

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 6:00-CV-1510-ORL-28
Antoon

ROBERT C. TOUCHSTON, DEBORAH
SHEPPERD and DIANA L. TOUCHSTON,

Plaintiffs,

vs.

MICHAEL McDERMOTT, ANN McFALL, PAT
NORTHY, THERESA LePORE, CHARLES E.
BURTON, CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE, DAVID
LEAHY, LAWRENCE KING, JR., and MIRIAM LEHR,
in their official capacities as members of the County
Canvassing Boards of Volusia, Palm Beach, Broward
and Miami-Dade Counties, respectively; and
KATHERINE HARRIS, in her official capacities as
Secretary of the Department of State and as a
member of the Elections Canvassing Commission,
and CLAY ROBERTS and BOB CRAWFORD, in
their official capacity as members of the Elections
Canvassing Commission,

Defendants.

DEFENDANTS' MICHAEL McDERMOTT,
ANN McFALL, AND PAT NORTHEY, RESPONSE TO
PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Defendants, by counsel, hereby incorporate as if set forth fully herein their
Response and Memorandum of Law filed in Siegel v. LePore, Case No. 00-CV-9009, U.S.

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District Court for the Southern District of Florida. Defendants attach herewith a copy of said Response and Memorandum of Law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Defendants' Response has been delivered by hand delivery and facsimile (812- 235-3685) to James Bopp, Jr., Heidi K. Meyer, James R. Mason, III, Eric C. Bohnet, Justin David Bristop, and J. Aaron Kirkpatrick, 1 South 6th Street, Terre Haute, Indiana 47807 and facsimile (407-875-0770) Matt Staver, Esq., 210 East Palmetto Avenue, Longwood, Florida 32750 this 14th day of November, 2000.



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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 00-9009-CIV-MIDDLEBROOKS

NED SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA,
CARRETTA KING BUTLER,
DALTON BRAY, JAMES S. HIGGINS,
and ROGER D. COVERLY, as Florida
registered voters,

and

GOVERNOR GEORGE W. BUSH, and
DICK CHENEY, as candidates for President
and Vice President of the United States of America,

Plaintiffs,

vs.

THERESA LEPORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL, SUZANNE
GUNZBURGER, ROBERT LEE, DAVID LEAHY,
LAWRENCE KING JR., MIRIAM LEHR, MICHAEL
MCDERMOTT, DEANIE LOWE, and JIM WARD,
in their official capacities as members of the County
Canvassing Boards of Palm Beach, Miami-Dade, Broward,
and Volusia Counties, respectively,

Defendants.

**ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

THIS CAUSE comes before the Court upon Plaintiffs' Emergency Motion for

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Temporary Restraining Order and Preliminary Injunction, filed November 11, 2000.

I. Introduction

Plaintiffs, consisting of individual registered Florida voters as well as the Republican candidates for President and Vice-President Governor George W. Bush and Richard Cheney, move for entry of a temporary restraining order and preliminary injunction against Defendants, individual members of the electoral canvassing boards of Palm Beach, Broward, Miami-Dade, and Volusia Counties. They request that the canvassing boards of Broward, Miami-Dade, Palm Beach, and Volusia Counties be enjoined from proceeding with manual recounts of the November 7th election.

The gravamen of their complaint is that a manual recount may diminish the accuracy of a vote count because of ballot degradation and the exercise of discretion on the part of the county canvassing boards in determining a voter's intent. Implicit in their argument is a concern that selected manual recounts in some counties but not others may skew the election results even if the hand count is accurate. This is so because the machine counting process may reject ballots which upon visual inspection can be determined to be valid, and the machine error rate is likely to be spread equally across all precincts. If only selected precincts or counties are manually counted, the hand count, assuming it is more accurate, may help the candidate favored in those areas.

These are serious arguments. The question becomes who should consider them. Under the Constitution of the United States, the responsibility for selection of electors for the office of President rests primarily with the people of Florida, its election officials and, if necessary, its courts. The procedures employed by Florida appear to be neutral and, while not yet complete,

the process seems to be unfolding as it has on other occasions. For the reasons that follow, I believe that intervention by a federal district court, particularly on a preliminary basis, is inappropriate.

II. Factual Background

On November 7, 2000, the United States held a general election wherein Florida voters cast ballots for several offices, including votes for the twenty-five electors for President and Vice President of the United States. On November 8, 2000, the Division of Elections for the State of Florida reported that the Republican Party presidential ticket received 2,909,135 votes and the Democratic Party presidential ticket received 2,907,351 votes. Other candidates on the presidential ballot received a total of 139,616 votes. The margin of difference between the votes received by the Republic and Democratic presidential tickets was 1,784, or 0.0299% of the total Florida vote.

In Florida, the administration of elections includes statewide and local features. While the Secretary of State is the chief election officer of the state, see Fla. Stat. § 97.102(1), the actual conduct of elections occurs in Florida counties. Except for the appointed supervisor in Miami-Dade County, the county supervisor of elections is an elective office, chosen every four years. See Fla. Stat. § 98.015(1). The supervisor employs deputy supervisors. See Fla. Stat. § 98.015(8). The county canvassing board is an essential part of Florida's election scheme. Ordinarily, the board is made up of the supervisor of elections, a county court judge, and the chair of the board of county commissioners. See Fla. Stat. § 102.131(1). The canvassing boards are responsible for counting the votes given each candidate. See Fla. Stat. § 102.141(2). It is their responsibility to judge the accuracy of vote counts. In addition, a county canvassing board,

on its own initiative, may order mechanical recounts “[i]f there is a discrepancy which could affect the outcome of an election.” Fla. Stat. § 102.166(3)(c). After the vote counts are certified, the results are forwarded to the Department of State for any election involving a federal or state officer. See Fla. Stat. § 102.111(1); Fla. Stat. § 102.112. Based on the sum total of the results generated locally, the Elections Canvassing Commission, consisting of the Governor, the Secretary of State, and the Director of the Division of Elections, is granted authority to “certify the returns of the election and determine and declare who has been elected for each office.” Fla. Stat. § 102.111(1). The Commission also issues certificates of the result of the election for federal and state officers, including presidential electors. See Fla. Stat. § 102.121. County canvassing boards are obligated to file a report with the Division of Elections at the same time the results of an election are certified. See Fla. Stat. § 102.141(6). Using these reports, the Secretary of State may issue advisory opinions. See id.; see also Fla. Admin. Code 1S-2.010.

Candidates or voters can promptly protest “erroneous” returns. See Fla. Stat. § 102.166(1)-(2). Candidates and political parties also can request manual recounts. See Fla. Stat. § 102.166(4). The procedures for such manual recounts are described in the pertinent statutory provisions. See Fla. Stat. § 102.166(4)-(10). Following certification by the county canvassing board, a candidate or voter also may contest election results by filing a complaint in circuit court. See Fla. Stat. § 102.168 et seq. The circuit courts are authorized to provide any relief that is appropriate. See Fla. Stat. § 102.168(8). District courts of appeal and the Florida Supreme Court are available to review circuit court orders.

In this case, the initial phase of election verification began automatically because Florida Statutes, §102.141(4), compels machine recount for electoral differentials of 0.5% or less. The

law further provides that candidates, as well as political parties, can submit written requests for hand counts. If granted, the threshold hand count encompasses a minimum of three precincts or 1% of the count's vote, whichever is greater. If the results of the initial manual recount indicate a disparity with the machine count which could affect the outcome of the election, the canvassing board "shall" undertake a manual recount of all precincts. See Fla. Stat. § 102.166(5).

In this case, the Florida Democratic Party filed requests for manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties within seventy-two hours as required by Florida Statutes, § 102.166(4)(b). As required by the statute, those requests set forth reasons, which included the extraordinary closeness of the statewide margin, as well as concern as to whether the vote totals reliably reflected the true will of the Florida voters.

Broward County

On November 8, 2000, pursuant to Fla. Stat. § 102.141(4), the Broward Canvassing Board conducted a statutorily mandated machine recount which is now complete. As a result of that recount, Vice President Gore received an additional 43 votes and Governor Bush received an additional 44 votes. On November 9, 2000, within 72 hours after midnight on the date the election was held, the Broward County Democratic Party filed a request for a manual recount pursuant to Florida Statutes, § 102.166(4). Pursuant thereto, a meeting of the Broward Canvassing Board was scheduled for Friday, November 10, 2000, at 10:00 a.m. The Broward County Republican Party, through its chair, Ed Pozzuoli, was notified by telephone of the date and time of the meeting. The Broward County Republican Party appeared and participated at the hearing.

The Broward Canvassing Board authorized a manual recount in three of Broward

County's precincts, comprising at least one percent of the total votes cast for Vice President Gore. Pursuant to Florida Statutes, § 102.166(4)(d), the Broward County Democratic Party chose the three precincts subject to the manual recount. The one percent recount has not been completed and will continue Monday, November 13, 2000.

Miami-Dade

The Canvassing Board received a request from the Miami-Dade Democratic Party on November 9, 2000 pursuant to Florida Statutes, § 102.166(4), to conduct a recount. That request was revoked and amended later the same day. The Republican Party of Dade County submitted a response opposing the request for a manual recount. The Canvassing Board has not yet decided whether to grant or deny the request for a recount and has scheduled a hearing for Tuesday, November 14, 2000, at 9:30 a.m. to consider the matter.

Palm Beach

On November 11, 2000, when the manual recount of one percent of Palm Beach voters established a net gain of nineteen votes for Vice President Gore, the Palm Beach Canvassing Board, by a 2-1 vote, directed a manual recount of all precincts in the county. That decision adhered to Florida Statutes, § 102.166(5)(c), requiring a full recount when the one percent result shows that the election outcome could be changed by a full manual recount.

Plaintiffs allege that the manual recount in Palm Beach County has been characterized by ad hoc and arbitrary decisions. They claim that Leon St. John, attorney for the Palm Beach Canvassing Board, and Bob Nichols, spokesperson for the Board, gave a confusing press briefing on November 11, 2000 in which, at different times, they stated varying standards the Board was

using to determine if a ballot would be tallied or not.¹ Plaintiffs also allege that during the first hour of the manual recount no procedural guidance was given to recount observers or party representatives, and that no written criteria or rules were ever promulgated by the Board. Finally, Plaintiffs allege that because there were not enough Republican employees in the Supervisor of Elections' office, certain teams of reviewers did not include any Republican members.

Volusia

The Canvassing Board was advised during the evening of November 7, 2000 that a malfunction of the diskette in the electronic ballot tabulating machine in precinct 216 caused an obviously erroneous report of the results in the presidential vote from that precinct. The supervisor supplied another diskette which was inserted in another electronic ballot tabulating machine and all paper ballots from that precinct were tabulated.

On November 8, 2000, Deanie Lowe, Supervisor of Elections for Volusia County, provided to the Canvassing Board the directive of the Florida Secretary of State to conduct a mandatory recount of the presidential election pursuant to Florida Statutes, § 102.141(4). On November 8, 2000, the Canvassing Board conducted the mandatory recount by reconciling the printouts of all votes case from each electronic ballot tabulating machine with the compilation of results from the host computer. The mandatory recount revealed no variance from the original count. The ballots were not removed from their sealed containers or recounted electronically or

¹Apparently, the two men referred to different standards for adjudging partially-punched ballots ranging from a "light" test, which counts ballots as vote if light is seen to shine through a punch hole, to a "corner" test, which determines if a corner of a punch hole has been detached.

manually, except for ballots from precinct 216. Representatives of the Florida Republican Party suggested and expressly agreed to a manual recount of precinct 216. The Canvassing Board conducted a manual recount of the ballots from precinct 216 and the result was identical to the result from the electronic tabulation received after the substitution of the diskette.

After the mandatory recount, on November 9, 2000, the Florida Democratic Party requested a manual recount of all ballots. The Canvassing Board granted the request. On November 12, 2000, the Canvassing Board began the manual visual recount of all ballots. Numerous teams of two county employees, who are registered electors, are reading and counting the ballots. Republic and Democratic parties have been afforded the opportunity to have one observer for each counting team. Security of ballot storage and the counting room is provided under the direction of the Canvassing Board with Florida Department of Law Enforcement and Volusia County Sheriff's Office personnel.

The Volusia Canvassing Board has adopted a motion stating that it will comply with the requirements of Florida Statutes, § 102.111, to certify the results of the election to the Department of State no later than 5:00 p.m. on Tuesday, November 14, 2000, unless the time is extended by lawful authority. The Canvassing Board also has authorized the County Attorney and such other attorneys as he may appoint to seek state or federal judicial relief from the time limit for certification provided in Florida Statutes, § 102.111.

III. Standard for Injunctive Relief

In reviewing Plaintiffs' request for injunctive relief,² we apply the traditional four-factor

²In this case, Plaintiffs moved for both a preliminary injunction and a temporary restraining order. Federal Rule of Civil Procedure 65(a) permits federal district courts to issue a

test which requires Plaintiffs to demonstrate: “(1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” McDonald’s Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (citing All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., 887 F.2d 1535, 1537 (11th Cir.1989)). Under our caselaw, “[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the ‘burden of persuasion’ as to the four requisites.” Id. “The burden of persuasion in all of the four requirements is at all times upon the plaintiff.” Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 909 F.2d 480, 483 (11th Cir. 1990) (citations omitted). With this standard in mind, we evaluate Plaintiffs’ motion.

preliminary injunction only after proper notice has been given to the adverse party. See id. Federal Rule of Civil Procedure 65(b), however, permits federal district courts to issue a temporary restraining order (“TRO”) “without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.” Id. If a TRO is granted without notice, “the motion for a preliminary injunction shall be set down for hearing at the earliest possible time.” Id. Here, I have set the hearing for the preliminary injunction motion at the earliest possible time that would permit Defendants a fair opportunity to respond to Plaintiff’s motion. In my judgment, Plaintiffs’ motion and accompanying affidavits did not establish that they would suffer “immediate and irreparable injury, loss, or damage” if this Court refrained from entering injunctive relief until a hearing on the motion could be heard first-thing Monday morning.

IV. Analysis

Our review of Plaintiffs' claims necessarily begins with the United States Constitution. The Constitution does not provide for the popular election of a President or Vice President of the United States on either a national or a state-by-state basis. Instead, the Constitution delineates that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President." U.S. Const., Art. II, §1. This constitutional provision grants "extensive power to the States to pass laws regulating the selection of electors." Williams v. Rhodes, 393 U.S., 23, 30-31, 89 S.Ct. 5, 21 L. Ed. 24 (1968); see also McPherson v. Baker, 146 U.S. 1, 27 (1892) (noting that the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object [of selecting electors]"); Fitzgerald v. Green, 134 U.S. 377, 389-90, 10 S.Ct. 586 (1889) (observing that rather than "interfere with the manner of appointing electors, or, where [according to the now general usage] the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election . . .," Congress "has left these matters to the control of the states").³ However,

³In addition, federal law gives states the exclusive power to resolve controversies over the manner in which presidential electors are selected:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of

while this power is broad, “these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.” Id.

Here, Plaintiffs assert that Florida Statutes, § 102.166(4) violates the First and Fourteenth Amendments. In adjudicating similar challenges to state electoral laws, the Supreme Court has adopted a balancing test which weighs “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” versus the legitimacy, strength, and necessity of the state interests underlying the electoral scheme. Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L. Ed. 547 (1983) (citing Williams, 393 U.S. at 30-31, 89 S.Ct. 5). More recently, the Court has observed:

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’ Norman v. Reed, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions. Anderson, 460 U.S., at 788, 103 S.Ct., at 1569-1570; see also id., at 788-789, n. 9, 103 S.Ct., at 1569-1570, n. 9.

the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. §5 (2000).

Burdick v. Takushi, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063-64, 119 L.Ed.2d. 245 (1992).⁴ A central precept of this approach is the recognition that while “[e]lection laws will invariably impose some burden upon individual voters . . . [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Id. (citations omitted). It is within this framework that we address the specifics of Plaintiffs’ claims.⁵

Florida law outlines a structural process by which a candidate or political party “may file a written request with the county canvassing board for a manual recount.” Fla. Stat. § 102.166(4)(a). Such a request “must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.” Fla. Stat. § 102.166(4)(b). Once a request is made, “[t]he county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.” Fla.

⁴The Eleventh Circuit has explained in Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992), that “[t]he approach used by the Anderson Court can be described as a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending on the circumstances.” Id. The Eleventh Circuit then emphasized that the Supreme Court in Burdick “reiterated the Anderson test and reaffirmed that ‘to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.’” Id. (quoting Burdick, 504 U.S. at 433, 112 S.Ct. 2059).

⁵To the extent Plaintiffs raise an independent equal protection claim in addition to their due process and voting claims, I find for the reasons discussed herein that Plaintiff has failed to establish likelihood of success on this constitutional claim.

Stat. § 102.166(4)(c). If the board decides to conduct a manual recount, “[t]he manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.” Fla. Stat. § 102.166(4)(d). “If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election,” the statute authorizes the canvassing board to undertake a variety of remedial measures, including the manual recount of all ballots. Fla. Stat. § 102.166(5).⁶ The state law also provides that “any manual recount shall be open to the public,” and outlines the procedures by which a manual recount must take place. Fla. Stat. § 102.166(6)-(10).⁷

⁶This provision states, the county canvassing board shall:

- (a) Correct the error and recount the remaining precincts with the vote tabulation system;
- (b) Request the Department of State to verify the tabulation software; or
- (c) Manually recount all ballots.

Id.

⁷These procedures are as follows:

- (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
- (b) If a counting team is unable to determine a voter’s intent in

This state election scheme is reasonable and non-discriminatory on its face. Unlike a ballot access restriction that burdens only certain candidates or parties, see Anderson, 460 U.S. at 787-89, 103 S.Ct. 1564 (invalidating an early filing deadline for independent presidential candidates); Williams, 393 U.S. at 30-31, 89 S.Ct. 5 (striking down state election laws that imposed substantial ballot access restrictions on minority parties), Florida's manual recount provision is a "generally-applicable and evenhanded" electoral scheme designed to "protect the integrity and reliability of the electoral process itself"—the type of state electoral law often upheld in federal legal challenges. Anderson, 460 U.S. at 788 n.9. On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead, the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the

casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to s. 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

Id.

scheme, as evidenced by its plain language, is to remedy “an error in the vote tabulation which could affect the outcome of the election.” Fla. Stat. §102.166(5).⁸ In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as near as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards challenged in this suit have reported various anomalies in the initial automated count and recount.⁹ The state manual recount provision therefore serves important governmental interests.

In addition, the manual recount provision is the type of state electoral law that safely resides within the broad ambit of state control over presidential election procedures. As the Eleventh Circuit has explained, “[t]he functional structure embodied in the Constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by § 1983’ operate to restrict federal relief in the state election context.” Curry v. Baker, 802 F.2d 1302, 1314 (11th Cir. 1986) (quoting Gamza v. Aguirre, 619 F.2d 449, 452 (5th Cir. 1980)); see also Duncan v. Poythress, 657 F.2d 691 (5th Cir. Unit B 1981). In Curry, the Eleventh Circuit rejected a substantive due process claim based

⁸In addition, as previously outlined, once a decision to conduct a manual recount is made by the canvassing board, the Florida manual recount law articulates a structured process for conducting the recount.

⁹One of the main rationales behind a manual recount system is observe whether an imprecise perforation, called a “hanging chad,” exists on the physical ballot. If the blunt-tipped voting stylus strikes the ballot imperfectly, the chad, the rectangular perforation designed to be removed from a punch card when punched, can remain appended to the ballot (although it is pushed out), and an automated tabulation will record a blank vote. This problem is particularly associated with counties that still rely on punch card technology. Palm Beach, Broward, and Miami-Dade all use punch card voting systems. The final county, Volusia County, found a series of irregularities with its automated tabulation results including reports of computer failure and statistical aberrations.

on an Alabama subcommittee's use of polling data to determine the number of illegal votes cast in a Democratic gubernatorial runoff primary. The Court noted "[a]lthough federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to examine the validity of individual ballots or supervise the administrative details of a local election. Only in extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id.* (citation omitted).¹⁰ Moreover, the Supreme Court, in the analogous context of a state manual recount of a Senate election, stated:

Unless Congress acts, Art. I, s 4, empowers the States to regulate the conduct of senatorial elections. This Court has recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 24, 92 S.Ct. 804, 31 L.Ed.2d. 1 (1972) (emphasis added).

The central thrust of these decisions is that federal courts should tread cautiously in the traditional state province of electoral procedures and tabulations. Simply put, “[f]ederal courts are not the bosses in state election disputes unless extraordinary circumstances affecting the integrity of the state’s election process are clearly present in a high degree. This well-settled principle—that federal courts interfere in state elections as a last resort—is basic to federalism, and we should take it to heart.” Roe v. Evans, 43 F.3d 574, 585 (11th Cir. 1995) (Edmondson, J., dissenting). These principles of comity and federalism equally apply to state electoral procedures for the selection of presidential electors given the broad ambit of state authority in this area as outlined in Article II, Section 1 of the United States Constitution. Otherwise, federal courts run the risk of being “thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” Duncan v. Poythress, 657 F.2d 691, 701 (5th Cir. 1981).

The thrust of Plaintiffs’ position is that Florida’s decentralized county-by-county electoral system can yield disparate tabulating results from county to county. For instance, similarly-punched ballots in different counties may be tabulated differently in a manual recount due to the introduction of human subjectivity and error. Further, if manual recounts are held in certain counties but not others, ballots previously discarded by electronic tabulation in manual recount counties would be counted, while similarly-situated ballots in non-manual recount counties would not—thereby diluting the vote in non-manual recount counties.¹¹ These concerns

¹¹It should be noted that any presidential candidate was afforded an equal opportunity under the statute to ask for a manual recount in each Florida county. No evidence has been

are real, and, in our view, unavoidable given the inherent decentralization involved in state electoral and state recount procedures. For instance, at least 48 states employ recount procedures— many of which differ in their methods of tabulation.¹² In Florida, 65 of 67 counties use one of many different electronic voting systems certified by the Division of Elections.¹³ One county uses a mechanical lever machine and another county uses manually-tabulated paper ballots. Undoubtably, the use of these disparate tabulating systems will generate tabulation differences from county to county. Unless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions and alike), there will be tabulating discrepancies depending on the method of tabulation. Rather than a sign of weakness or constitutional injury, some solace can be taken in the fact that no one centralized body or person can control the tabulation of an entire statewide or national election. For the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corruption, bias, or error can influence the ultimate result of an election.

presented to suggest any discriminatory practice or policy in the county-by-county determinations to grant such recount requests. Whatever disparities may result from a county-by-county election count or recount do not constitute a constitutional injury. As the former Fifth Circuit has recognized, in the context of a Fourteenth Amendment challenge to the tabulation of election vote results in a school district election, there is a fundamental “distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a [constitutional violation].” Curry, 802 F.2d at 814 (quoting Ganza, 619 F.2d at 453).

¹²It has been represented to this Court by Plaintiffs that at least fifteen states employ some type of statutory manual recount scheme in presidential elections.

¹³Of these, 26 use punch-card and 39 use optical-scanning systems.

Moreover, Plaintiffs have failed to demonstrate that manual recounts are so unreliable that their use rises to the level of a constitutional injury. The burden of proof rests squarely with Plaintiffs on this point. Manual recounts are available in numerous states, and have been used since the time of the Founding. While some level of error is inherent to manual tabulation, no method of tabulation is free from error. It has been submitted to this Court that electronic tabulation runs a five per cent error rate. In fact, the very premise of a manual recount after an electronic tabulation, as is the case here, is to provide an additional check on the accuracy of the ballot count. While manual recounts may produce verifiable errors in certain cases, we do not find sufficient evidence to declare a law authorizing the use of a manual recount to be unconstitutional on its face. As the Supreme Court has elucidated, “[f]acial invalidation ‘is, manifestly, strong medicine’ that ‘has been employed by the Court sparingly and only as a last resort.’” National Endowment for the Arts v. Finley, 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998); see also New York State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 11, 108 S.Ct. 2225, 101 L.Ed.2d. 1 (1988) (stating that “to prevail on a facial attack the plaintiff must demonstrate that the challenged law either ‘could never be applied in a valid manner’”) (citations omitted). Clearly, the manual recount process, unless rife with error (which has not been proven by Plaintiffs), has many conceivable constitutional applications that would help ensure an accurate vote tally. It is unconvincing to argue that a process structured to render a vote tally more accurate somehow structurally dilutes the voting rights of the electorate. Simply because the recount tally postdates the initial vote or, as in this case, prolongs the certification of an election result does not result in a dilution of voting rights— anymore than the tallying of lawfully-cast absentee ballots dilutes the value of votes cast at polling precincts on election day.

