. §5. To the extent that changing the rules after the election would deprive the State of Florida of the "safe harbor" of that section, the radical departure of the trial court from settled Florida statutory law and precedents would clearly lead to that result. Moreover, to the extent that the 3 U.S.C. §5 implies a prohibition on "changing the rules" after the election, the trial court's departure from settled Florida law would violate federal law.

STATEMENT OF THE CASE AND FACTS

A. Palm Beach County

On November 12, following a sample recount, the Palm Beach Board voted to conduct a manual recount of all ballots cast in Palm Beach County for President and Vice President. Following a legal opinion from the Secretary of State calling into question the validity of manual recounts in vote tabulation, the Palm Beach Board voted to suspend its manual recount.

From November 16 through 26, 2000, the Palm Beach County Board conducted a manual recount of all the presidential votes, under § 102.166(5)(c), Florida Statutes (2000).

During its review of ballots, the Palm Beach Board excluded approximately 3,308 legal votes, including:

- Using a per se rule, ballots where the voter mistakenly voted for one presidential candidate, taped over the wrongly punched chad and then voted for Al Gore were declared overvotes and

not counted. (Tr. Palm Beach County Canvassing Board, 11/19/00, at 66, 75-76, 82, and 84-85)

- A damaged ballot on which the voter wrote in the name of Al Gore for President was declared an overvote and not counted. (Tr. Palm Beach County Board 11/18/00, at 94-97)
- Several ballots were declared undervotes and not counted where, consistent with other races on the ballot, the voter made a pinhole in the chad for Al Gore for President, which did not fully dislodge the chad. PX 35; (Tr. Palm Beach County Board 11/18/00 at 20-21; PX 38 Tr. Palm Beach County Board 11/21/00, at 222-223)
- A ballot was rejected as an undervote where “one corner is definitely detached, and...[a Board member] can see right through it” because the Board said the “policy we adopted before starting was the two-corner...approach.” PX 36 (morning); Tr. Palm Beach County Canvassing Board, 11/19/00, at 72-73

On November 22, 2000, the Palm Beach Board reviewed Judge Labarga's order, and recommenced reviewing ballots on November 24, 2000. Trial Tr. II: 265-268. After hearing evidence as to factors that might lead to partially indented ballots, Judge Burton appears to have acknowledged that the Board had erred up to that point in applying a “clear and convincing” standard in its review up to that point. (PX 40; Tr. Palm Beach County Canvassing Board, 11/24/00, at 45 and Tr. of Hearing before Palm Beach County Circuit Judge Labarga, 11/22/00 at 79) The Palm Beach Board did not revisit the precincts that had been decided under the erroneous standard. (Transcripts of Palm Beach County Canvassing Board, 11/24/00, 11/25/00 and 11/26/00)

On November 26, the Palm Beach Board sought an extension of the mandatory acceptance time for reporting the results of its manual recount, both by telephone and in writing. The Secretary of State refused to extend the mandatory acceptance time. PX 14.

Before the end of the mandatory acceptance period, the Palm Beach Board sent the results of the manual recount that it had completed to Secretary of State Harris and the Election Canvassing Commission. At that time, the Palm Beach Board reported the manual recount results for the

approximately 586 out of 637 precincts in Palm Beach County where it had completed its partial manual count and the unrevised machine recount results for the remaining precincts. There was a net increase of 172 votes for Al Gore over the county's results before the manual recount. (PX 14)

Despite the Secretary's refusal to accept returns beyond the prescribed time, the Palm Beach Board continued with its manual recounts of votes. At 7:07 p.m., just 127 minutes after the mandatory acceptance time, the Palm Beach Board completed its recount. The complete manual recount identified a total additional net 215 votes for Al Gore over the machine recount. App. 3; 4.

On November 26, shortly after 7:30 p.m., Secretary Harris and the Commission certified the results of the election, but rejected the results of the manual recount from Palm Beach County, and instead certified the result of the earlier machine recount in Palm Beach County.

B. Miami-Dade County

After conducting a sample manual recount, the Miami-Dade Canvassing Board voted on November 17 to conduct a full manual recount and commenced it on November 20.

Approximately 10,750 ballots in Miami-Dade County did not register a vote for president on Miami-Dade's Votamatic tabulation machines. Plaintiffs' Exhibit 7, Trial Tr. II: 183. At trial, it was established that this above-average undervote rate was attributable at least in part to unreliable voting machines that were acquired in the 1970's (Trial Tr. II: 418-19, 437-40) and had not been cleaned of chads and other debris for at least eight years. Trial Tr. II:183; App. 7 (Stipulation); Ruling Tr. at 10.

On the morning of November 22, the Miami-Dade Canvassing Board decided, in light of the mandatory acceptance time set by this Court, to focus its manual count on the approximately 10,750 "undervotes", of which approximately 9,000 had not yet been reviewed. Prior to November 22, in two full days of work the board had reviewed all of the ballots from approximately 139 precincts, or approximately 20% of the 617 Miami-Dade precincts, and roughly 15% of the approximately 653,000 ballots cast. Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. I, at 4, 35-37. The Board had found 436 legal votes that the machines had failed to tabulate – 302 votes for Vice President Gore and 134 votes for Governor Bush, for a net gain of 168 votes for Vice President Gore. App. 8; PX 6.

