IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 00-2447

HARRY N. JACOBS, *et al.*

Appellants,

vs.

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; *et. al.*

Appellees.

BRIEF OF APPELLEES THE SEMINOLE COUNTY CANVASSING BOARD, SANDRA GOARD, KENNETH MCINTOSH AND JOHN SLOOP

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STATEMENT OF TYPE SIZE AND FONT

This Brief is prepared in 14-point type, Times New Roman Font.

JURISDICTION

The Court should refrain from exercising in this case the discretionary jurisdiction afforded under Article V, Section 3(b)5, Florida Constitution. The Order under review may ostensibly appear to be of great public importance because Appellants contend that the effect of granting the relief they seek (i.e., throwing out all absentee ballots within Seminole County) would affect the outcome of the November 2000 Presidential election. The statute under which Appellants have sought relief in the trial court, however, Section 102.168, Florida Statutes, does not apply to a Presidential election. Therefore, the best exercise of the Court's discretion would be to refrain from accepting this case.

The proper resolution of the controversy before this Court requires an understanding of the way in which the President of the United States is elected. Under the U.S. Constitution, voters do not directly elect the President and Vice-President. Instead, the method and manner of nominating presidential electors lies exclusively with the Florida Legislature. See, U.S. Const., Art. II, §1, cl. 2; 103.021(1), Fla. Stat. (2000). Voters elect a slate of presidential electors from their state who in turn vote in the Electoral College. Voters thus elect presidential electors, not the presidential candidates themselves.

The election to select the presidential electors from the State of Florida was held on November 7, 2000, the same day as the election for other states' electors.

See, § 103.011, Fla. Stat. (2000). Prior to the election, the Governor of the State of Florida nominated and certified to the Secretary of State competing slates or presidential electors for the Republican Party of Florida and the Florida Democratic Party, as well as other political parties. See § 103.021(1), Fla. Stat. (2000). The names of the candidates for President and Vice President of the United States were printed on the ballots that were used in the election on November 7, and Florida voters cast their votes for these candidates. See, § 103.011, Fla. Stat. (2000). Under Florida law, however, those votes are only "counted as votes for the presidential electors supporting such candidates". § 103.011, Fla. Stat. (2000).

The results of the election were certified by each county canvassing board and forwarded to the Department of State. See, § 102.011, Fla. Stat. (2000). The Elections Canvassing Commission thereafter certified the returns of the election. See, Id.

The certification Appellants challenge in this action took place on November 26, 2000, when the Elections Canvassing Commission certified returns of the November 7 general election. (¶ 16, Complaint). Thereafter, the Governor executed a Certificate of Ascertainment certifying the 25 Republican Presidential Electors for the State of Florida. The Certificate of Ascertainment certified that the Republican Presidential Electors received a plurality of the votes in the General Election held in Florida on November 7, 2000. On November 27, 2000, the

Governor forwarded this Certificate of Ascertainment to the United States Archivist. The execution of the Certificate of Ascertainment is an official action of the Executive Branch of the State of Florida. The Court can take judicial notice of this official action as well as the official action of sending the Certificate of Ascertainment to the United States Archivist which were filed with the circuit court in this case as attachments to John E. Thrasher's Amicus Memorandum of Law. See, Florida Evidence Code, § 90.202, Fla. Stat. (2000).

The President and Vice President will ultimately be chosen on January 6, 2001 during a joint session of Congress where the electoral votes of each state will be counted. Once the votes are counted, the result will be delivered to the President of the United States Senate who will then announce the vote. That announcement will be deemed a sufficient declaration of the persons elected President and Vice President of the United States. See, 3 U.S.C. § 15.

Florida does not recognize a right at common law right to contest an election. See McPherson v. Flynn, 397 So.2d 665, 668 (Fla. 1981); see also Pearson v. Taylor, 159 Fla. 775, 776, 32 So.2d 826, 827 (Fla. 1947); Harden v. Garrett, 483 So.2d 409, 411 (Fla. 1985). Therefore, to the extent that right exists, it must be expressly granted by the Florida legislature. See McPherson, 397 So.2d at 668.

