

ALBERT GORE, Jr., Nominee of the
Democratic Party for President of the
United States, the FLORIDA
DEMOCRATIC EXECUTIVE COMMITTEE,
and the Miami-Dade County Democratic Party,

Petitioners/Movants

v.

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

Respondents.

Case No. _____

PALM BEACH COUNTY CANVASSING BOARD
V.
HARRIS

Consolidated Case Numbers SC00-2346

**PETITION FOR WRIT OF QUO WARRANTO, WRIT OF MANDAMUS,
WRIT OF MANDAMUS, PROHIBITION OR
SUCH OTHER WRIT THE COURT DEEMS APPROPRIATE
UNDER ITS ALL WRITS AUTHORITY AND ALTERNATIVE
EMERGENCY PETITION FOR WRIT OF MANDAMUS,
WITH INCORPORATED MEMORANDUM OF LAW**

Petitioners/Movants, the Miami-Dade County Democratic Party, Albert Gore, Jr., and the Florida Democratic Executive Committee (hereinafter "petitioners"), respectfully ask this Court to issue an emergency writ of mandamus compelling respondents Miami-Dade County Canvassing Board, Lawrence D. King, Myriam Lehr, and David C. Leahy, (hereinafter the "Canvassing Board") to resume the manual recount of ballots in Miami-Dade County, pursuant to the "mandatory obligation" under Florida law, and this Court's recent decision in Palm Beach County Canvassing Board v. Harris.

Emergency relief from this Court is required to due to the pendency of the recount certification deadline set by this Court in Harris. Without this emergency relief, the Court's mandate in Harris will be frustrated by a deliberate campaign of delay and the intimidation of local officials in the fulfillment of their obligation to tabulate the votes of the people of Florida.

FACTUAL BACKGROUND

Many of the underlying facts are well known to this Court. See Harris, Slip. Op. 2-14.

Pursuant to public notice, on November 14, the Canvassing Board in Miami-Dade County agreed to conduct a sample recount of three Miami-Dade precincts. Because the sample manual recount (of 1% of Miami-Dade County votes) yielded a

statistically significant net gain of votes for Vice President Gore, counsel for the Democratic Party urged that, in the context of the narrow statewide margin in Florida, a full manual recount was mandated. By a two to one vote, however, the Canvassing Board declined to proceed to either a manual recount of all 10,750 undervotes or a manual recount of all 653,000 Miami-Dade ballots. In stating the rationale for the majority decision, Supervisor Leahy (joined by Judge Lehr) articulated the view expressed by Secretary of State Katherine Harris that any error contemplated by the manual recount laws was confined to mechanical failure. (Vol. II-W).¹ Ultimately, the Board agreed to accept the additional votes for found in the sample recount as votes for Vice President Gore. Id.

The following day, the Broward County Canvassing Board determined to proceed with a county-wide manual recount. (Vol. 1-M.). Moreover, that same day a Palm Beach Circuit Judge issued the first judicial declaration by a trial court to address standards for manual recounts. Recognizing that these two intervening developments would very probably add hundreds of additional votes to existing tallies, petitioners submitted in writing their request on November 15, 2000 that the

¹ The opinion of the Secretary of State has since been held to be incorrect as a matter of law. See Palm Beach County Canvassing Board v. Harris, Slip Op. at 14. Thus, in weighing the circumstances that account for the delays in Miami-Dade County, the impact of a legally erroneous opinion of the Secretary of State must be taken into account.

Canvassing Board reevaluate its decision. Id. Following extensive argument and additional delays, the Canvassing Board voted two-to-one to undertake a county-wide manual recount on November 17, 2000.

This recount finally began on Sunday morning, November 19, 2000 at 9:00 a.m. The recount was underway when this Court heard argument in the Harris matter on Monday, November 20, and rendered its decision the following day. See Palm Beach County Canvassing Board v. Harris. (Vol. 1-V).

Ironically, the Court's opinion in Harris, which underscored the importance of determining the voters' intent, and prescribed a time-table for completing the process necessary to validate that intent, had an unintended effect on the then-underway recount in Miami-Dade County.

