IN THE SUPREME COURT OF FLORIDA
SC Case No. 00-2403
Lower Tribunal No. 1D00-4513
CV00-2745

MATT BUTLER,

Petitioner/Appellant,

vs.

HONORABLE KATHERINE
HARRIS, etc., et. al.

Respondents/Appellees

INITIAL BRIEF OF PETITIONER/APPELLANT MATT BUTLER

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

INTRODUCTION

Appellant, Matt Butler, appeals the finding of Judge Nikki Ann Clark, Leon County Circuit Judge,, that the manual recount provisions of Section 102.166(4) and (5), Florida Statutes are constitutional even though they treat Florida voters differently of based solely on their county of residence. In this brief, Appellant will be referred to as "Mr. Butler," "Butler," or "the voter." Appellees, Honorable Katherine Harris and Honorable Robert Butterworth were made defendants to the underlying action because the Secretary of State's office is charged with enforcing Florida's election code and The Attorney General's office is a necessary party to any action seeking to declare a statute unconstitutional. In this brief, Appellees Honorable Katherine Harris will be identified as "Secretary Harris," "the Secretary of State," or "Ms. Harris." Appellant Honorable Robert Butterworth will be identified as "the Attorney General," or "Mr. Butterworth."

STATEMENT OF CASE AND FACTS

Mr. Butler is a resident of Collier County, Florida. He voted for Gov. George W. Bush in the November 7, 2000 general election. Collier County used a punch card type voting system similar to the ones used in Palm Beach, Broward, and Miami-Dade

counties. Mr. Butler believes that he properly followed the simple instructioons for completing his ballot, but has no idea whether his vote was actually counted.

Shortly after the election, the losing candidate, Vice President Al Gore, requested a manual recount in Volusia, Palm Beach, Broward, and Miami-Dade counties, pursuant to §102.166(4), Florida Statutes. Despite numerous legal issues related to these requests, all of which this Court is well aware, manual recounts were performed to various degrees in those counties. The Vice President did not seek a recount in any other Florida counties although many of them used the same or similar voting machines which the Vice President claims caused errors in Palm Beach, Broward and Miami-Dade.

On November 13, 2000, several canvassing boards sued the Secretary of State's office to prevent her from requiring final certified returns by the statutory deadline of November 14, 2000, under Sections 102.111 and 102.112, Florida Statutes. Volusia County Canvassing Board v. Harris, Leon County Case No. CV-00-2700. The case was completed in Leon County Circuit Court in a few days. Mr. Butler participated in that case and pointed out that there was a possible constitutional defect in the statute because voters (specifically, the actual counting of the votes) were treated differently based solely on their county of residence which is in violation of the equal protection and due process clauses of the U.S. and Florida Constitutions.

Mr. Butler was only an intervenor in the Palm Beach County Canvassing Board case, therefore, he did not directly challenge the constitutionality of the statute. Instead, he filed a separate petition for declaratory judgment action on Nov. 17, 2000, App. 1, the same day Judge Lewis ruled that Secretary Harris did not abuse her discretion by refusing to accept late returns from the South Florida counties. Mr. Butler's petition was heard by Judge Nikki Ann Clark at approximately 3 p.m. that afternoon.

Mr. Butler's claim was simple. Section 102.166(4), Florida Statutes, provides that only a candidate or political party may request a manual recount. This amounts to statutory discrimination against voters who were not entitled to have their votes manually reviewed for "voter intent" simply because no candidate or political party asked for one in their county. The respondents defended the statute on different grounds. Secretary Harris argued that the statute was not unconstitutional because she had interpreted the statute as only applying in limited instances where there was a breakdown on the voting machinery. Thus, she claimed, manual recounts were not applied differently in similar counties; they were performed only for counties which were inherently dissimilar - their machines did not work. The Attorney General's office argued that the statute was not unconstitutional because there is no fundamental

right to a manual recount and that the State had reasonable legitimate interests served by limiting the requests to candidates and their political parties.

The hearing lasted about an hour. Judge Clark issued her Final Declaratory Judgment almost immediately. App. 2. Mr. Butler filed a Notice of Appeal with the First District Court of Appeal within minutes. App. 3. Butler also filed a Suggestion pursuant to Florida Rule of Appellate Procedure 9.125. App. 4

The First District Court of Appeal certified this case as being one which requires immediate resolution by this Court because it involves issues which are of great public importance. App. 5. This Court entered a Scheduling Order that same day.