Florida law also provides no statutory mechanism for contesting the election of presidential electors in a presidential election. Section 102.168, the statute under which Appellants have proceeded in seeking relief in this case, applies only to a contest of an election of "any person to office". The Presidential electors selected on November 7, 2000 do not hold any "office" under Florida law, thereby making Section 102.168 inapplicable to their election. As a result, Section 102.168 has no bearing upon, and cannot be read to apply to, the election of the President and Vice President of the United States.

The Florida Supreme Court has long recognized that where the language of a statute is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998). The Court reaffirmed that principle in its recent decision in Palm Beach County Canvassing Board vs. Harris, No. 00-2346, at 25-26 (Fla. Nov. 22, 2000):

> Where the language of the [Florida Election] Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.

The terms of Section 102.168 are unambiguous. The statute does not provide a cause of action to contest either the election of candidates running for the office of

President of the United States, or the election of "presidential electors" from the State who will vote in the Electoral College.

This exact issue was recently addressed in Andres Fladell, et al. v. The Elections Canvassing Commission of the State of Florida, et al., (November 20, 2000, 15th Judicial Circuit). The circuit court, after an extensive analysis of the Florida Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was **not** intended to apply to U.S. Presidential elections. See, Id. at 10-15.

The plaintiffs in Fladell sought an injunction against certification of the results of the November 2000 Presidential election. They argued that the election should be declared void and that the winner should be determined in an election contest under Section 102.168 because of alleged irregularities in the form of the ballot used in Palm Beach County. The plaintiffs thus argued that the contest provision of Section 102.168 provided alternative means of selecting presidential electors provided by 3 U.S.C. Section 2 (which allows the Florida Legislature to apply alternative means to select electors where a state "has failed to make a choice on the day prescribed by law").

The circuit court in Fladell engaged in an extensive analysis of the state and federal procedures for nominating and electing presidential electors. The court noted that the provisions for certifying the election of presidential electors are set

forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted Section 103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." Id., slip op. at 6. The court further noted that Section 103.011, entitled "Electors of President and Vice President", makes **no** provision for a "contest" of the Presidential election. The court concluded from this omission that the Florida Legislature did **not** intend for Section 102.168 to apply to U.S. Presidential elections. Id. at 15. Rather, "[a] review of the statutes that immediately follow Section 102.168 point to the conclusion that Section 102.168 was intended to apply to elected offices **other** than the Presidency." Id., slip op. at 9, n.3 (emphasis supplied).

On December 1, 2000, this Court concluded that because the circuit court's dismissal of the Complaint in Fladell was proper, all other issues ruled upon by the circuit court were not properly reached and, therefore, were a nullity. Irrespective of this decision by the Court, the analysis in Fladell is indisputably correct.

Section 103.011 provides for the certification of the election of "presidential electors." That statute, which **does** specifically relate to the election of Presidential electors, does **not** provide for a contest of the election. Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or

otherwise…the Governor may appoint a person to fill such vacancy…" Section 103.021(5). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. Section 103.061. Fla. Stat. Although Florida law provides these mechanisms for replacing "presidential electors", it does not provide for any "contest" of the election after the election is certified.

A plain reading of Section 102.168 also confirms that its provisions were not intended by the Florida Legislature to apply to the contest of a Presidential election. First, had the Florida Legislature intended for Section 102.168 to be a means for contesting a U.S. Presidential election, it would not have provided that the action was available only to contest "the certification of election…of any person **to office**." See Section 102.168(1). Despite the inclusion of the names of Governor Bush and Vice President Gore on the ballot on November 7, 2000, the only persons "elected" in connection with the Presidential election on that date were "presidential electors." See, Section 103.021, Fla. Stat.