All three board members concurred with conducting a manual recount of just the undervotes. (Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1, at 35-37). Unfortunately, within hours, a transformation took place. As

the morning session was concluding, one speaker confronted the canvassing board directly with the reality of accelerating tensions:

There is a full protest going on out in the lobby
and we cannot bring people in or out. We have
people *attempting to get into a fight with officers
or with members of the media.*

Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1, at 50 (emphasis added). As another speaker advised the canvassing board, “We were both crushed up against the door.” Miami-Dade Canv. Bd. 11/22/00 T. Pt. 1, at 92. The Board's own intensifying concerns about the potential impact of these disturbances were also stated on the record by Supervisor Leahy. “Until the demonstration stops, nobody can do anything.” Miami-Dade Canv. Bd. Tr. 11/22/00 Pt. 1 at 51.

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.

The Canvassing Board also voted to return to the certification of November 8. Miami-Dade Canv. Bd. Tr. 11/22/00 Vol. II at 35-36. This had the effect of discarding the 436 legal votes that had already been duly counted up to that moment. The Miami-Dade Democratic Party appealed to the Third District Court of Appeal, which held that the Canvassing Board had a “mandatory obligation” to complete the manual recount, but that it was physically impossible to meet this Court's deadline. *Miami-Dade Dem. Party v. Miami-Dade Canvassing Commission*, Case No. 3D00-3318 (3rd DCA Nov. 22, 2000).

C. Nassau County

On the evening of November 7, 2000, the Nassau County Supervisor of Elections informed Secretary Harris that unofficial returns of the general election for President in Nassau County showed Gore/Lieberman with 6,952 votes and Bush/Cheney with 16,404 votes. App. 9; PX 54 (Trial Stipulation). On November 8, the Nassau County Canvassing Board conducted the machine recount of ballots mandated by section 102.141(4), Fla. Stat. (2000); App. 9; PX 54. The statutorily mandated machine recount produced returns of 6,879 votes for Gore/Lieberman and 16,280 votes for Bush/Cheney, a loss of 124 votes for Bush/Cheney and a loss of 73 votes for Gore/Lieberman, resulting in a net gain of 51 votes for Gore/Lieberman. App 9; PX 54. On November 8, the Nassau County Canvassing Board faxed its certification reflecting the tabulation based on the statutorily

mandated machine recount. Trial Tr. IV: 587. On November 17, the Canvassing Board submitted an additional certification without changing the machine recount results. PX 17

At a meeting held at 8:30 a.m., on November 24, believing that votes had been missed in the machine recount (solely because the election night returns were higher), without any further investigation, without a manual recount or even a further machine recount, without any protest by anyone authorized by section 102.166 to make a protest, and based on erroneous advice from the Elections Division of the Department of State, the Nassau County Canvassing Board purported to certify to the Department of State 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). App. 9; PX 54; Trial Tr. Vol IV: 593. The Nassau County Canvassing Board transmitted its new certification to the Department of State on Friday November 24. PX 54; App. 9; Trial Tr. IV 574-576; 581-592.

D. Elections Canvassing Commission Certification

On November 26, the Elections Canvassing Commission certified the results of the November 7th Presidential Election. PX 1. 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

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO DECIDE THIS CASE.

There is no doubt that the trial court's order addresses a question of great public importance, and this appeal requires immediate resolution by this Court. The trial court's decision not to count disputed ballots in this election contest directly affects the validity of Florida's election. The decision whether the trial court erred in failing to count the disputed ballots may determine which candidate was elected President of the United States. It is difficult to imagine a case raising a question of greater public importance.

Further, it cannot be disputed that this case requires immediate resolution. Failure to quickly review the trial court's ruling can result in the

selection of Florida's presidential electors not being given deference by Congress under 3 U.S.C. § 5. Moreover, if this Court determines that the trial court erred below, this Court must fashion a remedy that will fit within the limited time available.

Finally, in the past, this Court has exercised its discretionary jurisdiction under Article V, section 3(b)(5) to review a trial court's opinion in election cases. *See Palm Beach Canvassing Board v. Harris, et al.*, Case No. SC00-2346 (Fla. Nov. 21, 2000), *vacated and remanded by Bush v. Palm Beach County Canvassing Board*, 2000 U.S. LEXIS 8087 (U.S. Dec. 4, 2000); *Beckstrom v. Voulsia County Canvassing Board, et al.*, 707 So.2d 720 (Fla. 1998); *Harden v. Garrett*, 483 So.2d 409 (Fla. 1985); and *McPherson v. Flynn*, 397 So.2d 665 (Fla. 1981).

II. THE APPEAL PRESENTS QUESTIONS OF LAW, NOT FACT.

This appeal presents issues of laws not fact. Accordingly, the standard of review is de novo. The determinative facts in this matter come from documents, not witnesses. Unfortunately the most important documents are the ones the trial judge refused to look at, even though he admitted them into evidence: the nearly 14,000 ballots now in the custody of this Court. On such matters, the trial court's perspective and knowledge is entitled to no deference from this Court. *See, e.g., Schweinberg v. Click*, 627 So. 2d 548 (Fla. 5th DCA 1993); *Hillsborough County v. Kortum*, 585 So. 2d 1029 (Fla. 2nd DCA 1991); *Wheeler v. State*, 472 So. 2d 847 (Fla. 1st DCA 1985); *Hicks v. United States*, 368 F. 626 (4th Cir. 1966).

