IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2447

HARRY N. JACOBS,

Appellant,

vs.

THE SEMINOLE COUNTY CANVASSING BOARD, *et al.*,

Appellees.

BRIEF OF APPELLEES GEORGE W. BUSH, DICK CHENEY, AND THE REPUBLICAN PARTY OF FLORIDA

From the Second Judicial Circuit Court, in and for Leon County,
Lower Tribunal No. CV00-2816

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
Washington, D.C.

B. DARYL BRISTOW
AMY DOUTHITT MADDUX
BAKER BOTTS LLP
Houston, Texas

STUART LEVEY
MILLER, CASSIDY, LARROCA & LEWIN LLP
Washington, D.C.

BARRY RICHARD
Florida Bar No. 0105599
GREENBERG TRAURIG, P.A.
Post Office Drawer 1838
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

Counsel for Appellees George W. Bush and Dick Cheney

KENNETH W. WRIGHT
Florida Bar No. 0188799
SHUTTS & BOWEN LLP
20 North Orange Avenue
Orlando, Florida 32801

Counsel for Appellee Republican Party of Florida

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STATEMENT REGARDING DISCRETIONARY JURISDICTION

In its December 8, 2000 Order, this Court instructed the parties to brief the issue of "why this Court should exercise its discretion under Article V, Section 3(b)(5), Florida Constitution." The Court should decline to hear this appeal because the court's opinion is based on the application of settled law to the facts adduced at trial. In addition, Appellees' view, this Court has no discretion, because (1) the Complaint was filed out of time; and (2) the Complaint failed to name indispensable parties[1].

A. The Court Should Decline To Exercise Jurisdiction Because This Case Involves A Circuit Court's Fact Findings Applied To Established Precedent From This Court.

The Court and the public would be better served if this Court declines to accept this appeal.[2] As the circuit court observed, the decision in this case was based on trial court fact findings made after trial on the merits, applying well-

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[1]Appellant also notes that a substantial issue exists as to this Court's jurisdiction under § 102.168, Fla. Stat. in connection with Presidential elections. *See* Appellees' Motion for Leave to File Clarification of Argument, and Clarification of Argument filed December 7, 2000 in *Gore v. Harris*, No. SC 00-2431.

[2]Under Article V, Section 3(b)(5) of the Florida Constitution, this Court "*[m]ay review* any order or judgment of a trial court . . . certified by the District Court of Appeal . . . to be of great public importance, or to have a great effect on the proper administration of justice throughout the state . . . ." Whether to accept a certified case, however, is within the full discretion of this Court; the fact that a case may be of great interest or importance does not require this Court to exercise its jurisdiction. *See State v. Cruz*, 189 So. 2d 882 (Fla. 1966); *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961).

established law that has been on the books and repeatedly upheld for over 25 years. At trial, the circuit court reviewed the evidence and evaluated the credibility of testimony, and heard arguments of counsel, and made controlling determinations of fact and mixed fact and law. The Court made numerous credibility determinations. That alone should end this matter. The circuit court rejected Appellant's claims that alleged irregularities in the pre-printed postcard *request* forms for absentee ballots should void all 15,000 absentee *ballots*, even though there was no dispute that these validly cast votes that reflected the clear intent of the voters. The court's opinion in this case creates no new law, and, though this case is not about absentee ballots themselves, is fully consistent with this Court's recent decision in *Fladell v. Palm Beach County Canvassing Board,* Nos. SC00-2373 & SC00-2376, Slip op. (Fla. Dec. 1, 2000), in which the Court held that a "court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements." There is no reason for this Court to revisit those issues again.

B. The Court Lacks Jurisdiction Because This Contest Was Not Filed Within The Statutory Jurisdictional Deadline.

This Court lacks jurisdiction because Appellant failed to file his petition within the statutory jurisdictional deadline.[3] Failure to file a complaint within the time frame required by the statute deprives the Court of jurisdiction.[4]

In this case, the canvassing boards officially certified the contested results on November 14, 2000. Therefore, the deadline for any judicial challenge was November 24, 2000. The subsequent ruling by this Court in *Gore v. Harris*, No. SC00-2346, extending the certification deadline to November 26 was vacated by the U.S. Supreme Court. *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, 531 U.S. ____ (Dec. 4, 2000). As a matter of law, a vacated decision is a nullity, and has no effect whatsoever. *Bane v. Bane,* No. SC99-93, 2000 WL 1726795, at *2 (Fla. Nov. 22, 2000) ("when a court vacates a judgment . . . the effect of that

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[3] *See* § 102.168(2), Fla. Stat. ("Such contestant shall file a complaint … with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.").

[4] *See Kinzel v. City of North Miami*, 212 So.2d 327, 328 (Fla. 3rd Dist. Ct. App. 1968) ("[w]here a particular remedy is conferred by statute, it can be invoked only to the extent and in the manner prescribed."). Jurisdiction will not vest if the petition is incorrectly filed, regardless of whether the deficiency was caused by inadvertence or mistake. *See Bailey v. Davis*, 273 So. 2d 422, 423 (Fla. 1st Dist. Ct. App. 1973).

ruling is to return the case and the parties to the same position they were in before the court entered the judgment.") (Pariente, J.). As of this date, this Court still has not issued any new opinion in compliance with the express direction of the U.S. Supreme Court. Therefore the original certification date, and not the extended date set by this Court, is the legally binding date for purposes of determining whether Appellant's contest action was filed within the jurisdictional time limit. Because Appellant's Complaint was not filed until November 27, 2000, it is untimely, and this Court lacks jurisdiction to hear this appeal.

C. The Appeal Must Be Dismissed For Failure To Join Indispensable Parties.

Section 102.168(4), if applicable, requires the compulsory joinder of each "successful candidate" as an indispensable party. Under this provision, the "successful candidates" are the Republican presidential electors, who were elected and certified under § 103.011. However, Appellant failed to join as defendants the twenty-five presidential electors who have been certified pursuant to § 103.011. Thus, pursuant to Florida Rule of Civil Procedure 1.14(b)(7), Appellant's Complaint must be dismissed for failure to join indispensable parties. *See, e.g., Commodore Plaza, Etc. v. Saul Morgan Ent., Inc.*, 301 So. 2d 783 (Fla. 3rd Dist. Ct. App. 1974).

STATEMENT OF THE CASE

On November 27, 2000, Appellant filed this action in Leon County Circuit Court. Trial was held on December 6 and 7, 2000. On December 8, 2000, the circuit court issued an order stating its findings of fact and conclusions of law, and entered a final judgment in favor of Appellees. On the same day, Appellant filed a notice of appeal to the District Court of Appeal, First District, which certified the matter to this Court pursuant to Article V Section 3 (b)(5) of the Florida Constitution.

STATEMENT OF THE FACTS

Before the November 2000 general election, in an effort to facilitate absentee voting, Florida's Republican and Democratic Parties, statewide, provided potential voters with pre-printed absentee ballot request forms, which pre-printed certain public and easily ascertainable information, such as the voter's name, address, and voter identification number. (Stip. ¶ 7).[5] Democrats used similar pre-printed requests. However, the Democrat forms were addressed back to Democratic headquarters. (Stip. ¶ 28). The Democratic request forms were mailed

[5]The postcard application forms were designed to minimize the amount of time and effort required for a voter to request an absentee ballot, and to maximize the ability of county officials to verify the identity and address of the voter. Again, all of the pre-printed information on the postcard is available to any member of the public. (Stip. ¶¶ 2, 29 & Stip. Ex. 1 and 5.) The application was designed to ensure that, merely by writing in only the voter's signature and the last four digits of his or her

to Democratic headquarters, handled by and in the possession of Democratic representatives, and thereafter delivered by Democratic representatives to the Seminole County Office of the Supervisor of Elections. *Id*.; (Tr. 166-168.)

