IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-2447

HARRY N. JACOBS,

Plaintiff/Appellant,

vs

THE SEMINOLE COUNTY CANVASSING BOARD, et al.,

Defendants/Appellees.

APPEAL OF A FINAL JUDGMENT OF THE
SECOND JUDICIAL CIRCUIT
CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF APPELLANT

Gerald F. Richman
Alan G. Greer
John R. Whittles
Richman, Greer, Weil, Brumbaugh,
Mirabito & Christensen, P.A.
One Clearlake Centre
250 Australian Avenue, Suite 1504
West Palm Beach, Florida 33401

Scott E. Perwin
Pamela I. Perry
1100 Miami Center
201 S. Biscayne Blvd.
Miami, Florida 33131-4327

[Additional counsel listed on signature page]

TABLE OF CONTENTS

4

TABLE OF CITATIONS

Page

Statutes

Cases

Other Authorities

8

STATEMENT OF THE REASONS
FOR THE COURT'S EXERCISE OF JURISDICTION

This Court has authority under Article 5, § 3(b)(5) of the Florida Constitution to review "any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, . . . and certified to require immediate resolution by the supreme court." This is without doubt such a case. As this Court is well aware, George W. Bush has been certified by the Florida Secretary of State as the winner of Florida's 25 electoral votes by a razor-thin margin. As of this writing, the margin of victory in Florida is 193 votes, a number considerably less than the number of votes at issue in this case. As the Court is also well aware, the Electoral College meets in a few days. While there are several potential scenarios that might ultimately determine the outcome of the presidential election, it is entirely possible that the outcome of this case will determine whether Governor Bush or Vice President Gore is the next President of the United States. In addition, and entirely apart from its immediate effects on the election, this case presents important issues involving the interpretation and enforcement of Florida's election laws not previously addressed by this Court. We respectfully contend that such an appeal merits the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court disregarded undisputed facts showing systematic criminal violations of Florida's election laws sufficient to invoke the well-established remedy of absentee ballot

9

invalidation. The lower court did so in large part based on the court's view that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights of the Florida Constitution, for without that basic freedom, all others would be diminished." Slip op. at 2 (attached as Exhibit 1). In allowing the Florida Constitution to override the clear intent of the Florida Legislature, the Circuit Court disregarded Article II of the United States Constitution and committed reversible error. *See Bush v. Palm Beach County Canvassing Board*, 531 U.S. ___, 121 S. Ct. 471 (Dec. 4, 2000). Moreover, the Circuit Court ignored controlling decisions of this Court, which make it clear that, while "the will of the electorate must be protected, so must the sanctity of the ballot and the integrity of the election." *Bolden v. Potter*, 452 So.2d 564, 567 (Fla. 1984).

A. Statement of Facts

The undisputed facts show that at least two paid operatives of the Republican Party turned the office of the Seminole County Supervisor of Elections into an arm of the Republican Party for some three weeks immediately before the November 7, 2000 election. Exploiting this unfair and discriminatory opportunity, these operatives systematically and illegally altered already-rejected absentee ballot request forms submitted by voters who apparently supported the Republican, rather than the Democratic, presidential candidate. This conduct violated not one but two criminal statutes, *see* Fla. Stat. § 104.047 (making it a third-degree felony to request an absentee ballot other than in compliance with chapter 101); Fla. Stat. § 104.0515 (making it a third-degree felony to apply disparate practices to different groups of voters), and more than justifies the relief sought by Plaintiff and denied by the Circuit Court.

Many of the material facts are contained in a Stipulation of Material Facts ("Stip."),

attached to this brief as Exhibit 2.[1] Those facts, along with others established by uncontroverted evidence, are summarized below.[2]

Defendant Sandra Goard is a registered Republican and the Supervisor of Elections for Seminole County. Stip. ¶¶ 23 & 44. She ran unopposed for re-election in the November 7, 2000 election. *Id.* ¶ 24.

Prior to the election, the Florida Republican Party disseminated pre-printed ballot request forms ("request forms") to households of registered Republican voters. Stip. ¶ 2. Many thousand of these forms were sent out without preprinted voter identification numbers, which numbers are required by Fla. Stat. §102.62 before an absentee ballot may be issued. *Id.* ¶ 4. Most of the voters who received such forms did not add the missing voter identification numbers, resulting in more than 2,000 incomplete absentee ballot request forms being submitted to the Supervisor of Elections by Republicans in Seminole County. *Id.* ¶ 5. These requests were rejected by Goard, consistent with her policy not to process absentee ballot request forms missing required information *Id.* ¶¶ 8 & 22. Goard and her staff were fully aware of the statutory requirements. Goard Depo. Tr., Vol. II, 33:20 – 35:14. Goard testified that the rejected absentee ballot request forms were put in "one specific box" and segregated from absentee ballot request forms submitted by

---

[1] Because of their length, the exhibits to the stipulation have not been included.

[2] Only four live witnesses were called at trial (three by Plaintiff and one by Defendants), so the factual underpinnings of the Circuit Court's ruling are based almost exclusively on the stipulated facts, supplemented by written deposition testimony and exhibits. As a result, the trial court's opportunity to observe witness demeanor or evaluate credibility was minimal.

Democrats and Independents. Goard Depo. Tr., Vol. I, 33:16-20.[3] Goard had never followed that procedure before. *Id.* 33: 21-23.

In early October, as absentee ballot request forms arrived at her office, Goard and members of her staff contacted those applicants who had submitted faulty applications, either by letter, Pike Depo. Tr. 20:13-16, or by telephone, *id.* 24:12-17, informing the applicant of the problem. However, by October 10, 2000, Goard's office had fully mobilized to support the Republican Party's efforts and, from October 10 to October 15, 2000, only two such calls were made to applicants. *Id.* 25:13-26:4. After October 15, 2000, no calls were made. *Id.* During the same time period, Goard and her staff, busily helping the Republicans to alter the Republican requests, had no time to write letters and those efforts also stopped. Pike Depo. Tr. 21:25-23:6.

In October 2000, Mr. Schnick, a high-ranking official of the Florida Republican Party contacted Goard by telephone and requested that Goard permit one or more representatives of the Florida Republican Party to come to her office for the purpose of adding voter registration numbers to the already-rejected Republican request forms. Stip. ¶ 6. Goard testified during her deposition that she did not know the identity of the individual who made this request, but the Vice Chair of the Republican Party subsequently testified that she clearly did know his identity, and that the individual was Mr. Schneck. Stelling Depo Tr. 25:20-24.

Goard then met with her entire staff to discuss the fact that the Office had received many incomplete absentee ballot applications which had been rejected. Buchans Depo. Tr. 13:13-19. Thereafter, Goard permitted Michael Leach, a paid representative of the Republican Party, and

---

[3] Citations to deposition testimony are limited to those portions of the depositions placed into evidence at trial.

for a brief time two other representatives, to have access to the incomplete, already-rejected Republican request forms.[4] Stip. ¶ 10. These individuals were not supervised by Goard or other employees, *id.* § 13, and the room where Leach worked was not a room to which the public normally has access. *Id.* ¶ 14. Goard knew that these individuals were paid staff representatives of the Republican Party. *Id.* ¶ 11.

Between mid-October and early November, a period of approximately three weeks, Leach worked in a non-public area of the Supervisor's office, using a laptop computer that he brought with him containing voter identification numbers, to hand write voter identification numbers onto the rejected Republican request forms. Stip. ¶ 12. He was given access to the already-rejected forms at times when the office was officially closed. Mascioli Depo. Tr. 15:10 – 16:14. At times Leach had access to the absentee request forms alone, and at other times he had one or two white, middle-aged men who assisted him. Mascioli Depo. Tr. 16:15 – 25. Leach was assisted by employees of the Election Supervisor's office, including Michael Mascioli, who segregated the Republican request forms and delivered trays full of those forms to Leach, Mascioli Depo. Tr. 18:18-24, and by high-ranking members of the Supervisor's staff. Stip. ¶ 18.

With the assistance and permission of Supervisor Goard, Leach and his colleagues added voter registration numbers by hand to approximately 2,126 of the

---

[4] The evidence showed that both Leach and his boss, Todd Schnick, were fully familiar with the requirements of Fla. Stat. § 101.62. Leach claimed that he was a "military man" who simply "follow[ed] orders" in altering the Republican request forms. Leach Depo. Tr. 20:24 – 21:1.

already-rejected Republican request forms and then re-submitted them for processing. Stip. ¶¶ 19, 20 & 34. The forms were not returned to the voters who initially submitted them before they were re-submitted. After the Republican operatives added voter registration numbers to the request forms, the Supervisor's office processed those requests and mailed absentee voter ballot materials to the 2,126 individuals. Stip. ¶ 21 & 35.