It is further clear that "presidential electors" are not "successful candidates" for "office" as that term is used in the election code. In light of the "resign to run" law set forth in Section 99.012, Florida Statutes, and Article 2, Section 5, of the Florida Constitution, the term "office" in the statute cannot be interpreted to include the position of "presidential elector." Indeed, if "presidential elector" were an

office, then numerous presidential electors proposed by the candidates prior to the November 7, 2000 election would have been required to resign from any office they currently held in Florida. In the case of the presidential electors recommended prior to the election by the Florida Democratic Party, this would mean that Attorney General Bob Butterworth, Senate Minority Leader Buddy Dyer, Senators Daryl Jones, Kendrick Meek and Les Miller, and Representative Robert Henriquez would all be in violation of Florida law because they failed to submit resignations from their current offices before becoming candidates for the "office" of "presidential elector." See Fla. Const., Art. 2, § 5; Section 99.012(3)(a), Fla. Stat. (2000) ("No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other."); cf § 02.168(1), Florida Statutes (2000) (providing that an unsuccessful "candidate for such office" may file a contest).

Second, had the Florida Legislature intended for Section 102.168 to be a means for contesting a Presidential election, it would not have identified the "unsuccessful candidate" as a proper plaintiff or required that the "successful candidate" be named as an indispensable party. See, § 102.168(1), Fla. Stat. The certification of a Presidential election by the Elections Canvassing Commission states only the number of votes received by the candidates for President. It does not "certify" the election of the President of the United States. The successful

candidate for that office will not be determined until January 6, 2001 when the votes of the presidential electors will be counted. See, 3 U.S.C. § 15.

Third, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a Presidential election or the certification of presidential electors, it would have provided a mechanism for ordering meaningful relief under the statute. The relief contemplated under Section 102.168 is not only unavailable and inappropriate in light of the nature of the office, but it is preempted by federal law. For example, in the event "the contestant is found to be entitled to the office", Section 102.1682 calls for the entry of a judgment of "ouster" against the successful candidate. The courts of the state of Florida clearly lack the authority to enter a judgment of "ouster" against a sitting President of the United States. See Fladell, slip op. at 9, n.3 ("surely this court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States"); see, also, State ex. rel. Bisbee v. Drew, 17 Fla. 67 (1879).

Finally, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a Presidential election, or the certification of presidential electors, it would have included procedures for the orderly contest of the election within the limited time allowed under federal law. Section 102.168 is silent on this subject. See Fladell, slip op. at 9-10 ("the time limitations included in Section 102.168 do not necessarily coincide with the time constraints of 3 U.S.C.A. § 5.").

Instead, the statute provides that the defendant has ten (10) days in which to prepare and file an answer. See § 102.168(6), Fla. Stat.. This statute clearly was not designated to contest a Presidential election.

STATEMENT OF CASE AND FACTS

Appellees adopt and incorporate by reference the Statement of Case and the Statement of Facts set forth in the Answer Brief of Appellees, George W. Bush and Richard Cheney.

SUMMARY OF ARGUMENT

Appellees adopt and incorporate by reference the Summary of Argument set forth in the Answer Brief of Appellees, George W. Bush and Richard Cheney.

STANDARD OF REVIEW

The election process is entrusted to the Executive Branch of Government. Canvassing Boards exercise discretion to make judgments on the validity of ballots and voter counts. These Boards certify county election returns and, absent fraud, their judgments are presumptively correct. A court may intervene in this function of the Executive Branch only for compelling reasons and only when there are clear, substantial departures from the essential requirements of law. Boardman v. Esteva, 323 So. 2d 250, 268 n. 5 (Fla. 1976). Where the legal standard is abuse of discretion, a court may not substitute its own discretion for that of a Canvassing Board; it may substitute its judgment only as to whether there was a failure to

perform a mandatory statutory act. Broward County Canvassing Board v. Hogan, 607 So. 2d 508, 510 (Fla.4th DCA 1992).