III. THE VOTE TOTALS MUST BE REVISED BECAUSE THEY ARE BASED ON THE “REJECTION OF A NUMBER OF LEGAL VOTES SUFFICIENT TO CHANGE OR PLACE IN DOUBT THE RESULT OF THE ELECTION.”

A. THE LEGAL VOTES ALREADY IDENTIFIED BY THE PALM BEACH COUNTY CANVASSING BOARD MUST BE INCLUDED IN THE VOTE TOTALS.

In the course of its manual recount, the Palm Beach County Canvassing Board identified a net gain of 215 additional votes for Vice President Gore. *See App. 3 (Answer of Palm Beach Canvassing Bd.); App. 4 (Trial Testimony of Judge Burton).* The Elections Canvassing Commission did not include these votes in the certified vote totals. PX 1.

Trial Tr. III: 52-53; App. 3.

Defendants have conceded that these votes are legal. Tr. 11/28/00 p. 44: 9-12 (Statement of Barry Richard: “We believe the [Palm Beach] Canvassing Board acted within its discretion and within order [sic] of Judge Labarga, so we have not challenged what they did.”). Exclusion of these lawful votes is thus a clear violation of Section 102.168(3)(c), which bars “rejection of . . . legal votes.” The trial court also found that the Palm Beach Board acted properly in its manual review of these 215 ballots (Ruling Tr. at 10).

B. THE LEGAL VOTES ALREADY IDENTIFIED BY THE MIAMI-DADE COUNTY CANVASSING BOARD MUST BE INCLUDED IN THE VOTE TOTALS.

As of the time the Board ceased its manual count, it had identified an additional 436 lawful votes: 302 for Vice President Gore and 134 for Governor Bush. App. 8; PX 6, attachment 1.

There can be no doubt that these are “legal votes” that would “change or place in doubt the result of the election.” Section 102.168(3)(c).

Accordingly, the votes must be added to the certified vote totals.

Significantly, the Circuit Court did not dispute that these are legal votes or that the standard applied by the Miami-Dade Canvassing Board was in any way improper. Indeed, it upheld the Miami-Dade Canvassing Board's determinations with respect to the ballots. App. 8; PX 6 Moreover, the Secretary of State certified results of a partial manual recount using the Miami-Dade standard when she certified the six additional votes from the three precincts sampled by the Miami-Dade Board. PX 1; App. 8.

The Circuit Court held the 436 votes tabulated during the partial manual recount should not be included because it believed that Florida law bars the inclusion in the Elections Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. Ruling Tr. at 10. This determination is plainly incorrect. It again confuses the statutes that govern the Commission's certification and the laws that govern a post-certification Section 102.168 contest.

Nothing in Section 102.168 provides that legal votes may be recognized only if they were identified in county-wide recounts. Indeed, it is well established that the addition of legal votes to certified totals without conducting a district-wide recount is required. *See, e.g., State ex rel. J.R. Carpenter v. J.K. Bake*, 198 So. 49 (Fla. 1940). For these reasons, these additional 436 votes – a net increase

of 168 for Vice President Gore – must be added to the vote tabulation.

IV. THE VOTE TOTALS FROM NASSAU COUNTY MUST BE REVISED TO REFLECT THE TOTALS THAT THE CANVASSING BOARD WAS LEGALLY REQUIRED TO SUBMIT TO THE ELECTIONS CANVASSING COMMISSION.

Because of the closeness of the election, there was a statutorily mandated machine recount pursuant to Section 102.141(4), which states that when the election night returns “reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office,” the responsible canvassing board “shall order a recount.” §102.141(4). The statute provides:

If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

§ 102.141(4) (emphasis added).

The Nassau County Canvassing Board plainly violated this statutory command. As discussed above, there was a discrepancy between the initial returns and the recount results, but Nassau County – after initially submitting the statutorily required recount results – subsequently substituted a certificate setting forth the initial results. App. 9; PX 1. That clear violation of Florida law must be corrected by this Court.

The plain terms of Section 102.141(4) obliged the Nassau County Canvassing Board to certify to the Secretary of State the results of the tabulation of the ballots determined in the statutorily-mandated recount. The Board's November 24th revised certification reverting to the election night returns plainly violated the statutory requirement. The Circuit Court stated that the Nassau County Board “did not abuse its discretion in its certification of Nassau County's voting results. Such actions were not void or illegal, and it was done within the proper exercise of its discretion upon adequate and reasonable public notice.” Ruling Tr. at 12. But the statute confers no discretion whatever upon a canvassing board in this situation: the Board must certify the recount results. See *Morse v. The Dade County Canvassing Board*, 456 So.2d 1314 (Fla. 3rd DCA, 1984) (holding that tabulation is presumed correct). The Circuit Court's conclusory assertion cannot be squared with the plain language of the governing

statute and should therefore be reversed by this Court.

