No. _____

In The

Supreme Court of the United States

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

v.

MICHAEL MCDERMOTT, ET AL., *Respondents*.

_____

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

_____

Appendix to Petition for a Writ of Certiorari

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-15985

D.C. Docket No. 00-01510-CV-ORL.

ROBERT C. TOUCHSTON,
DEBORAH SHEPPERD, ET AL.,

Plaintiffs-Appellants,

versus

MICHAEL MCDERMOTT, in his official capacity
as a member of the County Canvassing Board
of Volusia County,
ANN MCFALL, in her official capacity
as a member of the County Canvassing Board
of Volusia County, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for

the Middle District of Florida.

(December 6, 2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The district court's denial of a preliminary injunction is affirmed for the reasons set forth in Siegel v. LePore, No. 00-15981 (11th Cir. Dec. 6, 2000).

AFFIRMED.

TJOFLAT, Circuit Judge, dissenting, in which BIRCH and DUBINA, Circuit Judges, join, and in which CARNES, Circuit Judge, joins as to Part V.

Following the November 7, 2000 general election, the Florida Supreme Court handed down a decision in *Palm Beach County Canvassing Bd. v. Harris,* Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), *vacated by Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d___ (December 4, 2000), that changed the standards for counting votes and certifying vote totals in the race for President and Vice President of the United States. Specifically, the supreme court gave its imprimatur to a scheme under which a political party could obtain a manual recount of votes in select counties. By changing the "rules of the game" after it was played, the supreme court debased the votes of thousands of Florida voters and denied them the equal protection of the laws guaranteed by the Fourteenth Amendment.

In this case, brought by voters of Brevard County, Florida, a United States district judge refused to enter a preliminary injunction enjoining the manual counting of votes in four counties selected by the Florida Democratic Party. The voters appealed. Now, three weeks later, this court affirms the district judge's ruling.

Plaintiffs may return to the district court tomorrow and ask for a ruling on the merits of their claims. If they do so and the district court rules, which is likely given the obvious need for immediate and decisive action, the case will return to this court and the decision that some are reluctant to make today will have to be made.

I dissent because, in my view, plaintiffs have established a case of serious constitutional deprivation. Contrary to the

majority's view that the record needs further factual development, the pertinent facts are well known and uncontested. "We cannot as judges be ignorant of that which is common knowledge to all men." *Sherrer v. Sherrer*, 334 U.S. 343, 366, 68 S.Ct. 1087, 1102, 92 L. Ed. 1429 (1948). The "man on the street" is well aware of the mischief the Florida Supreme Court's *Harris* decision has wrought. As I explain below, further proceedings in the district court are unnecessary. Plaintiffs' constitutional injuries are real; they increase in magnitude daily. We should delay no further.

I.

A.

1.

The outcome of the national presidential election, conducted November 7, 2000, turns upon the results in Florida, for neither the Republican ticket of Governor George W. Bush and his running-mate Secretary Dick Cheney nor the Democratic ticket of Vice President Al Gore and his running-mate Senator Joseph Lieberman has enough electoral votes to win the election without the twenty-five electoral votes from Florida.[1] The outcome of the Florida election has been hotly contested because the results are

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[1]A candidate must receive a majority of those electors entitled to vote. U.S. Const., Art. II, § 1 ("The Person having the greatest Number of Votes [of electors] shall be the President, if such Number be a Majority of the whole Number of Electors appointed."). Assuming all of the electors vote in this presidential election, a candidate will need at least 270 electoral votes to win the election. Without Florida's 25 electoral votes, the Democratic ticket has 255 electors pledged to vote for its ticket and the Republican ticket has 246 electors.

Although the results are not final in New Mexico and Oregon, the number of electors in these two states is insufficient to give either the candidate the election - even if one candidate wins both states. New Mexico has five electoral votes; Oregon has seven electoral votes.

so close.

The initial count of the November 7 vote, as reported by the Division of Elections of the State of Florida, revealed that the votes for the Republican ticket totaled 2,909,135 and that the votes for the Democratic ticket totaled 2,907,351.[2] Other candidates on the presidential ballot received a combined total of 133,583 votes. The margin of difference between the Republican and Democratic tickets was 1784 votes, or 0.0299% of the total votes cast in Florida.

Florida law requires an automatic recount in all races where, as here, the final differential between two candidates is 0.5% or less. Fla. Stat. § 102.141(4). This recount was conducted in all 67 Florida counties beginning on November 8, 2000; certifications to the Department of State were completed by November 14.[3] The results of this automatic recount altered the margin between the Republican ticket and the Democratic ticket. The difference between the parties after the automatic recount (but still before the overseas absentee votes were counted) was a mere 300 votes; the Republican ticket received 2,910,492 votes and the Democratic ticket received 2,910,192 votes.

On November 18, the overseas absentee ballots were counted and certified to the Department of State by the counties. The inclusion of these ballots increased the lead for the Republican

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[2]These numbers did not include vote totals received from overseas. Florida law permits its residents who are currently located overseas to have their ballots counted if the ballots arrive in Florida within ten days of the date of election provided the ballot is either "postmarked or signed and dated" no later than the date of election. Fl. Admin. Code Ann. r. 1S-2.013(2), (7).

[3]Volusia County finished a manual recount in time to submit its totals to the Secretary of State before the deadline on November 14. Thus, the November 14 vote totals included manually recounted ballots from Volusia County.

ticket to 930 votes.[4] Finally, following an order by the Florida Supreme Court on November 21,[5] all manual recounts that were completed and submitted to the Elections Canvassing Commission[6] by 5:00 P.M. on November 26 were added to final vote totals. The evening of November 26, the Elections Canvassing Commission certified the vote total of Florida in the presidential race. That certification stated that Governor Bush received 2,912,790 votes and Vice President Gore received 2,912,253 votes - a difference of 537 votes.[7]

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[4]The Republican ticket received 2,911,872 votes and the Democratic ticket received 2,910,942.

[5]I recognize that the United States Supreme Court has subsequently vacated the decision of the Florida Supreme Court and remanded the case for further proceedings. See Bush v. Palm Beach County Canvassing Bd., No. 00-836, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (December 4, 2000). It is unclear what effect the decision of the United States Supreme Court has on the certification of votes. However, as discussed infra II, I believe that the Florida Supreme Court's initial decision provides solid evidence of the manner in which Florida's statutory election system operates.

[6]The Elections Canvassing Commission consists of the Governor, the Secretary of State, and the Director of the Division of Elections. Fla. Stat. § 102.111(1). In the current dispute over the presidential election, the Governor of Florida, Jeb Bush, has recused himself from the Elections Canvassing Commission because the Republican candidate for President, George W. Bush, is the brother of the Florida Governor. The Florida Governor has appointed the Agriculture Commissioner, Bob Crawford, as his replacement on the State Elections Canvassing Commission.

[7] Palm Beach County did not complete its recount by the 5:00 deadline, so the Secretary of State did not include in the final certification any of the votes gained in that county's manual recount. Further, Miami-Dade County determined that it could not complete its manual recount by the 5:00 deadline, so the November 26 certified vote total does not include ballots added by a manual recount in that county. Broward County completed its manual recount by the deadline. Thus, the November 26 vote certification included manual recounts from Broward County and from Volusia County (as noted supra note 3).

2.

The Florida statutory election system contemplates mixed control between local and state officials. The Secretary of State is the chief election officer of the state, Fla. Stat. § 97.012(1), but the actual conducting of elections takes place in each of the various counties of Florida under the auspices of the county supervisor of elections.[8] County canvassing boards are responsible for counting the votes given to each candidate, Fla. Stat. § 102.141, and they may, *sua sponte*, order mechanical recounts "if there is a discrepancy which could affect the outcome of an election." Fla. Stat. § 102.166(3)(c). After the county canvassing board certifies the votes, the county results in any race involving a state or federal office are forwarded to the Department of State.[9]

The November 26 certified vote total also included 288 overseas absentee votes that were not included in the November 18 certification. Of these 288 votes, 195 went to Governor Bush, 86 went to Vice President Gore, and 7 went to other candidates.

[8]The county supervisor of elections is an elected official with a four-year term, according to statute. Fla. Stat. § 98.015(1). Each county supervisor employs deputy supervisors. Fla. Stat. § 98.015(8). Additionally, each county has a canvassing board, which typically consists of the supervisor of elections, a county court judge, and the chair of the board of county commissioners. Fla. Stat. § 102.141(1).

[9] County canvassing boards are required to file a report on the "conduct of the election" with the Division of Elections at the same time that the results of an election are certified to the Department of State.

> The report shall contain information relating to any problems incurred as a result of equipment malfunctions either at the precinct level or at a counting location, any difficulties or unusual circumstances encountered by an election board or the canvassing board, and any other additional information which the canvassing board feels should be made a part of the official election record.

Fla. Stat. § 102.111(1); Fla. Stat. § 102.112. After all the counties have certified election returns to the Department of State, the Elections Canvassing Commission has the power to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

Florida Statute section 102.166(4)(a)-(b) authorizes a candidate or his political party - but not a voter - to request a county canvassing board to conduct a "manual recount," provided that the request is made "prior to the time the canvassing board certifies the [election] results . . . or within 72 hours after midnight of the date the election was held, whichever occurs later." When presented with a manual recount request, the canvassing board has unrestricted discretion to grant or deny a sample manual recount of three precincts. Fla. Stat. § 102.166(4)(c)-(d); *see Broward County Canvassing Bd. v. Hogan,* 607 So. 2d 508, 510 (Fla. 4th DCA 1992) ("The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board."). If the board so authorizes, the candidate chooses the three precincts to sample. Then:

> If the manual recount [of the three precincts] indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

Fla. Stat. § 102.141(6).

Fl. Stat. § 102.166(5).

3.

Unsatisfied with the results of the initial vote count, the Florida Democratic Party, pursuant to Fla. Stat. § 102.166(4)(a), requested manual recounts in four selected counties: Broward, Miami-Dade, Palm Beach, and Volusia. These requests were made on November 9. Voter registration in these four counties is heavily Democratic, and the Democratic ticket carried them by a substantial margin in both the initial vote counts and automatic recounts. No candidate or political party requested manual recounts of the presidential race in any of the other sixty-three counties. The decisions of the county canvassing boards to conduct full manual recounts in the four counties requested by candidate or political parties pursuant give rise to this lawsuit and other litigation concerning the Presidential election in Florida.

B.

1.

On November 13, 2000, Robert C. Touchston, Deborah Shepperd, and Diana L. Touchston commenced this action by filing a verified complaint and moving for a preliminary injunction in the District Court for the Middle District of Florida. Plaintiffs are registered voters in Brevard County, Florida, who voted in the general election on November 7; they attempted to cast their ballots for the Republican ticket of George W. Bush and Dick Cheney for President and Vice-President of the United States.[10] Plaintiffs sued the Florida Secretary of State, members of

[10] We note that plaintiffs "attempted" to cast their ballots because, as explained infra, it is impossible for a voter to know whether his or her vote was properly cast and duly tabulated. Plaintiffs allege that they voted for the

the Elections Canvassing Commission, and the county canvassing boards of Volusia, Palm Beach, Broward, and Miami-Dade Counties.[11] Plaintiffs brought this action pursuant to 28 U.S.C. § 1983, claiming violations of the Fourteenth Amendment. Section 1983 provides a remedy for the deprivation of rights "secured by the Constitution and laws" of the United States by persons acting under color of state law. In their complaint, plaintiffs allege that the manual recounting of ballots in some counties but not others unconstitutionally debases the votes cast in the latter counties, and in particular the votes cast by plaintiffs and those similarly situated. Plaintiffs also allege that the lack of standards to guide the canvassing boards in determining "the voter's intent," Fla. Stat. § 102.166(7)(b), in a manual recount unconstitutionally debases votes by permitting the canvassing boards to speculate as to a voter's intent and thereby erroneously conclude that a voter cast a ballot in behalf of a particular candidate. Plaintiffs seek a judicial declaration that Fla. Stat. § 102.166(4) is unconstitutional (both on its face and as applied) because it debases their votes and the votes of those similarly situated and thereby denies them rights guaranteed by the Fourteenth Amendment.

Plaintiffs therefore asked the district court to enjoin the county defendants from "certifying any vote tallies that include the results of any manual recount" in Broward, Miami-Dade, Palm Beach,

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Republican ticket, but it is conceivable that plaintiffs actually did no more than attempt to vote for the Republican ticket due to, among other possibilities, stray marks on the voting ballot.

[11] After the complaint was filed, Governor Bush moved the district court for leave to intervene as a defendant. The district court granted his motion on November 16. After this appeal was taken, the Florida Democratic Party moved this court to intervene on November 15. We granted the motion on November 29. The Attorney General of Florida moved this court to intervene on December 1. We granted the motion.

and Volusia Counties; to enjoin the state defendants from "receiving" and thereafter "certifying the results of the election for electors" for the office president and vice-president based, in whole or in part, on the results of any manual recount; and to order the state defendants to certify the results of the election on November 17, 2000, based on county-certified results that did not include any manual recounts.[12] On appeal, this court ordered that the case be heard initially *en banc*, pursuant to Fed. R. App. Proc. 35. *See Hunter v. United States*, 101 F.3d 1565, 1568 (11th Cir. 1996) (en banc); *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). Plaintiffs asked this court for an injunction pending appeal, which, if granted, would have enjoined the county defendants from conducting manual recounts and/or enjoined the state defendants from certifying the results of the Presidential election that contained any manual recounts. We denied the motion without prejudice. *Touchston v. McDermott*, ___ F.3d ___, No. 00-15985 (11th Cir. slip op., Nov. 17, 2000).

2.

Plaintiffs appeal from the district court's order denying a preliminary injunction. While this appeal has been pending, several things have transpired which have materially altered the status of the case.

First, the Florida Supreme Court, in consolidated cases in

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[12] On filing their verified complaint, plaintiffs moved the district court to enter a preliminary injunction granting the above relief. On November 14, after hearing argument from counsel, the district court denied plaintiffs' motion. Touchston v. McDermott, ___ F. Supp. 2d ___, No. 00-01510-CV (M.D. Fla. slip op., Nov. 14, 2000). When the hearing began, the district court announced that it would rule on plaintiffs' motion without entertaining any evidence. The district court also denied plaintiffs' oral motion for an injunction pending appeal. After these denials, plaintiffs filed a notice of appeal with this court on November 14.

which the plaintiffs in the case before us were not parties, has interpreted Florida's statutory election system to permit selective manual recounting in counties chosen by a candidate or his political party. *Palm Beach County Canvassing Bd. v. Harris*, Nos. SC00-2346, SC00-2348, & SC00-2349 (Fla. Nov. 21, 2000), *vacated by Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (Dec. 4, 2000). In effect, the Florida Supreme Court removed any doubt that may have existed as to whether Florida's vote counting scheme operates as the plaintiffs allege in their verified complaint. Given the court's ruling, plaintiffs' constitutional claims now present pure questions of law.[13]

Second, a series of events has highlighted the current and future constitutional injury to the plaintiffs and those similarly situated. Already, Volusia County and Broward County have included the results of manual recounts of ballots, based on requests by the Florida Democratic Party, in the November 26 official certification by the Elections Canvassing Commission. These manual recounts proceeded under the standardless vote counting scheme at issue and thus necessarily included some

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[13]The fact that the United States Supreme Court vacated and remanded the decision of the Florida Supreme Court is of no moment. The Florida Supreme Court's interpretation of Florida's statutory scheme was not questioned by the United States Supreme Court. Bush v. Palm Beach County Canvassing Bd., No. 00-836, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (Dec. 4, 2000). Instead, the United States Supreme Court vacated the Florida Supreme Court's judgment because it was unsure whether the judgment was based solely on issues of state law. Because of this ambiguity, the United States Supreme Court simply requested the Florida Supreme Court to clarify the underlying rationale for their interpretation - not to clarify their interpretation itself. Id. That the judgment was vacated does not alter the fact that the election for president in Florida has been conducted pursuant to the Florida Supreme Court's decision in Harris.

"votes" that were not detected by the vote tabulating machines but were counted because county elections officials determined the "intent" by examining the ballot. [14]Plaintiffs languish under the very real possibility of further injury because of the "contest" suit brought by Vice President Gore in Leon County pursuant to Fla. Stat. § 102.168. *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. Nov. 27, 2000). In that litigation, Gore claims that legal votes (which his complaint calls "indentations" in punch card ballots) have not been counted in Miami-Dade and Palm Beach counties. The lawsuit seeks a judicially-mandated manual recount of ballots in these counties and asks that new totals, which would include indented ballots, be added to the certified total. Although the trial court ruled against the need for further recounts, an appeal has already been taken and the matter is pending with the Florida Supreme Court. *Gore v. Harris*, No. SC00-2431 (Fla.) (filed Dec. 5, 2000). Thus, the potential for further injury to the plaintiffs and those similarly situated is very real.

In light of these events and the fact that this appeal presents pure questions of law, plaintiffs have moved this court to consider the merits of their claims and to direct the entry of an injunction.

In the ensuing analysis, the question arises whether the Florida Supreme Court's decision in *Harris* announced a new vote counting scheme for statewide elections in Florida or whether it merely interpreted the pre-existing vote counting model. Either answer to this question presents a pure question of constitutional law. In Part III, I address the question from the starting point that the Florida Supreme Court announced a new vote counting model for Florida. In Part IV, I address the question from the other starting point - that the Florida Supreme Court merely clarified

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[14]Volusia County produced 98 net additional votes for Vice President Gore. Broward County produced 567 net additional votes for Vice President Gore.

the pre-existing vote counting model. Before I embark on the analysis, however, I discuss the competing "models" that have been presented as properly implementing Florida's statutory election system is appropriate and instructive. Part II undertakes this discussion.

II.

In *Palm Beach County Canvassing Board v. Harris*, Nos. SC00-2346, SC00-2348, SC00-2349 (Fla. Nov. 21, 2000), *vacated by Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (Dec. 4, 2000), the Florida Supreme Court was faced with conflicting interpretations of the state's election statutes. The Florida Secretary of State, as appellee before the supreme court, interpreted the statutes as having created one vote counting model, and the Florida Attorney General, as intervenor-appellant, interpreted the statutes as embodying a different model. In Harris, the court rejected the Secretary of State's interpretation in favor of the interpretation advocated by the Attorney General.

In order to understand the court's decision in Harris, one must consider two things. First, one has to understand how Florida voters cast their ballots in a general election, including the one held on November 7. Second, one must compare the model for counting votes advocated by the Secretary of State with the model that emerged from the Florida Supreme Court's opinion.

A.

In the November 7 election, voters in 65 Florida counties cast

their votes on paper ballots read by vote tabulating machines.[15] For ease of discussion, I describe the voting process as it occurs in counties that use punch card ballots.[16] A voter can return a punch card ballot in one of three conditions: (1) the voter may take a ballot but choose not to vote in any election or referendum, so that the ballot contains no punched holes when returned; (2) the voter may vote in some but not all contests, so that the ballot contains punched holes in some races when returned; or (3) the voter may vote in all contests, so that the ballot is returned with a hole punched for every race. If a voter returns the ballot with holes punched in some contests but not others, the ballot is said to

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[15] Of the remaining two counties, one county uses mechanical lever voting machines and one county counts all votes by hand. Mechanical lever voting machines record votes on a counter wheel when voters pull a lever after making their voting choices, but no paper is produced.

[16] Twenty-four counties use punch card voting systems. A punch card ballot is a paper card bearing perforated punching holes that the voter inserts into a jig labeled with the candidates' names. When properly inserted into the jig, the perforated punching holes on the card are aligned with holes in the jig next to the candidates' names. To vote, the voter pushes a blunt-tipped stylus through the hole in the jig next to the desired candidate's name, punching out the small, perforated bit of the card (the "chad") that is aligned with the hole in the jig. Once a voter has voted in all of the races for which he cares to vote, he deposits the ballot into the ballot box.

Forty-one counties use marksense voting systems. In counties that use marksense technology, voters record their votes by using a pen or pencil to fill in geometric figures (circles, ovals, squares, or rectangles) next to the candidates or issues for which they wish to vote. Marksense vote tabulating machines use optical scanning technology to detect the darkened figures and count the votes accordingly.

I recognize that Brevard County, the county in which all of the plaintiffs before us reside, uses the marksense technology in its vote tabulating machines. Nevertheless, the same difficulties that arise in the marking and counting of votes on punch card ballots and equipment also arise with the marksense ballots and equipment.

be "undervoted."[17]

To count the votes, the ballots are fed into a punch card reading machine (the "vote tabulating machine") programmed to tabulate votes based on the location of holes punched. This machine count is conducted in every election, and, in most elections, is the only count. Recognizing that machines are not infallible, however, the Florida legislature created a failsafe manual recount provision that permits a candidate or political party to request a manual recount to verify the machine tabulation.[18] While the process for counting votes is fixed by

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[17]Some voters also return "overvoted" ballots which have multiple votes cast in a single contest where only one vote is appropriate.

[18]The Florida statutory election system provides for both an automatic recount of votes in certain close races and for candidate and voter protest of the election returns. Neither of these provisions, however, affects the baseline system. The automatic recount provision requires a recount of all votes in a race decided after the first count by one-half of one percent or less. Fla. Stat. § 102.141(4). Since this recount is a non-discretionary repeat of the initial count, I deem it to be nothing more than a re-do of the first machine count. The protest provision found in section 102.166(1)-(2) permits any candidate or voter to file a protest with the appropriate canvassing board, but does not provide any process or remedy for such a protest. Therefore this protest provision is, in my view, essentially meaningless.

Further, after the last county canvassing board has certified its election results, an unsuccessful candidate, an elector qualified to vote in the election, or any taxpayer may bring a judicial contest of the election. Fla. Stat. § 102.168. The contest complaint must be filed within ten days after the last county canvassing board certifies the results of the election being contested, Fla. Stat. § 102.168(2), and must set forth the grounds on which the contest is made, Fla. Stat. § 102.168(3). Section 102.168(3)(c) establishes that a valid ground for contesting an election includes, "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." As a remedy, the circuit judge is permitted to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, . . . to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." Fla Stat. § 102.168(8).

statute, there is room for interpretation in its implementation. Perhaps the most important part of the statutory system left open to interpretation is what constitutes a valid vote. The Florida Supreme Court noted in *Harris* that the ultimate goal in conducting an election is "to reach the result that reflects the will of the voters." *Harris*, at 9. The election statutes, however, do not provide guidelines outlining how the will of individual voters should be determined from their ballots. It is this lack of guidance that gave rise to the differing interpretations propounded by the Secretary of State and the Attorney General. According to the Secretary, a voter's will is only adequately expressed by properly casting a vote such that the machine can read it. Under the Attorney General's interpretation, with which the supreme court agreed, a vote is valid if it demonstrates the voter's intent in any ascertainable manner, whether read by the machine or not. To understand the model that emerged from Harris, one must first examine the model as understood by the Secretary of State.

B.

1.

The Secretary's vote counting model, which was in place prior to the supreme court's decision, applied a fixed, objective standard for determining voter intent - voters were required to indicate their voting intent unequivocally by marking their ballots in such a way that the vote tabulating machine, with its pre-programmed evaluation standard, could read it. I refer to this vote counting model as the "machine model," because it counts as valid only those votes that the vote tabulating machine can read and record. The machine model thus relies on an objective tabulating machine that admits of no discretion to count votes - if a vote is properly

cast according to the instructions given to the voter,[19] the machine will count it.[20]

Under the machine model, the purpose of the manual recount provision (the failsafe in the statutory election system) is to allow a candidate or his party to request human verification that the vote tabulating machine functioned properly. This construction of the manual recount provision explains why a canvassing board is given three alternatives in section 102.166(5) in the event that it grants a manual recount request and the three-precinct sample manual recount reveals "an error in the vote tabulation."[21] The first two options permitted under section 102.166(5) do not require a complete manual recount of votes county-wide, but rather involve making repairs to the machine tabulating system so

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[19]Instructions to voters in Palm Beach County, a county that uses punch card technology, read: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." The instructions in Broward County, also a punch card county, read: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice."

[20] The Florida statutory election system includes a provision for the counting of properly cast votes that are not detected by the vote tabulating machine. If the vote tabulating machine does not record a properly cast vote for one or more contests on the ballot because the ballot was damaged or defective, Florida law requires that vote to be counted and added to the machine tabulation of votes. Fla. Stat. § 101.5614(5). If improperly marked ballots (such as punch cards bearing indented, but not detached, chads) are regarded as damaged or defective, then the initial ballot count in each county would not be complete until every ballot the tabulating machine reads as undervoted (including ballots read as totally blank) was counted in accordance with section 101.5614(5). The canvassing boards do not treat improperly marked ballots as damaged or defective when they perform their initial machine counts; they rely exclusively on the machine tabulation of votes.

[21]I describe these three statutory alternatives in supra Part I.A.2.

that it properly counts the votes. Only the third option available to the canvassing board permits a county-wide manual recount of ballots. The availability of these alternative solutions to correct an error in vote tabulation suggests that a full manual recount is appropriate only when the machine tabulating system has failed irreparably.

The Secretary of State, pursuant to her authority under section 97.012(1), interpreted the statutory system as the machine model. Nevertheless, the Florida Supreme Court, in its November 21 decision, rejected the machine model and, in effect, propounded a different model requiring a fluid, subjective test for ascertaining voter intent when counting votes.

2.

The Florida Supreme Court ruled that a ballot marked improperly, so that a vote tabulating machine reads it as undervoted, must nevertheless be examined for any evidence of voter intent that might be construed as a vote.[22] This conflicts with the Secretary of State's position that voter intent is sufficiently discerned by properly functioning vote counting machines.[23] According to the supreme court, ballots must be inspected by hand because vote tabulating machines do not sufficiently read

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[22]The Florida Supreme Court stated that "'error in the vote tabulation' includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery." Harris, at 13.

[23]The Florida Supreme Court acknowledged that it was discarding the machine model supported by the Division of Elections, ruling that: "Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. . . . Thus, we find that the Division [of Election's] opinion . . . is contrary to the plain language of the statute." Id. at 14.

voter intent.[24] The vote counting model that emerged from the supreme court's decision requires the counting of votes improperly cast (according to the Secretary's model) as valid votes if, applying a subjective standard, voter intent can be ascertained by manual inspection of the ballot.

While the court endorsed counting votes by looking at each race on a ballot to determine whether the voter intended to cast a vote in that race, the court did not provide uniform standards for counties to follow in determining voter intent.[25] The court left to each county canvassing board that conducts a manual recount the unfettered discretion to set its own standards. Under this standardless system, a mark on a punch card ballot that is deemed a sufficient showing of intent to be counted as a vote in one county might be deemed a non-vote by another county.[26]

Furthermore, although the court held that vote tabulating machines do [not necessarily discern valid expressions of voter intent, it did not order that all 65 counties that use such machines

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[24]The Court concluded that there has been a vote tabulation error if there is "a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count." Id. at 13.

[25]For example, the court did not require that the canvassing boards consider such circumstantial evidence as the instructions to the voter, or the physical appearance of the remainder of the ballot (including whether the voter clearly marked his choices for candidates in other races).

[26]For instance, Florida Circuit Court Judge Jorge LaBarga, in a Declaratory Order, stated that:

> The Palm Beach Canvassing Commission has the discretion to utilize whatever methodology it deems proper to determine the true intention of the voter and it should not be restricted in the task. To that end, the present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law.

Florida Democratic Party v. Palm Beach County Canvassing Bd..

begin manually examining all undervoted[27] ballots for any sign of voter intent. Rather, the court left the candidates or their parties with the option of requesting a count of undervoted ballots by invoking the manual recount statute in any one or more counties.

Accordingly, applying *Harris* to my punch card example, indentations on punch card ballots - which I call "dimple votes" - may be counted as valid votes in selected counties.[28] The necessary implication of this model, given that the machines are not programmed to count dimples, is that a vote tabulating machine is merely a *screening device* - a method of determining the intent of voters who properly punched their ballots - that is inadequate as a tabulating device because it fails to count all valid votes.

If the vote tabulating machines serve merely as a screening device in counting valid votes, then the legislature, in enacting sections 102.166(4)-(7), inaptly refers to the process of manually counting dimple votes as a "recount." In fact, a county's *initial* vote count (including the automatic recount) is not complete until all ballots containing non-votes in any race have been examined manually. Nevertheless, section 102.166(4) provides that such a manual examination of ballots will be conducted only at a candidate or political party's request, and only in those specific

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[27]I recognize the ballots rejected the tabulating machines as overvoted may also be deemed to contain valid expressions of voter intent on manual inspection. While I restrict my explication of the vote counting model that emerged from Harris to undervoted ballots, the model, and the concern it raises, are equally applicable to the attribution of valid voter intent to overvoted ballots.

[28]In saying "dimple votes," I am referring to any mark on either a punch card or marksense ballot that was not made according to the directions for casting a proper vote. Such improper markings are not read by the vote tabulating machines, but may be construed by some people as giving insight into the voter's intent upon manual inspection.

counties chosen by the candidate or political party.[29] In other words, while *Harris* presumes that vote tabulating machines will not count all valid votes, it precludes the counting of remaining votes except in those counties selected by a candidate or his party. Under this "selective dimple model,"[30] dimple votes cast in a county where no "recount" is requested are simply not counted.

Under the selective dimple model, the standard of evaluating voter intent (i.e., what constitutes a valid vote) in a manual recount will differ from the standard applied by the machines in the initial count. The model, therefore, lends itself to several undesirable results.[31]

Since the selective dimple model leaves to the candidates the decision of whether and where dimple votes should be included in the final vote tally, the system encourages candidates to cherry-pick - to carefully select the counties in which to request that ballots be manually examined for dimple votes. Under the selective dimple model, a candidate will choose the counties based on: (1) the percentage of the total machine-tabulated vote received; (2) the size of the county, measured by the total number of ballots cast in the election; and (3) the political makeup of the

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[29]Fl. Stat. § 102.166(4) ("Any candidate whose name appeared on the ballot [or his political party] . . . may file a written request with the county canvassing board for a manual recount.").

[30]I refer to the vote counting model that emerged from the Florida Supreme Court's decision in Harris as the selective dimple model because the model contemplates that dimple votes will be counted only in those counties selected by a candidate or his political party for a manual recount.

[31]The undesirable implications of the selective dimple model, discussed in infra Part IV, apply only in statewide or multi-county elections.

canvassing board in the county.[32] A candidate will want dimple votes counted in counties where he captured a greater proportion of the machine tabulated vote than did his opponent, because the candidate can expect that he will likely take a similar proportion of the dimple votes. [33]A candidate will favor counties where the most ballots were cast because those counties will have the most dimple votes.[34] The political composition of the county canvassing board will be critical to a candidate in making selective manual count requests for two reasons. First, the election statutes give the canvassing board unfettered discretion to honor a candidate's request to manually examine ballots.[35] Second, if the canvassing board grants the request, the election system affords the canvassing board unfettered discretion to set the standards for determining which markings on a ballot demonstrate voter intent

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[32]In most Florida counties, all members of the canvassing board will be elected officials.

[33] In reality, the candidate will probably receive a higher proportion of the vote in a manual count because the county canvassing board has unfettered discretion as to what constitutes sufficient voter intent to amount to a vote. Since candidates are most likely to request and be granted manual recounts in counties where the canvassing board is dominated by political allies, the canvassing board will likely lean, when intent is difficult to discern, to finding a voter intended to vote for the candidate who requested the count.

[34]For example, assume that five percent of voters statewide cast dimple votes. In a county where 1,000 ballots were cast, a candidate will likely have only 50 ballots from which he can hope to pick up votes if he requests that dimple votes be counted. In a county where 10,000 total ballots were cast, a candidate will likely have 500 ballots from which he can hope to pick up additional votes by requesting that dimple votes be counted.

[35] Fla. Stat. § 102.166(4)(c) (providing no standards for determining whether a candidate's request for a manual recount should be granted, but rather stating simply that "the county canvassing board may authorize a manual recount").

sufficient to constitute a vote.[36] Thus, a candidate is more likely to have his request for a manual count granted, and to receive favorable interpretations of voter intent, in counties where the candidate shares a political party affiliation with the majority of the canvassing board.