In addition, we find Plaintiffs' alleged injuries on an as-applied basis to be speculative, and far from irreparable, at this stage in the electoral recount process. The four Florida canvassing boards challenged in this case still are in the process of conducting a manual recount, and the record in this case is undeveloped and changing by the hour. Thus far, no manual recount results have been announced, and no evidence has been demonstrated that these recounts have generated erroneous tabulations. While some charges of subjective tabulations and potential irregularities have been leveled in vague form, the evidence on these tabulation details generally has been in the form of media broadcasts and other unsubstantiated forms. Further, each county canvassing board is at a different stage in the manual recount process, and there are different pertinent factual circumstances in each county. The inconclusive state of these recount processes coupled with their different factual postures counsels against preliminary uniform injunctive relief at this time.

Further, there also has been no evidence presented by Plaintiffs that they lack an adequate remedy in state court to challenge either the manual recount results or the canvassing board decisions regarding the commencement and administration of recount procedures. See Curry, 802 F.2d at 1316-17. In fact, Florida Statutes, § 102.168 outlines an entire process by which "the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy."¹⁴ Fla. Stat. §102.168(1). In applying this provision, the Supreme

¹⁴Specifically, Fla. Stat. §102.168(3) allows a candidate to challenge an election on the following grounds:

Court of Florida has held that “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 expressed the will of the voters, then the court in an election contest brought pursuant to section 102.168, Florida Statutes (1997), is to void the contested election even in the absence of fraud or intentional wrongdoing.” Beckstrom v. Volusia Cty. Canvassing Bd., 707 So.2d 720, 725 (Fla. 1998). It therefore appears that if Plaintiffs could prove that the manual recounts in the four challenged counties leads to the state certification of an election result

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt 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.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

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

Id. In addition, “[a]ny candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. Fla. Stat. §102.168(7). “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.” Fla. Stat. §102.168(8).

contrary to the “will of the voters,” it would have a colorable claim in state court.

In short, I simply do not find Plaintiffs’ claims to have demonstrated a clear deprivation of a constitutional injury or a fundamental unfairness in Florida’s manual recount provision. While this dispute has assumed clear national prominence and importance due to the close and undecided outcome of the presidential election, the types of specific issues raised by Plaintiffs’ motion—for example, that manual ballot recounts are unreliable—are similar to the “‘garden-variety’ election dispute[s]” over counting ballots which have not been found to “rise to the level of a constitutional deprivation” under our caselaw. Curry, 802 F.2d at 1315; see also Welch v. McKenzie, 765 F.2d 1311, 1317, vacated on other grounds and remanded, 777 F. 2d 191 (5th Cir. 1985) (stating that “even though votes inadvertently counted incorrectly threw an election to the wrong candidate, this court refused to intervene” because our Constitution envisions such disputes to be regulated by state and not federal law); Pettengill v. Putnam Cty. Sch. Dist., Unionsville, Missouri, 472 F.2d 121 (8th Cir.1973) (refusing to intervene in election controversy where plaintiffs claimed that the right to vote had been diluted by defendant’s improper counting of ballots). I agree with the Curry Court that “a federal court should not be ‘the arbiter of disputes’ which arise in elections” because it is not “the federal court’s role to ‘oversee the administrative details of a local election.’” Curry, 802 F.2d at 1315. I also stress that this not a case alleging clear and direct infringements of the right of citizens to vote through either racial intimidation or fraudulent interference with a free election such as stuffing the ballot box or deliberately undercounting votes.

Finally, I conclude that the public interest is best served by denying preliminary injunctive relief in this instance. The mere possibility that the eventual result of the challenged

manual recounts will be to envelop the president-elect in a cloud of illegitimacy does not justify enjoining the current manual recount processes underway. Central to our democratic process as well as our Constitution is the belief that open and transparent government, whenever possible, best serves the public interest. Nowhere can the public dissemination of truth be more vital than in the election procedures for determining the next presidency.

V. Conclusion

While I share a desire for finality, I do not believe it can be accomplished through this request for an injunction. One of the strengths of our Constitution's method for selection of the President is its decentralization. Florida, one of the 50 states, has 67 counties, each with a supervisor of election, a canvassing board, and different voting and tabulation equipment. In a close statewide election, it is difficult to come to a final determination.¹⁵

A federal court has a very limited role and should not interfere except where there is an immediate need to correct a constitutional violation. At this stage, there is no likelihood that such a showing can be made. The request for preliminary injunction is DENIED.

¹⁵I have sympathy with the election officials throughout the state who are struggling to come to a conclusion. In his dissent in Williams v. Rhodes, 393 U.S. 23, 64, 89 S. Ct. 5, 27, 21 L.Ed.2d 24, 60 (1968), Chief Justice Warren pointed out that the Supreme Court had but seven days to consider the important constitutional questions presented in that case and had been compelled to decide the case "without the unhurried deliberation which is essential to the formulation of sound constitutional principles." I have tried to be mindful of the pressures on the parties in this case, allowing at least a day for the Defendants to respond, and I am attempting to rule promptly so that an appellate court will have an opportunity for meaningful review.

DONE AND ORDERED in Chambers, at Miami, Florida, this 13th day of November
2000.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA) Case No.
DOUGLAS, GONZALO DORTA, CARRETTA)
KING BUTLER, DALTON BRAY, JAMES S.)
HIGGINS, and ROGER D. COVERLY, as)
Florida registered voters,)

and)

GOVERNOR GEORGE W. BUSH and DICK)
CHENEY, as candidates for President and Vice)
President of the United States of America,)

Plaintiffs,)

vs.)

THERESA LePORE, CHARLES E. BURTON,)
CAROL ROBERTS, JANE CARROLL,)
SUZANNE GUNZBURGER, ROBERT LEE,)
DAVID LEAHY, LAWRENCE KING, JR.,)
MIRIAM LEHR, MICHAEL McDERMOTT,)
ANN McFALL, and PAT NORTHY, in their)
official capacities as members of the County)
Canvassing Boards of Palm Beach, Miami-Dade,)
Broward and Volusia Counties, respectively,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their counsel, seeking declaratory and injunctive relief against Defendants,

state the following:

INTRODUCTION

1. This lawsuit is brought to preserve the integrity, consistency, equality, and finality of the most important civic action that Americans take: their votes in an election for the President of the United States. It is brought reluctantly, because the election of the President is properly left to the people, not the courts. But it is necessary because the current course of events threatens to undermine that democratic process.

2. The Constitution and laws of the United States and the laws of Florida prescribe a process for selecting electors of the President and Vice President of the United States. Pursuant to those requirements, the people cast their votes on November 7, 2000. The votes (other than the overseas absentee ballots) were counted in Florida and Governor George W. Bush and Dick Cheney received the most votes.

3. *Because the margin was less than one-half of one percent, Florida law required an automatic recount. After completion of this automatic recount, Governor George W. Bush and Dick Cheney again received the most votes.*

4. There is no allegation or evidence of voter fraud, or of coercion or corruption. There is thus no basis for further recounts.

5. Not content, however, with the results of the first and second counts, certain individuals and groups have now launched a series of legal and administrative actions to delay and ultimately attempt to change the electoral result. This action could nullify the first and second ballot counts and alter the results of those counts by means of a third round of manual counts. Those manual counts would not be universal, rather they would be limited to selected ballots in selected counties.

6. Though perhaps carried out with the best intentions, the manual counts would not be more accurate than the automated counts – indeed, they are less fair and accurate. Human error and individual subjectivity would replace precision machinery in tabulating millions of small marks and fragile hole punches. If this recount does not yield the desired result, perhaps another, in yet another county, might. Indeed, the process appears to permit repeated counts. And no uniform procedures or standards govern when or how it might happen.

7. The problems of inherent unreliability and subjectivity of manual counts are magnified in this case where the shifting of a few votes could determine the outcome of this Presidential election.

8. At some point, Florida voters – indeed all Americans – are entitled to certainty and finality. If enough human hand counts are conducted, with enough potential human error, the result could presumably change – and perhaps even change back. But the changed result would not be the most accurate result, simply the most recent one. The official count, on Election Day, yielded a final answer through a counting process that was untainted by fraud or misconduct. The official recount, two days later, confirmed that result.

9. Both counts have been by the most accurate means available. Further recounts, by human hand until the results are different, will not further the interests of the voters or of the nation. They will not further, but rather will undermine, the integrity of the election. This court's intervention is necessary to protect the integrity of the constitutional process for selecting the President of the United States.

PRELIMINARY STATEMENT

10. This is a civil action for declaratory and injunctive relief under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. This action

seeks to prevent further and needless recounts of the ballots in the statewide election of November 7, 2000 and to require the certification and release of the twice-counted vote tallies. Absent a showing of fraud, corruption, or coercion in the voting process by Defendants, such remedies should be ordered to avoid the debasement of Plaintiffs' votes and the voting process in the State of Florida.

JURISDICTION AND VENUE

11. This is a civil action for declaratory and injunctive relief under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution.

12. The jurisdiction of this Court is based on 28 U.S.C. §§ 1331 and 1343.

13. Venue is proper in this Court because at least one of the Defendants resides within the Southern District of Florida and all of the Defendants reside within the State of Florida. 28 U.S.C. § 1391(b).

PARTIES

14. Plaintiffs Governor George W. Bush and Dick Cheney are the Republican candidates for President and Vice President of the United States. Plaintiffs Bush and Cheney have a substantial constitutional interest in having the votes certified and released without further delay, as Defendants' decision to permit further recounts violate the due process rights of Governor George W. Bush and Dick Cheney.

15. Plaintiff Ned L. Siegel is a resident of Palm Beach County, Florida, and is a registered voter in Florida. In the general election on Tuesday, November 7, 2000, Plaintiff Siegel sought to cast his ballot for Governor George W. Bush for President of the United States and Dick Cheney as Vice President of the United States.

16. Plaintiff Georgette Sosa Douglas is a resident of Broward County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff Sosa Douglas sought to cast her ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

17. Plaintiff Gonzalo Dorta is a resident of Miami-Dade County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff Dorta sought to cast his ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

18. Plaintiff Carretta King Butler is a resident of Volusia County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff King Butler sought to cast her ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

19. Plaintiff Dalton Bray is a resident of Clay County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff Bray sought to cast his ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

20. Plaintiff James S. Higgins is a resident of Martin County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff Higgins sought to cast his ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

21. Plaintiff Roger D. Coverly is a resident of Seminole County, Florida, and is a registered voter in Florida. In the general election held on Tuesday, November 7, 2000, Plaintiff

Coverly sought to cast his ballot for Governor George W. Bush and Dick Cheney as President and Vice President of the United States.

22. The above-named Plaintiffs, Siegel, Douglas, Dorta, Butler, Bray, Higgins and Coverly (the "Voter Plaintiffs"), are typical of Florida voters who were registered and eligible to vote in the November 7 statewide election. Their validly cast ballots have now been counted twice. The Voter Plaintiffs have a substantial constitutional interest in having those votes certified and released without further delay. The Voter Plaintiffs also have a substantial constitutional interest in not having these votes debased by further recounts that are in no way linked to any showing of fraud or material irregularities in the voting process. The Voter Plaintiffs' claims are typical of those of all voters.

23. Defendants Barton, LePore, and Roberts are the members of the Palm Beach County canvassing board. Defendants Leahy, King, and Lehr are the members of the Miami-Dade County canvassing board. Defendants Carroll, Gunzburger, and Lee are the members of the Broward County canvassing board. Defendants McDermott, McFall, and Northy are the members of the Volusia County canvassing board. Defendants are all residents of the State of Florida and are sued in their official capacities only.

FACTUAL BACKGROUND

24. On November 7, 2000, the State of Florida held a general election wherein Florida voters cast ballots for several offices, including to choose electors of the President and Vice President of the United States.

25. On November 8, 2000, the Division of Elections for the State of Florida reported that the Republican Party presidential ticket received 2,909,135 (48.8%) votes and the

Democratic Party presidential ticket received 2,907,351 (48.8%) votes (the "initial count").

Other candidates on the presidential ballot received a total of 139,616 votes.

26. Under Florida law, at the close of a general election the election boards for each precinct are to open the ballot boxes in the presence of the public and count the ballots. Florida Statute 102.061. The election boards for each precinct must then deliver to the supervisor of elections for each county the ballots and ballot boxes, as well as a certificate of the results of the election. Florida Statute 102.061.

27. Pursuant to Florida Statute 102.112, after each county's canvassing board has certified the returns, the returns for the election of federal or state officers must be forwarded to the Florida Department of State no later than 5 p.m. on the seventh day following the election. Otherwise, the returns may be ignored.

28. Florida Statutes 102.111 and 102.121 provide that the Elections Canvassing Commission of the State of Florida must then certify the results of the election and issue certificates of the results of the election.

29. Florida Statute 102.141(4) provides that if a candidate is defeated or eliminated by one-half percent or less of the votes cast for an office, then the Elections Canvassing Commission shall order a recount of the votes cast with respect to that office.

30. On November 8, pursuant to Florida Statute 102.141(4), each of the canvassing commissions of Florida's sixty-seven counties began a recount of the returns. Media reports indicate that the recount has confirmed the outcome of the election.

31. The multiple counting of the returns has raised several issues. For example, in at least one county (Gadsden County), the ballots were not merely recounted but rather

“interpreted” – or reinterpreted – by the county’s canvassing board. This resulted in additional ballots being counted. This recount calculated a result different from that of the original count, resulting in a net gain of 153 votes in favor of the Democratic presidential ticket. *See Exhibit A (Statements of John M. Leace and Edgar E. Stanton).*

32. It is also clear that the repetitive counting of ballots – especially manual counting – diminishes the accuracy of the counts.

33. On November 8, 2000, while the automatic statewide recount was continuing, three local Democratic Party operatives filed an action styled as *Fladell v. Palm Beach County Commission* in the Circuit Court for the Fifteenth Judicial Circuit of the State of Florida, contesting the presidential election returns in Palm Beach County. This action sought to void the presidential election results in Palm Beach County and requested that a new election be conducted in that jurisdiction for that race. *See Exhibit B.*

34. In addition to Defendants’ conduct, upon information and belief, numerous lawsuits and other litigation have been commenced across Florida purporting to challenge the result of the election in Florida or otherwise delay the certification and release of those results.

- a. On November 9, 2000, while the automatic statewide recount was still continuing, an action, styled as *Rogers v. Elections Canvassing Commission of the State of Florida* was also filed in the Circuit Court for the Fifteenth Judicial Circuit of the State of Florida, also contesting the presidential election returns in Palm Beach County, and seeking the same relief as that of *Fladell*. (Exhibit C).

- b. On November 9, 2000, while the automatic statewide recount was still continuing, a complaint styled as *Miller v. Harris* was filed in the United States District Court for the Southern District of Florida, West Palm Beach Division. This action also contested the presidential election results in Palm Beach County and sought a new election in that jurisdiction. (Exhibit D).
- c. Media reports have indicated that as many as five (5) additional lawsuits relating to the results of the election have been filed. Plaintiffs have not been able to obtain copies of these suits.

35. The gravamen of *Fladell, Rogers, and Miller* is that the presidential election ballot used in Palm Beach County was “deceptive, misleading and/or confusing,” and that the results of the election were therefore invalid.

36. On November 9, 2000, again while the automatic statewide recount was still continuing, media reports indicated that either the Gore campaign, the Democratic party and/or some other entity or individual had filed requests for manual recounts of ballots in Palm Beach, Miami-Dade, Broward, and Volusia counties.

37. Florida Statute 102.166 provides that any candidate or his party may file a written request with a county canvassing board for a manual recount within 72 hours after midnight of the date of the election or prior to the time the canvassing board adjourns, whichever occurs later. Florida Statute 102.166 further provides that a county canvassing board need only make a “reasonable effort” to notify each candidate whose race is being manually recounted of the time and date of the recount. The statute does not require that an opposing candidate or party be

notified of the request for the manual recount or the canvassing board's ruling as to the request, and/or the time and date upon which any manual recount will take place.

38. Florida Statute 102.166 requires that the request for a manual recount "contain a statement of the reason the manual recount is being requested." Florida Statute 102.166(4)(a).

39. Florida Statute 102.166 neither requires nor suggests that an opposing candidate or party be given the opportunity to be heard as to whether a manual recount should occur. The statute apparently gives the county canvassing board complete discretion in making that decision, and it sets forth no standards for the determination of whether a manual recount should take place.

40. The canvassing boards of Palm Beach and Volusia counties have consented to the request for a manual recount. Both Volusia and Palm Beach Counties will begin manual recounts by Saturday, November 11, 2000.

41. The canvassing boards of Miami-Dade and Broward counties have received requests from the Gore campaign and/or others to conduct a manual recount of the election results. Upon information and belief, those canvassing boards have not yet determined whether they will consent to a manual recount.

IRREPARABLE INJURY

42. If Defendants' threatened manual recounts are allowed to proceed, Plaintiffs will suffer irreparable injury. If an unlawful recount occurs, in violation of the First and Fourteenth Amendments, and a changed result happens to occur (however unlikely), that tainted result will be broadcast to the nation. Any subsequent invalidation by this Court will not be able to cure the serious damage to the legitimacy of the presidential election. Any such taint, and the perception

of multiple reversals in outcome, will interfere with the orderly transition of constitutional government.

FIRST CLAIM FOR RELIEF

(Violation of 42 U.S.C. § 1983 and the Fourteenth Amendment)

43. Plaintiffs repeat and reallege paragraphs 1-42.

44. Defendants' actions have violated the Voter Plaintiffs' rights under the Fourteenth Amendment by arbitrarily denying them the effective exercise of their right to vote and to have that vote counted in an equal and consistent fashion with all other voters in this election. The citizens of Florida cast their votes on November 7, 2000. These votes were counted according to the processes prescribed by law, with no allegation of fraud, error, or other misconduct in the conduct of the counting. In accordance with a vote count conducted pursuant to the laws of Florida, Governor George W. Bush and Dick Cheney were determined to have received the most votes. Pursuant to Fla. Statute 102.141(4), an automatic recount was conducted with the participation of local officials of both political parties. Again, there was no allegation that the counting was infected by fraud, error, or other misconduct, and Governor George W. Bush and Dick Cheney once again received the most votes. Pursuant to requests by certain individuals and voters, county officials in Palm Beach, Miami-Dade, Broward, and Volusia counties have begun or will shortly begin yet a third count of the ballots cast, this time manually.

45. Florida law, as applied to these circumstances, threatens to inflict irreparable injury on the Voter Plaintiffs and on all similarly situated voters by arbitrarily denying full effect to the votes that they cast on November 7, 2000. It does so in the following ways. First, the provisions of Florida Statute 102.166 provide no standards to guide the discretion of the canvassing board in determining whether a manual recount is warranted in the first place or, if

so, what the scope, nature, manner, and method of such recount should be. For example, one county canvassing board has been asked to and has apparent discretion to grant a recount for three precincts only; three others have been asked and has discretion to grant a recount for the entire county. There is nothing in the statute to constrain the county canvassing boards' discretion as to how many precincts (beyond a minimum of three precincts) to recount. There is no rational basis for distinguishing which counties or precincts to recount, other than the unconstrained determination of the applicant that he may get more votes from those precincts selected.

46. Second, Florida Statute 102.166 establishes no criteria to limit the discretion of the canvassing boards in determining how to conduct the tally of votes. One canvassing board may decide to count votes that are not fully punched; another may not. One canvassing board may decide that a stray mark indicates an intent to vote for a particular candidate; another board may not. One board may try to determine the intent of voters who marked multiple candidates on a ballot; another may not. Florida Statute 102.166 authorizes the county canvassing board to determine the subjective "intent" of a voter, without setting forth any standards for determining how to discern that intent. This creates arbitrariness in the implementation of a process that concerns the fundamental right to vote.

47. Third, if a manual recount gives effect to partially punched ballots, or counts ambiguous ballots based on the canvassing boards' subjective interpretation of voters' intent, it has the effect of unconstitutionally diluting the votes of the other voters both in the affected county and in the counties not subject to recount.

48. Because of this arbitrary and unconstrained decision-making authority conferred upon the county canvassing boards, a disappointed candidate in a close election can seek recounts in successive favorable jurisdictions until he is satisfied with the results, and thereby arbitrarily deny the force and effect of the votes cast and validly counted (and verified on recount) for the winning candidate.

49. There is no reason to believe that a recount is more accurate than the initial count, or that subsequent recounts add any further accuracy. In fact, empirical evidence indicates otherwise: that recounts diminish accuracy with each recount. Ballots are degraded, and human error is common. Thus, without any guarantee of increased accuracy, and at the virtually certain risk of increased inaccuracy, canvassing boards are given unbridled discretion to affect the results of an election through individual subjective decisions.

50. And natural human error and subjectivity are not the only risks. In an ordinary presidential election, where all votes occur on the same day and are tallied simultaneously, no one election official perceives his or her actions could materially affect the outcome of the election. In these unique circumstances, however, the incentives for favoritism or worse – in the hopes that a small swing of votes could determine the President – are grossly magnified in a manual recount where individual counters have direct and subjective contact with the ballots.

51. This potential for delay and uncertainty inherent in the above-described scheme is compounded by its interaction with Florida Statute 102.168. That statute creates a means to carry on contests of election in the relevant circuit courts. Such contests may be filed by any candidate, any voter, or even any taxpayer. Such contests threaten to further delay the effective implementation of the ballots cast by Florida voters and increase the uncertainty that now exists

with respect to the result of the election. Different challenges may be filed in different courts.

There is a virtual certainty that different courts will react differently to similar claims.

52. As a result, the process of selecting and certifying the decisive electors of the President and Vice President of the United States may be tied up in trial litigation and appellate litigation indefinitely, casting doubt on the integrity and legitimacy of the process for selecting the holder of the highest office in the land. This circumstance, when combined with the arbitrary discretion vested in the canvas boards – if allowed to proceed unchecked – threatens to prevent the smooth and clear transition of Presidential power, a matter of paramount national interest.

53. This unbridled discretion, as applied in the circumstances of this case, results in the arbitrary deprivation of the Voter Plaintiffs' right to vote under the Fourteenth Amendment.

SECOND CLAIM FOR RELIEF

(Violation of 42 U.S.C. § 1983: Equal Protection)

54. Plaintiffs repeat and reallege paragraphs 1-42 and 44-47.

55. Because, for the reasons discussed, the statutory scheme produces arbitrary and capricious decision-making by state and county officials as to whose votes will count, and whose will not, in different precincts and counties, the scheme also violates the Equal Protection Clause of the Fourteenth Amendment. If a manual recount gives effect to partially punched ballots, or counts ambiguous ballots based on the canvassing boards' subjective interpretation of voters' intent, it arbitrarily subjects voters in other counties to unequal treatment in violation of the Fourteenth Amendment. Because a fundamental right is at issue here – the right to vote – the state's action is subject to strict scrutiny.

THIRD CLAIM FOR RELIEF

(Violation of 42 U.S.C. § 1983 and the Fourteenth Amendment)

56. *Plaintiffs repeat and reallege paragraphs 1-42.*

57. Because the recount begun or about to begin by Defendants is limited to portions of only four counties, the Voter Plaintiffs who are not residents or voters in those four counties are being deprived of rights accorded to voters of those counties and/or will have their votes diluted in violation of the Fourteenth Amendment.

FOURTH CLAIM FOR RELIEF

(Violation of 42 U.S.C. § 1983 and the First Amendment)

58. *Plaintiffs repeat and reallege paragraphs 1-42.*

59. The right to vote in a democracy is among the most precious of all individual rights, and is the crux of the democratic system. The right to vote is clearly established under the First Amendment of the Constitution of the United States.