V. This Court should order the immediate counting of the 9,000 BALLOTS from Miami-dade county and THE 3,300 disputed VOTES IN PALM BEACH COUNTY AND the inclusion of ALL LEGAL votes in the vote totals

In light of the razor-thin margin separating the candidates, and the undisputed evidence that hundreds of legal votes were present in uncounted ballots, the Circuit Court's refusal to examine any of the nearly 13,000 disputed ballots taken into evidence in this case, to determine whether they included any legal votes, is error.

The Circuit Court's decision to ignore these votes rested on three flawed conclusions of law: (1) that a court in an election contest may not review only the contested ballots but rather must review all ballots cast for the office – or none at all; (2) that the issue in a contest action is whether the county canvassing board abused its discretion; and (3) that a plaintiff must establish a “reasonable probability that the results of the election would have been changed” before the court may review the contested ballots. When these errors are set aside, it is clear that the ballots must be reviewed by this Court for a determination of how many legal votes were excluded from the vote totals.

Judicial review of ballots to identify legal votes is not a novel or unusual remedy under Florida's election contest law. It has been invoked for decades in this State. Plaintiffs' contest arises under 102.168(3)(c): the “rejection of a number of legal votes sufficient to change or place in doubt the result of the election.” The Florida Legislature provided courts with broad authority to determine how best to investigate and consider the merits of such an election contest claim:

“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 such circumstances.” Section 102.168(8) (emphasis added).

As this 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 [are] for judicial determination, if duly presented in appropriate proceedings.” Whether 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 commonsense conclusion is confirmed by the numerous cases in which – *prior to entering final judgment* -- courts have performed a ballot-by-ballot review in a contest action. In *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 722 (Fla. 1998), this Court compellingly validated that obligation with the manual count of the disputed ballots -- in that case, over 8,000 absentee ballots. In *Beckstrom*, “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.

A. The Trial Court Erred in Holding That Florida Law Restricts The Remedy In a Contest Action To A Statewide Recount.

Plaintiffs are not aware of a single Florida case in which a court has held that it was required to review any ballots other than those contested by the plaintiff in the contest action – and neither the Circuit Court nor Defendants have cited *any* authority for that proposition. Indeed, numerous Florida cases specifically state that the court's reviewed only the ballots contested by the plaintiff. For example, in *Beckstrom*, the trial court ordered the recount of only the challenged ballots, not all of the ballots cast in the election. Similarly, in other Florida election contest cases the trial court has counted only the disputed ballots. *See In re The Matter of the Protest Election Returns and Absentee Ballots in the November 4, 1997, Election for the City of Miami*, 707 So.2d 1170 (Fla. 3rd DCA 1998)(focusing only on absentee ballots in an election contest challenging fraud in the absentee ballots); *Spradley v. Bailey*, 292 So.2d 27 (Fla. 1st DCA 1974)(focusing only on the absentee ballots where the facts showed illegal absentee ballots); *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975)(focusing only on the disputed irregularities or errors in the absentee ballots).

Moreover, such an approach would be wholly inconsistent with the legal principle underlying the contest actions, which by its terms allows plaintiffs to contest the election by identifying specified flaws in the process and bringing those matters before the court for prompt resolution; here, “[r]eceipt of a number of illegal votes or rejection of a number of legal votes.” There is no basis at all for construing that statute – which emphasizes the need for expeditious consideration (see Section 102.168(7) (“immediate hearing”) and flexible relief – to impose such an enormous

burden on plaintiffs and defendants, as well as on the court required to review the ballots that are not the subject of plaintiff's contest.

The Circuit Court relied on Judge Klein's dissenting opinion in the *Fladell v. Palm Beach Canvassing Board*, Case nos. 4D00-4145, 4D00-4146, and 4D00-4153 (Fla. 4th DCA Nov. 27, 2000), for the proposition that the Appellants had to seek a state-wide recount. In addition to the fact that the opinion is a dissent, it is also irrelevant because it relates to the propriety of a revote – not judicial review of contested ballots -- and purports to distinguish *Beckstrom* on the ground that the case did not involve a revote. The *Fladell* dissent thus by its own terms makes clear that its reasoning would not apply to the area addressed in *Beckstrom*, judicial review of contested ballots. In sum, there is no authority whatever for the trial court's assertion that judicial review was required to extend beyond the ballots contested by Plaintiffs.

B. The Trial Court Erred in Failing to Make Its Determinations De Novo And Instead Reviewing the Actions of The County Canvassing Boards Only for a “Clear Abuse of Discretion.”

Section 102.168 and settled precedent make clear that a court engages in de novo review of the issues brought before it in a contest action. 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), Fla. Stat. (2000). An election contest is clearly an original action before the circuit court – not some sort of appellate review of the Canvassing Board's decisions. As in any such action, the court must make the initial decision.

While one ground for an election contest is an error or misconduct by members of the canvassing board, *see, e.g.*, §§102.168(3)(a), (d), Fla. Stat. (2000), the statute also 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). This provision requires only proof 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.