As discussed above, section 102.166(5) allows the county canvassing board to conduct a recount[37] only if the results of the recount "could affect the outcome of the election." Seemingly, the candidate who received the most votes state-wide according to the machine tabulation could never demonstrate that a manual recount of any county could affect the outcome of the election,[38] since adding dimple votes would only serve to increase that candidate's margin of victory. Thus, it is doubtful that a county canvassing board would, in its discretion, grant such a candidate's request for the sample manual recount. Arguably, however, granting the candidate's request could affect the outcome of the election if his opponent is granted full recounts in other counties, and thereby gains a significant number of votes. Given that the canvassing board has limited time to certify the election results, and that one

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[36]Section 102.166(7) describes the procedures to be followed in the conduct of a "manual recount" of ballots and provides simply that the canvassing board's objective in evaluating ballots is "to determine the voter's intent." Fla. Stat. § 102.166(7)(b). Evidence of intent that a canvassing board might consider in deciding whether an indentation is a vote includes the instructions given to voters on how to properly cast a vote, examination of how the voter marked the ballot in other races, and whether the other votes cast on the ballot indicate an attempt to vote party line.

[37]The board has three options in the case of an "error in the vote tabulation," including a county-wide manual recount, as discussed supra Part I.A.2.

[38]Unless, of course, the candidate chose a densely populated county in which he carried a vast minority of the machine-counted vote - a highly unlikely strategy.

board may not know whether another county will manually recount its ballots, I question exactly what remains to guide a canvassing board in its decision to grant or deny a manual count.

The selective dimple model also encourages candidates to manipulate the timing of manual recount requests, so as to use the statutory limitations period to foreclose his opponent from making his own requests for manual counts. Since the manual recount statute cuts off a candidate's right to request a manual examination of ballots, a candidate who stays his request until the midnight hour may pin his opponent against the statutory deadline.[39] Thus, by gaming the timing and location of recount requests under the selective dimple model, a candidate can maximize the count of dimple votes cast for him, while minimizing the number of dimple votes counted for his opponent.

C.

Prior to the supreme court's decision in *Harris*, the Division of Elections interpreted the statutory election system as creating a machine model. The decision, however, indicated that the selective dimple model is the proper vote counting scheme under the statutory election system. In Part III, therefore, I discuss whether the supreme court's decision constituted a post-election change in Florida's vote counting model, in derogation of the principles set forth in *Roe v. Alabama*, 68 F.3d 404 (11th Cir.

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[39]Implicit in the selective dimple model is the propensity for candidate gaming - treating some voters like pawns in a chess match. Each candidate will try to maximize the number of dimple votes counted for him, while minimizing the number of dimple votes gained by his opponent. To that end, a candidate will gladly sacrifice the dimple votes of supporters who cast those votes in counties that the machine tabulation indicates were carried by his opponent. Those dimple votes, and the voters who cast them, are the pawns - they are throwaways - that the candidate will sacrifice to advance his effort to have dimple votes counted only in select, favorable counties where he stands to achieve a net gain if dimple votes are counted.

1995) ("*Roe III*"). In Part IV, I consider whether the selective dimple model that emerged from *Harris* infringes upon plaintiffs' rights in violation of the Fourteenth Amendment.

III.

Plaintiffs contend that *Harris* materially altered Florida's vote counting model after the November 7 election. They argue that retroactively validating defective votes by judicial decree violates the rule established in *Roe*.

While federal courts generally do not intervene in "garden variety election disputes," our involvement is appropriate and necessary when "the election process itself reaches the point of patent and fundamental unfairness" indicating a violation of due process for which relief under 42 U.S.C. § 1983 is appropriate. *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986) (internal citations omitted). The Supreme Court has held that "the right of suffrage can be 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, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d. 506 (1964).

In *Roe*, we were presented with allegations that a post-election judicial interpretation of a state's election laws required the inclusion of theretofore invalid votes, which amounted to stuffing the ballot box. See *Roe I*, 43 F.3d at 581. An Alabama statute required a person voting by absentee ballot to execute an affidavit in the presence of a "notary public or other officer authorized to acknowledge oaths or two witnesses 18 years of age or older." *Id.* at 577, citing Ala. Code § 17-10-7 (1980). During a general election held on November 8, 1994, "between 1000 and 2000 absentee voters failed to properly complete their affidavits, either by failing to have their signatures notarized or by failing to have them witnessed by two people." *Id.* at 578. Pursuant to the applicable statute, those ballots were not counted - but were set

aside as contested ballots. The election results in one race were particularly close - informal estimates placed the leading candidates "a mere 200 to 300 votes apart without counting the contested absentee ballots." *Id.* Two absentee voters, on behalf of themselves and others similarly situated, filed suit in state court seeking an order that the contested absentee ballots be counted. The court ordered that certain of the absentee ballots be counted, stating that "*absentee ballots may not be excluded from being counted because of a lack of notarization or a lack of witnesses.*" *Id.* (emphasis in original). The court further ordered that the Secretary of State refrain from certifying the vote totals until the new count, including the contested absentee ballots, was forwarded to him. *Id.*

Larry Roe, on behalf of himself and other similarly situated Alabama voters, brought suit in the United States District Court for the Southern District of Alabama alleging that the counting of absentee ballots, in contravention of the state's past practice, violated the Fourteenth Amendment. The district court agreed, finding that "the past practice of the Alabama election officials prior to [the] general election has been to refrain from counting any absentee ballot that did not include notarization or the signatures of two qualified witnesses," that "the past practice of the Secretary of [the] State of Alabama has been to certify Alabama election results on the basis of vote counts that included absentee votes cast only by those voters who included affidavits with either notarization or the signatures of two qualified witnesses," and that the circuit court's order changed this past practice. *Id.* at 579. The district court ordered that the contested ballots be preserved and protected; that the Secretary refrain from certifying election results based on a vote count that included the contested absentee ballots; that Alabama's sixty-seven county election officials forward vote totals to the Secretary without counting the contested absentee ballots; and that the Secretary, upon receipt of those vote totals, certify the election results. *Id.*

Defendants appealed, and we certified the question to the Alabama Supreme Court: "WHETHER ABSENTEE BALLOTS THAT, ON THE ACCOMPANYING AFFIDAVIT ENVELOPE, FAIL TO HAVE TWO WITNESSES AND LACK PROPER NOTARIZATION . . . MEET THE REQUIREMENTS OF ALABAMA LAW . . . TO BE COUNTED IN THE NOVEMBER 8, 1994 GENERAL ELECTION." *Roe I*, 43 F.3d at 583. The Alabama Supreme Court answered in the affirmative, stating that the signature of the voter alone, if accompanied by the voter's address and reason for voting absentee, satisfies the statute's requirements. *Roe v. Mobile County Appointment Bd.*, No. 1940461 (Ala. March 14, 1995). After receiving the supreme court's response, we remanded the case to the district court for a determination of whether, prior to and at the time of the November 8, 1994 general election, the practice in Alabama had been to reject or, conversely, to count absentee ballots whose envelope did not include the signature of either a notary public or two witnesses. *Roe v. Alabama*, 52 F.3d 300 (11th Cir. 1995) ("*Roe II*"). The district court found, after trial of the case, that the practice in Alabama prior to the November 8, 1994 election, had been uniformly to exclude ballots not in conformity with the literal requirements of the statute. Given this finding, the district court concluded that the plaintiffs were entitled to relief, for "to include the contested ballots in the vote totals would depreciate the votes of [the plaintiff class]" in violation of the Fourteenth Amendment. *Roe III,* 68 F.3d at 407. The district court entered a permanent injunction that, among other things, directed the Secretary of State to certify the results of the elections.

Defendants again appealed, arguing that the court should have given effect to the Supreme Court of Alabama's answer to the certified question. We noted in response that "the Alabama Supreme Court, in answering our question, construed an Alabama statute; the court did not, and was not called upon to, decide whether the counting of the contested ballots cast in the . . .

election - in the face of Ala. Code § 17-10-4 and in the face of a uniform state-wide practice of excluding such ballots - infringed the [plaintiff] class' constitutional rights." *Id.* at 409. We affirmed the decision of the district court, confirming our conclusion in *Roe I* that such a post-election change in the applicable law "demonstrated fundamental unfairness." *Roe I*, 43 F.3d at 580.

As in *Roe*, the appropriate analysis in this case begins with an examination of Florida's past practice in tallying its election results. The past practice of Florida counties using machine-read ballots (whether they are optical scanning or punchcard ballots) has been to certify the machine tabulation of votes as the county's official vote count. In keeping with that practice, no counties in the November 7 election supplemented the *machine* counts with hand counts of undervoted ballots before submitting their results to the Secretary of State. If the machines were merely screeners[40] on November 7 as the selective dimple model presumes, then the election officials in each county should have examined all undervoted ballots on the night of the election. That they did not do so is evidence that either the Florida Supreme Court changed the election law, or that county election officials were shirking their duties.

The interpretations of the election statutes promulgated by Florida election officials before the state supreme court's decision are also of paramount interest. The Secretary of State is the chief election officer of Florida, and it is her responsibility to "obtain and maintain uniformity in the application, operation, and

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[40]As described in Part II.B.2, supra, under the selective dimple model the vote tabulating machine acts as a screener, recording votes that were properly cast, but does not count all valid votes.

interpretation of the election laws."[41] Fla. Stat. § 97.012(1) (2000).

Pursuant to section 106.23(2),[42] the Division of Elections, a division within the Department of State, issued three advisory opinion letters on November 13, 2000, advocating the machine model for counting votes under the statutory system. The letters were written in response to requests asking the Division to define the meaning of "error in the vote tabulation" in the statutory manual recount provision. The Division stated that "'an error in the vote tabulation' means a counting error in which the vote tabulation system fails to count . . . properly marked marksense or properly punched punchcard ballots." *Advisory Opinion Letter from L. Clayton Roberts, Director, Division of Elections, Nov. 13, 2000*. Significantly, the Division opined that the "inability of a voting system[] to read an . . . improperly punched punch card ballot . . . is not an 'error in the vote tabulation.'" *Id.* Fla. Stat. § 106.23(2).

Apparently, however, state officials could not agree about the meaning of the phrase "error in the vote tabulation." Attorney General Robert Butterworth, in a letter to the Palm Beach County Canvassing Commission, took issue with the November 13 opinion issued by the Division of Elections. He noted in his letter that "the division's opinion is wrong is several respects," and

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[41]In so doing, the Secretary of State must take steps to "provide training to all affected state agencies on the necessary procedures for proper implementation of [the election laws]." Fla. Stat. § 97.012(8) (2000).

[42]The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take.

stated that "where a ballot is so marked as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated." *Letter from Robert A. Butterworth to Hon. Charles Burton, November 14, 2000*. Insofar as Attorney General Butterworth's statement can be read to suggest that all ballots with undervoted ballots should have been examined on November 7, it is noteworthy that no county canvassing board member has, to my knowledge, been charged with neglect of duty under Fla. Stat. § 104.051 for failure to take such action. *See* Fla. Stat. § 104.051 ("Any official who willfully refuses or willfully neglects to perform his or her duties as prescribed by this election code is guilty of a misdemeanor of the first degree.").

The legislative history of the manual recount provision also indicates that it was added to ensure an accurate count of *properly* cast (as opposed to dimpled or otherwise mismarked) votes. The manual recount provision was enacted as part of the Voter Protection Act of 1989 to provide a remedy to candidates who believed the vote tabulating equipment was not working properly in a given county. The Senate Staff Analysis and Economic Impact statement on the legislation indicated that it was enacted, in part, in response to a problem in a prior election in which "an apparent software 'glitch' or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones." *Bush v. Palm Beach County Canvassing Bd.*, Pet. For Cert. Resp. of Harris, p. 13 n.10, *cert. granted* (No. 00-836).

As the evidence shows, then, *Harris* interpreted the state election system in a way that was inconsistent with previous state practice. If this was a post-election changing of the rules, rather than merely an interpretation of an ambiguous vote counting model, such a change is fundamentally unfair in three ways. First, deciding *after* the election to count votes that do not satisfy

requirements set forth *before* the election dilutes the votes of those who attended the polls and indicated their intent in accordance with the instructions.[43] This is directly analogous to the violation in *Roe*. *Cf. Roe I*, 43 F.2d at 581.

Second, to the extent that *Harris* constitutes a change in election procedures, it creates a vote dilution problem more egregious than that in *Roe*. In addition to dilution caused by counting improperly executed ballots that nevertheless express a clear intent to cast a vote, Florida voters also suffer from dilution by the inevitable counting of markings on ballots that were *not* intended as votes.[44] The wholly arbitrary standards for determin-

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[43]For the instructions at the polling places in Palm Beach County, for example, *see supra* note 19. Given these or similar instructions, it was reasonable for voters to believe that the only marking of a ballot that would be counted as a valid vote would be the complete punching and removal of a chad from the ballot. Presentation of a ballot with these instructions is analogous to the offer and acceptance in unilateral contract formation, where the offeror instructs the offeree on how to accept the offer, and only that method of acceptance creates a valid contract. The offeree knows that he has not accepted the contract if he has made any indications of intended acceptance other than strict compliance with the method specified by the offeror. Similarly, the county instructs voters how to mark their ballots to cast a vote; reasonable voters can expect that they must comply with those instructions to cast a valid vote.

[44]I note in passing that significant First Amendment concerns are raised when political speech in the form of a vote is attributed to a person who intended to refrain from speaking. See Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16, 106 S. Ct. 903, 912, 89 L. Ed. 2d 1 (1986) ("The choice to speak includes within it the choice of what not to say."). For instance, consider a voter who intended not to vote in the contest for President/Vice President on the ballot. In the process of voting in other contests, he may have inadvertently placed the stylus on the hole for the contest of President/Vice President, thereby leaving an indentation. Relying on the instructions that require the chad to be "cleanly punched . . . [with] no chips left hanging," that voter may not have requested a new ballot. The application of the selective dimple model leaves open the very real possibility that a county canvassing

ing voter intent in various counties ensure the erroneous addition of countless non-votes to a candidate's tally. This bolsters plaintiffs' claim of a *Roe*-type violation, which dilutes the votes of bona fide voters in violation of the First and Fourteenth Amendments.[45]

Third, if *Harris* changed the definition of a "valid vote" *after* the running of statutory limitations period within which a candidate could ask for a manual recount, such a change would work fundamental unfairness. By the time the court's decision was announced on November 21, the time limit in which the candidates or their parties could request manual counts had elapsed. Had the candidates known that Florida's statutory election system allowed the selective mining of votes through its manual recount provision, they might have made use of the system to request that at least some of the 180,000 ballots containing non-votes in the presidential race be examined sometime *before* November 21. The court presumably recognized this problem when it offered to extend the time period for requesting manual counts.[46] *Harris*,

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board attributes speech to this voter by misreading his indentation as a vote. Despite this possible constitutional infringement, it is impossible to determine which voter's "dimples" were counted, and which were disregarded as non-votes.

[45]In *Roe*, there was no concern that the intent of the voters who cast the contested ballots would be misconstrued; the voter's intent was unambiguous. *Roe* I, 43 F.3d at 581. Counting the contested votes in that case would have diluted valid votes solely because the invalid votes were executed improperly.

[46]n46 Notably, however, the court inquired whether the candidates would want to request a recount in other counties despite the running of the time period, and the candidates chose not to make any requests. *Harris*, Nos. SC00-2346, SC00-2348 & SC00-2349 at 40, n. 56 ("At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties.

Nos. SC00-2346, SC00-2348 & SC00-2349.

I find plaintiffs' argument that the court retroactively changed the state's vote counting model extremely persuasive. Because of past practice, interpretations of state officials prior to *Harris*, and the legislative history, I believe that the Florida Supreme Court superimposed a new model onto the state's statutory election scheme. Because of this circuit's clear precedent in *Roe*, I would hold that the Florida Supreme Court unconstitutionally changed the election system after the election had taken place. This alone is reason to reverse.

Even if I am incorrect in assessing *Harris* as a post-election change in violation of *Roe*, plaintiffs' allegations that the selective dimple model itself is constitutionally infirm warrant a full analysis.

IV.

Florida law gives every qualified voter one vote in its statewide election of presidential electors. In counting those votes under the selective dimple model, however, it employs a county unit system which works to disenfranchise voters based on where they reside. As noted in my description of the selective dimple model, voters who express their intent to vote for President in a manner undetectable by a vote tabulating machine will have their votes counted only at the behest of a candidate or political party. The statutes provide no way for a voter, himself, to demand that his "dimple" or other marking be counted before the vote total is certified; he must wait for a qualified partisan proxy to do it for

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Neither candidate requested such an opportunity."). One wonders whether, had the candidates accepted the Florida Supreme Court's offer to reopen the time period to request manual recounts in other counties, county canvassing boards would nevertheless have retained discretion to refuse a candidate's request.

him.[47] If no qualified proxy requests a manual count, the untabulated votes simply remain uncounted.

The selective disenfranchisement caused by the selective dimple model implicates two similar but distinct fundamental rights: the right to vote and the right of freedom of association. These rights, embodied in the First Amendment, are enforced against the states by the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment guarantees, as its name suggests, that no person shall be denied "equal protection of the laws." U.S. Const. amend. XIV, § 1. Thus, I first examine in Part A, Sections 1 and 2, whether the selective dimple model impermissibly classifies and discriminates against certain voters or groups of voters. I then turn in Part B to an analysis of the vote counting scheme under the Due Process Clause of the Fourteenth Amendment, which guarantees that no State "shall deprive any person of life, liberty, or property, without due process of law." *Id.* The concept of "liberty," as interpreted by the United States Supreme Court, includes a right to freedom of association. *See NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the

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[47]This model for "recounting" votes in certain counties not only relies on candidates to select the counties, but it effectively restricts the candidates who may obtain a recount to the major party candidates. This is so because section 102.166(5) only permits manual counts if the board finds that it "could affect the outcome of the election." Third party candidates for whom vote totals are critical if they wish to obtain federal funds for their party in the next election are left out of this process and their voters are left relying on other candidates to choose their county. The same problem exists under the provision for contesting elections. Fla. Stat. § 102.168(3)(c). If the ground for the contest is that legal votes were not counted, the contest provision requires that a sufficient amount of the legal votes not counted "change or place in doubt the result of the election" before the contest may proceed. Fla. Stat. § 102.168(3)(c).

Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). My inquiry, therefore, focuses on whether the Florida vote counting scheme, as applied in this case, infringes upon plaintiffs' right of association in violation of the Due Process Clause.

A.

1.

Under the selective dimple model, if a candidate in a Florida statewide race is trailing his opponent by a small number of votes following the machine counts, his only chance to win is to mine for additional votes via manual counts.[48] The candidate will turn, naturally, to those counties in which he believes he can make up the difference. As discussed in Part II.B.2, *supra*, in considering whether to ask for a manual count in a particular county, a candidate will consider (1) the percentage of the vote he has carried in the county thus far, (2) the size of the county, and (3) the political makeup of the decision-making body in the county. Thus, a candidate would, under the current system, be likely to ask for manual counts in large counties in which his party predominates.

These observations underscore the adversarial structure of the Florida scheme which allows candidates to play games with individual rights. The selective dimple model puts voters in no better a position than children in a schoolyard game yelling, "Pick me, pick me!" The candidates, as team captains, will only choose those who are sure to help them win. Smaller, less populated

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[48]The frontrunner, on the other hand, is seemingly unable to get a county-wide manual count under the selective dimple model, as he could never show that an additional number of votes for him "could affect the outcome of the election." Fla. Stat. § 102.166(5).

counties - like frail schoolchildren - have almost no chance of being picked.[49] At the end of choosing teams, those who aren't chosen simply don't get to play. This scheme clearly contravenes the long-settled principle that "qualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted." *Duncan v. Poythress,* 657 F.2d 691, 700 (5th Cir. Unit B 1981), citing *Ex parte Yarbrough*, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1884), and *United States v. Mosley*, 238 U.S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 (1915). As Justice Douglas wrote in *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S. Ct. 801, 808-09, 9 L. Ed. 2d 821, L. Ed. 2d 821 (1963):

> once the geographical unit for which a representative is to
>
> be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. 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 [United States Supreme Court] decisions.

The Florida vote counting model, as interpreted by the Florida Supreme Court, works to deprive voters of their right to vote

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[49]As noted in my description of the manual count statute, a full manual count should only occur when the sampling of precincts shows "an error in vote tabulation that could affect the outcome of the election." Fla. Stat. § 102.166(5). The number of dimpled ballots generated in a sparsely populated county will almost certainly never be enough to make the requisite showing, thus the voters in small Florida counties - like the kid with two left feet - will never be invited to the big dance.

based on their county of residence and thereby denies them equal protection of the laws.[50]

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[50]It is well-established that "to meet the standing requirements of Article III . . . a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury is particularized as to him.'" *Raines v. Byrd*, 521 U.S. 811, 818-19, 117 S.Ct. 2312, 2317, 138 L. Ed. 2d 849 (1997). "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third persons not parties to the litigation." *Singleton v. Wulff,* 428 U.S. 106, 113, 96 S. Ct. 2868, 2874, 49 L. Ed. 2d 826 (1976). The plaintiffs in the instant case have not specifically alleged that they were disenfranchised by the state election scheme, and thus arguably may not have a "personal" equal protection claim in the nature discussed *supra* Part IV.A.1. While a party may not ordinarily claim standing to vindicate the constitutional rights of some third party, this is a prudential, rather than jurisdictional, rule of practice. The rule has been relaxed in cases where a plaintiff alleging his own injury is asserting "concomitant rights of third parties that would be 'diluted or adversely affected' should [his] constitutional challenge fail." *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (allowing saloon keeper suffering economic injury to raise equal protection rights of young men to buy beer at the same age as women); *see also Carey v. Population Servs. Int'l,* 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (allowing corporate seller of contraceptives to challenge state statute prohibiting sale of contraceptives to persons under 16 years old); *Pierce v. Society of Sisters*, 268 U.S. 510, 545, 69 L. Ed. 1070, 45 S. Ct. 571, S. Ct. 571, 69 L. Ed. 1070 (1925) (allowing a private and a parochial school to assert constitutional rights of parents and guardians to direct the upbringing and education of their children).

The Supreme Court has looked primarily to two factual elements to determine whether the rule against asserting the rights of third parties should apply in a particular case:

> The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

2.

In addition to facilitating discrimination against individuals on a geographical basis, the selective dimple model encourages wily candidates to fence out voters on the basis of their party affiliation. Plaintiffs claim that, as Bush voters, their vote has been diluted by the selective enfranchisement of dimple voters in heavily populated, predominately Democratic counties. Specifically, they allege that Vice President Gore and the Democratic Party requested and received manual counts in Volusia, Palm Beach, Broward, and Miami-Dade counties - all counties in which

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Singleton, 428 U.S. at 114-15, 96 S. Ct. at 2874. In the instant case, third parties' enjoyment of their right of suffrage is "inextricably bound up with the activity [plaintiffs] wish to pursue" - associating with and preserving the political strength of their party's supporters. It will be impossible for plaintiffs to associate with other voting members of their party if those voters are disenfranchised. As the remedy sought by the plaintiffs will effectively vindicate the rights of the third parties, the plaintiffs are fully effective as a proponent for the third party interests.

Finally, I note an additional consideration weighing heavily in favor of granting plaintiffs third party standing (or standing to raise a personal disenfranchisement claim): It would be difficult, if not impossible, to know exactly which voters were disenfranchised by the state election scheme. Even if voters could remember whether they had dimpled their chads rather than punching them through, an allegation to that effect would be entirely self-serving and impossible to corroborate. To require such a showing as an element of standing would either bar disenfranchisement suits altogether or encourage perjury in the complaint. Moreover, even those voters who recall dimpling or improperly marking their ballots cannot prove whether those "votes" were counted. From a prudential standpoint, therefore, it would be unreasonable to insist that the equal protection claim could only be raised by such unidentifiable, or indeed fabricated, plaintiffs. *Cf. NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 459, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488 (1958) ("The [standing] principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court.").

he received approximately six out of every ten machine-counted votes. His opponent, Governor Bush, did not request manual counts in any county.[51] I agree that the selective dimple model, as applied, is tailor-made for unconstitutional party-based discrimination.

"The right to form a party for the advancement of political goals means little if a party can be . . . denied an equal opportunity to win votes." *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S. Ct. 5, 10-11, 21 L. Ed. 2d 24 (1968). Under the selective dimple model, the state encourages candidates to wield the manual count provision as a sword to cut down the strength of an opposing party's support. The game is best played by the candidate who is able to enfranchise scores of his own supporters while validating as few extra votes as possible for his opponent. Plainly, then, the vote counting scheme encourages candidates to discriminate between groups of voters - organized in county units - based on the predominant party affiliation of each county's voters.

The question is whether this gamesmanship works a constitutional injury not only to the individual voters who are not chosen for enfranchisement, but also to those *groups* of voters whose power is intentionally and systematically diluted by the selective validation of votes for an opposing party's candidate. *Riddell v. National Democratic Party*, 508 F.2d 770, 777 (5th Cir. 1975) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."). "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful

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[51] Indeed, as I have noted, Bush's requests would likely have been futile - no amount of dimple votes in his favor "could [have] affected the outcome of the election." Fla. Stat. § 102.166(5).

discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944); *see also Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980). Such discrimination "may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." *Snowden*, 321 U.S. at 8, 64 S. Ct. at 401. Additionally, "the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of a pattern that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process and whether state officials have succumbed to 'temptations to control . . . elections by violence and by corruption.'" *Gamza*, 619 F.2d at 453.

The action taken in the instant case by Vice President Gore and the Democratic Party, in selecting heavily populated, predominately Democratic counties in which to request manual counts, evinces purposeful discrimination against voters who reside in non-Democrat-dominated counties. The injury inflicted upon his opponent's supporters is planned vote dilution - undoubtedly "a pattern that erodes the democratic process." This injury is certainly actionable, for "the right to associate with the political party of one's choice is an integral part of [First and Fourth Amendment] freedoms," *Communist Party v. Whitcomb*, 414 U.S. 441, 449, 94 S. Ct. 656, 662, 38 L. Ed. 2d 635 (1974), and purposeful, systematic disenfranchisement of a party's members interferes with the ability of the group to express its ideas as a whole.

Given the Florida Supreme Court's endorsement of what I have been calling the selective dimple model, I feel confident in saying that planned vote dilution by use of selective manual

counts will not be an isolated event in Florida's statewide elections.[52] Furthermore, that such action is advocated by the State in its statutory election system, and sanctioned when the vote totals are certified by the state Election Canvassing Commission is, I believe, sufficient to deem it state action for purposes of section 1983. Where there exists such a state sanctioned discriminatory scheme targeting a particular group of voters on the basis of their political association, relief under the equal protection clause is not only appropriate, but is required. *See Snowden*, 321 U.S. at 11, 64 S. Ct. at 402 ("Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."); *see*

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[52]The Supreme Court's plurality decision in Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986), a political gerrymandering case, does not undermine my conclusion. Justice White, writing for four members of the Court, stated that in political gerrymandering cases, an equal protection violation may be found only where there is evidence of "continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* 478 U.S. at 133, 106 S. Ct. at 2811. The rationale behind the rule was articulated thus:

> In determining the constitutionality of multi-member districts challenged as racial gerrymanders, . . . we have required that there be proof that the complaining minority "had less opportunity . . . to participate in the political processes and to elect legislators of their choice." . . . This participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats, for it could hardly be said that Democrats, any more than Republicans, are excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected. For constitutional purposes, the Democratic claim in this case . . . boils down to a complaint that they failed to attract a majority of voters in the challenged multimember districts.

478 U.S. at 136-37, 106 S. Ct. at 2812-13. Davis is therefore inapposite here, where the evidence supports the plaintiffs' allegation that voters in non-Democratic counties are "excluded from participating in the affairs of their own party" and "from the processes by which candidates are . . . elected."

also Shakman v. Democratic Org., 435 F.2d 267, 270 (7th Cir. 1970) ("The equal protection clause secures from invidious official discrimination the voter's interest in a voice in government of equal effectiveness with other voters.").

B.

In addition to encouraging unlawful discrimination against voters based on their county of residence or political affiliation, it is clear that Florida's vote counting scheme for statewide elections unconstitutionally burdens a fundamental right secured by the Constitution: the freedom of association. "The right of individuals to associate for the advancement of political beliefs . . . ranks among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 10, 21 L. Ed. 2d 24 (1968). As explained above, the right to freedom of association is guaranteed by the First Amendment and protected against state impairment by the Due Process Clause of the Fourteenth Amendment. *See Id.* at 30-31.

On November 7, plaintiffs expressed their beliefs about who should hold the office of President of the United States. Similarly, by voting in the national election, *all* Bush voters expressed the same sentiment. In other words, plaintiffs and Bush voters attempted to associate collectively for the advancement of the belief that George W. Bush should be President of the United States. The right of association protects this activity of "engaging in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958).

By counting the dimpled votes in some but not all counties, the state of Florida infringes upon the plaintiffs' right, and the right of all voters, to associate for the advancement of their favored political candidate. *See Sowards v. Loudon County,*

Tenn., 203 F.3d 426, 432 (6th Cir. 2000) (stating "support of a political candidate falls within the scope of the right of political association") and *Mariani v. United States*, 212 F.3d 761, 771 (3d Cir. 2000) (stressing "the right to association through support of the candidate of one's choice").[53] Consider, for example, a Bush voter in Brevard County whose vote was counted by the vote tabulating machine; his right to political association is diminished when other votes for Bush are not counted. Just as plaintiffs' freedom of association "encompasses 'the right to associate with the political party of one's choice,'" *see Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 633, 46 L. Ed. 2d 659 (1976), plaintiffs' right also entails the freedom to associate with like-minded voters in support of a candidate of their choice.

Once it decided that dimples were valid votes, but that those votes would be counted only in counties selected by the candidates, the Florida Supreme Court's decision disenfranchised dimple voters in the remaining counties and thereby trampled the right of association enjoyed by plaintiffs and *all* Florida voters. The selective dimple model inhibits voters from demonstrating their true electoral strength. By interfering with plaintiffs' ability to associate with other Bush voters so as to "enhance their political effectiveness as a group," *see Patriot Party of Allegheny Cty. v. Allegheny County Dep't of Elections*, 95 F.3d 253, 262 (3d Cir. 1996) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794, 103 S. Ct. 1564, 1572-73, 75 L. Ed. 2d 547 (1983)), the selective dimple model denies plaintiffs' and other Bush voters the fruits of

[53]Specifically at issue in these cases were laws relating to political contributions.

their association, to wit: their political impact.[54] *See Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 278 (2d Cir. 1985) (explaining "the Williams Court intimated that a statutory regime denying a group the fruit of their association - political impact - runs afoul of the first amendment no less than one precluding association itself" (quoting L. Tribe, American Constitutional Law 779 (1978)).

"Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958). As such, this constitutional right may be limited only when "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate exists." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 341, 9 L. Ed. 2d 405 (1963); *see also Williams*, 393 U.S. at 31, 89 S. Ct. at 11. I can find no compelling interest in Florida's vote-counting scheme that counts some valid votes but not others. *See Williams*, 393 U.S. at 32-33, 89 S. Ct. at 11 (explaining that due process requires that the state accomplish its goal of administering elections narrowly and fairly to avoid diluting these fundamental liberties"); *see also Riddell v. National Democratic Party*, 508 F.2d 770, 776-77 (5th Cir. 1975) (citing *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S. Ct. 303, 307, 38 L. Ed.

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[54] A Gore voter in Brevard County (or any of the non-recount counties) is similarly affected. One may argue that a Gore voter's right to political association is not infringed because dimpled votes are being counted in the counties selected by Vice President Gore. Even so, there are undoubtedly Gore voters who dimpled their ballots in the counties which did not conduct manual recounts, and those votes are not being counted. Thus, a Gore voter's right to political association was abridged also once Florida decided that: (1) dimpled chads are valid votes, and (2) these votes would be counted only at the candidates' request.

2d 260 (1973) (stating "'the states may not infringe upon basic constitutional protections' and 'unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments'")). Accordingly, I would hold that the state of Florida's current election scheme infringes upon plaintiffs' right to association in violation of the First and Fourteenth Amendments.

V.

A.

The majority holds that plaintiffs have failed to demonstrate an irreparable injury, and thus we need not consider the likelihood of success on the merits. This holding can mean one of two things: either the majority is contending that plaintiffs have suffered no injury, or that the injury that has been suffered is reparable. We consider each of these possibilities in turn.

If the majority is resting its decision on the ground that plaintiffs have suffered no injury, then it has agreed with the argument of the appellees and the Attorney General that an injury does not exist in this case because plaintiffs voted for the putative winner, George W. Bush. In other words, unless a voter cast his vote for a losing candidate, the voter cannot be found to have suffered any cognizable constitutional injury - the existence of his constitutional right is dependent upon the outcome of the election. It defies common sense, however, to suggest that a voter has no cause of action for the debasement of his vote, and the consequent denial of the equal protection of the laws, *unless* his candidate has lost the election.

