

**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC00-2341**

1<sup>st</sup> DCA Case No. 1D00-4745

2<sup>nd</sup> Judicial Circuit Case No. 00-2808

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ALBERT GORE, JR., ET AL.,

Plaintiffs/Appellants,

vs.

KATHERINE HARRIS, ETC., ET AL.,

Defendants/Appellees.

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ON DISCRETIONARY REVIEW FROM  
THE FIRST DISTRICT COURT OF APPEAL  
TALLAHASSEE, FLORIDA

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**BRIEF OF INTERVENORS, CRUCE, ET AL.**

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## **CERTIFICATE OF TYPE SIZE AND STYLE**

The size and style of type used in this brief is Times New Roman Regular 14 point (western) and Times New Roman Italic 14 point (western).

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**CERTIFIED QUESTIONS OF GREAT IMPORTANCE**

- I. WHETHER THIS COURT HAS JURISDICTION UNDER ARTICLE 5, SECTION 3(b)(5) OF THE FLORIDA CONSTITUTION.
  
- II. WHETHER A PROPERLY PLEADED STATEWIDE ELECTION CONTEST UNDER SECTION 102.168, FLORIDA STATUTES (2000) REQUIRES REVIEW AND RECOUNT OF ALL BALLOTS IN ALL COUNTIES WITH RESPECT TO A PARTICULAR ALLEGED IRREGULARITY OR INACCURACY IN THE BALLOTING PROCESS.

## **PRELIMINARY STATEMENT**

Al Gore, Jr., et al., were the plaintiffs below and will be referred to herein as Plaintiffs or Appellants. Katherine Harris and others were the defendants below and will be referred to herein as Defendants or Appellees. Intervenors, Stephen Cruce, Teresa Cruce, Terry Kelly, and Jeanette K. Seymour were Intervenors below and will be referred to herein as the Intervenors Cruce. The Order appealed from is a Final Judgment denying plaintiffs all relief.



## **STATEMENT OF THE CASE AND FACTS**

The procedural history of the plaintiffs'/appellants' case is set forth within the Briefs of the plaintiffs/appellants and will not be set forth at length, here.

On November 27, 2000, Stephen Cruce, Teresa Cruce, Terry Kelly and Jeanette K. Seymour filed a Motion to Intervene in the election contest filed by the unsuccessful candidates, Albert W. Gore, Jr. and Joseph I. Lieberman, in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, Case No. 00-2808, and their Motion to Intervene was granted in open court on the same day. On December 2 and 3, 2000, an evidentiary hearing was held on the election contest. On December 4, 2000, the circuit court judge entered a Final Judgment denying all relief to the plaintiffs in the election contest. The trial court judge specifically found that a properly pleaded state cause of action under section 102.168 of the Florida Statutes (2000) to contest a statewide federal election requires the plaintiffs to place in issue and seek a remedy with the attendant burden of proof a review and recount of all ballots in all counties in this state with respect to the particular alleged irregularity or inaccuracy in the balloting or counting process. Plaintiffs filed a timely notice of appeal. On December 5, 2000, this Court entered its Order setting oral argument and setting briefing schedule.

The Motion to Intervene alleged that Intervenor, Stephen Cruce, is a resident of Panama City, Bay County, Florida. As a registered and qualified voter in that county, Mr. Cruce cast a vote via an absentee ballot in Florida's 2000 Presidential Election. Intervenor, Teresa Cruce, is a resident of Panama City, Bay County, Florida. As a registered and qualified voter in that county, Ms. Cruce cast a vote via an absentee ballot in Florida's 2000 Presidential Election. Intervenor, Terry Kelly, is a taxpayer and a resident of Panama City, Bay County, Florida. Intervenor, Jeanette K. Seymour, is a taxpayer and registered voter in Navarre, Santa Rosa County, Florida. Mr. Kelly and Ms. Seymour did not vote in the Florida 2000 Presidential Election because news reports declaring Vice President Gore the winner in Florida were broadcast prior to the polls closing in West Florida. Upon hearing this information they were convinced that their vote would be meaningless and decided not to vote.

