

IN THE
SUPREME COURT OF FLORIDA
CASE NO. 00-2447

HARRY N. JACOBS and
JOHN AND JANE DOES 1-NNN,

Appellants

v.

THE SEMINOLE COUNTY CANVASSING
BOARD, SANDRA GOARD, KENNETH
MCINTOSH, JOHN SLOOP, THE FLORIDA
REPUBLICAN PARTY, RYAN MITCHELL, MICHAEL
LEACH, GEORGE W. BUSH , RICHARD
CHENEY, THE STATE OF FLORIDA ELECTION
CANVASSING COMMISSION and KATHERINE
HARRIS,

Appellees.

**ANSWER BRIEF OF KATHERINE HARRIS, AS FLORIDA SECRETARY
OF ~~BOBICER AND GRIDHERNEMBERSIS, FITHLAYORD ROBERTSONSD~~
CANVASSING COMMISSION**

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I. DISCRETIONARY JURISDICTION OF THIS COURT

This Court has ordered that briefs address the issue of this Court's jurisdiction. The Florida Rules of Appellate Procedure provide that the Supreme Court has discretionary jurisdiction to review orders and judgments of trial courts certified by district courts of appeal if the appeal requires immediate resolution and is a matter of great public importance. Fla. R. App. Proc. 9.030(B)(i)(2000); see also Art. V, § 3(b)(5), Fla. Const. The Secretary of State ("Secretary") and the Elections Canvassing Commission ("Commission") acknowledge the applicability of this rule and the constitutional provision to the present case and leave to the sound discretion of this Court whether it should exercise its jurisdiction.

II. STATEMENT OF CASE AND FACTS

The facts of this case are as stipulated by the parties and provided in Judge Clark's Order from the trial court ("Final Order"). See Appendix Tab 1, Jacobs v. Seminole County Canvassing Board, No. CV-00-2816 (Fla. 2d Cir. Ct., December 7, 2000), at 3-4.

Judge Clark determined in the case below that "the certified election in Seminole County was the result of the fair expression of the will of the people of Seminole County." Final Order at 10. Because the intent of the voters was clear, Judge Clark gave effect to the will of the voters who cast ballots in the November 7, 2000, presidential election. Id.

III. STANDARD OF REVIEW

Judge Clark found that the evidence in this case did not show a “substantial noncompliance with the election statutes.” Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720, 725 (Fla. 1998); Final Order at 9. She further determined that because there was “substantial compliance with the absentee voting laws,” the ballots cast were not void or illegal. Boardman v. Esteva, 323 So. 2d 259, 264 (Fla. 1975); Final Order at 10. Because the will and intent of the voters could be clearly determined by the ballots cast and there was no evidence of substantial noncompliance with the elections laws, Judge Clark found that she must give effect to the will of the people, and the absentee ballots should be counted. Final Order at 10.

The trial court’s judgment should 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). Evidentiary findings and conclusions of the trial judge that are supported by legally sufficient evidence should not be lightly set aside. Florida Bar v. Abramson, 199 So. 2d 457, 460 (Fla. 1967). As Judge Clark noted, she based her decision “on the facts as they were developed during the trial of this matter.” Final Order at 1. Judge Clark’s factual findings are presumptively correct and are fully supported by the evidence presented at trial. The Final Order, therefore, should be affirmed.

IV. INTRODUCTION

As is apparent from reading Judge Clark's Final Order, this election contest is not about voting. Rather, this case is about requests for ballots preliminary to voting. The Appellants asserted no claim that any absentee ballot in Seminole County was cast by any person other than the duly registered voter. The Appellants made no claim that the absentee ballots at issue lacked proper signatures of electors or witnesses. The Appellants have asserted no claim that any absentee ballot in Seminole County was cast by a deceased or otherwise ineligible person. The Appellants made no claim that any absentee ballot in Seminole County was not timely cast. The Appellants asserted no claim that any person influenced, in any way, any voter's choice on any absentee ballot in Seminole County. The Appellants made no claim that any person in Seminole County voted more than once.

