IN THE SUPREME COURT OF FLORIDA
SC Case No. 00-2431
Lower Tribunal No. 1D00-4745
CV00-2808

ALBERT GORE, et. al.,

Petitioner/Appellant,

vs.

KATHERINE HARRIS, etc., et. al.

Respondents/Appellees

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# ANSWER BRIEF OF INTERNVENOR/APPELLEE MATT BUTLER

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## CERTIFICATE OF FONT SIZE AND STYLE

This Brief is typed using a Times New Roman 14-point font.

## STATEMENT OF CASE AND FACTS

Matt Butler ("Butler") realizes that numerous briefs will be filed in this matter, and that this Court is well aware of most of the pertinent facts of this case, including its procedural history. Moreover, every attempt is being made not to reargue the same issues that will undoubtably be addressed to this Court in other briefs. This statement, therefore, will focus on only the few points most relevant to the argument presented herein.

Butler is a registered voter in Collier County, Florida. He voted for Gov. George W. Bush in the Nov. 7, 2000 general election. Mr. Butler intervened in this case to protect the integrity and value of his vote, and those other Florida voters in the same position. Butler testified that he used a punch card ballot and, though he thinks he voted properly, does not know if his vote was counted.

At the two day trial in this matter, Plaintiffs presented two witnesses. One was intended to prove that there was an undervote problem in the State of Florida as a result of the type of voting devices used in many Florida counties. He testified that punch card type voting devices can create problems for various reasons, many of

which result in a voter's intended vote not being counted by the tabulating equipment. 24 Florida counties used punch card type devices.

Plaintiff then presented a statistician to opine that there was alleged statistical evidence that counties using punch card devices showed a much higher percentage of undervotes than counties utilizing other voting devices. The conclusion inferred by Plaintiffs was that there were many votes cast, but not counted, in the Nov. 7, 2000 presidential election.

Plaintiffs' election contest suit was focused primarily on two counties, Miami-Dade and Palm Beach. Despite the alleged evidence that there was a statewide undervote problem, Plaintiffs only produced "evidence" as to the number of such votes in those two counties. This evidence was disputed by Defendants, but if believed may have established that a manual recount in Miami-Dade, and a second more liberal recount in Palm Beach, may have resulted in sufficient additional net votes for Plaintiff to make him the winner of the total Florida vote.

After hearing two days (but at least three days worth) testimony, Judge Sanders Sauls issued his ruling. Following are the critical portions of that ruling:

> In this case, there is ***no credible statistical evidence*** and no other competent substantial evidence to establish by a preponderance a reasonable probability ***that the results of the statewide election*** in the State of Florida ***would be different*** from the result which has been certified by the State Elections Canvassing Commission.

* * * *

> . . . balloting and counting ***problems cannot support*** or affect any ***recounting necessity*** with respect to Dade County, ***absent the establishment of a reasonable probability that the statewide election result would be different,*** which has not been established in this case.

* * * *

> Further, this court would further conclude and find that the properly stated cause of action under Section 102.168 of the Florida Statutes to contest a statewide federal election, the ***plaintiff would necessarily have to place at issue and seek a remedy with the attendant burden of proof a review and recount of all ballots in this State with respect to the particular irregularity or inaccuracy*** in the balloting or counting processes alleged to have occurred.

* * * *

> There is in this type of election one statewide election and one certification. Palm Beach County did not elect any person as a presidential elector, but rather the election was a winner take all proposition dependent on the statewide vote.

## SUMMARY OF ARGUMENT

The legal standard for relief under the election contest is that the party seeking relief must show that, but for the irregularity or inaccuracy claimed, the result of the election would have been different. The plaintiff in any civil case has the burden of proof. In this case, Plaintiffs claimed an irregularity or inaccuracy which existed across the State of Florida in a statewide election. However, they did not present ***any***

evidence that had the irregularity or inconsistency been fixed throughout the State they would have been the winner. They simply failed to carry their burden of proof. Here, Judge Sauls likely would have had an obligation to enter a directed verdict if requested. There can be no question that, sitting as the finder of fact, he could have properly found that Plaintiffs failed to prove their case. The judgment must be affirmed.

## ARGUMENT

### 1. JUDGE SAULS PROPERLY FOUND THAT THE EVIDENCE PRESENTED BY PLAINTIFFS, EVEN IF BELIEVED, WAS INSUFFICIENT TO WARRANT ANY REMEDY UNDER SECTION 102.168, FLORIDA STATUTES, BECAUSE PLAINTIFFS FAILED TO PROVE THAT THE STATEWIDE ELECTION RESULTS WOULD BE AFFECTED IF THE PROBLEMS RAISED BY PLAINTIFFS WERE CORRECTED

Plaintiffs have claimed since a few days after the election that "every vote counts." Their actions belie their claims. Plaintiffs have never requested a manual recount of any ballot in this State except the ones in four heavily democratic counties. With the extension this Court granted a few weeks ago, plaintiffs were able to request manual recounts selectively performed in those four counties. The results were not enough for Plaintiffs to prevail.