QUESTION PRESENTED

1. Whether the manual recount provisions of Section 102.166(4) and (5) are unconstitutional because they deprive voters in Florida of equal protection by allowing manual review of ballots in some counties to divine "voter intent" while not conducting the same review, or at least providing an opportunity by voters to request such a review, in other counties.

2. Whether the manual recount provisions of Section 102.166(4) and (5) are unconstitutional because they deprive Florida voters of due process by not having any reasonably uniform standards for manual recounts.

SUMMARY OF ARGUMENT

The manual recount provisions of Section 102.166, Florida Statutes are unconstitutional for two reasons.

First, the statute deprives voters of equal protection under the Florida and United States Constitutions by creating a legislative classification of voters, based purely on where they live, and providing the different classes with different levels of vote protection. Section 102.166(4), Florida Statutes, provides that only candidates and political parties may request manual recounts. Voters cannot ask for this scrutiny of their votes. Thus, voters who happen to live in counties where a statutorily authorized person requests a manual recount are provided special treatment vis a vis their vote compared to the voters who live in counties where no such person asked for a manual recount.

The State has no compelling or even legitimate interest in this discriminatory scheme. Even the defendants here cannot defend the classification. The Secretary of State will not file a brief defending the statute. The Attorney General has written a

letter explaining that a "two tiered" system of counting votes, where manual recounts are allowed in some counties but not others, has serious constitutional concerns.

Second, the statute deprives voters of due process by failing to provide any meaningful standards for manual recounts. County Canvassing Boards are left with unfettered discretion and no standards to apply to determine alleged "voter intent." This has led to a circus atmosphere where the standards themselves have changed numerous times in the last few weeks. The statute cannot stand unless there are appropriate standards.

ARGUMENT

1. THE TRIAL COURT ERRED BECAUSE THE MANUAL RECOUNT PROVISIONS ARE UNCONSTITUTIONAL IN THAT THEY DENY FLORIDA VOTERS EQUAL PROTECTION UNDER THE LAW.

Section 102.166, Florida Statutes contains Florida's "protest provisions" which allows protests for a certain time period following an election. The statute itself provides for different forms of protest. Sections (1)-(3) allow any candidate or "elector qualified to vote in the election" to take certain protest steps. § 102.166(1), Fla. Stat. (2000). With respect to electro-mechanical equipment-based elections, a protest is limited to examining precinct records and election returns, and fixing any clerical errors. § 102.166(3)(c), Fla. Stat. (2000). If there appears to be an error which

could affect the outcome of the election, the only available remedy for a voter under the statute is to "recount the ballots on the automatic tabulating equipment." Id.

The statute then contains a provision allowing only certain people to ask for manual recounts of ballots. § 102.166(4), Fla. Stat. (2000). This limited class of people includes the candidates, their parties, and political action committees which support or oppose an issue which appeared on the ballot[1]. Id. Voters are not included in the categories of persons who may request manual recounts. Basic principles of statutory construction illustrate that the legislature did not intend for voters to be able to request manual recounts. See Beach v. Great Western Bank, 692 So. 2d 146 (Fla. 1997), aff'd, 523 U.S. 410 (1998) (when legislature includes particular language in some parts of statute, but not others, it is presumed the exclusion was intentional); Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898 (Fla. 1996) (the mention of one thing (i.e. class) implies exclusion of another thing (i.e. class)). Thus, whereas voters may request some level of inspection, they cannot ask for a manual recount.

This statutory scheme leads to inevitable disparate treatment in statewide elections. Many Florida counties use voting devices which are not perfect. It appears

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[1] The third category clearly does not apply here because the dispute is over a candidacy, not an issue. Therefore, this Brief will identify only the other two classes.

that one of the reasons a manual recount provision was placed in the protest statute may have been to allow for the potential manual inspection of ballots to determine "voter intent" that may not be read by a machine.[2] In fact, unless the Secretary of State was correct in her interpretation of the statute - that manual recounts are only available when machines are not working - then the ***only*** conceivable reason to perform a manual recount is to determine what, if any, votes contain evidence of "voter intent" not read by the tabulating machine.