The sole allegations during the trial below were that representatives of the Republican Party prepared requests for absentee ballots and sent those requests to the voters for execution. The voters then executed and returned the requests to the Seminole County Supervisor of Elections ("Supervisor") if the voters so chose. This action was perfectly legal.

This case arose because the Republican Party failed to include the voter identification numbers on the request forms of some potential voters in Seminole

County. Voters relied on the request forms and duly executed them, and such forms were submitted to the Supervisor. Rather than simply throw the request forms away and potentially disenfranchise those innocent voters, the Supervisor responded to the Republican Party's request to correct the error by allowing party representatives to insert the voter identification numbers on the request forms. The Supervisor then mailed absentee ballots to the appropriate voters, and the voters duly voted for whomever they desired. As Judge Clark recognized in her Order below, nothing in the complaint alleged -- or even hinted -- that representatives of the Republican Party touched the absentee ballots themselves. Final Order at 10.

The Appellants sought to disenfranchise every absentee voter in Seminole County because of the failure of the Republican Party to include voter identification numbers on some of the absentee ballot request forms the Republican Party lawfully submitted to the voters of Seminole County. The Appellants attempted to cloak their allegations with fraud or misconduct on the part of various elections officials. However, the Appellants did not prove -- or even allege -- facts that would support a finding of fraud or criminal misconduct on the part of those named. At most, Appellants proved that the local elections officials permitted a political party to correct an error in a legal absentee ballot request program approved by the state Elections Division. As a result, duly qualified voters cast their ballots pursuant to Florida law.

V. SUMMARY OF THE ARGUMENT

This case is not about absentee ballots. Rather, it is about request forms for absentee ballots and corrections to those forms by third parties who originally mass mailed the forms to voters. These voters relied on the forms, filled them out, executed them and, but for the mistake of the third parties, would have received absentee ballots. Appellants have not alleged that the ballots themselves were seen, touched, or otherwise compromised by third parties. Indeed, no claim has been asserted that any person influenced, in any way, any voter's choice on any absentee ballot in Seminole County.

The trial judge found that the corrections to the request forms did not demonstrate a “substantial noncompliance with the election statutes.” Final Order at 9. Additionally, because there was “substantial compliance with the absentee voting laws,” the ballots cast were not void or illegal. Final Order at 10. The trial court found that based on the evidence presented, the will of the voters should be given effect and the absentee ballots should be counted. Id.

Although there may have been a failure by the election officials in Seminole County to adhere to technical requirements of the statute governing ballot request forms, that failure did not amount to “gross negligence” as contemplated by this Court in Boardman v. Esteva, 323 So. 2d at 269, or to “substantial noncompliance with

election laws” as described in Beckstrom v. Volusia County Canvassing Board, 707 So. 2d at 725. The only effect of the correction of the error was that innocent voters received their ballots.

Florida law permits and facilitates mass mailing of unsolicited absentee ballot request forms to voters. Information required for the request forms is maintained by county supervisors of elections, and voter-specific information is available to the political parties under Florida law. Two Division of Elections opinions, one from 1990 and the other from 1998, unequivocally state that political parties and other persons may provide absentee ballot request forms to electors in order that the elector can complete the form and return it to the supervisor of elections.

Elections officials, including these Appellees, did not engage in fraud, misconduct, or criminal election law violations. As the trial judge found, the only technical violation of law was of section 101.62, Florida Statutes, a non-criminal statute relating to ballot request forms. Section 104.047, Florida Statutes, which provides for criminal penalties, governs absentee ballots, not absentee ballot request forms.

The trial judge found that irregularities alleged concerning the absentee ballot request forms did not “adversely affect the sanctity of the absentee ballots subsequently cast.” Final Order at 10. Additionally, the trial judge found that the

certified election in Seminole County was the result of the fair expression of the will of the people of Seminole County. For these reasons, the Final Order of the trial court should be affirmed.