Once it is clear that plaintiffs' constitutional rights are not dependent upon the outcome of the election, the question becomes whether and when plaintiffs suffered any redressable injury. I

contend that the injury to the voters in the instant case occurred once the time limit for requesting manual recounts had expired, and at least one but not all counties had certified results containing manual recounts conducted pursuant to § 102.166.[55] It was at that moment we could be sure that some voters had been disenfranchised, while others had suffered a debasement of their vote by the selective addition of dimpled votes to the total. Thus, it is clear under federal law and under the facts of this case that plaintiffs have suffered a constitutional injury.

Perhaps, then, the majority did not mean to say that plaintiffs suffered no injury, but that whatever injury they may have suffered was not irreparable. It was posited to the court during oral argument that even if plaintiffs had been injured, they still had adequate redress in the state courts.[56] This is a wholly fallacious argument. A voter may bring a contest suit in state court on the ground that legal votes were excluded or illegal votes included, but must show that such action was sufficient to "change or place in doubt the result of the election." Fla. Stat. § 102.168(3)(c). Clearly, then, a Bush voter could not maintain a contest suit - he could neither allege nor establish that the inclusion of other legal votes, or the exclusion of illegal votes, would change the outcome of the election.[57] The state remedy,

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[55] I am not including those manual recounts conducted merely to verify the machine total.

[56] During oral argument yesterday, the Florida Democratic Party and the Florida Attorney General contended that because the state has a complex scheme for contesting elections, lower federal courts have no role in adjudicating even a voter's federal constitutional claims, such as those set forth by plaintiffs in this case. The net effect of their argument is that the United States Supreme Court is the only federal forum available to plaintiffs.

[57] Similarly, a voter who dimpled his ballot in favor of a losing candidate in a non-recount county will not be able to get his vote counted, unless he can prove that the inclusion of more legal votes, or the exclusion of illegal votes,

therefore, is no remedy at all for voters who have suffered constitutional injury while attempting to vote for the winning candidate. [58]

Not only is plaintiffs' injury not redressable by the state courts, but it continues to compound itself by the day. The uncertainty regarding the integrity of the presidential election in Florida has cast a pall of illegitimacy over the entire process. If the federal constitutional principle is that plaintiffs have a cause of action without having to show that their candidate lost, but should have won, there is no other remedy available. The constitutional injury has been suffered and is not ameliorated by inaction. Plaintiffs have no viable recourse in the state courts. The constitutional question is before us, and time is of the essence.

B.

This case is before our court as an appeal of a district court order denying a motion for a preliminary injunction. Had nothing of relevance transpired since the district court issued its order, we would simply ask whether, given the record before it, the district court abused its discretion in denying relief. *See Panama City Med. Diagnostic v. Williams,* 13 F.3d 1541, 1545 (11th Cir.

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could "change or place in doubt the result of the election." If the candidate for whom he voted was defeated by a significant margin (such as a third party candidate), he is effectively precluded from bringing a meritorious suit. This is true even though minor party voters have a strong associational interest in having all votes for their candidate counted so that they may obtain matching federal funding.

[58]I understand, of course, that a section 1983 action, stating the same constitutional claims as the complaint before us, may be brought in state court. I do not read the majority opinion, however, to suggest that such recourse is mandatory, or that plaintiffs must exhaust their state remedies before bringing their claim to federal court.

1994).[59] This is the track the majority chooses to take.

However, many events of relevance have taken place since the district court made its ruling. This court has been apprised of these events by the parties' supplemental filings and oral argument. Most important of these subsequent events is the Florida Supreme Court's definitive interpretation of the Florida system of conducting state-wide elections: Florida employs the selective dimple model.[60] This interpretation has crystalized plaintiffs' claims into pure questions of law. This court can and should determine - without the necessity of further proceedings in the district court - whether the selective dimple model has deprived plaintiffs of fundamental constitutional rights. Instead, the majority elects to act as if the situation had not changed, as if we had not asked to be updated on ongoing developments, and as if there is no constitutional violation and injury at all.

C.

When a case is on appeal from the denial of a preliminary injunction, it may be reviewed on the merits "if a district court's ruling rests solely on a premise as to the applicable rule of law,

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[59]Specifically, we would ask first whether the district court erred in holding that plaintiffs failed to establish the first prerequisite for a preliminary injunction. This Circuit has established a four-pronged test for a plaintiff to obtain a preliminary injunction: "(1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that [their] own injury would outweigh the injury to the nonmovant, and (4) that the injunction would not disserve the public interest." *Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999).

[60]The fact that the United States Supreme Court has vacated the Florida Supreme Court decision which instituted the selective dimple model does not alter the fact that the selective dimple model has governed the counting of ballots and the certification of votes in this presidential election.

and the facts are established or of no controlling relevance." *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 757, 106 S. Ct. 2169, 2177, 90 L. Ed. 2d 779 (1986), *rev'd on other grounds by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); Donovan v. Bierwirth, 680 F.2d 263, 270 (2d Cir. 1982) (ruling on the merits of an injunction, in an appeal from the grant of a preliminary injunction, because the "quarrel is over the legal standard and its application to facts not seriously in dispute"). In the instant case, intervening events have narrowed the issues in this appeal to pure questions of constitutional law.

To obtain a permanent injunction, as opposed to a preliminary injunction, plaintiffs must show not just "a substantial likelihood of success on the merits" - the first of four requirements for a preliminary injunction - but must demonstrate actual success on the merits. *See Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404 n.12, 94 L. Ed. 2d 542 (1987). My analysis reveals, beyond any doubt, that the state of Florida has infringed plaintiffs' rights under the First and the Fourteenth Amendments. Moreover, there can be no doubt that plaintiffs' injury is real and ongoing. Accordingly, there is no need to remand this case to the district court for further proceedings. *See Clements Wire & Mfg. Co. v. NLRB*, 589 F.2d 894 (5th Cir. 1979) (ruling on the merits of a claim, even though the appeal related only to a preliminary injunction, where it was clear that one side could not prevail);[61] *Illinois Council on Long Term Care v. Bradley,* 957 F.2d 305, 310 (7th Cir. 1992) ("Since plaintiffs cannot win on the merits, there is no point in remanding the case for further proceedings."). To remand now is a waste of judicial

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[61] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

energy and resources and withholds from plaintiffs the relief they are entitled to receive at this very moment. *See Thornburgh*, 476 U.S. at 757, 106 S. Ct. at 2177 (holding that a court of appeals' usual limitation to review of a preliminary injunction for abuse of discretion "is a rule of orderly judicial administration, not a limit on judicial power"); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) ("The sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy.").

I would direct the district court to enjoin the Secretary of State and/or Elections Canvassing Commission to issue amended vote certifications under Fla. Stat. § § 102.121 and 103.011 that do not contain the results of manual recounts conducted in response to a candidate or political party's request under Fla. Stat. § 102.166 (namely Volusia, Broward, Miami-Dade and Palm Beach Counties). I would further enjoin the Secretary of State and/or the Elections Canvassing Commission from issuing any future certification that includes manual recounts requested by a candidate or political party in select counties pursuant to Fla. Stat. § 102.166.

I respectfully dissent.

BIRCH, Circuit Judge, dissenting; in which TJOFLAT and DUBINA, Circuit Judges, join:

While I concur in the dissenting opinions by my colleagues, Judges Tjoflat, Dubina and Carnes, my concern about the constitutional deprivations alleged in these cases is focused on the lack of standards or guiding principles in the Florida manual recount statute. Florida's statutory election scheme envisions hand recounts to be an integral part of the process, providing a check when there are "errors in the vote tabulation which could affect the outcome of the election." *See* Fla. Stat. Ann. § 102.166(5). The 1989 Florida legislature, however, abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recount would be conducted fairly, accurately, and uniformly. While Florida's legislature was unquestionably vested with the power under Article II, Section [One of the United States Constitution to devise its own procedures for selecting the state's electors, it was also required to ensure that whatever process it established comported with the equal protection and due process requirements of the Fourteenth Amendment to that same Constitution.[62] Other states, such as Indiana, have provided clear and definitive standards under which manual recounts are to be conducted. *See* Ind. Code § 3-12-1-9.5 (providing in part that chads that have been pierced count as valid votes, but those with indentations that are not separated from the ballot card do not). Absent similar clear and certain standards, Florida's manual recount scheme cannot pass constitutional muster.

Moreover, Congress, to which the electors from Florida will be ultimately certified, has established a safe harbor, 3 U.S.C. § 5, that requires that such rules and standards be established *before*

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[62] *See Moore v. Ogilvie*, 394 U.S. 814, 818-19, 89 S. Ct. 1493, 1496, 23 L. Ed. 2d 1 (1969) (discussing the applicability of the Fourteenth Amendment to the nominating process for presidential candidates).

the election. Because the 1989 Florida legislature has, in my view, abdicated its responsibility to formulate constitutionally clear and objective statutory rules and standards for the election process in Florida, it has disenfranchised voters throughout the state.[63] The well-intended and responsible county canvassing boards across the state have been given, in legislative terms, an unfunded mandate discern the voter's intent without any objective statutory instructions to accomplish that laudable goal. The effect of such an unguided, standardless, subjective evaluation of ballots to ascertain voter intent is to cause votes to be counted (or not to be counted) based only upon the disparate and unguided subjective opinion of a partisan (two members are elected in partisan voting) canvassing board.[64] Since their opinions as to voter intent are standardless no meaningful judicial review is possible by a Florida court. Accordingly, by finding an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made. [65]

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[63]*See* Fl. Stat. Ann. § 102.166 (West 1989). *See generally Roe v. Alabama*, 43 F.3d 574, 581-82 (11th Cir. 1995) (per curiam) (finding that the alteration of objective standards after the election disenfranchised voters).

[64]*See* Fl. Stat. Ann. § 102.141 (providing that the County Canvassing Board shall be comprised of a county court judge, chairman of the board of county commissioners and supervisor of elections; Fl. Stat. Ann. § 124.01(2) (providing for popular election of county commissioners); Fl. Const. Art. 8, Sec. 1(d) (providing for popular election of the supervisor of elections).

[65]We have indicated that the injury suffered by a plaintiff is "'irreparable' only if it cannot be undone through monetary remedies." Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir. 1987). To that end, we have presumed irreparable harm to a plaintiff when certain core rights are violated. See Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) (irreparable harm presumed in Title VII cases); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) (irreparable injury presumed from violation of First Amendment rights); Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. Unit B 1981) (irreparable injury presumed from violation of right to privacy under the Fourteenth Amendment); Northeastern Florida Chapter of Ass'n of

It has been said that to err is human--- and humans vote. Thus, it should not be surprising that the voting process is subject to error. However, as demonstrated in the recent Presidential election, the frequency, magnitude and variety of error associated with the exercise of this sacred right of citizenship is at once astounding and deeply troubling. Morever, the media's focus on the campaign preceding November 7, having been eclipsed by its subsequent frenzy, has left the average citizen at the least skeptical, and at the worst cynical, about our democratic institutions. Morever, in its present incarnation, the post-election debacle that brings these cases to us for resolution may be cynically viewed by some as depicted by Congresswoman Shirley Chisholm:

> Politics is a beautiful fraud that has been imposed on the people for years, whose practitioners exchange gilded promises for the most valuable thing their victims own: their votes. And who benefits the most? The lawyers.

Shirley Anita Chisholm, *Unbought and Unbossed*, 1970. To respond in that way would be a mistake.

While our nation's citizens have every right to be concerned, exasperated, fatigued and even cynical, it is my fervent hope that from these events they will come to understand, if not appreciate, the role of government's Third Branch in the life of our precious democracy. Our basic function in this society is to provide a

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Gen. Contractors v. City of Jacksonville, Florida, 896 F.2d 1283, 1285-86 (11th Cir. 1990) (explaining that the basis for presuming irreparable injury in Cate and Deerfield was that given the "intangible nature" of the violations alleged, the plaintiffs could not effectively be compensated by an award of monetary damages). Cf. Richard Feiner & Co. v. Turner Entm't Co., 98 F.3d 33, 34 (2d Cir. 1996) (irreparable harm presumed when plaintiff establishes a prima facie case of copyright infringement).

forum in which disputes both great and small (although to those involved, a dispute is never "small") can be decided in an orderly, peaceful manner; and with a high level of confidence in the outcome. Lawyers, as officers of the court, are integral to that process in our adversarial system.

The right to vote---particularly for the office of President of the United States, our Commander-In-Chief, ---is one of the most central of our fundamental rights in a democracy.[66] Accordingly, any dispute that has at its core the legitimacy of a presidential election and impacts upon every citizen's right to vote, deserves the most careful study, thought and wisdom that we can humanly bring to bear on the issues entrusted to us. Thus, I feel compelled to attest to the fact that my brother and sister judges have embraced this case with a sense of duty, concern, and conscientious hard work that is worthy of the issues before us.

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[66] An executive like the President has broad discretion; he has the power to affect every voter, and thus every voter must be permitted to vote and to have his ballot both counted and equally weighed. As the Supreme Court observed in *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S. Ct. 1564, 1573, 75 L. Ed. 2d 547 (1983) (citations omitted):

> In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Aware of the importance of these cases[67] and the urgency attendant to the issues presented, we decided to take these disputes *en banc* that is, before the entire court of twelve judges.[68] Moreover, utilizing a procedure that we normally employ in death penalty cases, we arranged through the clerks of the district courts involved to have copies of all filings there "lodged" (i.e., copies provided) with us contemporaneously.[69] Hence, we have been able to review and study the progress of the factual and legal matters presented in these cases from their inception. Accordingly, long before the anticipated notices of appeal were filed, formally bringing them to us, we were about the study and review of the legal issues to be resolved. Thus, the reader of our opinions[70] in this case should understand that our time for consideration has been considerably longer than it might appear at first blush.

Just as the electorate was divided in their good faith effort to cast their votes for our nation's chief executive, the members of this court have discharged their duty to interpret the law in the context of this case in an unbiased and sincere effort. Inevitably

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[67]These cases have arrived at the appropriate juncture and present circumstances are of such an extraordinary scope that the "challenge to a state election rises to the level of a constitutional deprivation." *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). *See Roe*, 43 F.3d at 580, 585. The dissent in *Roe* opined that federal courts should not interject themselves into "state election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree." *Id.* at 585. I am convinced, and surmise that the Supreme Court has concluded, that such a situation confronts us now.

[68]Fed.R.App.P. 35(a)(2).

[69]11th Cir. R. 22-3.

[70]All of our opinions are available to the public on the Internet at **www.ca11.uscourts.gov** upon publication.

the pundits will opine that a judge's decision is somehow linked to the political affiliation of the President that appointed the judge. While we at all levels of the judiciary have come to expect this observation we continue to regret that some "think" that is so. It may be true that a judge's judicial philosophy may reflect, to some degree, the philosophy of the appointing President --- not a surprising circumstance --- but to assume some sort of blind, mindless, knee-jerk response based on the politics of a judge's appointer does us and the rule of law a grave injustice. More importantly it is just wrong.

I would hope that a careful and thoughtful review of the opinions of my brothers and sisters would dispel any suggestion that their views on the important issues before us are anything but the result of days of careful study and thoughtful analysis because these opinions are nothing less. We have done our duty. I am proud to be associated with my judicial colleagues that have been called upon to discharge their respective constitutional obligations, albeit reluctantly both on this court and the many other state and federal courts involved. Indeed these recent events have been a civics lesson for some particularly the young; but they have also been a reminder that our nation's system of governance has weathered the test of time and tumult; the old three-legged stool[71] still stands erect and with sufficient strength to support the hopes and dreams of our nation's citizens.

The revered and quotable jurist, Learned Hand, once observed: "The spirit of liberty is the spirit which is not too sure that

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[71]The three branches of our government, the Legislative, the Executive, and the Judicial ("The Third Branch"), have often been compared to the familiar early American three-legged stool.

it is right . . ."[72] While not "right" about many things, I am confident that we have given these matters the attention they justly deserve and trust that, at least, we have laid the groundwork for an informed decision by the justices of the United States Supreme Court should they exercise their judgment to hear this case. It is my hope that they do. We have done our best so that they can do their best.

[72]The corollary to that thought was expressed by the elder statesman from Florida, Congressman Claude Pepper: "One has the right to be wrong in a democracy." Cong. Rec. May 27, 1946.

DUBINA, Circuit Judge, dissenting, in which TJOFLAT and BIRCH, Circuit Judges join:

I agree with the majority's disposition of the issues of abstention, res judicata, collateral estoppel, and mootness. I also join and concur fully in the dissenting opinions filed by Judges Tjoflat, Birch, and Carnes. I dissent from the disposition of the remaining issues discussed in the majority's opinion. Specifically, I disagree with the notion that we cannot convert the preliminary injunction and reach the merits of this case. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 467 U.S. 747 (1986).

As to the merits of this case, the legal principles set forth in the cases of *Moore v. Ogilvie*, 394 U.S. 814, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969), and *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), govern. Based on these principles, I would reverse the judgment of the district court in this case.

CARNES, Circuit Judge dissenting, in which TJOFLAT, BIRCH and DUBINA, Circuit Judges, join:

For the reasons set out in my opinion in *Siegel v. Lepore*, No. 00-15981, I dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15981

D. C. Docket No. 00-9009

NED L. SIEGEL,
GEORGETTE SOSA DOUGLAS, et al.,
Plaintiffs-Appellants,
versus
THERESA LEPORE,
CHARLES E. BURTON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 6, 2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

This is an appeal from the denial of a preliminary injunction.

The Republican candidates for the offices of President and Vice President of the United States, along with several registered Florida voters, filed suit in federal court in Miami, seeking to

enjoin four Florida counties from conducting manual recounts of ballots cast for President of the United States in the November 7, 2000, election. The district court denied Plaintiffs' request for preliminary injunctive relief, and Plaintiffs appeal. For the reasons stated below, we affirm.

I.

On November 7, 2000, Florida voters cast ballots for several offices, including votes for the twenty-five electors for President and Vice-President of the United States. The following day, 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, for a margin of difference of 1,784, or 0.0299% of the total Florida vote.

Under Florida law, county canvassing boards are responsible for determining the number of votes cast for each candidate. *See* Fla. Stat. § 102.141. If a candidate for office is defeated by one-half of one percent or less of the votes cast for such office, the canvassing board must order a recount. *See id.* § 102.141(4). Pursuant to this statute, because the Presidential vote returns reflected that the Democratic ticket was defeated by less than one-half of one percent, the canvassing boards conducted automatic recounts of the votes. After the automatic recounts, the Republican ticket retained the majority of votes, although by a slimmer margin. Under Florida law, a manual recount may be requested by any candidate whose name appeared on the ballot, a political committee that supports or opposes an issue that appeared on the ballot, or a political party whose candidates' names appeared on the ballot. *See* Fla. Stat. § 102.166(4)(a). Such a request must be filed with the canvassing board within 72 hours after midnight of the date the election was held, or before the canvassing board has certified the challenged results, whichever is later. *See id.* § 102.166(4)(b). The canvassing board may, but is not required to,

grant the request. *See id.* § 102.166(4)(c); *Broward County Canvassing Bd. v. Hogan,* 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992) ("The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board."). The statutory manual recount provision applies to all Florida counties. Therefore, the procedure for requesting a manual recount is the same in all counties, although the decision of whether to conduct a manual recount would, of course, be made separately by each county's canvassing board.

Once authorized by a county canvassing board, a manual recount must include "at least three precincts and at least 1 percent of the total votes cast for such candidate." *Id.* § 102.166(4)(d). The person requesting the recount chooses three precincts to be recounted, and, if other precincts are recounted, the canvassing board chooses the additional precincts. *See id.* If the results of the manual recount indicate "an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots." *Id.* § 102.166(5).

Florida law specifies the procedures for a manual recount. Section 102.166(7) of the Florida Statutes provides that:

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

intent.

In this case, the Florida Democratic Party filed requests for manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties on November 9, 2000, within the 72-hour statutory deadline. The stated reasons for the requests included the closeness of the statewide race and a concern that the vote totals might not reflect the true will of Florida voters. The apparent practical effect of a manual recount is that some ballots which were unreadable by machine due, for example, to voters' failure to mark or punch the ballots in a machine-legible fashion, might be read by human counters; and these votes could be added to the totals for each candidate.

II.

On November 11, 2000, registered voters Ned L. Siegel from Palm Beach County, Georgette Sosa Douglas from Broward County, Gonzalo Dorta from Miami-Dade County, Carretta King Butler from Volusia County, Dalton Bray from Clay County, James S. Higgins from Martin County, and Roger D. Coverly from Seminole County, along with the Republican candidates for President and Vice-President, George W. Bush and Richard Cheney (collectively "Plaintiffs"), filed a Complaint and a Motion for a Temporary Restraining Order and Preliminary Injunction in the district court for the Southern District of Florida.

Plaintiffs sued members of the county canvassing boards of Volusia, Palm Beach, Broward, and Miami-Dade Counties.[1] Plaintiffs' Complaint alleged that the manual recounts violate the Fourteenth Amendment's guarantees of due process and equal

[1]There are no state defendants in this case. In addition to the parties mentioned above, the district court granted a motion by the Florida Democratic Party to intervene, and the Florida Democratic Party is an intervenor-appellee in this case on appeal. The Attorney General also appeared as an amicus at oral argument to defend the constitutionality of the statute.

protection, and deny and burden the First Amendment's protection of votes and political speech.

Plaintiffs' prayer for relief in their Complaint included the following:

> (a) Declaring that Defendants may not subject any vote totals to manual recounts;
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> (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;
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> (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;
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> (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.

(Complaint at 16-17.)

The Motion for a Temporary Restraining Order and Preliminary Injunction which Plaintiffs filed with their Complaint asked, *inter alia*, that the district court prohibit the county canvassing boards from proceeding with manual recounts of the

November 7th election results. Like the Complaint, this motion contended that the manual recounts violate the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The district court heard oral argument on the motion on November 13, 2000, and Plaintiffs' request for a preliminary injunction was denied. On November 14, 2000, Plaintiffs filed a notice of appeal.[2]

During the pendency of this appeal, several Florida cases were appealed to the Florida Supreme Court. In these cases, some plaintiffs challenged Florida Secretary of State Katherine Harris's decision to refuse to accept the results of manual recounts submitted by county canvassing boards after the statutory deadline of 5:00 p.m. on November 14, 2000. On November 21, 2000, in the consolidated cases of *Palm Beach County Canvassing Bd. v. Harris, Volusia County Canvassing Bd. v. Harris,* and *Florida Democratic Party v. Harris*, the Supreme Court of Florida decided that Florida Secretary of State Harris must accept the late-reported results of manual recounts from these counties submitted by the evening of November 26, 2000. The Florida Supreme Court expressly stated that neither party had raised as an issue on appeal the constitutionality of Florida's election laws, and it did not address federal constitutional issues in its opinion.[3]

On appeal, Plaintiffs filed an Emergency Motion for an

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[2]The documents in this case were lodged in this Court as they were filed in the district court. Pursuant to Federal Rule of Appellate Procedure 35, this Court ordered that this case be heard initially *en banc*. *See Hunter v. United States*, 101 F.3d 1565, 1568 (11th Cir.1996) (*en banc*); *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

[3]The United States Supreme Court recently vacated the Florida Supreme Court's opinion. *See Bush v. Palm Beach Canv. Bd.*, No. 00-836 (U.S. Dec. 4, 2000).

Injunction Pending Appeal, asking this Court to prohibit the county canvassing board Defendants from proceeding with manual ballot recounts. This motion was denied without prejudice on November 17, 2000. Among other things, we then said:

> Both the Constitution of the United States and 3 U.S.C. § 5 indicate that states have the primary authority to determine the manner of appointing Presidential Electors and to resolve most controversies concerning the appointment of Electors. The case law is to the same effect, although, of course, federal courts may act to preserve and decide claims of violations of the Constitution of the United States in certain circumstances, especially where a state remedy is inadequate. In this case, the State of Florida has enacted detailed election dispute procedures. These procedures have been invoked, and are in the process of being implemented, both in the form of administrative actions by state officials and in the form of actions in state courts, including the Supreme Court of Florida. It has been represented to us that the state courts will address and resolve any necessary federal constitutional issues presented to them, including the issues raised by Plaintiffs in this case. If so, then state procedures are not in any way inadequate to preserve for ultimate review in the United States Supreme Court any federal questions arising out of such orders.

Order Denying Plaintiffs' Emergency Motion for Injunction Pending Appeal, *Touchston v. McDermott,* No. 00-15985 (Nov. 17, 2000) (citations omitted).

Plaintiffs moved this Court to expedite the underlying appeal, which motion we granted. This case is now before us on the appeal of the district court's denial of Plaintiffs' motion for a preliminary injunction. Plaintiffs ask this Court either to reverse the district court's decision, enjoin the canvassing board Defen-

dants from conducting manual recounts or certifying election results that include manual recounts, or order the deletion and/or non-inclusion of final vote tabulations that reflect the results of manual recounts.[4]

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[4]Plaintiffs' request on appeal is thus broader than their request for an injunction pending appeal, which asked only that we halt manual recounts then underway. To the extent that Plaintiffs' request on appeal represents a petition for permanent relief, we must decline to convert this appeal of a denial of a preliminary injunction into a final hearing on the merits of Plaintiffs' claims. Our review of such a case is normally limited to whether the district court abused its discretion; however, we recognize that an appellate court under some circumstances may decide the merits of a case in connection with its review of a denial of a preliminary injunction. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S.747, 755-56, 106 S. Ct. 2169, 2176 (1986).

In *Thornburgh*, the Supreme Courts said that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." Id. at 757, 106 S. Ct. at 2177. The Supreme Court affirmed the appellate court's decision to review the merits, rather than merely determine whether the district court had abused its discretion by entering a preliminary injunction, where it had the benefit of "'an unusually complete factual and legal presentation from which to address the important constitutional issues at stake.'" *Id*. (quoting *Thornburgh v. American College of Obstetricians & Gynecologists,* 737F.2d 283, 290 (3d Cir. 1984)). Additionally, the Supreme Court observed that appellate review was aided by three recent decisions from the same circuit on the constitutional issues. *See id*. at753-54, 757, 106 S. Ct. at 2174-75, 2177. Thus, it stated that "when the unconstitutionality of the particular state action under challenge is clear," an appellate court need not abstain from addressing the merits. *Id.* at 756, 106 S. Ct. at 2176. In so holding, however, the Supreme Court noted that "[a] different situation is presented, of course, when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial." *Id.* at 757 n.8, 106 S. Ct. at 2177 n.8 (citations omitted).

This case clearly falls within this latter category, and thus represents the very situation in which the Supreme Court held that appellate review was not

This Court has carefully considered Plaintiffs' appeal, as well as the other documents filed, and has conferred *en banc* on numerous occasions. We heard oral argument on December 5, 2000. Recognizing the importance of a resolution to this case, a prompt decision on the appeal is required.

III.

We first consider whether Rooker-Feldman bars our exercise of subject matter jurisdiction over Plaintiffs' claims.

The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S. Ct. 1303, 1317 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 150 (1923). The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are "inextricably intertwined" with a state court judgment. *Feldman*, 460 U.S. at 482 n.16, 103 S. Ct. at 1315 n.16; *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997). A federal claim is inextricably intertwined with a state court

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appropriate. The answer to the constitutional questions is anything but clear. And, in stark contrast to *Thornburgh*, we have before us a factual record that is largely incomplete and vigorously disputed. The district court based its ruling on Plaintiffs' motion for a preliminary injunction solely on limited affidavits and the submission of few documents, including news media reports. Moreover, there was no discovery in this case, much less a trial or a plenary hearing, and none of the scant evidence presented to the district court was tested by the adversarial process of cross-examination. The controlling relevant facts are fervently contested by the parties. These evidentiary infirmities are especially problematic given that Plaintiffs' major claims are as-applied challenges to the Florida statutes, arguments the validity of which depends upon the development of a complete evidentiary record. Mere expediency does not warrant this Court reaching the merits of Plaintiffs' claims in the absence of the necessary evidence by which to do so. Therefore, applying the reasoning of *Thornburgh*, the circumstances of this case as it currently stands require us to deny their request.

judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 1533 (1987) (Marshall, J., concurring).

In light of the United States Supreme Court's decision vacating the Florida Supreme Court's November 21, 2000, decision, it is unclear at the moment that any final judgments giving rise to Rooker-Feldman concerns now exist. *See Bush v. Palm Beach County Canv. Bd.*, No. 00-836 (U.S. Dec. 4, 2000). No party has called to our attention any final judgments in the Florida state courts upon which a Rooker-Feldman bar reasonably could be based as to these Plaintiffs.[5] Thus, we conclude that Rooker-Feldman does not bar Plaintiffs from bringing these particular constitutional challenges to the implementation of Florida's manual recount provision.

Defendants Broward, Palm Beach, and Volusia County

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[5]For similar reasons, we conclude that neither res judicata nor collateral estoppel bars our consideration of the issue of the constitutionality of Florida's statutory manual recount provision. We look to Florida law to determine the application of these preclusive doctrines. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984)(holding that under the Full Faith and Credit Act, a federal court must give the same preclusive effect to a state court judgment as another court of that state would give). Florida adheres to the traditional requirement of mutuality of parties in its application of res judicata. *See Albrecht v. State of Florida,* 444 So. 2d 8, 11 (Fla. 1984); *State Street Bank & Trust Co. v. Badra*, 765 So. 2d 251, 253 (Fla. Dist. Ct. App. 2000) (citing *Youngblood v. Taylor*, 89 So. 2d 503, 505 (Fla.1956)). The parties to this case are not the same parties that appeared before the Florida Supreme Court. Florida similarly requires mutuality of parties in the application of collateral estoppel. *See Stogniew v. McQueen,* 656 So. 2d 917, 919-20 (Fla. 1995). Further, the doctrine of collateral estoppel bars identical parties from relitigating only those issues that have previously been decided between them. *See Mobil Oil Corp. v. Shevin,* 354 So.2d 372, 374 (Fla.1977). Where, as here, the issue in dispute has not been fully litigated, the doctrine is inapplicable. We therefore conclude that neither res judicata nor collateral estoppel bars our review of the constitutionality of Florida's manual recount provision.

Canvassing Boards also argue that this case is moot because the manual recounts have been completed and the boards have filed their certified vote tabulations with the Elections Canvassing Commission. However, we conclude that this case is not moot.

Article III of the Constitution limits federal court jurisdiction to live cases or controversies, and the "case-or-controversy" requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990). This Court has held that "[a] claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir. 1997).

We conclude that neither of these elements is satisfied in this case. The Democratic candidate, Vice President Gore, and others are currently contesting the election results in various lawsuits in numerous Florida state courts. There are still manual recount votes from at least Volusia and Broward Counties in the November 26th official election results of the Florida Secretary of State.[6] In view of the complex and ever-shifting circumstances of the case, we cannot say with any confidence that no live controversy is before us.[7]

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[6]There may also be some manual recount votes in those results from a number of other Florida counties, such as Seminole, Gadsden, and Polk.

[7]Read broadly, Plaintiffs' request for injunctive relief can be interpreted as request that Defendants be ordered to certify only those vote totals that resulted from machine recounts. Because Florida Secretary of State Harris has certified the election results and because she is not yet a party to this appeal, we note that there is some question whether this Court could order the requested relief once the Defendant canvassing boards have completed their manual

IV.

Defendants argue that we should abstain from hearing this case under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943), or under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941). We conclude that abstention is not appropriate in this case.

The *Burford* abstention doctrine allows a federal court to dismiss a case only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000) (citing *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361, 109 S. Ct. 2506, 2514 (1989)). A central purpose furthered by *Burford* abstention is to protect complex state administrative processes from undue federal interference. *See New Orleans Pub. Serv.*, 491 U.S. at 362, 109 S. Ct. at 2515. The case before us does not threaten to undermine all or a substantial part of Florida's process of conducting elections and resolving election disputes. Rather, Plaintiffs' claims in this case target certain discrete practices set forth in a particular state statute. Further, *Burford* is implicated when federal interference would disrupt a state's effort, through its administrative agencies, to achieve uniformity and consistency in addressing a problem. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727-28, 116 S. Ct. 1712, 1727 (1996). This case does not threaten to undermine Florida's uniform approach to manual recounts; indeed, the crux of Plaintiffs' complaint is the absence of strict and uniform standards for initiating or conduct-

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recounts and have certified their vote totals to the state Elections Canvassing Commission. However, because we deny Plaintiffs' motion for a preliminary injunction, we need not address this issue.

ing such recounts. Finally, we note that *Burford* abstention represents an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S. Ct. 1060, 1063 (1959). We do not believe that the concerns raised by Defendants in this case justify our abstention under this narrow doctrine.

