

SUPREME COURT OF THE UNITED STATES

No. 00-949 (00A504)

GEORGE W. BUSH et al v. ALBERT GORE, JR., et al.

**APPENDIX TO BRIEF OF RESPONDENTS/INTERVENORS CARR,
HARRELL, RICHARDSON, SHULER, TEMPLE AND THOMAS IN
SUPPORT OF THE RELIEF REQUESTED BY PETITIONERS**

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

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

Plaintiffs,

CASE NO. 00-2808

v.

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

and

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

and

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

EX. 1

CANVASSING BOARD, and SHIRLEY N. KING, individually and as Supervisor of Elections,

and

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

and

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

Defendants.

_____ /

MOTION FOR ORDER ALLOWING INTERVENTION

COME NOW the Petitioners/Intervenors, GLENDA CARR, LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER, KEITH TEMPLE, and MARK A THOMAS, by and through undersigned counsel, and hereby move the Court for an order allowing Petitioners/Intervenors to intervene in this case. As grounds for this motion, Petitioners/Intervenors state:

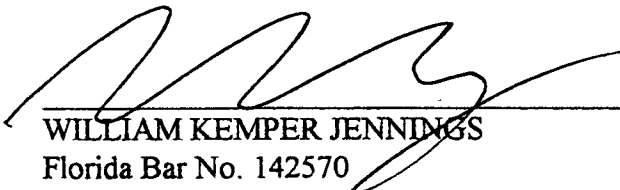
1. Attached hereto is the Petitioners'/Intervenors' Emergency Petition for Declaratory Judgment that the Florida Statutory Scheme for a Manual Recount is Unconstitutional and Motion to Dismiss the Complaint to Contest Election. Said Petition is hereby alleged and made a part of this motion to allow intervention.

2. The issues raised in the said Petition are ones that would be dispositive of all the issues raised in the Plaintiff's Complaint if the subject statutory scheme is deemed to be unconstitutional as alleged.

3. There will be no need to present extensive evidence on behalf of Petitioners/Intervenors. Indeed, other than the status of the Petitioners/Intervenors as registered voters and taxpayers in Florida and their respective counties, all evidence that will be presented by the parties already before the Court will suffice as evidence for the determination of all the facts and issues of law raised by Petitioners'/Intervenors' pleadings

4. Petitioners/Intervenors have an interest in this litigation because all votes manually recounted in the counties unfairly selected by the Gore-Lieberman candidacy destroys their right to due process and equal protection of the law, and because the statutory scheme for manual recounting allows the losing candidates to intentionally and unfairly skew the election results thereby diminishing the weight of Petitioners'/Intervenors' right to vote. See, Rule 1.230 Fla.R.Civ.P.

WHEREFORE, Petitioners/Intervenors pray that they be allowed to intervene and that the other parties be required to respond to the Petition and Motion to Dismiss within a truncated but reasonable period of time.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, hand delivery or facsimile transmission, on this 29th day of November, 2000, to the following:

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FOR MATT BUTLER



WILLIAM KEMPER JENNINGS

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

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

Plaintiffs,

CASE NO. 00-2808

v.

KATHERINE HARRIS, as SECRETARY
OF STATE, STATE OF FLORIDA, and
SECRETARY OF AGRICULTURE BOB
CRAWFORD, SECRETARY OF STATE
KATHERINE HARRIS AND L. CLAYTON
ROBERTS, DIRECTOR, DIVISION OF
ELECTIONS, individually and as members of
and as THE FLORIDA ELECTIONS
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LEHR and DAVID C. LEAHY as members
of and as THE MIAMI-DADE COUNTY
CANVASSING BOARD, and DAVID C.
LEAHY, individually and as Supervisor of
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THE NASSAU COUNTY CANVASSING
BOARD, ROBERT E. WILLIAMS, SHIRLEY
N. KING, AND DAVID HOWARD (on, in the
alternative, MARIANNE P. MARSHALL), as
members of and as the NASSAU COUNTY
CANVASSING BOARD, and SHIRLEY N.
KING, individually and as Supervisor of
Elections,

and

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

and

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

Defendants.