60. *By their votes, the Voter Plaintiffs and all the other voters expressed a political message regarding their choice of candidates for the Presidential election. That message will be delivered only when their votes are counted and certified for release by Defendants, such that government can act on the Voter Plaintiffs' votes. In this particular case, that message includes selection and direction of electors to the Electoral College under the United States Constitution. Voter Plaintiffs' votes are a means for orderly change of government under the United States Constitution. The message of the Voter Plaintiffs' votes, therefore, is at the core of political speech and is entitled to the highest protection under the First Amendment to the United States Constitution.*

61. The state's action in this case arbitrarily denies and burdens the Voter Plaintiffs' votes and political speech. Due to the standardless nature of the recount and contest scheme,

government officials are vested with arbitrary power and authority to deny the vote and thus thwart political speech. Such schemes are presumptively violative of the First Amendment.

62. Defendants' actions and conduct are in willful disregard of the Voter Plaintiffs' constitutionally protected rights, and were committed with the intent of depriving the Voter Plaintiffs of their constitutional rights.

FIFTH CLAIM FOR RELIEF

(Section 1983; Violation of the Fourteenth Amendment)

63. Plaintiffs Governor George W. Bush and Dick Cheney repeat and reallege paragraphs 1-42.

64. Under the Due Process clause of the Fourteenth Amendment, candidates for public office are entitled to due process in election procedures, including with regard to the fair and timely counting and reporting of the votes cast for that candidate.

65. This Court should declare that Defendants' refusal to certify and release those votes that they have now counted twice since November 7 and their performance of any additional recounts violate the rights of Plaintiffs Governor George W. Bush and Dick Cheney under the Fourteenth Amendment.

WHEREFORE, Plaintiffs pray for a judgment and order:

- (a) Declaring that Defendants may not subject any vote totals to manual recounts;
- (b) In the alternative, declaring that Florida Statute § 102.166(4) is unconstitutional to the extent it does not limit the discretion of Defendants to conduct manual recounts in this case;
- (c) Declaring that Defendants should certify and release forthwith all vote totals that have been the subject of two vote counts since November 7, 2000;
- (d) Declaring that the form of ballot used in Palm Beach County was valid;

- (e) Declaring that any ballot punched or marked for two Presidential candidates not previously counted cannot now be counted;
- (f) Consolidating or removing to this Court any and all actions filed across the State of Florida purporting to challenge the results of the November 7 statewide election or otherwise delay the certification and release of those results; and
- (g) Granting such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

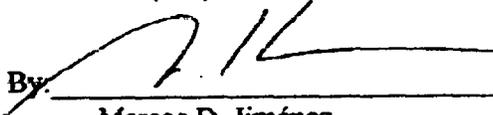
Barry Richard, Esq.
GREENBERG TRAURIG, P.A.,
Tallahassee, Florida

Theodore B. Olson, Esq.
GIBSON DUNN & CRUTCHER LLP
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- and -

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By: 

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Of Counsel:

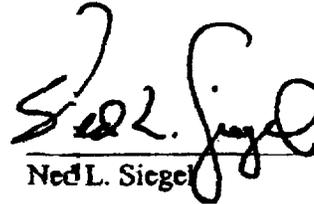
George J. Terwilliger III
Timothy E. Flanigan
WHITE & CASE LLP
Washington, D.C.

VERIFICATION OF NED L. SIEGEL

1. My name is Ned L. Siegel and I am over the age of twenty-one (21).
2. I am a resident of Palm Beach County, Florida and the lead plaintiff in this action.
3. I have read the allegations of the verified complaint, and the facts stated therein are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 2000.



Ned L. Siegel

**IN THE COUNTY OF GADSDEN
STATE OF FLORIDA**

STATEMENT

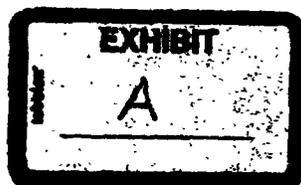
Comes now your affiant, John M. Lease, and gives the following sworn statement:

On November 9, 2000 at approximately 8:45 A.M., I was in the chambers of the Honorable Richard L. Hood, County Judge of Gadsden County, Florida. Also present was Hal Richmond (the county attorney of Gadsden County), Dennis Crowley, and Edgar Stanton. The Presidential Election ballot recount was discussed. Judge Hood informed me that Al Gore had a net gain of over 150 votes after the recount. This was confirmed by Mr. Richmond. The two went on to explain how this occurred. They explained that as part of the Canvassing Board, they had been involved in the recount. Further, they explained that the ballots had not been simply recounted. A number of the ballots were not properly completed, and these ballots were examined by board members and "interpreted" by the board members. The improperly completed ballots, after examination were tallied for the respective candidates; this resulted in the net gain of 153 votes for Gore.

The ballots that were "interpreted" included ballots with abnormalities such as:

- 1) Ballots that had more than 1 candidate's bubble selected. The Board interpreted which candidate the voter intended based on some choices "not being fully crused" or where "one bubble was darker or more completely filled in."
- 2) Ballots with no candidate properly selected, but an "astrix or star" near one of the names.
- 3) Ballots that did not select a candidate but "had markings that indicated the voter's intent."


John M. Lease



IN THE COUNTY OF GADSDEN
STATE OF FLORIDA

STATEMENT

Comes now your affiant, Edgar E. Stanton, IV, and gives the following sworn statement:

On November 9, 2000 at approximately 8:45 A.M., I was in the chambers of the Honorable Richard L. Hood, County Judge of Gadsden County, Florida. Also present was Hal Richmond (the county attorney of Gadsden County), Dennis Crowley, and John M. Leace. The Presidential Election ballot recount was discussed. Judge Hood informed me that Al Gore had a net gain of over 150 votes after the recount. This was confirmed by Mr. Richmond. The two went on to explain how this occurred. They explained that as part of the Canvassing Board, they had been involved in the recount. Further, they explained that the ballots had not been simply recounted. A number of the ballots were not properly completed, and these ballots were examined by board members and "interpreted" by the board members. The improperly completed ballots, after examination were tallied for the respective candidates; this resulted in the net gain of 153 votes for Gore.

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- 2) Ballots with no candidate properly selected, but an "asterisk or star" near one of the names.
- 3) Ballots that did not select a candidate but "had markings that indicated the voter's intent."


Edgar E. Stanton, IV

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. **CL0010965AN**

ANDRE FLADELL and
ALBERTA MCCARTHY
and LILLIAN GAINES,

Plaintiffs.

vs.

PALM BEACH COUNTY
CANVASSING BOARD,
as constituted by County Court
Judge Charles Burton; Supervisor
of Elections Theresa LePore; and
County Commissioner Carol Roberts;
GEORGE W. BUSH, DICK CHENEY,
AL GORE and JOE LIEBERMAN,

Defendants.

FILED
NOV 14 2000
CIRCUIT CIVIL 5
CL0010965AN

9

COMPLAINT FOR DECLARATORY RELIEF

The Plaintiffs, ANDRE FLADELL, ALBERTA MCCARTHY and LILLIAN GAINES, through counsel, file this complaint against Defendants, PALM BEACH COUNTY CANVASSING BOARD, as constituted by County Court Judge, Charles Burton; Supervisor of Elections, Theresa LePore; and County Commissioner, Carol Roberts; George W. Bush, Dick Cheney, Al Gore and Joe Lieberman, and states:

1. This is an action for declaratory and other relief concerning the adequacy of the ballots booklets used in Palm Beach County only for the November 7, 2000 Presidential Election.

EXHIBIT
B

2. All conditions precedent to the filing of this action have been performed or have been waived.

3. Defendant, PALM BEACH COUNTY CANVASSING BOARD, as constituted by County Court Judge Charles Burton; Supervisor of Elections Theresa LePore; and County Commissioner Carol Roberts, is the duly appointed county canvassing board for Palm Beach County.

4. Defendant, THERESA LEPORE, is the Supervisor of Elections for Palm Beach County, Florida.

5. Defendant, George W. Bush, is a resident of the State of Texas and the Republican candidate and nominee for President of the United States and is joined in this action as an interested party pursuant to Florida Statute §86.091

6. Defendant, Dick Cheney, is a resident of the State of Wyoming and the Republican candidate and nominee for Vice-President of the United States and is joined in this action as an interested party pursuant to Florida Statute §86.091.

7. Defendant, Al Gore, is a resident of the State of Tennessee and the Democratic candidate and nominee for President of the United States and is joined in this action as an interested party pursuant to Florida Statute §86.091.

8. Defendant, Joe Lieberman is a resident of the State of Connecticut and the Democratic candidate and nominee for Vice-President of the United States and is joined in this action as an interested party pursuant to Florida Statute §86.091.

9. Plaintiffs, ANDRE FLADELL, ALBERTA MCCARTHY and LILIAN GAINES, are residents of Palm Beach County, Florida, duly qualified electors and taxpayers who voted in the November 7, 2000 Presidential Election.

10. This is an action brought for declaratory judgment and supplemental relief which is within the jurisdiction of this Court.

11. On November 7, 2000, a general election was held in which Palm Beach County voters voted for candidates for President and Vice-President.

12. All of the candidates for the Presidential election were listed on two facing pages of the ballot booklet that is attached to each voting machine.

13. The punch holes for each candidate were in a single column that ran between the facing pages.

14. The names of independent (non-Democratic and non-Republican) candidates such as Pat Buchanan) and the punch holes for such candidates were placed adjacent to the names of the Democratic Candidates, Al Gore and Joe Lieberman.

15. As a result, many voters, and in particular, many senior citizens, intending to vote for Al Gore and Joe Lieberman, mistakenly punched the punch hole on the ballot card designated for Pat Buchanan and Ezola Foster (hole #2).

16. In addition, the holes in the ballot cards for numbers 4 (Gore and Lieberman) and 5 (Pat Buchanan and Ezola Foster) were directly adjacent to the section of the ballot listing the Democratic candidates (Gore and Lieberman). As a result, many voters, and in particular, many senior citizens, intending to vote for Al Gore and Joe Lieberman punched punch hole numbers 4 and 5 in the mistaken belief that such numbers referred to a vote for Al Gore and Joe Lieberman. It has been reported in the Palm Beach Post that in Palm Beach County Reform Candidates (Pat Buchanan and Ezola Foster) received 3,040 votes.

17. Palm Beach County was the only county to list the candidates on two pages. It is believed that such format had never before been used in a Presidential election and that said format created and contributed to much voter confusion. All sixty-six (66) other counties in Florida listed all candidates in a straightforward, non-confusing manner, listing each candidate vertically from top to bottom as prescribed by Florida Statute 101.191 (1999) ("Form of General Election Ballot."). Moreover, pursuant to Florida Statutes §101.151(4), §101.191 (1999), Defendant, THERESA LEPORE, was required by law to place the Democratic candidates in second position on the ballot (as the Democratic Party had received the second highest number of votes for Governor in the last election in which a Governor was elected), but instead placed the Democratic candidates in third position (third punch hole). Defendant, THERESA LEPORE, had no discretion to change the statutorily mandated position of the Democratic candidates on the ballot.

18. A copy of the ballot as reproduced in the Sun-Sentinel is attached hereto as Exhibit "A". Plaintiffs are not currently in possession of the actual ballot booklets used in the election, but will obtain same through discovery.

19. Plaintiffs contend that (1) as a result of the above-described positioning of the candidates on the ballots in violation of Florida law, the ballots in Palm Beach County as they pertain to the Presidential Election were inherently confusing, (2) that because of this positioning the Reform Party candidates, Pat Buchanan and Ezola Foster and possibly other independent candidates, received votes that were intended for the Democratic candidates, Al Gore and Joe Lieberman and (3) that because of this positioning, electors inadvertently punched more than one hole to vote for Al Gore and

Joe Lieberman, thereby invalidating their ballot and disenfranchising themselves.

20. The Supervisor of Elections, Defendant, THERESA LEPORE, has taken the position during and after the election that the format used for the ballots and positioning of the candidates names was not misleading.

21. Based upon the foregoing contrary contentions of the parties, an actual bona fide dispute exists between the parties as a result of which Plaintiffs are in doubt as to the validity of the results of the Presidential Election in Palm Beach County, Florida.

22. It has been widely acknowledged by the media and political commentators that the results of the Presidential Election in Florida will be decisive as to whether the Democratic or Republican candidates are elected President and Vice-President. Without winning the election in Florida neither candidate can win the Presidential Election. Votes unintentionally cast for Buchanan in Palm Beach County will make a decisive difference in the outcome of the November 7, 2000 Presidential election.

23. This Court has the right, duty, and power to declare the rights and liabilities of the respective parties herein, and to give such other and further relief as may be necessary and proper under the circumstances.

24. There is a bona fide, actual, present and practical need for the declaration and adjudication of the rights of the parties hereunder and the dispute described in this Complaint deals with a present, ascertained controversy.

25. The controversy outlined above concerns an interpretation of a privilege and/or right of the parties dependent upon a determination and resolution of the facts described in this Complaint.

26. The Plaintiffs have an actual, present, adverse and antagonistic interest in the subject matter outlined in this Complaint and all of the antagonistic and adverse interests are before this Court.

WHEREFORE, Plaintiffs requests that the Court declare the general election ballot as it pertains to the Presidential Election to be in violation of the foregoing statute, declare that said ballot is deceptive, confusing and/or misleading, declare the election results for the public office of President and Vice-President to be null and void and direct that a new general election for the office of President and Vice-President of the United States be held in Palm Beach County, Florida.

954
648
1131

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BY: 

HENRY B. CANDLER, ESQ.
Florida Bar No. 259284
DAVID K. FRIEDMAN, ESQ.
Florida Bar No. 307378

Bruce Silver, Esq.
Of Counsel
Florida Bar No. 935182

Confusion at Palm Beach County polls

Some Al Gore supporters may have mistakenly voted for Pat Buchanan because of the ballot's design.

Although the Democrats are listed second in the column on the left, they are the third hole on the ballot.

Punching the second hole casts a vote for the Reform party.

REPUBLICAN
 GEORGE W. BUSH - president
 DICK CHENEY - vice president

DEMOCRATIC
 AL GORE - president
 JOE LIEBERMAN - vice president

LIBERTARIAN
 GARY BOWSER - president
 ART OLIVER - vice president

GREEN
 RALPH ABNER - president
 WANDA LINNCE - vice president

SOCIALIST WORKERS
 JAMES BARNES - president
 MARGARET THOBE - vice president

NATURAL LAW
 JOHN HAMLIN - president
 RAY GOLDMANN - vice president

REFORM
 PAT BUCHANAN - president
 SCOTT PETERSON - vice president

SOCIALIST
 DAVID MCCRELLAN - president
 MARY ZAL BRICE - vice president

CONSTITUTION
 HOWARD PHILLIPS - president
 J. CURTIS PRANGE - vice president

WORKERS WORLD
 MONICA JOHNSON - president
 GLORIA LA RIVIERA - vice president

WHITEHAI CANDIDATE
 To vote for a white-hai candidate, please use
 checkboxes on the top side of your ballot only.

Staff graphic

EXHIBIT A

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.:

BEVERLY ROGERS, and RAY KAPLAN,
individually and on behalf of
others similarly situated electors
in Palm Beach County, Florida,

Plaintiffs,

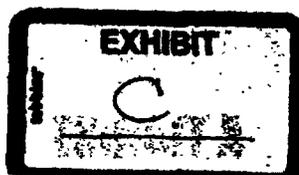
v.

**THE ELECTIONS CANVASSING COMMISSION
OF THE STATE OF FLORIDA; GOVERNOR JEB
BUSH; SECRETARY OF STATE KATHERINE
HARRIS; CLAY ROBERTS, Director of the
Division of Elections for the State of Florida;
THERESA LaPORE, Supervisor of Elections
for Palm Beach County; THE PALM BEACH
COUNTY ELECTIONS CANVASSING
COMMISSION; AL GORE; and GEORGE W. BUSH,**

Defendants.

COMPLAINT

The Plaintiffs, **BEVERLY ROGERS and RAY KAPLAN**, individually and on behalf of others similarly situated, electors in Palm Beach County, Florida sue Defendants, **THE ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA; GOVERNOR JEB BUSH; SECRETARY OF STATE KATHERINE HARRIS; CLAY ROBERTS**, Director of the Division of Elections for the State of Florida; **THERESA LaPORE**, Supervisor of Elections for Palm Beach County; **THE PALM BEACH COUNTY ELECTIONS**



CANVASSING COMMISSION; AL GORE; and GEORGE W. BUSH, pursuant to Section 102.168, Fla. Stat., and in support thereof allege the following:

1. On November 7, 2000, an election was held in the United States of America, including throughout Palm Beach County, Florida, to elect the 43rd President of the country.

2. On November 7, 2000, the Plaintiffs, **BEVERLY ROGERS, RAY KAPLAN, AND SAM KAPLAN**, and numerous other electors in Palm Beach County, Florida (hereinafter collectively referred to as "**ROGERS**"), presented to various polling stations throughout Palm Beach County with the intention of casting their ballots for the office of President of the United States of America on behalf of Al Gore, Jr.

3. Various Florida Statutes govern the form of ballots to be utilized for elections held in the State of Florida. Section 101.191, Fla. Stat., provides the form to be utilized for general elections ballots. That form clearly provides that candidates for the Office of President and Vice-President of the United States of America shall be listed along the left hand side of the ballot, with a blank space adjacent to the right of the candidate's name to be filled in to indicate a selection of that candidate. Section 101.151, Fla. Stat., provides detailed specifications for general election ballots, including the mandate that the candidates for any office shall be listed in the following order: the name candidate of the party which received the highest number of votes for governor in the last election in which a governor was elected shall be placed first under the heading for each office, together with an appropriate abbreviation of party name, to be followed by the name of the candidate of the party which received the second highest vote for governor. Finally, Section 101.011, Fla. Stat., provides that where paper ballots are used, the elector shall retire to a booth, alone, and place a mark after the name of the candidate of his or her

clearly violates Florida Law, the Plaintiffs and others similarly situated cast their ballots for a candidate for whom they had no intention of voting.

8. A simple review of the polling data clearly and convincingly proves that a wrong was committed in Palm Beach County, Florida. In Broward County, Florida (one county to the south), of total ballots cast (573,183), Pat Buchanan received 789 votes, or .14 percent.

9. In Martin County, Florida (one county to the north), of the total ballots cast (61,842), Pat Buchanan received 112 votes, or .18 percent.

10. In Indian River County, Florida, of the total ballots cast (49,606), Pat Buchanan received 105 votes, or .21 percent.

11. However, in Palm Beach County, the only county where these illegal ballots were utilized, of the total ballots cast (432,183), Pat Buchanan received 3,407 votes, or .788 percent. Buchanan received no more than 1,012 votes in any other county in this state, and received a total of 16,946 votes in the entire state See, Exhibit "B").

12. Clearly the statistics and election results shown above reveal that Buchanan received a disproportionate share of the votes cast in Palm Beach County, Florida for President and Vice President. There should be no doubt that the results are directly related to the illegal design and use of the ballot in question.

13. Section 102.168, Fla. Stat., governs the contest of elections. The statute provides that any elector qualified to vote to in the election related to the contested candidacy, or any taxpayer may file an action contesting the results of the election. Included among the permitted grounds for contesting an election are misconduct, fraud, or corruption on the part of any election official or any member of the Canvassing Commission sufficient to change or place in doubt the result of the election; or any other cause or allegation which, sustained, would show that a person other than the successful

candidate was the person duly elected to the office in question. Further, Section 102.168(7), Fla. Stat., provides that any qualified elector or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing thereon. Finally, under Section 102.168(8), Fla. Stat., the circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to insure 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.

14. Under Section 102.141, Fla. Stat., a county canvassing board shall first review the results of the election in that county and declare a winner of each office subject to election. Under Section 102.151, Fla. Stat., the county canvassing board shall issue certificates containing the total number of votes cast for each person nominated or elected, the names of the persons for whom such votes were cast and the number of votes cast for each candidate or nominee. Those certificates shall be transmitted to the Department of State. Finally, under Section 102.155, Fla. Stat., the supervisor of elections for the county shall give any person, for whom the election has been certified by the county canvassing commission, a certificate of the person's election, and that certificate of election shall be *prima facie* evidence of the election of such person.

15. Section 102.111, Fla. Stat., provides that the results of elections from each County shall be forwarded to the Department of State and the Election Canvassing Commission, which consists of the Governor of the State, the Secretary of the State, and the Director of Division of Elections. The Election Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns from the election and determine and declare who has been elected for each office. Under Section 102.121,

COUNT II**CLAIM TO SET ASIDE ELECTION RESULTS**

Plaintiffs incorporate and adopt the allegations of Paragraph Nos. 1 through 15 above, as if the same were fully set forth herein.

20. Given the State law violations concerning the form and design of the ballot utilized in Palm Beach County, Florida, for the election of President and Vice-President of the United States of America, there is genuine dispute as to the validity of the number of votes cast for each candidate.

21. Plaintiffs and others similarly situated believe they may have inadvertently voted for Pat Buchanan, the Reform Party candidate for President of the United States, when they in fact intended to vote for Al W. Gore, the Democratic Party candidate for President of the United States.

22. The election for President and Vice-President of the United States has been extremely close, and in fact, the winner of the election hinges upon the outcome of the election for those offices in the State of Florida. Upon information and belief, and after a recount of the votes cast for President and Vice-President of the United States, it is believed that the difference between the total votes cast in Florida for the Republican and Democratic party candidates for President of the United States will be less than two thousand (2,000) votes, and may indeed be less than one thousand (1,000) votes.

23. Given the discrepancy in the votes cast for Pat Buchanan, and the errors and irregularities in the ballot utilized in Palm Beach County, the results of the election for President and Vice-President of the United States of America from Palm Beach County, Florida, must be set aside and a second general election for Palm Beach County called so

that a new ballot may utilized and the electors given a chance to vote for President and Vice-President of the United States with a ballot which complies with Florida law.

WHEREFORE, based on the foregoing, this Court must void the entire election throughout Palm Beach County, order that the ballot be re-designed to comply with all Florida Law, and schedule a re-election as soon as practicable.

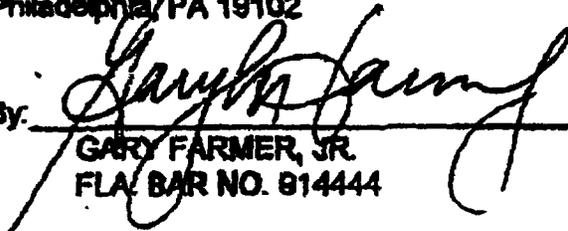
DATED November 9, 2000.