Perhaps the most persuasive justification for abstention advanced by Defendants is based on *Pullman*, 312 U.S. 496, 61 S. Ct. 643; however, we conclude that abstention under this doctrine would not be appropriate. Under the Pullman abstention doctrine, a federal court will defer to "state court resolution of underlying issues of state law." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S. Ct. 1177, 1181 (1965). Two elements must be met for *Pullman* abstention to apply: (1) the case must present an unsettled question of state law, and (2) the question of state law must be dispositive of the case or would materially alter the constitutional question presented. *See id.* at 534, 85 S. Ct. at 1182. The purpose of *Pullman* abstention is to "avoid unnecessary friction in federal-state functions, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id.* Because abstention is discretionary, it is only appropriate when the question of state law can be fairly interpreted to avoid adjudication of the constitutional question. *See id.* at 535, 85 S. Ct. at 1182.

Plaintiffs claim that Florida's manual recount provision is unconstitutional because the statute does not provide sufficient standards to guide the discretion of county canvassing boards in granting a request for a manual recount or in conducting such a recount. There has been no suggestion by Defendants that the statute is appropriately subject to a more limited construction than the statute itself indicates.

Our conclusion that abstention is inappropriate is strength-

ened by the fact that Plaintiffs allege a constitutional violation of their voting rights. In considering abstention, we must take into account the nature of the controversy and the importance of the right allegedly impaired. *See Edwards v. Sammons*, 437 F.2d 1240, 1243 (5th Cir. 1971) (citing, as examples of cases where the Supreme Court referred to the nature of the right involved in upholding a refusal to abstain, *Harman*, 380 U.S. at 537, 85 S. Ct. at 1183 (voting rights); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226 (1964) (school desegregation); *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316 (1964) (First Amendment rights)). Our cases have held that voting rights cases are particularly inappropriate for abstention. *See Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. Unit B 1981) (stating that while an alleged denial of voting rights does not preclude federal abstention, Supreme Court precedent indicates that a federal court should be reluctant to abstain when voting rights are at stake); *Edwards*, 437 F.2d at 1244 (stating the general rule that abstention is not appropriate "in cases involving such a strong national interest as the right to vote"). In light of this precedent, the importance of the rights asserted by Plaintiffs counsels against our abstention in this case; although, as discussed below, we are mindful of the limited role of the federal courts in assessing a state's electoral process.

We therefore conclude that abstention is not appropriate.

V.

This is an appeal from the denial of a preliminary injunction. Plaintiffs state two main claims. First, Plaintiffs argue that Florida's manual recount scheme, and particularly Fla. Stat. § 102.166(7), is unconstitutional because it contains no standards for when a ballot not read by the machine may be counted. They describe their claim as an "as-applied" challenge based on the allegedly standardless and partisan application of the (allegedly facially standardless) statute in Palm Beach, Broward, Dade, and

Volusia Counties. Plaintiffs' chief objection is that different criteria used by different counties, or by different election officials within a county, may mean that the same ballot rejected in one instance is accepted in another instance, or vice versa. They contend that such unequal treatment violates the Equal Protection Clause and that the lack of standards by itself violates the Due Process Clause. Plaintiffs also contend that the absence of statutory standards for when a manual recount occurs permits arbitrary and partisan decision-making, exacerbates the potential for unequal treatment of ballots, and thus warrants a federal court's intervention.

Second, Plaintiffs assert that they are denied due process and equal protection because, under Fla. Stat. § 102.166(4), ballots in one county may be manually recounted while ballots in another county are not. They contend that, as a result, similarly situated voters will not be treated similarly based purely on the fortuity of where they reside; a ballot that would be counted in one county pursuant to a manual recount may not be counted elsewhere because that voter's county did not conduct such a recount.

Defendants, as well as the Intervenor-Appellee, dispute all of these contentions. They argue that Florida law does contain constitutionally adequate standards for evaluating when a manual recount should occur and for evaluating the ballots during such a recount, and that Plaintiffs' as-applied claim fails because no record evidence shows that those standards have been employed in an arbitrary or partisan fashion. They also maintain that allowing decisions to be made on whether a manual recount occurs on a county-by-county basis is reasonable and consistent with the approach taken by other states, and that in any event no constitutional violation is present for many reasons, such as there is no record evidence indicating that a recount request was made and accepted in one Florida county while a request made in a different county was rejected. More generally, they raise a series

of arguments for the proposition that Plaintiffs' challenge to Florida's election laws does not rise to a level that would warrant federal intervention.

The district court, weighing the parties' arguments, determined that Plaintiffs had failed to show a substantial likelihood of success on the merits. We have reviewed the competing arguments. To some extent, our consideration of these arguments is shaped by the practical difficulties of marshaling an adequate record when ongoing and unexpected events continually alter the key facts. In this case, only limited affidavits and a few documents were introduced into the record before the district court. No formal discovery has been undertaken, and, as yet, no evidentiary hearing has been held in this case. Many highly material allegations of facts are vigorously contested. Preliminary injunction motions are often, by necessity, litigated on an undeveloped record. But an undeveloped record not only makes it harder for a plaintiff to meet his burden of proof, it also cautions against an appellate court setting aside the district court's exercise of its discretion.

However, we need not decide the merits of the case to resolve this appeal, and therefore, do not decide them at this time. The district court rejected Plaintiffs' preliminary injunction motion not only because it found no likelihood of success on the merits, but also on the separate and independent ground that Plaintiffs had failed to show that irreparable injury would result if no injunction were issued. We may reverse the district court's order only if there was a clear abuse of discretion. *See, e.g., Carillon Importers, Ltd. v. Frank Pesce Int'l Group* Ltd., 112 F.3d 1125, 1126 (11th Cir. 1997) (per curiam); *Revette v. International Ass'n of Bridge, Structural & Ornamental Iron Workers,* 740 F.2d 892, 893 (11th Cir. 1984) ("The district court's decision will not be reversed unless there is a clear abuse of discretion."); *Harris Corp. v. National Iranian Radio & Television,* 691 F.2d 1344, 1354 (11th Cir. 1982). Because Plaintiffs still have not shown

irreparable injury, let alone that the district court clearly abused its discretion in finding no irreparable injury on the record then before it, the denial of the preliminary injunction must be affirmed on that basis alone.

A district court may grant injunctive relief only if the moving party shows that: (1) it has a 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. See *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (citing *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)). In this Circuit, "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites. Id. (internal citation omitted); *see also Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975) (grant of preliminary injunction "is the exception rather than the rule," and plaintiff must clearly carry the burden of persuasion).[8]

A showing of irreparable injury is "'the sine qua non of injunctive relief.'" *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978)); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 2568 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury."); *Robertson*, 147 F.3d at 1306 (plaintiff must show "irreparable injury will be suffered"); *Harris Corp.*, 691 F.2d at

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[8]The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

1356-57 (concluding that district court "did not abuse its discretion in finding a substantial likelihood of irreparable injury to [the plaintiff] absent an injunction"); *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981) (to be granted a preliminary injunction plaintiffs must show "a substantial likelihood that they would suffer irreparable injury").[9]

Significantly, even if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper. See *Snook v. Trust Co. of Georgia Bank of Savannah,* N.A., 909 F.2d 480, 486 (11th Cir. 1990) (affirming denial of preliminary injunction even though plaintiff established likelihood of prevailing because plaintiff failed to meet burden of proving irreparable injury); City of Jacksonville, 896 F.2d at 1285 (reversing preliminary injunction based solely on plaintiff's failure to show irreparable injury); *Flowers Indus. v. FTC*, 849 F.2d 551, 552 (11th Cir. 1988) (same); *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) (affirming denial of preliminary injunction and stating that a plaintiff's "success in establishing a likelihood it will prevail on the merits does not obviate the necessity to show irreparable harm"). As we have emphasized on many occasions, the asserted irreparable injury "must be neither remote nor speculative, but actual and imminent." *City of Jacksonville*, 896 F.2d at 1285 (quoting *Tucker Anthony Realty Corop. v. Schlesinger*, 888 F.2d 969, 973 (2d Cir. 1989)); accord, *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir.

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[9]We have occasionally spoken of requiring a substantial "threat" of irreparable harm. *See Haitian Refugee Ctr., Inc. v. Baker,* 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam). We do not read those opinions, however, as intending to relax the traditional standard – stated by the Supreme Court -- that a plaintiff must show either that he will suffer, or faces a substantial likelihood that he will suffer, irreparable injury. *See e.g., Doran,* 422 U.S. at 931, 95 S. Ct. at 2568. In any event, the outcome is the same even using substantial "threat" as the benchmark.

1975) ("An injunction is appropriate only if the anticipated injury is imminent and irreparable.").

At this time, Plaintiffs cannot demonstrate a threat of continuing irreparable harm. At the moment, the candidate Plaintiffs (Governor Bush and Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have been certified as the winners of Florida's electoral votes notwithstanding the inclusion of manually recounted ballots. Moreover, even if manual recounts were to resume pursuant to a state court order,[10] it is wholly speculative as to whether the results of those recounts may eventually place Vice President Gore ahead. *See Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994) ("a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate -- as opposed to a merely conjectural or hypothetical -- threat of future injury"). At the moment it also remains speculative whether such an order may be forthcoming. Indeed, the Florida Circuit Court in Leon County considering the Vice President's contest to the final certification has now denied the Vice President's request for resumption of manual recounts as part of its broader judgment in the entire contest action. This development reinforces that the candidate Plaintiffs are suffering no serious harm. Moreover, as noted earlier, the United States Supreme Court has now vacated the Florida Supreme Court's decision, raising still further doubt about the likelihood of any substantial injury. Nor are the voter Plaintiffs (all of whom allege that they voted for Governor Bush and Secretary Cheney) suffering serious harm or facing imminent injury. No voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice. Nor does

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[10]This case involves discretionary recounts ordered by county canvassing boards. A recount ordered by a state court under state law in a contest proceeding might be a substantially different case, raising different legal issues.

any voter claim that his vote was rejected or not counted. The cases called to our attention by the parties that have warranted immediate injunctive relief have involved these kind of circumstances. Even assuming Plaintiffs can assert some kind of injury, they have not shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction. Additionally, any alleged voter injury, unrelated to the outcome of the election certified by the Florida Secretary of State, can be adequately remedied later. And although these Plaintiffs assert that Florida's existing manual recount scheme must be invalidated for now and in the future, no one suggests that another election implicating those procedures is underway or imminent.

Plaintiffs' other allegations of irreparable injuries to justify a preliminary injunction are unconvincing. The candidate Plaintiffs contend that if the manual recounts are allowed to proceed, simply rejecting the results of those recounts after the conclusion of this case will not repair the damage to the legitimacy of the Bush Presidency caused by "broadcasting" the flawed results of a recount that put Vice President Gore ahead. But the pertinent manual recounts have already been concluded, and the results from those recounts widely publicized. Moreover, we reject the contention that merely counting ballots gives rise to cognizable injury.

Plaintiffs also contend that a violation of constitutional rights always constitutes irreparable harm. Our case law has not gone that far, however. See, e.g., City of Jacksonville, 896 F.2d at 1285 ("No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation."); *Cunningham v. Adams,* 808 F.2d 815, 821-22 (11th Cir. 1987) (affirming denial of preliminary injunction in action alleging Fourteenth Amendment violations, and finding no abuse of discretion in district court's rejection of the plaintiff's argument

that "irreparable injury will be presumed where there has been a violation of substantive constitutional rights"); see also *Hohe v. Casey*, 868 F 2d 69, 73 (3d Cir. 1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction."). The only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether. See *City of Jacksonville*, 896 F.2d at 1285 (citing *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) and *Deerfield Med. Ctr.*, 661 F.2d at 338); *see also Hohe*, 868 F.2d at 72-73 ("[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits. Rather, . . . it is the 'direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury.'") (quoting Cate, 707 F.2d at 1188)). This is plainly not such a case. *Cf. City of Mobile v. Bolden*, 446 U.S. 55, 76, 100 S. Ct. 1490, 1505 (1980) (constitutional right to vote, and the principle of equality among voters, is conferred by the Equal Protection Clause of the Fourteenth Amendment) (citing *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964)).

Simply put, this principle is the law: we may reverse a district court's denial of a preliminary injunction if and only if we find that the court clearly abused its discretion.[11] Our review,

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[11]The district court did not peg its finding of no irreparable harm to any incorrect legal principle. On the contrary, the district court found that, on the record presented to it, no irreparable harm had been proved. See *Siegel v. LePore*, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), at *8 ("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 inconclusive state of these recount processes coupled with their different factual

therefore, must be highly deferential. *See, e.g., Carillon Importers*, 112 F.3d at 1126 ("The review of a district court's decision to grant or deny a preliminary injunction is extremely narrow in scope."); *Revette*, 740 F.2d at 893 ("Appellate review of such a decision is very narrow."). As we have explained:

> This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district court.

Id. (quoting *Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974)) (internal quotation marks and additional citation omitted). The abuse-of-discretion standard, therefore, serves an important and vital purpose.

In the case now before us, the district court expressly found that Plaintiffs did not meet their burden of showing that immediate irreparable harm would result if preliminary injunctive relief were not entered. It did so largely because the limited record before it did not support Plaintiffs' claims of harm. That critical finding remains just as compelling, and the irreparability of the alleged injury is no more established, today.

Accordingly, we cannot say that the district court abused its broad discretion in finding that Plaintiffs did not meet their burden of showing at least a substantial likelihood of irreparable injury. Because proof of irreparable injury is an indispensable prerequisite to a preliminary injunction, Plaintiffs are not entitled to a preliminary injunction at this time; and the district court's

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postures counsels against preliminary uniform injunctive relief at this time.").

order must be affirmed. *See, e.g., Canal Authority v. Callaway*, 489 F.2d 567, 574 (5th Cir. 1974) ("[W]here no irreparable injury is alleged and proved, denial of a preliminary injunction is appropriate."). The Court does not at this time decide the merits of Plaintiffs' constitutional arguments.[12]

AFFIRMED.

[12]A decision by the Court on the likelihood of success would require the Court to reach, in some sense, constitutional questions. Even for those of us who believe that the record will not support a substantial likelihood of success on the merits, it is a "fundamental and longstanding principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 1323 (1988). Given our view on the issue of injury, no necessity is present here.

ANDERSON, Chief Judge, concurring specially:

I join in the opinion of the Court. I subscribe to the entire opinion including, *inter alia*, the holding and reasoning that Plaintiffs have failed to demonstrate irreparable injury. Although I agree that judicial restraint cautions against the court's addressing constitutional issues unless necessary, it does not seem inappropriate for me in light of the extensive dissents, to discuss my own views about the likelihood of success on the merits of Plaintiffs' constitutional issues.

I. LIKELIHOOD OF SUCCESS

A. Standard of Review

A party seeking a preliminary injunction must establish the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that its own injury outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest. *See Haitian Refugee Center, Inc. v. Baker,* 949 F.2d 1109, 1110 (11th Cir. 1991).

I note at the outset that the scope of this review of the district court's denial of injunctive relief is limited to whether the district court abused its discretion. *See Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1310 (11th Cir. 1999) ("The grant or denial of a preliminary injunction is a decision within the sound discretion of the district court."). The district court must exercise its discretion "in deciding upon and delicately balancing the equities of the parties involved." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983) (quoting *Tatum v. Blackstock*, 319 F.2d 397, 401-02 (5th Cir. 1963)). In this review, I adopt the district court's findings of fact unless clearly erroneous, but I review de novo jurisdictional issues and issues of law. *See SEC v. Unique Financial Concepts, Inc.*, 196 F.3d 1195, 1198 (11th Cir. 1999). "Because a preliminary injunction is 'an extraordinary and

drastic remedy,' its grant is the exception rather than the rule, and plaintiff must clearly carry the burden of persuasion." *Lambert*, 695 F.2d at 539 (quoting *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)).

B. Constitutional Delegation of Authority to the States

The Constitution delegates to the states the authority to establish and implement procedures for selecting Presidential electors. The Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . ." U.S. Const. art. II, § 1, cl. 2.[13] The United States Code provides that the timely appointment of Presidential electors pursuant to state law is conclusive. *See* 3 U.S.C. § 5.[14] The Supreme Court has confirmed this broad delegation of power to the states, subject to the limitation that a state may not exercise this power in a manner that violates

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[13]Article II, Section 1, Clause 2 of the Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[14]3 U.S.C. § 5 provides:

> 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 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.

specific provisions of the Constitution of the United States. *See McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3 (1892). *See also Anderson v. Celebrezze*, 460 U.S. 780, 796 n.18, 103 S. Ct. 1564, 1573 n.18 (1983) (stating that "[t]he Constitution expressly delegates authority to the States to regulate the election of Presidential electors," but that this does not give states the power to impose unconstitutional burdens on the right to vote); *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 9 (1968) (stating that the extensive powers granted to the states to pass laws regulating the selection of electors is subject to the limitation that these powers "may not be exercised in a way that violates other specific provisions of the Constitution"); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. Unit B 1981) (stating that while the Constitution provides no guarantee against innocent irregularities in the administration of state elections, in rare situations where state election procedures undermine the basic fairness and integrity of the democratic system, a constitutional violation exists).

While the unconstitutional exercise of state power is prohibited, the Supreme Court has recognized that a state's regulations governing the electoral process will inevitably impact, in a manner that may burden or restrict, its citizens' exercise of their right to vote. *See Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992); *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1570. The Supreme Court has acknowledged that such restrictions are necessary "if [elections] are to be fair and honest . . . ." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974). In the context of a Presidential election, the Supreme Court has confirmed that a state's interest in conducting an orderly and fair election is "generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1570.

To preserve the essential balance between states' power to govern elections and voters' constitutional rights, the Supreme Court has developed a flexible standard to use in assessing

constitutional challenges to a state's regulation of elections. The Supreme Court described this standard succinctly in *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992):

> [W]hen [First and Fourteenth Amendment] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. 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.

Id. at 434, 112 S. Ct. at 2063 (internal quotation marks and citations omitted).

Our Circuit's precedent addressing constitutional challenges to state election processes has reflected comparable deference to state regulation of elections. We have held that the scope of voters' exercise of their right to vote is restricted in the state election context by considerations of "[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 the remedy afforded by section 1983 . . . ." *Gamza v. Aguirre*, 619 F.2d 449, 452-53 (5th Cir. 1980);[15] see also *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986) ("Although 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.") (internal citation

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[15]The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

omitted); *Duncan*, 657 F.2d at 701. We have emphasized that federal court intervention is not appropriate in "garden variety" disputes over election irregularities, but that redress of alleged constitutional injuries is appropriate if "the election process itself reaches the point of patent and fundamental unfairness . . . ." *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Curry*, 802 F.2d at 1315).

These principles guide my analysis of the Plaintiffs' likelihood of success in their constitutional challenges to Florida's election laws. The Plaintiffs argue on appeal that the district court erred by refusing to enjoin the post-election manual recounting of ballots in four Florida counties, because they allege that these recounts violate the constitutional rights of the state's voters. The Plaintiffs advance two arguments, an equal protection argument and a substantive due process argument. I discuss each in turn and cannot conclude based on the sparse record before this Court that the district court abused its discretion in denying the Plaintiffs' motion for preliminary injunctive relief. I believe that the Plaintiffs have failed to establish with sufficient clarity a severe burden or impact on the rights of Florida voters. See *Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 ("Preliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution."). Rather, the alleged impacts are reasonable and are justified by their furtherance of the state's important regulatory interests in ensuring accurate and complete election results. Accordingly, the Plaintiffs fail to make the requisite showing of a substantial likelihood of success on the merits of their claims, and the district court thus did not abuse its discretion in refusing to grant a preliminary injunction.

C. Equal Protection Claim

The Plaintiffs claim that Florida's statutory manual recount provision as applied in this case violates the rights of all voters to be treated equally because the manual recounts are limited to four heavily Democratic counties. The crux of the Plaintiffs' equal protection argument is that some ballots in counties not conducting manual recounts will not be counted despite the voters' intent, because the ballots are not machine-legible, while identical ballots in counties conducting manual recounts will be counted.[16] The argument boils down to this: there is greater certainty in some counties than in others that every voter's intent is effectuated. I conclude that this argument fails to state a violation of the equal protection clause.

Under the framework developed by the Supreme Court, when a state election law severely burdens voters' constitutional rights, it must be narrowly tailored to serve a compelling interest; however, lesser burdens trigger less exacting review, and a state's important regulatory interests are typically enough to justify reasonable, nondiscriminatory restrictions. *Timmons v. Twin Cities Area New Party*, 520 U.S.351, 358, 117 S. Ct. 1364, 1370 (1997) (citing *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063).

The first step in this analysis, then, is to determine whether Florida's manual recount provision severely burdens the

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[16]For example, the Plaintiffs point to the fact that some ballots that are imperfectly punched will be counted in at least one manual-recount county, while an identical ballot would not be machine-counted, and thus would not be counted in a county not conducting manual recounts. In *Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. 00-11078 (Fla. Palm Beach Co. Cir. Ct., Nov. 22, 2000), Circuit Judge Jorge Labarga held that the Palm Beach County Canvassing Board could not follow a policy of per se exclusion of any ballot, but that each ballot must be considered in light of the totality of circumstances and that where the voter's intent could be fairly and satisfactorily ascertained, that intent should be given effect.

rights of those voters in counties not conducting manual recounts, because their ballots receive less scrutiny than those of voters in counties conducting manual recounts. I believe that it does not.

In reaching this conclusion, I note first that the Plaintiffs could not credibly argue that the mere availability of manual recounts in some counties, but not in others, places an inequitable burden on their right to vote. Taking this argument to its logical conclusion would lead to the untenable position that the method of casting and counting votes would have to be identical in all states and in every county of each state. For example, if one state counted ballots by hand while another counted by machine, there inevitably would be some ballots in the manual-recount state that were counted notwithstanding the fact that the identical ballot in the machine-count state would not be counted. The only apparent way to avoid this disparity would be for every state to use an identical method of counting. No court has held that the mere use of different methods of counting ballots constitutes an equal protection violation. Such a position would be manifestly inconsistent with the command of Article II, Section 1, Clause 2, that Presidential electors are to be appointed in the manner directed by each state legislature. Accord Anderson, 460 U.S. at 796 n.18, 103 S. Ct. at 1573 n.18; Williams, 393 U.S. 23 at 29, 89 S. Ct. at 9. Moreover, there is nothing uncommon or unusual in a state statute permitting and regulating recounts. The Supreme Court has acknowledged that recount procedures are a common and practical means of ensuring fair and accurate election results. *See Roudebush v. Hartke,* 405 U.S. 15, 25, 92 S. Ct. 804, 810-11 (1972). In *Roudebush*, the Supreme Court noted with approval that Indiana, along with many other states, had made vote recounts available to guard against irregularity or error in the tabulation of votes, and the Court stated that such recount provisions are "within the ambit of the broad powers delegated to the States by Art. I, § 4." *Id.*

The Plaintiffs attempt to bolster their treat-every-ballot-

alike argument by suggesting that partisan influences have tainted the operation of Florida's manual recount procedures in this case. The Plaintiffs allege that partisan influences have intruded in two ways: (1) that the Florida Democratic Party selectively requested manual recounts in a few populous counties that indicated significantly more Gore votes than Bush votes in order to gain political advantage; and (2) that the lack of statutory standards guiding the canvassing boards' decisions to grant manual recounts permitted partisan influences to influence those decisions.

The statute itself provides several safeguards against the kind of abuses suggested by the Plaintiffs. Pursuant to the statute, a candidate or party can only request, not mandate, a manual recount, and the decision is made by a county canvassing board composed of three statutorily designated officials, including a county court judge, none of whom are active participants in the candidacy of any candidate. *See* Fla. Stat. §102.141. The canvassing board's discretion is not standardless, but rather is guided by a statutory purpose of determining the intention of voters and correcting "an error in the vote tabulation which could affect the outcome of the election." *Id*. §102.166(5). Florida law further provides that canvassing board meetings must be open to the public. *See id*. §286.0105(1). Finally, a canvassing board's decision to grant or deny a manual recount is subject to judicial review. See *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508 (Fla. 4th DCA 1992). Once a manual recount has been authorized, statutory safeguards are provided to ensure that the results are fair and accurate, and untainted by partisan manipulation.[17] The combination of the composition of the canvassing boards, the statutory standards guiding their discretion, and the availability of judicial review provides meaningful checks on the exercise of discretion by canvassing boards, and reduces the risk of partisan influences tainting the process.

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[17]These provisions are described infra at 27.

Especially with respect to the Plaintiffs' concern that political candidates can select particular counties, but also relevant to the Plaintiffs' concern about the discretion of canvassing boards, any candidate has an equal right and an equal opportunity to request manual recounts in any county. *See* Fla. Stat. §102.166(4)(a). The Florida statute clearly placed the political parties in this case on notice of this right and opportunity.[18] Other safeguards relevant to both of the Plaintiffs' concerns include: the fact that both the request and decision must be guided by the statutory standards of determining voters' intent and correcting error which could affect the outcome, *see id.* §102.166(5), (7)(b); the fact that the decision is made, not by an ad hoc board, but by an existing board composed of statutorily designated officials, including a county judge, who are not active participants in the candidacy of any candidate, *see id.* §102.141; the fact that canvassing board meetings and any manual recounts must be open to the public, see id. §§ 102.166(6), 286.0105(1); and the fact that a canvassing board's decision is subject to judicial review. *See Broward County Canvassing Bd.*, 607 So. 2d at 508.

In assessing the severity of the impact on the right to vote, the scarcity of evidence in the instant record is also significant. On the sparse record in this appeal, I cannot conclude that Plaintiffs have made the showing requisite for relief at this preliminary judgment stage. I cannot conclude that Plaintiffs have established actual partisan manipulation or fraud. The Plaintiffs do not claim that any canvassing board unfairly refused to conduct a manual

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[18]The Plaintiffs do not claim to have lacked timely actual notice that manual recounts were requested by the Florida Democratic Party in the four counties at issue in this case. Indeed, the record reveals that the manual recounts were requested on Thursday, November 9, 2000, and that the Republican Party representatives in Miami-Dade County and Broward County filed responses opposing the manual recounts on the same day, well within the 72-hour statutory deadline for making requests in other counties, i.e., midnight on Friday, November 10, 2000.

recount. They argue on appeal that canvassing board officials may have a strong personal interest in the outcome of the election; however, such a vague allegation of a possible manipulative or discriminatory motive does not rise to the level of severity required to merit strict scrutiny of the Plaintiffs' equal protection claims.

Applying a reasonableness standard, therefore, to judge the constitutionality of Florida's manual recount provision, see *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063, I would conclude that the state has sufficiently strong interests to justify the manual recounting of votes within the established statutory framework. As provided by the plain language of the statute, the manual recount provisions are designed to remedy errors in the vote tabulation "which could affect the outcome of the election" and to arrive at the true "voters' intent." Fla. Stat. §§ 102.166(5), (7)(b). Florida has a strong interest in ensuring that the results of an election accurately reflect the intent of its voters. A manual recount provision as a supplement to mechanical counting provides a valid method to discern the will of voters, where doubt is raised as to the validity of a machine count.

With respect to the county-by-county differences which the Plaintiffs allege violate their equal protection rights, the state legislature expressly delegated to each county the decision-making authority regarding whether and how to conduct manual recounts, within the context of the statutory standard and procedures, and subject to the statutory restraints and safeguards, all as discussed above. There are strong and obvious state interests, both practical and administrative, supporting Florida's decentralization of this function to the county level. I cannot conclude that the Constitution would require that any manual recount be conducted statewide.[19] A statewide requirement would impose a very

[19]Many states decentralize this process without requiring statewide recounts.

significant administrative burden, and an often unnecessary one, as there are innumerable circumstances in which a manual recount would be warranted only in a single county. The decision to decentralize is both reasonable and nondiscriminatory. Indeed, in doing so, Florida is merely exercising the power expressly delegated in Art. II, § 1, cl. 2, and it is exercising that power by following the same pattern of federalism reflected in the Constitution itself. Further, with respect to Florida's designation of candidates and parties as the entities authorized to request a manual recount, this would seem to be a natural and reasonable choice. They are the ones most likely to be alert to problems with a machine tally.[20] Permitting only candidates, political parties and committees, but not individual voters, to request recounts is a common practice among the states.[21] I believe that Florida's interest in the efficient administration of elections is sufficient to justify its decision to provide for the implementation of its manual recount provision on a decentralized, localized basis.

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[20]There are obvious and powerful reasons not to permit individual voters to trigger a manual recount; their interests are adequately represented by the candidates and parties, and individual voter participation would likely lead to administrative nightmares.

[21]Many states permit a recount to be triggered only upon the request of a candidate, political party and/or a political committee, but not upon the appeal of an individual voter. See e.g., ARK. CODE ANN. § 7-5-319 (candidate); COLO. REV. STAT. § 1-10.5-106 (candidate); IDAHO CODE § 34-2301 (candidate); IND. CODE ANN. § 3-12-11-1 (candidate or political party's county chairperson); IOWA CODE § 50.48 (candidate); LA. REV. STAT. § 1451 3-12-11-1 (candidate or political party); ME. REV. STAT. ANN. tit. 21-A, § 737-A (losing candidate); MD. CODE. ANN., Elections § 12-101 (losing candidate); MO. REV. STAT. § 115.553 (candidate); N.J. STAT. ANN. § 19:28-1 (candidate); OKLA. STAT. ANN. tit. 26, § 8-111 (candidate); OR. REV. STAT. § 258.161 (candidate, political party or county clerk); TEX. ELEC. CODE ANN. § 212.023 (candidate); VA. CODE ANN. § 24.2-800 (candidate); WASH. REV. CODE § 29.64.010 (candidate or political party); W. VA. CODE § 3-6-9 (candidate); WIS. STAT. ANN. § 9.01 (candidate); WYO. STAT. ANN. §§ 22-16-109 & 110 (losing candidate or county canvassing board).

My conclusion that the deprivation of rights alleged by the Plaintiffs does not merit strict scrutiny is supported by the contrast between this case and cases in which the Supreme Court has applied strict scrutiny: those cases have involved a complete deprivation of the right to vote or a differential weighting of votes based on impermissible classifications. In *O'Brien v. Skinner*, 414 U.S. 524, 94 S. Ct. 740 (1974), the Supreme Court applied strict scrutiny to invalidate a state electoral scheme that completely denied individuals the right to vote based on arbitrary distinctions. *See id.* at 533, 94 S. Ct. at 745 (invalidating a New York absentee ballot statute that operated to deny otherwise eligible prisoners the right to vote, based solely on the prisoner's county of incarceration). The reasoning of *O'Brien* does not apply here, however, as the Plaintiffs do not assert that they have been denied the right to vote or to have their vote counted; rather, they assert that their votes have received unequal treatment in the post-election counting process.

In the one-person, one-vote cases, the Supreme Court has held that states' weighted voting systems, which arbitrarily and systematically granted a lesser voice to some voters based on their geographic location, violated the voters' right to equal protection. See *Moore v. Ogilvie*, 394 U.S. 814, 819, 89 S. Ct. 1493, 1496 (1969); *Reynolds v. Sims*, 377 U.S. 533, 563, 84 S. Ct. 1362, 1382 (1964); *Roman v. Sincock,* 377 U.S. 695, 709-10, 84 S. Ct. 1449, 1458 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S. Ct. 801, 808 (1963). The facts presented by those cases are different from the facts here, however. The ballots of voters in Florida counties conducting manual recounts are not receiving greater weight than are votes elsewhere in Florida. The additional scrutiny of ballots afforded under Florida's manual recount procedures does not weigh the value of votes; it merely verifies the count. Unlike the foregoing cases which have held that the systematic unequal weighting of votes is unconstitutional, here there is no automatic, inevitable, or systematic granting of greater

weight to the choices of any voter or class of voters.

This conclusion is further supported by the fact that the Constitution itself, in Article II, § 1, cl. 2, contemplates that each state will direct its own (potentially different) method of appointing Presidential electors. Within each state, federal courts have acknowledged that diverse methods of voting may be employed. *See Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) (citing *Carrington v. Rash*, 380 U.S. 89, 91, 85 S. Ct. 775, 777 (1965)). The Supreme Court has confirmed that recounts are well within the ambit of a state's authority, *see Roudebush*, 405 U.S. at 25, 92 S. Ct. at 810-11, and the manual counting of ballots has been commonplace historically. In the light of the constitutional delegation of authority to the states, confirmed by case law, I believe that manual recounts in some counties, while identical ballots in other counties are counted and recounted only by machine, and the inevitable variances that this will produce, do not in themselves severely burden the right to vote.