**EMERGENCY PETITION FOR DECLARATORY JUDGMENT THAT
THE FLORIDA STATUTORY SCHEME FOR A MANUAL RECOUNT
IS UNCONSTITUTIONAL AND MOTION TO DISMISS THE COMPLAINT
TO CONTEST ELECTION**

COME NOW the Petitioners/Intervenors GLENDA CARR, LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER, KEITH TEMPLE and MARK A. THOMAS, and hereby petition this Court for a declaratory decree that those portions of Chapter 102, Florida Statutes, providing for a manual recount of votes for the electors of the respective Presidential and Vice-Presidential candidates be declared unconstitutional and furthermore that the contest of the election filed herein by the Plaintiffs be dismissed. As grounds therefor, Petitioners/Intervenors state:

1. Each of the Petitioners/Intervenors are registered voters and taxpayers in the State of Florida, reside in counties which cast ballots for the electors of the respective Presidential and Vice-Presidential candidates, and each Petitioner voted for George W. Bush and Dick Cheney in the

election held on November 7, 2000.

2. Venue is in Leon County because this action is pending in Leon County, Florida.

3. The Petitioners/Intervenors are:

- a. GLENDA CARR, a resident of Duval County, Florida
- b. LONNETTE HARRELL, a resident of Okaloosa County, Florida.
- c. TERRY RICHARDSON, a resident of Bay County, Florida..
- d. GARY H. SHULER, a resident of Calhoun County, Florida.
- e. KEITH TEMPLE, a resident of Duval County, Florida.
- f. MARK A. THOMAS, a resident of Leon County, Florida.

4. The election which is the subject matter of this Petition involved the votes of registered voters throughout the 67 counties of the State of Florida, and the process by which Florida Statute 102.166 allows for the determination of a manual recount purportedly enables a presidential or vice-presidential candidate and such candidates' party to obtain a manual recount of only a few of those counties where such candidate won the election in order to enable such candidate or candidates to enhance the amount of votes determined to have been cast for such candidate or candidates.

5. This procedure allows the candidate who loses the popular vote in the entire State of Florida to select arbitrarily, and without consideration of other counties which have discredited or "undervoted" ballots, to seek to undermine the statewide election result by selecting counties for manual recount only in those counties where there will be an enhancement of such candidates' vote in the statewide tabulation. Some of the Petitioners/Intervenors reside in Florida counties where there were a great many discredited or "undervoted" ballots.

6. This type of procedure ignores the logical purpose of the manual recount statute: Permitting the losing candidate or party in the election to seek a manual recount, but only if such a manual recount will correct errors which could affect the outcome of the election. Section 102.166(5), Florida Statutes.

7. The process ignores the obvious truth that the candidate who wins the popular vote in a statewide tabulation has absolutely no motive or reason to demand a manual recount within 72 hours of the election results, and thereby the statutory scheme arbitrarily, capriciously and illogically allows the losing candidate in the statewide election, but the winning candidate in counties of the candidates' own choosing, to demand a manual recount without including the discarded and/or uncounted ballots in the counties where the winner of the statewide tabulation is likely to obtain a greater number of votes through a manual recount of such discarded or uncounted ballots.

8. Such a scheme is arbitrary, capricious and undermining of the people's right to vote and be heard, and thereby completely destroys the equality of the voting rights of all of the registered voters of Florida, including Petitioners/Intervenors, who cast ballots on November 7, 2000, in counties other than where the losing candidates chose to demand a manual recount. The Petitioners/Intervenors are within such category of voters whose voting rights have been diminished by the actions of Albert Gore, Jr. and Joseph I. Lieberman.

9. Even the Democratic attorney general, Robert A. Butterworth, acknowledges the obvious risk to the disenfranchising of the voters of the State of Florida when certain counties are allowed to be recounted to the exclusion of other counties. See Attorney General's letter to Charles E. Burton, Chairman, Palm Beach County Canvassing Board, dated November 14, 2000, which is attached hereto and made a part hereof.

10. Whether a particular candidate or political party filed a request for a manual recount within the time period provided by Florida law in no way waives the right of the individual voters to have their ballots or votes treated equally under the United States Constitution, Amendments V and XIV. Moreover, any such waiver by a candidate or political party cannot deprive the individual voters of their right to due process of law as guaranteed by the United States Constitution, Amendments V and XIV.