At no time did Ms. Goard permit or encourage representatives of the Florida Democratic Party to add missing information to incomplete absentee ballot request forms submitted by Democratic voters.[5] At no time did she permit or encourage representatives of the various minority parties or their supporters to add missing information to request forms submitted by those voters. At no time did she permit or encourage independent voters to add missing information to their request forms.

In fact, the evidence demonstrates that Goard strictly enforced the requirements of section 101.62 and other statutory requirements prior to receiving Mr. Schneck's request, and that she continued to enforce them strictly after Mr. Schneck's request against all non-Republicans. For example, the Supervisor's web site stated throughout the period prior to the November 7th election that absentee ballot request forms lacking voter registration numbers were "void." Plaintiff's Ex. 20. Uncontroverted evidence established that Goard told one witness, Steve Hall,

---

[5] In fact, there is no dispute that Goard specifically informed Democratic county commissioner candidate, Dean Ray, that adding missing voter identification numbers to a candidacy petition was illegal. Goard admonished Ray that the flawed signatures appearing on the petition were invalid, and could not be released for alteration or correction. Trial testimony of Dean Ray, 85:15 – 86:13.

who was representing a Democratic candidate, that requests lacking voter registration numbers would be rejected. Trial testimony of Steve Hall, Dec. 7, 2000, 59:7-18. Goard told other witnesses that voter registration numbers could not be added to materials filed with the Supervisor of Elections after they had been filed because such materials became public property. Trial testimony of Dean Ray, 85:25 – 86:13; Livingston Depo Tr. 7:24 – 8:1. Goard nevertheless waived these mandatory requirements only for the Republican Party.

In her approximately 23 years as Supervisor of Elections for Seminole County, Goard had never previously allowed representatives of any political party to work out of her office, and had never previously allowed representatives of any political party to handle absentee ballot request forms. Goard Depo. Tr., Vol. I, 31:9 – 13; *id.*, Vol. II, 46:3 – 9; Mascioli Depo. Tr. 18:9 – 13.

Of the 2,126 applicants who received absentee ballots as a result of Leach's alteration of the already-rejected Republican absentee ballot request forms, 1,932 returned their absentee ballots and cast votes in the November 7th election. All or most of these 1,932 absentee ballots were counted and included in the certified vote total in the November 7, 2000 general election. Stip. ¶ 36. Of these 1,932 voters whose ballots were returned, 1,833 were registered Republicans, and approximately 54 were registered Democrats, all but a handful of them living in Republican households. *Id.* ¶ 37; Trial transcript, Dec. 5, 2000, 64:3 – 20 (stipulation in open court). These 1,932 votes are sufficient to alter the outcome of the November 7, 2000 Presidential election.

All together, 15,594 domestic voters cast absentee ballots in Seminole County in the November 7, 2000 election. Of these 15,594 voters, 15,504 voted in the Presidential election, and of these 15,504 votes, 10,006 votes were counted for defendants Bush and Cheney and 5,209 votes were counted for Gore and Lieberman. These votes were included in the totals certified by the Seminole County Canvassing Board. Stip. ¶ 32.

Contrary to the Circuit Court's statement that "[t]here was no evidence that any absentee ballot requests were excluded or denied solely because they lacked the required voter registration number," slip op. at 9, it is ***undisputed*** that at least 34 such requests, not submitted on preprinted Republican forms, were denied for precisely that reason. Trial testimony of Rachel Gebaide, 272:17 – 19 (called by Defendants). The actual number of denied requests could be considerably higher, since the box in which they were kept was not secured and was subject to the control of Goard and her staff, as well as Leach and other Republican operatives.

Rather than serving as a passive observer of misconduct by others, the evidence shows that Goard called her office staff together, informed them of the problem facing the Republican Party and instructed her staff to assist the Republicans, even at the expense of their other duties. She and her staff turned their energies toward segregating the Republican request forms and feeding them to Leach for processing and resubmission. In this fashion, Goard integrated Leach into the operation of the Supervisor's office. The sole purpose of doing so was to ensure that voters targeted by the Republican Party voted by absentee ballot. This

16

goal could not have been achieved—and George W. Bush would have received fewer votes in the Presidential election—if Goard had not given Republican Party operatives access to her staff and records, and then acquiesced in the acceptance of applications that she knew did not comply with Florida law.

B. Course of Proceedings and Disposition Below

This contest action was filed on November 27,2000 in the Circuit Court for Leon County, Florida pursuant to Fla. Stat. § 102.168.[6] In accordance with the requirements of the contest statute, the Court placed the matter on an expedited discovery schedule and set the case for a bench trial on December 6, 2000. The trial was held on December 6-7, 2000 and resulted in a written order issued by the Circuit Court on December 8, 2000. A copy of that order is attached as Exhibit 1.

ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW IN ELEVATING THE RIGHT OF SUFFRAGE FOUND IN THE FLORIDA CONSTITUTION OVER THE CLEAR AND MANDATORY DIRECTIVES OF THE FLORIDA LEGISLATURE AS EXPRESSED IN THE FLORIDA STATUTES?

2. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THAT REPEATED AND INTENTIONAL VIOLATIONS OF SECTION 101.62 ARE INSUFFICIENT TO JUSTIFY INVALIDATION OF ABSENTEE BALLOTS UNDER THIS COURT'S DECISION IN *BOARDMAN v. ESTEVA*?

---

[6] A prior contest action had been filed in Seminole County Circuit Court raising the same issues. By agreement of the parties, that action was transferred and consolidated with the instant action, filed in Leon County.

3. WHETHER THE CIRCUIT COURT ERRED IN CONCLUDING THAT A SUPERVISOR'S PRACTICE OF ASSISTING REPRESENTATIVES OF ONE PARTY BUT NOT OTHERS TO ALTER ALREADY-REJECTED ABSENTEE BALLOT REQUEST FORMS DOES NOT AMOUNT TO DISPARATE TREATMENT OF VOTERS IN VIOLATION OF FLA. STAT. § 104.0515 AND IS INSUFFICIENT TO JUSTIFY INVALIDATION OF ABSENTEE BALLOTS UNDER THIS COURT'S DECISION IN *BOARDMAN v. ESTEVA*?

4. WHAT IS THE APPROPRIATE REMEDY FOR THESE VIOLATIONS?

SUMMARY OF THE ARGUMENT

The Circuit Court ignored the plain language of the applicable Florida statutes, controlling case law of this Court and undisputed evidence of intentional wrongdoing in declining to order the relief requested in this case. The conduct at issue here satisfies all three elements of this Court's three-part standard for interfering with election results as a result of absentee ballot irregularities, and required the Circuit Court to invalidate all 15,504 absentee ballots cast in Seminole County in the November 7, 2000 election, or at the very least to invalidate the 1,932 absentee ballots that were the fruit of Defendants' poisonous tree. None of the arguments pressed by Defendants is capable of overcoming the mandatory requirements of Florida law.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN PERMITTING THE CONSTITUTIONAL "RIGHT TO VOTE" TO OVERRIDE THE CLEAR AND MANDATORY DIRECTIVES OF THE FLORIDA LEGISLATURE

Article II, section 1 of the United States Constitution provides in pertinent part:

> 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 each State may be entitled in the Congress . . .

This constitutional provision gives the Legislature plenary authority over the selection of Presidential electors and precludes the courts from overriding legislative directives based on a state constitution, which is not an expression of legislative will. *See Bush v. Palm Beach Canvassing Board*, 531 U.S. ___,121 S. Ct. 471 (Dec. 4, 2000); *McPherson v. Blacker*, 146 U.S. 1, 25 (1892). In cases involving presidential elections, reliance on a state constitution to override statutory directives violates the federal constitution. *Id.*

The Circuit Court in this case relied prominently on the right to vote identified in the Florida Constitution and construed that right to override the plain requirements of Florida's statutory election laws, apparently based on a misapprehension regarding the import of the United States Supreme Court's recent opinion in the *Harris* case. At the outset of the Circuit Court's ruling, Judge Clark wrote:

> The right of suffrage is the preeminent right contained in the Declaration of Rights of the Florida Constitution, for

without that basic freedom, all others would be diminished. An accurate vote count is one

20

> of the essential foundations of our democracy. . . . *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. 2000), vacated on other grounds at *Bush v. Palm Beach County Canvassing Board*, 121 S. Ct. 471, 2000 WL 1769093 (Dec. 4, 2000).

Slip. op. at 2.