Florida's statutory manual recount provision does not limit the Plaintiffs' ability to cast their votes, nor significantly undermine the certainty that their votes will be counted. While the statute permits enhanced scrutiny to be given to ballots in counties where the candidates or parties have requested and the canvassing boards have authorized a manual recount, the statute provides ample safeguards to ensure that the decision to conduct manual recounts, and the manner in which the recounts are conducted, is open, fair, and accurate. While there is some potential for the statute to be manipulated by those with partisan interests, the sparse record here does not in my opinion establish a clear showing of partisan fraud or misconduct that would be required in this preliminary injunction stage. Nor does the record reveal concrete evidence of substantial or uncorrected errors in manual counting that have generated erroneous vote tabulations. Therefore, I conclude that at this stage the Plaintiffs have failed to

sufficiently demonstrate a severe impact on their equal protection rights, so that heightened scrutiny of Florida's manual recounts is not merited. *See Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063. I believe that Florida's important regulatory interests are sufficient to justify the reasonable, nondiscriminatory impact the Plaintiffs have shown to their voting rights.[22]

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[22]Much of Plaintiffs' argument focuses on the assumption that a candidate's self-interest in selecting counties likely to produce more undervotes for him introduces an invidious and unconstitutional discrimination. My discussion in text reveals the weaknesses which I see in this argument. In summary, a candidate can only request, not mandate, a recount. The decision is made by a county canvassing board with several built-in statutory safeguards – including the composition of the board (preordained county officials, including a county judge, none of whom can be active in any candidacy), statutory standards to guide the board's discretion (relating to the intention of voters and an error in the mechanical tabulation), and the fact that the board's meetings must be open and are subject to public scrutiny and court review. Strong state interests support county-level decentralization; mandating statewide recounts in every instance would impose severe administrative burdens. Rather than invidious discrimination, I suggest that the statute contemplates that candidates or parties are the appropriate entities to make such request because their self-interest prompts them to be alert to problems in a machine tally which might make a recount appropriate. Like the statutory contemplation, a requesting candidate would also contemplate that any opposing candidate would be alert to problems in counties favorable to him. There is an equal right and an equal opportunity in that respect, as stated clearly in the statute. Nothing in the statute suggests that only a candidate losing in a particular county can make a request in that county; the statutory standard is an error in the vote tabulation that *could affect* the outcome of the election. Nothing suggests that the statute means the "outcome" in that particular county; rather, the statute says "outcome of the election" itself. Nothing suggests that a canvassing board may not consider the potential effects of other recounts in its own decision to authorize a manual recount. Nothing prevents a candidate or a party requesting a manual recount from notifying a canvassing board of the fact that other counties may authorize or have authorized manual recounts which may change the vote totals. As applied here, the record before this Court does not reveal a motive by the Democratic Party to deprive the Republican Party of its opportunity to request manual recounts. The requests challenged here were not strategically delayed; rather, the requests were made on November 9, 2000, more than 24 hours before

For the foregoing reasons, I would conclude that the Plaintiffs have failed to prove a likelihood of success on the merits of their equal protection claim.

D. Substantive Due Process Claim

The Plaintiffs argue that the counting procedures used by counties conducting manual recounts are arbitrary and rife with irregularities that constitute a denial of due process. Specifically, the Plaintiffs allege that the standards used to decide which marks or punches on a ballot are counted as votes differ from county to county and further that these standards have been changed mid-count in one county. I believe that the record evidence fails to establish that the alleged unreliability or inaccuracy of manual recounting rises to the level of a severe burden on the right to vote.

In *Curry v. Baker*, 802 F.2d 1302 (11th Cir.1986), we refused to find a constitutional violation in a state gubernatorial candidate's argument that election officials had miscounted ballots. *See id.* at 1319. We stated that, in order for the election process to reach the point of "patent and fundamental unfairness," the "situation must go well beyond the ordinary dispute over the counting and marking of ballots." Id. at 1315 (quoting *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981)). In *Curry*, we emphasized that a federally protected right is implicated only "where the entire election process – including as part thereof the state's administrative and judicial corrective process – fails on its

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the 72-hour deadline, leaving ample time for the opposing candidate to make requests in response. Permitting candidates to request recounts is a reasonable way to promote the state's legitimate and strong interest in ensuring a full and accurate count of ballots where the voters' intention can be fairly and satisfactorily ascertained, especially so when any request is circumscribed by the statutory safeguards provided here. Indeed, many states permit candidates or political parties to request such recounts; if Plaintiffs' arguments prevail, the status of many state election laws, and many elections, would be constitutionally suspect.

face to afford fundamental fairness.'" *Id.* at 1317 (quoting *Griffin*, 570 F.2d at 1078).

These principles resonate in numerous federal cases holding that disputes over human or mechanical errors in ballot counting, absent a showing of intentional manipulation, do not rise to the level of a federal constitutional violation. See *Gold v. Feinberg,* 101 F.3d 796, 802 (2d Cir.1996) (holding that human errors resulting in the miscounting of votes, the presence of ineligible candidates on ballot, and the late delivery of voting machines to some polling places, did not rise to the level of a constitutional violation because adequate state remedies existed); *Bodine v. Elkhart County Elec. Bd.*, 788 F.2d 1270, 1272 (7th Cir.1986) (concluding that voter-plaintiffs failed to state a constitutional claim where mechanical and human error resulted in errors in counting votes, but where there was no allegation that the defendants acted with intent to undermine the election); *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir.1980) (concluding that allegations of negligent vote counting did not state a constitutional claim); *Hennings v. Grafton*, 523 F.2d 861, 864-65 (7th Cir. 1975) (stating that while due process rights would be implicated on a showing of "willful conduct which undermines the organic processes by which candidates are elected," no constitutional guarantee protects against inadvertent errors or irregularities; instead, state law must provide the remedy); *Pettengil v. Putnam County R-1 Sch. Dist.*, 472 F.2d 121, 123 (8th Cir. 1973) (refusing to intervene in a controversy over whether illegally cast ballots were mistakenly counted by local election officials); *Powell v. Power,* 436 F.2d 84, 88 (2d Cir.1970) (concluding that no federal remedy existed for human error resulting in non-party members mistakenly allowed to vote in congressional primary).

Despite these precedents, in reliance on our opinion in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), the Plaintiffs argue that post-election changes in ballot-counting procedures are fundamentally unfair and thus rise above the level of "garden variety"

election disputes to constitute a substantive due process violation. In *Roe*, a state court order would have forced Alabama election officials to count absentee ballots that had been rejected pursuant to a state statute and in accordance with previous state practice.[23] *See id.* at 578. We concluded that such a post-election departure from the state's statutory mandate and previous election practice would undermine the fundamental fairness of the election. *See id.* at 581. As we explained in *Roe*, our decision was based on the fact that such a change would disenfranchise those people who would have voted absentee, but were deterred from doing so by the burden of complying with the statutory requirements for completing absentee ballots. *See id.; see also Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir.1978) (finding fundamental unfairness in a state's unforeseeable invalidation of absentee ballots which resulted in the disqualification of ten percent of the total votes cast in a primary election). *Cf. Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) (rejecting a substantive due process challenge to Hawaii's decision to count blank ballots as votes against convening a state constitutional convention, where there was no suggestion that voters in favor of the constitutional convention had relied on the state's previous practice of disregarding blank ballots in a constitutional convention vote); *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825, 828 (1st Cir.1980) (holding that the Supreme Court of Puerto Rico's decision to count mismarked ballots where the intent of the voter was clear did not violate due process, because here could have been no detrimental reliance by any voter on the assumed invalidity of mismarked ballots).

Our decision in *Roe* is distinguishable from the instant

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[23]The applicable Alabama statute required absentee voters to send their ballots accompanied by an affidavit which was either notarized or signed by two witnesses. It was undisputed in *Roe* that the previous practice in Alabama, as mandated by statute, had been to disregard absentee ballots that were mailed in without the required affidavit.

case in at least two significant ways. First, at this stage of the litigation, the record does not establish the requisite showing of a significant post-election departure from Florida's manual recount practices before this election.[24] Unlike the circumstance in Roe, where the post-election change of procedure violated a statutory mandate, in this case Florida's statute expressly provides for manual recounts and establishes the voter-intent standard to be used in conducting the recounts. While the Plaintiffs have alleged that various canvassing boards have used different standards or have changed their standards with respect to the analysis of particular physical attributes of ballots, the Plaintiffs have not alleged that any board has departed from a good-faith attempt to determine the voters' intent. Thus, the Plaintiffs have failed to show any departure from statutory mandate or from a pre-election procedure that rises to the level of fundamental unfairness.

Second, Roe is distinguishable because this record does not show detrimental reliance by voters. In this case, there is no evidence to suggest that a voter in any county failed to adequately punch or mark a ballot in reliance on a belief that a vote in some other county would not be counted if a ballot were only partially

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[24]There remain in the present record sufficient disputed facts as to any significant change of practice that I cannot conclude with the necessary clarity that any significant number of votes was counted pursuant to a changed practice.

My opinion would not change, even assuming that there may have been a change of practice – i.e., from counting only partially detached chads to counting ballots that were not partially detached, but under the totality of the circumstances the intention of the voter could be fairly and satisfactorily ascertained. *See Florida Democratic Party v. Palm Beach County Canvassing Board,* No. 00-11078 (Fla. Palm Beach Co. Cir. Ct., Nov. 22, 2000). The statutory standard – i.e., the determination of the voter's intent within the Canvassing Board's discretion, subject to judicial review – has remained constant. Even assuming some change with respect to the discretionary interpretation of particular physical attributes of ballots, there is no evidence in this record that a practice has been implemented which is inconsistent with the plain statutory standard, as was the case in *Roe*.

punched, i.e., in reliance on an anticipated lack of a manual recount. Indeed, it would be manifestly unreasonable to suggest such reliance. Quite the contrary, the statute expressly puts voters on notice of the possibility of a manual recount. As a corollary to this obvious lack of reliance, this case involves no disenfranchisement of voters, unlike the disenfranchisement in *Roe* of people who failed to vote absentee because of the inconvenience imposed by the statutory notarization/witness requirement.

In addition to the lack of detrimental reliance by voters on Florida's previously established election procedures, the record before us is not sufficient to conclude that the district court was clearly erroneous in declining to find purposeful, systematic discrimination in the manual recounting procedures employed. In fact, the manual recount statute mandates procedures to ensure fairness and accuracy in the conduct of any manual recount. Any manual recount must include at least one percent of the total votes cast and at least three precincts. *See* Fla. Stat. §102.166(4)(d). A manual recount must be open to the public, and counting teams must have at least two members who are, when possible, members of at least two political parties. *See id.* § 102.166(6), (7)(a). Determination of the voter's intent is the statutory standard. *See id*. § 102.166(7)(b). Florida law provides that the decisions and actions of county canvassing boards are subject to judicial review, not only with respect to their decision on whether to conduct a manual recount, as discussed above, but also with respect to the general validity of their counting procedures. *See Beckstrom v. Volusia County Canvassing Bd*., 707 So. 2d 720 (Fla. 1998); *Boardman v. Esteva,* 323 So.2d 259 (Fla. 1975). State courts have authority to review election challenges, whether brought by a candidate or party as a protest under Fla. Stat. § 102.166, or brought by a candidate, qualified voter, or taxpayer as a contest under Fla. Stat. § 102.168. A court may void a challenged election result based on a finding of substantial irregularities that raise a reasonable doubt as to whether the election results express the will

of the voters. *See Beckstrom*, 707 So. 2d at 725. These statutory safeguards are calculated to protect against the risk of the abuses that the Plaintiffs fear. In this case, the Plaintiffs have failed to persuade me that these safeguards were ineffective. The district court found, based on the evidence stipulated at the hearing, that "no evidence has been demonstrated that these recounts have generated erroneous tabulations." Based on my review of the evidence, I cannot conclude that this finding was clearly erroneous.[25]

Under these circumstances, I am not persuaded that Plaintiffs have made the requisite showing of a severe impact on their right to vote. On this record, they have failed to prove that this case rises above a "garden variety" dispute over the counting of ballots to reach the level of fundamental unfairness. Because Florida's strong state interests, as discussed above, justify a decentralized vote-counting process, I conclude that the Plaintiffs fail to show a likelihood of success in proving their substantive due process claim. Because the Plaintiffs fail to show a substantial likelihood of success on the merits of their constitutional claims, they fail to demonstrate that the district court abused its discretion in denying the motion for preliminary injunctive relief.[26]

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[25]While this record reveals isolated observations of acts from which a fact finder might infer an effort to dislodge a chad, I cannot conclude that the district court was clearly erroneous. I see little or no evidence of actual intent to dislodge a chad, or that ballots were counted when they were not already partially dislodged. I also note that the presence of Republican and Democratic observers, in addition to the intense public scrutiny, helps to ensure the integrity of the process.

[26]The Plaintiffs also allege a First Amendment violation, essentially arguing that Florida's statute grants county canvassing board members unlimited discretion to impinge on voter's rights through arbitrary decisions regarding whether to conduct manual recounts. In another articulation of their argument, the Plaintiffs argue that the canvassing board's decisions are governed by no standards. The Plaintiffs argue that the right to vote is protected

II. CONCLUSION

For the foregoing reasons, I would conclude that Plaintiffs have failed to establish a substantial likelihood of success warranting federal court intervention on either equal protection or

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by the First Amendment. *See Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S. Ct. 5, 10 (1968) (stating that the right to vote is entitled to similar constitutional protections as the First Amendment right of association); *Carrington v. Rash,* 380 U.S. 89, 85 S. Ct. 775 (1965) (holding that the right to vote is a fundamental right protected by the Equal Protection Clause). They argue that the Constitution prohibits the overbroad exercise of discretion by officials over First Amendment rights and, therefore, that Florida's statute violates the Constitution. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S. Ct. 2395, 2401 (1992) (stating that an "impermissible risk of suppression of ideas" exists where "an ordinance . . . delegates overly broad discretion to the decisionmaker").

Contrary to the Plaintiffs' argument, cases implicating First Amendment standards have involved claims that pure speech might be chilled or prevented altogether. *See Forsyth County*, 505 U.S. at 129-30, 112 S. Ct. at 2401; *City of Jacksonville*, 896 F.2d at 1285 (citing *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) and *Deerfield Med. Ctr.*, 661 F.2d at 338). This is not such a case. Instead, the constitutional right to vote, and the principle of equality among voters, is protected under the Equal Protection Clause of the Fourteenth Amendment. *See City of Mobile v. Bolden*, 446 U.S. 55, 76, 100 S. Ct. 1490, 1505 (1980)(citing *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964)). I conclude that the Florida manual recount statute satisfies equal protection because it contains constitutionally sufficient standards to constrain the discretion of canvassing board officials. I describe the statutory and judicially imposed constraints on these officials' discretion *supra* at 11-13. Based on these constraints, I conclude that the challenged provisions of Florida election law do not permit officials to exercise overly broad discretion over voters' rights.

I thus conclude that the Plaintiffs have failed to show a severe burden on their voting rights; instead, the statutory safeguards ensure only reasonable, nondiscriminatory burdens. I conclude that Florida's important interests in ensuring accurate, complete election results, and the state's strong interest in its established system of decentralized administration of elections, justify the reasonable, nondiscriminatory impact of Florida's manual recount statute on voters' rights. The Plaintiffs thus fail to establish a First Amendment violation.

due process grounds. The conclusion of a majority of this court that the district court did not abuse its discretion in concluding that Plaintiffs had failed to establish a substantial likelihood of irreparable harm, and my conclusion in this concurring opinion that Plaintiffs have failed to establish a substantial likelihood of success, are supported by the lack of evidentiary development in this case and by the preliminary injunction posture of the case. Especially significant in our consideration of this case is the sparse record on which Plaintiffs have chosen to proceed.[27] The record before us is without the benefit of discovery or evidentiary hearing. Where, as here, a party has chosen to forego an evidentiary hearing, it is not entitled to have its disputed representations accepted as true. *See Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998). The scant evidence in this record has not been tested by the adversarial process, notwithstanding the fact that material and relevant facts are in dispute. In addition, the preliminary injunction posture of this case cautions against federal court intervention. *See Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 ("Preliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution."). I cannot conclude that Plaintiffs on this sparse record have demonstrated a clear showing, either with respect to the likelihood of success or irreparable injury, and thus have not made a clear showing that an injunction before trial is definitely demanded by the Constitution.

For the foregoing reasons, I thus specially concur, in

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[27]We noted in our November 27, 2000, Order that Plaintiffs' motion for permanent injunctive relief has remained pending in the district court, and that court has remained available for further factual development.

addition to joining the opinion of the court.

TJOFLAT, Circuit Judge, dissenting, in which BIRCH and DUBINA, Circuit Judges, join and in which CARNES, Circuit Judge, joins as to Part V. of Judge Tjoflat's dissent in *Touchston v. McDermott*:

I dissent. The Florida election scheme at issue is unconstitutional for the reasons set forth in my dissenting opinion in *Touchston v. McDermott*, No. 00-15985 (11th Cir. Dec. 6, 2000) and by Judge Carnes in his dissenting opinion.

BIRCH, Circuit Judge, dissenting, in which TJOFLAT and DUBINA, Circuit Judges, join:

While I concur in the dissenting opinions by my colleagues, Judges Tjoflat, Dubina and Carnes, my concern about the constitutional deprivations alleged in these cases is focused on the lack of standards or guiding principles in the Florida manual recount statute. Florida's statutory election scheme envisions hand recounts to be an integral part of the process, providing a check when there are "error[s] in the vote tabulation which could affect the outcome of the election." *See* Fla. Stat. Ann. § 102.166(5). The 1989 Florida legislature, however, abdicated its responsibility to prescribe meaningful guidelines for ensuring that any such manual recount would be conducted fairly, accurately, and uniformly. While Florida's legislature was unquestionably vested with the power under Article II, Section One of the United States Constitution to devise its own procedures for selecting the state's electors, it was also required to ensure that whatever process it established comported with the equal protection and due process requirements of the Fourteenth Amendment to that same Constitution.[28] Other states, such as Indiana, have provided clear and definitive standards under which manual recounts are to be conducted. *See* Ind. Code § 3-12-1-9.5 (providing in part that chads that have been pierced count as valid votes, but those with indentations that are not separated from the ballot card do not). Absent similar clear and certain standards, Florida's manual recount scheme cannot pass constitutional muster.

Moreover, Congress, to which the electors from Florida will be ultimately certified, has established a safe harbor, 3 U.S.C. § 5, that requires that such rules and standards be established *before* the election. Because the 1989 Florida legislature has, in

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[28] *See Moore v. Ogilvie*, 394 U.S. 814, 818-19, 80 S. Ct. 1493, 1496 (1969) (discussing the applicability of the Fourteenth Amendment to the nominating process for presidential candidates).

my view, abdicated its responsibility to formulate constitutionally clear and objective statutory rules and standards for the election process in Florida, it has disenfranchised voters throughout the state.[29] The well-intended and responsible county canvassing boards across the state have been given, in legislative terms, an unfunded mandate --- discern the voter's intent without any objective statutory instructions to accomplish that laudable goal. The effect of such an unguided, standardless, subjective evaluation of ballots to ascertain voter intent is to cause votes to be counted (or not to be counted) based only upon the disparate and unguided subjective opinion of a partisan (two members are elected in partisan voting) canvassing board.[30] Since their opinions as to voter intent are standardless no meaningful judicial review is possible by a Florida court. Accordingly, by finding an abridgement to the voters' constitutional right to vote, irreparable harm is presumed and no further showing of injury need be made.[31] It has been said that to err is human --- and

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[29] *See* Fl. Stat. Ann. § 102.166 (West 1989). *See generally Roe v. Alabam*a, 43 F.3d 574, 581-82 (11th Cir. 1995) (per curiam) (finding that the alteration of objective standards after the election disenfranchised voters).

[30] *See* Fl. Stat. Ann. § 102.141 (providing that the County Canvassing Board shall be comprised of a county court judge, chairman of the board of county commissioners and supervisor of elections; Fl. Stat. Ann. § 124.01(2) (providing for popular election of county commissioners); Fl. Const. Art. 8, Sec. 1(d) (providing for popular election of the supervisor of elections).

[31] We have indicated that the injury suffered by a plaintiff is "'irreparable' only if it cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). To that end, we have presumed irreparable harm to a plaintiff when certain core rights are violated. *See Baker v. Buckeye Cellulose Corp.,* 856 F.2d 167, 169 (11th Cir. 1988) (irreparable harm presumed in Title VII cases); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (irreparable injury presumed from violation of First Amendment rights)*; Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) (irreparable injury presumed from violation of right to privacy under the Fourteenth Amendment); *Northeastern Florida Chapter of Ass'n of Gen.*

humans vote. Thus, it should not be surprising that the voting process is subject to error. However, as demonstrated in the recent Presidential election, the frequency, magnitude and variety of error associated with the exercise of this sacred right of citizenship is at once astounding and deeply troubling. Morever, the media's focus on the campaign preceding November 7, having been eclipsed by its subsequent frenzy, has left the average citizen at the least skeptical, and at the worst cynical, about our democratic institutions. Morever, in its present incarnation, the post-election debacle that brings these cases to us for resolution may be cynically viewed by some as depicted by Congresswoman Shirley Chisholm:

> [P]olitics is a beautiful fraud that has been imposed on the people for years, whose practitioners exchange gilded promises for the most valuable thing their victims own: their votes. And who benefits the most? The lawyers.

Shirley Anita Chisholm, *Unbought and Unbossed*, 1970. To respond in that way would be a mistake.

While our nation's citizens have every right to be concerned, exasperated, fatigued and even cynical, it is my fervent hope that from these events they will come to understand, if not appreciate, the role of government's Third Branch in the life of our precious democracy. Our basic function in this society is to provide a forum in which disputes --- both great and small (although to those involved, a dispute is never "small") --- can be decided in an orderly, peaceful manner; and with a high level of

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Contractors v. City of Jacksonville, Florida, 896 F.2d 1283, 1285-86 (11th Cir. 1990) (explaining that the basis for presuming irreparable injury in *Cate* and *Deerfield* was that given the "intangible nature" of the violations alleged, the plaintiffs could not effectively be compensated by an award of monetary damages). *Cf. Richard Feiner & Co. v. Turner Entm't Co.*, 98 F.3d 33, 34 (2d Cir. 1996) (irreparable harm presumed when plaintiff establishes a prima facie case of copyright infringement).

confidence in the outcome. Lawyers, as officers of the court, are integral to that process in our adversarial system.

The right to vote --- particularly for the office of President of the United States, our Commander-In-Chief, --- is one of the most central of our fundamental rights in a democracy.[32] Accordingly, any dispute that has at its core the legitimacy of a presidential election and impacts upon every citizen's right to vote, deserves the most careful study, thought and wisdom that we can humanly bring to bear on the issues entrusted to us. Thus, I feel compelled to attest to the fact that my brother and sister judges have embraced this case with a sense of duty, concern, and conscientious hard work that is worthy of the issues before us.

Aware of the importance of these cases[33] and the urgency

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[32]An executive like the President has broad discretion; he has the power to affect every voter, and thus every voter must be permitted to vote and to have his ballot both counted and equally weighed. As the Supreme Court observed in *Anderson v. Celebrezz*e, 460 U.S. 780, 794- 95, 103 S. Ct. 1564, 1573 (1983) (citations omitted):

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

[33]These cases have arrived at the appropriate juncture and present circumstances are of such an extraordinary scope that the "challenge to a state election rise[s] to the level of a constitutional deprivation." *Curry v. Bake*r, 802 F.2d 1302, 1314 (11th Cir. 1986). *See Ro*e, 43 F.3d at 580, 585. The dissent in *Roe* opined that federal courts should not interject themselves into "state

attendant to the issues presented, we decided to take these disputes *en banc* --- that is, before the entire court of twelve judges.[34] Moreover, utilizing a procedure that we normally employ in death penalty cases, we arranged through the clerks of the district courts involved to have copies of all filings there "lodged" (i.e., copies provided) with us contemporaneously.[35] Hence, we have been able to review and study the progress of the factual and legal matters presented in these cases from their inception. Accordingly, long before the anticipated notices of appeal were filed, formally bringing them to us, we were about the study and review of the legal issues to be resolved. Thus, the reader of our opinions[36] in this case should understand that our time for consideration has been considerably longer than it might appear at first blush. Just as the electorate was divided in their good faith effort to cast their votes for our nation's chief executive, the members of this court have discharged their duty to interpret the law in the context of this case in an unbiased and sincere effort. Inevitably the pundits will opine that a judge's decision is somehow linked to the political affiliation of the President that appointed the judge. While we at all levels of the judiciary have come to expect this observation we continue to regret that some "think" that is so. It may be true that a judge's judicial philosophy may reflect, to some degree, the philosophy of the appointing President — not a surprising circumstance ---

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election disputes unless extraordinary circumstances affecting the integrity of the state's election process are clearly present in a high degree." *I*d. at 585. I am convinced, and surmise that the Supreme Court has concluded, that such a situation confronts us now.

[34]Fed. R. App. P. 35(a)(2).

[35]35 11th Cir. R. 22-3.

[36]All of our opinions are available to the public on the Internet at **www.ca11.uscourts.gov** upon publication.

but to assume some sort of blind, mindless, knee-jerk response based on the politics of a judge's appointer does us and the rule of law a grave injustice. More importantly it is just wrong. I would hope that a careful and thoughtful review of the opinions of my brothers and sisters would dispel any suggestion that their views on the important issues before us are anything but the result of days of careful study and thoughtful analysis — because these opinions are nothing less. We have done our duty. I am proud to be associated with my judicial colleagues that have been called upon to discharge their respective constitutional obligations, albeit reluctantly --- both on this court and the many other state and federal courts involved. Indeed these recent events have been a civics lesson for some --- particularly the young; but they have also been a reminder that our nation's system of governance has weathered the test of time and tumult; the old three-legged stool[37] still stands erect and with sufficient strength to support the hopes and dreams of our nation's citizens.

The revered and quotable jurist, Learned Hand, once observed: "The spirit of liberty is the spirit which is not too sure that it is right . . ."[38] While not "right" about many things, I am confident that we have given these matters the attention they justly deserve and trust that, at least, we have laid the groundwork for an informed decision by the justices of the United States Supreme Court should they exercise their judgment to hear this case. It is my hope that they do. We have done our best so that they can do their best.

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[37]The three branches of our government, the Legislative, the Executive, and the Judicial ("The Third Branch"), have often been compared to the familiar early American three-legged stool.

[38]The corollary to that thought was expressed by the elder statesman from Florida, Congressman Claude Pepper: "One has the right to be wrong in a democracy." Cong. Rec. May 27, 1946.

DUBINA, Circuit Judge, dissenting, in which TJOFLAT and BIRCH, Circuit Judges, join:

I agree with the majority's disposition of the issues of abstention, res judicata, collateral estoppel, and mootness. I also join and concur fully in the dissenting opinions filed by Judges Tjoflat, Birch, and Carnes. I dissent from the disposition of the remaining issues discussed in the majority's opinion. Specifically, I disagree with the notion that we cannot convert the preliminary injunction and reach the merits of this case. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 467 U.S. 747 (1986).

As to the merits of this case, the legal principles set forth in the cases of *Moore v. Ogilvie*, 394 U.S. 814 (1969), and *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), govern. Based on these principles, I would reverse the judgment of the district court in this case.

CARNES, Circuit Judge, dissenting, in which TJOFLAT, BIRCH and DUBINA, Circuit Judges, join:

I agree with the Court that the lawsuits in this case and in *Siegel v. Lepore*, No. 00-15981, are not barred by the *Rooker-Feldman* doctrine or by the doctrines of res judicata, collateral estoppel, or mootness, and that there is no basis for this Court to abstain.[39] I disagree, however, with the Court's conclusion that irreparable injury has not been shown in these two cases. My disagreement with that conclusion stems from my belief that the selective manual recounts in some of the Florida counties that use the punch card system of voting violate the equal protection rights of the voters in the other punch card system counties. The harm from that violation exists and will continue so long as the results of any of those selective manual recounts are included in Florida's certified election results. Because the existence and nature of the constitutional violation is inextricably linked to the question of irreparable injury, I turn first to a discussion of the selective manual recounts in this case, and how those recounts violated the constitutional rights of the similarly situated voters who did not receive the benefit of them.

Of course, not every election dispute implicates the Constitution and justifies federal court intervention, and "[g]enerally, federal courts do not involve themselves in 'garden variety' election disputes." *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995) (*Roe I*) (quoting *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986)). But this case is more than a garden variety

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[39]I address the two cases jointly in this opinion, which is appropriate in view of the similarity of issues, substantial overlap of parties, cross reference in the briefs and oral argument in each case to the other, and the district court in *Touchston's* incorporation by reference of the reasoning of the district court's opinion in *Siegel*.

In order to avoid duplication, I will adopt in my dissenting opinion in *Touchston* what I have said here.

election dispute. It concerns more than the validity of individual ballots or the administrative details of an election. This case involves part of a state's election law designed in a way that permits or even encourages infringement of the federal constitutional rights of a large category of voters, and a claim that the law was actually applied in a way that violated those rights. Federal courts have the authority and duty to address and decide such claims. That is what the Supreme Court did in *Moore v. Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493 (1969) (striking down as unconstitutional part of Illinois' method for selecting Presidential electors). That is what we did in the *Roe* cases. *See Roe I*, 43 F.3d at 580 (affirming preliminary injunction against counting votes that state trial court had ordered to be counted); *Roe v. Alabama,* 52 F.3d 300 (11th Cir. 1995) (*Roe II*) (same); *Roe v. Alabama*, 68 F.3d 404 (11th Cir. 1995) (*Roe III*) (same as to permanent injunction). That is what we should do in this case.

The record in this case is not replete with factual detail, but there are sufficient undisputed facts to establish a constitutional violation based upon the selective manual recounts that were undertaken in only a few punch card counties and the resulting discriminatory treatment or weighting of the votes of similarly situated voters.[40] For present purposes, I accept as fact

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[40]The plaintiffs also complain about the manual recount that took place in one county, Volusia, which uses the optical scan or marksense system of voting. However, the evidence makes it abundantly clear that Volusia County was plagued with a host of problems in tabulating its vote, including outright equipment and software failures. There is no evidence that the manual recount conducted in Volusia County was done for any reason except to correct those failures and ensure that they did not taint the reported results. Nor is there any evidence in the record that any other county had an optical scan system that suffered from similar problems but for which no manual recount was ordered. The situation involving Volusia County is materially different from that involving the punch card system counties of Broward, Palm Beach, and Miami-Dade. Accordingly, I will not discuss Volusia County any further in this opinion.

everything represented as fact in the affidavits filed by the Democratic Party, which is the party that requested the selective manual recounts at issue in this case, and the chief party in interest on the defendants' side, and will add to them only those facts which neither party disputes. Proceeding in that manner makes it appropriate to decide the merits and whether permanent relief should be granted in these two appeals from the denials of preliminary injunctions. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755 - 57, 106 S. Ct. 2169, 2176 (1986), *overruled on unrelated grounds, Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992). The *Thornburgh* decision establishes that a court of appeals may decide the final merits of a case in an appeal from the grant or denial of a preliminary injunction if "the facts are established or of no controlling relevance," and it is not a situation "when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to be developed at trial." *Id.* at 757 & n. 8, 106 S. Ct. at 2177 & n. 8. The facts that are established or undisputed in these two cases entitle the plaintiffs to relief for reasons I will explain, and thus all disputed or undeveloped facts are of "no controlling relevance."[41]

Proceeding in this manner, the Florida Democratic Party's factual position plus the undisputed facts are these. Twenty-four of Florida's 67 counties use a vote system in which the voter's preference is expressed by punching a stylus through a card that is later passed through a tabulating machine. *See Siegel*, Off. of William F. Gavin, Appendix to Brief of Florida Democratic Party

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[41] When a court of appeals decides the final legal merits of a case on an appeal from the denial of a preliminary injunction, it does not review merely for an abuse of discretion. Instead, its scope of review is plenary. See *Thornburgh*, at 757, 106 S. Ct. at 2176 ("The customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.").