11. The electoral canvassing committees that are charged by the statutory scheme with the responsibility of conducting the manual recount have absolutely no parameters established by law to guide them in their divination of the "intent of the voter." They can, under the present circumstances, determine that a vote was cast for a candidate even if there is no clear indication of such intent.

12. These canvassing boards have attempted to "read the minds" of the voter who may have determined that he or she was not going to vote for any Presidential candidate, or may have started to vote for a Presidential candidate and then determined that he or she could not bring himself or herself to vote for anyone in the Presidential race. Indeed, this is an extremely probable state of mind for a high percentage of voters in what has been a very close election making it difficult for many to determine the one for whom to vote.

13. For the reasons described above, the Florida statutory scheme for manual recounting, both on its face and as applied in the circumstances of this election, is unconstitutionally vague and/or overbroad and violates the Petitioners'/Intervenors' right to due process and equal protection of law, and constitutionally diminishes their right to vote under the aforesaid provisions of the United States Constitution.

14. Moreover, the statutory provisions providing for a manual recount are not reasonably related to the purpose of allowing a losing candidate to seek determination of the true result of all the votes in the subject election. These provisions permit a candidate who loses the statewide popular vote but wins in some counties, often overwhelmingly, to choose only those counties for the purpose of a recount; and such scheme impermissibly allows the state-wide loser to, with Machiavellian purpose, undermine the weight and value of the votes in those counties where such candidate lost, often overwhelmingly. This statutory scheme therefore does not provide for a more accurate reflection of the will of the voters but allows for an unfair and false image of the statewide vote tabulation.

15. Such a scheme violates the due process clauses, the equal protection clause, and the constitutional protection of each individual's right to vote under the provisions of the United States Constitution, Amendments V and XIV.

WHEREFORE, Petitioners pray that this Court will declare the said statutes providing for a manual recount, on their faces and as applied, to be violative of the Petitioners'/Intervenors' right to have their vote treated equally and right to due process of law. Further, Petitioners pray that the Court, due to the said unconstitutionality, enter an order dismissing Plaintiffs' complaint.

DATED this 29th day of November, 2000.

Respectfully submitted.



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Florida Attorney General

November 14, 2000

The Honorable Charles E. Burton
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

Dear Judge Burton:

Attached is the legal opinion requested by the Board.

The circumstances surrounding these legal issues are extremely serious. If hand recounts have already occurred in Seminole County and an unknown number of other counties without the restraint of a legal opinion while similar hand counts are blocked in other counties due to a newly issued standard, 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 benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

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-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/dmm

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

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ALBERT GORE, JR., et al.,

CASE NO.00-2808

Plaintiffs,

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vs.

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KATHERINE HARRIS, as Secretary

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of State, STATE OF FLORIDA, et al.,

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Defendants.

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IN RE:

Ruling

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BEFORE:

HONORABLE N. SANDERS SAULS
Circuit Court Judge

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DATE:

Monday, December 3, 2000

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TIME:

Commenced: 4:30 p.m.

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Concluded: 6:31 p.m.

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LOCATION:

Leon County Courthouse
Courtroom 3D
Tallahassee, Florida

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REPORTED BY:

B. J. QUINN, RPR, CMR, CP
Certified Realtime Reporter
Notary Public in and for the
State of Florida at Large

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ITEM
PROCEEDINGS COMMENCEMENT
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PROCEEDINGS

THE COURT: All right. At this time we'd call the case of Albert Gore, et al., versus Catherine Harris, et al., Case Number 00-2808.

At this time, the action having been tried, the Court at this time will enter its ruling from the bench, as to the exigencies surrounding this case, the ruling and findings shall be incorporated into the final judgment, and shall be immediately entered herein.

At this time the Court finds and concludes as follows: The complaint filed herein states in its first paragraph that this is an action to contest the state certification in the presidential election of 2000, asserting that the state Elections Canvassing Commission's certification on in November 26th, 2000, was erroneous, and the vote totals wrongly included illegal votes, and do not include legal votes that were improperly rejected.

Plaintiffs further contest the State of Florida's certification of the electors for George W. Bush and Richard Cheney as being elected.