With all respect to the Circuit Court, the United States Supreme Court vacated this Court's opinion in *Harris* on precisely the grounds for which it was cited by the Circuit Court: this Court's reliance on the Florida Constitution and the constitutional "right to vote" enumerated in it. The high Court emphasized that, in a presidential election, the states do not act solely on their own authority as an organ of the state government, but also by virtue of a grant of authority made directly to the state legislature in Article II, section 1 of the federal constitution. Slip op. at 4. The Court implicitly criticized this Court's view that election laws must be "liberally construed" in favor of the right to vote. *Id.* at 5. It therefore vacated this Court's opinion, expressing concern that this Court did not sufficiently appreciate the importance of the federal grant of authority to the Florida Legislature to regulate presidential elections, and that this Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2." *Id.* at 7.

Article II of the federal constitution requires the courts of this State to interpret Florida's election laws with greater-than-normal attention to the plain language of the relevant statutes. Whether or not this is deemed "strict construction," and whether or not it mandates "strict compliance," it is certainly stricter construction than that provided by the Circuit Court. The lower court's ruling disregards the

command of the federal constitution, and should be reversed on that ground alone. The trial court should be directed to enforce the statutory requirements enacted by the Florida Legislature.

II. THE UNDISPUTED FACTS SHOW THAT DEFENDANTS COMMITTED CRIMINAL VIOLATIONS OF TWO FLORIDA STATUTES

The events summarized above constitute criminal violations of at least two Florida statutes, more than justifying the relief sought in the Circuit Court.

A. Section 101.62

First, Fla. Stat. § 101.62(1)(b) provides that the Supervisor of Elections "may accept a written . . . request for an absentee ballot from *the elector*, or, if directly instructed by the elector, a member of the elector's immediate family, or the elector's legal guardian" (emphasis supplied). It goes on to provide that "[*t*]*he person making the request must disclose*" nine required items of information, including the applicant's voter registration number.[7]

These and other provisions of section 101.62 were enacted in 1998 in response to widespread absentee voter fraud in the 1997 Miami mayoral race and a 1997 city commission race in Miami Beach. *See* Senate Staff Analysis and Economic

[7] Florida courts have consistently held that the term "must" can only be construed as mandatory. *See State v. Meyers*, 708 So.2d 661, 663 (Fla. 3d DCA 1998) ("While the 'may' as used in the habitual felony offender and habitual violent felony offender is construed as permissive, 'must' and 'shall' as used in the violent career criminal provision can only be construed as mandatory"); *Kelder v. Act Corp.*, 650 So.2d 647, 649 (Fla. 5th DCA 1995) ("There is nothing ambiguous about subsection (6). Reporting wrongdoing to an agency is mandated by the legislature's use of the word 'must'").

22

Impact Statement, Bill CS/SB 1402, dated March 12, 1998 (attached as Exhibit 3). As described in the legislative history:

> The bill restricts telephone and written requests for absentee ballots to the elector, the elector's immediate family, or the elector's legal guardian.
>
> (a) *Identification of Elector* – The requester must provide the following elector information: elector's name; address; last 4 digits of elector's Social Security Number; and the elector's voter identification number.
>
> (b) *Identification of Requester* – The requester must also provide the following information about himself or herself: name, address, Social Security Number, driver's license number (if available), relationship to the elector, and signature (written requests only).
>
> All other requests for absentee ballots must be made *by the elector* in person or in writing.

Id. at 14 (emphasis in original).

The same bill created a new third-degree felony under Florida law: requesting an absentee ballot in a manner not in compliance with chapter 101. *See* Fla. Stat. 104.047(2).

There can be no doubt that alteration and resubmission of an already-rejected absentee ballot request form by an individual who is not the elector, a member of the elector's immediate family, or the elector's legal guardian violates both the letter and the spirit of the anti-fraud provisions of sections 101.62 and 104.047.

The Circuit Court agreed. The trial court properly recognized that "[t]he irregularity of allowing the ballot requests to be completed by someone other than the person making the request after the submission of the requests violated Section

101.62, Florida Statutes. The statute requires the disclosure of the voter identification number by '[t]he person making the request.'" Slip op. at 7. Having expressly found a violation of Florida law amounting to a third-degree felony, the trial court nevertheless went on to conclude that, since the election statutes do not expressly provide that a ballot resulting from an incomplete absentee ballot application is void or illegal, such a violation cannot support invalidation of the tainted ballots and therefore cannot amount to "substantial noncompliance" under *Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975). *Id.* This reasoning is unsound on at least two grounds.

First, the rule adopted by the Circuit Court would imply that there are *no* irregularities relating to the absentee ballot application itself that are sufficient to void an absentee ballot, since nowhere in the current version of the Florida Statutes does the Legislature expressly provide that such ballots are illegal. Under the lower court's ruling, Goard could have processed absentee ballot applications lacking *any* of the information required by section 101.62 without legal consequence. Indeed, during closing argument, under questioning by the Circuit Court, Defendants Bush and Cheney as much as conceded that a slightly more extreme version of the facts of this case, involving a large number of altered Republican request forms and an explicit denial of a request for similar treatment by Democrats, would require invalidation of the tainted votes.[8] Trial transcript, Dec. 7, 2000, 377:17 – 378:13. Under the rule adopted

[8] To use a different hypothetical that was discussed in the Circuit Court, Goard's conduct is analogous to that of a Supervisor who sees two busloads of voters arriving at the polls five minutes after closing time, and permits the bus carrying Republicans, but not the one carrying Democrats, to vote late. Under these circumstances, the late Republicans' votes are not declared illegal by any express provision of the election laws, and yet no one would dispute that they should not be

by the Circuit Court, a Supervisor of Elections is free to be as unfair and discriminatory as she likes in handling absentee ballot applications as long as she does not accept absentee ballots that are barred by section 101.68(2)(c)1. Such a rule would encourage wholesale violation of the election laws and should be rejected.

Second, the lower court's reasoning is circular. As discussed more fully below, *Boardman* adopted a three-part test to decide whether irregularities in absentee ballot procedures should result in invalidation of the affected votes. The Circuit Court's ruling would replace that test with a one-part test: Has the legislature expressly provided that the irregularity is sufficient to void the ballot? Having concluded by applying this test that the absence of a voter registration number is not sufficient to void the ballot, the lower court finds that the violation is therefore not "substantial" under *Boardman* and, hence, insufficient to void the ballot. But if the Court has already concluded that the voter's ballot is lawful, it has already answered the question addressed by *Boardman* and has no need to apply the three-part test. Having first assumed that the voter's ballot is lawful, the Circuit Court concludes that it is lawful. This reasoning is entirely circular.

It is true that, in *Boardman*, this Court wrote: "Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, *provided such irregularity is not calculated to affect the integrity of the ballot or election*." 323 So.2d

---

counted.

at 265 (emphasis in original). The Florida Legislature expressly determined in 1998 that imposing stricter requirements on absentee ballot applications was necessary to preserve the "integrity of the ballot or election." The Circuit Court improperly treated those mandatory requirements as merely aspirational, based at least in part on the state-constitutional right to vote, and its decision should be reversed.

B. Section 104.0515

In addition, Defendants unquestionably violated Florida's voting rights act, section 104.0515. Section 104.0515 provides in relevant part:

> (2) No person acting under color of law shall:
>
> (a) In determining whether any individual is qualified under law to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under law to other individuals within the same political subdivision who have been found to be qualified to vote.
>
> . . .
>
> (5) Any person who violates the provisions of this section is guilty of a felony of the third degree . . . .

By turning over her office to the Republican Party, and permitting Republicans but not Democrats or independents to alter already-rejected absentee ballot request forms, Supervisor Goard knowingly and purposefully applied "standards, practices and procedures" to Republicans that were not applied to other voters. This conduct was a blatant and intentional violation of the Florida voting rights act.

The Circuit Court's offhand statement that Plaintiff "failed to show that [Goard] treated other political parties differently than she treated the Republican

party" defies belief and certainly lacks substantial competent evidence to support it. Slip op. at 8. It was *undisputed* that Goard allowed paid operatives of the Republican party to take over her office and criminally alter already-rejected Republican request forms, and that *she did not allow non-Republicans to do the same*. It was *undisputed* that Republican forms were corrected and that, aside from a handful of Democrats who happened to receive forms destined for Republicans, non-Republican forms were not.[9] To the Circuit Court's response—"You didn't ask"—we say: We didn't know. Nor did the other rejected absentee voters. Requiring a request under these circumstances would simply reward Defendants' successful concealment of their conspiracy—and would require others to join in criminal activity in order to challenge it.