VI. ARGUMENT

A. ABSENTEE BALLOTS, LIKE ALL BALLOTS, MAY NOT BE INVALIDATED BECAUSE OF HYPERTECHNICAL ERRORS

Absentee ballots are not presumed to be fraudulent or otherwise disfavored under Florida law. Absentee voting advances the fundamental value of our democracy that every person who wishes to vote may do so; invalidation of valid absentee votes because of a third party's technical error in providing the ballot to the voter does not. Absentee voting is authorized by sections 97.021(1)(d) and 101.62, Florida Statutes. Electors may request absentee ballots either in person or by telephone. § 101.657, Fla. Stat. Additionally, absentee voting is expressly permitted at any time prior to the day of the election at the office of the supervisor of elections; the voter need only show a driver's license or other picture identification. § 101.657, Fla. Stat.

Section 101.68(c)(1), Florida Statutes, expressly states the conditions under which an absentee ballot will be considered illegal. Nothing in that statute; in section 101.62, the statute providing for a request for an absentee ballot; or anywhere else in the Election Code indicates any intent to disenfranchise any absentee voter for some error in the means by which the voter obtained the absentee ballot.

Florida law does not permit the disenfranchisement of a voter who made an unequivocal choice for a candidate within the appropriate time on an official ballot. See Boardman, 323 So. 2d at 263. Boardman, like this case, involved absentee ballots that were timely cast by qualified electors. The absentee ballots at issue in Boardman were contested because of errors on the part of elections officials. This Court considered and rejected the attempt to invalidate absentee ballots of innocent voters. The Court's words are plain:

Assuming that the absentee ballots counted in the election were cast by qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects, a majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

Boardman, 323 So. 2d at 263.

Similarly, in Beckstrom v. Volusia County Canvassing Board, 707 So. 2d at 725, which also involved absentee ballots, this Court held that only "substantial noncompliance" with election laws that results in doubt as to whether a certified election reflected the will of the voters justifies interference by courts with the election process. This Court stated:

[T]he essence of our Boardman decision is that a trial court's factual determination that a contested certified election reliably reflects the will of the

voters outweighs the court's determination of unintentional wrongdoing by election officials in order to allow the real parties in interest -- the voters to prevail. . . . In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election only if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

Id. at 725.

The law of Florida, beginning with Boardman, compels the conclusion that invalidation of the ballots of innocent voters is not permissible here. Violation of a statute related to absentee ballots and the even more tangentially related request for an absentee ballot will not alone invalidate any ballot. Violation of the statutory procedures related to absentee ballots will only invalidate a ballot if a statute says that the remedy for the specific violation is the exclusion of an otherwise valid ballot, or if the ballot itself does not reveal the true choice of an eligible, registered voter.

Boardman, 323 So. 2d at 265. Even if the actions of persons other than duly registered, eligible voters involved in the requests were subject to criminal penalties -- a highly dubious proposition here -- that would be no justification to disenfranchise the 15,000 voters whose voices were heard through their absentee ballots in Seminole County.

As Judge Clark noted in her Final Order, nothing in this case amounts to “negligence that is so pervasive that it thwarts the will of the people” or “substantial

noncompliance with the election statutes.” Beckstrom, 707 So. 2d at 725; Final Order at 9.

1. Mere Irregularities, Even Involving the Ballots Themselves, Do Not Invalidate Absentee Ballots

In McLean v. Bellamy, 437 So. 2d 737 (Fla. 1st DCA 1083), the Court was asked by an unsuccessful candidate to void 293 absentee ballots based upon the violation of various statutory requirements governing absentee voting. In evaluating the case, the Court first reviewed the legal principles established in Boardman. The First District noted this Court’s statement:

Unless the absentee voting laws which have been violated in the casting of the vote expressly declare 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, provided such irregularity is not calculated to affect the integrity of the ballot or election.