("Fla. Dem. App.") at tab 10; Chart A.[42] There are different models of punch card tabulating machines, but all of them work by directing light at the punch card being fed through the machine and reading the beam that results from the light passing through the hole that has been punched in the card by the voter. *See Siegel*, Off. of William F. Gavin, Fla. Dem. App. at tab 10. If the hole punched in the card is not clear of any chad, there is a possibility, perhaps a likelihood, that the tabulating machine will not count the vote. *Id.* The failure of the punch card system to count all of the intended votes is a problem inherent in that voting system. *See, e.g., Siegel*, Off. of Ion V. Sancho, Fla. Dem. App. at tab 9; *Siegel*, Off. of William F. Gavin, Fla. Dem. App. at tab 10; *Siegel*, Off. of Rebecca T. Mercuri, Fla. Dem. App. at tab 16. It is a serious problem that results in a significant number of intended votes not being counted; and those intended votes will remain uncounted unless there is a manual recount involving visual inspection of the punch cards by human beings. *See Siegel*, Off. of Jackie Winchester, Fla. Dem. App. at tab 8; *Siegel*, Off. of Ion V. Sancho, Fla. Dem. App. at tab 9; *Siegel*, Off. of William F. Gavin, Fla. Dem. App. at tab 10; *Siegel*, Off. of Jon Ausman, Fla. Dem. App. at tab 13; *Siegel*, Off. of Rebecca T. Mercuri, Fla. Dem. App. at tab 16. While plaintiffs question whether human beings can accurately ascertain the intent of a voter by inspecting a punch card with an indented, pregnant, swinging, or otherwise not fully removed chad, the theory of the selected manual recounts undertaken in this case is that it can be done, and that as

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[42]One of the affidavits submitted to the district court by the Florida Democratic Party states that 26 Florida counties use punch card voting systems. *See Siegel*, Aff. of Jon M. Ausman, Appendix to Brief of Florida Democratic Party at tab 13. According to the affidavit, that information was obtained from the Florida Secretary of State's Web Site. *Id.* We know now, however, based on official records provided by the Secretary of State, that only 24 Florida counties use punch card voting systems. *See* Chart A. Although the difference is not material to resolution of the legal issues, I will use the correct number, which is 24.

a result intended votes which would otherwise have been disregarded can and will be counted in a manual recount.

Indeed, the unwavering refrain of the Florida Democratic Party underlying its requests for manual recounts in 3 punch card counties, and throughout all of the state and federal litigation related to this case, has been that punch card systems necessarily and invariably undercount votes which can only be recaptured and considered by manual recounts. In justifying its request for manual recounts in the 3 counties, the Party told the Florida Supreme Court in a related state court case that, "It is well established that machine tabulation of votes fail (sic) to capture votes cast by a large number of voters, particularly when the number of votes cast is substantial – almost six million in the case of Florida's Presidential election. Machine tabulation of these votes, without some additional process for counting votes that the machines fail to tabulate, results in the disenfranchisement of countless voters." Answer Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party at 20, *Palm Beach County Canvassing Bd. v. Harris*, ___ So.2d ____ (filed in the Fla. Supreme Court Nov. 19, 2000) (Nos. SC00-2346, SC00-2348 & SC00-2349); *see also id.* at 15 ("Underlying the addition of a provision for a manual recount is an understanding that the process is *more* accurate than machine counts, not less.") (emphasis in original); *id.* at 16 ("[M]any studies indicate that machine counts of punch card ballots produce significant inaccuracies.").

In the briefs the Democratic Party filed in our court in these two cases, it has told us that:

> The optical scanner voting system used by most Florida counties provides good results, including a "non-vote" percentage for the Presidency (where one would expect "non-votes" to be very low) of only 0.40%. Punch card voting, by contrast, which is in effect in the three larger counties that have undertaken considerable manual

> recounts ... is much less reliable, yielding an improbable "non-vote" percentage for the Presidency of over 3%. Brief of Intervenor/Appellee Florida Democratic Party at 23-24, *Touchston v. McDermott*, No. 00-15985 (filed in the 11th Cir. Nov. 28, 2000); *see also id.* at 10 ("Punch card ballots generate a consistently greater level of undervotes – approximately 3.2% – due to imperfect perforations and still-appended chads.").[43]

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[43]The figures I have quoted from the Florida Democratic Party's brief were drawn by the Party from the affidavit of Jon Ausman, which the Party filed in the district court in the *Siegel* case. *See Siegel,* Off. of Jon Ausman, Fla. Dem. App. at tab 13. In that affidavit, which is dated November 12, 2000, Mr. Ausman states that those figures are based upon the best data he could obtain at that time. The data was from only 18 of Florida's 67 counties – 11 punch card counties and 7 optical scan (or marksense) counties. *Id.* at paragraphs 6 - 7.

We now have complete figures from all 67 Florida counties, because the Secretary of State as part of her official duties keeps election reports that counties are required by law to submit to her. The Florida Supreme Court takes judicial notice of the contents of records kept by the Secretary of State, *see State ex rel. Glynn v McNayr*, 133 So. 2d 312, 315 (Fla. 1961), and so may we, *see generally* Fed. R. Evid. 201; cf. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1243 (11 th Cir. 1991) (minutes of a county commission meeting) ("A district court may take judicial notice of public records within its files relating to the particular case before it or other related cases.").

The complete figures for all 24 punch card counties, which are contained in Chart C in the appendix to this opinion, show a combined 3.92 % "non-vote" or "no vote" rate in those counties. The complete figures for all 41 marksense or optical scan counties, which are contained in Chart F in the appendix to this opinion, show a combined 1.43% no vote rate in those counties. (The number of punch card counties added to the number of optical scan counties equals 65 instead of 67, because one county uses a lever machine system of voting and another uses paper ballots counted by hand.).

The complete figures show us that the true difference between the no vote rates of the punch card and optical scan counties is 3.92 % minus 1.43%, or 2.49 %, and not the difference that Ausman's incomplete figures show (3.2 % minus .40 %, or 2.8%). The complete figures still show a significant difference

The Democratic Party told the United States Supreme Court essentially the same thing: "Because of the high percentage of undervotes created by punch card voting systems, the vast majority of counties in Florida do not use them." Brief of Respondents Al Gore, Jr., and Florida Democratic Party at 4 n.2, *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836 (filed in the United States Supreme Court Nov. 28, 2000).

Summarizing its theory of the case, the Democratic Party has said: "the evidence in this case suggests that some Florida voters could potentially be disenfranchised because the automated systems utilized in some Florida counties caused thousands of votes to go uncounted. The only means whereby those uncounted votes can be examined is to discern the intent Florida's voters is (sic)through a manual recount auditing process." Response of Intervenor/Appellee the Florida Democratic Party In Opposition to Appellants' Emergency Motion for Injunction Pending Appeal at 7, *Touchston*, No. 00-15985 (filed in the 11th Cir. Nov. 16, 2000). In any punch card county where manual recounts are not undertaken, the Party says, "outright disenfranchisement" occurs. *See id.* at 40("Each of the county standards employed [in the Palm Beach and Broward County manual recounts] was, thus, a vast improvement over the outright disenfranchisement that results from machine undercounts caused by hanging and dimpled chads.").

If the Florida Democratic Party's theory is not valid, then the manual recounts it requested and any change in votes resulting from those manual recounts would amount to stuffing the ballot boxes in the selected counties with illegal or non-existent votes, and counting those bogus votes would be unconstitutional for that

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between optical scan and punch card counties considered as a whole, but the complete figures also show that in the optical scan counties the no vote rate is not .40 %, which the Florida Democratic Party's brief tells us "is to be expected," but instead is 1.43%, or three times the Party's "expected" rate.

reason. *See Baker v. Carr,* 369 U.S. 186, 208, 82 S. Ct.691, 705 (1962) (recognizing that the right to vote is infringed by false tally or by stuffing the ballot box); *Roe I*, 43 F.3d at 581. But, as I have explained, the Democratic Party insists that a manual recount actually results in the counting of intended votes that would not be detected by machine, and it has put in the record numerous affidavits supporting that view. The Florida Supreme Court seems to have embraced the theory as well by interpreting "error in the vote tabulation" in Fla. Stat. § 102.166(5) to include a discrepancy between a machine count and a sample manual recount in a punch card county. *See generally Palm Beach County Canvassing Bd. v. Harris,* ___ So.2d ___, 2000 WL 1725434, at *5-6 (Fla. Nov.21, 2000), *vacated*, *Bush v. Palm Beach County Canvassing Bd*., 531 U.S. ___,___ S. Ct. ___, No. 00-836 (Dec. 4, 2000) (per curiam). Because the state high court did so, and because the theory is a necessary premise of the manual recounts the Party requested in the selected counties, I accept as a fact for present purposes the proposition that manual recounts of punch card ballots will result in intended votes being counted that otherwise would not have been if the process had stopped with machine tabulation.

If manual recounting had been conducted in all the counties using the punchcard voting system so that all voters who were at risk of having their intended votes disregarded were protected to generally the same extent by the corrective process, there would be no federal constitutional violation, at least if we assume (as I will for purposes of this analysis) that the standards applied in the recount were accurate, consistent, and fair enough to satisfy due process. But manual recounts did not occur in all of the punch card counties. Not by a long shot. Instead, the Florida Democratic Party requested and, in conjunction with state officials and using administrative processes sanctioned by state law, brought about a selective manual recount. The process which the Party insists corrects machine errors and ensures that the will of voters is ascertained, that voters are not disenfranchised by

defective technology, was requested in only 3 of Florida's 24counties that suffer from the punch card malady, the 3 being Broward, Palm Beach, and Miami-Dade. No recount was requested or undertaken in the remaining 21 Florida punch card counties: Collier, Desoto, Dixie, Duval,Gilchrist, Glades, Hardee, Highlands, Hillsborough, Indian River, Jefferson, Lee,Madison, Marion, Nassau, Osceola, Pasco, Pinellas, Sarasota, Sumter, andWakulla.

The manual recounts have been completed inBroward and Palm Beachcounties, and the resulting additional votes from Broward County have been addedto the statewide totals. Whether part or all of any corrections brought about by themanual recounts in Palm Beach and Miami-Dade Counties will be added to thestatewide totals as a result of other ongoing litigation in state court remains to beseen. Given the fluidity of events, I will assume for the remainder of this opinionthat the manual recount results from all 3 of the selected counties will be added tothe statewide totals. However, irrespective of what is decided in the statelitigation involving Palm Beach and Miami-Dade Counties, my conclusion remains the same because any difference in degree of selectivity between one, two, or three counties being manually recounted and the remainder of the 24 punchcard counties not being recounted is immaterial under the applicable constitutional principles. The difference between one, two, or three manual recounts beingconducted may affect the result of the election, but the Constitution forbidsviolations of voters' equal protection rights even when those violations do notchange the outcome of the election. *See infra* at 44-45.

The voters who for whatever reason did not succeed in dislodging the chadnext to their choice for President had their votes counted in Broward County andmay eventually have their votes counted in the 2 other selected counties, but the voters in all of the other 21 punch card counties who applied the same pressure onthe stylus and brought about the same effect, or lack of intended

effect, on thechad connected with their choice for President did not have their votes counted. Under the Florida Democratic Party's theory of punch card undercounting, thousands of similarly situated Florida citizens who intended to vote for Presidentwere thwarted in their efforts by defective technology, perhaps combined with abit of personal carelessness, and whether their intended votes count has been madeto depend solely upon the county in which they live. If they live in BrowardCounty (or maybe in Palm Beach or Miami-Dade Counties, too), their votescount; but if they live in any of the other punch card counties, they do not. The one and only difference is in which of the 24 punch card counties they live.

"A citizen's right to a vote free of arbitrary impairment by state action hasbeen judicially recognized as a right securedby the Constitution, when suchimpairment resulted from dilution from a false tally, or by a refusal to count votesfrom arbitrarily selected precincts, or by a stuffing of the ballot box." *Baker v.Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 705 (1962) (internal citations omitted); *accord Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964) ("Andthe right of suffrage can be 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.") (footnote omitted).

For at least a quarter of a century, it has been established that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status." *Reynolds*, 377 at 566, 84 S. Ct. at1384 (internal citations omitted). As the Supreme Court explained in *Reynolds*,"Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." Id. at 563,84 S. Ct. at 1382. The Constitution prohibits states from weighting votes differently based on the voters' place of residence. The

Supreme Court enforced this prohibition in *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963), when it struck down the county unit system the Georgia Democratic Party used in its primary elections. Under that complicated system every citizen got one vote, but inthe final analysis some votes mattered more than others – they counted more –and the difference was based upon the counties in which the voter lived. Id. at370-72, 83 S.Ct. at 803-04. The Court held that the Constitution prohibits suchselectivity. *Id.* at 380-82, 835 S.Ct. at 808-09.

Another variation on selective weighting of franchise by county ofresidence was presented to the Court in *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct.1493 (1969). That case involved an Illinois law that required a candidate seekinga place on the statewide ballot to present a nominating petition containing thesignatures of at least 25,000 voters. That basic requirement was not aconstitutional problem, but a proviso that also required the nominating petition toinclude the signatures of 200 or more voters from each of at least 50 counties wasa problem. Id. at 815, 84 S.Ct. at 1494. Illinois adopted that proviso in order toensure that any candidate who got on its statewide ballot had at least minimalstate-wide support, because "[a]n elected official on the state level represents allthe people in the state," and "[s]uch representatives should be aware of andconcerned with the problems of the whole state and not just certain portionsthereof." *Moore v. Shapiro*, 293 F. Supp. 411, 414 (N.D. Ill. 1968) (three-judgecourt), *rev'd sub nom. Moore v. Ogilvie*, 394 U.S. 814, 893 S.Ct. 1493 (1969).The geographic-spread proviso in Illinois' nominating petition requirement was unquestionably "an expression of rational state policy," *Moore v. Shapiro*, 293 F.Supp. at 414, but that did not save it from being struck down. The problem with the Illinois proviso, the Supreme Court explained in *Moore*, was that it discriminated against voters residing in the more populous counties of the state in favor of those residing in the less populous counties. Theconstitutional math went like this:

> Under this Illinois law the electorate in 49 of the counties which contain 93.4 % of the registered voters may not forma new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6 % of registered voters properly distributed among the 53 remaining counties mayform a new party to elect candidates to office. ... It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

Id. at 819, 89 S.Ct. at 1496. Although the selective weighting of the franchiseaccomplished by the proviso involved in *Moore* was more sophisticated and lessdirect, and as a result less obvious, than the laws struck down in *Reynolds v. Sims*,it still failed to "pass muster against the charges of discrimination or ofabridgement of the right to vote." *Moore*, 394 U.S. at 818, 89 S.Ct. at 1496.

Given the fertility of the human mind when focused upon politicalobjectives, denial or debasement of the franchise can be accomplished in myriadways. But whatever the method or means used to count, weigh, or value somevotes differently from others, however sophisticated or indirect the device, theConstitution is up to the task. *See Reynolds*, 377 U.S. at 563, 84 S.Ct. at 1382("One must be ever aware that the Constitution forbids 'sophisticated as well assimpleminded modes of discrimination.'") (citation omitted). Because of thecentral importance of the right to vote in our system of representative democracy,"any alleged infringement of the right of citizens to vote must be carefully andmeticulously scrutinized," *id.* at 562, 84 S.Ct. at 1381, and that is the duty of the courts.[44]

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[44]The Attorney General of Florida argues to us that in judging the selective manual recounts at issue in this case under the Equal Protection Clause we ought not apply strict scrutiny but, instead, should apply a lesser standard, and he cites *Burdick v. Takushi*, 504 U.S. 428, 112S.Ct. 2059 (1992), and

Of course, many cases dealing with sophisticated debasements of the right to vote have political overtones, and that is no less true here than usual. The Supreme Court was presented in *Reynolds* with the argument that it ought to stay its hand and keep out of the political thickets involved in that case. To that suggestion the Court responded: "Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Id.* at 566, 84 S.Ct. at 1384. That is a good answer.

In order to apply the principles of these decisions to the facts of the cases before us, I turn now to a closer examination of the selection of the 3 counties in which a manual recount was requested.[45] Acting pursuant to Fla. Stat. §102.166(4), the

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Fulani v. Krivanek, 973 F.2d 1539 (11 th Cir. 1992), for that proposition. See Supplemental Brief of Appellee Attorney General of Florida at 4-7, *Siegel*, No. 00-15981(filed in the 11th Cir. Nov. 28, 2000). However, his argument, and those citations, miss the point. *Burdick* and *Fulani* are ballot-access cases, not cases involving different treatment or weight given to votes cast. In *Reynolds*, which did involve different treatment of votes cast, the Supreme Court said that the proper standard was careful and meticulous scrutiny. 377 U.S. at561-62, 84 S. Ct. at 1381.

The question is actually less one of the degree of scrutiny than it is a straightforward inquiry into whether the votes of otherwise similarly situated voters are being treated or weighted differently because of where they live in the state. If that occurs, then there is a violation of the equal protection rights of the voter even if there is a rational purpose for the discrimination, as there was in *Moore v. Ogilvie.*

[45]There has been some discussion by the parties about full or partial manual recounts that were undertaken in at least 2 (Gadsden and Seminole) and possibly 3 (Polk) counties that use the marksense or optical scan voting system. The parties agree that those manual recounts were not requested by any candidate or political party, but were instead initiated by local canvassing boards during the period for the statewide automatic machine recount undertaken pursuant to Florida law. The circumstances relating to those recounts and any problem that may have led to them are unknown in large part because neither

Democratic Party filed written requests for manual recounts in Broward, Palm Beach, and Miami-Dade Counties, and no other punch card counties. *Siegel*, Fla. Dem. App. at tabs 1, 3 & 5. There were two common grounds stated in each of those 3 written requests. One ground given in all 3requests was that the punch card system with its chads created a risk that intended votes had not been counted ("undervotes") or actually did result in undervotes, a problem the requests said could be corrected by a manual recount with its attendant visual inspection of the cards. The other stated ground in all 3 requests was that the election results in Florida showed that the race for President was very close. No other grounds were given in the manual recount requests.[46] *See id.*

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of these two cases contains a claim or counterclaim concerning those recounts, and the canvassing boards involved are not parties to either lawsuit.

Those recounts do not affect my analysis because they occurred in optical scan counties, were not conducted at the request of a political party or candidate, and may have been undertaken as a result of local problems, as was the case with Volusia County, which also uses the optical scan system. *See supra* n.2. In any event, even if there were unconstitutional selectivity in the choice of those 3 optical scan counties, that would not lessen the violation of the Equal Protection Clause that occurred when the Florida Democratic Party selected 3 of the 24 punchcard counties for manual recounts.

[46]There is one exception to that statement. The request for a manual recount in Palm Beach County contained another ground. It was stated in the Palm Beach recount request that the particular configuration of the ballot in that county (the so-called "butterfly ballot") had confused Palm Beach's voters, producing two bad results: a substantial number of votes were disregarded because more than one choice was punched in the presidential race; and some voters may have inadvertently voted for someone other than their true choice. *See Siegel,* Fla. Dem. App. at tab 1.

That problem cannot explain or justify why the Democratic Party selected the 3 punchcard counties that it did. First, neither Broward or Miami-Dade Counties used a butterfly ballot, and there was no voter confusion reported in the request for manual recounts filed in either of those counties. Second, the

The problem with machine tabulating of punch card ballots is common to counties that use the punch card system. The Democratic Party has never contended to the contrary, but instead has insisted that the problem is inherent in punch card technology. For that reason, the existence of a punch card voting system cannot be a basis for differentiating the 3 counties that were selected from the 21 that were not. And, of course, the fact that the statewide totals in the race for President were extremely close was a common fact, and therefore could have served as grounds for a recount in any of the other 21 punch card counties. There is nothing in the reasons that the Party gave for requesting a manual recount in the3 selected counties that explains, let alone justifies, the discrimination in favor of those 3 punch card counties and against the other 21. In order to give the Party the benefit of the doubt and to consider all the possibilities, I will now look elsewhere for an explanation.

Charts A - F, which are attached as appendices to this opinion, contain population and other demographic data, as well

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purpose of a manual recount in a punch card county is to find intended votes that the tabulating machine did not pick up because a chad was not sufficiently punched out. Any ballot in which the tabulating machine picked up two votes cast for the same office would be one in which the voter had cleanly punched out not one but two chads, or the machine would not have read it as two votes. Instead of helping cure that "overvote" problem, a manual recount searching for additional votes in the form of dimpled, pregnant, or swinging chads not picked up by the tabulating machine could only aggravate the problem. That isprecisely the concern that the Horowitz intervenors, a group of Palm Beach voters who supportedthe Democratic Party's nominee in the election, expressed in the district court. *See Siegel,* Hearing Trans. at 108.

As to the Palm Beach voters who allegedly inadvertently voted for the wrong candidate because they were confused, a visual inspection of a punch card ballot showing a hole clear enough for the tabulating machine to have picked it up could not reveal whether at the time the hole was punched the person doing the punching thought it would count as a vote for another candidate.

as relevant vote data on a county-by-county basis.[47] That vote data represents things as they stood on November 9,2000, after the automatic machine recount required under Fla. Stat. § 102.141(4)had been conducted. That is the relevant vote data for our purposes, because it reflects the facts as of the time the Florida Democratic Party filed its manual recount requests in Broward, Miami-Dade, and Palm Beach Counties on November 9, 2000.

Chart A shows that the 3 counties selected by the Democratic Party for a manual recount share these characteristics: 1) they are the 3 most populous counties in the State of Florida; 2) they are the 3 counties in which the Party's nominee, Vice-President Al Gore, received the largest number of votes; and 3) in each of them he received substantially more votes than his opponent, Governor Bush.

The theory underlying the manual recount, as I have already explained, has always been that the punch card system of voting necessarily and inevitably results in some intended votes not being picked up by the tabulating machine. The Florida Democratic Party has never suggested that its selection of counties for manual recounts was based upon any county-by-county variation in either the way the punch card system operates or in its rate of accuracy. Instead, the consistent position of the Party, which is generally supported by the affidavits it submitted in the district court, is that every time the punch card system is used there will be intended votes that are not counted by the tabulating machine. *See supra* at 4-9.Given the stated justification that the manual recounts were necessary in Broward, Miami-Dade, and Palm Beach Counties because those counties used the punchcard system, the more relevant focus is on the population

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[47]We can take judicial notice of that vote data, which is from the records the Florida Secretary of State keeps as required by law and pursuant to her official duties. *See supra* n.5.

and voting data from all of Florida's 24 punch card counties. Chart B shows that data. Of course, because the 24 punch card counties are a subset of all of Florida's 67 counties, the characteristics that distinguish the 3 counties chosen by the Party on a statewide basis also distinguish them in relation to the other 21 punch card counties: those 3 are the most populous and vote-rich of all the punch-card counties, and in each of them the Party's nominee received substantially more votes than his principal opponent.

Not only that, but we also see from the data contained in Chart B another conspicuous fact. The 3 counties the Florida Democratic Party selected for manual recounts are 3 of the 4 punch-card counties that gave its nominee the highest percentage of the vote cast among the two opposing Presidential candidates. Those percentages are as follows: Broward (68.55%); Palm Beach (63.81%); and Miami-Dade (53.18%). No other punch card county gave the Party's nominee a greater percentage of its vote than Broward and Palm Beach Counties, and only one punchcard county gave the Party's nominee a greater percentage of its vote than Miami-Dade County did. That lone exception is sparsely populated Jefferson County which, although favoring the Party's nominee with 55.10 % of its vote, cast a total of only 5,519 votes for the nominees of both major parties (compared, for example, to the 618,335 votes cast for them in Miami-Dade County). Because so few votes were cast in Jefferson County, that county offered little prospect for finding enough uncounted votes to make a difference. In effect, the voters of Jefferson County were too few in number to matter in view of the Party's objective, which was to change the election result that had been reported to that date.

Given the theory of the recount – finding intended votes that were not counted by the punch card system – the most relevant data of all would be the percentage of votes that were intended but not counted. We do not have that, but neither did the Florida Democratic Party when it selected the punch card counties

in which to request recounts. We do have the "no vote" data, which shows the difference between the total number of voters who cast a ballot and the total votes cast for any Presidential candidate. In other words, the no vote data shows the number of ballots in which no vote for President was counted either because the tabulating machine did not pick up from the punch card any vote for President, or because it picked up two or more votes for President on the same card resulting in no vote for President being counted.

Chart C ranks the punch card counties by percentage of no votes in the Presidential race. If Palm Beach, Miami-Dade, and Broward Counties had been selected for manual recounts because of problems resulting in no vote for President being picked up by the tabulating machines, those 3 counties would have the highest no vote rates. They do not. Chart C shows that there are 7 punch card counties with a higher percentage of no votes in the Presidential race than Palm Beach County, yet none of them was selected for manual recounts. The chart also shows that 10 punch card counties have a higher percentage of no votes than Miami-Dade County, but none of them was selected for a manual recount. And as for Broward County, there were 17 punch card counties with a higher no vote rate that were not selected for manual recounts. In fact, Broward is tied for the fourth smallest percentage of no votes for President among all of the 24 punch card counties, yet the Florida Democratic Party still selected it for a manual recount.

One of the many affidavits the Florida Democratic Party submitted in the district court stated that "two groups of citizens, the elderly and minorities, are more prone to have problems on this system than the rest of the population." *Siegel*, Aff. of Ion V. Sancho, Fla. Dem. App. at tab 9. Perhaps that opinion rests upon derogatory stereotypes that federal courts should not countenance. Even assuming, however, that there is some factual basis for that opinion and that we should consider the possibility, the problems that any group, including the elderly and minorities, have with

punch card voting should be captured to some extent in the no vote data contained in Chart C. But as we have seen, the Party's selection of the 3 counties cannot be justified on the basis of that data.

Moreover, Chart D, which ranks the punch card counties by percentage of population over the age of 65, shows that 7 of those counties that were not selected for manual recounts have a greater percentage of their population in that age category than Palm Beach County does; 11 not selected for manual recounts have a greater percentage in that age category than Broward County does; and 13 of them have a greater percentage in that age category than Miami-Dade County does. The Florida Democratic Party's selection of punch card counties for manual recounts could not have been based upon the percentage of elderly in each county's population.

As for "minorities" having more problems with punch card voting, it is unclear exactly what the Florida Democratic Party's affiant meant by "minorities." Chart E shows that if he meant to include both blacks and Hispanics in that grouping, Miami-Dade County's population does have a higher percentage of minorities than any other punch card county. But the chart also shows that 6 punchcard counties that were not selected for manual recounts have a higher percentage of minorities in their populations than Broward County, which was selected. And it shows that 8 punch card counties that were not selected for manual recounts have a higher percentage of minorities in their population than Palm Beach County which was also selected.

So, the facts we have about the Florida Democratic Party's selection of the counties in which a manual recount would be undertaken in order to ensure that voters were not disenfranchised by systemic problems with punch card technology or by carelessness, are these. The selection was not based upon the rate of punchcard error – the no vote rate – nor was it based upon the

relative percentage of senior citizens or minorities in each county's population. Instead, the defining characteristic of the 3 punch card counties chosen to undertake a manual recount is that they are the 3 most populous counties in the state, all of which gave the Party's Presidential nominee a higher percentage of the vote than his opponent.

Of course, none of this is surprising. We expect political parties to act in their own best political interest, and the 3 most populous counties that had voted for its nominee presented the Florida Democratic Party with its best prospects for turning the election around. It would not have served the Party's goal of electing its nominee for President for it to have sought the intended but unsuccessful votes in those punch card counties that went for the other party's nominee, Governor George W. Bush. The voters in 17 of the 24 punch card counties favored Governor Bush. *See* Chart B. Examples include Hillsborough County (51.6 % of its 350,317 Bush/Gore votes went for Bush) and Collier County (66.89 % of its 90,351 Bush/Gore votes went for Bush). *Id.* Making sure that every intended vote was counted in those 17 counties that favored Bush over Gore, over two-thirds of the total number of punch card counties, was not the way for the Florida Democratic Party to get its candidate elected.

Nor would it have been efficient for the Florida Democratic Party to expend its manual recount efforts in vote-poor counties like Jefferson, whose voters did express a pronounced preference for the Party's nominee. Loyal Democrats though they may be, the citizens of Jefferson County suffered from the misfortune of living in a county whose population was so small that the total votes it cast for the two principal candidates for President were only 1.31 % of those cast in Palm Beach County, only .98 % of those cast in Broward County, and only .89 % of those cast in Miami-Dade County. That is to o few to have mattered when it came to the Party's goal of changing the results of the statewide election.

There may have been another factor at work in the Florida Democratic Party's selection of the 3 most populous counties as the ones in which to request a manual recount. State law encourages, if not requires, manual recount choices to favor counties with greater vote totals over those with lesser vote totals. Under the statute, once a sample recount of at least 3 precincts and 1 percent of the votes cast in the county has been conducted, the county canvassing board can manually recount all the ballots only "[i]f the manual recount [sample] indicates an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. §102.166(5). Of course, the larger the number of votes in a county the greater the likelihood that a complete manual recount in that county alone will affect the election, and under § 102.166(5) that appears to be the measuring rod for undertaking a complete manual recount. Because the number of votes obviously varies in relation to a county's population, there is a greater likelihood that a complete manual recount in a more populous county will change the election result. Since the possibility of a different statewide result appears to be a prerequisite for a complete manual recount in a county, the statute encourages and, in some cases – where the pre-manual recount statewide difference in votes is larger than the votes that could be picked up by a full manual recount in a less populated county – may require discrimination against less-populous counties. Consider the present case. After the statewide machine recount mandated by Florida law, the statewide difference between the two Presidential candidates was 300 votes. It would be far easier for the Florida Democratic Party to show that that margin could be erased by a manual recount in heavily populated Miami-Dade County, which had reported a total of 618,335 votes for the two candidates, than it would be for the Party to show the same thing in sparsely populated Jefferson County, where only 5,519 votes were cast for the two candidates. In fact, depending upon the initial margin of victory, it could well be impossible to get a complete manual recount in many of the punch card counties, regardless of which

candidate the voters in that county favored.[48]

It may be that the Florida Democratic Party would have chosen the 3 punchcard counties it did even without the requirement in Fla. Stat. § 102.166(5) that the sample recount conducted in each county show that the outcome of the election could be changed by continuing the recount in that county. Somewhat to its credit, the Party has never denied (at least not in federal court during litigation of these two cases) that it chose for manual recounts the 3 counties that it did, and not others, because those counties are populous, i.e., vote rich, and their voters had expressed a preference for its Presidential nominee. In our Court alone, the Party filed over 180 pages of briefs and used more than 40 minutes of oral argument time to explain its position. Never once in its briefs or in its oral arguments did the Party suggest that its selection of the 3 punch card counties out of 24 for a manual recount was based on anything other than partisan self-interest. That the Democratic Party predictably acted in its own best interests in using the state law recount machinery to ensure that intended votes which would otherwise be disregarded would only be counted in counties favoring its candidate does not end the inquiry. There is the matter of the Constitution.

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[48]The discrimination that results from making a manual recount dependent upon whether the recount difference in the county could change the statewide result can also be illustrated by a fairly simple hypothetical. Suppose the statewide difference was Bush over Gore by 300 votes, and a sample manual recount showed that a full recount in Miami-Dade would probably result in a net gain for Gore of 400 votes. Suppose further that in each of the 17 punch card counties that voted for Bush over Gore a sample manual recount showed that conducting a full manual recount would result in net gains for Bush of 25 to 100 votes in each of those 17 counties for a combined total net gain of 900 votes for Bush. As Fla. Stat. § 102.166(5) is written, it appears that complete manual recounts could not occur in those 17 less-populated counties, because the projected change in none of them, standing alone, would be enough to alter the statewide result, even though the combined total of their projected changes would have swung the election result back to Bush.

When a political party uses state machinery and exercises prerogatives it is given under state law to influence the counting or alter the effect of votes, it is a state actor subject to the same constitutional constraints that protect citizens from the state and its officials. See *Terry v. Adams*, 345 U.S. 461, 481, 73 S. Ct. 809,819 (1953) (white primary case) ("[A]ny part of the machinery for choosingofficials becomes subject to the Constitution's restraints.") (citations andquotations omitted). The manual recount provision contained in Fla. Stat. §102.166(4), and the selectivity it encourages or permits political parties to exercisein bringing about recounts, is an integral part of the election process in Florida, aswe have seen in recent days, and the Supreme Court has held that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 1495 - 96 (1969).

The Florida manual recount statute gives government officials some discretion over whether to conduct a manual recount, *see* Fla. Stat. § 102.166(4)(c)("The county canvassing board may authorize a manual recount"), and government officials are intimately involved in the actual recount procedure itself. Those two facts reinforce the conclusion that the Florida Democratic Party's selection of the counties in which manual recounts could occur is state action subject to constitutional scrutiny. See *Dennis v. Sparks*, 449 U.S. 24, 27 - 28, 101 S. Ct. 183,186 (1980) ("[T]o act 'under color of state law' for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action are acting . . . 'under color' of law for purposes of § 1983 actions.") (citation omitted); *Gray v. Sanders*, 372U.S. 368, 374 - 75, 83 S.Ct. 801, 805 (1963) ("We agree with that result and conclude that state regulation of this preliminary phase of the election process makes it state action.") (citation omitted).

What the State of Florida and its officials cannot constitutionally do alone, the State and the Florida Democratic Party acting jointly cannot do either.