David H. Krathen, Esq.
Fla. Bar No. 147810
Michael Freedland, Esq.
Fla. Bar No. 126988
LAW OFFICES OF DAVID KRATHEN
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Stephen A. Sheller, Esq.
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1528 Walnut St., 3rd Floor
Philadelphia, PA 19102

By:


GARY FARMER, JR.
FLA. BAR NO. 914444

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2000, a true copy of the

foregoing was furnished by facsimile transmission and U.S. to:

Governor Jeb Bush
Office of the Governor, The Capitol
Tallahassee, FL 32399-0001
Phone: (850) 488-4441
Fax: (850) 487-0801

Katherine Harris
Secretary of State
The Capitol
Tallahassee, Florida 32399
Phone: (850) 488-5500
Fax: (850) 487-2214

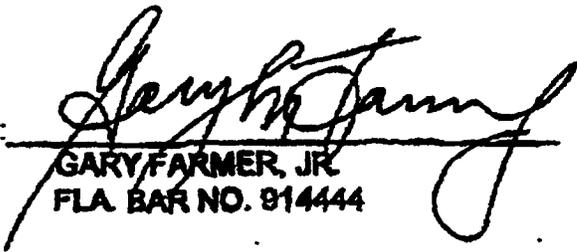
L. Clayton Roberts,
Director of Florida Department of Elections
Department of State, Division of Elections
The Capitol, Room 1801
Tallahassee, FL 32399-0250
Phone: (850) 488-7890
Fax: (850) 488-1788

Theresa LaPore,
Supervisor of Elections
P.B.C. Governmental Center
301 North Olive Avenue, Room 105
West Palm Beach, FL 33401-4795
Phone: (561) 955-2650
Fax: (561) 355-4006

Vice President Al Gore, Jr.
601 Mainstream Drive
Nashville, TN 37226
Phone: (615) 340-2000

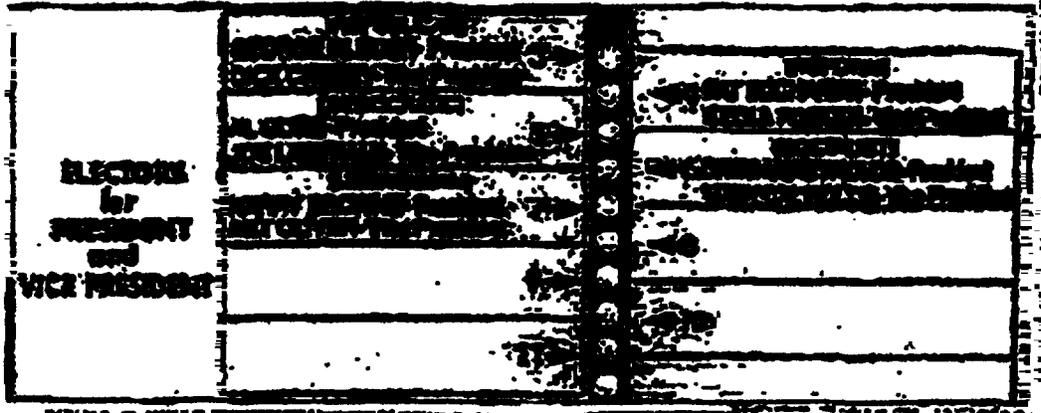
Governor George W. Bush, Jr.
P.O. Box 1902
Austin, TX 78767
Phone: (512) 697-2000
Fax: (850) 681-0184

By:


GARY FARMER, JR.
FLA. BAR NO. 914444

<p>REPUBLICAN DEMOCRATIC LIBERTARIAN GREEN SOCIALIST NATIONAL</p>	<p>REPUBLICAN DEMOCRATIC LIBERTARIAN GREEN SOCIALIST NATIONAL</p>	<p>REFORM POST-INDUSTRIAL SOCIALIST GREEN SOCIALIST NATIONAL</p>

EXHIBIT A



On top of the online newsstand | on new | contact us | care | read state | community



Local news: South Beach | Fort Lauderdale | Ft. Lauderdale | West Beach | Palm Beach

FLORIDA: UNOFFICIAL RETURNS >>

County	% Report	Bush (REP)	Cheney Lieberman (DEM)	Goins / Browne / Oliver (LWR)	Mader / Harris / DeVos (REP)	Hagelin / Trons (REP)	Buchanan / McReynolds / Foster (REP)	Phillips / Frazier (REP)	Moe (REP)
Alachua	100.0%	34,082	47,300	608	3,215	6	42	4	20
Baker	100.0%	5,910	2,392	17	59	0	3	0	3
Bay	100.0%	39,957	19,950	171	829	5	18	3	18
Brevard	100.0%	5,413	3,872	28	84	0	2	0	2
Broward	100.0%	115,165	97,316	643	4,470	11	39	11	72
Broward	100.0%	177,278	306,518	1,212	7,089	49	128	25	74
Calhoun	100.0%	2,873	2,155	10	39	0	1	1	2
Charlotte	100.0%	58,419	29,841	127	1,481	6	15	3	19
Clara	100.0%	28,744	25,501	184	1,378	5	18	0	18
Clay	100.0%	41,745	14,930	204	582	1	14	3	6
Collier	100.0%	60,429	29,905	185	1,400	7	94	4	10
Columbia	100.0%	10,984	7,047	127	258	1	7	2	8
DeSoto	100.0%	4,259	3,322	23	157	0	0	3	6
Dade	100.0%	2,898	1,825	32	75	0	2	0	3
Duval	100.0%	162,982	107,860	956	2,752	38	180	16	57
Escambia	100.0%	73,029	40,958	287	1,729	6	24	3	110
Flagler	100.0%	12,888	19,891	60	435	1	4	3	3
Franklin	100.0%	2,445	2,042	17	85	1	3	0	3
Gadsden	100.0%	4,750	9,565	24	139	3	4	3	7
Gulfstream	100.0%								

ELECTION NEWS >>

STATE PARTIES

- democrats
- libertarian party
- grass party
- reform party
- republicans

CANDIDATES

- pat buchanan (rep)
- george w. bush (rep)
- ed gora (dem)
- ralph nader (ind)

SECTIONS >>

- NEWS
- SPORTS
- BUSINESS
- WEATHER
- FEATURES
- ENTERTAINMENT
- SERVICES >>
- CLASSIFIEDS
- YELLOW PAGES

71

51

			3,300	1,810	52	87	0	1	28	0	2
BACK TO TCPALM	Glades	100.0%	1,840	1,440	12	56	0	3	6	1	0
HELP SITE MAP SEARCH	Gulf	100.0%	3,546	2,389	21	88	2	4	71	2	2
	Hamilton	100.0%	2,153	1,718	11	39	6	2	24	9	7
	Hardee	100.0%	3,784	2,341	17	75	0	2	30	0	2
	Hendry	100.0%	4,743	3,289	11	108	3	1	22	2	7
	Hernando	100.0%	30,846	32,844	116	1,501	8	28	242	4	10
NEW FEATURES	Highlands	100.0%	20,198	14,152	64	545	6	16	127	9	7
• health & medicine	Hillsborough	100.0%	180,713	188,520	1,136	7,488	35	217	845	30	68
• travel	Holmes	100.0%	4,885	2,154	15	91	1	7	78	3	6
• food & family	Indian River	100.0%	28,827	19,769	123	950	4	13	105	2	13
• home & garden	Jackson	100.0%	9,138	8,868	40	138	0	2	102	1	4
• religion	Jefferson	100.0%	2,481	3,038	14	78	2	1	29	1	0
• television	Lafayette	100.0%	1,869	788	6	28	3	0	10	1	1
• entertainment	Lake	100.0%	48,983	38,595	203	1,469	4	36	289	1	21
• science & technology	Lee	100.0%	185,123	73,538	540	3,584	30	81	308	4	34
• books	Leon	100.0%	39,053	61,425	330	1,932	9	28	282	7	16
• travel	Levy	100.0%	6,860	5,403	92	284	1	1	67	1	10
• trends	Liberty	100.0%	1,318	1,011	12	19	0	3	39	0	1
NEW: TCPALM.COM	Madison	100.0%	3,038	3,011	18	54	0	2	28	1	1
• news	Manatee	100.0%	57,948	48,189	243	2,489	5	36	272	9	19
• sports	Marion	100.0%	55,135	44,648	381	1,810	14	28	568	6	22
• business	Martin	100.0%	83,884	28,819	109	1,118	14	29	112	8	19
• weather	Miami-Dade	100.0%	289,458	328,702	759	5,365	88	119	561	36	69
• entertainment	Monroe	100.0%	18,059	18,483	162	1,090	1	26	47	0	3
• features	Nassau	100.0%	18,404	8,952	83	255	0	7	80	4	3
• real estate	Okechobee	100.0%	52,843	18,824	813	884	4	15	287	2	33
• classifieds	Okeechobee	100.0%	5,858	4,588	21	131	1	4	43	1	3
• city plus	Orange	100.0%	134,478	140,115	892	3,661	13	65	446	7	41
• water's edge	Osceola	100.0%	28,218	28,177	309	732	10	21	145	6	10
• extra											
• extra...											

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

00-9004

CLERK, USDG / SDFL / WPB

MILTON H. MILLER, a registered voter
of the State of Florida
Plaintiff,

Case No.:
CIV-RYSKAMP

**MAGISTRATE JUDGE
VITUNAC**

KATHERINE HARRIS, Secretary of State, Chief Election Officer,
THERESA LEPORE, Supervisor of Elections for Palm Beach County, Florida, and
FLORIDA DEPT OF STATE, DIVISION OF ELECTIONS

Defendant.

COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF

Plaintiff, MILTON H. MILLER, vs Defendant(s) FEDERAL ELECTION COMMISSION and PALM BEACH ELECTIONS COMMISSION and states:

1. This action seeks preliminary and permanent injunctive relief against Defendants to (1) maintain the status quo until such time that a new election be held in Palm Beach County, Florida and (2) and to order a new election in Palm Beach County

2. This action brings a Federal question based upon Federal law, the United States Constitution, the Florida Constitution and Florida Statutes Title 9, chapters 97-107.

3. This action properly lies in the Southern District of Florida, as all acts took place in this judicial district

PARTIES

4. Plaintiff is a citizen and resident of the United States and of Palm Beach County, Florida, within the Southern District of Florida and is a male, over the age of 18.

5. Plaintiff is a registered voter, registered to vote at precinct #214 in the city of Boca Raton, Palm Beach county, Florida.

6. Defendant KATHERINE HARRIS, Secretary of State, is the Chief Election Officer for the State of Florida

7. Defendant THERESA LEPORE, is the Supervisor of Elections for Palm Beach County, Florida



- 8 Florida Dept of State Division of Elections oversees all elections in the State of Florida.
- 9 All times material, Defendants have scold through their agents and employees, acting within the scope of their employment, as well as on its own.

GENERAL ALLEGATIONS

10. Plaintiff went to the 1st Korean Christian Reform Church on November 7, 2000 where voting at precinct #214 is held
11. At all times material, Plaintiff was supervised by agents of the Defendants.
12. Plaintiff voted but was unsure of who he voted for as a result of the confusing and misleading ballot.
13. Defendants agents were made aware of misleading and confusing ballot by Plaintiff, and officers but took no action to rectify the situation.
14. At the time of voting and to date, Plaintiff is unaware of who Plaintiff voted for, Al Core or Pat Buchanan.
15. According to Florida Statute 101.151(4) and 101.27 the order of the names of the candidates is stated as follows: [t]he names of the candidates of the party which received the highest number of votes for Governor of the last election in which the Governor was elected shall be placed first under the heading for each office, together with an appropriate abbreviation of the party name; the names of the candidates of the party which received the second highest vote for Governor shall be second under the heading for each office. . . . [n]o political party candidates and candidates with no party affiliation shall have their names appear on the general election ballot following the names of recognized political parties in the same order as they were certified."
16. The names of the parties on the Palm Beach ballots were in the correct order. However, the names were sig-2agged so that the punch-holes were not in the correct order. The first party - Republican - received the first punch-hole. The second party Democrat received the third punch-hole with the Reform party receiving the second punch-hole.
17. Plaintiff meant to vote for Democrat - Al Core - but was confused by the altered order format and believes that he punched the second punch hole thus voting for the Reform Party and being denied his right to vote.

PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

18 Plaintiff restates and realleges paragraphs 1 through 17 as if stated herein.

19. The general function of an injunction is to preserve the status quo until full relief can be granted following a final hearing. Tamiami Trail Tours, Inc. v Greyhound Lines, Inc. Southern Greyhound Lines Division, 212 So. 2d 365 (Fla 4th DCA 1968). See also: University of Texas v Camplish 451 U.S. 390, 395 (1981). The issuance of a preliminary injunction falls within the broad discretion of the court. A preliminary injunction must be based upon (1) irreparable harm, (2) a clear legal right (3) an inadequate remedy at law, (4) consideration of the public interest. Islandia Condominium Association, Inc. v Vermont, 438 So. 2d 89 (Fla 4th DCA 1983). Clearly the balance of equities heavily favors the plaintiff in this case such that justice requires the preservation of Plaintiff's statutory and common law right to vote with freedom for the candidate of his choice.

20 The status quo preserved by a preliminary injunction is the last peaceable non-contested condition that preceded the controversy. Baily v Christo, 453 So 2d 1134, 1137 (Fla 1st DCA 1984), citing Bonding v National Convey & Trucking Co. 135 So 541 (Fla 1931). Thus the status quo sought to be maintained in this action is Plaintiff's statutory and common law right to vote.

21 The facts and application of law hereto indicate that Plaintiff faces irreparable harm and an inadequate remedy at law absent the issuance of a preliminary injunction. An injury is irreparable where the damages are estimable only by conjecture and not by any accurate standard. One must distinguish between the difficulty of proving that an injury exists and the difficulty of measuring the amount or extent of a proven injury. 42 Am. Jur 2d Injunctions sec. 49 at 790. Here an injury clearly exists with the only question being the full extent thereof.

22 Plaintiff will suffer irreparable harm due to the Defendants' actions in the event a preliminary and permanent injunction is not granted. Defendant's actions have caused Plaintiff to suffer emotional distress for which he can not adequately calculate money damages.

23 Furthermore, Plaintiff has no adequate remedy at law in that his vote is so unique as to be incapable of complete and adequate compensation through money damages.

24 "Irreparable harm is (resumed) if the party seeking injunctive relief clearly established validity and continuing infringement of it's ... rights." Smith Int'l, Inc. v Hughes Tool Co., 718 F.2d 1573, 1581 (Fed Cir. 1983) cert denied 464 U.S. 996 (1983)

- 25 The equitable remedy of preliminary injunction allows Plaintiff to be made whole where the legal remedy is clearly inadequate and damage to plaintiff's right to vote is irreparable.
- 26 Plaintiff has a clear legal right to the remedy requested of a preliminary and permanent injunction.
- 27 Plaintiff has a clear right to vote. He is a registered voter in the State of Florida.
- 28 Plaintiff was denied that right to vote at the ballot was inherently unfair and incorrect.
- 29 Clearly the prevention of Plaintiff's right to vote for whichever candidate he wants to vote for is contrary to public interest.
- 30 The issuance of injunctive relief in this case would serve the public interest by protecting the rights of Plaintiff and also all others who were similarly misled by the ballot of Palm Beach County and thus denied their right to vote.
- 31 Any argument that the granting of an injunction allowing a new election in Palm Beach County would unduly harm Defendants is without merit.
- 32 Respectfully the only way to properly insure the preservation of plaintiff's rights is to issue a mandatory preliminary injunction which provides for the preservation of the status quo and a new election to be held in Palm Beach County, Florida.
- 33 Plaintiff stands ready, willing and able to perform any act required by this Court or the law of Florida for the issuance of a preliminary injunction, including but not limited to, the posting of a reasonable bond. However, given the circumstances the plaintiff respectfully requests that any bond be a minimal amount.

WHEREFORE, Plaintiff moves this Honorable Court for the issuance of a preliminary injunction enjoining Defendants, their officers, agents, employees and all those in active participation with them to preserve that status quo of the time immediately prior to the election of November 7, 2000 and to further order a new election for the County of Palm Beach, Florida. And any other relief the Court deems proper under the circumstances.

Respectfully submitted,

WALLBERG & RENZY, P.A.
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Lawrence J. Navarro
Florida Bar No.: 989185

~~distributed~~

CLERK, USDC / SDFL / WPE

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

MILTON H. MILLER, a registered voter
of the State of Florida

Plaintiff,

v.

KATHERINE HARRIS, Secretary of State, Chief Election Officer,
THERESA LePORE, Supervisor of Elections for Palm Beach County, Florida, and
Florida Dept of State, Division of Elections

Defendant.

00-9004

Case No: **CIV-RYSKAMP**

**MAGISTRATE JUDGE
VITUNAC**

EMERGENCY MOTION FOR INJUNCTIVE RELIEF

Plaintiff, **MILTON H. MILLER**, by and through undersigned counsel files this

Emergency Motion for Injunctive Relief and states:

1. Plaintiff went to the 1st Korean Christian Reform Church on November 7, 2000 where voting at precinct #214 is held.
2. At all times material, Plaintiff was supervised by agents of the Defendants.
3. Plaintiff voted for a presidential candidate but was unsure of who he voted for as a result of the confusing and misleading ballot.
4. Defendant's agents were made aware of misleading and confusing ballot by Plaintiff and others but took no action to rectify the situation.
5. At the time of voting and to date, Plaintiff is unaware of who Plaintiff voted for, Al Gore or Pat Buchanan.
6. Respectfully the only way to properly insure the preservation of plaintiff's rights is to issue a mandatory preliminary injunction which provides for the preservation of the

status quo and a new election to be held in Palm Beach County, Florida.

- 7. Plaintiff stands ready, willing and able to perform any act required by this Court or the law of Florida for the issuance of a preliminary injunction, including but not limited to, the posting of a reasonable bond. However, given the circumstances the plaintiff respectfully requests that any bond be a minimal amount.**
- 8. Based on media reports, a re-count of the presidential vote is being made in Palm Beach and will be completed sometime today, November 9, 2000, at which time the voters choice for president will be determined.**
- 9. Based on media reports, because of the historically close vote, only several hundred votes separate the two presidential candidates, Al Gore and George W. Bush, media reports indicate that because of the misleading Palm Beach ballot, approximately 3,000 votes meant for Al Gore were made for Pat Buchanan. This could mistakenly give the election to George Bush.**
- 10. The only fair and just way to resolve this problem is for this Court to order Palm Beach to hold a second vote for president of the United States using correct and comprehensible ballots.**

WHEREFORE, Plaintiff moves this Honorable Court for the issuance of a preliminary injunction enjoining Defendants, their officers, agents, employees and all those in active participation with them to preserve that status quo of the time immediately prior to the election of November 7, 2000 and to further order a new election for the County of Palm Beach, Florida and any other relief the Court deems proper under the circumstances.

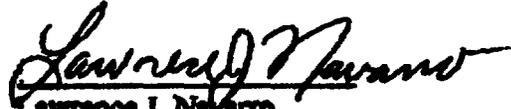
Respectfully submitted,

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By: 
Wendy S. Wallberg
Florida Bar No.: 0047996
For The Firm
Ron Renzy
Florida Bar No.: 0958610
For The Firm

By: 
Lawrence J. Navarro
Florida Bar No.: 989185

~~CONFIDENTIAL~~

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA) Case No.
DOUGLAS, GONZALO DORTA, CARRETTA)
KING BUTLER, DALTON BRAY, JAMES S.)
HIGGINS, and ROGER D. COVERLY, as)
Florida registered voters,)

and)

GOVERNOR GEORGE W. BUSH and DICK)
CHENEY, as candidates for President and Vice)
President of the United States of America,)

Plaintiffs,)

vs.)

THERESA LePORE, CHARLES E. BURTON,)
CAROL ROBERTS, JANE CARROLL,)
SUZANNE GUNZBURGER, ROBERT LEE,)
DAVID LEAHY, LAWRENCE KING, JR.,)
MIRIAM LEHR, MICHAEL McDERMOTT,)
ANN McFALL, and PAT NORTHY, in their)
official capacities as members of the County)
Canvassing Boards of Palm Beach, Miami-Dade,)
Broward and Volusia Counties, respectively,)

Defendants.)

**EMERGENCY MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION AND
SUPPORTING MEMORANDUM OF LAW**

Plaintiffs, Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King
Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly, as Florida registered voters (the
"Voter Plaintiffs"), and Governor George W. Bush and Dick Cheney, as candidates for President

and Vice President of the United States of America, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, move for the entry of a Temporary Restraining Order and Preliminary Injunction against the Defendants, who are members of the canvassing boards of Palm Beach, Broward, Miami-Dade, and Volusia Counties, in order to protect the integrity of, and bring finality to, the November 7, 2000 Presidential election (the "November 7th election") As grounds therefor, Plaintiffs respectfully state:

INTRODUCTION

This is an action for declaratory and injunctive relief under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. Plaintiffs, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, seek the entry of a Temporary Restraining Order against the Defendants, who are members of the canvassing boards of Palm Beach, Broward, Miami-Dade, and Volusia Counties, Florida.

One of the most fundamental of all rights in our democracy is the right to vote. There is a keen public interest in the finality of elections. Without attention to the need for finality and certainty in elections, the election can be transformed from the culmination of election campaigns to just another phase of the candidates' efforts.

In the November 7th election, the Florida votes have been now counted twice and the results established a winner. Counting these same ballots again and again will not produce a more accurate result, only more delay and confusion. Defendants, members of the county canvassing boards in four counties (Miami-Dade, Broward, Palm Beach and Volusia), have made or have been asked to make ad hoc determinations that a third count, this time a manual, inherently subjective recount, shall proceed in their counties. State courts also have been asked

to intervene and indefinitely prolong the outcome of the Florida portion of the national election for President and Vice President.

It is inconsistent with both the Constitution and the public interest for select county canvassing boards arbitrarily to reopen the 2000 presidential election in Florida for a third time. This Court should prevent a standardless patchwork of ad hoc decisionmaking from undermining the integrity of the electoral process and public confidence in election results.

The Voter Plaintiffs will suffer irreparable injury if Defendants are permitted to conduct a third, manual recount of the ballots from the November 7th election in their counties and announce the results. Such a recount, without a predicate showing of fraud, corruption or coercion, would unduly extend the election process, introduce the potential for human error or fraud to occur, and impermissibly impede the plaintiffs' constitutional right to have their votes certified in a uniform and even-handed manner.

FACTUAL BACKGROUND

1. On November 7, 2000, the United States held a general election wherein Florida voters cast ballots for several offices, including votes for the electors for President and Vice President of the United States.
2. On November 8, 2000, the Division of Elections for the State of Florida reported that the Republican Party presidential ticket received 2,909,135 votes and the Democratic Party presidential ticket received 2,907,351 votes (the "initial count"). Other candidates on the presidential ballot received a total of 139,616 votes.
3. The margin of difference between the votes received by the Republican and Democratic presidential tickets was 1,784, or 0.0299% of the total Florida vote.

4. Under Florida law, at the close of a general election, the election boards for each precinct are to open the ballot boxes in the presence of the public and count the ballots. Fla. Stat. § 102.061. The election boards for each precinct must then deliver to the supervisor of elections for each county the ballots and ballot boxes, as well as a certificate of the results of the election. Id.

5. Each county's canvassing board must certify the returns and then forward them to the Florida Department of State by no later than 5 p.m. on the seventh day following the election. Id. §§ 102.111(1) & 102.112(1).

6. The Elections Canvassing Commission shall then certify the returns of the election and determine and declare who has been elected for each office. Id. § 102.111(1).

7. Florida law provides that, if a candidate is defeated or eliminated by one-half of a percent or less of the votes cast for an office, then the Elections Canvassing Commission shall order a recount of the votes cast with respect to that office, unless the defeated candidate "request[s] in writing that a recount not be made." Id. § 102.141(4) ("the .5% recount"). The .5% recount is performed in the same manner as the original count, with the use of automatic tabulation equipment. See Id. § 102.141(4); see also id. §§ 97.021(2)(c), 101.5603, 102.166(3)(c).

8. On November 8, pursuant to Fla. Stat. § 102.141(4), each of the canvassing commissions of Florida's sixty-seven counties began a recount of the returns. This recount is now complete. The recount has confirmed the result of the initial vote count in the State of Florida. Governor Bush has received more votes than Vice President Gore.

9. The multiple counting of the returns have raised several issues. For example, in at least one county (Gadsden County), the ballots were not merely recounted, but

rather “interpreted”—or reinterpreted—by the county’s canvassing board. Additional ballots were counted as a result. This recount calculated a result different from that of the original count, resulting in a net gain of 153 votes in favor of the Democratic presidential ticket. See Exhibit A (Statements of John M. Leace and Edgar E. Stanton).

10. The repetitive counting of ballots—especially *manual* counting—diminishes the accuracy of the counts. See Exhibit B (Declaration of Raymond A. Phelps, Jr.).

11. On November 9, 2000, while the statewide .5% recount was still continuing, media reports indicated that either the Gore campaign, the Democratic Party, and/or some other entity or individual had filed requests for manual recounts of ballots in Palm Beach, Miami-Dade, Broward, and Volusia counties.

12. Fla. Stat. § 102.166(4) provides that any candidate or his party may file a written request with a county canvassing board for a “manual recount” within 72 hours after midnight of the date of the election or prior to the time the canvassing board adjourns, whichever occurs later. Id. § 102.166(4) (emphasis added). That provision further states that a county canvassing board need only make a “reasonable effort” to notify each candidate whose race is being manually recounted of the time and place of the recount. Fla. Stat. § 102.166(4)(c). The statute does *not* require that an opposing candidate or party actually be notified of the request for the manual recount, the canvassing board’s ruling as to the request, and/or the time and place upon which any manual recount will take place. Id.

13. Fla. Stat. § 102.166(4)(a) requires that the request for a manual recount “contain a statement of the reason the manual recount is being requested.”

14. Florida law sets forth no standards whatsoever for the determination of whether a manual recount should take place, thereby giving each county canvassing board

unlimited discretion in making that decision. *Id.* § 102.166(4)(c) simply states: "The county canvassing board may authorize a manual recount."

15. The canvassing boards of Palm Beach and Volusia counties have already consented to the request for a manual recount. The manual recount for Palm Beach County is to occur Saturday, November 11, 2000. The manual recount for Volusia County was to begin Friday, November 10, 2000.