With respect to the Republican Party request forms, what was intended as a convenience to voters was marred by a computer error. As a result, many of the voter identification numbers were misprinted, and distributed to prospective Seminole County voters. (Stip. ¶¶ 4, 5, 33.) The forms were pre-printed to be returned directly by the voter to the Office of the Supervisor of Elections for Seminole County. (Stip. ¶33). These Republican request forms did not inform prospective voters that a voter registration number was required. (Stip. ¶ 3.) Despite containing incorrect or missing voter registration numbers, these cards were mailed by prospective voters to the Supervisor of Elections, thus clearly evidencing their intent to obtain a ballot. (Stip. ¶ 5.)

After receipt by the Supervisor of Elections, the misprinted forms were set aside and initially were not processed. Absentee ballot packages were not sent to voters at that time. (Stip. ¶ 8.) However, the request forms were in no way "rejected."

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social security number, the voter could request an absentee ballot by return mail. *Id.*

The Republican Party subsequently recognized its mistake and acted to ensure that prospective voters who had relied on the misprinted request forms, and were expecting to receive absentee ballots, would not be prevented from receiving their ballots due to no fault of their own.

In October 2000, a member of the Florida Republican Party contacted Sandra Goard, Supervisor of Elections of Seminole County, by telephone and obtained permission for a Republican party representative to come to the Office of the Supervisor for the sole purpose of correcting misprinted voter registration numbers on the Republican request forms. (Stip. ¶¶ 6, 7, 44, 46; Tr. 122:8-16; Tr. 129:25 through 131:2; Tr. 132:23 through 134:5.) Neither Goard nor Office employees initiated this process, (Tr. 150:1-8; 162:9-12), and provided no assistance beyond a table and a place to sit.

Before any part of the balloting process – well before the election – Goard permitted Michael Leach, a representative of the Republican Party, and for a brief time two other representatives, to have access to the Republican request forms in question. (Stip. ¶ 10.) Mr. Leach worked in a high-traffic area in the Office from approximately mid October to approximately early November, 2000, with an Office employee sitting next to him for most of the time, and using a laptop computer that he brought with him that contained voter identification numbers, to hand-write the correct voter registration numbers onto many of these request

forms. (Stip. ¶ 12; Tr. 123:18 through 124:15; Tr. 125:5-12; Tr. 254:14 through 255:8; Leach Depo. 74:7-18; Bailey Depo. 22:18-20.) It is undisputed that the only addition to the forms was a correct identification number.

Notably, Leach corrected or supplied the voter registration numbers to request forms that were signed and submitted by both registered Republicans and Democrats who had used the pre-printed Republican form. (Stipulation regarding Michael Leach Deposition, Tr. 254:14 through 255:8; Leach Depo. 21:10-21; 30:25 through 31:8.) After the Republican representatives corrected voter registration number information on request forms, and nothing more, the Office of the Supervisor of Elections processed the requests and mailed to voters absentee ballot materials for consideration and processing by voters. (Tr. 123:18 through 124:10; Tr. 127:17-24; Tr. 140:16-25.)

Although Leach was physically in an area near Office of Supervisor computers, he did *not* have passwords and thus no access to confidential information of any kind. (Tr. 254:14 through 255:8; Leach Depo. 75:4-5.) (Leach Depo. 74:25 through 75:3; Tr. 255:9-11; Bailey Depo. 22:15-17; Tr. 126:14-23.) There was no access to Office documents, voting equipment, ballots, or absentee ballot request forms other than the Republican forms that were corrected. (Leach Depo. 75:6-9.) Nor did they alter any other information already on the requests. (Tr. 150:9-15.) In fact, Leach and his colleagues did not do anything in the Office

that would detrimentally affect any of its operations. (Leach Depo. 75:10-12; Tr. 163:7 through 165:11.)

No other party had this problem or requested this accommodation. There were no systemic printing errors on the Democratic cards, and, in any event, those cards were forwarded to Democratic headquarters, where they could be corrected before being delivered. (Tr. 138:4 through 140:15; Tr. 142:1-12; Tr. 151:16 through 153:7; Tr. 162:5-8.).

The Supervisor would have afforded Democratic representatives or others the same opportunity. (Stipulation regarding Michael Leach Deposition Tr. 254:14 through 255:8; 36:11-13; 73:13 through 74:6). The Office was a non-partisan office, and the employees treated all political parties equally.[6]

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[6](Tr. 253:15-16; Sadler Depo. 20:4-17; Tr. 253:24-25; Eaton Depo. 18:1-12; Tr. 254:2-3; Bailey Depo. 22:4-14; Tr. 254:10-11; Buchans Depo. 14:16 through 15:5.). Although the circuit court was not required to reach the issue of affirmative defenses, the evidence at trial also established Appellees' affirmative defenses of laches, estoppel, and waiver. The situation regarding the error on the pre-printed Republican request forms, and the fact that representatives of the Republican Party were correcting it, was widely known in Seminole County by the public in general, and by high-ranking officials of the Florida Democratic Party in particular, *before* the *election*. Prior to the election, a challenge to the procedures at issue could have been remedied in a number of ways, none of which would have resulted in the disenfranchisement of a single voter. Significantly, however, rather than acting before the election, the Democratic Party officials chose to defer any complaint regarding these procedures until after the votes had been counted.

Keith Altiero, a reporter for WDBO radio in Orlando with responsibility for Seminole County, testified that his radio station aired a story regarding the problem with the request forms during morning drive time on October 17, 2000. (Altiero

Of the 15,594 domestic absentee ballots that were returned and counted, it is uncontested that 15,504 cast valid, countable votes in the Presidential election. (Stip ¶ 32). Of these, 10,006 votes were counted for defendants Bush and Cheney and 5,209 votes were counted for Gore and Lieberman. *Id.* These votes were included in the totals certified by defendant Seminole County Canvassing Board. *Id*. The Board's Certificate is included in the Record, as is the Report of the Board. (Stip. Exhs. 2-4).

The Office of the Supervisor of Elections for Seminole County received 2,126 misprinted absentee ballot request forms on the pre-printed Republican postcards. (Stip. ¶ 34). The Supervisor of Elections processed the corrected Republican forms and issued absentee ballots to the 2,126 applicants. (Stip. ¶ 35). Of the 2,126 applicants, 1,932 returned absentee ballots to the Seminole County

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Depo. 4:9-16; 4:19 through 5:11; 6:17 through 7:13; 31:20 through 32:7.) Mr. Altiero also testified that his news story warned prospective voters who had used the pre-printed Republican form about the situation. (Altiero Depo. 7:23 through 8:15; 9:16-24; 10:14-23; 11:5-18; 13:3-10.)

Thereafter, Mr. Altiero aired a follow-up story on October 30, 2000. Significantly, this story contained a report of the reaction from Bob Poe, State Chairman of the Florida Democratic Party. In this news radio report, Poe took the position that the Republican absentee ballot request forms should be "nullified," in part because of the absence of the voter identification number. (Altiero Depo. 15:12-16; 15:23 through 16:20.)

By the date of this second radio broadcast, Mr. Altiero was aware that representatives of the Florida Republican Party were at the Office inserting correct

Office of Elections. (Stip. ¶ 36). All or most of these 1,932 absentee ballots were counted and included in the certified vote total in the November 7, 2000 general election. *Id.* Of these 1,932 persons whose ballots were returned, 1,833 were registered Republicans, and approximately 54 were registered Democrats. (Stip. ¶ 37).

When an absentee ballot request form was processed, an absentee ballot packet was issued which included an envelope with a certification form on the back, a secrecy envelope, voter instructions, and an absentee ballot. (Stip. ¶ 21; Tr. 171-172). There is no evidence that Republican representatives had possession of, altered, added to or otherwise improperly included any information to or on any absentee ballot or the accompanying materials forwarded by the Office of the Supervisor to voters in response to absentee ballot requests. (Stip. ¶ 21). In fact, the law and the evidence demonstrates that the procedures and extensive security measures designed to protect the integrity of the *ballot* itself are entirely unaffected by absentee ballot request forms. (Tr. 171:2 through 176:25).