Assuming for the sake of argument that "divining" voter intent is a good idea, the statute arbitrarily excludes from this scheme all voters in counties who are not fortunate enough to have a candidate of party request a recount for them. If the voters are truly the "real parties in interest" as suggested by this Court just last week, Palm Beach County Canvassing Board v. Harris, Slip Op. (Nov. 21, 200) at 9 vacated sub. nom. Bush v. Palm Beach County Canvassing Board, 531 U.S. ___ (Dec. 4, 2000), how can this be legal? It cannot be.

The first question this court must address in an equal protection challenge is what standard to apply to in reviewing the claimed violation. A classification which

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[2] Mr. Butler recognizes that there is a legal dispute about whether recounts should be performed at all based simply on alleged "voter error." Assuming the Gore/Lieberman position is correct and such recounts are appropriate, the statute is unconstitutional for the reasons cited herein.

impinges on a fundamental right can only be sustained if the classification furthers a compelling governmental interest. Spence v. Hughes, 485 So. 2d 903, 905 (Fla. 5th DCA 1986), approved 500 So. 2d 538 (Fla. 1987). "An equal protection challenge to a statute that does not involve a fundamental right or suspect classification is evaluated by the rational relationship test. [citations omitted] According to this test, the court must uphold a statute if the classification bears a rationale relationship to a legitimate governmental objective. [citations omitted]." Department of Ins. v. Keys Title and Abstract Co., 741 So. 2d 599, 602 (Fla. 1st DCA 1999). Whether this Court applies a standard of strict scrutiny or the rational relationship test, the statute is unconstitutional.

Before addressing this issue further, Mr. Butler notes that the Attorney General has already expressed the opinion that manually recounting ballots in some counties creates a serious constitutional problem. Mr. Butterworth wrote the Palm Beach Canvassing Board on Nov. 14, 2000, three days before his counsel appeared before Judge Clark and claimed the statute was constitutional, explaining:

> The circumstances surrounding these legal issues are extremely serious. If hand recounts have already occurred in [a] number of . . . counties . . . while similar hand counts are blocked in other counties . . . , a two tier system for reporting votes results.
>
> ***A two-tier system would have the effect of treating voters differently, depending upon what county they voted in.*** A voter in a county where

> a manual count was conducted would have a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.
>
> As the State's chief legal officer, ***I feel a duty to warn*** that if the final certified total for balloting in the State of Florida includes figures generated from this two tiered system of differing behavior by official canvassing boards, ***the State will incur a legal jeopardy, under both the U.S. and State constitutions.***

Letter from Robert A Butterworth, Attorney General, to The Honorable Charles F. Burton, Chair, Palm Beach County Canvassing Board, Nov. 14, 2000. App. 6. (emphasis added).[3]

A. THIS COURT MUST APPLY STRICT SCRUTINY TO THE STATUTORY SCHEME BECAUSE, ALTHOUGH MANUAL RECOUNTS ARE NOT FUNDAMENTAL RIGHTS, THE MANUAL RECOUNT PROVISIONS IMPINGE ON FUNDAMENTAL RIGHTS.

There is no fundamental right to a manual recount. However, there is a fundamental constitutional right to vote and to have those votes counted fairly and equally. See Art. 1, Sec. 1, Fla. Const.; Art. 6, Sec. 2, Fla. Const. See also Reynolds v. Sims, 377 U.S. 533, 555 (1964) (holding that the right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

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[3] It appears from the letter that the Attorney General's office was responding to a concern that some other counties may have already performed hand recounts. The undersigned is unaware of any such manual recounts, but can assert that no such recounts were performed in Collier County, where Mr. Butler resides and voted. Notwithstanding any other alleged recounts, the statute is still discriminatory.

prohibiting the free exercise of the franchise.") It is also well recognized that political power cannot be predicated upon geography. Roman v. Sincock, 377 U.S. 695, 712 (1964) (holding that both houses of state legislatures must be apportioned in relation to population); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653 (1964) (emphasizing that state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of the State's citizens merely because of where they happen to reside.")

Florida law clearly recognizes that statutes may be subject to strict scrutiny not only when they have classifications based on fundamental rights, but also when they impinge on fundamental rights. For example, in Spence, supra, this Court approved and adopted a decision by the Fifth District interpreting the "No-Fault Threshold" statute to equally benefit both residents and non-residents who carried the "required" insurance coverage to avoid unconstitutionally impinging on the right to travel. Importantly, the key issue before the district court, the right to the threshold defense, was not a fundamental or constitutional right. Still, the court reasoned that providing a non-fundamental benefit - the threshold defense - to people based only on where they lived, would impinge on the constitutionally protected right to travel.