If Florida enacted a statute that provided a manual recount procedure for correcting the undervote caused by the use of the punch card voting system, but provided that the corrective procedure could be invoked only in the 3 most populous counties of the state, no one would question that such a provision would be unconstitutional.[49] And it would be unconstitutional no matter how rational the purpose of the statute. Suppose, for example, that the state thought it was more efficient to conduct manual recounts in the really big punch card counties, and not worth the effort to do it in any little, sparsely populated, or vote-poor punch card counties. I hope that no judge on this Court would suggest such a law would be constitutionally permissible.

The reason we would or should be unanimous in holding such a law unconstitutional is that states cannot treat votes differently depending upon the counties in which the voters live. The constitutional wrong in that hypothetical case and in the present case is the mirror image of the one in *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493 (1969). Just as the Constitution forbids a state from counting or weighting votes less because they come from more populated counties, it also forbids a state from counting or weighting votes less because they come from more sparsely populated counties. Yet that is precisely what the

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[49] The hypothetical statute is not far removed from the statute that Florida does have. As I have previously pointed out, the statute appears to permit a full manual recount only if the sample recount indicates that a full recount in that county could affect the election result. Fla. Stat. § 102.166(5) (the county canvassing board can manually recount all the ballots only "[i]f the manual recount [sample] indicates an error in the vote tabulation which could affect the outcome of the election"). Because of that apparent requirement, the statute encourages in every case, and may require in some cases, that the manual recounts be requested in more populous, vote-rich counties.

manual recounts in the 3 selected Florida counties does.

Recall that the central fact underlying the theory behind the manual recounts in Broward, Palm Beach, and Miami-Dade Counties is that the punch card system of voting necessarily and inevitably results in some intended votes not being counted unless there is a manual recount. See *supra* at 4-9. With the selective manual recounts that the Florida Democratic Party and government officials have jointly brought about, voters are treated differently depending upon where they live. There are two sets of punch card voters whose efforts to vote are not picked up by the tabulating machines. One set, the favored one, lives in Broward, Palm Beach, and Miami-Dade Counties. The second set has the misfortune to live in the other 21 punch card counties. The votes of the first set count; the votes of the second set do not. Two voters using the same effort to press an identical stylus against a punch card and bringing about the identical effect on a chad next to a Presidential candidate are treated differently. *See O'Brien v. Skinner*, 414 U.S.524, 529, 94 S.Ct. 740, 743 (1974) (holding unconstitutional a statute under which two citizens "sitting side by side in the same cell may receive different treatment as to voting rights"). One vote is counted, the other not. The sole reason is that the Florida Democratic Party, acting with the authority given to it by the state, and pursuing its own political interests, chose to have one vote counted and the other not.

The matter was aptly put in a letter Florida Attorney General Robert Butterworth wrote to the Chair of the Palm Beach County Canvassing Board on November 14, 2000. The letter referred to the "extremely serious" legal issues that would arise if manual recounts were conducted in some counties but not others. He said that "a two-tier system for reporting votes would result," and:

> A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A

> voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

Touchston, Hearing, Ex., Trans. at 9-16, 44-45 & 48. That is exactly the situation resulting from the Florida Democratic Party and Florida's state or local officials acting jointly to manually recount votes in only 3 of the 24 punch card counties. In that letter, Attorney General Butterworth went on to say that he felt "a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and state constitutions." That "legal jeopardy" under the United States Constitution is what this litigation is about.[50]

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[50]Butterworth, who is the co-chair of the Florida campaign for the Democratic nominee for President, *see Touchston*, Hearing Trans. at 10, wrote the letter and an attached advisory opinion in order to persuade Palm Beach County to manually recount its punch card ballots. The letter referred to the possibility that Seminole County, which did not use the punch card system, had manually recounted its ballots. The Florida Democratic Party represented to us, however, that the optical scan or marksense system of voting, which is what Seminole County uses, *see* Chart A, "provides good results" and a no-vote percentage that one would expect to occur naturally, *see* Brief of Intervenor/Appellee Florida Democratic Party at 23-24, *Touchston v. McDermott*, No. 00-15985 (filed in the 11th Cir. Nov. 28, 2000). The Party says that system is not plagued by the same problems as the punch card system used in Palm Beach and the 23 other counties.

If manually recounting in one county that does not have a punch card system results in "legal jeopardy" because voters are being treated differently in that county from voters in punch card counties, then conducting manual recounts in only a few of the punch card counties also treats similarly situated voters in the punch card counties differently, and results in "legal jeopardy."

The Butterworth letter does speak of the different treatment being a result of "differing behavior of official canvassing boards," but it was the Florida

If we accept what the Florida Democratic Party has told us, we can even put an estimate on the number of affected voters who are being discriminated against in the manual recount: the number who tried to vote for a Presidential candidate but were prevented from doing so by the punch card system and for whom no effort is being made to ascertain their true intent. The Party says that the optical scanner system used in most Florida counties provides good results and the undervote in counties using that system is only .40 %, which the Party says is about what we should expect to occur naturally, i.e., by virtue of voter intent, in a Presidential election in Florida. Brief of Intervenor/Appellee Florida Democratic Party at 23-24, *Touchston v. McDermott*, No. 00-15985 (filed in the 11th Cir. Nov. 28, 2000). Yet the undervote in punch card counties, the Party says, is approximately 3.2%. Id. at 10. Thus, the difference in the undervote rate caused by the punch card system, if we accept the Party's figures, is approximately 2.8%. The total number of ballots cast in the 21 punch card counties in which no manual recount is being conducted is 2,013,666. *See* Chart C.

Applying the Party-supplied machine-caused-undervote rate of 2.8% to that figure gives us an estimated 56,382 voters in the non-selected punch card counties who tried to cast their votes but were thwarted by chad problems of one kind or another.[51] It is

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Democratic Party that chose which county canvassing boards could undertake a manual recount pursuant to Fla. Stat. § 102.166(4). And, as I have already explained, Supreme Court precedent establishes that in choosing those counties, the Party was engaged in state action, and could not do what the Constitution forbids government officials from doing.

[51] As I have already pointed out, the Florida Democratic Party's estimated 2.8 % undervote difference between the optical scan and punch card counties was based upon incomplete data, and we now know from complete data that the difference in "no vote" rates is actually 2.49 %. *See supra* n.5. However, if the results from Broward, Miami-Dade, and Palm Beach Counties are excluded, then the rate of no vote in the remaining 21 punch card counties drops from

those more than 56,000 voters whom the Florida Democratic Party, in conjunction with the state, is discriminating against in its selective manual recount. Unlike their similarly situated fellow citizens in the 3 most populous counties, no effort is being made to ascertain their true intent – thereby re-enfranchising those whose attempts to vote were thwarted by defects in the technology – by manually inspecting their punch card ballots. As the Supreme Court held in *Reynolds v. Sims*, "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" 377 U.S. at 563, 84 S. Ct. at 1382 (citations omitted).

The same analysis applies and the same conclusion is reached, of course, if one views the selection factor as being not the population of the counties but instead the number or percentage of votes cast for the Florida Democratic Party's nominee in the counties (both factors coincided here). Just as a state, and a political party acting in conjunction with the state, cannot discriminate among voters based upon the population of their counties, so also they may not discriminate among voters based upon political opinions and beliefs as expressed by the candidates for whom those voters cast their ballots. Shifting the focus of the selection from population to political preference simply adds the weight of the First Amendment to that of the Equal Protection Clause in prohibiting the selectivity. Either way there is unconstitutional discrimination against the voters in the punch card

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3.92% to 3.62%. *See supra* n.5 & Chart C. When the marksense or optical scan novote rate of 1.43% is subtracted, *see* Chart F, the resulting difference in no vote rates between the remaining punch card counties and the optical scan counties is 2.19%. Applying that rate to the number of ballots cast in the remaining 21 punch card counties indicates that if the Party's central theory is correct, there are 44,099 voters in those 21 counties whose intended vote for President was not counted.

counties not selected for manual recounts. "Their right to vote is simply not the same right to vote as that of those living in a favored part of the State." *Reynolds*, 377 U.S. at 563, 84 S. Ct. at 1382.

In the face of the constitutional command that votes be treated and weighted the same regardless of where the voter lives within a state, various of the defendants respond with several arguments. One thing they argue is that states aredue deference in the way they run elections and, in light of Article II, § 1, cl. 2 ofthe Constitution, and 3 U.S.C. § 5, states are due special deference when it comes to the selection of electors. But states are due no deference if they go about selecting electors in a way that violates specific provisions of the Constitution, including the Equal Protection Clause. The Supreme Court has expressly held that the power that Article II gives the states to select electors cannot be exercised in away that violates the Equal Protection Clause. *See Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 9 - 10 (1968) ("Nor can it be thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. ... We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall ... deny to any person ...the equal protection of the laws.'"); *accord, Anderson v. Celebreezze*, 460 U.S.780, 795 n.18, 103 S.Ct. 1564, 1573 n.18 (1983). After all, *Moore v. Ogilvie,*394 U.S. 814, 89 S. Ct. 1493 (1969), applied the one person, one vote doctrine to strike down an Illinois statute in a case involving the selection of electors. The issue is not about Article II or 3 U.S.C. § 5; it is about whether the selective manual recounts in question violate the Constitution. Because they do, nothing in Article II and certainly nothing in any federal statute

insulate that unconstitutional action from remedy.[52]

Getting closer to the merits issue, the defendants also argue that Florida law permits any political party with a candidate on the ballot, or any candidate whose name appears on the ballot, to file a written request with the county canvassing board for a manual recount. See Fla. Stat. § 102.166(4)(a). There is no equal protection problem, they say, because the Republican Party or its candidate could have *requested* that manual recounts be conducted in each of the punch card counties. This argument is not at all persuasive.

As I have already explained, although the Republican Party or its candidate could have requested a manual recount in any of Florida's counties, the statute permits full manual recounts in only those counties in which a sample manual recount indicates "an error in the vote tabulation which could affect the out come of the election." Fla. Stat. § 102.166(5). Some of the punch card

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[52]Some of the defendants seek cover from *Roudebush v. Hartke*, 405 U.S. 15, 92 S. Ct.804 (1972), but it does not provide any for them. That decision did not address the equal protection rights of voters, nor did it involve the discriminatory application of election laws in general or of recount laws in particular. It decided only the narrow issue of whether a recount of the ballots cast in an election for the United States Senate was a valid exercise of a state's power to prescribe the times, places, and manner of holding elections pursuant to Article I, § 4, or was instead a forbidden infringement on the power that Article I, § 5 gives the Senate to judge the qualifications of its members.

The opinion in *Roudebush* does observe that Indiana, along with many other states, had found that the availability of a recount was necessary to guard against irregularity and errors in vote tabulation, and says that "[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, § 4." *Id.* at 25, 92 S. Ct. at 810 - 11. True enough, but a recount is not any more integral to the electoral process than the actual election itself, and as we have already seen, Article II, § 4 does not permit states to conduct elections in a way that violates a specific constitutional provision such as the Equal Protection Clause. It follows that states cannot conduct recounts in a way that violates that clause, either.

counties are so sparsely populated, so vote poor, that even if a manual recount had been requested and a sample recount conducted as provided in Fla. Stat. § 102.166(4)(d), the result of that sample recount would not have indicated that a full manual recount in the county could affect the outcome of the election. So, even if the Republican Party or its candidate had requested manual recounts in every punch card county, the process would still have ended up treating some punch card voters differently based upon the counties in which they lived. The Constitution forbids that.

There is a another, more fundamental flaw in the argument that treating punch card voters differently depending upon the county of their residence is permissible because the Republican Party or its candidate could have, but did not, prevent that difference in treatment. The constitutional rights involved are those of the voters in the other punch card counties. It is their votes and their constitutional rights at stake. The voters whose constitutional rights are being violated are not permitted to request a manual recount. *See* Fla. Stat. §102.166(4)(a). There is no loophole in the Constitution that permits what would otherwise be an unconstitutional action to occur simply because a third party could have, but did not, prevent it from occurring. Therefore, the fact that both parties were permitted to request manual recounts does not shield the selective recounts from constitutional attack.

Another argument the defendants put forward responds to the criticism of the previous one. Florida Attorney General Butterworth, who was so concerned in his November 14, 2000 letter about the "legal jeopardy" that his state would be in if there was a "two-tier" system in which manual recounts occurred in some counties but not others, a fortnight later filed a brief in this Court telling us there is nothing to worry about after all. According to Attorney General Butterworth's latest position on the subject, manual recounts can be requested or granted under Fla. Stat. 102.166(4)(a) - (c) in as selective or discriminatory a way as

the human mind can imagine without running afoul of the Constitution. The reason, he says, is that although a voter cannot request a manual recount at that stage of the election process, a voter can later file an election contest and try to get the court to conduct a manual recount as part of that contest.

That argument is unpersuasive. Even assuming that Florida law provides a mechanism for individual voters to request manual recounts as part of an electioncontest, the practical and legal burdens imposed upon an individual who seeks to contest an election are entirely different, and far more burdensome, than those that a party or candidate must meet in order to institute an election contest. A request filed by a political party or candidate before the results are certified merely has to set out grounds for a manual recount, and the county canvassing board can grant it. Fla. Stat. § 102.166(4). An election contest, on the other hand, cannot be filed until after the last county canvassing board certifies results, *see* Fla. Stat. §102.168(2), and once it does, a presumption kicks in and weighs against granting any relief in the contest. Under Florida law, "elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary," and "there is a presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So.2d 259, 268 (Fla. 1976) (citation omitted).

Besides, there is the problem of time. Election contests cannot be instituted until "after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested." Fla. Stat.§ 102.168 (2). That might be enough time in ordinary circumstances to file a contest, have it litigated through the trial and appellate stages of the state court system, win the right to a manual recount, have any issues arising in that manual recount be litigated to conclusion, and have the new result accepted. Maybe, but the circumstances giving rise to these cases are not ordinary.

To begin with, the effective deadline in this case is not some time next year as it might be with most elections, but instead is December 12, and the drop-dead deadline is December 18, 2000. Not only that, but the Florida Supreme Court extended the time for the last county canvassing board to certify its results to the Secretary of State from 7 days after the election, the time specified in Fla. Stat. §§ 102.111 and 102.112, until November 26, 2000, which is 19 days after the election. *See Harris*, ___ So.2d at___, 2000 WL 1725434, at *16, *vacated, Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. ___, ___ S. Ct. ___, 2000 WL 1769093 (Dec. 4, 2000) (per curiam).That cut 12 days out of the period that would otherwise have been provided for conducting an election contest through to conclusion.

We know from the inability of Miami-Dade and Palm Beach Counties to finish the actual manual recounts in even the extended time the Florida Supreme Court allotted them, that it would have been impossible as a practical matter for a voter in, for example, Hillsborough County, a punch card county in which 369,467ballots were cast in the Presidential election, *see* Chart C, to file an election contest demanding a manual recount in that county, try the case before the trial court, succeed on appeal in time for the canvassing board to conduct and complete a full manual recount, and then have any issues arising in that recount decided. An election contest under Florida law is not a practical remedy for voters who have been discriminated against in the Florida Democratic Party's selection of punch card counties in which to request a manual recount.

Even if there were enough time for such manual recounts after the extended period for the county canvassing boards to report, there is another serious obstacle to a voter using the Florida election contest procedures to secure a manual recount in that voter's county. Except in cases of outright fraud, bribery, or other corruption, or the ineligibility for office of the successful candidate, Florida law requires that anyone filing an election

contest show that correction of the problem complained about would change the results of the election. *See* Fla. Stat. §102.168(3)(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.") &(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."). If the voter cannot show that the constitutional violation he suffered changed the result of the election, he has no grounds for contesting the election under the Florida election statute.

While Florida's interest in bottom line election results is certainly expedient, the Constitution demands more than expediency. It is concerned with values other than the outcome of elections. To say that it is sufficient to remedy only those constitutional violations that matter to the political parties and their candidates is to say the rights of voters themselves do not matter. Can anyone seriously suggest that the *Reynolds v. Sims, Gray v. Sanders*, and *Moore v. Ogilvie* doctrines apply only when election results would be changed? When the Supreme Court in *Reynolds* said, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen," 377 U.S. at 567, 84 S.Ct at 1384, the Court did not add "unless it makes no difference in the election results." When the Court said that "the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives," *id.*, surely the Court did not mean for that basic principle to be inapplicable except where it was outcome determinative for a candidate.

In *Moore* there was "absolutely no indication in the record that the appellants could not, if they had made the effort, have easily satisfied Illinois' 50-county, 200-signature requirement," *see* 394 U.S. at 820 - 21, 89 S. Ct. at1497(Stewart, J., dissenting). In other words, there was absolutely no indication that the

differential treatment of citizens based upon the counties in which they lived affected whether any would-be candidate could get on the ballot. Nonetheless, the Supreme Court did not hesitate to strike down the discrimination among voters, explaining that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* at 819, 89 S.Ct. at 1496. The one person, one vote principle is not so fickle as to depend upon the closeness of an election.

One last argument relating to the merits which is put forward by several of the defendants is that there is no constitutional violation in selective manual recounts based upon county of residence, because there are variations among the counties in election systems and different systems give rise to different error rates. In other words, unless the Constitution mandates that every county use the same voting system, it logically cannot prohibit selective correction of error rates in counties that use the same system. But why not? Why are differences in the number of vote errors that occur as a result of local variations in choice of vote systems before an election the constitutional equivalent of selective correction of errors based upon county of residence after the election?

There is no reason to believe that any county would attempt to choose for itself a voting system with a high error rate in order to disadvantage its citizens compared to those of other counties. There is every reason to believe that political parties or candidates will selectively choose the counties in which to initiate the process of manual recounts based upon how those counties voted and their population. The intent behind the two actions is different. To understand the importance of that difference, consider this hypothetical. Suppose a state legislature mandated the type of voting systems to be used in each county, and deliberately favored urban counties with low-error systems that would keep down the undervote, while sticking rural counties with high-

error systems that would increase the undervote in those counties thereby reducing their influence in statewide elections. Maybe the legislature, dominated by members from the more populous counties, just wanted to keep the country folks in their place. Is there any doubt that such legislation would be unconstitutional under *Reynolds* and related cases? It would be unconstitutional even though the discriminatory choice occurred on the front end, before the election, and even though it involved variations in the vote systems used in different counties.

How then can it be constitutionally permissible to make a materially similar, discriminatory choice on the back end after the election: to favor the voters of more populous counties who went for one candidate with a process that ameliorates their undervote, while not applying that process to ameliorate the same or worse undervote problems in less populous counties that went for the other candidate? The answer is that it is not constitutionally permissible to discriminate in favor of the voters of Broward, Palm Beach, and Miami-Dade, or any combination of those counties, and against the voters in the other 21 punch card counties when it comes to a post-election remedy of the undervote problem caused by the voting system technology.

The Florida Supreme Court reminded us that: "Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy." *Harris*, ___ So.2d at ____, 2000 WL 1725434, at *13(footnote omitted). But we also must not lose sight of the constitutional guarantee of equal protection, which prohibits states from selectively facilitating and safeguarding the rights of voters based upon where they live in the state. Florida's election laws, as applied in this case, run afoul of that prohibition.

Finally, the defendants contend that we need not even decide the merits of the constitutional claims in this case because

the plaintiffs have not suffered an irreparable injury. They base that assertion on two premises. First, the defendants maintain that it is inappropriate at this juncture to decide whether permanent injunctive relief should be issued. I disagree for the reasons I have already stated. *See supra* at 3-4, discussing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57, 106 S.Ct. 2169, 2176 - 77 (1986). Second, the defendants maintain that there is no equal protection violation unless and until the outcome of the election is altered by the inclusion of the manually recounted ballots in Florida's certified results. But, as I have already explained, the constitutional harm is inflicted when the ballots of similarly situated voters are counted and weighted differently, and that harm exists regardless of the outcome of the election.

The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 1404 n.12 (1987). In addition to succeeding on the merits, a plaintiff must "demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law." *Newman v. State of Ala.*, 683 F.2d 1312, 1319 (11th Cir. 1982). Explaining the distinction between "irreparable injury" and "adequate remedy at law," our predecessor circuit said:

> [T]he essential prerequisite to a permanent injunction is the unavailability of an adequate remedy at law. Irreparable injury is, however, one basis, and probably the major one, for showing the inadequacy of any legal remedy. . . . Often times the concepts of "irreparable injury" and "no adequate remedy at law" are indistinguishable. . . . "[T]he irreparable injury rubric is intended to describe the quality or severity of the harm necessary to trigger equitable intervention. In contrast, the inadequate remedy test looks

> to the possibilities of alternative modes of relief, however serious the initial injury."

Lewis v. S. S. Baune, 534 F.2d 1115, 1124 (5th Cir. 1976) (citations omitted).

Here, I believe that the plaintiffs in these two cases have succeeded on the merits by establishing that the disparate treatment of similarly situated voters violates the Equal Protection Clause. That constitutional injury to their right tovote is irreparable, since it "cannot be undone through monetary remedies."*Cunnigham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987), both because of the unquantifiable nature of the right to vote as well as its fundamental importance in our system of representative democracy. *See Reynolds v. Sims*, 377 U.S. 533,562, 84 S.Ct. 1362, 1381(1964) (the right to vote is "a fundamental political right, because [it is] preservative of all rights"') (citation and quotations omitted). *See also Northeastern Fla. Chapter of the Assoc. of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (discussing cases in which this Court has recognized that an on-going violation of the First Amendment or privacy rights constitutes irreparable injury, and stating that "[t]he rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated by monetary damages; in other words, plaintiffs could not be made whole").

Not surprisingly, there is no suggestion by the defendants that there is an adequate remedy at law to address the voting-rights injury presented in this case. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986)("Given the fundamental nature of the right to vote, monetary remedies would obviously be inadequate in this case; it is simply not possible to pay someone for having been denied a right of this importance."). There is an irreparable injury to the right to vote for which there is no adequate remedy at law. Accordingly, granting the requested

injunctive relief is the only appropriate remedy.

Appendices

CHART A

[Note: these charts will be provided in printed briefs as foldouts enlarged to conform with required 11 point size.]

Chart B

Chart C

Chart D

Chart E

Chart F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Robert C. Touchston, Deborah Shepperd, and Diana L. Touchston,

Plaintiffs,

-vs- Case No. 6:00-cv-1510-Orl-28C

Michael McDermott, Ann McFall, Pat Northy, Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzberger, 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.

ORDER

This cause came on for consideration on Plaintiff's

Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction (Doc. 3, filed November 13, 2000).

Plaintiffs, registered voters in Brevard County, Florida, have sued the members of the County Canvassing Boards of Counties of Volusia, Palm Beach, Broward, and Miami-Dade, the members of the Florida Elections Canvassing Commission, and the Secretary of the Florida Department of State. In their complaint, Plaintiffs challenge the constitutionality of Section 102.166(4) of the Florida Statutes, asserting that the statute violates their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Based on these claims, Plaintiffs seek an order from this Court stopping the manual recount of votes in these counties. Notwithstanding the exigencies described as justification for emergency relief and short notice to the Defendants, this action was filed with the Clerk of this Court at 3:51 p.m. yesterday, just hours after similar claims were denied by The Honorable Donald M. Middlebrooks in the United States District Court in the Southern District of Florida.**(1)** Although the Court has had the opportunity to consider the complaint, the late filing of this action has resulted in an Order perhaps too brief to give the issues raised therein the dignity they deserve. Upon review of Plaintiffs' complaint and the accompanying memorandum of law, as well as counsel's argument, this Court determines that the relief sought by Plaintiffs should be denied.

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(1) Due to the last-minute filing of this action, counsel for Plaintiffs was told, at approximately 6:00 p.m. yesterday and upon inquiry, via telephone that the Court would hold a hearing on the motion for a temporary injunction at 2:00 p.m. today. Counsel for Plaintiffs was told to notify the Defendants of the hearing as soon as possible and to be prepared to certify at the hearing what

efforts were made to inform the Defendants of the hearing.

2

Background

One week ago today, on Tuesday, November 7, 2000, a general election was held throughout the United States. When the popular vote for the office of President of the United States was counted in the State of Florida, the difference between the votes cast for the Republican candidate, Texas Governor George W. Bush and the Democratic candidate, Vice President Al Gore, was less than one-half of one percent of the votes cast. Because of this small difference, Florida law required a recount. **(2)**

Florida law also provides that a candidate or certain other persons may request a manual recount. **(3)** Vice-President Al Gore requested a manual recount in four Florida

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(2) Section 102.141(4), Florida Statues, provides in relevant part, "If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent of less of the votes cast for such office...the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast for such office....".

(3) Section 102.166(4) provides:

> (a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the

county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certified the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The 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.

(d) The 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, the county canvassing board shall select the additional precincts.

counties: Volusia, Palm Beach, Broward, and Dade. **(4)** Plaintiffs contend that the selective manual recounts in these four

apparently largely Democratic counties, unconstitutionally dilute their votes because the manual recounts are likely to result in an increase in the number of votes counted for the Democratic candidate. Plaintiffs contend that Section 102.166(4), Florida Statutes, violates their equal protection and due process rights both on its face and as applied.

Additionally, Section 102.166(5) provides that "[i]f the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (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." Moreover, "[a]ny manual recount shall be open to the public." 102.166(6) Fla. Sta. (2000).

The Florida statue further provides:

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as may 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 a counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

102.166(7), Fla. Stat. (2000)

(4) There were no affidavits attached to Plaintiffs' complaint or motion; the only attachments to the complaint are the pertinent Florida statute and a news article. Accordingly, only a brief, general statement of facts has been included in this Order.

4

Specifically, Plaintiffs argue that Section 102.166(4) has enabled Vice President Gore to selectively seek and effectuate a manual recount only in heavily populated, predominantly Democratic counties. Plaintiffs contend that such selective manual recounting will skew the election result toward the Democratic candidate by adding a proportionately higher number of Democratic votes which were not tabulated through the automatic mechanism. In essence, Plaintiffs contend that the state law permitting manual recounts in counties selected by the Democratic candidate is effectively diluting their votes for the Republican candidate cast in a predominately Republican county where a recount was not requested. This, according to the Plaintiffs, is contrary to guarantees of the Fourth Amendment.

Plaintiffs also assert that the manual recount process established within Section 102.166(4) lack due process protections. First, Plaintiffs assert that section 102.166(4) is enabling Vice President Gore to gain a disproportionate number of total "undervotes" by selecting a manual recount in counties with a majority of Democratic voters. According to Plaintiffs, the Florida law does not afford due process because it fails to establish safeguards that would prevent a candidate from using the manual recount mechanism to mine for votes. Second, Plaintiffs contend that Section 102.166(4) fails to provide procedural process because it grants county canvassing boards absolute discretionary authority as to whether to grant or deny a manual recount while failing to establish standards that are sufficient to guard against arbitrary and capricious decisions. Third, Plaintiffs

contend that Section 102.166(4)'s lack of standards for delineating when to recognize a valid ballot during a manual recount results in the application of inconsistent rules and subjective evaluations. Plaintiffs claim that Section 102.166(4) enables county canvassing boards to develop, on an ad hoc basis, vague, subjective, arbitrary, and capricious standards to count ballots when voters have not completed the casting of his or her vote by sufficiently punching the chad on the ballot. Fourth, Plaintiffs claim that Section 102.166(4) fails to provide notice and opportunity to be heard to an opposing candidate when a manual recount has been proposed by a candidate or is being considered by a canvassing board.

In addition, Plaintiffs argue that Section 102.166 enables a candidate in a statewide election to use the manual recount mechanism to selectively cause the ballots in some counties to be recounted while ignoring similarly situated valid ballots in other counties. This practice, the Plaintiffs contend, does not sufficiently embrace the principle embodied within the equal protection clause of the Fourteenth Amendment that voters are entitled to have their valid votes counted along with the valid votes of other electors.

Analysis

Essentially, the same arguments Plaintiffs make here were also make by the complaints in *Ned Siegel, et al. and Gov. George W. Bush, et al. v. Theresa LePore, et al.,* Case No. 00-9009-CIV-Middlebrooks, filed in the Southern District of Florida only a few days ago. In that case, Judge Middlebrooks entered an order that this Court considers well-reasoned and comprehensive.

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After its own independent consideration of the issues presented here, this Court adopts the reasoning contained in Judge

Middlebrook's Order of November 13, 2000. *See Seigel v. Lepore,* 2000 WL 1687185 (S.D. Fla. Nov 13, 2000) (attached hereto). Nonetheless, it is important to briefly reiterate the reasons federal courts remain reluctant to interfere with state electoral processes.

While there are a myriad of controversial issues surrounding this extraordinary close presidential elections, we are concerned with only one – whether the federal courts should enjoin the manual count of ballots in certain counties authorized by local officials pursuant to the request of one of the candidates. In resolving this questions, it is important to keep in mind that the election of a President under out federal system is decentralized and does not turn on the popular vote. The states themselves play an important constitutional role in this process. Article II, section 1 of the United States Constitution provides that the states will, according to the manner established by their respective legislatures, appoint electors who will then elect the President. Florida has enacted laws as to how this responsibility should be carried out, including Section 102.166, which give county canvassing boards under certain circumstances the discretion to grant requests for manual recounts of the ballots.

As the Eleventh Circuit observed in *Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), although "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." In its consideration of a challenge to Indiana's recount of ballots in a U.S. Senatorial election, the United States Supreme Court 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 show are necessary in order to enforce the fundamental right involved." *Smiley v. Holm,* 285 U.S. 355, 366, 52 S. Ct 397, 399, 76 L. Ed. 795 [(1932)].
>
> 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 elections, the results are not final if a candidate's opinion 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.

6

Roudebush v. Hartke, 405 U.S. 15, 24 (1972) (emphasis added). Federal courts remain concerned with state laws and practices that create patters of systematic denial of equality in voting. **(5)** But, in the absence of "systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be [constitutional violations]." *Curry*, 802 F .2d at 1314 (quoting *Gamza v. Aguirre*, 619 F .2s 449, 452 (5th Cir. 1980)). Section 102.166 is facially neutral and nondiscriminatory. Furthermore, Plaintiffs have failed to establish that the canvassing board's exercise of its discretion has been carried out in a discriminatory or fraudulent manner.

In summary, Plaintiffs have failed to set forth a valid basis for intervention by federal courts. They have not alleged that the Florida law is discriminatory, that citizens are being deprived of the right to vote, or that there has been fraudulent interference with the vote.

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(5) Examples of patent and fundamental unfairness sufficient to justify federal intervention include, inter alia: 1) dilution of votes by reason of malapportioned voting districts or weighted voting systems; 2) purposeful or systematic discrimination against voters of a certain class, geographic area, or political affiliation; 3) election frauds; 4) placing bogus candidates on primary ballots; and 5) failure to give notice to perspective candidates of new and rigorous standards for ballot placement and denial of access to disqualified petitions. *Hennings v. Grafton,* 523 F .2d 861, 864, (7th Cir. 1975) (collecting irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent [and did] no show conduct which is discriminatory by reason of its effect or inherent nature").

Additionally, in *Roe v. State of Alabama,* 43 F .3d, 574 (11th Cir. 1995) (*Roe I"),* federal court intervention was deemed justified where a state court judge ordered elections officials to count absentee ballots which were not notarized or witnessed, notwithstanding the fact that the previous practice in Alabama was not to count such ballots. The appellate court concluded that this would render the election at issue fundamentally unfair. No such circumstances are present in this instant matter.

7

Moreover, Plaintiffs have failed to establish any of the requisite elements for the entry of a preliminary injunction. In order to establish entitlement to this extraordinary remedy,

Plaintiffs must 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; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp v. Robertston,* 147 F .3d 1301, 1306 (11th Cir. 1998) (citing *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp.,* 887 F .2d 1535, 1537 (11th Cir. 1989)). A preliminary injunction is a drastic remedy and should only be granted in extraordinary circumstances where the "burden of persuasion" as to all four requisites is established. *Id.* Plaintiffs have simply failed to meet this burden.

Plaintiffs have not established a likelihood of success on the merits of their claims. **(6)** This failure is in part based on the fact that the Plaintiffs failed to include allegations of fact in the complaint regarding how the manual counts are being conducted. Although the complaint is verified, the details contained in the text of the pleading are based upon information and belief. "[W]hen the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for preliminary injunction." 11A James Wm. Moore, et al., Moore's Federal Practice 2949 (2d ed. 1995). Hence, Plaintiffs have failed to demonstrate that they will suffer irreparable injury unless an injunction issues. Furthermore, the result of this manual count asserted by the Plaintiffs is a matter of speculation.