As of election day, 472 of the corrected Republican cards remained unprocessed. (Def. Ex. 12.) Of that number, 209 received absentee ballots from other requests and only 263 did not receive absentee ballots. *Id*. Of the 263

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voter identification numbers on the pre-printed Republican request forms. (Altiero Depo. 32:16 through 34:7.)

applicants, all but 46 people in fact voted at the polls. *Id.* Obviously, then, if the absentee ballot requests corrected by the Republican Party had never been processed, there was no believable evidence that these voters would not have voted in any event.

There were only 40 pre-printed Democratic Party cards absentee ballot request cards that were unprocessed by the Supervisor's office. (Tr. 268-269; 271-272; Def. Ex. 12) Of those applicants, 37 received absentee ballots pursuant to other requests. (Tr. 270-272; Def. Ex. 12). Only three Democratic Party cards were unprocessed. (Tr. 270; Def. Ex. 12.)

There were only 243 unprocessed "miscellaneous" absentee ballot requests, that is, not on either party's pre-printed request forms. (Tr. 270-271). Of those applicants, 133 either received an absentee ballot pursuant to another request or voted at the polls. (Def. Ex. 12.)

SUMMARY OF THE ARGUMENT

Although this case has drawn national attention, it boils down to a straightforward application of well-established Florida law to facts presented at trial, just like any other lawsuit. After listening to the testimony and weighing the credibility of over 30 witnesses, the circuit court made key findings of fact and findings of mixed fact and law. Based on those findings, the court found that Appellant did not meet his burden of proof under the contest provisions in

§ 102.168, Fla. Stat. The court's factual determinations are supported by substantial competent evidence, and should not be disturbed by this Court.

Appellant has alleged irregularities in the *requests* for absentee ballots, not in the absentee *ballots* themselves. Based on the facts presented, the circuit court determined that there is no evidence of fraud, gross negligence or intentional misconduct by election officers or the Republican Party. The court held that the correction of voter registration numbers on the request forms by representatives of the Republican Party, while perhaps a technical violation of a "directory" provision of § 101.62 of the election statute, was not a substantial non-compliance with elections law, and had no effect on the integrity of the ballots or the integrity of the election.

Appellant presented no evidence at all that the ballots themselves had been affected or that the election did not reflect the clear will of the voters. Appellant's arguments presume against all common sense that the absentee voters would not have voted had the registration numbers not been corrected on the Republican forms. Indeed, their expert witness did not even give an opinion on that issue. The evidence in this case demonstrated that the absentee voters at issue likely would have made other arrangements to cast a vote if their original request for a ballot had been rejected.

As to Appellant's allegations of disparate treatment by the Seminole County Supervisor of Elections, the circuit court found after weighing and evaluating the credibility of witnesses and other evidence, that the facts failed to show that the Supervisor treated, or would have treated, other parties differently than she treated the Republican Party. Unlike the Republican Party's pre-printed forms, the Democratic mail-out did not suffer from misprinted voter identification numbers. The Democrats did not need, nor did they request, access to request forms to make corrections.

These findings of fact are matters within the unique purview of a trial court's discretion and should not be disturbed on appeal. Since Appellant essentially based his entire case on state of mind issues and claims of disparate treatment, the circuit court's factual findings regarding state of mind and disparate treatment should be conclusive.

Although the court did not have to reach the issue, the uncontested evidence also established as a matter of law that Appellees' affirmative defenses of estoppel, waiver, and laches. The facts showed that the Democratic Party, knew *well before the election* of the misprints on Republican request forms and of the attempts to correct them, *but consciously chose not to raise any objection until after the election*. As this Court has long held, an aggrieved party is estopped from

attacking the outcome of the election when he could have made his complaints to the proper authorities before the election.

The circuit court's decision is not only supported by the evidence, but it is compelled under federal law. Both the U.S. Constitution and federal statutes prevent the county canvassing boards, the circuit court, and this Court from denying voters the right to vote – especially in a Presidential election – based on mere technicalities in the voting process that have no relation to whether the voters who voted were qualified to do so. There is no dispute in this case that the absentee votes at issue were cast by qualified voters.

It cannot be the law that a technical error like the one in this case, which is known before the election, at a time when it can be corrected, can be saved for later, allowing a plaintiff to "lie behind the log" until after election day, and then object in an attempt to disenfranchise thousands of voters who did nothing wrong.

STANDARD OF REVIEW

The trial court's findings of fact will not be set aside unless "totally unsupported by competent and substantial evidence." *Lee v. Lee*, 563 So. 2d 754, 755 (Fla. 3rd Dist. Ct. App. 1990). Factual conclusions are "clothed with a presumption of correctness." *Smiley v. Greyhound Lines, Inc.*, 704 So. 2d 204, 205 (Fla. 5th Dist. Ct. App. 1998). This Court does not review evidence *de novo*, substituting its own opinion of the facts and credibility of the witnesses for that of

the trial court. Rather, this Court "must indulge every fact and inference in support of the trial court's judgment, which is the equivalent of the jury verdict." *Id*.

The judgment of the trial court "will be upheld if there is any basis which would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (citing numerous decisions). In this Court, any disputed issues of fact must be reviewed in the light most favorable to the prevailing party, and the findings and rulings of the circuit court should be affirmed unless they are unsupported by any basis in the record. *See Woodlands Civic Ass'n, Inc. v. Darrow*, 765 So. 2d 874, 876 n.3 (Fla. 5th Dist. Ct. App. 2000). In this case, the circuit court based its decision "on the facts as they were developed during the trial of this matter." (Final Order at 1.) The court's factual findings are presumptively correct and are fully supported by the evidence presented in this case. Therefore, the Final Order must be affirmed.

ARGUMENT

I. The Circuit Court Correctly Held That There Was No Factual Or Legal Basis To Grant Appellant Any Relief.

The seminal opinion in Florida on the test for determining the validity of absentee ballots is the Court's decision in *Boardman v. Esteva*, 323 So. 2d 259 (1976). In *Boardman*, this Court found that in making the initial determination as to the validity of the absentee ballots, the underlying concern is "whether they were cast by qualified, registered voters, who were entitled to vote absentee and

who did so in a proper manner." *Id*. at 269. The Court held that "the primary consideration in an election is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots cast, the following factors shall be considered:

> (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
>
> (b) whether there has been substantial noncompliance with the essential requirements of the absentee voting law; and
>
> (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election."

Id. [7]

Appellant was required to present "clear and convincing evidence" of irregularities sufficient to affect the validity of the ballots. *Burke v. Beasley*, 75 So. 2d 7, 8-9 (Fla. 1954). Because of the near-conclusive presumption of validity of election officials' performance, where there is no clear and convincing evidence that a certified election result does not reflect the will of the voters, it will not be set aside, *even where there has been substantial noncompliance with the election*

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[7]The Court also held in *Boardman* that "[t]he canvassing of returns, including absentee ballots is vested in canvassing boards in the respective counties who make judgments on the validity of the ballots." *Id.* at 268 n.5. "Those judgments are entitled to be regarded by the county as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate." *Id.*

laws. *Beckstrom v. Volusia County*, 707 So. 2d 720 (Fla. 1998); *Boardman*, 323 So. 2d 259; *McLean v. Bellamy*, 437 So. 2d 737 (Fla. 1st Dist. Ct. App. 1983).

Applying the *Boardman* standard, which was recently reaffirmed by the Legislature, (*see infra*), the circuit court correctly found that Appellant did not satisfy his burden of proof. Although the circuit court concluded (incorrectly in our view) that there was an irregularity in the correction of request forms, which violated § 101.62, Fla. Stat., it also found that that irregularity, was directory only, could not invalidate the ballots, did not constitute substantial non-compliance with elections laws, and did not compromise the integrity of the ballots cast or the integrity of the election. The court also found that the evidence presented was insufficient to prove fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. The evidence in the record fully supports the circuit court findings, and therefore they should be affirmed.