As this Court held in *State v. Williams*, 97 Fla. 159, 120 So. 310, 314

(Fla. 1929) (emphasis added, internal citation omitted):

[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. . . . What is a substantial compliance with the requirements of the statute is ultimately a judicial question*

[I]rregular 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.*

See also Wiggins v. State, 106 Fla. 793, 144 So. 62 (Fla. 1932) (“ultimately a judicial question.”); *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310, 314 (Fla. 1929) (“legal effect of votes is for judicial determination.”)

Just as the test for determining voter intent is a judicial question, so too application of that test to particular ballots must be a judicial action. In adjudicating a contest action, the court reviews the ballots themselves, not the canvassing board's assessment of the ballots. The ballots themselves are “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). Indeed, the fact that cases such as *Smith*, *Nuccio*, and *Wiggins* – which compel the judicial review of ballots through mandamus – further confirms the premise that there is no discretion under section 102.168 to allow legal votes to be discarded. *See also Carpenter v. Barber*, 144 Fla. 159, 198 So. 49 (1940).

The Circuit Court rejected Appellants' request for a manual count of the ballots in part on the ground that “[a]ll cases upon which plaintiffs rely were rendered upon mandamus prior to the modern statutory election system and remedial scheme enacted by the legislature of the state of Florida in section 102 of the Florida statute, or chapter 102 of the Florida statutes.” Ruling Tr. at 10. But that simply is not accurate. *Beckstrom*, decided by this Court in 1998, is the preeminent example of a case brought when the modern statutory scheme was in effect and in which Court approved a manual review of ballots by the circuit court to determine voter intent.

Nor is there any basis for the implication that, the Legislature's adoption of a statutory contest procedure somehow revoked or limited the long-established authority of a court to review ballots *de novo* in a

contest action. On the contrary, the provisions of section 102.168 would require a judicial determination even if abuse of discretion had been the standard in mandamus proceedings.

The continuing power of courts to count the ballots was confirmed in 1999 when the Legislature eliminated the right of a candidate to bring a protest action in court, consolidating a candidate's rights to judicial review of election results into the Section 102.168 contest procedures. At that time, the legislature made the broad remedial powers of the court under section 102.168 explicit by moving the provision authorizing the court to “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 such circumstances,” formerly part of the Section 102.166 protest provision, to Section 102.168(11), the judicially-supervised contest action. *See* Laws of Florida, Ch. 99-339 (1999). And the legislative history confirms that the legislature did not intend to eliminate the courts' power to issue, and candidate's right to request, a count of disputed ballots under writ of mandamus. *See* The Final Analysis by the House Committee on Election Reform at 5-8 (the bill does not “create, increase or reduce, either directly or indirectly,” any “authority to make rules or adjudicate disputes,” and discussing the power of courts in election contests “to compel a recount of the ballots cast in an election”). There is no basis to assert that the Legislature intended to revoke the Court's right to count contested ballots on its own motion or upon issuance of writ of mandamus.

In sum, there can be no doubt that the courts retain broad authority – and a statutory responsibility – to exercise de novo review of contested ballots in actions under Section 102.168. The trial court's ruling to the contrary is erroneous as a matter of law.

C. The Trial Court Erred Holding that Plaintiff Must Establish A “Reasonable Probability That The Results Of The Election Would Be Changed” Before A Court Reviews Contested Ballots.

The most important pieces of evidence in this case – the 13,000 contested ballots -- have never been reviewed. The trial court's decision not to review these ballots was wrong as a matter of law.

1. No Additional Factual Showing Is Needed To Obtain Judicial Review of Contested Ballots Introduced Into Evidence

The Circuit Court refused to review the contested ballots because plaintiffs did not “establish[] . . . a reasonable probability that the statewide election result would be different.” Ruling Tr. at 10. That holding imposes a standard that actually is higher than plaintiffs' burden for prevailing on the merits: the statute simply requires a plaintiff to establish “rejection of legal votes sufficient to change or *place in doubt* the result of the election.” Section 102.168(3)(c)(emphasis added); see also *Beckstrom*, 707 So. 2d at 725 (“if a court finds substantial noncompliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election reflected the will of the voters, then the court in an election contest . . . is to void the contested election even in the absence of fraud or intentional wrongdoing.”)

Moreover, plaintiffs are not required to prove their case before the evidence (i.e., the ballots) are considered. The ballots *are* the proof. Prior cases make clear that the courts' review of the ballots was conducted *prior* to the entry of judgment and *prior* to any finding that the plaintiff was entitled to prevail. See *Hornsby v. Hilliard*, 189 So.2d 361 (Fla. 1966); *Protest of Election Returns by Marlene Young*, Case No. G96-2984 (Cir. Court for Polk County, Dec. 1996); *cf.*, *Pullen v. Mulligan*, 138 Ill. 2d 21 (Ill. 1990); *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996). The absence of a need for such a showing by the plaintiff is most obvious in those cases in which the trial court reviewed the ballots, but later ruled against the plaintiff. See, e.g., *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998); *Boardman v. Esteva*, 323 So.2d 259 (Mass. 1975). The cases thus make clear that a decision in plaintiff's favor is not a necessary prerequisite to judicial review of the ballots.