The fundamental question in an appeal is whether the result reached by the trial court is correct, for whatever reason. If there is any theory upon which the trial court may properly have acted, the appellate court must affirm, even though the trial court's stated or indicated reasons are erroneous or the reviewing court disagrees with the trial court's reasoning. Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 644-645 (Fla. 1999).. Stuart v. State, 360 So. 2d 406 (Fla. 1978); Pan American Stone Company v. Landry, 526 So. 2d 197 (Fla. 4th DCA 1988); Parker v. Gordon, 442 So. 2d 273 (Fla. 4th DCA 1983). Appellees may, furthermore, without taking a cross-appeal, urge and support a decree of any matter appearing in the record, even though their argument involves an attack on the reasoning of the trial court or an insistence on matters overlooked or ignored by it. United States v. American Railway Express Company v. Same. Southern Traffic League, et. al., 265 U.S. 425, 44 S.Ct. 560, 68, L.Ed. 1087 (1924).

An appellate court may not substitute its judgment for that of the trial court on questions of fact by re-evaluating the testimony and evidence from the record on appeal before it. Delgado v. Strong, 360 So.2d 73 (Fla. 1978). Rather, it is the function of the appellate court only to decide whether the judgment of the trial court is supported by competent evidence. Brand v. Florida Power Corp., 633 So.2d

504 (Fla. 1st DCA 1994). The test of sufficiency of the evidence to support the trial court's findings of fact is not whether minds trained in the art of fine discrimination could have reached the same conclusion, but whether the evidence is such that reasonable men could have reached the same conclusion. Griffis v. Hill, 230 So.2d 143 (Fla. 1969). The appellate court must interpret the evidence, and all reasonable deductions and inferences therefrom, in the light most favorable to the trial court's findings. Shapiro v. State, 390 So.2d 344 (Fla. 1980), cert. denied, 450 U.S. 982, 67 L.Ed. 2d 818, 101 S.Ct. 1519 (1981); Greenwood v. Oates, 251 So.2d 661 (Fla. 1971). Where the evidence is conflicting as to an issue of fact, but there is ample credible evidence adduced to sustain the trial court's findings, the reviewing court errs in overruling the finding. The mere fact that the evidence is conflicting does not justify reversal. Markham v. Fogg, 458 So.2d 1122 (Fla. 1984).

Finally, as was stated by this Court weeks ago:

> Twenty-five years ago, this Court commented that **the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases**: The real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. **The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard**. We must tread carefully on that right or we risk

the unnecessary and unjustified muting of the public voice. **By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right**,

Palm Beach County Canvassing Board v. Harris, Case Nos. SC00-2346, SC00-2348 & SC00-2349 (Fla. Nov. 21, 2000) (quoting Boardman v. Esteva, 323 So.2d 259, 263 (Fla. 1975) (first and third emphasis added, second emphasis in original).

ARGUMENT

I.THE CIRCUIT COURT CORRECTLY HELD THAT THERE WAS NO FACTUAL OR LEGAL BASIS TO GRANT RELIEF TO APPELLANTS

Appellants failed to carry their burden of demonstrating "clear and convincing evidence", Burk v. Beasley, 75 So. 2d 7, 8-9 (Fla. 1954) of irregularities sufficient to affect the validity of the ballots, that the election was not a free expression of the public's will, or that there existed a reasonable possibility that the results of the election would have changed except for the irregularities complained of by Appellants. Nelson vs. Robinson, 301 So. 2d 508, 511 (Fla. 2nd DCA 1974).

The circuit court correctly denied relief to Appellants on the basis that Florida's absentee voting law requires only substantial compliance, as opposed to strict compliance, with its provisions. The court correctly determined that the addition of voter registration identification numbers on request forms for absentee ballots after they had already been submitted to the Supervisor of Elections did not constitute a violation of law that impugned or compromised the integrity of the ballots cast or the election itself such that the ballots should be invalidated. The circuit court also correctly ruled that the Supervisor of Elections did not improperly treat representatives of the Florida Republican Party differently from representatives

of other political parties to the extent that either the integrity of ballots cast or the election itself was compromised.

Section 102.168(3), which has been relied upon by the Appellants in contesting the election, requires that the complaint set forth the grounds on which the contestant intends to establish his or her right to the office involved or to set aside the result of the election on a submitted referendum. The grounds for contesting an election under Section 102.168(3)(a) are:

> "**Misconduct, fraud, or corruption** on the part of any election official or any member of the canvassing board **sufficient to change or place in doubt the result of the election**".