D. There Was Substantial Compliance with Election Laws.

Appellant's only evidence rested not on any alleged irregularity with regard to absentee *ballots*, (Stip. ¶ 21, 34), but rather solely on alleged irregularities with regard to *requests* for absentee ballots. (Tr. 377; Stip. ¶ 21) Specifically, the basis of Appellant's contest was that correcting identification numbers on pre-printed postcard applications for absentee ballots violated Section 101.62 of the Florida election laws.

Appellant relies on subsection (b) of § 101.62, Fla. Stat., which lists items to be disclosed when a voter requests an absentee ballot, including a voter registration number. The "irregularity" complained of was that, when the Republican Party realized that it had inadvertently misprinted the requesting voter's registration number, the Party corrected that mistake by hand-inserting the correct numbers that should have been included in the first place. (Cplt. ¶¶ 1, 25; Stip. ¶ 6, 10-12). There is no evidence that the registration numbers added to the forms were incorrect or improper in any way.

Appellant asserts that such conduct violated the statute because subsection (b) requires that the request for an absentee ballot be made by the voter or by a member of his immediate family. *See id*. Appellant's arguments about Section 101.62 hinge on one theory – that by the clerical act of correcting numbers on pre-printed request forms, the Republican Party, not the voter, was making the request for an absentee ballot. However, it is undisputed that these forms were signed by the voters themselves, that they were received in the Office of the Supervisor as requests of the voters themselves, and that, after correction, they were processed as the requests of the voters themselves.

The fact that the registration number was omitted certainly does not mean that the voter did not intend to request a ballot. Further, the typographical correction of a number on the *request* by the voter cannot logically be interpreted

as a *new request*.[8] The Division of Elections has expressly held that a political party does not make a "request" under the statute by furnishing a pre-printed request form that supplies the number for the voter. *See* Advisory Opinion DE 98-14 (Sept. 16, 1998). Both the Republican *and Democratic* Parties pre-print voter registration numbers on postcards used to request absentee ballots, (Stip. ¶¶ 2, 27-29), and Appellant makes no argument that this practice is impermissible. It therefore cannot seriously be argued that a postcard where the information is pre-printed by a third party is acceptable, but a postcard where the information is corrected by hand by a third party is not.

This Court held in *Boardman* that technical omissions or irregularities appearing on an application form under § 101.62 will not void the ballot "where the information that does appear on the application is sufficient to determine the qualifications of the applicant to vote absentee, and the omissions or irregularities are not essential to the sanctity of the ballot." 323 So. 2d at 265. In *Boardman*, the Court expressly receded from an earlier line of cases that had required strict interpretation of the absentee voting statute. *Id*. at 264. The Court expressly rejected the argument that an irregularity on the application invalidated the ballots, stating:

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[8]Advisory Opinion DE 98-14 (Sept. 16, 1998) (holding expressly that political party does not make "request" under statute by furnishing request form to potential elector.). (Tr. 167).

> There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with?

Id. The Court expressly established the bright line rule that is the law today:

> Unless the absentee voting laws which have been violated in the casting of the vote expressly declared that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, [p]rovided such irregularity is not calculated to affect the integrity of the ballot or election.

Id. at 265. Although the absentee voting provisions were amended recently, the Legislature specifically adopted the *Boardman* standard when it did so.[9]

The postcard application forms at issue conclusively establish the qualifications of the applicant. They contain the name, address, signature, and last four digits of the social security number of the applicant. (Tr. 59). This information is sufficient for election officials to determine that the voter is qualified to vote. *See* § 97.041, Fla. Stat. Moreover, Florida law provides for either the county canvassing board or the elections supervisor to compare the signature of the voter on the voter certificate form on the return envelope with the signature on the registration books to ensure that the voter is duly registered and that the ballot is legal. § 101.68(1) & (2)(c), Fla. Stat. This procedure in no way

relies on or even references the absentee ballot request form. There was no dispute in the court below that the voters who voted were duly registered and qualified voters.

Case law, as well as an express directive from the legislature, confirms that the requirements in § 101.62, including the requirement to include a voter registration number, are "directory," not "mandatory." The failure to follow a directory procedure is not cause to reject a vote. *McLean v. Bellamy*, 437 So. 2d 737, 744-745 (Fla. 1st Dist. Ct. App. 1983); *see also Jolley v. Whatley*, 60 So. 2d 762 (Fla. 1952). In *McLean*, absentee ballots were issued without requests being made at all. *McLean*, 437 So. 2d at 742-43. As the court stated, however, the failure to follow the letter of the provisions of § 101.62 does not result in the "invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee." *Id*. at 743-44.

In 1998, the Legislature, after reviewing changes in the law relating to absentee ballots and applications for absentee ballots, stated, "Although the statutes emphasize the importance of all the instructions, only the voter's signature and the signature and address of the attesting witness [on the absentee ballots themselves] are mandatory; all other provisions are directory in nature." *Comm.*

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[9] *See Comm. on Election Reform*, H.R. 99-339, Final Analysis on H.B. 281 at III.A. (Fla. July 15, 1999) (citing *Boardman*, 323 So. 2d at 265).

on Election Reform, H.R. 99-339, Final Analysis on H.B. 281 at III.A (Fla. July 15, 1999) at 8 (citing *Boardman*, 323 So. 2d at 265). The Legislature expressly quoted and relied upon the bright line rule established in *Boardman* as the proper interpretation of the current statute.

The statute expressly identifies the circumstances under which an absentee *ballot* will be considered illegal, and failure to follow the procedures for *requesting* an absentee ballot is not among them. Section 101.68(2)(c)(1) provides that an absentee *ballot* shall be considered illegal if it does not include the signature and the last four digits of the social security number of the elector, and either (a) the subscription of a notary or (b) the signature, printed name, address, voter identification number, and county of registration of one attesting witness. § 101.68(2)(c)(1), Fla. Stat. In this case, there was no evidence at trial that any voted *ballot* lacked these requirements. Rather, *all* of the evidence at trial related to *request forms* for absentee ballots. Thus, there is absolutely no basis under the statute to declare any absentee ballot illegal.

This principle has been longstanding law in Florida, and continues today. In *Jolley*, 60 So. 2d 762, there were a number of irregularities in requests for absentee ballots. Nevertheless, this Court refused to invalidate the ballots cast, stating, "[I]t may well be doubted, whether an irregularity in the filling out of the application would invalidate the ballot, unless it appeared that the voter was not entitled to

receive the ballot." *Id*. at 766. And this Court recently held in the context of irregularities in *ballots themselves*:

> As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements. When considering a petition alleging a violation in the form of the ballot, "a vital consideration guiding the courts in determining whether an election should be voided is the reluctance to reach a decision which would result in the disfranchisement of the voters. Indeed, as regards defects in ballots, the courts have generally declined to void an election unless such defects clearly operate to prevent that free, fair and open choice."

Fladell v. Palm Beach County Canvassing Bd., Nos. SC00-2373 & SC00-2376 (Dec. 1, 2000) (internal citations omitted). If these types of defects in the *ballots themselves* do not invalidate the vote, then a minor technical omission or mistake on an absentee ballot *request form* does not do so.

In this case, as in *Boardman, Jolley,* and *McLean*, there is no evidence whatsoever "that the absentee ballots in question were illegally cast or that they were cast by voters who were unqualified to vote absentee." *Boardman*, 323 So. 2d at 268. Further, every item of information included on the request form submitted to the Supervisor of Elections was correct. Relying on the important principle that the will of the voters is paramount, Florida courts (and other courts in

similar cases) have consistently refused to invalidate absentee ballots when the voters were qualified electors.[10] The circuit court properly refused to do so as well.

E. There Has Been No Adverse Effect On The Sanctity Of The Ballot Or The Integrity Of The Election.

In the absence of a statutory provision expressly declaring a particular act or omission to be grounds for invalidating an absentee ballot, the ballot may only be invalidated if the error represents substantial noncompliance with election laws *and* adversely affects the sanctity of the ballot or the integrity of the election. *Boardman*, 323 So. 2d at 265; *Wilson v. Revels*, 61 So. 2d 491, 492 (Fla. 1952); *Gilligan v. Special Road & Bridge Dist. No. 4*, 77 So. 84, 85 (Fla. 1917). The evidence presented at trial showed that neither the sanctity of the ballots cast nor the integrity of the election was compromised by any irregularities alleged at trial.