This result accords with common sense. How could the plaintiff be required to prove the entire case before the trial court examines what this Court has characterized as the “best evidence”? *State v. Smith*, 107 Fla. 134, 144 So. 333, 336 (Fla. 1932). It simply cannot be the case that a candidate must prove his or her claim in order to get access to the very evidence needed to prove that case.

An example illustrates the illogic of this approach. Assume a still-sealed box known to contain 1000 ballots was discovered after the results of the election were certified. If a proper party filed a contest action because the two candidates were separated by just 500 votes, he or she would have no way of knowing how the ballots in the sealed box would affect the result of the election. Under the Circuit Court's construction of the statute, that would mean that the ballots could never be reviewed by the court. Yet such a result would frustrate the

purpose of the contest statute itself: to ensure that the election results reflect the will of the voters. *See, e.g., Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975).

The approach we urge is also consistent with the usual rules in judicial proceedings. Contested ballots were introduced into evidence in this case. Surely a trier of fact cannot close his or her eyes to the most probative evidence in a case. Here, the ballots are the “best evidence” (*Smith, supra*) and were required to be reviewed by the court.

2. Even If, Contrary To Plaintiffs' Submission, Some Threshold Related To The Plaintiffs' Chances Of Prevailing On The Merits Is Required To Obtain Judicial Review Of Contested Ballots, That Requirement Is Satisfied Here.

Even if this Court were to conclude, contrary to our submission, that some threshold showing by plaintiffs is required to obtain judicial review of contested ballots, any such threshold was met here. This is especially true because the statute itself authorizes the court to take steps necessary to ensure that “each allegation in the complaint is investigated, examined, or checked.” Section 102.168(8).

As demonstrated above, when the certified vote totals are adjusted to account for the legal votes in Palm Beach and Miami-Dade Counties and to remedy the unlawful action of the Nassau County Canvassing Board, 0.0018% of the total votes cast in Florida separates the two major party candidates for President. That small margin is, in and of itself, sufficient to place in doubt the results of the election and require a count of the disputed ballots. *Cf. State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 192 So. 819 (1940).

Plaintiffs did not, however, rest their case solely upon the closeness of the result. They introduced substantial evidence, much of it undisputed, establishing that the results of this election are in doubt and that a count of the contested ballots will affect, or place in doubt, those results. For example:

Plaintiffs proved that the technology used to record votes in Miami-Dade and Palm Beach County – punchcards – is sufficiently unreliable that in a close election a manual count of the ballots is necessary.

The trial court explicitly credited this evidence finding that there was “voter error, and/or less than total accuracy, in regard to the

punchcard voting devices utilized in Dade and Palm Beach Counties, which these counties have been aware of for many years.” (Ruling Tr. at 10)

Second, plaintiffs proved that it is possible to review punchcard ballots that the machines could not count and, in many instances, determine for whom the voter intended to vote in the Presidential election.

Third, in *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, Case No. 3D00-3318 (3rd DCA November 22, 2000), the appellate court concluded that the sample manual recount in Miami-Dade County revealed “an error in the vote tabulation which could effect the outcome of the election.” Slip op. at 2-3.

Plaintiffs also proved that the 3,300 ballots reviewed by the Palm Beach County Canvassing Board and contested by Plaintiffs must be reviewed by the Court:

(a) According to the testimony of Judge Burton, a number of ballots that, as a matter of law, should have been counted as votes because they evidenced the intent of the voter were rejected because of per se exclusionary rules employed by one or more members of the Board. (Trial Tr. Vol. III, pp. 30-34.)

(b) Palm Beach Circuit Court Judge Jorge Labarga subsequently ruled 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 voter standard. In a written order on November 22, 2000, the Court reiterated its ruling that the Board could not apply rigid rules that would result in the rejection of validly marked ballots. Following Judge Labarga's second ruling, the Board recommenced reviewing ballots on November 24, 2000. After hearing evidence as to factors that might cause partially indented ballots, Judge Burton acknowledged that the Board had erred up to that point in applying a “clear and convincing” standard in its review up to that point. (See Tr. of Palm Beach Canvassing Board, November 24, p. 45.) However, the Board did not reexamine the precincts that had been decided under the erroneous standard. (Transcripts, November 24-26).

Plaintiffs bolstered their request to review the evidence of the ballots with data and statistical analysis showing that Vice President Gore is likely to obtain a net increase of over 400-800 votes if the contested ballots in Palm Beach County are reviewed using the standards for determining the intent of the voter previously established by this Court. While the statistical analysis may not establish to a certainty what the outcome of reviewing the ballots would be, they provide

further compelling support for the proposition that the Court should require such a review – the only means of determining the actual results of this election.

D. THE COURT SHOULD ORDER THAT THE BALLOTS BE COUNTED BY A JUDICIAL OFFICIAL UNDER THIS COURT'S AUSPICES

In view of the exigencies of time, as we discuss below, this Court should order that the ballots be reviewed under its auspices. In order to eliminate any uncertainty regarding the process of reviewing the ballots, it is appropriate for this Court to specify the standard to be applied in the review of those ballots.

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 three weeks ago, this Court stated:

“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”

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 also 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). This is the standard adopted by Circuit Judge Jorge Labarga in *Florida Democratic Party v. Palm Beach County Canvassing Board*, Case No. CL 00-11078 AB, Nov. 22, 2000.