Now, Plaintiffs contest the election. Again, they claim that every vote counts, but they presented evidence only as to two counties. The problem is, they failed to meet their burden of proof. The basis for Plaintiffs' claim that they are entitled to

relief under Section 102.168, Florida Statutes is that there is an "undervote" problem. The evidence showed that this undervote problem, to the extent it exists, is a statewide problem. There were some 180,000 undervotes spread across every county in Florida.

Plaintiffs couched their claim for relief as asking the court to "simply" count the "disputed" ballots. They misapply the term "disputed." First, there are many disputed ballots within the three counties which were manually counted for the Vice President that may not actually meet whatever legal standard a court would apply to determine voter intent. The mere fact that plaintiffs do not dispute some ballots did not make them undisputed. Mr. Butler and the other intervenors raised this issue to Judge Sauls by asking that if any recount were to be performed, that it include all 180,000 undervotes. Certainly the intent of those who cast all those votes is "disputed" or at the least unknown. Of course, Judge Sauls had no reason to count all the ballots once plaintiffs failed to make a prima facie case that they were entitled have any recounted.

At trial, Plaintiffs raised a general question regarding "undervotes." They claimed that, statistically, counties in Florida using punch card ballots had too high of an "undervote" pattern compared to non-punch card counties. Thus, they concluded, such undervote numbers in these counties represent not simply that a

certain percentage of people chose not to vote for president on Nov. 7, 2000, but that it represents a pattern of intended votes that were not counted by machines for one reason or another. See Direct Testimony of Professor Nicolas Hengartner.

Despite this general problem, showing a 300% increase in punch card "undervotes" versus other ballots, plaintiffs asked only for the court to review the ballots in those few heavily democratic counties that have been especially selected by him. In other words, with 24 Florida counties using punch cards allegedly susceptible to an "undervote" problem, Plaintiffs wanted the Court to review only the ballots from a few of them. Looked at a different way, plaintiffs asked the court to review (or approve the review by canvassing boards) only about 50,000 undervotes, even though Florida had 180,000 undervotes statewide. See Florida Department of State - Division of Election, Voter Turnout, November 7, 2000, **Unofficial Results**.

If the will of the people is paramount, and the concern is that machines did not properly record votes, then clearly the court's obligation is to ascertain not just the intent of the voters with whom Plaintiffs are most comfortable, but to ascertain the will of all potentially disenfranchised voters.

Plaintiffs incorrectly believe that:

> At bottom, this contest raises a single issue: Did the Defendants in this action "receive a number of illegal votes or reject a number of legal votes

> sufficient to change or place in doubt the result of the election. " Section [sic]102.168(3)(c), Fla. Stat. (2000).
> And this single question turns on five - and only five - issues that are almost exclusively legal in nature: * * *

Gore's Petition for Writ of Mandamus or other writ, or In the Alternative Review of Trial Court Proceedings and Brief at 1 (emphasis added). From Mr. Butler's or any other voter's perspective, this is a preposterous statement. The winner has been certified. If plaintiffs believed the true results of Florida's election should be different, then they should have asked that all of Florida's ballots (or at least all of the undervotes that may actually contain a presidential vote) be counted by the court by hand. It would have been patently unfair to change the certified winner of an election based on selective recounts chosen by the loser simply because he felt he could gain votes in some areas.

In short, assuming that there may be a problem with the punch card ballots, any remedy would have had to be statewide. Judge Sauls was right. Any other remedy would disenfranchise tens of thousands of other Florida voters.

This was an election contest under Section 102.168, Florida Statutes. The standard for contesting an election is that the plaintiff must be able to prove that there exists some fundamental irregularity which, if remedied, would probably change the outcome of the election. Smith v. Tyne, 412 So. 2d 925 (Fla. 1st DCA 1982). The

purpose behind this rule is to prevent contests filed simply to show a problem. Unless the remedy would change the election, there is no reason to go through with a contest.

Florida has not yet addressed the allegations or prima facie evidence needed to support a statewide election contest.[1] Illinois has. In re Contest of the Election for The Offices of Governor and Lieutenant Governor, 444 N.E.2d 170 (Ill. 1983). In that case, the unsuccessful candidates lost by 5,074 votes. They conducted discovery in 70 Illinois counties and alleged errors which would have made up 2,651 of those votes. Id. at 182-83. The petitioners filed a contest alleging these facts and claiming that a contest would change the results of the election. The winning candidates filed a motion to strike on the basis that the allegations were insufficient to pursue with an election contest. Id. at 172. The court granted the motion. Id. at 183.

The Illinois Supreme Court reasoned that the counties chosen by petitioners to establish the basis of their claim were "naturally chosen by petitioners because they were the most likely to yield results favorable to them." Id. This was an important factor because "[a]n election contest, however, is not a one-way street. If the motion

[1] No matter what the Vice President and his lawyers claim, this is not a "ballot contest", it is an election contest. And, it is not a local contest, seeking to define the correct winner of the popular vote in any of these three counties. The action is to determine whether Secretary of State Harris certified the correct winner for the entire State of Florida.