The same analysis applies here. Although there is no fundamental right to a recount, if the legislature provides for this non-fundamental statutory right, it cannot

impinge on any fundamental right. Section 102.166(4), Florida Statutes, impinges on Mr. Butler's fundamental right to have his vote counted fairly compared to other voters in the State of Florida.[4] By allowing other counties' voters to have their ballots personally reviewed, the legislature treats those voters very differently. Just as treating some people differently was rejected in Spence, it must be rejected here.[5]

There is absolutely no compelling state interest which warrants such discriminatory impingement on Mr. Butler's rights, or those of other voter's rights in the rest of Florida's 63 counties.[6] Primarily, Florida's interest in allowing for manual recounts is to protect the rights of Florida's voters. With that as the fundamental purpose, the state may also have an interest in allowing the candidates to protect their interest in the election. Everyone must agree that the voter's rights are more important

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[4] Any State action allowing for a dilution of votes clearly impinges on fundamental rights. Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.")

[5] In Spence, the statute was unclear as to whether it applied to provide the threshold protection to in-state drivers only. Thus, the Court had the latitude to interpret the statute in a manner which would be constitutional by allowing both in state and out of state drivers to avail themselves of the threshold as long as they carried the required insurance. That option is not available to this Court here because the statute clearly and unambiguously excludes voters from Section 102.166(4), Florida Statutes.

[6] Volusia County also performed a manual recount at Gore's request and filed its amended certified returns before the initial statutory deadline.

than the candidates' rights. As this court recently reaffirmed, the voters "are possessed of the ultimate interest and it is they whom [this Court] must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, ***thus subordinating their interest to that of the people.***" Palm Beach County, Slip. Op. at 9 (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). With this in mind, there is no legitimate, much less a compelling, reason to treat voters in similarly situated counties differently with respect to their fundamental voting rights, simply because of their county of residence. To the contrary, this Court has arguably held that the compelling interest lies with making the process fair to all the voters.

This Court has only allowed for a single deadline briefing schedule, so Mr. Butler must anticipate the possible compelling reasons the Secretary of State and/or Attorney General's office might claim. In the trial court, the Secretary of State's office argued that the statute was constitutional because she had interpreted the statute as only allowing for manual recounts when there was evidence of machine malfunction. This Court rejected her interpretation. Palm Beach County, Slip Op. at 10-14. Mr. Butler understands Secretary Harris will not file a brief defending the statute.

On the other hand, the Attorney General's office raised a few alleged "legitimate" reasons for the statutory classification.[7] First, he argued that the state has a legitimate interest in limiting the number of requests for manual recounts by limiting the people who may make them. Second, he argued that during a contest period only the candidates have any interest in having votes recounted because the candidates should not be forced to go through with a protest challenge.

Any interest the state has in preventing too many requests for manual recounts is, at most, a side interest. It is not a compelling state interest. The statutory scheme itself belies any claim that there is a compelling state interest in limiting voter rights to ask for protection. For example, Section (1) through (3) of the protest statute (Section 102.166,Florida Statutes) allow any voter to protest results. Unfortunately, it limits their remedies in an unequal and unjustified manner. Likewise, Section 102.168, Florida Statutes, provides that any voter or taxpayer may file an election contest after the winner has been certified. IF there were a legitimate concern about the numbers of

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[7] The Attorney General has recently claimed that the U.S. Supreme Court approved of partial recounts in state wide elections in Roudebush v. Hartke, 405 U.S. 15 (1972). He is incorrect. Roudebush dealt not with the legality of partial recounts, but the interaction between congress' constitutional authority to determine the qualifications of its own membership and a state recount provision. Though the Court mentioned that Roudebush had asked for recounts in eleven counties, id. at 17, it was not asked to address whether a partial recount violated the equal protection clause as has been asserted in this case. In fact, no one even claimed that any voter had been excluded from requesting a recount.

requests, the legislature would not authorize voters to make direct requests in these other instances.