Unhappily, in Miami-Dade County, the acceleration of local tensions seemingly displaced respect for the judicially-crafted framework for resolution of the present controversy. During the previous day, some opponents of the tabulation had launched personal attacks directed at Canvassing Board members and election personnel. The morning after this Court's decision, those tactics plunged to even uglier depths, exemplified by a New York Congressman's accusations that "thugs" were trying to "steal" the election in Miami-Dade County. Scores of noisy demonstrators engulfed the counting floors. Many were yelling and some pounding

on the doors and windows in close proximity to the election department's staff. Democratic personnel were physically assaulted within yards of the vote counting, while in the lobby below prominent Republicans launched vituperative attacks on the Canvassing Board members and its staff.² (Vol. II-U,V)

During that morning, Canvassing Board members convened and decided that, in light of this Court's deadline, they would manually recount the category of all ballots which were found to be "undervotes" -- votes where the tabulating machine failed to register a vote. This rational decision was an attempt to focus the Board's attention on correcting the greatest number of tabulation errors within the limited time allowed by this Court for the recount. As of that time, two full days of counting had generated a recount of over 96,500 ballots, representing 139 precincts. These results confirmed overwhelmingly that votes lost through the machine reading of punch cards were indeed being tabulated by human counters. Based on manual recounting,

² One source described the Canvassing Board's decision as occurring "against a backdrop of shouting protesters who at times accosted election officials." (Vol. II-Q). One Board member, Supervisor Leahy, acknowledged that the protesters influenced his decision to abandon the recount because "the decision this board was faced with made counting the ballots and separating the undercounts impossible." (Vol. II-R). Another source described the "raucous" crowd scene with people pounding on windows, shouts of "voter fraud," and a "fracas that clearly unsettled Elections Supervisor David Leahy." *Id.* Still another account confirmed, "A mob of angry Republicans storming the 19th floor of the Stephen P. Clark Building demanding that the recount be stopped." (Vol. II-S,T) This Court has the prerogative to judicially notice the news reports that chronicle such circumstances and, in the interests of justice, should consider these reports. Peters v. Delaware River Port Authority, 16 F.3d 1346 (3d Cir. 1994).

over 116 additional votes had been counted for Governor Bush, while 272 more votes for Vice President Gore were found through the manual recount. Put another way, 388 votes that the machines failed to tabulate were counted after approximately 20% of the precincts were reviewed. The net gain for Vice President Gore of 156 votes -- which, if extrapolated, could total almost 800 votes county-wide -- clearly could have a substantial impact on the outcome of the election.

Abruptly, following their lunch break -- and perhaps influenced by the protests, political attacks, and near mob-like action (see note 2, supra) -- and without prior notice of any intention even to consider the issue, the Canvassing Board began an immediate discussion of whether it would cease all manual recounts due to the supposed impossibility of complying with this Court's deadline. Contrary to existing practice, in which parties had been afforded prior notice and an opportunity to prepare presentations for any significant decision, this unexpected development came without notice.³

In addition to the cessation of all further recounting, the Canvassing Board determined that it would discard the hundreds of additional votes that had been duly

³ Because they had received no prior notice that the Board would be considering whether to stop all manual recounts, the two principal attorneys for the Miami-Dade County Democratic Party, who had conducted all previous presentations and proceedings concerning Presidential election recounts, were not even in the building; one was out-of-town.

counted during the previous two days. (Vol. I-H). Thus, while the Board had certified the votes tabulated in the sample recount, it simply discarded – without explanation or rationale – the hundreds of votes tabulated in the partially-completed full recount. *These voters had their votes inexplicably erased by the Board, though they were lawfully cast and lawfully tabulated.*

Hours later, petitioners filed an original action with the Third District Court of Appeal seeking an emergency writ of mandamus compelling the Canvassing Board to resume the manual recounting. While denying mandamus, the Third District found that the Canvassing Board's mandatory obligation to proceed with manual recounts had been established:

The results of that sample recount showed "an error in the vote tabulation which could effect the outcome of the election[,] " thus triggering the Canvassing Board's mandatory obligation to recount all the ballots in the county. *See* §102.166(5)(c), Fla. Stat. (1999).

Op. At 2-3. By virtue of this Court's decision, on November 21, however, the Third District found that it could not compel the Canvassing Board to proceed.

Since the Canvassing Board has determined that a complete manual recount cannot be done within the time frame set in *Harris*, mandamus cannot lie.