. . . were denied, [the successful candidates] would have the right to challenge the results in precincts likely to yield results favorable to them. These votes would undoubtably offset some, if not all, of the votes petitioners claim they have gained." Id.[2] The court concluded that "[t]he allegations of the petition lacks a clear and positive assertion[3] that an election contest will change the result of the election, and it does not contain allegations of fact sufficient to support a change in the result." Id.

The same rationale applies here. Plaintiffs merely assert a belief there are some net votes in a few carefully chosen counties which "may" allow them to gain on or pass the certified winner's vote total.[4] This evidence of a possible change in the

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[2] The court also noted that the alleged gains in just the chosen counties was insufficient to overcome the vote deficit. However, this does not limit the importance of the court's reliance on the common sense principle that to establish a likelihood of changing the outcome, there must be some statewide analysis and proof, rather than a statistically skewed claim based on a few cherry picked counties potential results.

[3] The "clear and positive assertion" standard has been superceded by statute. Ill. Rev .Stat. 1985, Ch. 46, p. 23-23.2. The Illinois statute provides now that a claim must be based on a "reasonable likelihood the recount would change the results of the election. Butler suggests, however, that even that standard is not met when a contestant to a statewide election raises only facts and argument from a few select counties.

[4] Matt Butler recognizes that technical pleading requirements do not exist in an election contest. See § 102.168(5), Fla. Stat. (2000). However, Judge Sauls did not dismiss the case based on insufficient allegations, he found plaintiffs were not entitled to relief after a full evidentiary hearing. In other words, although In re Contest may not be an attractive case to follow in the pleading stage, it is perfectly

outcome of the statewide election is not sufficient to prove the point if all counties with undervotes were challenged. Plaintiffs did not even attempt to establish this through their experts. See Direct Testimony of Prof. Nicolas Hengertner. Assuming the truth of Plaintiffs' claims, all he established is that they may gain on or pass Gov. Bush ***if only a few counties undervotes are reviewed***. As Judge Sauls recognized, plaintiffs failed to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the other counties were counted (i.e., a statewide recount) so that the results could offset all or some of the votes plaintiffs claim they may gain in the selected counties. Cf. In re Contest, 444 N.E.2d at 183.

Plaintiffs may argue that the potential outcome of other manual recounts are either irrelevant or that such evidence was Defendants' burden to introduce to challenge the plaintiffs' evidence. The first claim is offensive. In a statewide election all the other evidence is not only relevant, it is crucial. The second claim results either from a misunderstanding of the law or an incorrect recollection of what evidence they produced at trial. As discussed above, the Plaintiffs had an obligation to show, by a preponderance of the evidence, that the outcome of the statewide election would likely be changed by the relief they sought. Their proof that the outcome of the vote total in two counties would likely change was insufficient. ***Defendants had no obligation***

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logical and appropriate after a trial.

***to counter plaintiffs evidence because no witness ever opined that the statewide election would have been changed if the undervotes in Florida were counted***. A directed verdict would have been appropriate.

Plaintiffs' lawyers argued that Governor Bush could have asked for recounts in other counties during the protest period. Butler takes no position on whether Governor Bush should have done so. Butler was (unconstitutionally, he asserts) precluded by law from himself asking. As a candidate, Governor Bush surely had personal, legal, or strategic reasons to not requesting such recounts. The obvious reason for Mr. Bush's decision to not ask for a recount not the least of which is that he won the election.

Unfortunately, Plaintiffs ignore the fundamental principle reaffirmed by the Florida Supreme Court at Plaintiffs' own request: "[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom [the Court] must give primary consideration." Palm Beach Cty Canvassing Board v. Harris, Slip. Op. at 9, vacated sub. nom. Bush v. Palm Beach County Canvassing Board, 531 U.S. ___ (Dec. 4, 2000) (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)). Nonetheless, the statute used by Plaintiff to request the recounts during the protest period did not allow the voters to ask for a recount in their counties. § 102.166(4), Fla. Stat. (2000)(providing only

that candidates or their political parties may ask for a recount in this type of election).[5]

### 2. THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION UNDER ARTICLE 5, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE THE TRIAL COURT'S JUDGMENT WAS BASED ON SOUND LEGAL AND FACTUAL DETERMINATIONS.

This Court should decline to exercise its constitutional discretionary authority to resolve this case on the merits. This case has been through state and federal trial courts in many fashions in the last three weeks. Judge Sauls has made a detailed factual and legal determination of the election contest foreseen by this Court in Harris, supra. Moreover, this Court has already declined to intervene to force the hand recounts requested on several occasions. It is time for this case to end.

## CONCLUSION

For the reasons stated herein, the Final Judgment by Judge Sauls on Dec. 4, 2000, should be AFFIRMED.

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[5] Butler's action challenging the constitutionality of this statute is now pending before this Court in Case No. 00-2403.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been provided by U.S. Mail this 6th day of December, 2000, to the attached service list, and/or hand delivered or faxed to those marked as such on the service list.

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