(emphasis supplied). Additionally, this Court has stated in Boardman v. Esteva, 323 So.2d 359, 269 (Fla. 1976) 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 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 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 election**.

Id. As set forth in the section of this Brief on Jurisdiction, the trial court should have denied the relief sought by Appellants (as argued in Appellees' Motion for

Judgment on the Pleadings, Motion for Summary Judgment and Motion to Dismiss) on the basis that Section 102.168 provides no remedy for the relief sought by Appellants. In the subsections of this Argument that follow, Appellees will also demonstrate that were this Court to disagree with Appellees' position, Appellants also failed to establish either the two (2) grounds for contesting an election under Section 102.168(3)(a) or the three (3) factors established in Boardman for determining the effect of irregularities on the validity of absentee ballots cast. Appellants also failed to carry their burden of proving that the Supervisor of Elections accorded disparate treatment to Republican voters.

A. Substantial Compliance With Florida's Absentee Voting Law

As set forth above, one of the three factors established in Boardman in determining the effect of irregularities on the validity of absentee ballots cast is whether there has been "substantial compliance with the essential requirements of the absentee voting law". 323 So.2d at 269. Chapter 101, Florida Statutes (1999), sets forth voting methods and procedures for the State of Florida. Within that Chapter, Section **101.62** identifies the requirements for making a request for an absentee ballot to vote in an election. Chapter 102, Florida Statutes, (1999) on the other hand, sets forth the law in Florida with respect to conducting elections and ascertaining the results of those elections. Section **102.168** identifies the grounds upon which an individual may contest an election.

Appellants filed their Complaint in this action to contest the November 7, 2000 U.S. Presidential Election conducted in Seminole County, Florida, pursuant to Section **102.168**, on the basis that the requirements of Section **101.62** (which specifies the requirements for an application to request an absentee ballot) were not strictly adhered to by the Supervisor of Elections for Seminole County. Section 101.62(b) provides that the Supervisor of Elections may accept a request for absentee ballot from an **elector** and that the **person making the request** must disclose:

1.The name of the elector for whom the ballot is requested;
2.The elector's address;
3.The last four digits of the elector's social security number;
4.The registration number on the elector's registration identification card;
5.The requester's name;
6.The requester's address;
7.The requester's social security number, and driver's license number;
8.The requester's relationship to the elector;
9.The requester's signature (on written request only)

(emphasis supplied). Appellants contend that because a Republican Party representative corrected a printing error on absentee ballot request forms (after the applications had already been delivered to the Supervisor of Elections by the voter), a violation of election laws occurred constituting fraud, gross negligence or intentional wrongdoing as specified in Section 102.168.

It is important to focus on the fact that Appellants do not take issue, or allege any irregularities concerning, absentee **ballots**, but merely contend that irregularities occurred with regard to the **requests** or **applications** for absentee ballots. Specifically, the basis for Appellants' contest under Section 102.168 is that completion of missing digits on pre-printed applications for absentee ballots constituted misconduct in violation of Section 101.62, i.e., the statute set forth above governing the procedure for requesting an absentee ballot form.

Section 101.62(b) provides that the person making the request for an absentee ballot "**must** disclose" the nine (9) pieces of information specified in the statute and set forth above. Nowhere does the statute, however, identify the consequences where a person making the request provides less than all nine (9) pieces of information or where someone other than the elector provides any of the nine (9) pieces of information.

Strict compliance with absentee voting laws at one time was the rule in Florida, see, e.g., State ex. rel. Whitley vs. Rinehart, 140 Fla. 645, 192 So. 819 (1939); Frink vs. State ex rel. Turk, 160 Fla. 394, 35 So. 2d 10 (1948); Jolley vs. Whatley, 60 So. 2d 762 (Fla. 1952); Griffith vs. Knoth, 67 So. 2d 431 (Fla. 1953); McDonald vs. Miller, 90 So. 2d 124 (Fla. 1956). This Court receded from that rule, however, in 1975 when it decided Boardman vs. Esteva, 323 So.2d 259 (Fla. 1976). In Boardman, the court affirmed the rule that "**substantial** compliance"

with the absentee voting laws is all that is required to give legality to the ballot. The Court stated that in developing the rule regarding how far irregularities in absentee ballots will affect the result of the election… "a fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the public will". Id. at 264.