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.

VI. THE DECISION BELOW INFRINGED ON THE LEGISLATURE'S POWER UNDER THE U.S. CONSTITUTION; AFFIRMANCE OF THAT RULING MIGHT STRIP FLORIDA'S ELECTORS OF THE PROTECTION OF 3 U.S.C. §5

The U.S. Supreme Court's recent decision in *Bush v. Palm Beach County Canvassing Board*, 2000 Lexis 8087 (Dec. 4, 2000) (per curiam), provides another basis for reversal of the ruling below. As detailed above, the Circuit Court's separate legal rulings are erroneous on their own terms; but viewed together they effect a breathtaking change in that remedy, creating a cause of action dramatically different – and far, far narrower – than the one enacted by the Florida Legislature.

Defendants have emphasized throughout this litigation that Article II, Section 1, Clause 2 of the United States Constitution grants to state legislatures the authority to “direct” the “manner” for the appointment of electors. But the Circuit Court's novel, and unjustifiably cramped, rewriting of Section 102.168 – not a mere interpretation of the statute, but a judicial overhaul of that process – constitutes just the sort of free-form judicial decision making that defendants have warned of, intruding on the State Legislature's authority to fashion the rules governing the selection of Presidential electors in violation of Article II. *Cf. Bush, supra, at 7*. And given that these holdings represent a radical departure from the scheme in place on election day,

acceptance by this Court of these holdings could result in this state's electors being stripped of the protection found in 3 U.S.C. §5, because the method for resolving disputes surrounding the appointment of those electors may turn out NOT to have been resolved “by laws enacted prior to the day fixed for the appointment of the electors.” *See* 3 U.S.C. §5; *cf. Bush, supra, at 7.*

VII. THIS COURT SHOULD ITSELF SUPERVISE THE FURTHER PROCEEDINGS IN THIS CASE PURSUANT TO ITS ALL WRITS AND MANDAMUS AUTHORITY

This cause comes before the court as an appeal of a final order. Petitioners ask the Court to also accept their brief as an original action within the All Writs jurisdiction of 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).

Time is of the essence in this matter. This contest action must be resolved quickly to prevent “precluding Florida voters from participating fully in the federal electoral process.” *Harris*, 2000 Fla. LEXIS * 48; *see also* 3 U.S.C. § 5. If the office at issue was not the Presidency and if the federal statutory mandatory acceptance time 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).

Petitioners have striven mightily to expedite this proceeding; respondents have engaged in a legal strategy aimed at delay. Twice petitioners moved in circuit court to begin the ballot review. (V. I, pp. 33-39; I, 63-70; I, 109-115) Each time they were rebuffed. They sought appellate review of the decision. *Gore v. Harris*, Case No. 1D00-4717 (1st D.C.A. Dec. 1, 2000). The judge's refusal to even enter an order reflecting his ruling frustrated review. *Gore v. Harris*, Case No. 1D00-4717 (1st Dist. Ct. of Appeal Dec. 1, 2000). They also asked this court to issue a Writ of Mandamus to compel counting. This Court declined without prejudice to the right to seek the relief later. *Gore v. Harris*, Case No. SC00-2385, (Fla. Dec. 1, 2000).

Now is the last chance for a legal judgment to be rendered in this

case. In but a few more days, only the judgment of history will be left to fall upon a system where deliberate obstruction has succeeded in achieving delay – and where further delays risk succeeding in handing democracy a defeat.

This Court should exercise its original jurisdiction in one of two possible respects.

First, should the Court not be prepared to enter judgment for the petitioners – and instead, have under consideration a remand to the trial court -- it should instead consider asserting its original jurisdiction over this matter, and adjudicating all remaining issues and disputes, so as to promptly bring a full and final resolution to this case.

The alternative – reversing the decision below, and remanding the case for further proceedings – risks defeating any hope of a meaningful remedy by seeing the clock run out during the remand proceeding, particularly if post-remand appellate review is required. Alternatively, petitioners seek a writ of mandamus or other writ to immediately commence counting the contested ballots under the supervision of this Court, while the remaining issues are remanded to the trial court for its resolution. 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. Under this approach, this Court would not take over the entire action – it would simply 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. 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. Such tabulation could be done by the Clerk of this Court, *cf.*, *Beckstrom*, 707 So.2d at 722, or by judges of the Circuit Court of Leon County.

To delay counting will frustrate the statutory election contest scheme and this Court's November 21, 2000 Order. “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). This Court should expedite the counting to ensure prompt completion of the contest without risking disruption of the electoral process.

CONCLUSION

For the reasons stated above, petitioners hereby urge the Court to reverse the decision below. If this State's contest provision is to have any meaning, the meaning must be this: it is a mechanism for determining whether state authorities have certified the wrong candidate as the winner of the election. This case, unlike many other election contests, does not involve a dispute over election technicalities or formalities. Rather, it involves the most fundamental question an election can pose: Which candidate got more votes?