Op. At 4, *citing*, *Agency for Health Care Admin. v. Mt. Sinai Med. Ctr. Of Greater Miami*, 690 So. 2d 689 (Fla. 1st DCA 1997) ("Mandamus will not be to compel the performance of an act that is futile or impossible to perform.").

While unable to fashion a remedy, even though it found that a mandatory statutory duty concerning manual recounts had been established, Op. At 2-3, the Third District suggested that petitioners proceed to a different forum:

This ruling is without prejudice to the petitioners to seek relief in the Florida Supreme Court from the court-ordered deadline and to ask the Supreme Court to fashion an equitable remedy tailored to the conditions of Miami-Dade County.

Op. at 4. The petition to this Court followed the next morning.

LEGAL ARGUMENT

INTRODUCTION

The voters of Florida have waited two weeks since the Presidential election for their votes to be counted accurately, completely, and fairly. After a plethora of

obstacles were launched to such a count,⁴ this Court, in Palm Beach County Canvassing Board v. Harris, made it clear that

We consistently have adhered to the principle that the will of the people is the paramount consideration. Our goal today remains the same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be.

Palm Beach County Canvassing Board v. Harris, No. SC00-2346 (Fla. Nov. 21, 2000), slip op. at 9 (footnotes and citations omitted). Thus, this Court ordered the Secretary of State not to certify the results of the Presidential election until Sunday, November 26, at 5:00 p.m. at the earliest, so that the manual recounts could continue.

⁴ The obstacles aimed at blocking the recounts have included: (1) An opinion by Secretary of State Harris, dated November 13, holding manual recounts illegal (which was founded to be legally incorrect by this Court); (2) A statement by Secretary of State Harris holding that recounts submitted after November 14 would be accepted (which was found to be contrary to law by Judge Lewis); (3) A decision by Secretary of State Harris rejected additional votes from Palm Beach, Broward, and Dade counties (which was set aside by this Court in Harris); (4) An application to this Court for an order terminating the recounts (which was rejected by this Court on November 16).

Additionally, the manual recounts in Dade County have been subjected to a separate set of attacks and obstacles. A hearing on the recounts was delayed for two days by various motions and objections. The evening before the recount was to commence, the Republican Party filed a lawsuit seeking to enjoin the manual recount. Allen v. Canvassing Board of Miami-Dade County, Case No. 00-30338-CA-13 (Miami-Dade Cir. Ct.). (Vol. 1-P). The theories included the constitutional claim previously rejected by Judge Middlebrooks, as well as a Public Records Act claim insisting that before any ballots could be processed for a recount, the Republicans must first be allowed to examine, record, and photograph every single one of the 653,000 ballots in Miami-Dade County. The following morning, at a 7:30 a.m. hearing, the emergency judge denied the Republican injunctive request, noting the two interim orders of this Court on November 16 and 17, as well as the imminence of this Court's decision on the merits. (Vol. 1-R).

The next day, Monday, November 20, the Republican Party renewed its injunction request before the regularly assigned judge. On Tuesday morning, November 21, 2000, following an 8:00 a.m. hearing, the Republicans requested assorted relief that included requiring the Canvassing Board to extract all chads from trash receptacles. Once more, all such relief was denied.

The purpose of extending the time for certification was not for delay's sake, but rather to permit completion of "ongoing manual recounts," slip op. at 35. The Miami-Dade County Canvassing Board's abrupt decision on November 21 simply to abandon its statutory responsibility, purportedly due to the burden of complying with this Court's ruling, frustrates the implementation of this Court's mandate and defies the principles of Florida law that place the expression of the true will of the electorate ahead of concerns about administrative inconvenience.

The Canvassing Board should be ordered by this Court, now, to return to the work of counting the people's ballots before time runs out.⁵ Determining the will of the voters cannot be frustrated by the whim of local officials. Moreover, discarding the votes tabulated under the partial recount is inappropriate under Florida law and this Court's decision in Harris.⁶ This Court should direct that those votes be certified to the Secretary of State, and, more broadly, should direct completion of the rest of the recount. Because time is of the essence under the certification deadlines set by this Court, emergency relief is required.

⁵ While the Miami-Dade Canvassing Board was not a party to Harris, the holding of that case clearly applies just as much to it as it does to the Broward and Palm Beach County Canvassing Boards. Moreover, on November 18, 2000, in the Harris proceedings, the Miami-Dade Board filed a notification to this Court of its decision to proceed with a county-wide manual recount.