16. The canvassing boards of Miami-Dade and Broward counties have received requests from the Gore campaign to conduct a manual recount of the election results. Upon information and belief, those canvassing boards have not yet determined whether they will consent to a manual recount. Because Florida law does not require notice, however, the status of the requests before the Miami-Dade and Broward county canvassing boards cannot easily be confirmed. *Id.* § 102.166(4)(c).

17. There have been no credible reports of fraud, corruption, or coercion with regard to the voting process in the Defendants' counties.

MEMORANDUM OF LAW

A. Plaintiffs Are Entitled to the Entry of a Temporary Restraining Order.

Rule 65 of the Federal Rules of Civil Procedure requires the Court to consider the following four factors: (1) the substantial likelihood that plaintiffs will succeed on the merits; (2) the substantial threat that plaintiffs will suffer irreparable injury if the temporary restraining order were not granted; (3) the threatened injury outweighs the harm a temporary restraining order may cause the defendant; and (4) the grant of a temporary restraining order will not disserve the public interest. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Nnadi v. Richter*, 976 F.2d 682, 690 (11th Cir. 1992); *Future Tech Int'l v. Tae Il*

Media, Ltd., 944 F. Supp. 1538, 1532 (S.D. Fla. 1996). As to the four factors, "no particular quantum of proof is required as to each of the four criteria." Laboratorios Roldan v. Tex Int'l, Inc., 902 F. Supp. 1555, 1565 (S.D. Fla. 1995). The four factors, which also govern the grant of preliminary injunctive relief, favor the issuance of a temporary restraining order in this case.

B. Plaintiffs Will Succeed On the Merits of Their Claims.

To issue preliminary injunctive relief, "a district court need not find that the evidence positively guarantees a final verdict" in favor of the movant. Levi Strauss & Co., 51 F.3d at 985. Plaintiffs need only demonstrate a likelihood of success on the merits.

The right to vote is a "fundamental political right." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). This right is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 554 (1964). As the Supreme Court in Reynolds noted, "The conception of political equality ... can mean only one thing – one-person, one-vote. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." Id. at 557-58 (internal citations omitted).

The Eleventh Circuit has previously confronted such a case of vote dilution. Departing from historical practice in the state and voter expectation, an Alabama court ordered all absentee ballots, whether complying with the formal requirements for absentee ballots or not, to be counted in a statewide election. Roe v. Alabama, 68 F.3d 404 (11th Cir.) ("Roe II"), cert. denied, 516 U.S. 908 (1995). Applying fundamental principles of constitutional law, the Eleventh Circuit held that to count ballots that were invalid under state law and were historically treated as a nullity would run afoul of the one person, one vote principle. Id. As the Eleventh Circuit more fully explained in its initial confrontation with the case, Roe v. Alabama, 43 F.3d

574 (11th Cir. 1995) ("Roe I"), "counting ballots that were not previously counted would dilute the votes of those voters who met the requirements [of State Law] as well as those voters who actually went to the polls on election day." *Id.* at 581.

As in Roe, the votes of citizens across the State of Florida will be unconstitutionally diluted if the Defendants conduct a manual recount of only select ballots in portions of four heavily Democratic counties. Under Florida's scheme for discretionary manual recounts, the question whether a vote is subject to a recount and how it is counted is left to the unfettered discretion of the county canvassing boards and will vary throughout the state.

This is plainly impermissible under the Due Process and Equal Protection Clauses, as well as the First Amendment. Voting is a fundamental right that cannot be subject to arbitrary or inconsistent treatment. *See, e.g., Harper v. Virginia*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 379 U.S. 870 (1964). Yet the question whether to hold a manual recount, and whether to count a ballot if such a recount is held, is not guided by *any* standards, much less standards that ensure fair and equal treatment of all votes. Simply stated, under Florida's scheme, *identical* ballots in two different counties will be treated differently. For example, where there is a partial punch for one candidate, a ballot may be counted where the county board has decided to conduct a manual recount and, pursuant to wholly subjective perceptions, has determined that the voter "intended" to vote for the candidate. An identical ballot in another county will not be counted for that candidate in a county that has refused to engage in the manual recount.

This violates the equal protection rights of all voters to be treated equally and makes the exercise of a fundamental right turn on the arbitrary and unfettered discretion of government officials. It is well-established that even with respect to matters that do not involve fundamental rights, the government cannot engage in arbitrary distinctions among similarly situated citizens.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Moreover, the government cannot deny an individual's liberty or property interests through procedures that operate in a wholly arbitrary fashion. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). These principles apply a fortiori to the exercise of a fundamental right such as voting. Of equal importance, when the county canvassing boards implement a manual recount process that is pervasively arbitrary – and thus fundamentally unfair to Plaintiffs – their action violates the clearly recognized guarantees of the Due Process Clause. See Roe I, 43 F.3d at 580 (when “the election process . . . reache[s] the point of patent and fundamental unfairness, a violation of the due process clause may be indicated”); see also Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. 1981) (in contrast with “innocent irregularities in the administration of state elections,” some state election processes “may operate so unfairly as to constitute a denial of . . . due process”) (quoting Gamza v. Aguirre, 619 F.2d 449, 454 n.6 (5th Cir. 1980)); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978).

In addition, the fact that government officials are vested with standardless discretion over the exercise of a First Amendment right such as voting is, standing alone, unconstitutional. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 (1988) (“[The] danger [of a First Amendment violation] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.”); Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (“[This] doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement” and, under that doctrine, “laws are invalidated if they are wholly lacking in terms susceptible of objective measurement”) (internal quotation marks and citation omitted).

C. The Injury to Plaintiffs Is Irreparable and Cannot Be Made Whole by Money Damages.

Defendants' actions in seeking to conduct a manual recount of select votes cast in only portions of four counties in the State of Florida would result in irreparable injury to Plaintiffs that cannot be made whole by monetary damages. First, the Voter Plaintiffs would be deprived of their constitutionally protected rights under the First and Fourteenth Amendments to the Constitution as a result of the dilution/deprivation of their votes cast in the November 7, 2000 election for President in the State of Florida. Second, the actions of Defendants threaten to delay the certification of the election for President of the United States in the State of Florida. Third, the actions of the Defendants will undermine the integrity of the November 7, 2000 election for President in the State of Florida.

Defendants may argue that the proposed manual recounts should be allowed to proceed, and that this Court should rule on the merits of this action only if it so happens that these repetitive recounts alter the result of the election. Any such delay would be wholly inappropriate. If Defendants' threatened manual recount occurs, in violation of the First and Fourteenth Amendments, and a changed result happens to occur (however unlikely), the tainted result will be broadcast to the nation. Any subsequent invalidation by this Court will not be able to cure the serious damage to the legitimacy of the presidential election. Any such taint, and the perception of multiple reversals in outcome, will interfere with the orderly transition of constitutional government.

Without question, the impact of manual recounts in only four selected counties will provoke further uncertainty and calls for further counts in all Florida counties and perhaps in

other states. The indefinite extensions will cause irreparable harm to the Voter Plaintiffs and the nation by effectively eliminating their votes and the certification of their votes.

D. The Balance of Hardships Favors Plaintiffs.

The balance of hardships also favors granting the requested relief. For the reasons stated, the plaintiffs will suffer irreparable injury if the recount begins. This temporary restraining order will merely preserve the status quo until the Court can determine the constitutionality of the electoral scheme here. If, as we allege, the electoral scheme is unconstitutional, Defendants cannot be harmed by the avoidance of this constitutional injury. See Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir.), cert. denied, 522 U.S. 963 (1997).

E. The Public Interest Will Be Served by Granting the Requested Relief.

Plaintiffs seek a temporary restraining order to prevent Defendants from taking the first step in a course of action that will lead to a violation of 42 U.S.C. § 1983. The fundamental purpose of Section 1983 is to protect the civil rights of the citizens of the United States. Mitchum v. Foster, 407 U.S. 225, 243 (1972); Owen v. City of Independence, 445 U.S. 622, 636 (1980). Accordingly, the federal courts have been authorized by Congress to effectuate this fundamental purpose by awarding injunctive relief against violations of Section 1983. This Court's grant of a temporary restraining order against Defendants would thus be consistent with and further the public interest in enforcing the federal civil rights laws.

Indeed, in this application, Plaintiffs only seek a temporary restraining order to preserve the status quo. As the federal courts have observed, there is always a significant "public interest in preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court." Blackwelder Furniture Co. of Statesville v. Selig Manufacturing Co., 550 F.2d 189, 197 (4th Cir. 1977). Moreover, such further recounts would unnecessarily

delay the election process, potentially leading to a federal constitutional crisis. This is the last clear chance to avoid protracted and extensive administrative and judicial proceedings over the results of the presidential election. If a manual recount begins in the four counties, it will undoubtedly and justifiably lead to similar questions about the validity of vote counts in other Florida counties and in other states that divided narrowly in the election. Because of the powerful national interest in the finality of the selection of the President, the public interest clearly favors granting the requested relief.

F. Adequate Notice Has Been Given.

The specific facts set forth in the Plaintiffs' verified pleadings show that the Plaintiffs will suffer immediate and irreparable injury if the Defendants are not restrained from conducting manual recounts of the votes cast in their respective counties. Because the Defendants have begun to conduct manual recounts, immediate and irreparable injury will result to the Plaintiffs before the Defendants or their attorneys can be heard in opposition. In an abundance of caution, undersigned counsel has attempted to give both telephone and written notice (by facsimile) to all Defendants. In the event the Defendants or their attorneys cannot be heard in opposition at the emergency hearing on the Plaintiffs' Motion for Temporary Restraining Order, then, for the reasons set forth above, this Court should enter a temporary restraining order without notice. Rule 65(b) provides that a temporary restraining order may be granted under these circumstances without written or oral notice to the adverse party or that party's attorney.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court, pursuant to Rule 65, issue a temporary restraining order or, in the alternative, a preliminary injunction

prohibiting the Defendants, as election board canvassers, from proceeding with manual recounts of the November 7th election results.

Respectfully submitted,

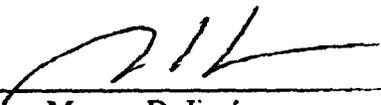
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**IN THE COUNTY OF GADSDEN
STATE OF FLORIDA**

STATEMENT

Comes now your affiant, John M. Leace, and gives the following sworn statement:

On November 9, 2000 at approximately 8:45 A.M., I was in the chambers of the Honorable Richard L. Hood, County Judge of Gadsden County, Florida. Also present was Hal Richmond (the county attorney of Gadsden County), Dennis Crowley, and Edgar Stanton. The Presidential Election ballot recount was discussed. Judge Hood informed me that Al Gore had a net gain of over 150 votes after the recount. This was confirmed by Mr. Richmond. The two went on to explain how this occurred. They explained that as part of the Canvassing Board, they had been involved in the recount. Further, they explained that the ballots had not been simply recounted. A number of the ballots were not properly completed, and these ballots were examined by board members and "interpreted" by the board members. The improperly completed ballots, after examination were tallied for the respective candidates; this resulted in the net gain of 153 votes for Gore.

The ballots that were "interpreted" included ballots with abnormalities such as:

- 1) Ballots that had more than 1 candidate's bubble selected. The Board interpreted which candidate the voter intended based on some choices "not being fully erased" or where "one bubble was darker or more completely filled in."
- 2) Ballots with no candidate properly selected, but an "astrix or star" near one of the names.
- 3) Ballots that did not select a candidate but "had markings that indicated the voter's intent."


John M. Leace

EXHIBIT

A

**IN THE COUNTY OF GADSDEN
STATE OF FLORIDA**

STATEMENT

Comes now your affiant, Edgar E. Stanton, IV, and gives the following sworn statement:

On November 9, 2000 at approximately 8:45 A.M., I was in the chambers of the Honorable Richard L. Hood, County Judge of Gadsden County, Florida. Also present was Hal Richmond (the county attorney of Gadsden County), Dennis Crowley, and John M. Leace. The Presidential Election ballot recount was discussed. Judge Hood informed me that Al Gore had a net gain of over 150 votes after the recount. This was confirmed by Mr. Richmond. The two went on to explain how this occurred. They explained that as part of the Canvassing Board, they had been involved in the recount. Further, they explained that the ballots had not been simply recounted. A number of the ballots were not properly completed, and these ballots were examined by board members and "interpreted" by the board members. The improperly completed ballots, after examination were tallied for the respective candidates; this resulted in the net gain of 153 votes for Gore.

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- 3) Ballots that did not select a candidate but "had markings that indicated the voter's intent."


Edgar E. Stanton, IV

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA) Case No.
DOUGLAS, GONZALO DORTA, CARRETTA)
KING BUTLER, DALTON BRAY, JAMES S.)
HIGGINS, and ROGER D. COVERLY, as)
Florida registered voters,)

and)

GOVERNOR GEORGE W. BUSH and DICK)
CHENEY, as candidates for President and Vice)
President of the United States of America,)

Plaintiffs,)

vs.)

THERESA LePORE, CHARLES E. BURTON,)
CAROL ROBERTS, JANE CARROLL,)
SUZANNE GUNZBURGER, ROBERT LEE,)
DAVID LEAHY, LAWRENCE KING, JR.,)
MIRIAM LEHR, MICHAEL McDERMOTT,)
ANN McFALL, and PAT NORTHY, in their)
official capacities as members of the County)
Canvassing Boards of Palm Beach, Miami-Dade,)
Broward and Volusia Counties, respectively,)

Defendants.)

DECLARATION OF RAYMOND A. PHELPS, JR.

1. I, Raymond A. Phelps, Jr., make the following Declaration. From 1972 to 1976, I served as the Director of Elections in St. Louis County, Missouri. In that position, I administered over 200 elections per year for more than 100 governing bodies authorized to call elections in the county. In 1976, I changed the method of voting in St. Louis County from mechanical lever



machines (manufactured by Shoup) to automated punch card voting systems (manufactured by Computer Election Systems, Inc.). I developed the administrative and operating procedures for the layout of ballot pages for the voting devices, the programming of the computers to count the ballots, and the information to train election board workers and instruct voters regarding the new voting method.

From 1976 to 1986, I was the Director of Elections and Assistant to the Secretary of State of Oregon. In that capacity, I supervised all elections held in the State of Oregon. I appeared as a witness in numerous legislative and judicial proceedings. Our office inspected, tested, and certified all voting systems proposed for sale and use in Oregon. We also established by administrative rule a standardized testing protocol to be used by all counties employing automated vote tally systems. During this same time period, I served as an Advisor to the Federal Election Commission's Clearinghouse for Elections. As an Advisor, I provided expert information to the Clearinghouse regarding all aspects of the election system. From 1991 to 1992, I was retained by the Secretary of State of Alaska to provide advice regarding all phases of the election process.

As Director of Elections in St. Louis County and for the State of Oregon, I supervised numerous recounts. For further information regarding my background and qualifications, please refer to the attached curriculum vitae.

As a result of my many years of experience supervising elections, developing, implementing and validating punch card ballot tabulation systems, and supervising recounts, I have formed opinions regarding the tabulation of punch card ballots, the processing and handling of punch card ballots, recounts involving punch card ballots, and the relative merits of mechanical versus manual tabulation of votes cast by punch card ballots.

2. Based on my experience and for the reasons stated below, it is my opinion that recounting of official ballots should not be done unless it is apparent that the original vote tally is not correct based on documents generated from the original vote tally process. The only exception to this principle is the situation when state law directs that an automatic recount occur as a result of a difference in votes between the top two candidates for a race or when the difference between the "yes" and "no" votes for a measure are within a statutorily prescribed percentage. This "recount" was performed by the Florida county election officials within the past few days. Unless a 100 percent recount is performed, no vote totals can be changed.

3. Computer card ballots processed by vote tally machines experience wear and tear from machine processing. A vote tally machine physically pulls and pushes cards through a slot in order to "read" the holes in a ballot for the purposes of compiling a vote total. Multiple processing of the same ballot cards typically causes a degradation of the cards which reduces the stamina of the cards. Ballot cards processed a number of times by vote tally machines oftentimes are mutilated or destroyed when the tally machines "jam" during the additional machine processing.

4. Multiple processing of ballot cards can in some cases produce different vote tally results. This usually occurs as the result of pieces of "flying" chad lodged within a deck of ballot cards. The vote tally machines use a blower to move cards from the intake hopper to the outtake stacker. As the blower operates, it may move a piece of chad into an otherwise valid response position in a deck of ballot cards and thus negate a valid vote. Alternatively, a chad covering a voting position can become dislodged through multiple handling to create either an "overvote" or a vote for a candidate not selected by a voter. There is no way to determine when either or both

of these events occur. This manipulation of ~~had~~ can result either from design or from accident in the case of hand counting.

5. Every time the ballot cards are counted or handled, their quality as evidence of the voter's original intent is degraded. This applies not only as to the particular office at issue in the recount, but also to all other offices and issues voted on the ballots. The ballots must be handled several times by election officials from the time they are removed from the ballot box until secured after the vote tally. Every time the ballot cards are recounted, they must again be handled several times.

6. Manual recounting of computer ballot cards does not assure better vote tally accuracy. The computer programs are validated before and after each mechanical tabulation to ensure the accuracy of the program. In most cases a manual recount of ballots will be inaccurate and thus not agree with the mechanical count performed by a computing machine. There are several reasons for this situation:

- A vote tally machine will count each and every ballot card consistently. A manual recount is not consistent.
- Recounting ballots places extreme pressure and stress on the people actually doing the recount. This can and usually does cause a great many errors in the counting of the ballots.
- Recount boards are usually allowed to make decisions for the purpose of "determining" voter intent. These actions will alter the automated vote tally total generated by the tally machine.

- **Poor supervision and inadequate training of recount boards will produce different results than those provided by the vote tally machine because these boards will make "subjective decisions" regarding what the boards feel is the intent of a voter.**
- **Wholly defective and rejected ballots may be included in a manual count at the discretion of a recount board.**

**I declare under penalty of perjury that the foregoing is true and correct. Executed on
November 11, 2000.**


Raymond A. Phelps, Jr.

Raymond A. Phelps, Jr.

CREDENTIALS

1972-1976 Director of Elections, St. Louis County, Missouri

Administered the elections of more than 100 governing bodies authorized to call elections in the county. On average, these elections numbered 200 per year and involved the selection of candidates for cities, special service districts, county, state and federal offices, as well as the approval or rejection of ballot measures of the various governmental units. We were the principal person directing a two-year effort that successfully recodified Missouri's election laws.

I supervised a permanent staff of 79 people. We processed voter registrations, absentee ballot requests, selected polling place locations, recruited and trained election board workers (judges), established precincts for polling place assignment, developed ballot layout for voting devices, prepared and delivered voting devices to polling places, collected and processed ballots voted at a polling place and by the absentee method, trained recount boards and supervised the recounting of ballots cast at an election, and prepared official abstract of votes to report official final voting results.

Of my many achievements, in 1976 I changed the method of voting in St. Louis County from mechanical lever machines (Shoup) to automated punch card voting (Computer Election Systems, Inc.). I developed the administrative and operating procedures for the layout of ballot pages for the voting devices, the programming of the computers to count the ballots, the information needed to train election board workers and the aids used to inform voters of the new voting method.

This new voting system was used for the first time at the 1976 primary and general elections.

1976-1986 Director of Elections, Assistant to Oregon Secretary of State

Supervised all elections held in the state. As part of my duties, I prepared and published all administrative rules regarding the administration and conduct of elections held in Oregon. I worked very closely with the state's 36 county election officials to ensure the integrity of Oregon's election system. We supervised the training of recount boards and the recounting of ballots cast at an election. I appeared as a witness in numerous legislative and judicial proceedings.

Our office inspected, tested and certified all voting systems proposed for sale in Oregon prior to the actual use of such a system at an election. Prior to the use of an automated system at any election, our office examined and approved the layout of all of the ballot pages used by an automated vote tally system. In addition, we

established by administrative rule a standardized testing protocol to be used by all counties employing automated vote tally systems.

Of my many achievements, I established administrative procedures to enable people to use the mail system for registering to vote, led the effort that gained passage of a recodification of the state's election laws, established the administrative and legislative guidelines for the conduct of statewide elections entirely by mail, and consolidated all election dates in the state to allow elections only on six specific dates per year.

I directed the reapportionment of the state following the 1980 decennial census. This plan was approved by the Oregon Supreme Court.

1976-1986 Advisor, Federal Elections Commission, Clearinghouse for Elections

Met to provide expert information to the Clearinghouse regarding all aspects of the election system, i.e., voter registration, absentee voting, selection of polling places, handicapped voting procedures, absentee voting (overseas and military), initiative and referendum petitioning process and the recruitment and training of election board workers.

Of my several achievements, I collaborated with a contractor retained by the Clearinghouse in the preparation of a three-part manual related to the "Planning, Costing and Administration of Elections."

1991-1992 Consultant, State of Alaska

Retained by Secretary of State Jack Coghill to advise regarding all phases of the election process. We initially dealt with the matter of reapportionment following the 1990 decennial census since the state was an "acknowledgment" state under the federal Civil Rights Act.

As time past, we became involved with all aspects of the administration of the state's election system. We effectively supervised the work of all of the employees of the state's election office for the 1992 local, state and federal elections.

1991 Director of Operations, Speaker of the Oregon House of Representatives

I developed the reapportionment plan adopted by the House of Representatives.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NED L. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARRETTA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY, as
registered Florida voters,

and

GOVERNOR GEORGE W. BUSH and DICK
CHENEY, as candidates for President and Vice
President of the United States of America,

Plaintiffs,

vs.

THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE,
DAVID LEAHY, LAWRENCE KING, JR.,
MIRIAM LEHR, MICHAEL McDERMOTT,
ANN McFALL, and PAT NORTHY, in their
official capacities as members of the County
Canvassing Boards of Palm Beach, Miami-Dade,
Broward and Volusia Counties, respectively,

Defendants.

Case No.

TEMPORARY RESTRAINING ORDER

Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary
Injunction (the "Motion") came before the Court on November __, 2000; and, the Court having
found and concluded that adequate notice of the Plaintiffs' request for a temporary restraining
order was given under the circumstances; the Court having considered the Motion and
memorandum submitted in support thereof, the Plaintiffs' Verified Complaint and the remaining
papers submitted by Plaintiffs; and based on all of the foregoing, the Court finds that unless a

temporary restraining order is granted, Plaintiffs will suffer immediate and irreparable harm through violation of their First and Fourteenth Amendment rights because:

(1) Plaintiffs have demonstrated a substantial likelihood of prevailing on the merits, and that, absent the requested relief, Plaintiffs will be irreparably injured by allowing Defendants to undertake complete manual recounts of the ballots from the November 7th election and announce results of such manual recounts, as any such manual recounts would unduly extend the election process, introduce the potential for human error or fraud to occur, and impermissibly impede the Plaintiffs' constitutional right to have their votes certified;

(2) The voters of the nation and Florida, inclusive of Plaintiffs, have a substantial constitutional interest in not having their votes (already the subject of one recount in Florida) diluted or debased by further recounts that are in no way linked to any showing of fraud or material irregularities in the voting process and that would serve only to create unnecessarily delay the election process. Furthermore, a temporary restraining order is necessary so that the federal election process will not be unduly and unnecessarily extended. Thus, it is in the public interest that Defendants be temporarily restrained from completing manual recounts of the ballots in the absence of a showing that the voting process has been affected by fraud, corruption or coercion; and

(3) The harm Plaintiffs' would suffer in the absence of relief clearly outweighs any harm that Defendants may incur. Therefore, it is hereby

ORDERED AND ADJUDGED, pending a determination of the Plaintiffs' request for a preliminary injunction, which shall be heard by the Court at _____ a.m. on November __, 2000:

1. The Emergency Motion for Temporary Restraining Order and Preliminary Injunction is hereby granted. Defendants may move to dissolve or modify such order at any time.

2. Defendants, including any person or entity who is served with a copy of this Order, and their officers, directors, agents, servants, employees and all other persons acting in active concert or participation with them, or any of them, are hereby restrained and enjoined from conducting manual recounts in Dade, Broward, Palm Beach and Volusia counties.

3. As a condition of this order, which is effective immediately, Plaintiffs shall post a bond in a form satisfactory to the Clerk or a certified check in the amount of \$ _____, securing Defendants against their costs and damages if it is found that they have been wrongfully restrained. Said security is to be filed within forty-eight hours of this entry.

4. This Order shall expire at 11:59 P.M. on November ____, 2000.

DONE AND ORDERED in Chambers at Palm Beach County, Florida, this ____ day of November, 2000.

UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA) Case No.
DOUGLAS, GONZALO DORTA, CARRETTA)
KING BUTLER, DALTON BRAY, JAMES S.)
HIGGINS, and ROGER D. COVERLY, as)
registered Florida voters,)

and)

GOVERNOR GEORGE W. BUSH and DICK)
CHENEY, as candidates for President and Vice)
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Plaintiffs,)

vs.)

THERESA LePORE, CHARLES E. BURTON,)
CAROL ROBERTS, JANE CARROLL,)
SUZANNE GUNZBURGER, ROBERT LEE,)
DAVID LEAHY, LAWRENCE KING, JR.,)
MIRIAM LEHR, MICHAEL McDERMOTT,)
ANN McFALL, and PAT NORTHY, in their)
official capacities as members of the County)
Canvassing Boards of Palm Beach, Miami-Dade,)
Broward and Volusia Counties, respectively,)

Defendants.)

**PLAINTIFFS' RULE 65(C) MEMORANDUM OF LAW IN
SUPPORT OF IMPOSITION OF A NOMINAL BOND
REQUIREMENT FOR PURPOSES OF A TEMPORARY
RESTRAINING ORDER**

Plaintiffs, by and through their undersigned counsel, respectfully submit this memorandum in support of their request that the Court require nominal security for the issuance of a temporary restraining order ("TRO") sought simultaneously herewith. As explained below,

defendants are unlikely to suffer any significant injury that can be attributed to the issuance of a TRO, and thus no bond should be required.

Federal Rule of Civil Procedure 65(c) provides that “[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” The determination of the appropriate amount of the security required by Rule 65(c) rests within the discretion of the district court. See Maryland Dep’t of Human Resources v. United States Dep’t of Agriculture, 976 F.2d 1462, 1483 (4th Cir. 1992); Wilson v. Office of Civilian Health and Medical Program of Uniformed Services (CHAMPUS), 866 F. Supp. 903, 910 (E.D. Va. 1994); 11 Wright & Miller, Federal Practice and Procedure § 2954, at 525 (1973). District courts have discretion to require only nominal security, or none at all. See Wilson, 866 F. Supp. at 910 (district court exercised its discretion under Rule 65(c) in requiring plaintiff to post a bond of zero dollars); 11 Wright & Miller, supra, § 2954, at 529; see also West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (\$100 bond); Warner v. Ryobi Motor Products Corp., 818 F. Supp. 907, 909 (D.S.C. 1992) (\$250 bond).

The purpose of a security bond under Rule 65(c) is “to protect an enjoined party from the negative effects of the injunction [or TRO] if it later becomes apparent that the injunction [or TRO] was wrongly issued.” Leeb Lines v. Barsky, No. 87 CIV 8714 (SWK), 1988 WL 31870 at *1 (S.D.N.Y. March 24, 1988); see Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 244 (D. Md. 1976); 11 Wright & Miller, supra, § 2954, at 523. Accordingly, “[t]he bond need only be sufficient to cover defendant’s potential losses from not being able to do what he would have

done but for the injunction [or TRO].” Leeb Lines, 1988 WL 31870 at *1; see Pargas, 423 F. Supp. at 244. In this case, defendants plainly would not suffer any loss from issuance of a TRO and, thus, no security, or minimal security, should be required.

It is settled law that the amount of security required by a district court should be no larger than necessary to satisfy the likely damages that would result directly from the injunction or TRO itself. “[T]he only damages recoverable from an injunction [or TRO] bond are those arising from the operation of the injunction [or TRO] itself and not from damages occasioned by the suit independently of the injunction [or TRO] (see Lever Bros. Co. v. Int’l Chemical Workers Union, 554 F.2d 115, 120 (4th Cir. 1976)), and the injunction [or TRO] must be the proximate cause of the damages.” See 11 Wright & Miller, supra § 2973, at 645-55. Thus, “the security will not include any damages for claims against the party who instituted the action other than those directly attributable to the improvidently issued injunction.” 11 Wright & Miller, supra, § 2954, at 525. Defendants can point to no proof that issuance of the requested TRO would result in damages to them.

Under these circumstances, the Court should not require plaintiffs to post any security in connection with the issuance of the requested TRO.

Dated: November 11, 2000.

Respectfully submitted,

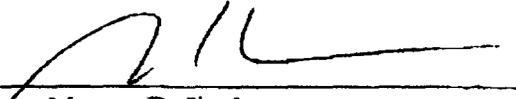
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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA)	Case No.
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GOVERNOR GEORGE W. BUSH and DICK)	
CHENEY, as candidates for President and Vice)	
President of the United States of America,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
THERESA LePORE, CHARLES E. BURTON,)	
CAKOL ROBERTS, JANE CARROLL,)	
SUZANNE GUNZBURGER, ROBERT LEE,)	
DAVID LEAHY, LAWRENCE KING, JR.,)	
MIRIAM LEHR, MICHAEL McDERMOTT,)	
ANN McFALL, and PAT NORTHY, in their)	
official capacities as members of the County)	
Canvassing Boards of Palm Beach, Miami-Dade,)	
Broward and Volusia Counties, respectively,)	
)	
Defendants.)	
	/	

**CERTIFICATE IN SUPPORT OF EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, Marcos D. Jiménez, am the attorney of record for plaintiffs in the above-captioned case.

In support of plaintiffs' Emergency Motion for Temporary Restraining Order, I certify as follows:

1. Defendants have begun or will imminently begin conducting manual recounts of certain ballots cast in the November 7, 2000 election for President of the United States in only four counties in the State of Florida.

2. On the morning of November 11, 2000, I caused to be sent to defendants by facsimile copies of the Verified Complaint, Motion for Emergency Temporary Restraining Order and Preliminary Injunction ("Motion"), and the remaining papers filed in support of the Motion, including a Notice of the Motion and this Certificate. I also caused to be attempted notice by telephone to the defendants that plaintiffs intended to seek an emergency temporary restraining order on November 11, 2000.

3. Further notice should not be required in light of the immediate and irreparable injury Plaintiffs will suffer if the emergency temporary restraining order is not entered.

Dated: November 11, 2000.

Respectfully submitted,

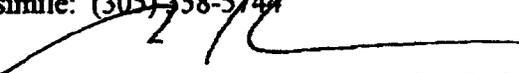
Barry Richard, Esq.
GREENBERG TRAURIG, P.A.,
Tallahassee, Florida

Theodore B. Olson, Esq.
GIBSON DUNN & CRUTCHER LLP
Washington, D.C.

Benjamin L. Ginsburg, Esq.
PATTON BOGGS LLP
Washington, D.C.

- and -

WHITE & CASE LLP
Attorneys for Plaintiffs
Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

By: 

Marcos D. Jiménez
Florida Bar No. 441503

Of Counsel:

George J. Terwilliger III
Timothy E. Flanigan
WHITE & CASE LLP
Washington, D.C.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
Case No. 00-CV-9009
Middlebrooks**

**NED L. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARETTA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY,
as Florida Registered Voters**

and

**GOVERNOR GEORGE W. BUSH and DICK
CHENEY, as candidates for President and
Vice President of the United States of America**

Plaintiffs,

vs.

**THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE,
DAVID LEAHY, LAWRENCE KING, JR.,
MIRIAM LEHR, MICHAEL McDERMOTT, ANN
McFALL, and PAT NORTHEY, in their official
capacities as members of the County Canvassing
Boards of Palm Beach, Miami-Dade, Broward and
Volusia Counties, respectively,**

Defendants.

**RESPONSE OF VOLUSIA COUNTY CANVASSING BOARD
TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

Plaintiffs seek a Temporary Restraining Order and Preliminary Injunction from this Court prohibiting the Volusia County Election Canvassing Board from proceeding with a

manual recount of the November 7th election results concerning the Offices of President and Vice President of the United States.

PRELIMINARY STATEMENT OF FACTS

Defendants, MICHAEL McDERMOTT, ANN McFALL, and PAT NORTHEY, in their official capacities as members of the Volusia County Canvassing Board, acting by authority of a Home Rule Charter, Laws of Florida, Special Acts, 70- 966, and Fla. Stat. 102.141, by and through their undersigned counsels, state in response to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, as follows:

1. On November 8, 2000, at approximately 2:00 a.m., Defendants reported the results of the 2000 general election wherein votes were cast by the registered voters of Volusia County, Florida for electors of all candidates for President of the United States.

2. On November 8, 2000, the Florida Secretary of State, Katherine Harris, directed Volusia County and all other Florida Counties to recount all ballots cast, pursuant to the automatic recount procedure in Section 102.141(4), Florida Statutes. The recount was completed by the Volusia County Election Department at approximately 6:00 a.m., November 9, 2000.

3. The Florida Democratic Party timely requested a manual recount on November 9, 2000, stating the reasons for said request pursuant to Section 102.166(4)(a), Florida Statutes. **See affidavit of Deanie Lowe attached hereto as Exhibit # 1.**

4. A manual recount of all Volusia County precincts, including the 3 precincts requested by the Florida Democratic Party, was commenced on November 12, 2000, and is expected to be completed before noon, November 14, 2000. The results will be timely

certified and forwarded to the Department of State . **See affidavit of Michael McDermott attached hereto as Exhibit # 2.**

MEMORANDUM IN SUPPORT OF RESPONSE

Recognizing the importance of the election results for electors of President and Vice President of the United States, the Volusia County Canvassing Board has acted in all regards for correctness throughout the process of counting and recounting. Defendants have carefully followed the laws of the State of Florida in this matter, and have acted in the interest of the parties concerned, including candidates, political parties and voters.

Pursuant to Section 102.166, Florida Statutes, the Florida Democratic Party requested a manual recount after the Canvassing Board completed the mandatory recount ordered by the Secretary of State. The reasons stated in the written request prompted the Canvassing Board to extend the manual recount to all precincts of Volusia County and, because they had been advised by the Supervisor of Elections about an equipment malfunction at Precinct 216 and the Holly Hill precinct, the board sought accuracy of the election results.

The manual recount orchestrated by the Canvassing Board consists of 4 person teams that review and count every ballot. Only one member of the team physically handles the ballot. Since we use paper ballots that are marked by the voter and read by an optical scanner, the likelihood of errors is minimized during our recounting process, compared to problems associated with punchcard ballots.

Although this election controversy involves the Office of the President and Vice President of the United States, it is, in fact, a dispute over the marking and counting of

ballots. *Roe v. Alabama*, 43 F.3d 574 (11th Cir.1995) (Roe I). The manual count of ballots by canvassing boards in this state is authorized and procedurally guided by Section 102.166(4), Florida Statutes. The Volusia County Canvassing Board has followed the legislative scheme and the directives of the Secretary of State with regard to all recounts undertaken in this case. Sections 102.141(4) and 102.166(4), Florida Statutes. It has not acted arbitrarily, but has exercised the sound discretion that the law grants to canvassing boards. *Broward County Canvassing Bd. v. Hogan*, 607 So.2d 508 (4th DCA 1992), Section 102.166(4)(c), Florida Statutes.

The likelihood of correctness of a manual recount by the Volusia County Canvassing Board is enhanced by the correctness demonstrated during the manual recount done of the Precinct 216 results. The manual recount procedure of the canvassing board was reliable in that instance, and will be reliable now.

CONCLUSION

The Volusia County Canvassing Board exercised its statutory discretion and ordered a manual recount of the results from the presidential election. The recount is underway at this time and is expected to be completed timely.

The reasons stated by the Florida Democratic Party in its request for a manual recount raised concerns about equipment failure. The Canvassing Board had prior knowledge of the equipment problems. The manual recount procedure utilized by the Canvassing Board is likely to render an accurate count of the election results.

The action taken by Defendants in this matter was lawful, proper and required under Florida Statutes. They have followed the directives of the Chief Elections Officer of the

State of Florida, The Secretary of State, and have complied with the laws of this state.

Defendants, Michael McDermott, Ann McFall and Patricia Northey respectfully request that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction be DENIED.

CERTIFICATE OF SERVICE

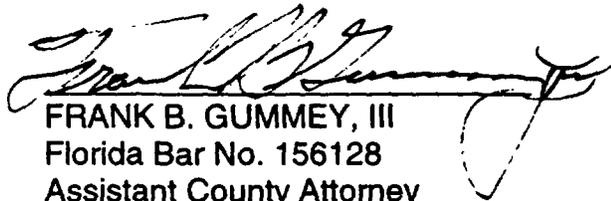
I HEREBY CERTIFY that a true and correct copy of the Response to Plaintiff's Motion for Temporary Injunction was sent via hand delivery and facsimile (305-358-5744) to Marcos D. Jimenez, Esq. White and Case LLP, Attorneys for Plaintiffs, Suite 4900, 200 South Biscayne Blvd., Miami, Florida 33131-2352; and to Harlan L. Paul, Esq., Attorney for Plaintiffs, P. O. Box 208, DeLand, Florida 32721-0208, facsimile (904) 734-1295, 12th day of November, 2000.



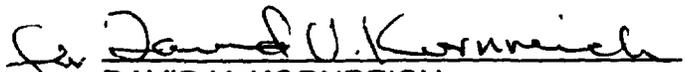
DANIEL D. ECKERT
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Telephone: 904-736-5950
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Facsimile: 305-379-3802
Attorney for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
Case No. 00-CV-9009
Middlebrooks**

**NED L. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARETTA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY,
as Florida Registered Voters**

and

**GOVERNOR GEORGE W. BUSH and DICK
CHENEY, as candidates for President and
Vice President of the United States of America**

Plaintiffs,

vs.

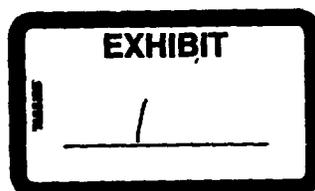
**THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE,
DAVID LEAHY, LAWRENCE KING, JR.,
MIRIAM LEHR, MICHAEL McDERMOTT, ANN
McFALL, and PAT NORTHEY, in their official
capacities as members of the County Canvassing
Boards of Palm Beach, Miami-Dade, Broward and
Volusia Counties, respectively,**

Defendants.

**AFFIDAVIT
DEANIE LOWE**

COMES NOW, Deanie Lowe, Supervisor of Elections, Volusia County, after being

1



duly sworn and states as follows:

1. I have served continuously as Supervisor of Elections for Volusia County since 1993.

2. Volusia County conducted an election for President on November 7, 2000, using a paper ballot, a sample of which is attached (Attachment A).

3. Volusia County uses an electronic voting system certified by the Florida Division of Elections. The AccuVote optical scan system is a product of Global Election Systems, Inc., which prepared the descriptive literature at Attachment B. The AccuVote system was utilized November 7, 2000, to conduct the election and determine the results.

4. The Florida Democratic Party requested a manual recount November 9, 2000 (Attachment C).

5. Prior to the Democratic Party's request, I had advised the Canvassing Board of the matters raised in paragraph 2 of the Democratic request and provided explanation of them as follows:

a. Six precincts were unable to transmit data over the phone lines after the polls closed.

Explanation: As a safeguard, the AccuVote system will not transmit from the precinct if any electronic interference is detected on the telephone line. Because of this, several regional sites throughout the County are provided to take the equipment to transmit. The six precincts did this and transmitted successfully.

b. The memory of the Holly Hill precincts tabulation machine burned out.

Explanation: The diskette in the tabulating equipment in Holly Hill failed. As a result, the equipment would not transmit the vote. The failed diskette was replaced and the ballots were reinserted in the tabulating equipment.

c. The Precinct 216 tabulation of votes first showed almost five times as many votes cast than registered voters in the precinct, a decrease of more than 16,000 votes for electors pledged to Al Gore and Joseph Lieberman, the erroneous award of more than 8,500 votes to the electors pledged to the Republican candidate, the erroneous award of almost 10,000 votes to Socialist Workers Party candidate James Harris, and the erroneous deduction of over 2,400 votes to Green Party candidate Ralph Nader.

Explanation: The obvious malfunction of Precinct 216 was immediately detected. The faulty diskette was replaced, the ballots were reinserted in the tabulating equipment and electronically totaled. The ballots were subsequently counted manually which confirmed the electronic count.

d. Dramatic inconsistencies also appeared in the initial vote counts of other candidates in the Presidential election. Unofficial count of the ballot totals for Constitution party candidate Howard Philips decreased by over 2,900 votes, and ballot totals for Libertarian party candidate Harry Browne decreased by over 2,700 votes. There was no corresponding increase in votes to other candidates. The increase in the vote count for the other candidates combined totaled 570 votes. Despite these dramatic aberrations, the votes for Al Gore and George Bush did not change by even a single vote.

Explanation: This occurred in Precinct 216, the explanation of which is in subparagraph "c" above. It is noted that the Democratic Party's request states that votes for Al Gore and George Bush were not changed.

e. During the recount process on the afternoon of Wednesday, November 8, 2000, a precinct clerk appeared at the Volusia County Elections Office with a bag of ballots that had not been previously returned.

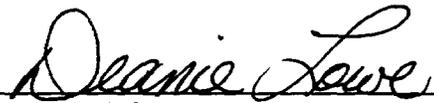
Explanation: Ballots are counted by the electronic equipment at the precinct as they are inserted into the machines by the voters. The poll workers electronically transmit the precinct vote and then manually deliver the already counted ballots in sealed containers to the Supervisor's facilities. A poll worker drove various pieces of voting materials and equipment including the sealed container of ballots in a private vehicle to the Supervisor's office November 7, 2000. Either the poll worker or a Supervisor's employee helping unload the poll worker's vehicle the night of the election overlooked the sealed container of ballots on the rear floorboard. The next day the poll worker delivered the container still sealed.

6. The manual recount of all ballots ordered by the Canvassing Board started November 12, 2000.

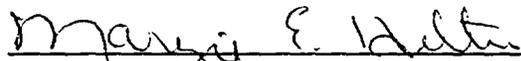
7. I have read the affidavit of Raymond A. Phelps, Jr., (Exhibit B to Plaintiffs' Emergency Motion for Temporary Restraining Order). The concerns he expresses about degradation of ballots pertain to the punch card type which are read by a mechanical card sorter. Volusia County ballots are not punched. They are marked with pen or pencil. They

are read by optical scanning equipment. There are no holes made in the ballots and no "chad" produced.

FURTHER AFFIANT SAYETH NAUGHT.


DEANIE LOWE, Supervisor of
Elections, Volusia County

Sworn to and subscribed before me this
12th day of November, 2000.


Notary Public Signature

Margie E. Helton

Notary Public Name (Typed,
printed or stamped)



My commission expires: January 26, 2002

DIVISIONS OF FLORIDA DEPARTMENT OF STATE

Office of the Secretary
Office of International Relations
Division of Elections
Division of Corporations
Division of Cultural Affairs
Division of Historical Resources
Division of Library and Information Services
Division of Licensing
Division of Administrative Services



FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
DIVISION OF ELECTIONS

MEMBER OF THE FLORIDA CABINET
State Board of Education
Trustees of the Internal Improvement Trust Fund
Administration Commission
Florida Land and Water Adjudicatory Commission
Siting Board
Division of Bond Finance
Department of Revenue
Department of Law Enforcement
Department of Highway Safety and Motor Vehicles
Department of Veterans Affairs

MEMORANDUM TO ALL SUPERVISORS OF ELECTIONS
Wednesday, November 8, 2000
9:30 a.m.

TALLAHASSEE -- As of 6:00 a.m., Wednesday, November 8, 2000, the Florida election returns in the 2000 U.S. Presidential election were 2,909,135 for Republican candidate George W. Bush and 2,907,351 for Democratic candidate Albert Gore. These returns reflect all precinct ballots cast and all absentee ballots cast in all 67 Florida counties, with the sole exception of outstanding overseas absentee ballots.

The difference in votes cast is 1,784 in favor of Governor George W. Bush, which is less than one half of one percent of all votes cast. Under these circumstances, Florida law requires an automatic recount of all votes cast, pursuant to section 102.141(4), Florida Statutes. The recount shall be conducted in each county by the statutorily prescribed county canvassing board. It is expected that the recount will be completed by the close of business on Thursday, November 9, 2000. You are not required to certify the results of the elections until the recount has been completed.

Under Florida law, Secretary of State Katherine Harris is the constitutionally independent officer elected by the people of Florida as the chief election officer of the state. As such, it is her responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws. Florida law has rules and procedures to ensure the integrity and accuracy of the recount process. The Secretary of State has sworn to uphold the laws of the state to their fullest extent and will exercise her sworn duties with the utmost vigilance.

The Capitol • Room 1801 • Tallahassee, Florida 32399-0250 • (850) 488-7690
FAX: (850) 488-1768 • <http://www.dos.state.fl.us> • E-Mail: election@mail.dos.state.fl.us

Attachment A

OFFICIAL BALLOT
GENERAL ELECTION
VOLUSIA COUNTY, FLORIDA
NOVEMBER 7, 2000

INSTRUCTIONS TO VOTER: Completely fill in the oval next to your choice as shown To cast a vote for a qualified write-in candidate whose name is not listed on the ballot, write the name of the qualified write-in candidate in the blank space provided for that purpose and completely fill in the oval

FEDERAL CONGRESSIONAL NONPARTISAN COUNTY

**ELECTORS FOR PRESIDENT
 AND VICE PRESIDENT
 (Vote For One Group)**

- George W. Bush REP
- Dick Cheney
- Al Gore DEM
- Joe Lieberman
- Harry Browne LIB
- Art Olivier
- Ralph Nader GRE
- Winona LaDuke
- James Harris SWP
- Margaret Trowe
- John Hagelin LAW
- Nat Goldhaber
- Pat Buchanan REF
- Ezola Foster
- David McReynolds SPF
- Mary Cal Hollis
- Howard Phillips CPF
- J. Curtis Frazier
- Monica Moorehead WWP
- Gloria La Riva

Write-in

**REPRESENTATIVE IN
 CONGRESS
 4TH CONGRESSIONAL DIST.
 (Vote For One)**

- Ander Crenshaw REP
- Tom Sullivan DEM
- Deborah Katz Pueschel NPA
- Write-in

STATE

**TREASURER AND
 INSURANCE COMMISSIONER
 (Vote For One)**

- Tom Gallagher REP
- John Cosgrove DEM

**COMMISSIONER OF
 EDUCATION
 (Vote For One)**

- Charlie Crist REP
- George H. Sheldon DEM
- Vassilia Gazetas NPA

LEGISLATIVE

**STATE REPRESENTATIVE
 27TH HOUSE DISTRICT
 (Vote For One)**

- Evelyn Lynn REP
- Andrew Spar DEM

**UNITED STATES SENATOR
 (Vote For One)**

- Bill McCollum REP

**SHERIFF
 (Vote For One)**

- Gus Beckstrom
- Ben Johnson

**SUPERVISOR OF ELECTIONS
 (Vote For One)**

- James "Andy" Baker
- Deanie Lowe

**COUNTY COUNCIL
 DISTRICT 4
 (Vote For One)**

- Harriet Damesek
- Joseph C. Jaynes

**COUNTY JUDGE
 GROUP 7
 (Vote For One)**

- Steve deLaroche
- Valerie P. Foote

VOTE BOTH SIDES



Division of Elections - Florida
Department of State

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Systems Used in
Florida](#)

[Table of Methods](#)

Voting Systems

There are currently 63 Florida counties that use one of the many electronic voting systems certified by the Division of Elections. In addition, three counties use mechanical voting machines and one county uses manually tabulated paper ballots.

The Division of Elections has prepared a list of vendors with electronic voting systems certified for use in the State of Florida. Links are provided to vendor home pages that provide a variety of vendor-provided information.

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Attachment B

The AccuVote

The **AccuVote** optical scan system is a precinct count and central accumulation voting system that brings a new level of speed and simplicity to the voting process and the task of conducting elections. It gives the election administrator powerful resources for individual polling places and the accumulation center (i.e., Election Central). Furthermore, the **AccuVote** system streamlines the entire election process, from the initial definition of candidates and issues, until the polls close and results are final.



Tools



News



About

Of paramount importance is the fact that the **AccuVote** system has three of the characteristics that are still among the most desired by many in today's voting public and within the election administration community. They are:

- Name-on-the ballot
- Ballots that are counted in the polling place, not transported to a central location
- Clear and distinct audit trail

The **AccuVote** system also addresses the needs for accuracy, security and integrity throughout the voting process.