In this action, the contest statute requires that “any relief appropriate under such circumstances” be provided. Fla. Stat. 102.168(8) (2000). Here, petitioners respectfully suggest that the following relief is appropriate:

1. Addition to the certified total of a net gain of 215 votes for Al Gore from Palm Beach County;
2. Addition to the certified total of the 436 votes (a net gain of 168 for Al Gore) in the Miami-Dade manual count;
3. Reinstatement of the previously certified total from Nassau County, in lieu of its adoption of a previously rejected total;
4. Order a tabulation of the approximately 9000 uncounted votes from Miami-Dade county, and a tabulation of the approximately 3300 miscounted votes from Palm Beach County:
 - a. Pursuant to the voter intent standard, as indicated above;
 - b. To be conducted by an appropriate officer designated by this Court, such as the Clerk of this Court; or one or more Circuit Court judges in Leon County; or the Clerk of the Circuit Court;
 - c. To permit that those directing the count employ sufficient resources to complete the count in advance of December 12, 2000.
5. Reject any counterclaims or defenses proffered by the appellees;
6. Upon completion of the tabulation proposed above, should the results

of that tabulation, when combined with any judgments rendered on petitioners' behalf on the issues identified above, indicate that Al Gore and Joe Lieberman did indeed receive more votes for President and Vice President than did George Bush and Dick Cheney, this Court should enter final judgment for the petitioners:

- a. Declaring the Election Canvassing Commission's certification of November 26th null and void, and directing that Commission to certify that Al Gore and Joe Lieberman as the victorious candidates in the Presidential and Vice Presidential election;
- b. Directing the Secretary of State, pursuant to the above, to “certify as elected the presidential electors of” Al Gore and Joe Lieberman, under Sec. 113.011;
- c. Providing such other relief, injunctive and declarative, as is appropriate to effectuate this Court's judgment;
- d. Or, in the alternative, remanding this case for further proceedings consistent with this Court's decision.

In the alternative, given the shortness of time and the importance of this proceeding, should the Court not be prepared to render final judgment for petitioners and instead be inclined to remand to the trial court, petitioners respectfully suggest that – in lieu of such a remand -- this Court exercise its original jurisdiction to:

- Adjudicate all remaining disputes in this matter – obviating the need for remand and possibly another set of appeals after a post-remand proceeding; or
- Direct and supervise the tabulation of contested ballots from Miami-Dade and Palm Beach Counties, while permitting further proceedings, on remand, before the Circuit Court.

RESPECTFULLY SUBMITTED ON THIS ____ DAY OF DECEMBER 2000.

John D.C. Newton, II
Berger Davis & Singerman
215 South Monroe Street, Suite 705

Mitchell W. Berger
Berger Davis & Singerman
350 East Las Olas Boulevard, Suite
1000

Tallahassee, Florida 32301
Telephone: 850/561-3010
Facsimile: 850/561-3013

Fort Lauderdale, Florida 33301
Telephone: 954/525-9900
Facsimile: 954/523-2872

W. Dexter Douglass
Douglass Law Firm
211 East Call Street
Tallahassee, Florida 32302
Telephone: 850/224-6191
Facsimile: 850/224-3644

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, New York 10504
Telephone: 914/273-9800
Facsimile: 914/273-9810

Ron Klain
c/o Gore/Lieberman Recount
430 S. Capitol St.
Washington, DC 20003
Telephone: 202/863-8000
Facsimile: 202/863-8063

Jeffrey Robinson
Baach Robinson & Lewis
One Thomas Circle, Suite 200
Washington, DC 20003
Telephone: 202/833-7205
Facsimile: 202/466-5738

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:

Barry Richard
Greenberg Traurig
101 East College Avenue
Tallahassee, FL 32301
for Governor Bush

Deborah Kearney, General Counsel
Florida Department of State
400 South Monroe Street, PL 02
Tallahassee, FL 32399
for Secretary Katherine Harris and
the Elections Canvassing Committee

Donna E. Blanton

Steel Hector & Davis
215 South Monroe Street, Suite 601
Tallahassee, FL 32301-1804
for Secretary Katherine Harris and
the Elections Canvassing Committee

Tucker Ronzetti
Assistant County Attorney
111 N.W. 1st Street
Miami, FL 33130
for Miami-Dade County Canvassing Board

Ben Ginsburg
State Republican Headquarters
420 West Jefferson Street
Tallahassee, FL 32301
for the Republican Party

Craig Meyer
Florida Department of Agriculture and
Consumer Services
The Capitol, PL-10
Tallahassee, FL 32399

Andrew McMahon
Palm Beach County Attorney Office
301 N Olive Avenue, Suite 601
West Palm Beach, FL 33401-4705
for Palm Beach Canvassing Board

Bruce Rogow
Bruce S. Rogow, P.A.
500 East Broward Boulevard, Suite 1930
Ft. Lauderdale, Florida 33394
for Palm Beach Canvassing Board

Michael S. Mullin
191 Nassau Place
Yulee, Florida 32097
for Nassau County Canvassing Board

Terrell C. Madigan
Harold R. Mardenborough, Jr.
McFarlain Wiley Cassedy & Jones
215 South Monroe Street, Suite 600
Tallahassee, Florida 32301
for Intervenor Butler

R. Frank Myers
Messer Caparello & Self
215 South Monroe Street, Suite 701
Tallahassee, Florida 32301
for Intervenor Named West Florida Voters

Attorney