In addition, there was no evidence in the record that the alleged irregularities affected the integrity of the election or "place[d] in doubt the result of the election." *See* § 102.168(3)(a), Fla. Stat.; *Boardman*, 323 So. 2d at 269;[11]

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[10]*See, e.g.*, *id.*; *Jolley*, 60 So. 2d at 767; *State ex rel. Titus*, 470 So. 309, 309 (Fla. 1936); *McLean*, 437 So. 2d at 746; *accord Prado v. Johnson*, 625 S.W.2d 368, 370 (Tex. Civ. App.—San Antonio 1981, writ dism'd); *Attorney Gen. ex rel. Miller v. Miller*, 253 N.W. 241, 246 (Mich. 1934).

[11]In *Gore v. Harris*, Nos. SC00-2431, Slip op. at 20-23, this Court recently rejected the "reasonable probability" standard for determining the Appellant's burden under Section 102.168, which had been followed consistently by Florida courts prior to this election. Instead, the Court held that Appellant need only show that their allegations, if true, would "place in doubt" the results of the election. *Id*.

Appellant does not even attempt to prove this element of the case, and the circuit court properly found proof of this essential element missing. Appellant presented no evidence to show, that if the voter registration numbers not been corrected on the request forms, the voters requesting those absentee ballots would not have voted or would have voted differently. Indeed, the evidence indicated the contrary.

Professor DeLong conceded that he had not considered the fact that, if these requests had not been corrected, and the applicants had not received an absentee ballot, many of them would have voted anyway (either absentee or at the polls). (Tr. 214, 237). In fact, the only evidence indicated that most of them would have voted.[12] Of the Republican cards, 472 remained unprocessed as of election day. (Def. Ex. 12). Of those applicants, at least 367 received an absentee ballot from another request or voted at the polls.[13] (Def. Ex 12). Therefore, even if the absentee ballot requests corrected by the Republican Party had never been processed, it is likely that the vast majority of voters would have voted anyway.

Appellees object to this standard for the reasons set forth in their Amended Brief of Appellees, at 42-43, n.25 and the Clarification of Argument, submitted in that case. However, regardless of the standard applied, Appellant in this case did not meet his burden of proof under either standard.

[12]The absentee ballot request forms were processed in the weeks leading up to the election. Therefore, there was time available for these voters to obtain an absentee ballot or make arrangements to vote at the polls. Professor DeLong did not take those facts into account in his testimony. (Tr. 214).

F. There Was No "Fraud, Gross Negligence Or Intentional Wrongdoing."

1. There Was No Evidence of Actual Fraud.

Contrary to Appellant's many allegations of fraudulent conduct, there was not a whit of evidence presented in this case of "fraud, gross negligence, and intentional wrongdoing in connection with any absentee ballots." (Final Order at 9). There are no allegations of any wrongdoing with respect to the *ballots*, only as to the *request forms*.[14] Where, as here, there is not even an allegation that fraud contaminated actual votes, the election results should stand. *See Bolden*, 452 So. 2d at 566 ("courts must not interfere with an election process when the will of the people is unaffected by the wrongful conduct."). It is the will of the voters that is paramount, and in the absence of any evidence—or even any allegation—that fraud thwarted the voters' will, the election results should not be overturned. *See Bolton*. The circuit court's findings of fact regarding Appellant's allegations are

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[13] There were 57 requests on Republican cards from people who were not registered to vote or whose names were illegible.

[14] *Cf. Bolden v. Potter*, 452 So. 2d 564, 567 (Fla. 1984) (invalidating votes under *Boardman* when there was clear fraud in the form of *ballots* being bought, so that the sanctity of the *ballot* was compromised); *In re Matter of Protest of Election Returns & Absentee Ballots in Nov. 4, 1997 Election for City of Miami*, 707 So. 2d 1170 (Fla. 3rd Dist. Ct. App. 1998) (invalidating ballots based on massive voter fraud scheme that included stolen *ballots*, *ballots* procured by "ballot-brokers," and *ballots* with false addresses and witnesses).

entitled to deference and should be affirmed because they are fully supported by the evidence. [15]

2. An alleged "possibility" of fraud is not sufficient.

Because there was no evidence of actual fraud in this case, Appellant essentially allege that some sort of fraud *might* have occurred while the Republican representatives had access to the request forms. (Cplt. 28-30; Tr. 309-315). However, as this Court has squarely held, where noncompliance with election laws creates the mere opportunity for fraud, but no actual fraud, the results of an election will nevertheless stand. *Beckstrom v. Volusia County Canvassing Bd.*, 707

[15]Rejection of Appellant's claims on these facts was even more appropriate given the extreme relief sought: disenfranchising thousands of voters. *See Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (holding that public's interest "is not served by arbitrarily ignoring the absentee vote, a substantial but undetermined portion of which was either legally cast or came from voters who would have gone to the polls but for the [erroneous advice]"); *cf. In re Protest,* 707 So. 2d at 1174 (distinguishing *Marks*, in which voters were erroneously allowed by election officials to vote absentee from situation involving massive voter fraud). Appellant's alternative of statistically "discounting" the votes cast by voters whose absentee ballot request forms were corrected is no more viable. Amazingly, his expert defended his statistical readjustment on a theory in direct conflict with every applicable Florida precedent: that "reflecting the will of the voters is an aggregate process and is not the result of individual votes each of which reflect the will of one voter." Tr. 211. Moreover, he used *statewide* data to predict how voters in Seminole County cast their ballots, without any effort to account for the particular characteristics of Seminole County; he used surveys of voters who went to the *polls* to predict how *absentee* voters case their ballots; and he did not take into account the fact that many, if not all, of these voters would have voted anyway if their absentee ballot request form had not been corrected and processed. (Tr. 214, *see also* Def. Ex. 12.)

So. 2d 720 (Fla. 1998). In *Beckstrom*, the opportunity for fraud relating to the absentee *ballots* themselves was far more egregious than the speculative opportunity for fraud alleged here relating only to *requests,* and still this Court denied the election challenge. *Id*. at 722.[16] In *Beckstrom*, this Court found that county officials had been substantially noncompliant with Florida election procedures, and that their actions, particularly the re-marking of ballots, created a striking opportunity for fraud. *Id*. at 726. Nonetheless, this Court sustained the election result, because in spite of the opportunity for fraud, no fraud had been shown to occur. *Id*. This Court stressed that it would be unfair to allow the acts of county officials to affect an election that was otherwise the "full and fair expression of the will of the people."[17]

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[16]In *Beckstrom*, there were also other alleged irregularities in the handling of absentee ballots, among them that absentee ballots were left unattended and accessible at the office of the elections supervisor; that ballots were opened outside the presence of any member of the canvassing board; that individuals who were not employees of the elections supervisor participated in the opening of absentee ballots; and that election officials failed to compare the signature on the voter's certificate with the signature in the voter registration records. *See* 707 So. 2d at 723.

[17]*Id*. at 725-727; *see also Carn v. Moore*, 76 So. 337, 340 (Fla. 1917) ("[T]he courts should not set aside an election because some official has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, unless fraud has been perpetrated or corruption or coercion practiced to a degree to have affected the result.").

As in *Beckstrom,* even if Appellant were correct that the Republican Party's access to the forms created an opportunity for fraud, there was no evidence in this case of actual fraud. Under *Beckstrom,* votes cannot be disqualified in this case on the basis of Appellant's speculation or even a bare inference of fraud. The draconian relief requested by Appellant – invalidation of thousands of votes cast by qualified and properly registered voters – is only appropriate in the face of dramatic and pervasive fraud.[18] Here, where there is not even an allegation of fraud in the actual casting and counting of ballots, this remedy should not be granted.

3. The alleged conduct does not constitute a violation of Section 104.047, the Public Records Act, or any other statutory provision.