III. THE ABSENTEE BALLOT IRREGULARITIES IN SEMINOLE COUNTY REQUIRE INVALIDATION OF THE ABSENTEE VOTES.

A. The Three-Part Test for Invalidation of Absentee Ballots in Florida

The courts of this State have emphasized that, "unlike the right to vote, which is assured every citizen by the United States Constitution, the ability to vote by absentee ballot is a privilege." *In re Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election*, 707 So.2d 1170, 1173 (Fla. 3d DCA 1998). Accordingly, in light of the opportunities for fraud that can attend an absentee (as opposed to an in-person) ballot, the law of Florida incorporates mandatory legal

[9] It is also undisputed that 80 people who had previously requested absentee ballots and had those requests rejected then had to make their ways to the polls on election day. Defendants' Ex. 12. Plainly, those voters were treated differently than the favored Republicans.

standards for invalidation of absentee ballots that differ significantly from the standards applied to ballots cast by the voter in person on election day. Those standards are contained in three seminal decisions of this Court--*Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975); *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984); and *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998)--discussed below.

In *Boardman v. Esteva*, this Court attempted to harmonize its prior precedents on the issue of the appropriate remedy for irregularities affecting absentee ballots in Florida elections. Acknowledging that prior cases were not wholly consistent on the point, the Court announced that "substantial compliance," rather than strict compliance, "is all that is required to give legality" to absentee ballots. 323 So.2d at 264. The Court thus made clear that absentee ballots were not to be invalidated by Florida courts solely for inadvertent technical violations of Florida law unrelated to the integrity of the electoral process or the accuracy of the election results. In order to guide future judicial decisions on these issues, the Court held that, in determining the appropriate remedy for violations of the election laws affecting absentee ballots, the following factors "shall be considered":

> (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
>
> (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
>
> (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

Id. at 269.

The *Boardman* Court emphasized that "no fraud or wrongdoing [had been] charged" in that case. 323 So.2d at 261. The Court also found that many of the alleged violations were not substantial and did not require the invalidation of the votes cast. Yet, even under the "substantial compliance" standard, this Court agreed with the trial court that 88 of the 3,389 absentee ballots cast in the election *were* invalid and should *not* be counted, including 13 such ballots *whose only infirmity was that the application for an absentee ballot had not been signed*. *Id.* at 261, 270. The Court also agreed with the trial court's invalidation of an additional 17 ballots in which return envelopes were not signed across the flap; 39 in which the official title of the subscribing witness was not indicated; and 19 in which the names of the electors were not on record. *Id.* By affirming the exclusion of these 88 absentee ballots, the Court necessarily concluded that such irregularities *were* substantial, and *did* adversely affect the integrity of the election.

The Court returned to these issues in *Bolden v. Potter*, 452 So.2d 564 (Fla. 1984). *Bolden* reaffirmed the three-factor test and affirmed the invalidation of all the absentee ballots cast in a county-wide election based on a finding that pervasive voting fraud had tainted the absentee voting process. The Court rejected the view adopted by the First District Court of Appeal that, before all absentee ballots in a county may be invalidated, there must be a specific finding that a sufficient number of ballots were affected by the illegal practices to change the result of the election. *Id.* at 566-67. "Once substantial fraud or corruption has been established to the extent that it permeated the election process, it is unnecessary to demonstrate with mathematical

certainty that the number of fraudulently cast ballots actually affected the outcome of the election." *Id.* at 567.[10] The Court distinguished *Boardman* as a case where "there was no allegation or suggestion of fraud, corruption, or any type of intentional misconduct on the part of any person involved with the election." *Id.* at 566. The Court thus held that, where pervasive wrongdoing is present, all absentee ballots should be invalidated even if only a relatively small number of such ballots are likely to have been affected by the unlawful practices.[11]

In *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998), this Court again reaffirmed the *Boardman* test and held that, where the facts reveal only unintentional noncompliance with election law rather than intentional wrongdoing, a court must also find "reasonable doubt . . . as to whether a certified election expressed the will of the voters" in order to interfere with the election. *Id.* at 725. The Court defined unintentional non-compliance as "noncompliance with statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or . . . the election officials' erroneous understanding of the statutory requirements." *Id.* In such cases, as distinguished from

---

[10] Significantly, the Court also stated that "[i]t makes no difference whether the fraud is committed by the candidates, election officials, or third parties. The evil to be avoided is the same, irrespective of the source. As long as the fraud, from whatever source, is such that the true result of the election cannot be ascertained with reasonable certainty, the ballots should be invalidated." *Id.* at 567; *see also In Re Protest of Election Returns*, 707 So.2d 1170 (Fla. 3d DCA 1998) (invalidating all absentee ballots cast in mayoral election even though there was no evidence that either candidate was responsible for the fraud).

[11] The Court adopted this remedy even though it found that election officials "substantially complied with the voting procedures." 452 So.2d at 567.

30

those (like *Bolden*) where the facts reveal intentional wrongdoing, the courts should not invalidate election results unless they find "reasonable doubt" that the election expressed the voters' will.

Boardman requires a Florida court to consider *all three factors*—intentional wrongdoing, substantial noncompliance, and the risk of a tainted outcome—to determine the appropriate remedy for absentee ballot irregularities in a contest proceeding. Thus, a court can invalidate absentee ballots in the absence of intentional wrongdoing if the integrity of the election is in doubt (*Beckstrom*), and sufficient intentional wrongdoing will support invalidation even absent a showing that the wrongdoing is likely to have affected the election's outcome (*Bolden*).

B. All Three *Boardman* Factors Are Present in This Case.

All three *Boardman* factors are plainly present in this case.

1. <u>Intentional Wrongdoing</u>

The facts here reveal "intentional wrongdoing" as that term is used in Florida election cases. Plaintiffs have proven that Defendant Sandra Goard, the Seminole County Supervisor of Elections, unlawfully turned over her office and the assistance of her staff to paid operatives of the Florida Republican Party and allowed them to alter already submitted absentee ballot request forms, resulting in more than 1,900 illegal absentee ballots in the County. As noted above, such conduct amounts to a criminal violation of Fla. Stat. §§ 101.62 and 104.047 and constitutes a third-degree felony under Florida law. This conduct also violated Fla. Stat. § 104.0515, which criminalizes the application of different standards or practices to different

groups of voters. The notion that commission of a third-degree felony is a matter of questionable "judgment," as the Circuit Court concluded (slip op. at 9), does not merit serious discussion.

Courts in other jurisdictions have found similar conduct sufficient to require invalidation of the affected votes. In *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993), the California Supreme Court voided an election after finding repeated violations of the state absentee ballot voting law, including instances where the absentee ballot request form was filled in by members of a political action committee rather than by the voter herself. *Id.* at 1329-30. As the state court noted: "Illegal votes include votes by persons receiving their absentee ballots in a manner that violates election laws governing absentee balloting." *Id.* at 1329.

In *McCranie v. Mullis*, 478 S.E.2d 377, 378 (Ga. 1996), the Georgia Supreme Court voided an election where the "most significant irregularities" involved illegal assistance in the completion of absentee ballots. The court noted that the individual who illegally assisted with the majority of the irregular ballots was connected to one of the candidates, *id.* at 379, and that "[t]he availability of criminal sanctions for violations of these rules demonstrates that these procedures governing the rendering of assistance are not mere technicalities but are an integral part of preserving the sanctity of the voting process." *Id.* at 378-79.

And in *Bingamin v. Eureke Springs*, 408 S.W.2d 607 (Ark. 1966), the Arkansas Supreme Court invalidated six absentee ballots where the application was prepared by the Deputy Clerk, not by the voters themselves, thereby changing the

outcome of a local bond measure which had passed by a scant 3 votes. Although it increased the number of votes cast, the court held that the practice was unlawful and required invalidation of the affected votes.[12]

2. Substantial Noncompliance

Nor can there be any doubt that Supervisor Goard's misconduct constitutes substantial noncompliance with Florida election law. As noted above, the legislature added significant anti-fraud provisions to section 101.62 in 1998 in order to combat the problems experienced in Miami-Dade County in 1997. The 1998 amendments to Section 101 strictly limited those who could request an absentee ballot to the elector, a member of the elector's immediate family, or the elector's legal guardian. Section 101.62(1)(b).