...

[W]e hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots case, the following factors shall be considered:

- (a) The presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance 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 ballot and the integrity of the election.

The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots 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 742 (quoting Boardman, 323 So. 2d at 269.)

The First District applied these legal principles and determined that the following acts in violation of the Florida absentee voting law did not constitute irregularities sufficient to void the absentee ballots that were cast by qualified, registered voters:

- (1) the mailing of unrequested ballots to voters where the City Auditor-Clerk mailed such ballots to individuals who voted absentee in a primary election but did not expressly request an absentee ballot for a runoff election;
- (2) improperly witnessed ballots where one of two required witnesses signed the ballot at the time the voter marked the ballot, but the second required witness signed the ballot without witnessing the voter's action;
- (3) failure of the voter to check on the ballot application the "appropriate reason" for which the voter was entitled to vote absentee; and
- (4) distribution of the absentee ballot forms to third persons without written authorization from the elector.

In evaluating these technical statutory violations, the First District explained:

"We are unable to glean from the provisions of [section 101.62] a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee."

McLean, 437 So. 2d at 743-44. The Court noted that the 1977 Legislature “relaxed some of the former rigidities of Section 101.62 regarding requests for absentee ballots,” and explained that “we find no declaration in Section 101.62, implied or explicit, that strict compliance with its provisions is essential to the validity of the ballot or that the failure to strictly follow any of its provisions will cause the ballot not to be counted.” Id.

In rejecting the unsuccessful candidate’s request to invalidate the absentee ballots, the First District repeatedly considered whether such rejection was necessary to ensure a full, fair, and free expression of the will of the people. Additionally, the First District held that rejection was not appropriate despite the irregularities. Id. at 743, 745, and 748. In concluding that it would be inappropriate to disenfranchise absentee voters for errors on the part of elections officials, the First District explained:

It is obvious that the subject election was managed by the election officials in a manner other than in strict conformance with the applicable voting laws. It may well be that such irregularities were the result of negligence on the part of the election officials. However, any such negligence avails the appellant nothing because such negligence did not descend to the kind of gross negligence which the Supreme Court in Boardman equated with fraud or intentional wrongdoing.

Id. at 750 (emphasis added).

Similarly, in Seminole County, there may have been a failure by the election officials to apply the technical letter of the request form statute. As Judge Clark noted:

While the Supervisor of Elections of Seminole County exercised faulty judgement in first rejecting completely the requests in question, and compounded the problem by allowing third parties to correct the omissions on the forms, no remedy against her is available in this election contest under section 102.168, Florida Statutes. Faulty judgement is not illegal unless the Legislature declares it so.

Final Order at 10.

The actions of elections workers in Seminole County “did not descend to the kind of gross negligence which the Supreme Court in Boardman equated with fraud or intentional wrongdoing.” McLean, 437 So. 2d at 750. Nor did they reflect “substantial noncompliance with the election statutes.” Beckstrom, 707 So. 2d at 725.

2. Absentee Ballots Will Be Voided Only if Ballot Fraud Affects the Outcome of the Election

In clear contrast to McLean and this action is In re the Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, 707 So. 2d 1170 (Fla. 3rd DCA 1998). In that case, the district court reviewed a decision in which the circuit court, evaluating events involving the 1997 Miami mayoral election, found an extensive “pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of the absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated.” Id. at

1171. The Third District ruled that it was appropriate in that situation to void all of the absentee ballots cast in the election.

In reaching its decision, the district court reviewed evidence presented to the trial court, including an expert document examiner's conclusion that 225 illegal absentee ballots were cast; an FBI agent's identification and confirmation of 113 false voter addresses; evidence of 14 stolen ballots; 140 falsely witnessed ballots; and evidence that over 480 ballots were procured or witnessed by approximately 29 ballot brokers who invoked their privilege against self-incrimination instead of testifying at trial. *Id.* at 1172. In summary, the court found "ample evidence of fraud" to support the trial court's finding that "the integrity of the election was adversely affected." *Id.* at 1172.¹

Without question, rampant absentee ballot fraud is justification for invalidating absentee ballots. Correction of a technical error created in a political party's legally sanctioned absentee ballot request program is not.