## **SUMMARY OF THE ARGUMENT**

A statewide contest of the election of the 25 electors needed to vote in the presidential election is a matter of great public importance. This court should accept jurisdiction and affirm the judgment below. Intervenors especially ask the court to affirm that portion of the judgment which states that a properly pleaded statewide election contest is directed to the statewide canvassing board and should include a recount of all ballots, if at all, where the balloting process was affected by an irregularity or inaccuracy which has been identified by the plaintiffs. There is no reason to assume that all electors who voted in all of Florida's counties had any less of an interest in having the true intent of their ballot counted any more or less than electors of Palm Beach and Dade Counties.

In a statewide election contest the unsuccessful candidate may not request a few counties to manually recount their votes because that would result in unequal treatment under the Fifth and Fourteenth Amendments to the United States Constitution which requires that a person's vote must be counted equally with all other voters in a particular state. The undercounted votes in any of Florida's 64 other counties not singled out by the plaintiffs in their statewide election contest are required to the same treatment that voters in Broward, Palm Beach and Dade Counties received, either a manual recount of those votes or no recount of those votes at all.

## ARGUMENT

### I. WHETHER THIS COURT HAS JURISDICTION UNDER ARTICLE 5, SECTION 3(b)(5) OF THE FLORIDA CONSTITUTION.

Intervenors submit that the issue presented should be answered in the affirmative. The election of the President of the United States is a matter of great public importance. The state of Florida's slate of electors must be in final certification by December 12, 2000, or there is a chance that all 25 of Florida's electoral votes will not be counted in the election for the President of the United States. This court must immediately resolve this question so that the certification of the state of Florida electors may be finalized as soon as possible. A similar question was raised and answered in the affirmative in *Palm Beach Co. Canvassing Bd. v. Harris*, SC00-2348 (Fla. November 21, 2000).

II. WHETHER A PROPERLY PLEADED STATEWIDE ELECTION CONTEST UNDER SECTION 102.168, FLORIDA STATUTES (2000) REQUIRES REVIEW AND RECOUNT OF ALL BALLOTS IN ALL COUNTIES WITH RESPECT TO A PARTICULAR ALLEGED IRREGULARITY OR INACCURACY IN THE BALLOTING PROCESS.

This Court should answer this question in the affirmative because allowing plaintiffs to select manual recounts in some counties and ignore other counties violates state and federal law.

#### STATE LAW

Intervenors, Stephen Cruce, et al., are electors who reside in counties not subject to the limited election contest filed by the plaintiffs as an unsuccessful candidate in a statewide election. The plaintiffs has preferred to seek an election contest in selected counties where there were undervotes and overvotes. A properly pleaded statewide election contest should identify all counties where a particular alleged irregularity, overvoting or undervoting, has occurred. The plaintiffs have failed to do this. The circuit court was correct in concluding that the plaintiffs have not properly pled a statewide election contest.

This court has repeatedly held, beginning in *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975); *Beckstrom v. Volusia Co. Canvassing Bd.*, 707 So. 2d 720 (Fla.

1998); and as recently as in *Palm Beach Co. Canvassing Bd. v. Harris*, SC00-2348, opinion issued November 21, 2000, that “the real parties in interest here, not in the legal sense but in the realistic terms, are the voters. They are possessed of the ultimate interest, and it is they whom we must give primary considerations. 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. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice, by refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right. *Palm Beach Co. Canvassing Bd. v. Harris, supra.*

The Intervenors do not rely on a hyper-technical reading of the election contest statute, section 102.168 (1), Fla. Stat. (2000), to inject their voice in this matter. They rely on long, established legal principles as annunciated by this court in other election contest cases. There would be no reason for the Legislature to have created this right

for an elector in section 102.168(1), Fla. Stat. (2000), if the Legislature itself did not deem the right of an elector to be heard in a contest to be of paramount importance. Intervenors recognize there is no common law right to contest elections and any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. *McPherson v. Flynn*, 397 So. 2d 665 (Fla. 1981).