It is undisputed that Ms. Goard rejected approximately 2,100 applications for absentee ballots because they lacked the information required by Section 101.62(1)(b). It is also undisputed that her staff reviewed all rejected absentee ballot application forms, sorted out those generated by the Republican Party, and then set

---

[12] *See also Eubanks v. Hale*, 752 So.2d 1113 (Ala. 1999) (invalidating several on-site absentee ballots cast in violation of state law); *Lewis v. Griffith*, 664 So.2d 177 (Miss. 1995) (invalidating absentee ballots that had been delivered by the Town Clerk to members of her family, in violation of state law); *Dilsaver v. Pollard*, 214 N.W.2d 478 (Neb. 1974) (voiding an absentee ballot obtained after the time for doing so had expired); *Adkins v. Huckabay*, 755 So.2d 206 (La. 2000) (invalidating absentee ballots that were hand delivered by the County Elections Supervisor, in violation of state law); *Miller v. Picacho Elementary School Dist. No. 33*, 877 P.2d 277 (Ariz. 1994) (invalidating absentee ballots that had been delivered by school district officials rather than by mail, in violation of state law); *Emery v. Robertson*, 586 S.W.2d 103 (Tenn. 1979) (voiding a close election where the incumbent sheriff obtained and distributed 25 absentee ballot applications, in violation of state law); *May v. Wilson*, 19 S.E.2d 467 (S.C. 1942) (invalidating absentee ballots where application had been delivered by one of the candidates, in violation of state law).

them aside so that representatives of the Republican Party, rather than a voter or a lawful requester, could use Supervisor of Election offices to add voter registration numbers to the rejected applications. It is undisputed that the Republican Party, rather than the electors, submitted these altered applications for processing.[13] Non-Republicans, in contrast, were not permitted to alter and resubmit forms; instead, the Supervisor of Elections strictly construed these statutes in processing forms from Democrats and Independents. Indeed, the Supervisor's web site informed voters that absentee request forms lacking the required information would be treated as "void." Finally, it is undisputed that Ms. Goard processed these altered applications and sent absentee ballots to 2,126 individuals, and that 1,932 of these forwarded ballots were counted by the Supervisor of Elections and included in the results certified by the Seminole County Canvassing Board. These undisputed facts compel a finding that the Seminole County Supervisor of Elections and the Republican Party failed to substantially comply with the requirements of Fla. Stat. 101.62.[14]

Boardman itself holds that matters involving the submission of the absentee ballot application can amount to substantial noncompliance and require invalidation of the affected ballots. The Legislature's 1998 decision to attach criminal penalties to the

---

[13] The evidence also shows that the voter registration numbers added were often incorrect, but the requests containing those numbers were nevertheless accepted for processing. Bailey Depo. Tr. 15:14 – 16:20.

[14] In addition, as argued elsewhere in this brief, the Board did not even remotely comply with §104.0515(2)(a), requiring that election officials apply the same "standard[s], practice[s], [and] procedure[s]" for all voters, or with § 104.047. Defendants' repeated violations of these other statutes also constitute "misconduct" sufficient to sustain plaintiffs' contest action under section 102.168.

34

unlawful submission of an absentee ballot request form dramatizes the importance of these provisions, and it is beyond question that the conduct involved in this case constituted unlawful submission of such forms.[15] The same reasoning applies to the Supervisor's failure to comply with the Florida voting rights statute, Fla. Stat. § 104.0515. Accordingly, there can be no reasonable question that the conduct alleged here amounts to substantial noncompliance with Florida law.[16]

Again, decisions in other jurisdictions support the conclusion that violations of statutory requirements relating to obtaining and submitting absentee ballots can constitute substantial noncompliance with election laws. *See Eubanks v. Hale*, 752 So.2d 1113 (Ala. 1999) (excluding absentee ballots lacking required witnesses and signatures); *Miller v. Picacho Elementary School Dist. Nol. 33*, 877 P.2d 277, 279 (Ariz. 1994) (invalidating absentee ballots that were hand-delivered rather than mailed, and rejecting as irrelevant testimony that the votes cast reflected the voter's intent); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000) (invalidating 495 absentee ballots where application failed to state reason for requesting ballot, as required by statute); *Gooch v. Hendrix*, 851 P.2d 1321 (Cal. 1993) (invalidating absentee ballots and ordering new elections where political action committee was involved in filling out ballot applications

---

[15] *See McCranie v. Mullins*, 478 S.E.2d at 378-79 (existence of criminal sanctions for violations of absentee ballot voting statutes shows that statutory requirements "are not mere technicalities but are an integral part of preserving the sanctity of the voting process").

[16] The Circuit Court's observation that acceptance of invalid absentee ballot request forms did not affect the voter's will is beside the point. The same thing was true of the unsigned or unwitnessed ballot applications in *Boardman*.

and returning ballots); *Adkins v. Huckabay*, 755 So.2d 206, 220-21 (La. 2000) (invalidating ballots that had been hand-delivered by registrar of voters after mailing deadline had passed).

3. Practices Affecting the Integrity of the Electoral Process

Finally, Goard's misconduct tainted the integrity of the election and called its results into doubt. The number of affected ballots–more than 1,900–is greater than the margin of victory in the Florida Presidential election. By allowing Republican but not Democratic or independent activists to remedy already-rejected absentee ballot forms, using both her office and her staff, Goard gave an unfair and illegal advantage to voters and candidates of one party and disadvantaged those of other parties or no party at all. The participation of a public official in this misconduct uniquely undermines the integrity of the electoral process, particularly when that public official is invested with the responsibility of ensuring that the election is fairly carried out. Courts have recognized the importance of expeditiously rectifying such a breach of the public trust. *See, e.g., Lewis v. Griffith*, 664 So.2d 177, 186 (Miss. 1995). Likewise, Florida law specifically condemned such misconduct when it criminalized the application of disparate election practices or procedures. *See* Fla. Stat. §104.0515(2)(a). This readily satisfies the third part of the *Boardman* standard.

IV. PLAINTIFF IS NOT REQUIRED TO PROVE HOW THESE 1,932 VOTERS WOULD HAVE VOTED IF THERE HAD BEEN NO VIOLATION

Defendants have argued that Plaintiff had the burden of proving that, if these uncontroverted violations of the election laws had not occurred, the 1,932 voters who received absentee ballots would not have voted or would have voted differently,

and failed to meet that burden. There is no such burden. Our only burden is to prove that "the number of invalid absentee ballots is more than enough to change the result of the election," *Boardman*, 323 So.2d at 268, and there is presumably no dispute that 1,932 is more than 193. Indeed, as this Court held in *Bolden*, even the *Boardman* burden is relaxed in cases like this one, where intentional wrongdoing has been shown.

There was no discussion in *Boardman* about whether the 13 voters whose votes were invalidated because their applications for absentee ballots were unsigned would or could have voted lawfully. The Court did not attempt to reconstruct what the world would have looked like had the violation not occurred, as Defendants seek to have done here. Having obtained their absentee ballots in violation of state law, the votes of those 13 voters were illegal and set aside. The same rule should be applied here.

If the law were as conceived by Defendants, a plaintiff in a contest action involving outright vote buying would be required to prove that the individuals whose votes were bought would not have voted for the same candidate had they not been paid, or at least a sufficient number of them to change the outcome of the election. Requiring proof of "causation" in that sense would effectively eliminate the possibility of a successful contest, and is flatly inconsistent with this Court's decision in *Bolden*. The contestant in *Bolden* was not required to prove even that the number of voters whose votes were bought was greater than the margin of victory, much less that those

voters would have voted differently. The “burden” imagined by Defendants does not exist.

38

V. ALL ABSENTEE BALLOTS CAST IN SEMINOLE COUNTY SHOULD BE REJECTED BECAUSE THE NUMBER OF INVALID BALLOTS IS SUFFICIENT TO AFFECT THE OUTCOME OF THE ELECTION.

"The general rule is that where the number of invalid absentee ballots is more than enough to change the result of the election, then the election shall be determined solely upon the basis of the machine vote. The reason for the rule is that since all the ballots have been commingled and it is impossible to distinguish the good ballots from the bad, . . . then in fairness all the ballots must be thrown out." *Boardman*, 323 So.2d at 268.[17] This rule was relaxed in *Bolden*, which held that, even where there is no showing that the number of affected ballots is enough to change the result of the election, it may be appropriate for all of the absentee ballots to be thrown out. Defendants' repeated charge that this remedy will "disenfranchise" the remaining voters was not accepted in *Boardman* or *Bolden*, and should not be accepted here.

The rule followed in Florida is also followed elsewhere. In *Luse v. Wray*, 254 N.W.2d 324, 331 (Iowa 1977), for example, the Iowa Supreme Court invalidated all of the absentee ballots in a particular county based on a finding that a small number of

---

[17] *See also In re Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election*, 707 So.2d 1170 (Fla. 3d DCA 1998) (invalidating all absentee ballots in Miami mayoral election where the evidence showed absentee ballot fraud); *Peacock v. Wise*, 351 So.2d 1134 (Fla. 1st DCA 1977) (affirming decision of trial court to invalidate all absentee ballots); *Spradley v. Bailey*, 292 So.2d 27, 28 (Fla. 1st DCA 1974) (applying the "well settled rule of this jurisdiction that if illegal absentee ballots are cast in sufficient numbers to affect the results of an election, none of the absentee ballots cast in the election should be accepted and counted and the election will be determined upon the machine or precinct vote count"); William T. McCauley, Comment, Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy, 54 U. Miami L. Rev. 625, 634-37 (2000).

such ballots had been improperly delivered to hospitalized voters. The court held that, since the invalid ballots had been commingled with the valid ones, it was appropriate to set aside all of the absentee ballots. This was so despite the fact that, "[i]f all commingled ballots are set aside, . . . some voters with proper ballots are disenfranchised." *Id.* at 331.[18]

VI. THIS COURT HAS AUTHORITY UNDER FLA. STAT. § 102.168(8) TO FASHION ALTERNATIVE RELIEF

Notwithstanding *Boardman*'s "general rule," section 102.168(8) "grant[s] trial courts broad authority to resolve election disputes and fashion appropriate relief." *Gore v. Harris*, SC00-2431, slip op. at 18 (Dec. 8, 2000). Courts in other states have recognized that this broad authority permits a court to invalidate less than all absentee ballots even in cases where the tainted ballots cannot be separated from the pure.