Because Appellant could not establish fraud, he alleged during trial a litany of statutory violations, attempting to turn an innocent correction of a printing glitch into the commission of a crime somehow to justify the disenfranchisement of thousands of votes. First, Appellant's allegations relate in part to the conduct of the Supervisor, and as the circuit court held, "no remedy against her is available in

[18]*See, e.g., In re the Matter of the Protest of the Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (invalidating all absentee ballots where there was clear and convincing evidence of massive absentee voter fraud); *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) (invalidating all absentee ballots where there was clear and convincing evidence of substantial fraudulent vote-buying). In both of those cases, the Court found extensive fraud and corruption.

this election contest under Section 102.168." Final Order at 10.[19] In any event, there has been no violation of the statutes cited by Appellant, and even if there were, it would not be a criminal violation and would not have any effect on the sanctity of the absentee ballots.

Appellant argues that by adding the voter identification numbers to the request forms, the absentee ballots were issued in contravention of Section 104.047(2), which makes it a crime to request a ballot on behalf of another voter. § 104.047(2), Fla. Stat. However, the Republican Party's correction of preprinted registration numbers on a form used by a voter to request an absentee ballot is not a request by someone other than the voter. *See supra* Part IA.

Nor is adding the missing digits to the postcard request forms a "criminal violation of the Florida Public Records Act." The only *criminal* violation contemplated within Chapter 119 is for the refusal of a public official to make public records available upon request. Final Order at 9. In any event, Appellant

[19]In any event, Appellant has no standing to bring claims of criminal violations. "Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (citing Article II § 3 of Florida Constitution). To establish the commission of a felony, as Appellant has alleged, Appellant must prove a criminal intent to violate Florida's Election Code, which he clearly did not do in this case. *See Chicone v. State*, 684 So. 2d 736, 743 (Fla. 1996) (stating that to interpret statute as dispensing with a mens rea requirement would "criminalize a broad range of apparently innocent conduct").

has not identified any provision of the Public Records Act that has been violated by the correction of the voter registration numbers,[20] and, even if there is a violation of the Public Records Act, such violation would not require invalidation of the votes cast by qualified voters.[21]

For similar reasons, Appellant's inflammatory allegation that Republican representatives falsified records, as proscribed by § 839.13 of the Florida Statutes, is not supported by the facts established at trial. First, *no documents were falsified*. There was no issue at trial that the voter identification numbers written on the

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[20]Appellant may assert that the addition of voter identification numbers is a violation of § 119.07(1), and thus the Supervisor and others are guilty of a misdemeanor in the first degree. But § 119.07(1) is simply a legislative command that custodians of public records allow citizens to inspect, examine, and duplicate nonexempt public records. Presumably, a violation of this section would result from the custodian's *refusal* to permit such inspection, examination, or duplication, and there is nothing in the language of the statute that indicates that a lack of custodial supervision would constitute a punishable violation of § 119.07(1). In any event, § 119.02 provides that "[a] public officer who *knowingly* violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, is guilty of a misdemeanor of the first degree, punishable as provided in §§ 775.082 and 775.083." (emphasis added). The circuit court's findings, based on the evidence, makes clear that there was no knowing violation of any statute.

[21]Notably, under the machinery that the Democratic Party uses to distribute postcard request forms, those forms are turned in by the voter to the Democratic Party, who has absolute "unfettered access," to alter or do anything to those requests before they are sent to the Supervisor. The Republican Party forms, however, were mailed by the voters directly to the Supervisor. Accordingly, the only basis that Appellant can find to argue that this correction of voter registration numbers by the Republican representatives should serve to invalidate votes is a superficial reliance on the Public Records Act.

corrected ballot request forms were not the true and correct identification numbers belonging to the qualified voter making the request. Further, Section 839.13 requires a showing of an affirmative intent to deceive, mislead, or corrupt.[22] Appellant has not alleged, much less proven, any intent by the Supervisor or the representatives of the Republican Party to deceive, mislead or corrupt, or that any information provided on any absentee ballot request form was fraudulent or incorrect. Looking to the types of wrongs proscribed by § 839.13 and to the benevolent intent of the Supervisor and others to honor the requests of qualified registered voters, a reading of that provision to criminalize their unknowing acts would be a perverse reading of the statute.

The voter registration number used on a request form is simply one of several ways of identifying persons eligible to receive the absentee ballot.[23] There are many other sufficient ways to identify eligible persons, however, and there is no allegation or evidence that those methods were not complied with, or that anyone other than a properly qualified person received absentee ballot materials

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[22]"839.13. Falsifying records. . . . If any . . . public officer, or any person whatsoever, shall steal, embezzle, alter, corruptly withdraw, falsify or avoid any record, process, charter, gift, grant, conveyance, or contract . . . or knowingly and willfully take off, discharge, or conceal any issue . . . or shall forge, deface, or falsify any document . . . or shall fraudulently alter, deface, or falsify. . . ."

[23]Voter registration numbers are available to political parties and candidates. 98.095(2), Florida Statutes.

and then properly voted to express his will. *See* Final Order at 8, 10. In this case, it could not be clearer that an alleged irregularity in this pre-election process was, at most, merely procedural and had no effect on the ballots cast.

G. The Supervisor Of Elections Did Not Treat The Republican And Democratic Parties Differently.

The circuit court correctly concluded that based on the facts in evidence, "[t]here was no showing of any violation of 104.0515, Florida Statutes, equal protection under the law under Article I, Section 2 of the Florida Constitution, or any other applicable law." Final Order at 8. Appellant's claim of disparate treatment appears to be based on the fact that the Supervisor of Elections did not initiate contact with the Democratic Party or individual Democratic voters to inform them that they could correct missing voter registration numbers. *Id*.

Even assuming that disparate treatment were a claim that could be made, Appellant would have had to have proved that parties similarly situated were treated differently. *McElrath v. Burley*, 707 So. 2d 836, 839 (Fla. 1st Dist. C. App. 1998). The evidence showed, however, that the Supervisor of Elections did not initiate contact with the Republican Party. (Tr. 150, Stip. ¶ 6) Rather, a representative of the Republican Party contacted the Supervisor requesting to correct the Republican pre-printed postcards which omitted a place for the voter registration number or contained an incorrect number. (Stip. ¶6, 10-12.) Unlike the Republican postcards, that were sent directly by the voter to the County

Supervisor of Elections, Democratic postcards were sent by the voters to the Democratic Party, which then forwarded them to the Supervisor. (Stip. ¶ 40.) Thus, Democrats had more than equal opportunity to correct errors or omissions that might have existed on their pre-printed forms.[24] Neither the Democratic Party nor anyone else asked to make corrections to absentee ballot request forms, nor was anyone refused. Tr. 140, 153.

As the Final Order recognizes, the undisputed evidence established that:

> Unlike the Republican mail-out, the Democratic mail-out did not suffer from the general omission of the voter identification numbers. Therefore, there was no need for the Democrats to request access to the request forms to correct them, and in fact, there was no evidence that such a request was made by the Democratic Party or any other political division. Consequently, there was no evidence that the request of any representative, including any Democrat, was denied by the Supervisor.

Final Order at 8; (*see* Tr. 142, 162).

Even if Appellant had proved differential treatment by the Supervisor, there is no legal basis to invalidate the absentee ballots cast by the voters. In *McLean*, 437 So. 2d 737, a losing candidate argued that he was adversely affected when unsolicited absentee ballots were sent to persons who had voted absentee in the

[24]As of election day, only 40 absentee ballot requests submitted on pre-printed Democratic Party forms were unprocessed. Of those applicants, 37 received an absentee ballot anyway pursuant to another request. Meanwhile, there were 472 unprocessed requests submitted on the pre-printed Republican cards, and 263 of those applicants never received an absentee ballot in this election. (Def. Ex. 12.)

primary election because absentee voters in the primary had preferred his opponent by a margin of 153 to 40, and therefore the clerk's procedure made voting easier for his opponent's supporters than for his supporters. *Id*. at 743.