Accuracy: Using paper ballots, the system collects permanent, physical records of voter choices. It accommodates traditional recounting procedures.

Security: The system features management controls over the voting process from ballot preparation to the verification of results.

Integrity: The system performs only those functions specified by the election officials. It provides a complete audit trail to confirm election results.

The **AccuVote** system also provides the advanced features necessary to conduct elections with ease and confidence.

For election administrators/officials, the **AccuVote** system streamlines each stage of an election while providing comprehensive security measures. The system helps provide a secure election environment through a combination of passwords, security levels and physical locks.

For precinct workers, the **AccuVote** is compact and lightweight so that it can be easily transported to and from the polling place. They can start using the **AccuVote** with minimal training and no computer expertise. After just a few hours of introduction and training, precinct workers can set up and

monitor elections with ease and confidence.

For voters, the ultimate end users of the system, the **AccuVote** features a straightforward, easy-to-understand concept. Voters simply indicate their choices by shading in an oval just as they would when selecting answers on a school test, or numbers on a lottery ticket. They have the opportunity to review their final decisions on paper, before casting their vote by inserting the ballot into the **AccuVote** tabulator.

The Integrated Advantage

The **AccuVote** system design is simple, yet powerful and functional. One of the most significant features that separate the system from its competitors is the seamless integration between the hardware and software components. This integrated advantage provides the election administrator with powerful tools to manage the entire election process with just three basic components. *This tightly integrated system requires no external devices to download, upload, or erase memory cards, generate postscript files, tabulate early/absentee ballots, tabulate precinct ballots, or display media results.*

The system's integrated components are:

The AccuVote Tabulator: The tabulator is a multi-functional unit that is the heart of the voting system. It is the interface between the individual voter and the accumulated will of the electorate as a whole. It counts and tabulates the ballots at precincts on election day and communicates with the host computer at Election Central by transmitting results for accurate and timely jurisdiction-wide results.

The Application Software (GEMS): GEMS is powerful multi-user multi-functional NT-based software that performs all of the election functions in a seamless fully integrated manner. It concurrently and automatically generates:

- Appropriate ballot styles for each precinct
- Postscript ballot files for postal ballots that eliminate manual typesetting and endless proofing tasks
- Precinct-specific media for precinct tabulation
- Vote tally files that receive totals to produce and distribute cumulative election results

The Host Computer: The host computer is a PC-based computer system configured to perform all of the necessary integrated functions of the application software, from the beginning of the election process, to the posting of final jurisdiction-wide results.

Other Exclusive Features

Ballot Size, Flexibility : The **AccuVote** ballot is 8.5" wide and can be 11", 14" or 18" long depending upon the number of

aces, candidates and issues on the ballot. Ballot layout is freeform and flexible and can be formatted in one, two, three or four columns, front and back. The standard 8.5" width also makes printing less complicated. Since either the 8.5" x 11" size or the 8.5" x 14" size ballots accommodates most elections, standard size boxes and shelves can be used for transport and storage.

Visible Light Reader: The **AccuVote** tabulator utilizes visible light reader technology that permits the voter to shade in the oval next to the candidate of choice with a standard pen or pencil. This is especially advantageous in an un-controlled absentee-by mail voting environment.

Internal Battery Backup: The **AccuVote** tabulator employs a battery backup feature that acts as an uninterruptible power supply. The battery is automatically and continuously charged. It engages during a power failure to permit the voting process to continue. It also provides enough power to print the zero tape at the opening of the polls and ready the **AccuVote** system to begin accepting ballots, continue counting ballots, or even print and transmit results at the closing of the polls.

TeleResults: The **AccuVote** system pioneered modem transmission of precinct results directly from the polling place to the host computer for jurisdiction-wide results using standard landlines or cellular telephones. Global first introduced **TeleResults** in 1994 and it has since become the industry standard. Global users throughout the United States and Canada are using **TeleResults** extensively.

Postscript, the "Electronic Ballot": A major cost-saving feature of the **AccuVote** system is the so-called "electronic ballot." Now as an integral function of the ballot layout process, Global's application software produces an industry-standard postscript file, which is then transmitted to a qualified commercial printer for ballot production. This advanced feature eliminates time-consuming process of typesetting and drastically reduces the seemingly endless task of proofreading and making corrections. It is notable that that the Global postscripts file production is part of the Integrated Advantage, and requires no third party intervention typical of competitive systems.

Flexible, and Modular Design Concept: The **AccuVote** tabulator's modular design measures 14 in. x 16 in. x 3 in. and weighs only 13.75 pounds. It has been proven to be the most flexible optical scan tabulator on the market. It is designed to optimize continuous operation in a precinct environment. Perhaps the most important design feature is that it is a software driven device. This enables enhancement with software updates to ensure backward compatibility and eliminate "built-in obsolesce."

Ease of Maintenance and Storage: The **AccuVote** system is

unequaled in its maintenance and storage features. It has the ability to perform self-diagnostic testing of the system, prior to each election. Any component of the system, including the five-year gel cell battery, can easily be replaced as needed. Routine maintenance includes replacing the audit trail paper roll as necessary and cleaning the unit before and after elections. Each tabulator requires only .39 cubic feet of storage space. Twenty-four (24) units can be stacked 6 foot high on shelving 4 foot wide and 1.5 foot deep. The ballot box measures 2 feet x 2 feet x 3 feet and can be stacked two (2) or three (3) high in a 4 square foot footprint.

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REQUEST FOR MANUAL RECOUNT OF BALLOTS TO VOLUSIA COUNTY CANVASSING BOARD

The State Executive Committee of the Florida Democratic Party (FDP), by and through undersigned counsel, and as provided in Section 102.166(4), Florida Statutes, requests that the Volusia County Canvassing Board conduct a manual recount of the ballots cast on November 7, 2000 in Volusia County, Florida for electors for the offices of President and Vice-President of the United States of America.

In support of this request, the FDP states:

1. Electors pledged by oath to vote for the Democratic candidates for the Offices of President and Vice-President of the United States were selected and certified as provided by Section 103.021(1), Florida Statutes. In accordance with Section 103.021(2), the names of Al Gore and Joseph Lieberman were placed on the November 7, 2000 general election ballot as the Democratic candidates for the offices of President and Vice-President of the United States. Votes cast for the Democratic candidates are counted as votes cast for the presidential electors pledged to support Al Gore and Joseph Lieberman.

2. During the balloting process, the subsequent tabulation of ballots, and the statutorily required recount, numerous problems transpired which call into question the accuracy and veracity of Volusia County's returns for the Offices of President and Vice-President of the United States. Those problems include:

a. Six precincts were unable to transmit data over the phone lines after the polls closed;

b. The memory of the Holly Hill precincts tabulation machine burned out;

c. The Precinct 216 tabulation of votes first showed almost five times as many votes cast than registered voters in the precinct, a decrease of more than 16,000 votes for electors pledged to Al Gore and Joseph Lieberman, the erroneous award of more than 8,500 votes to the electors pledged to the Republican candidate, the erroneous award of almost 10,000 votes to Socialist Workers Party candidate James Harris, and the erroneous deduction of over 2,400 votes to Green Party candidate Ralph Nader.

d. Dramatic inconsistencies also appeared in the initial vote counts of other candidates in the Presidential election. Unofficial count of the ballot totals for Constitution Party candidate Howard Philips decreased by over 2,900 votes, and ballot totals for Libertarian party candidate Harry Browne decreased by over 2,700 votes. There was no corresponding increase in votes to other candidates. The increase in the vote count for the other candidates combined totaled 570 votes. Despite these dramatic aberrations, the votes for Al Gore and George Bush did not change by even a single vote.

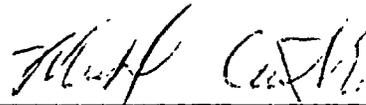
e. During the recount process on the afternoon of Wednesday, November 8, 2000, a precinct clerk appeared at the Volusia County Elections Office with a bag of ballots that had not been previously returned.

3. The problems set forth herein have been the subject of intense national scrutiny, making the assurance of an accurate vote count of exceptional local, state and national importance. In order to preserve the integrity of this most fundamental exercise of the democratic rights of the populace, and in light of the unprecedented effect that an accurate vote count in Florida will have on the national legitimacy of the November 7, 2000 Presidential election, a manual recount of a representative sample

of Volusia County's ballots is necessary to determine whether an error exists which could affect the outcome of the election for presidential electors within the state.

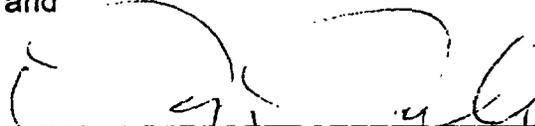
4. The FDP requests that all Volusia County, Florida precincts be selected for a manual recount of ballots.

Dated this 9th day of November, 2000.



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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
Case No. 00-CV-9009
Middlebrooks**

**NED L. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARETTA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY,
as Florida Registered Voters**

and

**GOVERNOR GEORGE W. BUSH and DICK
CHENEY, as candidates for President and
Vice President of the United States of America**

Plaintiffs,

vs.

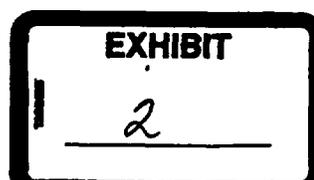
**THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE,
DAVID LEAHY, LAWRENCE KING, JR.,
MIRIAM LEHR, MICHAEL McDERMOTT, ANN
McFALL, and PAT NORTHEY, in their official
capacities as members of the County Canvassing
Boards of Palm Beach, Miami-Dade, Broward and
Volusia Counties, respectively,**

Defendants.

**AFFIDAVIT
MICHAEL MCDERMOTT**

COMES NOW, MICHAEL McDERMOTT, a County Court Judge of Volusia County,
Florida, and Chair of the Canvassing Board of Volusia County, Florida, after being duly

1



sworn and states as follows:

1. The Canvassing Board was advised during the evening of November 7, 2000, that a malfunction of the diskette in the electronic ballot tabulating machine in Precinct 216 caused an obviously erroneous report of the results in the Presidential vote from that precinct. The Supervisor supplied another diskette which was inserted in another electronic ballot tabulating machine and all paper ballots from that precinct were tabulated.

2. On November 8, 2000, Deanie Lowe, Supervisor of Elections, Volusia County, provided to the Canvassing Board the directive of the Florida Secretary of State to conduct a mandatory recount of the presidential election pursuant to Section 102.141(4), Florida Statutes (Attachment A).

3. On November 8, 2000, the Canvassing Board conducted the mandatory recount by reconciling the printouts of all votes cast from each electronic ballot tabulating machine with the compilation of results from the host computer. The mandatory recount revealed no variance from the original count. The ballots were not removed from their sealed containers or recounted electronically or manually, except for ballots from Precinct 216. Representatives of the Florida Republican Party suggested and expressly agreed to a manual recount of Precinct 216. The Canvassing Board conducted a manual recount of the ballots from Precinct 216 and the result was identical to the result from the electronic tabulation received after the substitution of the diskette.

4. After the mandatory recount, on November 9, 2000, the Florida Democratic Party requested a manual recount of all ballots. The Canvassing Board granted the request.

5. On November 12, 2000, the Canvassing Board began the manual visual recount of all ballots which continues at the time that this Affidavit is executed. Numerous teams of two county employees who are registered electors are reading and counting the ballots. Republican and Democratic parties are afforded the opportunity to each have one observer for each counting team. Security of ballot storage and the counting room is provided under the direction of the Canvassing Board with Florida Department of Law Enforcement and Volusia County Sheriff's Office personnel.

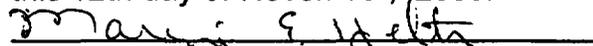
6. The Canvassing Board has adopted a motion stating that it will comply with the requirements of Section 102.111, Florida Statutes, to certify the results of the election to the Department of State no later than 5:00 p.m., Tuesday, November 14, 2000, unless the time is extended by lawful authority.

7. The Canvassing Board has authorized the County Attorney and such other attorneys as he may appoint to seek state or federal judicial relief from the time limit for certification provided in Section 102.111, Florida Statutes.

FURTHER AFFIANT SAYETH NAUGHT.


MICHAEL McDERMOTT, Chair
Canvassing Board, Volusia County

Sworn to and subscribed before me
this 12th day of November, 2000.


Notary Public Signature
Margie E. Helton

Notary Public Name (Typed, printed or stamped)



FROM :

TO :

19048225718

2000-11-08

01/01

DIVISIONS OF FLORIDA DEPARTMENT OF STATE
 Office of the Secretary
 Office of International Relations
 Division of Elections
 Division of Corporations
 Division of Cultural Affairs
 Division of Historical Resources
 Division of Library and Information Services
 Division of Licensing
 Division of Administrative Services



MEMBER OF THE FLORIDA CABINET
 State Board of Education
 Trustee of the Internal Improvement Trust Fund
 Administration Commission
 Florida Land and Water Adjudicatory Commission
 State Board
 Division of Bond Finance
 Department of Revenue
 Department of Law Enforcement
 Department of Highway Safety and Motor Vehicles
 Department of Veterans' Affairs

FLORIDA DEPARTMENT OF STATE
Katherine Harris
 Secretary of State
 DIVISION OF ELECTIONS

MEMORANDUM TO ALL SUPERVISORS OF ELECTIONS
 Wednesday, November 8, 2000
 9:30 a.m.

TALLAHASSEE -- As of 6:00 a.m., Wednesday, November 8, 2000, the Florida election returns in the 2000 U.S. Presidential election were 2,909,135 for Republican candidate George W. Bush and 2,907,351 for Democratic candidate Albert Gore. These returns reflect all precinct ballots cast and all absentee ballots cast in all 67 Florida counties, with the sole exception of outstanding overseas absentee ballots.

The difference in votes cast is 1,784 in favor of Governor George W. Bush, which is less than one half of one percent of all votes cast. Under these circumstances, Florida law requires an automatic recount of all votes cast, pursuant to section 102.141(4), Florida Statutes. The recount shall be conducted in each county by the statutorily prescribed county canvassing board. It is expected that the recount will be completed by the close of business on Thursday, November 9, 2000. You are not required to certify the results of the elections until the recount has been completed.

Under Florida law, Secretary of State Katherine Harris is the constitutionally independent officer elected by the people of Florida as the chief election officer of the state. As such, it is her responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws. Florida law has rules and procedures to ensure the integrity and accuracy of the recount process. The Secretary of State has sworn to uphold the laws of the state to their fullest extent and will exercise her sworn duties with the utmost vigilance.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-9009-Civ-Middlebrooks-Bandstra

NED SIEGEL, GEORGETTE SOSA DOUGLAS,
GONZALO DORTA, CARRETTA KING BUTLER,
DALTON BRAY, JAMES S. HIGGINS, and
ROGER D. COVERLY, as Florida registered voters,

and

GOVERNOR GEORGE W. BUSH and DICK CHENEY,
as candidates for President and Vice President of the
United States of America,

Plaintiffs,

vs.

THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL, SUZANNE
GUNZBURGER, ROBERT LEE, DAVID LEAHY,
LAWRENCE KING, JR., MIRIAM LEHR,
MICHAEL McDERMOTT, ANN McFALL, and
PAT NORTHY, in their official capacities as members
of the County Canvassing Boards of Palm Beach,
Miami-Dade, Broward and Volusia Counties, respectively,

Defendants.

**THERESA LePORE, CHARLES E. BURTON, AND
CAROL ROBERTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The Plaintiffs' request for preliminary injunctive relief should be denied because (1)
they cannot show a substantial likelihood of success on the merits, (2) they suffer no

irreparable injury, because the Florida Statutes provide a post-certification state court process for contesting the results of an election certified by a County canvassing board, and (3) the public interest is not served by a federal court order prohibiting the recounting of voters' ballots in order to determine the results of an election.

The doctrines of federalism and comity counsel against federal court interference with the administration of a state election. *See Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988), presenting a question regarding write-in ballots:

[T]his case does touch upon "a sensitive area of social policy" into which federal courts should intrude with great reluctance. State election codes are the product of careful consideration at the local level about how to ensure fair and orderly elections. The authority of states to enact such codes derives from the Constitution itself. *See* Article I, Sec. 4, cl. 1. Federal courts should refrain from deciding the constitutionality of state election laws when reasonable alternatives to such adjudication are available.

Id. at 589.

Florida law provides the reasonable alternative. *See* § 102.168, Fla. Stat. (Contest of elections) (copy attached). The statute provides in relevant part:

(1) The certification of election or nomination of any person to office . . . may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy

Relief can be based upon:

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

Thus, the Plaintiffs, should they be dissatisfied with the results of the recount in Palm Beach County, have a state court remedy that can address any constitutional, statutory, or equitable issue that they may wish to assert.

A. NO SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The Plaintiffs have not cited *any* case in which a court has found that a canvassing board's discretion to conduct a manual recount of ballots, or the exercise of that discretion, violates the Constitution. Our research has not identified any such case. To the contrary, the weight of authority is that:

to interpret section 1983 as providing a remedy for all election irregularities would cause the federal courts to be "thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." [*Powell v. Power*], 436 F.2d [84] at 86 [2d Cir. 1970]. The *Powell* court concluded that the federal courts are neither

equipped, nor empowered, to rectify every alleged election irregularity.

Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981).

United States District Court Judge Edward B. Davis recently wrote:

[F]ederal courts can only intervene in a state election dispute in the most extreme circumstances Moreover, public policy dictates that this court not meddle with the state process.

Scheer v. City of Miami, 15 F. Supp. 2d 1338, 1340 (S.D. Fla. 1998).

The Supreme Court has made it clear that the states are the masters of their election codes, even for a national office. *Roudebush v. Hartke*, 405 U.S. 15, 92 S. Ct. 804, 31 L.Ed.2d 1 (1972).

In *Roudebush* incumbent United States Senator Vance Hartke was declared the winner by 4,383 votes, “a margin of approximately one vote per state precinct.” *Id.* at 16, 92 S. Ct. at 806. His opponent, Richard Roudebush, filed suit seeking a recount, and a state court “appointed a three-man recount commission. . . .” *Id.* Hartke sought a federal injunction, claiming that only the Senate could “judge the elections, returns, and qualifications of its members.” *Id.* at 807. A three judge court granted the injunction. The Supreme Court reversed, holding that Indiana could conduct the recount. The recount was a manual recount:

If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened.

The recount commission may make new and independent determinations as to which ballots should be counted. In other words, it may reject ballots initially counted and count ballots initially rejected. Disputes within the commission are settled by a majority vote. When the commission finishes its task it seals the ballots it counted in one bag and the ballots it rejected in another. Once the recount is completed, all previous returns are superseded.

* * *

Indiana has found, along with many other states, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. A recount is an integral part of the Indiana electoral process and is within the ambit of broad powers delegated to the States by Art. I, § 4.

Roudebush, 405 U.S. at 810-811.¹

¹ The Supreme Court correctly recognized the ubiquity of state recounts. At least 48 states have recount procedures, and no two are the same. *See* Alaska Stat. 15.20; Article 2; Ala. Code Statutes Sec. 17-15-7; Ark. Code Title 7; Cal. Elec. Code, Ch. 9; Colo. Rev. Stat. T1 Elections, Art.10; Del.Code Ann. Title 15 Ch. 57; Haw. Rev. Stat.11.174.5; Idaho Code § 324.2301; Ill. Rev. Stat. 5/23-1.8a; Iowa Code 50.48 Ky. Rev. Stat. 120.017; La. Rev. Stat. 1313; Me. Rev. Stat. 737-A; Md. Code 12-101 Art 33, sec. 12-101; Mass. Gen. L. 54, Sec. 135; Mich. Comp. Laws 168.24a; Minn. Stat. 209.06; Mo. Rev. Stat. 115.543; Mont. Code Ann. 13-16. Neb. Rev. Stats. Ch. 32; Nev. Rev. Stats.Title 23, Ch.293; N. H. Rev. Stat. Ann. Title LXIII, Ch. 660; N.J. Stat. Ann.Title 19, Ch. 28 and 53A; N.M. Stat. Ann. Ch. 1; N.C. Gen. Stat. Ch. 163; N.D. Cent. Code Title 16.1, Ch. 16.1; Ohio Rev. Code Ann. Title XXXV, Ch. 3515, Okla. Stat.Title 26 Ch.A1; Or. Rev. Stat. Title 23, Ch. 258; R.I. Stats. Title 17, Ch. 12 and 19, Pa. Cons. Stat. Ann. Title 25, Ch. 14; S.C. Code Ann. Title 7; S.D. Codified Laws Title 12, Ch.12-17B *et seq*; Tenn. Code Ann. Title 2; Tex. Rev. Civ. Stats. Ann. Title 13; Utah Code Ann. Title 20A; VT. Stat. Ann. Title 17, Ch. 51; Va. Code Ann. Title 24.2, Ch. 8; Wa. Rev. Code. Title 29, Ch.29.64; W. Va. Code Ch. 3; Wis. Stat. Ch. 9; Wyo. Stat. Title 22, Ch.16.

Similarly, Article II, § 1 of the Constitution supports the concept of independent state decision-making in the presidential election process:

Each State shall appoint, in such Manner as the Legislature may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress

See also McPherson v. Blacker, 146 U.S. 1, 28-29, 15 S. Ct. 3, 36 L. Ed. 869 (1892) (the Constitution permits “various modes of choosing the electors”); Title 3 U.S.C. § 5 (Determination of controversy as to appointment of electors). The statute allows states wide authority to provide for the “final determination of any controversy or contest concerning the appointment of all or any of the electors of such State by judicial or other methods or procedures. . . .” The method of conducting the election for president is also left to the states.

Simply put, there is no authority for the Plaintiffs’ request that this Court interfere with Florida’s election code and its contemplation of manual recounts. Indeed, the manual recount undertaken in Palm Beach County pursuant to Florida law serves the highest constitutional goal: preserving the right to have one’s vote counted.

B. NO IRREPARABLE INJURY

None of the “injuries” alleged by the Plaintiffs are “irreparable.” *See* Complaint, p. 10, ¶ 42; Emergency Motion for Temporary Restraining Order and Preliminary Injunction,

p. 10. “[B]roadcast[ing] to the nation” the result of a recount *will not do* “serious damage to the legitimacy of the presidential election.” (Complaint, p. 10, ¶ 42). History suggests that more information, not less, best serves the principles of democracy and the Constitution. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed.2d 822 (1971) (the Pentagon Papers case):

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be “uninhibited, robust, and wide-open” debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270, 84 S. Ct. 710, 720-721, 11 L.Ed.2d 686.

Id., 403 U.S. at 724, 91 S. Ct. at 2146 (Douglas, J., concurring). If matters pertaining to national security are best broadcast to the nation, we fail to understand the Plaintiffs’ “fundamentally anti-democratic” desire to keep the results of a recount of ballots in Palm Beach County from the public. This Court should decline that request.

The Plaintiffs have a full and complete remedy in state court for all their claims should they be dissatisfied with the result of the recount. *See* discussion of Florida Statutes § 102.168, *supra*, p. 2. The Supreme Court of Florida has set the standard for voiding elections under that statute:

[I]f 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 expressed the will of the voters, then the court in an election

contest pursuant to section 102.168, Florida Statutes (1997), is to void the contested election even in the absence of fraud or intentional wrongdoing.

Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720, 725 (Fla. 1998). Obviously, if statutory election procedures were constitutionally invalid, a Florida court could provide appropriate relief:

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.

Section 102.168(8), Fla. Stat.

There can be no preliminary injunction without irreparable injury. There is no irreparable injury, therefore the motion for preliminary injunction should be denied.

C. A RESTRAINING ORDER / INJUNCTION WOULD DISSERVE THE PUBLIC INTEREST

The public interest requires the denial of injunctive relief. The public interest is best served by knowing the result of the Palm Beach County Canvassing Board recount, whatever that may be. The notion that informing the public might be harmful was rejected by Justice Brennan in *New York Times v. United States*, *supra*:

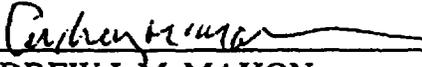
The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.

403 U.S. at 725-726 (Brennan, J. concurring). Substitute "prior judicial restraints of an election result" for prior restraint of the press, and the result is the same: no injunction should issue.