For example, in *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978), the Supreme Court of Alaska endorsed such a procedure in discussing how lower courts should deal with election contests. The Alaska court explained that the determination of whether electoral irregularities could have changed the election result depends on whether the irregularities introduced "bias" into the system. *Id.* at 260. The court explained:

---

[18] *See also Pickard v. Jones*, 243 S.W.2d 46 (Ky. 1951) (rejecting all absentee ballots where some of the ballots were invalid). *Cf. Gooch v. Hendrix*, 851 P.2d at 1330-33 (reversing decision of intermediate appellate court and ordering new election where it appeared that the number of illegal votes was sufficient to change the result of the election; the courts "must not 'sacrifice the integrity of the [elective] process on the altar of electoral finality'").

> If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the results of the election would be changed. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending upon the nature of the bias and the margin of votes separating the candidates. Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972). Where the malconduct has not injected any bias into the vote, but instead affects individual votes in a random fashion, those votes should be either counted or disregarded, if they can be identified, and the results tabulated accordingly. Finally, if the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast. Similarly, if a specified number of votes should have been counted but are no longer available for counting, they should be added to the vote totals of each of the candidates in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted.

Id. at 260.

A similar approach has been followed in other jurisdictions. *See, e.g., Waters v. Weed*, 43 Cal.3d 1 (1988) (the parties agreed to subtract allegedly illegal student votes from the candidates in a rough proportion to the agreed-upon political leanings of the populace in certain areas of the city); *Thornton v. Gardner*, 195 N.E.2d 723, 724 (Ill. 1964) (deducting illegal votes cast from each side in proportion to the total vote); *Grounds v. Lowe* , 193 P.2d 447, 453 (Ariz. 1948) (same).

In this case, if this Court were to find that a remedy is required but that invalidating all 15,504 absentee votes is an unacceptable price, the Court could

choose one of two alternative remedies without going beyond the stipulated facts.[19] First, the Court could deduct all 1,932 illegal votes from the Republican totals, on the ground that the illegality was designed to create Republican votes and that these votes are the "fruit of the poisonous tree." Second, the Court could deduct the 1,932 votes from both parties' totals based on the ratio of Republican to Democratic votes in the overall absentee ballot totals in Seminole County (10,006 votes for Bush to 5,209 votes for Gore), which would produce a net loss of only 594 votes for Governor Bush.[20]

Having demonstrated Plaintiff's entitlement to the relief denied by the Circuit Court, we turn to the arguments raised by Defendants below.

VII. THE FEDERAL VOTING RIGHTS ACT IS NOT A BARRIER TO RELIEF IN THIS ACTION

The federal Voting Rights Act presents no bar to the remedy sought in this proceeding. The provision cited by Defendants prohibits anyone acting under color of state law from preventing an individual from voting "because of an error or omission on any [ ] application, registration, or other act requisite of voting, if such

---

[19] In addition to the two alternative remedies suggested in the text, Plaintiff presented uncontroverted expert testimony at trial which demonstrated, through the use of statistical techniques, the number of voters in the group of 1,932 that were likely to have voted for Governor Bush, and the number that were likely to have voted for Vice President Gore. This testimony supported a third alternative remedy, the results of which fall in between the two methods described in the text. This third remedy would result in a net loss to Bush of at least 1,504 votes and at most 1,779 votes. Trial testimony of Dr. Brad DeLong, 187:10 – 205:13.

[20] Applying this second alternative remedy would result in deducting 1,240 votes from the Bush total and 646 votes from the Gore total. This allocation is extremely favorable to Governor Bush, because it ignores the fact that the 1,932 illegal votes were overwhelmingly cast by registered Republicans.

42

error or omission is not material in determining whether such individual is qualified under State law to vote in such election…" 42 U.S.C. § 1971(a)(2)(A). As demonstrated below, the constitutional powers that gave life to the Voting Rights Act do not extend to the dispute in this case. Even if they did, Election Supervisor Goard, the Secretary of State and the Legislature have all treated the presence or absence of a voter identification number as "material" in determining if an application had been sent by the voter. Absent this information, the Seminole County Supervisor of Elections did not issue absentee ballots (other than the ballots at issue in this case). There is abundant case law that supports the requirement in section 101.62 that individuals provide a voter registration number as proof of their identity as consistent with the Voting Rights Act. Similarly, the Justice Department found the 1998 amendments at issue here compiled with the Voting Rights Act. In sum, the Defendants have failed in their effort to contort a law designed to shield voters from discrimination by unscrupulous government officials into a shield to protect public officials from the consequences of their own wrongdoing.

A. Seminole County and State Officials Treated Voter Identification Numbers as Material in Determining if a Voter Was Eligible to Vote.

The Supervisor of Elections for Seminole County admits that voter identification numbers were material in determining if a voter was the actual person who submitted the application for an absentee ballot. Ms. Goard testified that absent this information, the applications were rejected and no absentee ballot was issued. Goard Deposition, Vol. II, 33:20-35:14; 48:11-19; *id.* Vol. III, 27:15-20; 28:5-9; 28:22-29:13; 32:18-22;

43

Bailey Depo. 5:1-10; 17:10-20; 19:2-7; Eaton Depo., 5:2-24; 6:3-6; 17:9-20. She also testified that for a short period of time, her staff tried to contact the voters to obtain this or other missing information if it was missing from the form. Goard Depo. Vol. III, 23:10-18; 25:6-22; 85:24-86:15.

The Secretary of State also treated this information as material to ensure that the individual requesting an absentee ballot was eligible to receive it. Shortly after passage of the 1998 amendments to Fla. Stat. § 102.62, the Chairman of the Republican Party asked the Secretary of State's Division of Elections for an Advisory Opinion interpreting what was required for a valid request of an absentee ballot. Advisory Opinion DE 98-14 (attached as Exhibit 4). The Division of Elections made clear that "*the elector must provide* his name, address, the last four digits of his social security number, his signature…and voter registration number", regardless of whether the request was in writing or by telephone. The Advisory Opinion repeated this legal mandate, stating the purpose of the statutory scheme was "so that *the elector can complete it and personally request a ballot themselves*." (emphasis supplied)

The Advisory Opinion ends with the reminder that voting absentee is "a privilege and a convenience" and that the changes were "an effort by the legislature to preserve the privilege while at the same time providing additional security with respect to the handling of the ballots."

As noted above, these practices conformed with the Legislature's intent in passing the 1998 amendments to the absentee voting regulations. Fla. Stat. section 101.62(b) provides that the person making the request "must disclose" the

44

required information, and section 104.047 makes it a third-degree felony to request an absentee ballot other than in compliance with chapter 101.

45

B. This Treatment of Section 101.62 Is Consistent With Section 1971.

Section 101.62's requirement that voters disclose their voter registration numbers on absentee ballot applications fully complies with 42 U.S.C. § 1971 because registration numbers are "material" to determining whether the voters are qualified.

Defendants have conceded that the reason the Legislature added the voter registration number requirement was to "give the elections authority still another means of identifying that those who request absentee ballots are eligible to vote." Bush/Cheney Motion to Dismiss at p. 6. They argue, however, that Section 1971 precludes any State from invalidating ballots on the basis that the application lacks voter registration numbers. This is simply wrong.

Section 1971 permits states to require a voter to provide information material to whether the voter is "qualified" to vote. Under Florida law, a voter must first "register pursuant to the Florida Election Code" to be a qualified voter. Fla. Stat. § 97.041(1)(a)(5). Furthermore, "a person who is not registered may not vote." Fla. Stat. § 97.041(3).[21] Thus, whether or not a voter is registered is directly relevant – indeed, is determinative – of whether a voter is qualified to vote in an election. This information is therefore "material" information permitted by Section 1971.

[21] Defendants concede that Fla. Stat. § 97.041 governs who is qualified to vote under Florida law.