The Attorney General's other claim, that a voter simply has no interest in a manual recount before a winner is certified, is untenable. First, this position contradicts the Attorney General's very opinion to Judge Burton, where he opines that vote counts before certification based on a "two tiered system" place Florida in "legal jeopardy." Second, it is simply illogical. The voter's interests are primary at all times. There is a significant legal question whether a manual recount may be requested at all after certification, i.e. as part of a contest pursuant to Section 102.168, Florida Statutes. Then, even assuming a voter has the right to request a manual recount after certification, there is a significant difference between the protections afforded to those who asked for recounts before certification versus those who seek them afterwards. For example, any manual recount under Section 102.166, Florida Statutes, is performed at the expense of that county. Conversely, assuming that manual recounts are even available in a contest, this cost would likely be borne by the contestor, even if that were a voter[8]. Clearly voters have a significant interest in being permitted to

[8] This problem is seen in the ongoing election contest by Vice President Gore pending before Judge Sauls. Leon County Case No. CV-00-2808. There, several voters have intervened (including Mr. Butler) to ask that, if any manual recount is allowed under the contest statute, that the manual recount include not only the alleged "undervotes" in a few select counties, but include all 180,000

participate in the process when it is still local and the expenses are covered by the counties, or at least to not be forced to contest an election after a candidate or party obtained recounts at county expense during the protest period.

The Attorney General's office also claimed below that until a winner is certified, the State has an interest in preventing candidates from being "held hostage" by voters who ask for recounts. This is silly. If a candidate wants to quit, he or she can do so. In any event, the real problem occurs when, as here, the losing candidate asks for a manual recount and the winner has legal or strategic reasons not to ask for one in other counties. The statute, as written and applied in a statewide election, places the interests of the candidates above that of the voters. It does so in a manner which impinges the voter's fundamental right to have their votes counted fairly. That cannot be reconciled with this Court's recent pronouncements in Palm Beach County.

Assuming the statute is intended to apply in statewide elections, the legislature failed to narrowly tailor the statute to meet the state's alleged interest, as is required when a classification impinges on a fundamental right. If preventing a plethora of requests is a state interest, the concern could easily be resolved without discriminating against voters by providing specific time periods, methods and reasons for allowing

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"undervotes" across the state. Unfortunately, the parties (Gore) have had to pay to transport certain requested ballots to Leon County, and such an expense would be prohibitive for voters who simply want a fair result for the entire State.

recounts. Or, it could simply provide for a public hearing based on a single request, which with proper notice to interested voters, could resolve the issue for the entire county. Or, as would make the most sense and be fairest to all the citizens of the State of Florida in a statewide election, it could simply provide that if any county conducts a manual recount, then all counties must do the same thing. In that way, no voter would have to specifically ask for a recount in their particular county in order to protect their votes, but would rather be assured that their interests are automatically protected in the event some counties chose to perform recounts.

There is clearly no compelling state interest justifying the disparate treatment between voters as occurs and in fact occurred in this case. Even the Attorney General agreed. See App. 6. The statutory provisions are unconstitutional and this Court must strike them from Section 102.166, Florida Statutes.

B. THE STATUTE VIOLATES MR. BUTLER'S EQUAL PROTECTION RIGHTS EVEN IF ANALYZED UNDER A RATIONAL RELATIONSHIP TEST.

Even assuming, arguendo, that this Court should apply the lesser standard of the rational relationship test, see Keys Title, 741 So. 2d at 602, this Court must still conduct a thorough analysis of the arguable purpose and interest the State has in its discriminatory manual recounting scheme. Ocala Breeders's Sales Co. v. Florida Gaming Centers, Inc., 731 So. 2d 21 (Fla. 1st DCA 1999). In that case, the district

court noted that although "[t]he legislature may set classifications . . . any such classifications must bear a reasonable relationship to the primary purpose of the law." The court went on to note the broad deference provided to the legislature in creating law, but still found that upon close examination even that standard is sometimes not met. In holding the statute unconstitutional, the court performed a basic analysis: first, it determined the apparent purpose of the statute; then, second, it scrutinized the statute to determine whether the purpose was actually served by the classification. Id. at 27.