As a direct result of absentee voter fraud problems in the 1997 Miami mayoral election, the Legislature enacted Chapter 98-129, 1998 Laws of Florida. This

¹The Appellants' reliance on *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) is misplaced. This Court in *Bolden* noted that the facts there showed "promiscuous vote buying" and that "fraud and illegal practices were so conspicuously corrupt and pervasive that it has tainted the entire absentee voting procedure in this election." *Id.* at 565.

legislation addressed voter registration, absentee voting, and criminal penalties associated with violation of election laws.²

The final staff report on the legislation, prepared by the House of Representatives Committee on Election Reform, describes the situation existing at the time of the legislation as follows:

Issues of voter fraud, with an emphasis on absentee balloting, arose in the 1997 Miami mayoral race and in a 1997 city commission race in Miami Beach. Similar allegations had arisen as early as 1993 in the Hialeah mayoral election. Specific allegations in the Miami mayor's race included:

- Someone voting on behalf of someone else
- The purchasing or selling of absentee ballots or another's vote
- Non-City-of-Miami residents voting
- Changing the markings on ballots
- False statements or information being provided with regard to address information and changes of address on voter registrations
- Use of certain addresses within the City as the "new address" for persons not residing within the City for the sole purpose of allowing non-residents to vote in the municipal election
- Voting by absentee ballots under the name of deceased persons
- Voting by non-U.S. citizens

²The Division of Elections and the Elections Canvassing Commission are well aware of the intent of this 1998 legislation. Clay Roberts, the Division Director and one of three members of the Elections Canvassing Commission, was the Staff Director for the House of Representatives Committee on Elections Reform in 1998, and was personally involved in the creation of this law. See Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBs 3743, 3941 (Passed as CS/SB 1402), May 12, 1998. Appendix Tab 2.

Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBs 3743, 3941 (Passed as CS/SB 1402), May 12, 1998. Appendix Tab 2.

The legislative report notes that an “absentee ballot is considered illegal if it does not include the signature of the elector, as shown by the registration records, and the signature and address of an attesting witness.” Id. at 8. The report further explains that “[a]lthough the statutes emphasize the importance of all the instructions, only the voter’s signature and the signature of the attesting witness are mandatory; all other provisions are directory in nature.” Id. (citing Boardman). The Legislature quoted Boardman’s admonition that “[u]nless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot.” Id. (quoting Boardman, 323 So. 2d at 265). The Legislature certainly did not specify that a third party’s correction of an error in a request form would invalidate a ballot thereby acquired.

Section 101.62, Florida Statutes (request for absentee ballots), and sections 101.64 and 101.65, Florida Statutes (delivery of absentee ballots and instructions to absent electors), take differing approaches. In section 101.62, the law directs that

certain information be set forth in the ballot request form. However, nothing in that provision states that failure to include the information will invalidate the ballot so requested. In comparison, both sections 101.64 and 101.65 contain clear instructions to the voter that failure to sign the voter's certificate on the ballot, or to have the signature properly witnessed, will invalidate the ballot. Nothing in the statutes, or in the attendant legislative history, suggests an intent to turn otherwise directory provisions in the absentee ballot law into mandatory provisions that will invalidate an absentee ballot.

The 1998 legislation also created or increased criminal penalties imposed for violations of election laws, and these penalty provisions are incorrectly cited by Appellants as applicable to this case. Section 104.047 was created to provide new penalties for the following absentee voting violations: vote brokering, requesting an absentee ballot on behalf of another without permission, witnessing more than five ballots in an election, marking the ballot of another, and returning more than two voted absentee ballots to supervisors. *Id.* Appendix Tab 2 at 23. None of these penalty provisions contain the barest hint of an intent to disenfranchise all absentee voters based on the means by which some voters innocently obtained their absentee ballots.