Intervenors, Cruce, et al., are electors and the statute explicitly includes them. Intervenors submit it is precisely for this situation that they were included in the statute. Obviously, there are going to be situations where an unsuccessful candidate and the successful candidate who seek their own interests in a contest ignore the interests of all the electors. That is what the plaintiffs attempted to do here.

However, Intervenors have not identified any case which states that a petition in an election contest may seek to exclude or include irregularities in an election in part of the precincts or county election unit without a review of all ballots in that precinct or county or a congressional district effected by irregularity.

Likewise, in *State v. Pritchard*, 111 Fla. 122; 149 So. 58, 59 (1933), the court stated,

Every ballot cast in an election must be definitely accounted for by the election officials. If ballots have been cast that, because of the irregular or illegal marking thereof, have not been deemed by inspectors entitled to be counted, and therefore have been discarded, a return to that effect disclosing the number of such discarded votes should be made, in order

that every ballot cast, or attempted to be cast, shall be accounted for in the election returns.

*Pritchard* at 59.

Section 102.168(2), Fla. Stat. (2000), requires a contest in an election to file a complaint with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board in empowered to canvas the returns certifies results in the election being contested. Here, the canvassing board results being contested are in fact the actions of the statewide canvassing board which took place on the evening of November 26, 2000. If the plaintiffs had been filing a contest against the returns of Dade County alone, perhaps they could have contested the results under the statute within 10 days of the returns being filed or when the returns were originally certified by the Florida Secretary of State on November 14, 2000, by filing an election contest in the circuit court of the Eleventh Judicial Circuit. However, Plaintiffs did not; they elected a statewide election contest which necessarily must be filed in the circuit court of the Second Judicial Circuit.

The plaintiffs' failure to file a challenge to the Dade County returns, pursuant to section 102.168(2), Fla. Stat. (2000), within 10 days precludes the plaintiffs from doing so now on an individual county basis. The only way this election contest complaint



is timely is if this court considers it as did the circuit court to be a contested challenge of the statewide election result.

The plaintiffs by desiring to have a “limited focus contest” overlooks this court’s and the Legislature’s paramount concern of the voter as the ultimate party in any election contest. It is no stretch to say that the statewide voters in a statewide election have interests which are superior to that of any individual candidate. Even if this court were to agree with the plaintiffs’ ability to seek the “limited focus contest,” it would contradict the purpose of section 102.168, Fla. Stat. (2000), and essentially rewrite section 102.168, Fla. Stat. (2000), to create a limited focus contest. As previously stated, the right to contest an election did not exist at common law and any grant of that right must be closely circumscribed by the legislative grant creating the right. The Legislature did not state in section 102.168, Fla. Stat. (2000) that in a statewide election contest the unsuccessful candidate may select one or several canvassing boards and contest those results while ignoring the results of the statewide canvassing board who certifies the statewide election. After all this is not the election of a city commissioner, this is a statewide election to elect Florida’s 25 electoral votes who will elect the next president of the United States. Moreover, a candidate for president in a statewide election contest who singles out the election returns in one county for the election count should at least have to establish that he is the unsuccessful candidate

in that county. The plaintiffs singled out Dade County and Palm Beach County for a contest, even though they were the successful candidates, i.e., the candidates who got the most votes in both of those counties.

Any circuit judge faced with the situation presented herein before Judge Sauls would have been compelled to address the same question that he did regarding the proper pleading of a statewide election contest.