⁶ Moreover, this action may be violative of the U.S. Constitution. See Griffin v. Burns, 570 F.2d 1065, 1078-1080 (1st. Cir. 1978)

**Florida Law Requires Mandamus To Compel
Election Functionaries To Perform Their Public Duties.**

Mandamus is the proper remedy. Such writs are granted by the courts to enforce “the performance of ministerial duties imposed by law where such duty has not been performed as the law requires.” State ex rel. Clendinen v. Dekle, 173 So.2d 452, 456 (Fla. 1965). The power to grant such requested is embodied within Article 5, §4(b)(3) of the Florida Constitution. That article confers upon this Court jurisdiction to “issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to complete exercise of its jurisdiction.” Moreover, “[t]o the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.” Id.

Petitioners properly and necessarily seek a writ of mandamus compelling the Canvassing Board of Miami-Dade County, Florida to resume immediately the ministerial duty of performing a manual recount of voter ballots in accordance with §102.166(5). Following a partial recount of three precincts in the county, the Canvassing Board initiated such a county-wide recount. As the Third District properly found, such a sampling showed "an error in the vote tabulation which could affect the outcome of the election" In this case, as the court below held, a manual recount is a "mandatory obligation." (Vol. 1-A; Op. at 2-3).

Distressingly, the Board responded to this "mandatory obligation" without any meaningful effort to marshal resources, or augment its structure and operation to meet the needs of the public and Florida law. The Canvassing Board has abruptly abandoned the manual recount, notwithstanding the statutory framework of §102.66(5) and § 102.166(5)(A),⁷ and refused to even attempt compliance with its "mandatory obligations," effectively blaming its failure to act on this Court's deadline. Moreover, the Board decided to discard the nearly 400 additional votes it had tabulated through this partial recount – votes lawfully cast and lawfully tabulated.

As a result, petitioners must turn to this Court for redress. ““The power which [a] court exercises by the writ of mandamus to compel a public officer to correctly perform the ministerial duties pertaining to his office and which by law he is required to perform is independent of the statute; it rests in the sovereign power of the state, and is confided to the judicial branch of government.”” State ex rel. Peacock v.

⁷ Section 101.5614(5) provides specific manual counting procedures with respect to a ballot which cannot be read by the automated punch card reading equipment. This statute specifies remedies in the case of any ballot card that is "damaged or defective so that it cannot properly be counted by the automatic tabulating equipment." This section continues with the following language:

The totals for all such ballot cards counted manually shall be added to the totals for the several precincts or election districts. **No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.** [emphasis supplied].

See also State ex rel. Knott v. Haskell, 72 Fla. 176, 72 So. 651 (Fla. 1916).

Latham, 125 Fla. 788, 170 So. 472, 479 (1936) (citing State ex rel. Knott v. Haskell, 72 Fla. 176, 72 So. 651 (Fla. 1916)).

Like other jurisdictions, Florida law applies to mandamus to compel canvassing boards and election officials to proceed with their responsibilities. In State ex rel. Knott v. Haskell, 72 Fla. 176, 72 So. 651 (1916) this Court held that "[t]he ministerial legal duty of election officers to make true and proper counts and returns of election may ... be enforced by mandamus." 72 So. at 663. In another case reflecting Florida's longstanding commitment to scrupulous adherence to election duties, the Court held that a "Petitioner in a mandamus proceeding had a clear legal right to a correct and accurate count of the votes cast ... and mandamus was a remedy available to him to enforce this right." Ex parte Beattie 124 So. 273, 275 (Fla. 1929). See also State ex rel. Titus v. Peacock, 170 So. 309 (Fla. 1936) (mandamus to canvassing board to compel validation of votes in case of recount); State ex rel. Peacock v. Latham, 125 Fla. 779, 170 So. 469 (Fla. 1936) (court has jurisdiction to correct the vote count by mandamus "irrespective of whether or not the correction of the count, when made, will change the result"); State ex rel. Barris v. Pritchard, 111 Fla. 122, 149 So. 58 (Fla. 1933). These principles clearly establish that mandamus is a proper remedy to

compel a canvassing board to perform its duties concerning the counting of ballots.⁸ Applied here, the law is plain that the Canvassing Board has a mandatory obligation to proceed with manual recounting that is enforceable through mandamus.⁹