B. FLORIDA LAW PERMITS AND FACILITATES MASS MAILING OF UNSOLICITED ABSENTEE BALLOT REQUEST FORMS TO VOTERS

Appellants' allegations do not withstand scrutiny when examined in light of the statutory language and its legislative history. Nothing alleged by the Appellants demonstrates fraud or misconduct. Correction of the errors on the request forms furthered Florida's longstanding practice of permitting the political parties to mass mail absentee ballot request forms to qualified electors in an effort to encourage them to vote.

In 1990, the Division of Elections was asked to opine on the following question: "Can a candidate legally mass mail unsolicited absentee ballot applications to the voters?" The Division answered unequivocally: "A candidate may legally mass mail unsolicited absentee ballot applications to the voters." Division of Elections Opinion DE 90-31.³ Appendix Tab 3. Thus, for at least ten years, it has been the explicit law of this state, well known to both political parties, that mass mailing of unsolicited absentee ballot applications is permissible.

Additionally, the statutes themselves provide political parties with the means to prepare such mass mailings. All necessary, voter specific information required for

³Division of Elections opinions are published on the Division's official web site at <http://election.dos.state.fl.us/index.html>.

request forms is available to both political parties from the Division of Elections in the form of the Central Voter File pursuant to section 98.097, Florida Statutes. The most current compilation of the information required for request forms is maintained by the county Supervisors of Elections. § 98.095(1)(b) & (2)(d), Fla. Stat. The voter specific information maintained by the county supervisor is available to the political parties. § 98.095(2)(d), Fla. Stat.

The Legislature's revisions to the absentee ballot laws in 1998 preserved the parties' participation in the request form process. Indeed, the Division was once again asked to opine concerning mass mailing of request forms and issued its opinion DE 98-14 addressing the effect of the 1998 legislation. Appendix Tab 4. The Division extensively analyzed the statutory changes and concluded that "[c]andidates, political parties, or other persons may provide absentee ballot request forms to electors in order that the elector can complete the form and return it to the supervisor of elections by mail, in person, or by delivery to a third party for transmittal to the supervisor." Id. at 2.

Thus, nothing prohibits a political party from mass mailing absentee ballot request forms to electors. To the contrary, such mass mailings have been specifically permitted by the Division for ten years, and such mailings are specifically permitted by the Division under the statutory scheme in effect today. The practice has the effect

of giving both political parties the incentive and means to effect maximum voter participation.

Nor is it unusual or at all improper that the two major, institutional political parties should have substantial responsibility for implementing voter turnout efforts, including with respect to absentee ballots. For example, the Legislature has specifically permitted political parties to appoint “Absentee Ballot Coordinators” for the purpose of assisting in the execution and witnessing of absentee ballots. § 101.685, Fla. Stat. Far from creating some nefarious scheme, our election laws contemplate and encourage participation by the political parties that are integral to our democratic process.

C. FILLING IN A VOTER’S IDENTIFICATION NUMBER ON A REQUEST FORM IS NOT A BASIS TO INVALIDATE BALLOTS

Like any right or privilege, the right to vote by absentee ballot can be abused. Such was the case in the 1997 Miami mayoral elections in which dead people voted by absentee, multiple absentee ballots were submitted on behalf of a single voter, and ballots were stolen and falsely witnessed. See In re the Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, 707 So. 2d at 1172. As previously noted, the Florida Legislature intervened and enhanced the requirements for absentee voting. See generally Ch. 98-129, Laws

of Florida. The Legislature required that additional information be included on the request for absentee ballots, including the elector's name and address, the last four digits of the elector's social security number and the registration number on the elector's registration identification card. § 101.62(b), Fla. Stat. However, the Legislature did not reverse Boardman and render the directory language in section 101.62 mandatory such that it would require invalidation of the absentee ballots because of technical irregularities with the absentee ballot request forms. See Appendix Tab 2 at p. 8. Thus, the law of this state remains that an error in the request form cannot invalidate the ballot itself.