On Monday, December 4, 2000, the United States Supreme Court in Bush v. Palm Beach County Canvassing Board, Case No. 00-836, vacated this Court's decision in Gore v. Harris, Case No. SC-00-2431 (Fla., November 21, 2000) for further proceedings not inconsistent with the opinion. In the opinion, the Court stated it was unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the Florida Legislature's authority under Article II, § 1, cl. 2. The Court stated it was also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5. Appellants may try to argue that the U.S. Supreme Court apparently indicated in its opinion that federal constitutional and statutory law requires **strict** compliance with state statutory requirements in matters related to Presidential elections. That recent decision of the U.S. Supreme Court, however, does not affect the outcome in this case.

As the circuit court acknowledged in the Final Order that is under review, the statute that is at issue in this case, Section 101.62(b), was revised in 1998, twenty-five (25) years after this Court's ruling in Boardman. Appellants, therefore, may

try to argue that the Florida Legislature's more recent enactment of statutory criteria in 1998 within Section 102.168, a statute that says it **"must"** be complied with, supersedes Boardman's relaxation of the standard to one of "substantial compliance". The Florida Legislature's 1998 revisions to Section 101.62(b), however, did not supercede Boardman on the issue of invalidating ballots where the statutory criteria are only **substantially** and not **strictly** complied with.

The legislative history for the 1998 amendments to Section 101.62 specifically confirm that the standard of review articulated by the Supreme Court in Boardman is still appropriate and in effect. After reviewing all changes in the law relating to absentee ballots and applications for absentee ballots, the Florida Legislature specifically stated that "although the statutes emphasize the importance of all of 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**." (emphasis supplied). See Committee on Election Reform, H.I. 99-339, final analysis on H.B. 281 at III. A. (Florida July 15, 1999) at 8. The legislative history specifically cites Boardman, 323 So. 2d at 265, in support of the Legislature's determination. The circuit court in its Final Order also cites the Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBS Sections 3743, 3941 at p. 8 (past as CS/HB 1402) on May 12, 1998 as authority for the statement that

unless a statutory provision specifically states that the lack of information voids the ballot, the lack of the information does not automatically void the ballot. (Final Order, p. 6).

As was recognized by Judge Clark in her Final Order, the Legislature has, in another instance, demonstrated its power to provide for mandatory, strict compliance with all criteria within an election law statute. Section 101.68, Florida Statute (which was erroneously referred to on Page 6 of Judge Clark's opinion as Section **102.68 (2)(c)** sets forth the criteria with which a county canvassing board must comply with canvassing or otherwise processing absentee ballots.

Specifically, the Statute provides:

> An absentee ballot **shall be considered illegal** if it does not include the signature and the last 4 digits of the social security number of the elector, as shown by the registration records. However, an absentee ballot shall not be considered illegal if the signature of the Elector or attesting witness does not cross the seal of the mailing envelope or if the person witnesses the ballot is Section 104(3). The Canvassing Board determines that any ballot is illegal, a member of the Board **shall, without opening the envelope, mark across the face of the envelope: "rejected as illegal"**:
>
> (a)The subscription of a notary or officer defined in Item 6.b. of the instruction sheet, or
>
> (b)The signature, printed name, address, voter identification number and County of registration of one attesting witness, who is a registered voter in this Stated.

Id. Therefore, the Legislature has shown its ability and intent in instances where it wishes to require strict compliance with statutory requirements. Its decision not to

require strict compliance with the 9 criteria established in Section 101.62 was purposeful.