Because the mandatory obligation is clear, the only real issue is whether this Court's decision in Harris will be permitted to have the ironic result of eliminating the manual recount remedy, even though manual recounting was clearly required by the Florida legislature. Upon completion of the "sample" precinct recount, the statute requires as follows:

If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county Canvassing Board *shall*:

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

⁸ Recent cases confirm the propriety of mandamus as a remedy in this case. See State ex rel. Chappel v. Martinez, 536 So. 2d 1007 (Fla. 1988) (mandamus issued to compel Department of State to accept results); Stapleton v. Board of Elections, St. Thomas - St. John, 821 F. 2d 191 (3d Cir. 1987), (affirming mandamus to compel canvassing board to apply proper standard in manual counting of votes.)

⁹ In contrast to scenarios entrusted to the Canvassing Board's discretion, such as the initial sample recount prerogative under §102.166(4), the responsibility to proceed with statutory manual recount procedures is, as the Third District found, a mandatory obligation.

Thus, the threshold decision under subsection (4), to initiate a one percent manual review, upon timely request of a candidate or party a county Canvassing Board, *is discretionary* ("may authorize a manual recount.") §102.166(4)(c) Fla. Stat. (emphasis added); see Broward County Canvassing Bd. v. Hogan, 607 So.2d 508, 510 (Fla. 4th DCA 1992). As the Third District confirmed, however, once a Canvassing Board exercises its discretion to initiate the recount procedures and receives actual results, its duties with respect to those procedures become mandatory.

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

(c) Manually recount all ballots.

§ 102.166(5) (emphasis added); see also Harris, slip op. at 27 ("if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount ...").¹⁰

Thus, upon finding an error in the vote tabulation in the sample recount with the potential to affect the outcome of the election as occurred here, the statute confers on the Canvassing Board certain nondiscretionary legal duties. While the obligation to proceed with manual recounting is plain, the statute specifies several alternatives for the Canvassing Board to follow once an error is identified that triggers manual recounting. The alternative of subparagraph (a) directing the Board to "correct the error," clearly authorizes a manual recount of "undervotes." After all, it follows that the principal, if not exclusive, error addressed through manual recounts is found with the so-called undervotes. The undervotes represent precisely the category of ballots that can, in many instances, be tabulated through manual recounts, but not by machines.

¹⁰ The word *shall* ordinarily "means 'must' and is inconsistent with a concept of discretion." Black's Law Dictionary 1375 (6th ed. 1990); see id. (a statute's use of the word *shall* "has the invariable significance of excluding the idea of discretion"); see also Florida Tallow Corp. v. Bryan, 237 So.2d 308, 309 (Fla. 4th DCA 1970) ("The word 'shall' when used in a statute or ordinance has, according to its normal usage, a mandatory connotation.")

Thus, the significant variance between the mechanical tabulation and the manual ballot count is precisely the kind of tabulation “error” that requires the Canvassing Board to invoke a manual recount remedy. The Florida statutory provision governing ballots used in mechanical tabulation systems expressly provides that “[n]o vote [on such a ballot] shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the Canvassing Board.” § 101.5614(5), Fla. Stat. It follows that if there *is* a “clear indication of the intent of the voter” on the ballot, but the tabulation machine failed to identify that intent, then the machine has made a tabulation “error” by declaring the vote on that ballot void.¹¹

Therefore, the need to recount manually the undervotes in order to “correct the error” is compelled by § 102.166(5)(a) (“correct the error and recount the remaining precincts with the vote tabulation system.”) The teachings of Harris further commend this view. “An ‘error in the vote tabulation’ includes a discrepancy between the number of votes determined by a voter tabulation system and the number of votes

¹¹ Cf. Ohio County Comm’n v. Manchin, 301 S.E.2d 183, 185-86 (W. Va. 1983) (describing similar manual recount procedure under W. Va. Code § 3-4A-28(4), which requires identification of a “variance” between the mechanical tabulation and a manual count in a sample recount, as “a means of testing the *accuracy* of the tabulation obtained through the electronic voting device” (emphasis added; internal quotation marks omitted)); DeBroux v. Board of Canvassers for the City of Appleton, 557 N.W.2d 423, 425 & n.3 (Wis. Ct. App. 1996) (describing “undervoted ballot” as occurring when tabulation machine “fails to record a designated vote” that can be identified in a manual recount); In re Election of November 6, 1990, 569 N.E.2d 447, 457-59 (Oh. 1991) (describing how different tabulation machines can make different overvote and undervote errors on same ballots, and explaining that a manual recount can correct such errors).

determined by a manual count of a sampling of precincts pursuant to § 102.166(4)."