The court refused to void the absentee ballots. *Id.* at 743-44. As to the losing candidate's concern about his opponent having benefited from the error, the court said:

> We have found no authority which suggests that in such a situation, the proper resolution would be to throw out the absentee ballots cast by qualified electors because of the highly speculative effect of certain electors not having received absentee ballots. . . . There is no indication that any of them contacted the election office or otherwise complained of not having received a runoff absentee ballot. The inference which McLean suggests that the City's failure to mail absentee ballots to the 89 primary non-voters somehow skewed the runoff absentee balloting in Chapman's favor is highly speculative and conjectural.

Id. at 744. Similarly, Appellant's assertion that not informing other voters that they could correct errors or omissions on their requests – especially when they never asked – somehow skewed the absentee voting is highly speculative and completely conjectural.[25]

[25]Any argument that Republican access to correct the voter registration numbers on postcard request forms resulted in disparate treatment under § 104.0515 is also meritless. Section 104.0515(2)(a) applies to the determination of voter *qualifications*, not voting procedures for obtaining an absentee ballot. Voter qualifications are listed in a separate provision of the statute, in § 97.041, and there is no dispute that the voters at issue were qualified to vote. *See* Final Order at 8.

H. Appellant Is Barred From Bringing A Post Election Challenge To Pre-Election Irregularities On Grounds Of Estoppel, Waiver and Laches.

The evidence at trial establishes that Appellant is barred by estoppel, waiver, and laches from attempting to invalidate these votes. A party is estopped from bringing a post-election challenge to irregularities that were discoverable before the election. As this Court has long held, an "aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." *Pearson v. Taylor*, 32 So. 2d 826, 827 (1947). The time for Appellant to challenge absentee ballot request forms was before the election, when any error could have been cured without depriving Seminole County voters of their votes. Because Appellant delayed until after the election, principles of equity bar his suit.

The equities are particularly strong against Appellant here, because he had notice of the alleged pre-election irregularity several weeks before the election. (Tr. 139; Altiero Depo. 4-11, 31-32). It was well known in Democratic circles before the election that, because of an error on pre-printed request forms mailed to voters by the Republican Party, representatives of the Republican Party had sought

and received permission to correct incomplete or missing voter registration numbers.[26]

A party who was on notice of irregularity before an election is clearly estopped from challenging it afterwards. In *McDonald v. Miller*, 90 So. 2d 124 (Fla. 1954), the losing candidate had been aware before the election of certain irregularities in the requests for absentee ballots, but did not object until after the election, complained that the ballots were illegal and that because they had been intermingled with validly cast absentee ballots, *all* absentee ballots must be rejected. *Id*. at 128. This Court refused to allow the candidate's challenge, holding that after standing by and allowing the errors to occur and the ballots to become intermingled, the candidate was estopped from seeking to invalidate the absentee ballots.[27]

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[26] It cannot be doubted that Harry Jacobs, who is an active member of the Democratic Party, was on notice of these events. But even if Mr. Jacobs personally lacked notice of these events, the knowledge of the Democratic Party must be imputed to him. To prevent parties from circumventing rules such as this, Florida courts look at the real party in interest, not simply the nominal plaintiff. *Cf. Kinney System, Inc. v. Continental Ins. Co.,* 674 So. 2d 86 (Fla. 1996) (for purposes of applying forum non conveniens, the court looks at the real party in interest, not the "straw man"). If the rule were otherwise, a party with notice of pre-election irregularities or deficiencies could simply find another party to bring the claim on his behalf.

[27] *See also Winterfield v. Town of Palm Beach*, 455 So. 2d 359, 362 (Fla. 1984) ("a party is estopped from voiding an election where he was on notice of the irregularity before the election"); *Greenwood v. City of Delray Beach*, 543 So. 2d 451, 452 (Fla. 4th Dist. Ct. App. 1989) (holding that one who challenges the

Similarly, Appellant is estopped from challenging the absentee ballots. He remained silent when the Supervisor issued ballots in response to what the Appellant now alleges to be invalid request forms, and he remained silent when the absentee voters, who relied on their receipt of ballots as evidence that their requests had been valid, cast their votes. Had he complained at the time, voters could have made other arrangements, by either requesting another ballot or voting at the polls. Appellant cannot now be heard to complain that those votes are void.

It is precisely because of the potential prejudice to voters, who are "the real parties in interest" in any election contest, *Boardman,* 323 So. 2d at 263, that Florida law generally requires errors discoverable before the election to be challenged before the election—whether or not Appellant was on actual notice. "A different rule applies to technical or procedural irregularities which occur and are challenged prior to a general election than to those which are discovered and challenged after the general election, in the absence of corruption or fraud."[28] A party who is not vigorous about protecting his rights at a time when it would do the

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"result of an election based upon improper notice thereto . . . must show that he was not aware of the deficiencies prior to the election.").

[28]*Speigel v. Knight*, 224 So. 2d 703 (Fla. 3d Dist. Ct. App. 1969); *see also State ex rel. Robinson v. N. Broward Hosp. Dist.*, 95 So. 2d 434 (Fla. 1957) (same); *Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1947) (same); *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d Dist. Ct. App. 1974) (same).

least harm to voters forfeits his ability to bring a challenge at a time when it would do voters the most harm.

II. Federal Law Prohibits This Court From Disenfranchising Qualified Voters Who Properly Cast Their Vote Based On Procedural Issues That Have No Bearing On A Voter's Qualifications.

Not only does state law mandate that the certified count of this election stand, but federal law mandates the same result – indeed, it prevents any other result. For a state court to disenfranchise absentee voters would violate federal law and amount to a denial of due process under the United States Constitution.

A. 42 U.S.C. § 1971 Prevents The Court From Denying Any Individual Vote Because Of Any Error Relating To An Absentee Ballot Application When The Defect Is Not Material To Determining Whether The Voter Is Qualified.

The voters whose votes are in question here were qualified to vote under Florida law and did, in fact, cast and have counted valid votes. Neither federal statutory law nor the federal constitution will permit a state court to override that vote, in a Presidential election, based on procedural technicalities such as those alleged here. 42 U.S.C. § 1971 provides that:

> *No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.*

42 U.S.C. § 1971(a)(2)(B) (emphasis added). All that is required for a voter to be qualified to vote is that he be 18 years old, a citizen of the United States, a legal

resident of Florida and the county in which he or she is registered pursuant to the Election Code, and not mentally incapacitated or convicted of a felony. § 97.041(1)(a) & (1)(b)(2), Fla. Stat. The alleged "irregularity" in this case can have no material relationship to determining the qualifications of a voter. Indeed, the court found that "[t]here was no allegation or evidence that any of the absentee votes counted were not 'cast by qualified, registered voters.'" Final Order at 8.

Appellant may argue that the voter registration number is "material" to determining whether a voter is qualified, because a person who is not registered may not vote. However, the presence of the registration number on the *request form* is not determinative of whether the voter is registered or not.[29] That number represents only one of several ways for officials to access formal registration records to confirm that a person can be sent a ballot.

Article II, Section 1 has long been interpreted "to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections." *Association of Community Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). Thus, Congress has the

[29] Appellant's previous reliance on *Johnson v. Byrd*, 429 S.E.2d 923 (Ga. 1993), is misplaced. In that case, the individuals "*never became lawfully registered voters*." *Id*. at 925 (emphasis added).

power to regulate Presidential elections.[30] This power extends to the regulation of the process of registering voters. *ACORN*, 56 F.3d at 793-94 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932) and other cases).

Moreover, Section 1971 acts to protect fundamental constitutional rights of voters. The right to vote, and the right to have one's vote counted are protected by the United States Constitution. *Ex parte Yarborough*, 110 U.S. 651 (1884) (right to vote).[31] Congress has specifically protected these rights of absentee voters through other statutes, as well. Under 42 U.S.C. § 1973aa-1, Congress requires the states to "provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State . . . ." In § 1973aa-1(a), Congress found

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[30]*See Burroughs v. United States*, 290 U.S. 534, 547 (1934) ("The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."); *see also Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997) (citing *Burroughs* in finding that "Congress has been granted authority to regulate presidential elections"); *Condon v. Reno*, 913 F. Supp. 946, 961 (D.S.C. 1995) (finding that Article I, Section 4 applies to elections for President and Vice President, and that Congress has additional power to regulate elections under Article I, Section 8, cl. 18 ("necessary and proper" clause), Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment).