Applying that analysis to the manual recount statutes illustrates that the statute's classifications cannot be reconciled with the purpose of the statute. In short, there is no rational relationship between the purpose of the statute and the classification distinctions contained therein. As explained above[9], the apparent purpose of the statute is to protect the voters of the State. See generally Palm Beach County, supra. There is simply no rational reason to create a statute intended to protect voters but intentionally or accidentally creates different categories among Florida voters. The categories are purely geographical; each voter's rights and interests are governed

[9] As the alleged purposes of the statute have been refuted above, Mr. Butler will not simply restate them. Each of those alleged interests discussed above, however, fail even under the easier analysis because they do not in any reasonable manner further any legitimate state interest.

solely by where they live.[10] If they live in a county where no candidate or party asks for a manual recount, then they have no right to one. This is precisely the type of completely arbitrary classification found illegal in Ocala Breeders, supra.

C. THE STATUTE MAY BE LIMITED IN ITS APPLICATION IN SUCH A MANNER AS TO NOT VIOLATE THE EQUAL PROTECTION CLAUSES BY LIMITING THE MANUAL RECOUNT PROVISIONS AS APPLYING ONLY IN COUNTY WIDE ELECTIONS.

The obvious problem facing Florida, and for that matter the rest of the United States and probably the world, has been that Vice President Gore cherry picked a few

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[10] In O'Brien v. Skinner, 414 U.S. 524 (1974), the United States Supreme Court held unconstitutional the New York absentee ballot statute because it made no provision for persons unable to vote while they were incarcerated. Although New York law did not disable such prisoners by virtue of their penal status, it also did not provide an affirmative means for these otherwise qualified voters to cast their vote. As applied uniformly throughout the State, the absentee ballot statute *did* provide the right to vote to certain prisoners (but not others) based on the accident of where they happened to be incarcerated. As the Court explained: "If a New York resident eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote . . . because he is 'unavoidably absent from the county of residence." Id. at 528-29 (quoting N.Y. Election Law 117(1)(b)). Consequently, the Court thus found:

> [T]hose held in jail awaiting trial in a county other than their residence are . . . permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reasons in the county of their residence are completely denied the ballot.

Id. at 530. New York did not have to allow prisoners to vote, but once it did so it could not treat prisoners differently based solely on the basis of where they were jailed. Likewise, although Florida has no obligation to provide for manual recounts, it cannot do so in a geographically discriminatory manner.

counties for manual recounts. Gore and Lieberman "naturally chose [those counties] because they were the most likely to yield results favorable to them." Compare In re Contest of the Election for The Offices of Governor and Lieutenant Governor, 444 N.E.2d 170, 183 (Ill. 1983). When voters have no right to have their votes reviewed, the statute in constitutionally flawed. This flaw, however, exists only in a statewide race such as the one for the slate of presidential electors.

This Court may find that the statute is unconstitutional here, but still applicable in local races. It is self-evident that the statutory scheme treats voters equally in countywide (or smaller) races, even if the right to request a recount is limited to only the candidate or party. If a manual recount is requested, then everyone who voted in that election has their vote reviewed the same way. If there is no manual recount requested, then every voter is treated the same way because no vote gets special, differing treatment. In short, there is no disparate treatment of the voters in these elections.

It appears that the legislature may have only intended the statute to apply in local elections. For example, the statute provides that if the initial manual recount shows an error in tabulation that "could affect the outcome of the election," the canvassing board shall take statutorily described steps to remedy the problem. § 102.166(5), Fla. Stat. (2000). This section begs the question: how can a local (county) canvassing

board determine what local changes could affect the outcome of a statewide election? It cannot. The most it can do is determine whether there are some more votes that it could add to the vote total in the countywide canvass results. The fundamental unfairness of the abuse of this statute by the Vice President has been that by skewing the weight of any additional votes he may gain in a few predominantly Democratic counties, he has redefined the phrase "change the results of the election." This is so because had all counties performed manual recounts to determine "voter intent," then it is just as likely that the Republican majority counties would balance out the gains by the Democrats in the South Florida counties. Compare In Re Contest, 444 N.E. 2d at 183 ("If the motion . . . 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.")

Surely, the legislature did not intend for the manual recount provision to be a political/legal mechanism for use by candidates or political parties to disenfranchise voters in most of Florida's counties by selectively looking out for only some voters' interests (and, of course, only those voter's interests most likley to coincide with those of the requesting candidate). Both Vice President Gore and Senator Lieberman have prattled on about the importance of "counting every vote," and being able to tell our

children that "every vote counts." The truth is that while making this claim to a national television audience, they have had their attorneys carefully manipulate a statute that provides no mechanism for other voters to protect themselves from such abusive manipulation. There is no way the Florida legislature intended to create that problem for Florida voters.