The Georgia Supreme Court also rejected Defendants' argument that registration information is immaterial under Section 1971. In *Johnson v. Byrd*, 429 S.E.2d 923 (Ga. 1993), the Court ruled that a state statute requiring voters to present signed registration cards did not violate section 1971 since signing the registration card is the act that qualifies them to vote. "By failing to sign their registration cards, the 43 individuals never took the oath of office and, therefore, they never became lawfully registered voters who were authorized to cast ballots." *Id.* at 925.

Section 1971 invalidates only those measures clearly bearing no relation to a voter's eligibility to vote. As the district court observed in *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995), "[t]his [Act] was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age."[22] The statute here imposes no such onerous and unreasonable requirements.

In fact, courts interpreting section 1971 have upheld measures imposing greater hardships than Florida's modest requirements. In *Howlette v. City of Richmond*, 485 F. Supp. 17 (E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978), the city charter required that

---

[22] Congress enacted Section 1971 to void state voting procedures targeted at limiting voting registration by racial minorities. Some courts have looked at this purpose in evaluating whether voting schemes violate Section 1971. For example, in *Malinou v. Board of Elections,* 271 A.2d 798, 802 (D.R.I. 1970), the court upheld Rhode Island voting procedures against a claim it violated Section 1971(a)(2)(B) because "[n]owhere in this record is there the slightest hint that the state board disallowed the disputed signatures because of the 'race, color, or previous condition of servitude' of either the signatories or the candidate whose nomination papers they signed."); *see also, McKay v. Altobello*, 1996 WL 635987, *1 (E.D. La. Oct. 31, 1996) ("[t]his section is intended to prevent racial discrimination at the polls . . ."). Here, Florida's absentee voter requirements are clearly race-neutral.

each signature on a petition for obtaining a referendum on issuance of general obligation bonds had to be *individually notarized* – meaning, of course, that not only were voters required to find a witness, but this witness also had to be registered as a notary public. Plaintiffs argued that the notarization requirement violated section 1971 because it was unnecessary since the City Registrar compared the names on the petitions with the names on the city voter rolls. *Id.* at 22. The court rejected this argument:

> In the Court's view, the requirement of individual notarization of each signature on a petition seeking a referendum is material in several respects. First, the individual notarization requirement impresses upon the signers of the petitions the seriousness of the act of signing a petition for a referendum. Second, the individual notarization requirement dissuades non-qualified persons from signing the names of qualified voters by subjecting those who take the oath to potential criminal liability for perjury. Third, the requirement that each person signing the petition appear and make oath before a notary will often provide an additional, neutral witness to the signing, further aiding the City in discouraging and prosecuting fraud and misrepresentation.

Id. at 22-23.

A stringent Rhode Island voting provision was also ruled to be in compliance with section 1971 in *Malinou v. Board of Elections*, 271 A.2d 798 (D.R.I. 1970). *Malinou* involved a state statute requiring that voters who wished to nominate a candidate for office had to sign their names precisely as they appeared on the voting rolls. Local officials had disallowed votes where the voters had signed their names without the middle initials or had used nicknames instead of proper names. *Id.* at 805.

48

The Rhode Island Supreme Court held that Section 1971 was intended to get rid of literacy tests and other similar measures, not to prevent states from imposing reasonable measures to ensure a voter's qualifications. *Id.* at 803. The Court ruled that "[t]he canvassers and their assistants, as they seek to meet the deadlines established in the primary law, are under no obligation to become handwriting experts." *Id.* at 805.[23]

The Florida statute imposes reasonable requirements that rationally serve to ensure that each person requesting an absentee ballot is a qualified voter. This is all that is required to pass muster under section 1971. Indeed, far stricter measures, such as requirements for notarization and precise spelling, have survived scrutiny under this provision. Defendants' argument should be rejected.

C. The Federal Voting Rights Act Cannot Be Applied to this Action Without Violating The Constitution.

1. The Power to Select Electors Is Vested in the States.

As noted earlier, Article II of the United States Constitution vests the power to select electors for President solely in the States. There are no powers granted to

---

[23] Defendants below cited only two cases in their discussion of Section 1971. Neither case interprets or even mentions section 1971 and both are irrelevant. *Griffin v. Burns,* 570 F.2d 1065 (1st Cir. 1978) involved a constitutional attack on the actions of local election officials. The court never mentioned section 1971. *Goodloe v. Madison County Bd. of Election Commissioners,* 610 F. Supp. 240 (S.D. Miss. 1985) was a claim that Mississippi officials had invalidated votes of predominantly black voters in violation of 42 U.S.C. § 1973, which prohibits state action abridging the right to vote on account of race. Again, the court said nothing about section 1971.

49

Congress in Article I, section 8 that can be construed to give Congress such power, much less derogate from the clear command of Article II, section I.

2. Congress' Power Concerning The Franchise for President of the United States is Strictly Limited

The constitutional authority for 42 U.S.C. § 1971 is provided solely by the Fourteenth and Fifteenth Amendments. The Fifteenth Amendment provides simply that "the right to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Plainly that Amendment has no relevance to this action.

The Equal Protection Clause of the Fourteenth Amendment provides the alternative wing of Constitutional support for §1971. This authorizes the Congress to legislate to protect the rights of one category of persons versus others. The original intent in 1957 was to protect blacks who were virtually without the franchise in some Southern states.[24]

The Due Process Clause of the Fourteenth Amendment has been used to invalidate arbitrary schemes that violate First Amendment rights made applicable to the States through the Fourteenth Amendment, but § 1971(a)(2)(B) was not designed to implement any of these rights, nor would it be appropriate if Congress had so intended.

3. If the Language of 42 U.S.C. § 1971 Were Applied as Sought By Defendants, It Would Be Unconstitutional

[24] It is arguable the Congress has the power under the Fourteenth Amendment to protect the franchise of other groups (cognizable under the Fourteenth Amendment) vis-à-vis one another.

Because the United States Has No Power to Legislate on This Subject

Although Congress was empowered by the Fourteenth and Fifteenth Amendments to protect the franchise of black citizens, it is not empowered to legislate the general manner in which elections for President are conducted. *See* U.S. Const. Art. II, Sec. I. As noted above, that power is explicitly given to the States and is not found in any other of Congress' enumerated powers.

Contemporary Supreme Court jurisprudence has emphasized constitutional limits on Congressional power. In *United States v. Lopez*, 514 U.S. 549 (1995), despite a number of federal criminal laws which cover certain subjects identical to that in state criminal law, the Court ruled that Congress exceeded its power under the Commerce Clause in criminalizing the possession of a firearm in a school zone. The Court recognized that Congress had broad authority over commerce and education, but held that this criminal conduct did not affect interstate commerce.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held the Violence Against Women Act (VAWA) unconstitutional. Congress had made substantial findings of fact to justify its legislation as authorized by the Commerce Clause and the Fourteenth Amendment. Despite the legality of statutes such as Title VII, the Court struck down the VAWA in its entirety.

As applied by defendants, the constitutionality of Section 1971 is considerably more suspect than in *Lopez* or *Morrison*. First, unlike either of those cases, the Constitution affirmatively assigns the power in question to the states. Second, in the instant case it is only an application of the federal statute that is unconstitutional, not

the statute as a whole. Defendants' effort to misuse Section 1971 for unintended, unconstitutional purposes should be rejected.

D. The United States Attorney General Has Found the Absentee Ballot Application Regulations to be Lawful Under the Voting Rights Act

States and political subdivisions that are subject to the requirements of the Voting Rights Act must seek the approval of the Attorney General (or a federal court) prior to implementing changes to election laws that may impact on voter eligibility. 42 U.S.C. §1973(c). The State of Florida sought and received the imprimatur of the Attorney General for the changes made in its absentee voter registration requirements. This is especially significant here, where the Department of Justice is the sole party capable of enforcing section 1971. *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (Department of Justice has sole enforcement power under Section 1971).

The Justice Department's Civil Rights Division engaged in a review of the Florida Legislature's 1998 amendments to Section 101.62, Florida Statutes. Secretary of State, Department of Elections, Opinion DE – 98-13 (August 19, 1998) (describing the pre-clearance process to that date). While the Justice Department had significant reservations (and ultimately refused to pre-clear all sections of the 1998 amendments), the section that requires voters to provide their voter identification number as a condition of obtaining an absentee ballot was pre-cleared on August 14,

52

1998.[25] Letter of Bill Lann Lee to the Honorable Robert A. Butterworth, dated August 14, 1998 (attached as Exhibit 5). That letter states in part:

> In reviewing [the new legislation and the State's supporting material], we have been well aware of the State's concerns about voter fraud; this Department shares those concerns. Procedures that enhance the integrity of the ballot are essential in ensuring that all citizens can vote and do so in a process free from fraud, coercion, or intimidation. However, the procedures used to eliminate voter fraud should not unnecessarily burden the rights of minority voters. Racially fair procedures are essential in ensuring that all citizens can vote and that their ballots are equally effective. If is with these concerns in mind that we conclude our review.
>
> **The Attorney General does not interpose any objection to Section 7 which provides a voter residence confirmation procedure, Section 13 which provides additional procedures relating to requests for absentee ballots,** Section 15 which provides additional procedures relating to the return of absentee ballots….