[31]*United States v. Mosley*, 238 U.S. 383 (1935) (right to have vote counted); *see also Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1977) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.").

that the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections "denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President," as well as rights of free movement across state lines, the privileges and immunities guaranteed to citizens under Article IV, section 2, clause 1 of the Constitution, and "due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment." 42 U.S.C. § 1973aa-1(a) (1994).

These same constitutional rights that were sought to be protected by § 1973aa-1 were targeted by § 1971 as well, and the power of Congress to protect the constitutional rights of the citizens or particular states under the Fourteenth Amendment is well established. *See, e.g*. *United States v. Raines*, 362 U.S. 17, 25 (1960) (upholding § 1971 and stating that "[it] is . . . established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments"). Section 1 of the Fourteenth Amendment provides that "[n]o Statute shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States," and under Section 5 of the Fourteenth Amendment, Congress has the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. This broad provision empowers Congress, through § 1971, to assure that voters will not be disqualified through the

omission of immaterial information from their applications.[32] Even if the power to seek affirmative relief under the statute is reserved for the attorney general, the court could not fashion a remedy in this case which would directly violate a federal statute. Applying § 1971 to prohibit the remedy Appellant sought would be entirely consistent with the numerous Congressional efforts to encourage absentee voting. *See, e.g.*, *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776-77 (5th Cir. 2000) (citing numerous federal statutes as evidence that "Congress looks with favor on absentee voting"), *cert. denied*, 120 S. Ct. 2660 (2000).

B. The United States Constitution And Other Federal Laws Prohibit The Invalidation Of These Absentee Ballots.

Federal constitutional protections of the right to vote are well-recognized. The right to vote, and the right to have one's vote counted, are protected by the United States Constitution. *See, e.g., Griffin*, 570 F.2d at 1074. In the context of an election of this magnitude—to elect the electors who will vote for the President and Vice President of the United States—this right is considered to be so important that Congress has enacted specific statutes governing the opportunities for absentee voting in that particular election. *See* 42 U.S.C. § 1973aa-1 *et seq.* Confirming the

[32] *See also Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congress's power to provide for absentee balloting in presidential elections, with four justices finding power under Section 5 of the Fourteenth Amendment, three finding power under Congress's right to protect travel, and one finding power under Congress' power to regulate national elections).

constitutional importance of the right to vote in this election, Congress has provided that the lack of sufficient opportunities for absentee registration "denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President." *Id*. § 1973aa-1(a)(1).

In *Griffin v. Burns*, the First Circuit held that the invalidation of absentee ballots was effectively a disenfranchisement of those absentee voters. There, the state court invalidated all absentee ballots cast in a primary election because it decided that, under state law, absentee voting was not allowed in a primary election. 570 F.2d at 1067-68. The disenfranchised absentee voters challenged the state court's action in federal court, and the First Circuit held that those voters' due process rights had been violated. *Id*. at 1079-79. Government officials had sent voters absentee ballots, and thus the voters had every expectation that their ballots were valid and would be counted. *Id.* at 1075-1076. Nullifying those votes after the fact, when voters had detrimentally relied on the implicit representation that they would be able to vote absentee, was unfair and had the effect of denying their right to vote.

Similarly, those voters who received absentee ballots from the Supervisor were entitled to presume that their applications had been valid; when they cast their ballots in the election, they had every expectation that those votes would count. (Stip. ¶ 32.) They never had notice or opportunity to otherwise cast their vote by

correcting the mistake on the application or going to the polls. To invalidate those votes now would deny those voters their due process rights. The time for Appellant to seek redress for any perceived errors in the pre-election process was *before* the election, when a ruling in his favor would not have foreclosed absentee voters' right to vote. *Cf. Griffin*, 570 F.2d at 1069 (noting that electors would have arranged to vote at the polls had they known that their absentee ballots would not count). This Court cannot grant the relief Appellant requests now, after the fact, without violating the federal due process rights of nearly 15,000 absentee voters.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the Court decline to exercise jurisdiction over this appeal. In the alternative, Appellee requests that the Final Order of the circuit court be affirmed.

Respectfully submitted,

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BARRY RICHARD
Florida Bar No. 0105599
GREENBERG TRAURIG, P.A.
Post Office Drawer 1838
Tallahassee, Florida 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
Washington, D.C.

DARYL BRISTOW
AMY DOUTHITT MADDUX
BAKER BOTTS, LLP
Houston, Texas

STUART LEVEY
MILLER, CASSIDY, LARROCA &
LEWIN LLP
Washington, DC

COUNSEL FOR APPELLEES
GEORGE W. BUSH and
DICK CHENEY

KENNETH W. WRIGHT
Florida Bar No. 0188799
SHUTTS & BOWEN LLP
Orlando, Florida

COUNSEL FOR APPELLEE
REPUBLICAN PARTY OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been furnished to the following on this _____ day of December, 2000.

GERALD F. RICHMAN
ALAN G. GREER
JOHN R. WHITTLES
SCOTT E. PERWIN
PAMELA I. PERRY
Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, P.A.
One Clearlake Centre
250 Australian Avenue South, Suite 1504
West Palm Beach, Florida 33401
Fax: (850) 205-6806

KENT SPRIGGS
Spriggs & Davis, P.A.
324 W. College Avenue
Tallahassee, Florida 32301
Fax: 224-8836

STUART LEVY
STEPHEN BRAGA
Miller Cassidy Larroca & Lewin
2555 M Street NW
Washington, D.C. 20003-1302
Fax: (202) 293-1827

SEGUNDO FERNANDEZ
TIMOTHY ATKINSON
C. ANTHONY CLEVELAND
Oertel, Hoffman, Fernandez & Cole, P.A.
301 South Bronough Street, Suite 500
Tallahassee, Florida 32301
Fax: 521-0720

TERRY C. YOUNG
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 South Eola Drive
Orlando, Florida 32801
Fax: (407) 423-4495

JANET COURTNEY
215 N. Eola Drive
P.O. Box 2809
Orlando, Florida 32802-2809
Phone: (407) 843-4600

MATTHEW D. STAVER
Liberty Counsel
210 East Palmetto Avenue
Longwood, Florida 32750

ERIK W. STANLEY
210 E. Palmetto Avenue
Longwood, Florida 32750-4241
Fax: (407) 875-8008

Fax: (407) 875-0770

DEAN F. DIBARTOLEMEO
8400 Bird Road
Miami, Florida 33155-3226
Fax: (305) 226-6147

KATHERINE CHRISTY
250 International Parkway #230
Heathrow, Florida 32746-5030
Phone: (407) 333-1610

JOHN STEMBERGER
4853 S. Orange Avenue
Suite C
Orlando, Florida 32806-6937
Fax: (407) 251-0023

KENNETH WRIGHT
Shutts & Bowen
300 South Orange Avenue, Suite 1000
Orlando, Florida 32801
Fax: (407) 425-8316

JONATHAN SJOSTROM
Steel, Hector & Davis
215 S. Monroe Street, Suite 601
Tallahassee, Florida 32301
Fax: 222-2300

JOSEPH P. KLOCK, JR.
Steel Hector & Davis
200 S. Biscayne Blvd., Suite 4000
Miami, Florida 33131-2310
Fax: 222-8410

DEBORAH K. KEARNEY
400 S. Monroe Street, PL 02
Tallahassee, Florida 32399
Fax: 922-5763

MICHAEL D. CIRULLO
3099 E. Commercial Blvd.
200
Ft. Lauderdale, FL 33308-4311
Fax: (954) 771-4923

MICHAEL S. MULLIN
191 Nassua Place
Yulee, Florida 32097-6303
Phone: (904) 491-3600

_____
Seann M. Frazier

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

_____

Seann M. Frazier

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