Harris, slip op. at 14.

Because the Board Had a Mandatory Obligation to Proceed with Manual Recounting, it Was Manifest Error to Deny Any Form of Relief.

Mandamus is particularly appropriate in cases such as this one, so that voters who have done all the statute requires them to do in casting their ballots are not be disfranchised solely because of the failure of election officials to observe direct statutory obligations. Boardman v. Esteva, 323 So.2d 259 (Fla. 1975). Thus, consistent with Florida's Declaration of Rights that "all power is inherent in the people," Art.I, §1, Fla. Const., the remedy of mandamus will ensure compliance with the legal requirement to count *all* votes in this landmark case, where but a fractional number of "cast but uncounted votes" could determine the fate of this country. Otherwise, the Canvassing Board's "deviation from the proper performance of the duties of the election officials ... may so frustrate the contemplated orderly procedure as to make inapplicable provisions of this statute which would otherwise be held to be mandatory." Peacock, 170 So. at 478.

In this case, the sample manual recounts completed thus far confirm that the mechanical tabulation made sufficient errors, that, when extrapolated, would "affect

the outcome of the election.” § 102.166(5), Fla. Stat¹². The Canvassing Board was thus required by law to invoke a statutory solution appropriate to the circumstances: a manual recount. Because there was simply “no room for the exercise of discretion” to avoid any form of remedy, and the Canvassing Board had a “clear duty to perform” the full manual recount, Rechler, 674 So.2d at 790, mandamus is an appropriate remedy for the Canvassing Board’s failure to act. Id.

**This Court Should Fashion an Equitable Remedy
to Enfranchise as Many Voters as Possible**

The Third District Court of Appeal held that, because a complete recount could not "be done within the time frame set out in Harris" and was therefore "futile," mandamus could not be ordered. Significantly, the district court noted that its order was "without prejudice to petitioners to seek relief in the Florida Supreme Court ... to ask the Supreme Court to fashion an equitable remedy tailored to the conditions of Miami-Dade County."

The Board’s actions turn the holding in Harris on its head. Rather than finding in Harris a mandate to enfranchise voters, the Board has discovered in it an excuse to disenfranchise thousands, which is a misapplication of the Court’s holdings. To

¹² Thus, the judgement made after the sample recount has been born out by the partially-completed full recount, which tabulated 400 additional votes with about one-fifth of the precincts tabulated. These preliminary findings suggest that literally thousands of residents of Miami-Dade cast votes that were not tabulated by the voting machines.

enforce the principles delineated in Harris and enfranchise as many voters as possible, this Court now should enter an equitable order requiring the Miami-Dade canvassing board to act with all due haste and employ all available resources to manually recount, and then include in its certification, at a minimum, results of a recount of the 10,750 "undervoted" ballots.

Moreover, even if it is the case that the Court's deadline in Harris makes it impossible to count all the ballots in Miami-Dade County, there is no excuse to fail to count as many ballots as possible in the time allowed. Put another way: while this Court certainly understood that the disenfranchisement of some voters was a possible consequence of its Sunday, November 26th deadline, there is no reason to believe that it intended to permit the disenfranchisement of voters whose votes could, in fact, be counted by that date. To command obedience with this Court's holding in Harris, the Court should direct the Board to tabulate as many votes as possible by the deadline – and reverse the Board's decision to disenfranchise many voters, in the name of its frustration over its purported inability to recount the ballots of all.

The Court's mandate in Harris is clear: each vote cast must, to the extent possible, be counted. "The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom, all others would be

diminished." Harris, at 30.¹³ If no action is taken, the Miami-Dade Board would be allowed to achieve what this Court, just two days ago, held that the Secretary of State could not do: reject the ballots of thousands of Floridians for reasons of mere administrative convenience.