Id. (emphasis supplied).

That the changes in absentee voter registration practices passed muster under the review of the Attorney General is yet another reason for this Court to reject Defendants' cynical invocation of the Voting Rights Act.

VIII. THIS COURT HAS MADE CLEAR THAT FLA. STAT. § 102.168 APPLIES TO <u>THIS</u> PRESIDENTIAL ELECTION

Some Defendants argued below that, despite its unlimited breadth, which extends to "the certification of election or nomination of *any person* to office"

---

[25] The amendments to 101.62 appeared in Section 13 of 1998 statute. Ch. 98-129, Laws of Fla.

(emphasis supplied), section 102.168 does not apply to a presidential election. This Court's December 8, 2000 opinion in *Gore v. Harris*, No. SC00-2431 (Fla. Dec. 8, 2000), expressly holds to the contrary.

IX. THE SUCCESSFUL PRESIDENTIAL "CANDIDATE," NOT THE SUCCESSFUL "ELECTORS," ARE INDISPENSABLE PARTIES TO A CONTEST PROCEEDING.

Section 102.168(4) provides that, in a contest proceeding, "the successful candidate shall be an indispensable party . . . ." Defendants argue that the term "successful candidate" should be read to mean "successful electors," and that Plaintiff's complaint is subject to dismissal because we have failed to name the 25 Republican presidential electors as defendants. This argument is specious.

Contrary to Defendants' claim, the Florida statutes consistently use the term "candidate" to refer to the individuals whose names actually appear on the Presidential ballot (i.e., George W. Bush and Richard Cheney), and the term "elector" to refer to the individuals who cast their votes in the Electoral College. For example, section 97.021(3) defines the term "candidate" to mean, among other things: "Any person who receives contributions or makes expenditures . . . with a view to bringing about his or her nomination or election to, or retention in, public office." Section 97.012(10) defines "elector" to mean "voter, . . . except where the word is used to describe presidential electors." The term "candidate" does not mean "elector," and the term "elector" does not mean "candidate."

Likewise, Fla. Stat. § 103.011, entitled "Electors of President and Vice President," provides in part:

> *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*.

(Emphasis added.) Section 103.021(2) continues in the same vein:

> The names of the presidential *electors* shall not be printed on the general election ballot, but the names of the actual *candidates* for President and Vice President for whom the presidential *electors* will vote if elected shall be printed on the ballot in the order in which the party of which the *candidate* is a nominee polled the highest number of votes for Governor in the last general election.

(Emphasis added.) And section 103.022:

> Persons seeking to qualify for election as write-in *candidates* for President and Vice President of the United States may have a blank space . . . . The *candidates* shall file with the department a certificate naming the required number of persons to serve as *electors*.

(Emphasis added.)

As these excerpts demonstrate, the Florida statutory scheme consistently and uniformly uses "candidate" to refer to the politicians who seek national political office, and "elector" to refer to the lesser-known individuals who participate in the Electoral College. It follows that Plaintiff's obligation under section 102.168(4) to name the successful "candidate" as a defendant has been satisfied by naming George Bush and Richard Cheney.

X. THE CERTIFICATION OF ELECTORS PURSUANT TO 3 U.S.C. § 6 DID NOT MOOT THIS CONTEST CHALLENGE

As noted above, it is now settled that a presidential election may be challenged through a contest proceeding. Certification by the Secretary of State is a statutory *prerequisite* for such a proceeding. *See* Fla. Stat. § 102.168(1) ("the certification of election or nomination of any person to office . . . may be contested in the circuit court . . . "). Several such contest proceedings are now underway, including this one. If certification mooted a presidential election contest, as Defendants contend, then such a contest could not possibly occur, since the action would become moot at the same moment it became ripe. Defendants' argument cannot possibly be correct.

Defendants have also suggested that 3 U.S.C. § 6 may moot this action, because the "Certificate of Ascertainment of Presidential Electors" has already been sent, with Republican electors, to the Archivist of the United States. But nothing in 3 U.S.C. § 6 prevents a state from withdrawing or amending that Certificate, *see id.,* as long as the Certificate is received before December 18, 2000. *See* 3 U.S.C. § 7. Should it be necessary to send an amended certificate at the conclusion of this or any other pending contest action, there is nothing to prevent a court from entering an order to provide this relief. Were it otherwise, the recent decision of this Court, expressly providing for actions to contest this Presidential election, would have no meaning at all.

XI. THE SEMINOLE COUNTY CANVASSING BOARD WAS PROPERLY NAMED

The Board defendants have claimed that plaintiffs were required to name the "Seminole County Supervisor of Elections Office" as an "indispensable party." Board Br. 21. The argument is frivolous. Section 102.168(4) provides that "[t]he canvassing

board *or* election board shall be the proper party defendant." (Emphasis added.) Plaintiffs named "The Seminole County Canvassing Board" as a defendant. Plaintiffs plainly had no obligation to name the Supervisor of Elections Office as well.

The Board defendants also argue that the Canvassing Board was improperly named, because that Board "has no duties or responsibilities as it relates to the means, methods and procedures of accepting requests for absentee ballots; the processing of said requests; the mailing or other transmittal of ballots . . . ; or the collection and collation of absentee ballots when received." Board Br. 24-25. However, the Canvassing Board certified a vote count that included almost 2,000 void ballots and Plaintiff asks this Court to order the Canvassing Board to rectify that error. The participation of Defendant Goard, a member and agent of the Seminole County Canvassing Board, in the violations of Florida's Election Law was essential for she was intimately involved with the acceptance, rejection, processing, mailing, and collection of absentee ballots. To suggest otherwise is baseless, at best.

XII DEFENDANTS' HALF-HEARTED WAIVER, LACHES, ACQUIESCENCE AND ESTOPPEL ARGUMENTS SHOULD BE REJECTED

Defendants completely failed to meet their burden of proving waiver, laches, acquiescence or estoppel, even assuming that such common-law defenses are applicable in a statutory contest proceeding. The only evidence n the record is that a Democratic official unrelated to Mr. Jacobs discovered the misconduct on or about October 30, 2000, which was far too late to take any corrective measures. No evidence was presented that the information was conveyed to Plaintiff, or that

57

Plaintiff delayed for even a moment taking corrective action after he learned the facts.

The related argument, that fraud occurring prior to the election cannot be raised in an election challenge, simply ignores the relevant statutes and case law. The contest statute provides that an elector may raise issues of "fraud" or "misconduct . . . on the part of any member of the canvassing board" sufficient to place in doubt "the result of the election," without limitation on when that fraud or misconduct occurred. Fla. Stat. § 101.168(3)(a). In applying this statute, the Florida courts have recognized, in cases including *Boardman* and *Bolden*, that fraud in the process of absentee ballot applications is a proper subject of election contests.

CONCLUSION

This case arises out of significant and repeated violations of Florida's election laws by Sandra Goard, a purportedly neutral public official, and paid representatives of the Republican Party. Those practices go to the heart of the integrity of the electoral process. The Circuit Court's order should be reversed, and the Court should be ordered to invalidate the 15,504 absentee ballots cast in Seminole County in the November 7, 2000 Presidential election.

Respectfully submitted,

By:_____
Gerald F. Richman
Florida Bar Number: 066457
Alan G. Greer

58

Florida Bar Number: 123294
John R. Whittles
RICHMAN, GREER, WEIL, BRUMBAUGH
MIRABITO & CHRISTENSEN, P.A.
One Clearlake Centre
250 Australian Avenue South, Suite 1504
West Palm Beach, Florida 33401

By_____
Scott E. Perwin
Pamela I. Perry
201 South Biscayne Boulevard
Miami, Florida 33131-4327

Robert D. Lenhard
1101 Seventeenth Street, N.W.
Suite 1210
Washington, D.C. 20036

Kent Spriggs
SPRIGGS & DAVIS
324 West College Avenue
Tallahassee, Florida 32301

John R. Cuti
Jonathan S. Abady
Ilann M. Maazel
EMERY CUTI BRINCKERHOFF & ABADY PC
545 Madison Avenue
New York, New York 10022

Eric Seiler
Katherine L. Pringle
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
875 Third Avenue
New York, New York 10022

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served this 11th day of December, 2000 by hand or facsimile on counsel for Defendants.

_____
Scott E. Perwin

60