Moreover, Plaintiffs, have not demonstrated that any injury they might suffer outweighs the damage that an injunction may cause the Defendants or that issuance of an injunction would not be adverse to the public interest. Finally, Plaintiffs have not alleged or proved that they are

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(6) Moreover, it is not at all clear that the Plaintiffs have

standing to maintain this action. In *Hubbard v. Ammerman*, 465 F .2d 1169, 1182 (5th Cir. 1972), the court held "[i]n the absence of a statute to the contrary, none but the candidate claiming to have been injured by illegalities therein occurring can contest the certified results of an election. No private person can bring such a contest on the pretext of "redressing a public wrong". *See also Curry v. Baker,* 802 F .2d 1302, 1312 n.6 (11th Cir. 1986) (questioning, in dicta, the standard of non-candidate challengers to bring equal protection and due process claims, noting that purported injury was "common to all voters, and indeed to all citizens alike").

8

without adequate state remedies to challenge canvassing board's decisions to engage in the manual counts, the manner in which the manual counts were administered, or the eventual results of the manual counts. In fact, as demonstrated by the events of the day, the state system is working fervently in resolving the issues discussed here.

BASED ON THE FOREGOING, Plaintiffs' Motion (Doc. 3) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida this 14th day of November, 2000.

/s/_____
JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

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,

[File Stamped : Nov. 13, 2000]

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 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 "if 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

[1]Apparently, 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.

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 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 Sheriffs 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

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[2]In 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 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

apply the traditional four-factor 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.

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 "each 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. 2d 24 (1968); see also *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S. Ct. 3, 36 L. Ed. 869 (1892) (noting that the Constitution "recog-

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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.

nizes 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, 380, 10 S. Ct. 586, 33 L. Ed. 951 (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, 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

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[3]In 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 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).

necessity of the state interests underlying the electoral scheme. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 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.

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 "election laws will invariably impose some burden upon individual voters ... common sense, as well as constitutional law, compels the conclusion that government must

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[4]The Eleventh Circuit has explained in *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992), that "the 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).

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, "the county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount." Fla. Stat. § 102.166(4)(c). If the board decides to conduct a manual recount, "the 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

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[5]To 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.

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]

This state election scheme is reasonable and non-discrimi-

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[6]This 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.

[7]These 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 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.

natory 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 even-handed" 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 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

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[8]In 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.

[9]One 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

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, "'the 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 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 "although 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. 1, s 4, empowers the States to regulate the conduct of senatorial elections. This Court

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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.

[10][text omitted in original]

> 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, "federal 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 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

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[11] "It 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 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 pattems 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 1314 (quoting *Gamza*, 619 F.2d at 453).

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.

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

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

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

declare a law authorizing the use of a manual recount to be unconstitutional on its face. As the Supreme Court has elucidated, "facial 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.

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

> (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.

§ 102.168(1). In applying this provision, the Supreme 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 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

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Id. In addition, "any 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).

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.

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

/s/
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel

[15]I 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.

Fla. Stat. § 102.111 Elections Canvassing Commission

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

Fla. Stat. § 102.141 County canvassing board; duties.

(1) The county canvassing board shall be composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners. In the event any member of the county canvassing board is unable to serve, is a candidate who has opposition in the election being canvassed, or is an active partici-

pant in the campaign or candidacy of any candidate who has opposition in the election being canvassed, such member shall be replaced as follows:

(a) If no county court judge is able to serve or if all are disqualified, the chief judge of the judicial circuit in which the county is located shall appoint as a substitute member a qualified elector of the county who is not a candidate with opposition in the election being canvassed and who is not an active participant in the campaign or candidacy of any candidate with opposition in the election being canvassed. In such event, the members of the county canvassing board shall meet and elect a chair.

(b) If the supervisor of elections is unable to serve or is disqualified, the chair of the board of county commissioners shall appoint as a substitute member a member of the board of county commissioners who is not a candidate with opposition in the election being canvassed and who is not an active participant in the campaign or candidacy of any candidate with opposition in the election being canvassed. The supervisor, however, shall act in an advisory capacity to the canvassing board.

(c) If the chair of the board of county commissioners is unable to serve or is disqualified, the board of county commissioners shall appoint as a substitute member one

of its members who is not a candidate with opposition in the election being canvassed and who is not an active participant in the campaign or candidacy of any candidate with opposition in the election being canvassed.

(d) If a substitute member cannot be appointed as provided elsewhere in this subsection, the chief judge of the judicial circuit in which the county is located shall appoint as a substitute member a qualified elector of the county who is not a candidate with opposition in the election being canvassed and who is not an active participant in the campaign or candidacy of any candidate with opposition in the election being canvassed.

(2) The county canvassing board shall meet in a building accessible to the public in the county where the election occurred at a time and place to be designated by the supervisor of elections to publicly canvass the absentee electors' ballots as provided for in s. 101.68. Public notice of the time and place at which the county canvassing board shall meet to canvass the absentee electors' ballots shall be given at least 48 hours prior thereto by publication once in one or more newspapers of general circulation in the county or, if there is no newspaper of general circulation in the county, by posting such notice in at least four conspicuous places in the county. As soon as the absentee electors' ballots are canvassed, the board shall proceed to publicly canvass the vote given each candidate, nominee, constitutional amend-

ment, or other measure submitted to the electorate of the county, as shown by the returns then on file in the office of the supervisor of elections and the office of the county court judge.

(3) The canvass, except the canvass of absentee electors' returns, shall be made from the returns and certificates of the inspectors as signed and filed by them with the county court judge and supervisor, respectively, and the county canvassing board shall not change the number of votes cast for a candidate, nominee, constitutional amendment, or other measure submitted to the electorate of the county, respectively, in any polling place, as shown by the returns. All returns shall be made to the board on or before noon of the day following any primary, general, special, or other election. If the returns from any precinct are missing, if there are any omissions on the returns from any precinct, or if there is an obvious error on any such returns, the canvassing board shall order a recount of the returns from such precinct. Before canvassing such returns, the canvassing board shall examine the counters on the machines or the tabulation of the ballots cast in such precinct and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office,

that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

(5) The canvassing board may employ such clerical help to assist with the work of the board as it deems necessary, with at least one member of the board present at all times, until the canvass of the returns is completed. The clerical help shall be paid from the same fund as inspectors and other necessary election officials.

(6) At the same time that the results of an election are certified to the Department of State, the county canvassing board shall file a report with the Division of Elections on the conduct of the election. The report shall contain information relating to any problems incurred as a result of equipment malfunctions either at the precinct level or at a counting location, any difficulties or unusual circumstances encountered by an election board or the canvassing board, and any other additional information which the canvassing board feels should be made a part of the official election record. Such reports shall be maintained on file in the Division of Elections and shall be available for public inspection. The division shall utilize the reports submitted by the canvassing boards to determine what problems may be likely to occur in other elections and disseminate such information, along with possible solutions, to the supervisors of elections.

Fla. Stat. § 102.155 Certificate of election.

The supervisor shall give to any person the election of whom is certified by the county canvassing board a certificate of the person's election. The Department of State shall give to any person the election of whom is certified by the state canvassing board a certificate of the person's election. The certificate of election which is issued to any person shall be prima facie evidence of the election of such person.

Fla. Stat. § 102.166(1)-(7) Protest of election returns

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the

returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4) (a) Any candidate whose name appeared on the ballot, any political committee that

supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such 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.

(c) The 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.

(d) The 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.

(5) If the manual recount indicates an error in the

vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount 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 casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

Fla. Stat. § 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, prop-

erty, 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 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.

Fla. Stat. § 103.011 Electors of President and Vice President.

Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify

as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CIVIL DIVISION

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

Plaintiffs,

v.

CASE. NO.: 00-2808

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

and

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

and

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

and

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

and

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

Defendants.

COMPLAINT TO CONTEST ELECTION

1. This is an action to contest the certification that George

W. Bush and Richard Cheney received more votes in the Presidential election in the State of Florida than Al Gore and Joe Lieberman. The vote totals reported in the Election Canvassing Commission's certification of November, 26, 2000 are wrong. They include illegal votes and do not include legal votes that were improperly rejected. The number of such votes is more than sufficient to place in doubt, indeed to change, the result of the election.

2. The Plaintiff's, Albert Gore, Jr., nominee of the Democratic Party of the United States for President in the 2000 General Election (Al Gore) and Joseph I. Lieberman, nominee of the Democratic Party of the United States for Vice-President of the United States in the 2000 General Election (Joe Lieberman), contest the November 26, 2000 certification by the Elections Canvassing Commission of the results of the Presidential election and the determination of the winning Presidential Electors in Florida. Al Gore and Joe Lieberman further contest the Secretary of State's certification of the electors for Defendants George W. Bush and Richard Cheney as elected.

3. The Election Canvassing Board certified 2,912,790 for George W. Bush and Richard Cheney, and 2,912,352 votes for Al Gore and Joe Lieberman, a difference of 537 votes. The difference was *entirely* the result of:

(a) rejecting the results of the complete manual count in Palm Beach County (which resulted in approximately 215 additional net votes for Gore/Lieberman) and the results of a manual count of approximately 20% of the precincts in Miami-Dade County (which resulted in

approximately 160 additional net votes for Gore/Lieberman), and

(b) including charges to the certified results of the Nassau County Canvassing Board which, over the Thanksgiving weekend, changed its previously certified results – not based on a manual count, but by adding votes in violation of Florida law from earlier tabulation that had previously been rejected by that Board as illegal (which resulted in a total of approximately 50 additional net votes for Bush/Cheney),

(c) not counting approximately 4,000 ballots in Palm Beach County that were marked by the voter with an indentation but which were not (in most cases at least) punctured that the Palm Beach Canvassing Board reviewed but did not count as a vote for any presidential candidate and which have been contested. If discernable indentations on such ballots were counted at votes, Al Gore and Joe Lieberman would received more than 800 net additional votes.

(d) not counting approximately 9,000 ballots in Miami-Dade County that have not been recorded as a vote for any presidential candidate and which were never counted manually because the Miami-Dade County Canvassing Board prematurely ceased its manual count with only approximately 20% of the precincts counted. If these approximately 9,000 uncounted ballots results in the same proportional increase in net votes as the ballots that were counted by the Board before it stopped counting, these ballots would result in approximately 600 net additional votes for Gore/Lieberman.

Common Allegations

4. This is an action to contest an election under Section

102.168, Florida Statues (2000).

5. Section 102.1685, Florida Statues (2000) establishes Leon County as the proper venue for this actions.

6. Section 102.168(8), Florida Statues (2000) empowers the judge in a contest action to:

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

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7. Plaintiff Al Gore was the nominee of the Democratic Party for President of the United States and Plaintiff Joe Lieberman was the nominee of the Democratic Party for Vice President of the United States in the year 2000 general election in the State of Florida. They appeared on the ballot in every county in Florida.

8. George W. Bush was the nominee of the Republican Party for President of the United States and Richard Cheney was the nominee of the Republican Party for Vice President of the United States in the year 2000 general election in the State of Florida. They appeared on the ballot in every county in Florida.

9. Section 102.111, Florida Statues (2000) creates the Elections Canvassing Commission and charges it with certifying the returns of elections and determining who has been elected for each office. Katherine Harris serves on the Commission by virtue of her position as Secretary of State. L. Clayton Roberts serves on the Commission by virtue of his position as Director of the Division of

Elections. Bob Crawford serves on the Commission as a substitute for Governor Jeb Bush, who has declined to serve because his brother is on the candidates.

10. On November 7, 2000, the State of Florida conducted a general election for the President of the United States. On November 8, 2000, the Division of Elections for the State of Florida reported that George W. Bush and Richard Cheney, the candidates for the Republican Party, received 2, 909,135 votes and that Al Gore and Joe Lieberman, the candidates for the Democratic Party, received 2, 907,351 votes.

11. The difference of 1, 784 votes between the Republican and Democratic candidates triggered the automatic recount provisions of Section 102.121(4), Florida Statues (2000), (requiring a recount by county canvassing boards if there is a difference of less than .5%). The recount by all county canvassing boards narrowed the difference between Gore/Lieberman and Bush/Cheney to 300 votes.

12. Section 102.151 Florida Statues (2000) requires county canvassing boards to issue certificates reporting the total number of votes cast for each person elected and transmit it to the Department of State.

13. Section 102.112, Florida Statues (2000) requires all county canvassing boards to file vote count returns for the election of a federal office with the Department of State.

14. The Florida Supreme Court directed that all amended certifications resulting from the manual counts in this election be filed with the Elections Canvassing Commission by 5:00 p.m., on Sunday, November 26, 2000, and that the Elections Canvassing Commission and the Secretary of State must accept those amended certifications. The Court further ordered that the certificates made

and signed by the Elections Canvassing Commission pursuant to Section 102.121 certify the amended returns, including the results of recounts and hand counts. *Palm Beach County Canvassing Board v. Harris*, Consolidated Case Number SC00-2346, Slip Op (Fla. Sup. Ct., Nov. 21, 2000).

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15. The Florida Supreme Court ordered that all amended certifications be filed by 5:00 p.m., November 26, 2000 in order to permit election contests pursuant to Section 102.168 to be filed and resolved by the December 12, 2000 deadline for the resolution of contests regarding the selection of electors.

16. On November 26, 2000 the Secretary of States certified the results of the November 7, 2000 Presidential Election.

17. On November 26, 2000 the Elections Canvassing Board declared George W. Bush and Richard Cheney as the winners of Florida's electoral votes.

Count I (Miami-Dade County Canvassing Board)

18. Plaintiff's re-allege paragraphs one through 17.

19. Defendants, Lawrence D. King, Myriam Lehr and David C. Leahy, are and were at all relevant times members of the Miami-Dade County Canvassing Board.

20. Defendant, David C. Leahy, is and was at all relevant times Supervisor of Elections for Miami-Dade County.

21. The Miami-Dade County Democratic Executive Committee exercised its right under Section 102.166(4), Florida

Statues (2000) to request that ballots be manually counted.

22. The Miami-Dade County Canvassing Board conducted the sample manual count required by Section 102.166, Florida Statues (2000). The Board determined that the sample manual count revealed an error in the vote tabulation that could affect the outcome of the election. The Board thereafter determined, pursuant to Section 102.166(5), Florida Statues (2000) to manually count all ballots.

23. On November 14, 2000, the Miami-Dade County Canvassing Board wrote the Division of Elections asking that votes resulting from manual counts be included in its certified results. On November 15, 2000, the Secretary of State advised that she refused to accept the votes.

24. The Florida Supreme Court issued three orders in Consolidated Case Numbers SC00-2346, SC00-2348 and SC00-2349 determining that the Secretary of State must accept the results of local canvassing board manual counts certified by the boards.

25. On the morning of November 22, 2000, the Miami-Dade Canvassing Board decided, in light of the deadline set by the Supreme Court, to manually count approximately 10.750 ballots with respect to which the machines did not record a vote for President. These ballots are known at "uncounted ballots". As of that time, in two full days of

work 96,5000 ballots from 139 precincts, approximately 20% of the 635 Miami-Dade precincts, had already been counted. These results confirmed overwhelmingly that the

machines which had read the punch cards had failed to count thousands of citizens' votes for presidential candidates.

26. In addition, hundreds of ballots contained a punch at the number immediately below that of the Gore/Lieberman punch hole in a location that could only evince the voter's intent to cast a ballot for the Gore/Lieberman candidacy.

27. The sample manual count conducted by the Miami-Dade Board identified six met additional votes for Gore/Lieberman. Those votes appear to be included in the totals certified by the Elections Canvassing Commission. Failure to include them would be rejection of lawful votes sufficient to change or place in doubt the outcome of the election.

28. Beginning November 22, 20000, Republican and other supporters of George Bush launched a campaign of personal attacks upon Canvassing Board members and election personnel. The November 24, 2000 New York Times reported:

> "Upstairs in the Clark Center (where votes were being counted), several people were trampled, punched, or kicked when protestors tried to rush the doors outside the office of the Miami-Dade supervisor of elections [sic]. Sheriff's deputies restored order. When the ruckus was over, the protestors had what they had wanted: a unanimous vote by the board to call off the hand counting."

29. Some news reports described the protests as a "near riot". The New York Times also reported on November 24, 2000, "One nonpartisan member of the board, David Leahy, the supervisor of elections, said that after the vote

that the protests were one factor that he had weighed in his decision."

30. Following a lunch break on November 23, and without notice of the intention to consider the issue, the Miami-Dade Canvassing Board announced it would cease all manual counts. The reason asserted for the decision was that it was not possible to complete a full manual count of all ballots by the 5:00 p.m., Sunday, November 26, 2000 deadline for amending certifications. The Canvassing Board also voted to discard the hundreds of additional votes that had already been duly counted up to that moment.

31. Section 102.166(5)(c), Florida Statutes (2000) required the Miami-Dade Canvassing Board to count all ballots in the county, given the results of the counting of the sample precincts. *Miami-Dade County Democratic Party v. Miami-Dade Canvassing Board*, Slip Op. At 3, Case No. 3D00-3318 (Fla 3rd DCA, Nov. 22, 2000) at 3. The court help that the Board had a "mandatory obligation" to count manually. *Id.* The Board had no authority to stop the counting until it was completed. Stopping meant that thousands of votes cast for Presidential candidates were not counted.

32. The Miami-Dade results alone show that Al Gore and Joe Lieberman received a number of votes which, when added to the statewide totals previously reported, would be sufficient to change or place in doubt the result of the election.

33. The refusal of the Miami-Dade County Canvassing Board to manually count the uncounted ballots, and the certifica-

tion of the Elections Canvassing Commission of results that did not include such uncounted ballots, results in the unlawful rejection of legal votes sufficient to change or place in doubt the result of the state-wide election for President.

34. The refusal of the Miami-Dade Canvassing Board to manually count the uncounted ballots and the certification of the Elections Canvassing Commission of results that did not include such uncounted ballots amounts to misconduct sufficient to change or place in doubt the result of the election.

35. If the uncounted ballots of Miami-Dade County are counted, it will show that a person other than the candidate certified by the Elections Canvassing Commission as the winner of Florida's Presidential election was duly elected.

Count II (Miami-Dade County)

36. Plaintiff's re-allege paragraphs one through 17.

37. The partial manual count of ballots conducted by the Miami-Dade County Canvassing Board identified approximately 160 net additional votes for Gore/Lieberman.

38. Failure of the Miami-Dade County Canvassing Board to file amended returns reporting the votes referred to in the immediately preceding paragraph, and the certification by the Elections Canvassing Commission missing such votes, was an unlawful rejection of legal votes sufficient to change or place in doubt the result of the state-wide election.

39. Failure of the Miami-Dade County Canvassing Board to file amended returns reporting the votes for candidates

counted in the manual counts, and the certification by the Elections Canvassing Commission missing such votes, is misconduct sufficient to change or place in doubt the result of the election.

Count III (Nassau County)

40. Plaintiff's re-allege paragraphs one through 17.

41. Defendants, Robert E. Williams, Shirley N. King, and David Howard were at all relevant times through November 24, 2000, the members of the Nassau County Canvassing Board.

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42. Defendant, Shirley N. King, is and was at all relevant times Supervisor of Elections for Nassau County.

43. On the evening of November 7, 2000, the Nassau County Supervisor of Elections informed the Department of State that unofficial returns of the general election for President and Vice President of the United States in Nassau County showed Gore/Lieberman with 6,952 votes and Bush/Cheney with 16.404 votes.

44. On November 8, 2000, the Nassau County Canvassing Board conducted the machine recount of ballots mandated by Section 102.141(4), Florida Statues (2000). The statutorily mandated machine recount produced returns of 6,879 for Gore/Lieberman and 16, 280 votes for Bush/Cheney, a net gain of 51 votes for Gore/Lieberman.

45. On November 8 or 9, 2000, the Nassau County Canvassing Board certified to the Department of State returns based on the statutorily mandated machine recount, that

is, 6,879 votes for Gore/Lieberman, and 16,280 votes for Bush/Cheney.

46. On November 24, 2000, Marianne Marshall, a Nassau County Commissioner, served as a substitute Board member in place of David Howard. Marianne Marshall was a candidate with opposition in the November 7, 2000 election.

47. On November 24, 2000, the Nassau County Canvassing Board met without the notice required by Section 286.011, Florida Statutes (2000). At that meeting, the Board decided to submit a new certification to the Department of State, reporting the unofficial election night returns (Gore/Lieberman - 6,952 votes and Bush/Cheney - 16.404 votes) rather than the returns of the statutorily mandated machine recount (6,879 votes for Gore/Lieberman and 16, 280 votes for Bush/Cheney). The Board thus changed its certification and certified November 7 results that it had previously certified as incorrect.

48. David Howard, a member of the Board, did not attend the November 24, 2000 meeting. Marianne Marshall did attend it.

49. Section 102.141(1), Florida Statues (2000) sets forth the rules to be followed to select a replacement Board member in the event that a member of the Canvassing Board is unable to serve.

50. Subsections (1)(a), (b), (c), and (d) of Section 102.121, Florida Statutes (2000) all provide that a person who is a candidate who has opposition in the election being canvassed is not eligible to be appointed as a substitute member of the Canvassing Board canvassing that election.

51. The Nassau County Canvassing Board transmitted its new

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

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52. The November 24 certification of the unofficial election night results violated Section 102.141(4), Florida Statutes (2000), requiring that a machine recount be conducted where candidate wins an election by less that 0.5% and further providing that if there is a discrepancy between the unofficial election night returns and the tabulation undertaken in the statutorily mandated recount, "the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly."

53. The refusal of the Nassau County Canvassing Board to certify returns reporting the votes for candidates identified in the required recount, and the certification by the Elections Canvassing Commission omitting such returns, is the acceptance of a number of illegal votes sufficient to change or place in doubt the result of the election.

54. The refusal of the Nassau County Canvassing Board to certify returns reporting the votes for candidates identified in the required recount, and the certification by the Elections Canvassing Commission omitting such returns, constitutes misconduct sufficient to change or place in doubt the result of the election.

55. The decision of the Nassau County Canvassing Board to refuse to certify returns including the results of the mandatory recount was unlawful and beyond its authority because Marianne Marshall participated in the decision. The result of this unlawful action is that a person other

than the successful candidate has been certified as duly elected.

56. The November 24, 2000 meeting of the Nassau County Canvassing Board violated Section 286.011, Florida Statutes (2000). Therefore, the actions taken at that meeting, including changing the returns certified are null and void. 286.011(1), Fla. Stat. (2000)

Count IV (Rejection of Palm Beach Manual Count)

57. Plaintiffs re-allege paragraphs one through 17.

58. On November 7, 2000, approximately 462,644 votes in Palm Beach County voted in an election which the first office to be voted for on the ballot was for electors of the President and Vice President of the United States.

59. On November 12, 2000, Defendant Palm Beach County Canvassing Board (the "Palm Beach Board") voted to conduct a manual count of all ballots cast in Palm Beach County for President and Vice President in the general election held on November 7, 2000. From November 16 to 26, 2000, the Palm Beach Board conducted this manual count of the presidential votes, under Section 102.166(5)(c), Florida Statutes (2000).

60. The manual count resulted in a net gain of approximately 215 votes for Al Gore and Joe Lieberman.

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

deadline.

62. On November 26, 2000, before 5:00 p.m., the Defendant certified the portion of the results of its manual count that it had completed before 5:00 p.m. to Secretary of State Harris and the Election Canvassing Commission.

63. As of 5:00 p.m., on November 26, the manual count identified approximately 190 net additional votes for Gore/Lieberman.

64. On November 26, 2000, Secretary Harris and the Commission certified the results of the election, but arbitrarily rejected the results of the manual count from Palm Beach County, instead certifying the result of the earlier machine count in Palm Beach County.

65. The Secretary's and Commission's rejection of the Palm Beach County manual count results violates their duty to certify the true results of the election under Section 102.111, Florida Statutes, and more specifically violates Section 102.131, Florida Statutes, which provides: "The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns."

66. The Secretary's and Commission's rejection of the Palm Beach County manual recount also violates the November 21 order of the Florida Supreme Court, which requires the Secretary and the Commission to accept amended certifications reflecting manual count results that is received before 5:00 p.m., November 26.

Count V (Palm Beach Board Failure to Complete Manual Count)

67. Plaintiff's re-allege paragraphs one through 17 and 58 to

66.

68. Early on November 12, the Palm Beach Board determined under Section 102.166(5), Florida Statutes, that a test manual count that it had just completed indicated an error in the vote tabulation which could affect the outcome of the election of presidential electors. The Board determined that the proper remedy was a manual count of all ballots in the county, under Section 102.166(5)(c), Florida Statutes.

69. The Board then delayed conducting the manual count for nearly four full days, in part because if relied on an advisory opinion by the Secretary of State that the Florida Supreme Court has decided unlawful. Consequently, the Palm Beach Board did not complete its manual count before the 5:00 p.m., November 26 deadline established by the Florida Supreme Court.

70. Of the 637 precincts (and groups of absentee ballots) in Palm Beach County, the Palm Beach Board certified to the Secretary of State the result of only 586 before the

5:00 p.m., November 26 deadline. Consequently, the Board failed to certify to the Secretary of State numerous votes cast for presidential electors, because it was unable to complete its manual count before the 5:00 p.m. deadline.

71. At approximately 7:30 p.m., November 24, 2000, the Palm Beach Board completed its manual count. The complete manual count identified approximately 215 net additional votes for Gore/Lieberman. The Elections Canvassing Commission had not included these votes in

the certified totals.

72. The Palm Beach Board's failure to complete its manual count before 5:00 p.m. on November 26 violated Section 102.166(5)(c), which required the Board to "[m]anually recount all ballots" (emphasis supplied), once the board has made a finding that this was the appropriate remedy under the statute.

73. Failure to include the votes identified in the manul count of the Palm Beach Board in the certified results is the rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

74. Failure to include the votes identified in the manual count of the Palm Beach Board in the certified results is misconduct sufficient to change or place in doubt the result of the election.

Count VI (Palm Beach County Intent Standard)

75. Plaintiff's re-allege paragraphs one through 17, 58 to 66, and 68 to 74.

76. Voters in Palm Beach County voted using Votomatic-style punch cards. Voters using this system vote first by inserting a punch card with perforated rectangles into a plastic marking unit that contains ballot pages. The voter then inserts a metal stylus into a hole in a template that corresponds to the chosen candidate. When the stylus is fully inserted into the hole, it should – but does not always – perforate a small square on the punch card ballot known at a "chad", creating a hole in the punch card ballot.

77. In some instances, however, the stylus only partially perforates the punch card or creates in indentation with no perforation at all.

78. The Votomatic-style marking units used in Palm Beach County in this election dramatically increased the number of partially perforated and indented chad's in the first column of many punch cards, the column that was used for the presidential votes. This problem resulted from equipment difficulties that included and unusually hard plastic backing underlying the punch card, the accumulation of discarded chad's on this surface, and punch card perforation and misalignment problems. These equipment difficulties interfered with the proper removal of chad's when voters inserted the stylus into their punch card ballots.

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79. The electronic tabulating equipment that counts punch card ballots operates by shining light through the punched holes in the punch card. If a voter does not completely dislodge a chad, the tabulating equipment often does not count a vote that a voter intended to cast. An "undervote" results when the tabulating equipment does not count a voter's choice, thus effectively disfranchising that voter.

80. Voting equipment failures that prevented voters who intended to vote for a presidential candidate from completely punching the first column of their ballots caused a substantial proportion of the undervote's rejected and not counted by the automatic tabulation machines in Palm Beach County.

81. The Palm Beach Board failed to count numerous votes cast for presidential candidates, because it applied a series of incorrect legal standards. The Palm Beach Board's uncompleted manual count resulted in a total of 8,222 uncounted votes. For example, the Palm Beach Board

failed to count numerous votes cast by voters whose ballots contained an incompletely punched or indented chad in the first column. These ballots have been segregated and preserved for judicial review.

82. On November 22, 2000, Judge Jorge LaBarga of Palm Beach County Circuit Court entered an Order making clear that the Palm Beach County Canvassing Board could not apply rigid rules that would result in the rejection of validly marked ballots. Judge LaBarga's Oder stated that:

    [A]s previously articulated in this Court's order of November 15, 2000, [the canvassing board] cannot have a policy in place of per se exclusion of any ballot; each ballot must be considered in light of the totality of the circumstances. Where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

83. Judge LaBarga relied in part upon *Delahunt v. Johnston,* 671 N.E.2d 1241(Mass. 1996), which held that a "discernible indentation made on or near a chad should be recorded as a vote for the person to whom the chad is assigned.

84. In reviewing the ballots cast in Palm Beach County, the Canvassing Board did not follow the correct legal standard, endorsed by Judge LaBarga, to determine the voter's intent. For example, on information and belief, the Board used a standard that failed to count ballots with indentations or dimples for a presidential candidate unless the ballot also revealed similar indentations, falling short of complete perforations, in other races. Applying this rigid rule did not honor the voters' intent or satisfy the applicable legal standard.

85. Section 101.5614(5), Florida Statutes (2000) governs the counting of Votomatic-style punch card ballots. It provides in relevant part: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the

canvassing board." Section 101.5614(6), Florida Statutes (2000) provides: "...if it is impossible to determine the elector's choice, the elector's ballot shall not be counted for that office..."(emphasis supplied).

86. Section 102.166(7)(b), Florida Statutes requires that the Palm Beach Board review ballots in a manual count to determine the voter's intent. Section 102.166(7)(b) provides: "If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."

87. The Board's failure to use the correct legal standard for determining voter intent in conducting its manual count has resulted in the rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

88. The Board's failure to use the correct legal standard for determining voter intent in conducting its manual count is misconduct of election officials and members of the canvassing board sufficient to change or place in doubt the results of the election.

Prayer for Relief

WHEREFORE, Plaintiffs pray that the court:

As to Count I (Miami-Dade County Canvassing Board)

A. Order that the Miami-Dade County Canvassing Board and Supervisor of Elections immediately transmit the approximately 10,750 uncounted ballots cast in the year 2000 Presidential election to the Clerk of this Court for safe keeping.

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

C. Order that the Elections Canvassing Commission include in the certified results for Presidential electors all votes counted in the Miami-Dade County election including the results of this court's count.

As to Count II (Miami-Dade County)

A. Order that the Elections Canvassing Commission include in the certified results of the election of Presidential Electors the results of all hand counts conducted by the Miami-Dade County Canvassing

Board.

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As to Count III (Nassau County Canvassing Board)

A. Order that the Elections Canvassing Commission include in its certification of results of the election of Presidential Electors 6,879 votes for Gore/Lieberman and 16.280 votes for Bush/Cheney.

As to Count IV, V, and VI (Palm Beach County)

A. Order that the Palm Beach County Canvassing Board and Supervisor of Elections immediately transmit the approximately 892 disputed ballots cast in the year 2000 Presidential election, which ballots were segregated at the request of agents for the Democratic Party during the recount of such ballots, to the Clerk of this Court for safekeeping.

B. Cause the approximately 892 disputed ballots cast in Palm Beach County for President and Vice President of the United States to be manually counted by or under the direction of this Court, counting each ballots unless it is impossible to determine the intent of the voter, in order to determine the true and accurate returns of this general election for President and Vice President from Palm Beach County.

C. Order that the Elections Canvassing Commission include in the certified results for President electors the results of the court's manual count for Palm Beach County.

As to Count VIII (Include All Manual Counts)

A. Order the Elections Canvassing Commission to amend its November 26, 2000 certification of the results of the election of Presidential electors to include the results of all ballots counted in Broward, Miami-Dade, and Palm Beach Counties, by machine or hand, through 7:30 p.m., November 26, 2000 to the extent that they were not included.

Universal Relief

A. Order that the Elections Canvassing Commission amend its November 26, 2000 certification of the votes received by the electors of Al Gore and Joseph Lieberman and George W. Bush and Richard Cheney to report the true and accurate results of the election as determined in this proceeding.

B. Order that the Secretary of the State Katherine Harris and the Division of Elections are enjoined from declaring the winning presidential electors pursuant to Section 103.001, Florida Statutes until this pro-

ceeding is completed and all relief ordered had been provided.

C. Order an immediate hearing pursuant to Section 102.168(7) to address the matters raised in this Complaint.

D. Advance this cause upon the court's docket.

E. Schedule a status conference to establish expedited deadlines and procedures for this proceeding.

F. Order counsel for all parties to make the utmost effort to promptly serve each other with all pleadings and documents, to exchange e-mail addresses, and to serve each other with all pleadings, to the extent possible, by e-mail in addition to the other means of service.

G. Order that the Elections Canvassing Commission certify that the true and accurate results of the 2000 Presidential Election in Florida is that the Electors of Al Gore and Joe Lieberman received the majority of the votes cast in the election.

H. Order that the Elections Canvassing Commission, Secretary of State, and the Division of Elections certify as elected the presidential electors of Al Gore and Joe

Lieberman.

I. And grant such other relief as the court deems right and just.

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Respectfully submitted this 27th day of November, 2000

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