This Court may look at the Constitutional issues and fundamental fairness, and easily conclude that the manual recount provisions of Section 102.166, Florida Statutes, must be limited to countywide elections, and simply do not apply inany statewide context.

2. THE TRIAL COURT ERRED BECAUSE THE MANUAL RECOUNT PROVISIONS ARE UNCONSTITUTIONAL IN THAT THEY DENY FLORIDA VOTERS OF THEIR RIGHT TO DUE PROCESS.

The facts here clearly present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed,'" Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir.) (quoting Griffin v. Burns, 570 F.2d 1065, 1077-78 (5th Cir. 1981), cert. granted, 455 U.S. 937 (1982), cert. dismissed, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

The due process problem here is not based upon any inadequacy in Florida's judicial remedies. This due process claim is substantive, not procedural: the arbitrary manual recounts countenanced by Florida law are unconstitutional, *inter alia*, because

Florida law fails to set any meaningful standards for determining whether a manual recount should be initiated, which ballots should be manually counted, and what standards should be applied in determining whether a ballot should or should not be counted. Quite simply, a State cannot deny an individual's liberty or property interest—including the right to vote—in an arbitrary and capricious manner. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). State election laws and practices having that effect constitute a denial of due process. See Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995); Duncan, 657 F.2d at 703; Gamza v. Aguirre, 619 F.2d 449, 454 n.6 (5th Cir. 1980); Griffin, 570 F.2d at 1077-79.

In Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970), the court invalidated an election board's imposition of *ad hoc* requirements for nominating petitions, agreeing with the plaintiffs' contention that "the Board's failure to issue guidelines clarifying the statutory standards for nominating petitions contravened due process." Id. at 1054, 1055. As the Seventh Circuit explained, "protection of the full measure of First and Fourteenth Amendment freedoms commands that state regulation of nominating procedures include a clear statement of the specific requirements by which nominating petitions will be tested." Id. at 1058.

The counties' arbitrary, capricious, and standardless manual recounts suffer from the same fault as the nomination procedure invalidated in Briscoe. If the State

of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision making of local election officials, who may have a keen personal interest in the outcome of an election and who administer the election system in counties selected by candidates or political parties who share those interests. The State's failure to provide such guidelines constitutes a clear violation of due process.

There can be no dispute that the manual recount scheme implemented selectively in Florida in the November 7, 2000, election utterly lacked any meaningful standards. Nor does statutory language suggesting that the mandatory recount statute has a "purpose" of remedying material errors, and includes a "process" for conducting recounts, see Siegel v. Le Pore, 2000 U.S. Dist. LEXIS 16333, *21-22 & n.8 (S.D. Fla. Nov. 13, 2000), cure this fatal flaw in Florida's election law. Neither of these characterizations by the district court in Siegel correctly describe the process currently unfolding in Florida. Moreover, the important point is that the statute prescribes no standards whatsoever to guide or constrain the canvassing boards in determining when or how to count any particular ballot. When a statute's "purpose" is as open-ended as the correction of error, and the statute supplies no standards to guide the determination of "error," any such general statement of purpose provides no

meaningful standard for its application by county officials. This is particularly true when the statute authorizes persons, without any standards or constraints, to divine the "intent" of voters. In any event, the existence of statutory procedures for conducting recounts cannot substitute for the articulation of substantive standards to guide the board's implementation of the manual recount procedures.[11]

Indeed, the arbitrary and standardless nature of the process is confirmed by statements recently made by Mr. Nichols, the county spokesman for Palm Beach County. See CNN Transcript: "Manual Vote Count Procedure Varies in Palm Beach County," November 11, 2000. With reference to the question whether partially punched ballots should be counted if one could see sunlight through the partial punch (the so-called "sunlight method"), Mr. Nichols explained that the standard "is very vague in the law." Id. As Palm Beach County Attorney Leon St. John further explained, the Palm Beach Board decided both to adopt *and* abandon the sunshine method in the midst of the recount itself. He noted that "[t]he canvassing board . . .