This Court specifically ruled in Boardman that unless the absentee voting laws that are alleged to 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 that such irregularity is not calculated to affect the integrity of the ballot or the election. Id. at 259. The Court also explained, however, that this does not mean that insignificant omissions or irregularities appearing on the **application form** made available through the provisions of Section 101.62 (which is at issue in this proceeding) must 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. Id.

Therefore, as a matter of law, the circuit court correctly ruled that the statutory requirement that the requestor **"must"** disclose the nine items in Section 101.62(b) is not a directive by the Legislature that absentee voter application forms omitting the voter's registration number are illegal or void.

With respect to the specific way in which Section 101.62(b) was not substantially complied with in this case, i.e., omission of voter registration

identification numbers, the absence of a voter registration identification number on a request form for an absentee ballot was de minimis. Other substantial information existed on the application forms sufficient to identify the voters requesting the absentee ballot, including their name, their address, and the last four digits of their social security number. Significantly, Appellants do not contend, and cannot contend, that any of the individuals who submitted the allegedly-defective absentee voter request forms were not registered voters, were non-existent, or were not qualified in come other way to vote. Therefore, as found by the circuit court, absence of the voter registration identification numbers should not have precluded, in the first instance, issuance of an absentee ballot to the voters who submitted the "incomplete" forms.

Because Section 101.62(b) requires that the request for an absentee ballot must be made by the voter or by a member of his immediate family, Appellants alternatively have asserted that the applications for absentee ballots at issue in this case were void because they originally lacked the correct voter registration numbers that must be disclosed under Section 101.62(b). Appellants argued that, when the voter registration numbers were added by Republican representatives, the requests were, in effect, "resubmitted" by the representatives and rendered the absentee ballot requests improper under Section 101.62(b).

It is undisputed that the voters themselves actually made the request when signing the application. The statute does not require that the voter himself write his voter registration number by hand on the request. The statute merely requires that the voter's registration number be disclosed. Significantly, the statute does not even require that the registration number be disclosed in writing. Section 101.62(1)(a-b), Fla. Stat. (providing that absentee ballots may be requested in person, in writing, or by telephone).

The Division of Elections has expressly held that a political party does not make a "request" under Section 101.62 by furnishing a request form to a potential elector. See Advisory Opinion V.E. 98-14 (September 16, 1998). Therefore, it cannot be a violation of the statute for a third party to supply the voter registration number by hand, so long as the number is correct. Appellants do not contend that the voter registration numbers provided in this case were incorrect.

Appellants are unable to provide any authority for the proposition that completing an incomplete request form constitutes an improper "submission" or "re-submission" of that request form to the Supervisor of Elections for purposes of the requirements of Section 101.62 Florida Statutes. There is no evidence in this case that any voter signed an application with anything except the intent to make a request for and receive an absentee ballot. The fact that the Republican representatives did not contact each voter to inform him or her of the correction

being made or to obtain the voter's consent to the correction is irrelevant. There is no statutory authority or case law to support the proposition that hand writing a correct voter registration number on a request form constitutes a "request" by someone other than the voter within the meaning of Section 101. 62.

If, indeed, insertion of the voter identification numbers onto the absentee voter application forms by the Republican representatives was a violation of Section 101.62, the circuit court correctly determined that any such irregularity was not a substantial non-compliance with elections law and did not compromise the integrity of the ballots cast or the integrity of the election. The circuit court made this determination because the request for absentee ballots could have been considered valid even without the identification numbers. (Final Order, p. 7).

As was stated by this Court in Boardman, so long as the statutory requirements are complied with to the extent that the duly responsible election officials can ascertain that electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, no one should be heard to complain that the statute has not been literally and absolutely complied with. "Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot." Id. at 259.

The application forms Appellants complain about contained ample evidence sufficient to determine the qualifications of the applicants even without the voter

registration number. The forms contained the voters' name, address and last four digits of their social security number. Florida law, moreover, requires that for each absentee ballot, either the County Canvassing Board or the Elections Supervisor must compare the signature of the voter on the voter certificate with the signature on the registration books to ensure that the voter is duly registered and that the ballot is legal. Section 101.68(1) and (2)(c). It is undisputed that all of the voters who voted their absentee ballots received upon processing of the corrected absentee ballot applications were duly registered and qualified voters.