They further challenge and contest the election certifications of the Canvassing Boards of Dade, Palm Beach, and Nassau Counties.

As to the Dade Canvassing Board, the Plaintiffs seek to compel the Dade board to include in its certification, and

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the state elections canvassing commission to include in the certification, a six-vote change in favor of Plaintiffs, resulting from the board's initial test and partial manual recount of one-percent of the countywide vote total conducted with respect to three precincts, designated by the Plaintiffs designee.

Also, additional votes manually hand-counted, and a further partial recount total resulting from the board's discretionary decision to stop completion of a full manual recount of all the votes and all the precincts in Dade, because of insufficiency of time to complete the same.

These represent the results of the count of an additional 136 precincts of the 635 precincts in Dade County.

And, also, the results of any Court order, manual review and recount of some nine to ten thousand voter cards or ballots, which at Plaintiff's request, have been separated, or were separated as alleged undervotes by the Dade Canvassing Board, or the Dade Supervisor of Elections, as a result of all of the countywide ballots being processed through the counting machines a third time and being

21 nonreadable by the machine.

22 As to the Palm Beach Canvassing Board, Plaintiffs seek
23 to compel the Palm Beach board to include in its
24 certification, and the State Elections Canvassing Commission
25 to include, in the state certification, additional votes

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1 representing the results of an attempted partial
2 certification of results, completed before the November 26th,
3 2000 deadline, mandated by the Florida Supreme Court, as well
4 as the additional remainder of the results of the manual
5 recount, which was completed after the deadline, and the
6 attempted certification thereof on December 1.

7 And in addition, the result of any Court ordered manual
8 review and recount of some 3,300 ballots which were objected
9 to during the Palm Beach board's manual recount which
10 Plaintiffs allege should have been counted as ballot votes
11 because that board used an improper standard.

12 As to Nassau, the Nassau County Canvassing Board, the
13 Plaintiffs seek to compel the Nassau Board to amend its
14 certification, and the State Elections Canvassing Commission
15 to amend the state certification to reflect and include the
16 results of the board's machine recount, rather than the
17 results of the board's original machine count, thereby
18 resulting in a favorable net gain to Plaintiffs, of 51 votes.

19 It is the established law of Florida as reflected in
20 State v. Smith that where changes or charges of irregularity
21 of procedure or inaccuracy of returns in balloting and
22 counting processes have been alleged, that the Court must
23 find as a fact that a legal basis for ordering any recount
24 exists before ordering such recount.

25 Further, it is well established and reflected in the

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1 opinion of Judge Joanos and Smith v. Tine, that in order to
2 contest election results under Section 102.168 of the Florida
3 Statutes, the Plaintiff must show that, but for the
4 irregularity, or inaccuracy claimed, the result of the
5 election would have been different, and he or she would have
6 been the winner.

7 It is not enough to show a reasonable possibility that
8 election results could have been altered by such
9 irregularities, or inaccuracies, rather, a reasonable
10 probability that the results of the election would have been
11 changed must be shown.

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

18 The Court further finds and concludes the evidence does
19 not establish any illegality, dishonesty, gross negligence,
20 improper influence, coercion, or fraud in the balloting and
21 counting processes.

22 Secondly, there is no authority under Florida law or

23 certification of an incomplete manual recount of a portion
24 of, or less than all ballots from any county by the state
25 elections canvassing commission, nor authority to include any

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1 returns submitted past the deadline established by the
2 Florida Supreme Court in this election.

3 Thirdly, although the record shows voter error, and/or,
4 less than total accuracy, in regard to the punchcard voting
5 devices utilized in Dade and Palm Beach Counties, which these
6 counties have been aware of for many years, these balloting
7 and counting problems cannot support or effect any recounting
8 necessity with respect to Dade County, absent the
9 establishment of a reasonable probability that the statewide
10 election result would be different, which has not been
11 established in this case.

12 The Court further finds that the Dade Canvassing Board
13 did not abuse its discretion in any of its decisions in its
14 review in recounting processes.

15 Fourthly, with respect to the approximate 3,300
16 Palm Beach County ballots of which Plaintiffs seek review,
17 the Palm Beach Board properly exercised its discretion in its
18 counting process, and has judged those ballots which the
19 Plaintiff wish this Court to, again, judge de novo.