Furthermore, to the extent that the circuit court would have had authority to order manual recounts of the so-called Dade County undervotes—approximately 10,000 votes—it would have been just as practical for the trial judge to order a recount of all such undercounted ballots in all counties. Dade County is the largest county and has the largest number of outstanding uncounted undervotes. There is no reason to suspect that a supervisor of elections in Collier County could not manage to count a much smaller number of undervotes in the same period of time that Dade County could count 9,000. Indeed, if the Plaintiffs simply elected to file a statewide election contest on November 14, 2000, pursuant to section 102.168, Fla. Stat. (2000), and the circuit court had awarded a manual recount of statewide votes, we would now be into the 20<sup>th</sup> day of counting. However, it was the plaintiffs who created this situation by seeking the relief they obtained in *Palm Beach Co. Canvassing Bd. v. Harris, supra*, and it is their delay in seeking relief under section 102.168, Fla. Stat. (2000), in a

properly pleaded statewide election contest that has created the time limitations that exist in the election contest they eventually filed.

#### FEDERAL LAW

This Court should also affirm the Order below to avoid a manual recount of undervotes in selective counties because it results in the unequal treatment of voters based upon the county of residence in violation of federal law and policy requiring equal protection of voters.

Permitting a select few counties to manually recount their votes would be especially repugnant to federal law and policy because it would necessarily result in *unequal treatment*. Under the equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution, “one person’s vote must be counted equally with those of all other voters in a State.” *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). Accordingly, it is essential that all voters receive “uniform treatment” in the electoral process. *Id.* at 565. If “dimpled” ballots are to be counted in one county, they must be counted in all Florida counties. Otherwise, voters in different Florida counties who voted in the same objective manner – say, by partially punching the Nader hole – will have their votes counted differently. In one county, one citizen’s “vote” will count; in the other county, the same “vote” will be ignored. But as *Reynolds* makes clear, “an individual’s right to vote” is “unconstitutionally impaired

when its weight is substantially diluted when compared with votes of citizens living in other parts of the State.” *Id.* at 568. A regime of geographically uniform counting methods is thus required by the federal Equal Protection Clause.

Moreover, even within single counties, equality concerns demand that manual recounts be performed under procedures that ensure uniformity of treatment. If all voters are to be treated equally, their votes must be counted according to the same criteria. In the counties that have previously performed manual recounts; however, the recounting has been conducted according to no criteria at all. Palm Beach County, for example, has been subjected to a judicial ruling that ignored federal equal protection concerns and incorrectly held that “dimpled chads” must be individually considered, through an undefined case-by-case inquiry into voter intent. The Palm Beach hand count thus *required* election officials to act arbitrarily instead of laying down uniform rules of general application. Such counting methods unlawfully infringe equal protection by permitting or even encouraging situations in which “similarly situated residents” are “treated differently,” *Attorney General v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (plurality opinion), with respect to their fundamental right to vote. *See id.* at 908 (recognizing the fundamental status of voting rights in the context of case concerning the less fundamental right to travel). The trial court’s determination not to permit manual recounting was therefore further required by the fact that any such

recounts would necessarily have to include counties that have already been recounted once, thus further drawing out the recounting process. While “mathematical exactness or precision is hardly a workable constitutional requirement,” *Reynolds*, 377 U.S. at 577, statewide and countywide equality of treatment certainly is.

## CONCLUSION

Intervenors respectfully submit that this court has jurisdiction of this matter as a question of great public importance under Article 5, Section 3(b)(5) of the Florida Constitution and should accept jurisdiction to immediately affirm the judgment of the circuit court on grounds that any statewide election contest seeking a manual recount of irregularly-voted ballots requires the manual recount of all irregular ballots in the state, not just ballots in three counties hand-picked by the unsuccessful statewide candidate. To hold otherwise, is a denial of equal protection of the law to Florida voters in the other 64 counties whose ballots may be similarly situated and never counted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Intervenor, Cruce, et al., was furnished this 6<sup>th</sup> day of December, 2000, by hand-delivery (in Tallahassee only), otherwise by fax, to the following:

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