This Court has held that it has the "equitable power" to "fashion a remedy that will allow a fair and expeditious resolution of the questions presented" in this matter. Harris, at 39-40. Part of that equitable power plainly includes directing counties, as required by Florida Statute 102.166(5), to count by hand those thousands of ballots that machines did not pick up in order to "correct the error" caused by the machines' failure to record a selection on these ballots. To the extent that machines erroneously did not reflect a vote on a ballot, this Court's decision in Harris makes it clear that counting such votes is of paramount importance. Plainly, undervotes are the focus of correcting error through manual recounts.

Fashioning equitable relief by ordering the Miami-Dade Canvassing Board to do its best to manually recount and then include in its certification, at a minimum, all

¹³ "[T]he fundamental purpose of the elections laws ... [is] to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy." Harris, at 32. "[A]n accurate vote count is one of the essential foundations of our democracy." Harris, at 34. "Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of citizens' right to vote." Harris, at 31-32. The "goal," the Court reaffirmed, is "to reach the result that reflects the will of the voters ..." Harris, at 9. "[W]here the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect." Harris, at 35 (citing Pullen v. Mulligan, 561 N.E. 2d 585, 611 (Ill. 1990)).

of the 10,750 "undervoted" ballots will implement Harris, and will protect and promote the interests identified therein. By definition, a significant proportion of the 10,750 "undervoted" ballots at issue represents the effort of Miami-Dade voters situated throughout the precincts of the entire county, who went to the poll on election day and cast a ballot, but did so in a manner in which a machine tabulation process could not discern and record the voter's intent with regard to the vote for the Presidency. By experience, the intent of a substantial percentage of those voters will be discernable by manual inspection. "To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end." Harris, at 35 (citing Pullen v. Mulligan).

By definition, the only form of tabulation capable of discerning the intent of these 10,750 voters is through manual recount and inspection. Devoting the resources and efforts to manually "recounting" these ballots therefore will simply ensure that these ballots, which will otherwise be discarded, are validated and voters will correspondingly be enfranchised.

Imposing this equitable order will ensure that as many Miami-Dade ballots as possible for President are counted and that as many Miami-Dade voters as possible are enfranchised. To the extent that the voter expressed an intent to cast a vote for

President, but did so in a manner not subject to being counted by machine, an equitable order is the only option that can enfranchise this voter. And the Board's action, which disenfranchised many, out of a fear that it could not tabulate more votes still, is peculiar.

The Miami-Dade Canvassing Board must comply with this order by marshaling the resources necessary to count manually all 10,750 undervotes not yet counted by machine. But to the extent that necessary deadlines imposed by this Court to protect the vote of others prevent the enfranchisement of all of the 10,750 voters, the remedy is for the county to include within its certification as many of these votes as have been manually counted by the deadline. The County Canvassing Board thus should include in its certification the 388 votes that were previously uncountable by machine but have already been counted manually.

There is no legal basis for the Board's decision not to include these votes in its certification, as they were lawfully cast and lawfully tabulated. The Board's decision to disenfranchise these voters – especially in light of its decision to certify the votes tabulated in the sample recount – is arbitrary and without legal foundation. And as noted above, see note 6, supra, it may violate the U.S. Constitution.

In addition to certifying the votes tabulated to date, the County Canvassing Board should include all additional votes successfully counted manually by the

deadline. Given its tabulation of nearly 100,000 votes in two days of the counting, the Board's ability to review these 10,750 ballots in the four days left under this Court's order should be clear. There is no credible excuse for failing to count manually all 10,750 undervoted ballots, just as the Canvassing Board agreed to do prior to its abrupt lunchtime reversal, made under intense political pressure.

And recounting should continue thereafter. That some additional votes might exist that could possibly have also been counted manually (had additional time permitted) cannot require the disenfranchisement of those votes that have been successfully counted -- by hand or machine -- up to the deadline. And the results of manual recounts could be important evidence for a contest action that either candidate might choose to file, after certification.

The Canvassing Board's Assumption That it Cannot Complete its Statutory Responsibilities Is Clearly Erroneous and Unsupported by the Record.