20 The old cases upon which Plaintiff rely are rendered
21 upon mandamus prior to the modern statutory election system
22 and remedial scheme enacted by the Legislature of the State
23 of Florida in Chapter 102 of the Florida Statutes.

24 The local boards have been given broad discretion which
25 no Court may overrule, absent a clear abuse of discretion.

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1 The Palm Beach County board did not abuse its
2 discretion in its review and recounting process.

3 Further, it acted in full compliance with the order of
4 the Circuit Court in and for Palm Beach County.

5 Having done so, Plaintiffs are estopped from further
6 challenge of this process and standards. It should be noted,
7 however, that said process and standards were changed from
8 the prior 1990 standards, perhaps contrary to Title III,
9 Section (5) of the United States code.

10 Furthermore, with respect to the standards utilized by
11 the Board in its review and counting processes, the Court
12 finds that the standard utilized was in full compliance with
13 the law and reviewed under another standard would not be
14 authorized, thus creating a two-tier situation within one
15 county, as well as with respect to other counties.

16 The Court notes that the Attorney General of the State
17 of Florida enunciated his opinion of the law with respect to
18 this, in a letter dated November 14, 2000, to the Honorable
19 Charles E. Burton, Chair of the Palm Beach County Canvassing
20 Board, which, in part, is as follows: "A two-tier system
21 would have the effect of treating voters differently,
22 depending upon what county they voted in."

23 The voter in a county where a manual count was
24 conducted, would benefit from having a better chance of

25 having his or her vote actually counted, than a voter in a
0012
1 county where a hand count was halted. As the State's chief
2 legal officer, I feel a duty to warn that the final certified
3 total for balloting in the State of Florida includes figures
4 generated from this two-tier system of differing behavior by
5 official Canvassing Boards, the State will incur a legal
6 jeopardy under both the United States and the state
7 constitutions.

8 This legal jeopardy could potentially leave Florida
9 having all of its votes, in effect, disqualified, and this
10 state being barred from the Electoral College's election of a
11 President.

12 The Court finds further that the Nassau County
13 Canvassing Board did not abuse its discretion in its
14 certification of Nassau County's voting results.

15 Such actions were not void or illegal, and was done
16 with the proper exercise -- within the proper exercise of its
17 discretion upon adequate and reasonable public notice.

18 Further, this Court would further conclude and find
19 that the properly stated cause of action under
20 Section 102.168 of the Florida Statutes to contest a
21 statewide federal election, the Plaintiff would necessarily
22 have to place at issue and seek as a remedy with the
23 attendant burden of proof, a review and recount on all
24 ballots, and all of the counties in this state with respect
25 to the particular alleged irregularities or inaccuracies in

0013
1 the balloting or counting processes alleged to have occurred.

2 As recently stated by Judge Kline with the concurrence
3 of Chief Judge Warner in the Fourth District Court of Appeal
4 case, of Bedell v. Palm Beach Canvassing Board,
5 Section 102.168 provides in Subsection (1) that the
6 certification of elections may be contested for presidential
7 elections. Section 103.011 provides that, "The Department of
8 State shall certify as elected the presidential electors of
9 the candidates for President and Vice President who receive
10 the highest number of votes."

11 There is in this type of election, one statewide
12 election, and one certification. Palm Beach County did not
13 elect any person as a presidential elector, but, rather, the
14 election with the winner-take-all proposition, dependent on
15 the statewide vote.

16 Finally, for the purpose of expedition, due to the
17 exigencies surrounding these proceedings, this Court will
18 deny those portions of the pending motions to dismiss of the
19 various parties herein not affected by or ruled upon in these
20 findings and conclusions in those portions consisting solely
21 of matters of law being reviewable upon such denial.

22 In conclusion, the Court finds that the Plaintiff
23 failed to carry the requisite burden of proof, and the
24 judgment shall be hereby entered, and the Plaintiffs will
25 take nothing by this action. All ballots in the possession

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1 of the Clerk of this Court shall remain pending review. A
2 judgment will be entered and filed with the Clerk immediately
3 following the hearing.

4 (HEARING CONCLUDED AT 4:48 P.M.)
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1 , through 14, are a true and correct record of the aforesaid
proceedings.