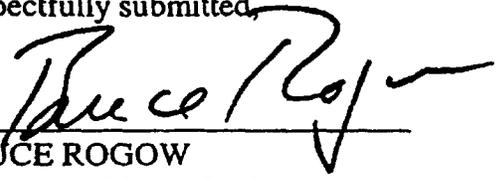
CONCLUSION

For the foregoing reasons, Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, seeking to prohibit the Defendants from proceeding with a manual recount of the November 7, 2000 election results for the offices of President and Vice-President, should be denied.

Respectfully submitted,


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Counsel for Defendant Theresa LePore

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the counsel listed below, by fax (on November 12, 2000) and by hand delivery (to those appearing in court on November 13, 2000), and by U.S. Mail (to all counsel on November 13, 2000):

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BRUCE ROGOW

FL ST s 102.168
West's F.S.A. § 102.168

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**WEST'S FLORIDA STATUTES ANNOTATED
TITLE IX. ELECTORS AND ELECTIONS
CHAPTER 102. CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS**

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Current through End of 2000 2nd Reg. Sess.

102.168. Contest of election

(1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt 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.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

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

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the

FL ST s 102.168

Page 7

allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) 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.

CREDIT(S)

2000 Electronic Pocket Part Update

Amended by Laws 1995, c. 95-147, § 602, eff. July 10, 1995; Laws 1999, c. 99-339, § 3, eff. July 1, 1999.

HISTORICAL AND STATUTORY NOTES

1982 Main Volume

Derivation:

- Laws 1979, c. 79-400, § 49.
- Laws 1977, c. 77-175, § 28.
- Fla.St.1975, § 102.161.
- Laws 1965, c. 65-378, § 16.
- Fla.St.1963, § 99.192.
- Laws 1951, c. 26870, § 3.
- Fla.St.1949, § 104.06.
- Comp.Gen.Laws 1927, § 444.
- Rev.Gen.St.1920, § 379.
- Gen.St.1906, § 283.
- Rev.St.1892, § 199.
- Laws 1845, c. 38, art. 10, §§ 7, 8.

Laws 1979, c. 79-400, a reviser's bill, conformed the sections of Fla.St.1977 to additions, substitutions, and deletions editorially supplied therein in order to remove inconsistencies, redundancies, unnecessary repetition and otherwise clarify the statutes and facilitate their correct interpretation.

West's F. S. A. § 102.168

FL ST § 102.168

END OF DOCUMENT

TRANSACTION REPORT

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NUMBER: 00-9009CIV-MIDDLEBROOKS
Magistrate Judge Bandstra**

NED L. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARRETTA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY, as
Florida registered voters,

and

GOVERNOR GEORGE W. BUSH and DICK
CHENEY, as candidates for President and Vice
President of the United States of America,

Plaintiffs,

v.

THERESA LePORE, et al., in their official
capacities as members of the County
Canvassing Boards of Palm Beach, Miami-Dade,
Broward and Volusia Counties, respectively,

Defendants.

**RESPONSE OF THE ATTORNEY GENERAL OF FLORIDA TO
THE PLAINTIFFS' CHALLENGE OF THE CONSTITUTIONALITY OF § 102.166**

The Attorney General of Florida, pursuant to S.D. Fla. Local Rule 24.1B and § 86.091, Florida Statutes (2000), for his Response to the Plaintiffs' Complaint and Motion for Preliminary Injunction, hereby states:

This complaint alleges that Florida Statute section 102.166 is unconstitutional because it violates the First and Fourteenth Amendments of the United States Constitution. The Attorney General of Florida is responsible for defending state statutes that parties challenge in state or federal

courts. Because this suit directly challenges the State of Florida's ability to regulate its own electoral process, if this court decides it must reach any constitutional issues, the Attorney General will submit an appropriate response to help guide the court.

The Attorney General believes that the court can resolve this suit without addressing the constitutional issues the Plaintiffs seem to be raising. Courts will address constitutional issues only if they are necessary to the resolution of the case before the court. See, Superintendent, Mass. Correc. Inst. v. Hill, 472 U.S. 445, 450, 105 S.Ct. 2768, 2771 (1985) (citing to Johnson v. Robison, 415 U.S. 361, 366-367, 94 S.Ct. 1160, 1165 (1974)).

Respectfully submitted,



ROBERT A. BUTTERWORTH
ATTORNEY GENERAL OF FLORIDA
Florida Bar No. 114422

Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Ft. Lauderdale, FL 33301
(954) 712-4670
Fax: (954) 712-4700

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served via facsimile transmission to each of the following this 12 day of November, 2000:

Marcos D. Jimenez, Esquire
White & Case, LLP
Attorneys for Plaintiffs
FAX: (305) 358-5744

Norman Ostrau
Deputy County Attorney
Broward County Attorney's Office

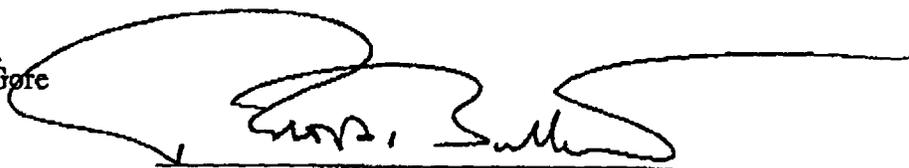
Attorney for Broward County Canvassing Board
FAX: (954) 357-7641

Andrew McMahon, Esquire
Palm Beach County Attorney's Office
Attorney for the Palm Beach County Canvassing Board
FAX: (561) 355-4234

Robert Ginsburg, Esquire
Miami-Dade County Attorney
Attorney for the Miami-Dade Canvassing Board
FAX: (305) 375-5634

Daniel Eckert, Esquire
Volusia County Attorney
Attorney for the Volusia County Canvassing Board
FAX: (904) 736-5990

Kendall Coffey, Esquire
Attorney for Vice President Al Gore
FAX: (305) 288-0257



ROBERT A. BUTTERWORTH
ATTORNEY GENERAL OF FLORIDA

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

NED L. SIEGEL, GEORGETTE SOSA)
DOUGLAS, GONZALO DORTA, CARRETTA)
KING BUTLER, DALTON BRAY, JAMES S.)
HIGGINS, and ROGER D. COVERLY, as)
Florida registered voters,)

**CASE NO. 00-9009-CIV-
MIDDLEBROOKS**

and)

GOVERNOR GEORGE W. BUSH and DICK)
CHENEY, as candidates for President and)
Vice President of the United States of America,)

Plaintiffs,)

vs.)

THERESA LePORE, CHARLES E. BURTON,)
CAROLS ROBERTS, JANE CARROLL,)
SUZANNE GUNZBURGER, ROBERT LEE,)
DAVID LEAHY, LAWRENCE KING, JR.,)
MIRIAM LEHR, MICHAEL McDERMOTT,)
ANN McFALL, and PAT NORTHY, in their)
official capacities as members of the County)
Canvassing Boards of Palm Beach,)
Miami-Dade, Broward, and Volusia Counties,)
respectively,)

Defendants.)

**RESPONSE OF BROWARD COUNTY CANVASSING BOARD
TO EMERGENCY MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

Defendants, JANE CARROLL, SUZANNE GUNZBURGER, and ROBERT LEE, in
their official capacities as members of the Broward County Canvassing Board the

"Broward Canvassing Board"), by and through their undersigned counsel, in response to the Emergency Motion for Temporary Restraining Order and Preliminary Injunction, state as follows:

INTRODUCTION

The Broward Canvassing Board is constituted pursuant to section 102.141, Florida Statutes. JANE CARROLL is the Broward County Supervisor of Elections. SUZANNE GUNZBURGER is the Chair of the Broward County Board of County Commissioners. ROBERT LEE is a County Court Judge. The Broward Canvassing Board's duties and responsibilities are as set forth in Chapter 102, Florida Statutes. At all times relevant hereto, the Broward Canvassing Board has acted strictly in conformity with said statutory provisions.

FACTUAL BACKGROUND

The Broward Canvassing Board takes no position with respect to the facts set forth in Plaintiffs' Emergency Motion, but hereby sets forth additional facts for this Court's consideration.

1. On November 8, 2000, pursuant to section 102.141(4), Florida Statutes, the Broward Canvassing Board conducted a statutorily mandated machine recount, which is now complete. As a result of that recount, Vice President Gore received an additional 43 votes and Governor Bush received an additional 44 votes.

2. On November 9, 2000, and within 72 hours after midnight on the date the election was held, the Broward County Democratic Party filed a request for a manual recount, pursuant to section 102.166(4), Florida Statutes, a copy of which is attached

hereto as Exhibit "A" and incorporated herein by reference.

3. Pursuant to said written request, a meeting of the Broward Canvassing Board was scheduled for Friday, November 10, 2000, at 10:00 a.m.

4. The Broward County Republican Party, through its Chair, Ed Pozzoli, was notified by telephone of the date and time of said meeting. The Broward County Republican Party appeared and participated at the hearing.

5. The Broward Canvassing Board authorized a manual recount in three (3) of Broward County's precincts, comprising at least one percent of the total votes cast for Vice President Gore. Pursuant to section 102.166(4)(d), Florida Statutes, the Broward County Democratic Party chose the 3 precincts subject to the manual recount.

6. The manual recount in Broward County is scheduled to commence on Monday, November 13, 2000, at 2:00 p.m.

MEMORANDUM OF LAW

Generally, state statutes are presumptively, constitutional. Paulson v. State of Florida, 360 F.Supp. 156 (S.D.Fla. 1973). Throughout the election process, the Broward Canvassing Board has presumed the validity of the duly enacted statutes it is charged with implementing. It is under no statutory or constitutional duty to delve into the constitutionality of its authorizing legislation.

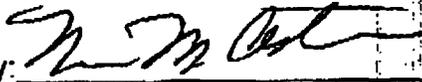
Throughout this process, the Broward Canvassing Board has adhered to its statutory duties as set forth in Chapter 102, Florida Statutes.

The Broward Canvassing Board takes no position with respect to the constitutionality of its authorizing legislation, and further takes no position with respect to

the propriety of issuing either a temporary restraining order or a preliminary injunction in this matter.

Respectfully submitted,

EDWARD A. DION
BROWARD COUNTY ATTORNEY
Governmental Center, Suite 423
115 South Andrews Avenue
Ft. Lauderdale, FL. 33301
Telephone: (954) 357-7600
Facsimile: (954) 357-7641

By: 
Norman M. Ostrau
Deputy County Attorney
Florida Bar No. 273971

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by facsimile transmission to each of the following, this 12th day of November 2000:

Marcos D. Jimenez, Esquire
WHITE & CASE LLP
Attorneys for Plaintiffs
(305) 358-5744

ANDREW McMAHON, Esquire
Palm Beach County Attorney's Office
Attorney for Palm Beach Canvassing Board
(561) 355-4234

ROBERT GINSBURG, Esquire
Miami-Dade County Attorney
Attorney for Miami-Dade Canvassing Board
(305) 375-5634

DANIEL ECKERT, Esquire
Volusia County Attorney
Attorney for Volusia Canvassing Board
(904) 736-5990

CECE DYKES, Esquire
Florida Attorney General's Office
(954) 712-4707

KENDALL B. COFFEY, Esquire
Attorney for Vice President Al Gore
(305) 285-0257

SAM GOREN, Esquire
Attorney for Jane Carroll, Broward County Supervisor of Elections
(954) 771-4923



Norman M. Ostrau
Deputy County Attorney
Florida Bar No. 273971555

WRITTEN REQUEST TO THE COUNTY CANVASSING BOARD OF BROWARD COUNTY FOR MANUAL RECOUNT OF ELECTION RETURNS

Broward, Florida

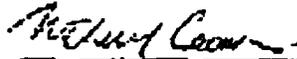
November 9, 2000

As provided in Section 102.166(4)(a), Florida Statutes, the Broward County Democratic Executive Committee, a political party whose candidates' names appeared on the ballots in Broward County, Florida, hereby requests a manual recount of the 6,686 "undervote" ballots cast for President in Broward County, Florida. The reasons we are requesting a manual recount include the following:

1. The outcome of this ballot count may determine who will be the next President of the United States of America.
2. Approximately 588,007 ballots were cast for President in Broward County.
3. On information and belief from those present during the recount that occurred on November 8, 2000, a substantial number of the 6,686 ballots did not register as votes for President of the United States of America due to an incomplete or partial punch, and thus were deemed "undervotes" and not counted.
4. Although the mechanical vote-counting equipment utilized by Broward County was not programmed to segregate "undervote" ballots, it is capable of being so programmed thereby eliminating the time and work associated with pulling those ballots manually.
5. In instances of incomplete or partial punches, the voter's choice for President should be obvious to the human eye, though the mechanical vote-counting equipment will not recognize it.
6. Given that the current state-wide vote count difference between George W. Bush and Al Gore is substantially less than the 6,686 uncounted votes in Broward County, a manual recount of those 6,686 is necessary to achieve an accurate calculation of the true intent of the voters of Broward County, the State of Florida, and the United States of America.

Under penalties of perjury, I swear that I have read the foregoing and that the facts alleged are true, to the best of my knowledge and belief.

Signed by:



Mitchell Ceasar
Chairman of the Broward County Democratic Executive Committee



T. TRANSACTION REPORT

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Nov-12	1:35 PM	9549577641	2m21s	7	OK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

CASE NO. 00-9009-CIV-MIDDLEBROOKS

NED I. SIEGEL, GEORGETTE SOSA
DOUGLAS, GONZALO DORTA, CARRETA
KING BUTLER, DALTON BRAY, JAMES S.
HIGGINS, and ROGER D. COVERLY, as
Florida registered voters,

and

GOVERNOR GEORGE W. BUSH AND
DICK CHENEY, as candidates for President and
Vice President of the United States of America,

Plaintiffs,

vs.

THERESA LePORE, CHARLES E. BURTON,
CAROL ROBERTS, JANE CARROLL,
SUZANNE GUNZBURGER, ROBERT LEE,
DAVID LEAHY, LAWRENCE KING, JR.,
MIRIAM LEHR, MICHAEL McDERMOTT,
ANN McFALL and PAT NORTHY, in their
official capacities as members of the County
Canvassing Boards of Palm Beach, Miami-Dade,
Broward and Volusia Counties, respectively,

Defendants.

**DEFENDANTS DAVID LEAHY, LAWRENCE KING, JR.,
AND MIRIAM LEHR'S RESPONSE TO PLAINTIFFS'
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

Defendants, David Leahy, Lawrence King, Jr., and Miriam Lehr, pursuant to the Court's
request, file this response to the Plaintiffs' Emergency Motion for Temporary Restraining Order

Siegel v. LePore
Case No. 00-9009-Civ-Middlebrooks

and Preliminary Injunction. The complaint names these Defendants solely in their capacity as members of the Canvassing Board of Miami-Dade County. As such it is equivalent to a claim against the Canvassing Board itself. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed. 2d 114 (1985). The Canvassing Board has no stake in the outcome of this proceeding and desires only to abide by the law.

The complaint seeks to prevent the Canvassing Board from conducting a manual recount of the ballots cast in the Presidential election. The Canvassing Board received a request from the Miami-Dade Democratic Party on November 9, 2000, pursuant to Fla. Stat. 102.166(4)(a), to conduct such a recount. (*Exhibit A*). That request was revoked and amended later the same day. (*Exhibit B*). The Republican Party of Dade County has submitted a response opposing the request for a manual recount. (*Exhibit C*). The Canvassing Board has not yet decided whether to grant or deny the request for a recount and has scheduled a hearing for Tuesday, November 14, 2000, at 9:30 A.M. to consider the matter.

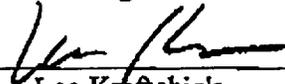
The complaint challenges the constitutionality of Fla. Stat. §102.166, which gives the State's county canvassing boards the authority to conduct manual recounts. The Florida Attorney General, who is the State official primarily responsible for defending the state statute, has been notified of this complaint and will be submitting a response in support of the statute's constitutionality. The Miami-Dade Canvassing Board defers to the real parties in interest, the

Siegel v. LePore
Case No. 00-9009-Civ-Middlebrooks

Plaintiffs, the Florida Attorney General and any other parties the Court deems appropriate, to argue the merits of the issues raised by the complaint.

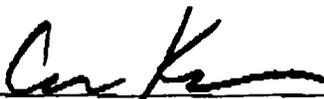
Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Tel: 305/375-1303
Fax: (305) 375-5634
E-mail: lak2@co.miami-dade.fl.us

By: 
Lee Kraftchick
Assistant County Attorney
Florida Bar No. 313726

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was faxed this 12th day of November, 2000 to: Marcos D. Jiménez, Esq, White & Case LLP, Attorneys for Plaintiffs, Suite 4900, 200 South Biscayne Boulevard, Miami, Florida 33131, Fax Number (305)358-5744; Andrew McMahon, Esq., Palm Beach County Attorney's Office Fax Number (561)355-4234; Daniel Eckert, Esq., Volusia County Attorney's Office, Fax Number (904)736-5990; Norman Ostrau, Esq., Broward County Attorney's Office, Fax Number (954)357-7641; Kendall B. Coffey, Esq., Fax Number (305)285-0257; and Cece Dykes, Esq., Fax Number (954)712-4707.


Assistant County Attorney

FROM : GELLER & GELLER

PHONE NO. : 954 925 9872

Nov. 09 2000 12:27PM P2

MIAMI DADE COUNTY DEMOCRATIC PARTY ☆

Joseph S. Geller
Chair

DEMOCRATIC PRIDE

Dorothy Jackson
Vice Chair



November 9, 2000

VIA FAX 305-375-2525

Convassing Board of Miami-Dade County
c/o David Leahy, Supervisor of Elections
111 N.W. First Street
19th Floor
Miami, FL 33130

Re: Request for manual recount of Miami-Dade County ballots

Dear David:

On behalf of the Democratic Party, I hereby request a manual recount of the ballots cast in Miami-Dade County in the Presidential election on November 7, 2000. The reasons for this request are as follows:

1. The paper ballots cast have "chads" which must be punched by the elector. In numerous instances, the chad remains fully or partly attached to the ballot which causes the vote to be rejected.
2. The count of the Presidential election ballots in Florida has, to date, reflected a difference of less than one thousand votes out of a total of almost six million votes cast for Al Gore and George Bush.
3. The risk of some votes not being counted, particularly in such a close race, creates an unacceptable situation in a democracy where each vote is valued, and where each vote must count.
4. The only possible way to obtain an accurate picture of the will of the voters of Miami-Dade County is to allow a manual recount. To deny the recount will risk thwarting the voters' intent. Section 102.166(7)(b), Fla. Stat., provides that the counting team and the canvassing board shall determine the voter's intent in casting the ballot.

Please advise me immediately whether you will grant this request for a manual recount. Should you grant the request, I will gladly designate at least three precincts and at least one



FROM : GELLER & GELLER

PHONE NO. : 954 925 9872

Nov. 09 2000 12:27PM P3

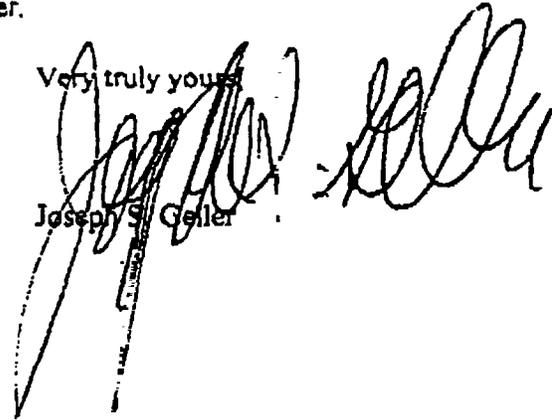
percent of the total votes cast for the Presidential race for the recount. However, I request, in the interest of democracy, that the canvassing board select additional precincts, up to and including 100% of the precincts, for the manual recount.

I also request that your office preserve all of the voted ballots and provide me with access to these ballots.

Thank you for your assistance in this matter.

Very truly yours

Joseph S. Geller

A large, stylized handwritten signature in black ink, appearing to read 'Joseph S. Geller', is written over the typed name. The signature is highly cursive and somewhat illegible due to its speed and style.

FROM : GELLER & GELLER

PHONE NO. : 954 925 9872

Nov. 09 2000 03:01PM P1

MIAMI DADE COUNTY DEMOCRATIC PARTY ☆

Joseph S. Geller
Chair

DEMOCRATIC PRIDE

Dorothy Jackson
Vice Chair

November 9, 2000

WRITTEN REQUEST TO THE COUNTY CANVASSING BOARD OF MIAMI-DADE COUNTY FOR MANUAL RECOUNT OF ELECTION RETURNS

Via Facsimile (305) 375-2525
Miami-Dade County Canvassing Board
c/o David Leahy, Supervisor of Elections
111 N.W. 1st Street, 19th Floor
Miami, FL 33130



Dear Mr. Leahy:

On behalf of the Democratic Party, I hereby request a manual recount of the ballots cast in Miami-Dade County in the Presidential Election on November 7, 2000. This request revokes and amends the previous request only on behalf of the Presidential Campaign regarding a recount. As provided in Section 102.166(4)(a), Florida Statutes, the Miami-Dade County Democratic Executive Committee, a political party whose candidates' names appeared on the ballots in Miami-Dade County, Florida, hereby requests a manual recount of the "undervote" ballots cast for President in Miami-Dade County, Florida. The reasons we are requesting a manual recount include the following:

1. The outcome of this ballot count may determine who will be the next President of the United States of America.
2. Approximately 900,000 ballots were cast for President in Miami-Dade County.
3. On information and belief from those present during the recount that occurred on November 8, 2000, a substantial number of the undervote ballots did not register as votes for President of the United States of America due to an incomplete or partial punch, and thus were deemed "undervotes" and not counted.
4. In instances of incomplete or partial punches, the voter's choice for President should be obvious to the human eye, through the mechanical vote-counting equipment will not recognize it.
5. Given that the current statewide vote count difference between George W. Bush and Al Gore is substantially less than the undercounted votes in Miami-Dade County, a manual recount of those votes is necessary to achieve an accurate calculation of the true intent of the voters of Miami-Dade County, the State of Florida, and the United State of America.

I also request that your office preserve all of the voted ballots and provide me with access to those ballots.

Thank you for your assistance in this matter.

Joseph S. Geller
Joseph S. Geller, Chair
Miami-Dade Democratic Party

MIAMI-DADE COUNTY
ELECTIONS DEPARTMENT
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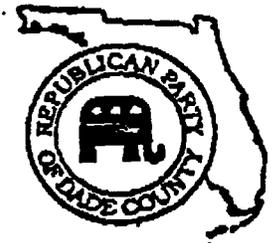
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REPUBLICAN PARTY OF FLORIDA

305 6788012

P.02/02

Republican Party — of — Dade County



Mary Ellen Miller
County Chairman

1790 Coral Way, Suite 200 • Miami, Florida 33145
(305) 854-2960 • Fax: (305) 854-2961

Via Telefax

November 9, 2000

Canvassing Board of Miami-Dade County
C/o David Leahy
Supervisor of Elections
111 N.W. First Street
19th Floor
Miami, FL 33130

00 NOV - 9 PM 5:14
MIAAMI-DADE COUNTY
ELECTIONS DEPARTMENT

Re: Response by the Republican Party of Miami-Dade County
to the Request for Manual Recount of the Miami-Dade County Ballots

I am submitting this letter on behalf of the Republican Party of Miami-Dade County in response to the request made by Mr. Joseph S. Geller on behalf of the Miami-Dade County Democratic Party for a manual recount of the Miami-Dade County ballots. The request for manual recount should be denied for the following reasons:

1. There are neither facts nor proof presented sufficient to show an error in the initial vote tabulation or in the recount that could affect the outcome of the election.
2. There are neither facts nor proof presented sufficient to show that the tabulation machines were malfunctioning, improperly used, or improperly calibrated.
3. There are neither facts nor proof presented sufficient to show that there was any fraud or impropriety in the manner in which the election was held.

The request for manual recount fails to suggest any possibility the manual recount would affect the outcome of the Presidential election. As a result, there is not a sufficient basis of support for the request. Therefore, granting the manual recount request would be arbitrary and capricious under the circumstances presented.

Accordingly, on behalf of the Miami-Dade Republican Party, I respectfully submit that the Canvassing Board should deny the request for manual recount submitted by the Miami-Dade Democratic Party.

Mary Ellen Miller
Mary Ellen Miller
Chairman
Republican Party of Miami-Dade County



T R A N S A C T I O N R E P O R T

Nov-12-00 Sun 12:39 PM

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