As noted by the Third District, the Canvassing Board determined in the morning of November 21, 2000, that it could satisfy its responsibilities concerning manual recounting and the need to ascertain the true intent of otherwise disenfranchised voters by manually recounting the roughly 10,750 undervotes. (Vol. 1-A, Op. at 4 n. 2.) Immediately upon its return from lunch, however, and without advance notice to anyone, the Board suddenly reversed itself

Any determination that it lacks the time and resources to complete a manual recount of undervoted ballots -- the ballots most likely to reveal machine tabulation errors in a manual recount -- is not supported by the record and is clearly erroneous. In Miami-Dade, undervoted ballots have been separated from the others among the 653,000 ballots so that they can be manually recounted without any need to examine entire precincts. Distilled to a field of only 10,700 ballots, it is clear that these can be manually recounted in less than five, less than three, or even within two days. To be sure, some level of inconvenience is presented, but surely urgency and public necessity warrant the additional staffing and longer hours that may be needed to correctly determine our President.

Disturbingly, the Canvassing Board demonstrated little interest in developing strategies to meet its statutory responsibilities -- and instead, seemed to succumb to intense pressure to stop the mandatory recounts. Just as troubling is the claim in its appellate papers that 10,750 ballots cannot be manually recounted by 5:00 p.m. November 26, 2000. Previously, the Canvassing Board had publicly announced that all 653,000 ballots would be manually recounted within ten days. Moreover, in just two days of manual recounting, some 96,500 ballots and 139 of 614 precincts were completed, all of which the Board now seeks to discard and invalidate.

Clearly, counting the 10,750 undervotes is achievable. The Board's appellate contention, that each ballot must be physically examined by the Canvassing Board, is hyperbole. The statutes provide for review by the Canvassing Board only of those ballots where intent is not reasonably ascertainable by the two counters. §102.166(7)(b) ("If a counting team is unable to determine a voter's intent in casting a ballot ..."). When applied properly, this stricture allows the two counters to determine ballot questions jointly and proceed to the Board itself only when further review is required.

Surely, a prudent, responsible management committed to furtherance of its statutory duty, not disavowal, would analyze and carefully weigh various strategies for putting forth the greatest possible effort. Here, nothing of the kind took place and, thus, the Board's refusal to act is indefensible.

CONCLUSION

In the end, to give meaning and effect to this Court's ruling in Harris, petitioners respectfully request that this Court order the Board to fulfill its mandatory obligation to complete its recount -- with a recount only of the undervoted ballots as an option if the Board determines that is the only feasible recount. The Board should be directed to add whatever votes it can tabulate prior to the previously established deadline to its certified total.

If the recount is not complete by this deadline, the Court may want to consider an extension of the deadline for Miami-Dade County, to enable its completion. But whether it does so or not, there is no reason the Board should be able to ignore and exclude whatever votes can be tabulated before the deadline arrives. This Court should order that the Board re-certify its totals to include any votes tabulated in this process.

In the alternative, should this Court decline to grant this relief to implement its previous mandate, it should, at the very least, direct the Board to include in its certified totals the additional ballots that it has tabulated to date, and direct the Board to continue to conduct the manual recount to facilitate a possible contest action under Florida law.

Specifically, petitioners request that this Court compel the Board to fulfill its mandatory obligations by directing:

1. That the Miami-Dade County Elections Canvassing Board be ordered to continue counting the “undervoted” ballots using all resources available to make sure an accurate manual recount occurs.
2. That on November 26, 2000 at 5:00 p.m. the Miami-Dade County Elections Canvassing Board shall certify all the then-tabulated votes to the Secretary of State.

3. That the Miami-Dade County Elections Canvassing Board then continue to recount all remaining ballots, until otherwise ordered by this Court, for a possible subsequent certification, or, alternatively, to preserve a record for a potential contest action under Florida law.
4. If the Miami-Dade County Elections Canvassing Board has not finished its manual recount by Sunday, November 26, at 5:00pm, it should advise this court on what additional time is needed to complete its recount.
5. Any ongoing counting of ballots in Miami-Dade County after Nov. 26, 2000 shall not limit any party's right to file a contest under Florida law (and this Court's holding in Harris), as of November 27, 2000, nor shall the initiation of a contest limit the Miami-Dade County Elections Canvassing Board obligation to continue its manual recount.
6. Should the Court fail to grant any of the above relief, it should direct the Board to include in its certified returns to the Secretary of State the ballots tabulated under the manual recount completed to date.

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