0016
1 Certified Realtime Reporter
2 519 East Park Avenue
3 Tallahassee, Florida 32301
4 (850) 222-5508
5 My Commission Expires March 20, 2001
6

7 CERTIFICATE OF NOTARY
8

9 STATE OF FLORIDA:
10 COUNTY OF LEON:
11

12 I, B. J. QUINN, Notary Public in and for the
13 State of Florida at Large, do hereby certify that the witness
14 personally appeared before me and was first duly sworn by me to
15 testify to the truth on the date and time indicated herein.
16

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2
3

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

DCA CASE NO. 1D00-4745

LOWER CASE NO. 00-2808

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

Appellants

v.

KATHERINE HARRIS, as SECRETARY OF STATE, et al.,

Appellees

On Discretionary Review Of A Question Certified
By The District Court Of Appeal, First District, To
Be Of Great Public Importance Requiring Immediate
Resolution By This Court

AMENDED BRIEF OF APPELLEES/INTERVENORS GLENDA CARR,
LONNETTE HARRELL, TERRY RICHARDSON, GARY H. SHULER,
KEITH TEMPLE, AND MARK A. THOMAS

WILLIAM KEMPER JENNINGS
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EX. 3

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STATEMENT OF THE CASE AND FACTS

Appellees/Intervenors adopt the statements of the case and facts posited by Appellee GEORGE W. BUSH and Appellee KATHERINE HARRIS provided, however, that the following supplements said statements of the case and facts.

Appellees/Intervenors are registered voters in their respective counties who voted for the electors of Governor George W. Bush for the office of President of the United States. They reside and voted in counties which were not subject to any manual recount after the election of November 7, 2000. They are:

GLEND A CARR, a resident of Duval County, Florida;

LONNETTE HARRELL, a resident of Okaloosa County, Florida;

TERRY RICHARDSON, a resident of Bay County, Florida;

GARY SHULER, a resident of Calhoun County, Florida;

KEITH TEMPLE, a resident of Duval County, Florida; and

MARK A. THOMAS, a resident of Leon County, Florida.

These voters were allowed to intervene on the basis of their allegations in their petition for declaratory judgment that the manual recount provisions of Chapter 102, Florida Statutes, were facially or in their application in the November 7, 2000 presidential election violative of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Importantly, these Intervenors did not waive the claims asserted in such petition or herein because the

manual recount provisions do not permit a voter who is not a candidate to seek a manual recount.

ARGUMENT

- I. IF THIS COURT EXERCISES ITS DISCRETIONARY JURISDICTION TO REVIEW THIS CASE AS ONE OF GREAT PUBLIC IMPORTANCE REQUIRING IMMEDIATE DETERMINATION BY THIS COURT, AN ESSENTIAL ISSUE BEFORE THE COURT IS WHETHER THE SUBJECT APPLICATION OF THE MANUAL RECOUNT PROVISIONS OF CHAPTER 102, FLORIDA STATUTES, ARE CONSTITUTIONAL UNDER THE PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS' DUE PROCESS AND EQUAL PROTECTION CLAUSES.

Appellees/Intervenors defer to the arguments of Appellee George W. Bush and Appellee Katherine Harris in regard to whether this court should exercise its discretionary jurisdiction and review the merits of Appellants' case. However, if this court exercises its discretionary jurisdiction to review this case as one of great public importance requiring immediate determination by this court, an essential issue before the court is whether Gore's attempted application of the manual recount provisions of Chapter 102, Florida Statutes, are constitutional under the provisions of the Fifth and Fourteenth Amendments' Due Process and Equal Protection of Law clauses.

- II. THE APPLICATION OF THE FLORIDA MANUAL RECOUNT STATUTES IN CHAPTER 102, FLORIDA STATUTES, SO AS TO ALLOW THE LOSING CANDIDATES IN THE STATEWIDE ELECTION, ALBERT GORE, JR. AND JOSEPH I. LIEBERMAN, TO SEEK A MANUAL RECOUNT IN THREE COUNTIES WHERE THEY WON OVERWHELMINGLY IS VIOLATIVE OF THE APPELLEES'/INTERVENORS' RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellants, the Democratic candidates for President and Vice President of the United States have sought a manual recount of

disqualified or rejected ballots in selected counties of the State of Florida, to-wit: Broward County, Palm Beach County, and Miami-Dade County. They have not requested a manual recount of disqualified, rejected, or "undervotes" in other counties within Florida. They have selected only those counties where they obtained an overwhelming majority vote. This application of the manual recount statute violates Appellees/Intervenors' right to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.