Additionally, an elections contest was never intended to reach decisions of elections workers and officials outside the balloting and counting process itself. The election contest statute only permits consideration of the balloting process and does not extend to matters outside the balloting. McPherson v. Flynn, 397 So. 2d 665, 668 (Fla. 1981) (“Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. . . . The statutory elections contest has been interpreted as referring only to consideration of the balloting and counting process.”) See also Smith v. Tynes, 412 So. 2d 925, 927 (Fla. 1st DCA 1982); Polly v. Navarro, 457 So. 2d 1140, 1144 (Fla. 4th DCA 1984).

D. ELECTIONS OFFICIALS DID NOT ENGAGE IN FRAUD OR MISCONDUCT

Appellants repeatedly and broadly allege fraud and misconduct and criminal election law violations on the part of various elections officials. However, as Judge Clark found, the only violation was of section 101.62--a non-criminal statute. Final Order at 7.

Allegations against these Appellees are as follows:

By certifying the statewide election, in spite of the violations of Sections 102.62 and 104.047, Katherine Harris and the State of Florida Election Canvassing Commission violated those sections of Florida Statutes. (Complaint at ¶ 53).

These allegations must be measured against section 104.047, Fla. Stat. That section prohibits a person from providing, offering or accepting a pecuniary or other benefit in exchange for *distributing, ordering, requesting, collecting, delivering or otherwise physically possessing absentee ballots*. With certain exceptions, it prohibits persons other than the voter from requesting an absentee ballot. It prohibits, with certain exceptions, a person marking the ballot of another person. And it prohibits persons from returning more than two absentee ballots to a supervisor of elections.

No provision in section 104.047 addresses access by the supervisor of elections to ballot request forms, the Division-approved mass mailing process, or the

certification process undertaken by either the county canvassing boards or the state Elections Canvassing Commission. As previously noted, the complaint relates to allegations regarding *request forms, not ballots*. Here, there can be no question but that the voter ordered or requested the absentee ballots. The only conduct proven was that an error on the form was corrected so that the voters' reliance on the form was effectuated.

In order to find any violation of section 104.047, this Court would have to find that a third party's insertion of a voter identification number on the absentee ballot request form *after it was submitted by the elector* was tantamount to that third party's *ordering or requesting* the absentee ballot in lieu of the voter having done so. Not only would such a reading stretch the plain meaning of the words "ordering" and "requesting," it would be contrary to the legislative history of this section.

When the 1998 Florida Legislature created section 104.047, it explained:

Section 26. Creates §104.047, F.S., relating to absentee voting and penalties. Creates new penalties related to absentee voting:

Vote brokering (third degree felony)

Requesting an absentee ballot on behalf of another without permission, except as provided in §§101.62 or 101.655, F.S. (third degree felony)

Witnessing more than 5 ballots in an election, with exceptions (first degree misdemeanor)

Marking the ballot of another, with exceptions (third degree felony)

Returning more than 2 voted absentee ballots to supervisors, with exceptions (first degree misdemeanor)

Appendix Tab 2 at 23.

Appellants, through their broad conclusory assertions of fraudulent conduct and violations of section 104.047, would have this Court read acts into this specific penal statute that were not contemplated either by the law or by those who wrote it.

Appellants have not proved facts sufficient to support any probability of an effect on the outcome of the election. § 102.168(3), Fla. Stat. Thus, the Final Order of Judge Clark should be affirmed.

VII. CONCLUSION

For the reasons expressed, this Court should affirm the Final Order of Judge Clark.

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CERTIFICATE OF FONT SIZE

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

CERTIFICATE OF SERVICE

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