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[11] For example, the procedural provisions of the manual recount statute address such matters as the composition of counting teams, the process for referring ballots to the canvassing board, and the procedures for verifying tabulation software. Florida Statute 102.166(7)-(10). Such procedures, however, do not guide the board's discretion in determining whether or not to count a vote. Although Section 102.166(5)(b) instructs the board "to determine the voter's intent," it gives no indication of how that subjective determination is to be made. The resulting discretion leaves an infinite space for the exercise of arbitrary and unequal treatment of voters.

just moments ago . . . had decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, then that will be a vote." Id.; see also Id. (statement of Bob Nichols, Palm Beach county spokesman) ("[T]he policy would be that if you don't -- they were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote."); id. at 9 (statement of Bob Nichols) ("There was a change in the middle.").[12]

Additional horror stories abound. Florida's Secretary of State, for example, has explained how " 'Flying' chads came off the ballots during the recount and were seen on the floor and furnishings . . . . Observers were heard asking the counters and canvassing board members to stop 'flexing' the cards because of the potential hazard in dislodging chads that otherwise may have been intact." Emergency Petition for Extraordinary Relief, Florida Supreme Court at 9 n.4. According to media reports, when observers attempted to memorialize the presence of dislodged chads, Democratic officials and county employees attempted to sweep away the chads rather than have the physical degradation documented. Kathy Sawyer & Serge F. Kovaleski, *Counters Try To Stay Calm As Storm Gathers*, Wash. Post., Nov. 19, 2000, A1. The atmosphere surrounding the recounts, moreover, became excessively politically

[12] These changing standards create a serious due process problem.

charged, obviously increasing the risk that conscious or unconscious bias would further taint the recount. Don Van Natta Jr. with David Barstow, *Election Officials Focus of Lobbying From Both Camps*, N.Y. Times, Nov. 18, 2000, A1.

Hence, given the circumstances surrounding the manner in which these manual recounts were conducted, the President of the United States could be determined not by the votes counted and recounted by neutral, tested equipment made for the express purpose of tabulating and recounting ballots, but by an elusive and infinitely elastic process that allows officials to change standards, and change again, without reference to established law, during the course of the process itself.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is an unacceptable risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by the officials' desire for a particular result. This risk of arbitrary and subjective decision making is especially acute in a extremely close election for the most important office in the nation. In effect, if the selective manual recount law is allowed to stand, the President of the United States may ultimately be selected by the arbitrary and standardless decisions of a handful of potentially interested county officials about such matters as whether to count a vote because a ray of light shines through a hole or because only one, rather than two, corners of a chad remains attached to a ballot.

3. THIS COURT SHOULD EXERCISE DISCRETION UNDER ARTICLE V, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE THE CONSTITUTIONALITY OF THE MANUAL RECOUNT STATUTE MUST BE RESOLVED IMMEDIATELY TO ENSURE THE INTEGRITY OF THE ONGOING ELECTION CASES.

The First District Court of Appeal certified this case pursuant to Florida Rule of Appellate Procedure 9.125. This Court should exercise its constitutional discretionary authority to resolve this case on the merits. Florida has seen unprecedented public scrutiny of its election process in the past 30 days. Most, if not all, of that scrutiny has centered on issues of manual recounts under Section 102.166, Florida Statutes. The issue of the statute's constitutionality must be resolved. It would be a shame for the world to learn, after the election disputes in Florida had come and gone, that the statute authorizing the centerpiece of all the litigation was not even legal.

An immediate resolution of this statute's constitutionality will also provide all of the courts of this state better guidance in handling the ongoing litigation. For example, Vice President Gore claims in his contest lawsuit that Judge Sauls must count ballots from Palm Beach and Dade County because he asked for manual recounts under the statute and did not receive them to his satisfaction. If the statute is stricken, the Gore requests are rendered meaningless and he cannot claim that any refusal to perform recounts constituted the "rejection of legal votes" under Section 102.168, Florida Statutes.

CONCLUSION

For the reasons stated herein, the Final Declaratory Judgment by Judge Clark on Nov. 17, 2000 should be reversed, and this Court should remand this case with instructions to enter a Final Declaratory Judgement finding that the manual recount provisions of Section 102.166 are unconstitutional. Alternatively, this Court should find the manual recount provisions do not apply to statewide races and remand with instructions to enter declaratory relief in that regard.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been provided by U.S. Mail this 4th 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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