As pointed out by the trial court, the Florida Attorney General, Robert Butterworth, had indicated that such selected and limited procedure could be violative of these constitutional provisions and thereby jeopardize the enfranchisement of all Florida voters. In his findings of fact, the trial judge quoted from Attorney General Butterworth's letter to Judge Burton of the Palm Beach County Canvassing Board:

SAULS: Furthermore, with respect to the standards utilized by the Board in its review and counting processes, the Court finds that the standard utilized was in full compliance with the law and review under another standard would not be authorized thus creating a two-tier situation within one county, as well as with respect to other counties.

The Court notes that the Attorney General of the State of Florida enunciated his opinion of the law with respect to this, in a letter dated November 14, 2000, to the

Honorable Charles E. Burton, Chair of the Palm Beach Canvassing Board, which, in part, is as follows: "A two-tier system would have the effect of treating voters differently, depending upon what county they voted in."

The voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted. 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-tier system of differing behavior by official Canvassing Boards, the State will incur a legal jeopardy under both the United States and the state constitutions.

This legal jeopardy could potentially leave Florida having all of its votes, in effect, disqualified, and this state being barred from the Electoral College's election of a President. Court Ruling Transcript, December 4, 2000, Case No. CV-00-2808, *Gore v. Katherine Harris, as Secretary of State, et al.*, (2d Fla.Cir.Ct. 2000). [Emphasis added]

There is serious doubt as to whether the statutory provisions calling for an application for a manual recount are intended to be used in a statewide election. However, even if such provisions are so intended, their use so as to "cherry pick" three counties is unconstitutional under the due process and equal protection clauses

of the United States Constitution. Appellants have attempted selected and limited application of the manual recount provisions in a manner clearly designed to weigh heavily in favor of the Gore-Lieberman candidacy. The court below recognized this:

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 as a remedy with the attendant burden of proof, a review and recount on all ballots and all of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred. *Id.*

Determining that the methods by which Gore-Lieberman sought a manual recount in the three (3) counties he selected violates the equal protection and the due process clauses of the United States Constitution is dispositive of all issues raised by Appellants. In other words, the election results certified to the Secretary of State either on November 14th or before the extended deadline established by this Court, both of which gave Governor Bush a plurality in Florida, would be final results because the selective manual recount sought by Gore-Lieberman is unconstitutional.

Alleged infringement of voting rights is subject to careful scrutiny:

Undoubtedly, the right of suffrage is a fundamental matter in

a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 1381 (1964).

The United States Supreme Court had dealt with the question of equal protection of voter rights under many circumstances where a disparity exists or could exist between representation afforded to a citizen in one part of a state versus that afforded to a citizen in another part of the state. In the instant case the Appellees/Intervenors contend that a two-tiered vote counting system violates the due process and equal protection clauses. Such a two-tiered system is like the problem presented in *Reynolds* where reapportionment was at issue:

The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state. *Reynolds*, at 561.

The specific allegation in *Reynolds* was that voters in one part of the State of Alabama had greater representation per person in the State Legislature than voters in another part of Alabama. The United States Supreme Court concluded:

A citizen, a qualified voter, is no more nor no less so because he

lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of government of the people, by the people, (and) for the people. The Equal Protection Clause demands no less than substantially equal state legislative representation for, all citizens of all places as well as of all races. *Reynolds*, at 568.

In the present case, the statutory provisions providing for a manual recount as urged by Gore-Lieberman are not reasonably related to the plain legislative purpose of allowing a losing candidate to seek determination of the true result of all the votes in the subject election. These provisions of Florida law as argued by Appellants would permit a candidate who loses the statewide popular vote but wins in some counties, often overwhelmingly, to choose only those counties for the purpose of a recount. Such application would impermissibly allow the statewide loser to undermine the weight and value of the votes in those counties where such candidate lost, often overwhelmingly. This misapplication of Florida election law therefore does not provide for a more accurate reflection of the will of the voters but in fact allows for an unfair distortion of the statewide vote.¹

¹ There were other counties in the State of Florida that employed similar or identical "votematic" machines where substantial amount of "undervotes" occurred. Many of these counties were carried by the Bush electors in overwhelming numbers. For example, Duval County results indicate an

Thus, the application of the statute proposed by Gore-Lieberman violated the due process clauses, the equal protection clause, and the constitutional protection of each individual's right to vote under the provisions of the United States Constitution, Amendments V and XIV. Appellants' application of Florida election law would travel well down the path to making Attorney General Butterworth's warning of disenfranchising all the voters in Florida a reality.

Although Appellees/Intervenors have found no precedent with the exact circumstances presented by the application of the manual recount provisions urged by the Gore-Lieberman candidacy, the United States Supreme Court's decisions establishing the "one man, one vote" rule are controlling. See *Reynolds*. No election system established or applied under state law may give the votes for a particular candidate or political party more weight than the votes for the other candidates or parties. Exactly as the long-rejected

approximate 55% majority for Governor Bush; Collier County

results showed approximately 66% for Governor Bush; Indian River County showed approximately 59% for Governor Bush; and Marion County showed approximately 55% for Governor Bush. There were many other counties with the "votematic" system carried by Governor Bush which also had "undervotes." Moreover, because Governor Bush carried fifty one (51) of the sixty seven (67) counties in Florida, there were many other counties using different election equipment, and some of these counties also had substantial "undervotes."

This information was provided by the Exhibits submitted into evidence by the Secretary of State and by the testimony of the statistical experts. See Secretary Harris' Exhibits S-DX3, S-DX4 and S-DX9.

schemes of gerrymandering created election advantages for a particular party or candidate, the misapplication of the Florida manual recount statutes, Chapter 102, by the Gore-Lieberman candidacy has diluted the votes of the Appellees/Intervenors and all the other voters in counties where a manual recount was not effected. This discrimination violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Finally, there is another constitutional issue in regard to this election contest. Governor Bush and Vice President Gore are not running for an office in Florida and are not elected to any office by the citizens of the State of Florida. Appellants have totally ignored the constitutional provisions regarding presidential electors. This issue has been addressed by Intervenor Thrasher, a currently certified Republican elector. Appellees/Intervenors adopt and concur in the Motion to Dismiss as presented by Intervenor Thrasher which we respectfully submit is a threshold issue. Should this Court reject the position of Intervenor Thrasher, we respectfully urge for the reasons set forth above that the Court deny the relief sought by Gore-Lieberman because such relief would offend the due process and equal protection clauses.

CONCLUSION

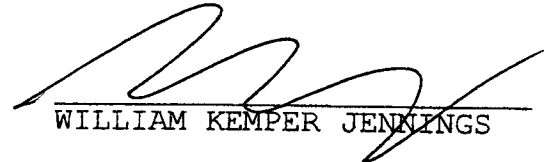
The application of the manual recount statutes as proposed by Gore-Lieberman creates a "two-tiered" system of counting votes and thereby, as Attorney General Butterworth has warned, threatens the disenfranchisement of all Florida voters in the Electoral College.

WHEREFORE, Appellees/Intervenors urge this Court to deny Appellants' requested relief of requiring the manual recount of votes in their selected counties. As discussed above, to grant such relief would apply the Florida manual recount provisions in a manner violative of Appellees'/Intervenors' rights to due process and equal protection under law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

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CERTIFICATE OF SIZE AND STYLE OF TYPE

I HEREBY CERTIFY that the font used in the body of this brief is 12-point Courier, a font that is not proportionately spaced.


WILLIAM KEMPER JENNINGS

CERTIFICATE OF SERVICE

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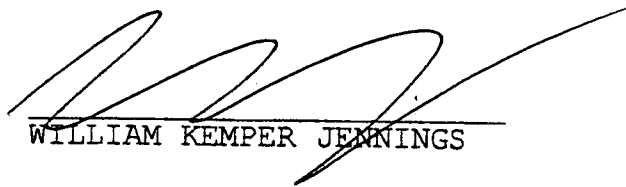
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