As was stated by the court in Jolley v. Whatley, 60 So.2d at 767, even if an irregularity exists as to a request for an absentee ballot application, it is cured by a subsequent event showing that application blanks and absentee ballots were received by a duly qualified voter and executed, canvassed and counted as provided by law. Moreover, the fact that there is no basis to invalidate the absentee ballots issued pursuant to the application forms is underscored by the fact that Florida law expressly identifies the circumstances under which an absentee ballot will be considered illegal. Section 101.68(c)(1), Fla. Stat. The failure to follow the procedures for requesting an absentee ballot is not among them.

B. No Disparate Treatment

Appellants allege in Paragraph 37 of their Complaint that the Seminole County Supervisor of Elections, through Goard and other agents, treated the

interests of non-Republican voters differently from those of Republican voters. Specifically, Appellants complained that other parties, including the Democratic Party, were not notified of the actions of the Republican representatives in adding the voter registration numbers to the absentee ballot applications, that Goard had informed Democratic Party representatives and other persons on or before November 7, 2000, that she would strictly enforce the requirements of Chapter 101.62, Florida Statutes, and would invalidate incomplete request forms, and that Goard informed Democratic activists in October 2000 that any person requesting an absentee ballot must include his or her voter identification number on the application in order to receive a ballot and that her office would not provide voters with voter identification numbers. Appellants contend that because Ms. Goard honored the request of a Republican representative to obtain access to the incomplete absentee ballot request forms and add the voter identification numbers, yet did not notify the Democratic Party or any other group of this development, such constituted illegal disparate treatment.

Appellants failed to offer any evidence at trial reflecting that Ms. Goard treated other political parties differently than she treated representatives of the Republican Party. Stated simply, no other party requested an opportunity to print missing voter registration numbers on any of their party members' absentee vote application forms or, indeed, any other information that may have been missing

from the forms. In sum, no printing errors occurred on the application forms for either the Democratic Party or any other party. The testimony was uncontraverted that the Supervisor of Elections would have afforded Democratic representatives the same opportunity as had been afforded Republican representatives in the event that Democratic absentee ballot request forms had experienced similar problems. The Elections Office was non-partisan, and employees treated all political parties equally.

The evidence sought to be employed by Appellants as evidence of disparate treatment simply is not evidence of disparate treatment. Appellants offered testimony from Dean Ray, an unsuccessful candidate for election to the office of Seminole County Commission who had initially petitioned to have his name added to the Seminole County Commission ballot in order to avoid paying the filing fee. Mr. Ray complained at trial that Ms. Goard refused to allow him to remove from her office the petition he had filed, which was incomplete, so that he could add missing information.

The petition contained approximately 800 signatures of the apparent 2,000 signatures required. Of the 800 signatures, approximately 125 were not registered voters. Mr. Ray never requested the opportunity to correct the petition in Ms. Goard's office. Mr. Ray also never submitted the remaining required signatures.

Instead, he paid the filing fee. His testimony did not concern absentee ballots, absentee ballot request forms or voter identification numbers.

The testimony is uncontraverted that Ms. Goard treated Mr. Ray and the Republican representatives exactly the same in connection with their request to remove papers of any kind from her office so that the missing information could be supplied. Goard refused the requests. (¶ 7, Stipulation) It was only after the Republican representative asked permission to correct the applications at the office of the Supervisor of Elections, that permission to have access to the forms was granted. (¶ 6, Stipulation). Mr. Ray made no such request of Ms. Goard.

Because the Democratic mail-out did not suffer from the same omission of voter identification numbers as the Republican mail-out, there was no need for the Democrats to request access to the request forms to correct them. In sum, Appellants failed to make any showing of disparate treatment of Republicans as opposed to any other individual or groups with regard to the absentee ballot request forms. Accordingly, Appellants failed to show any violation of section 104.0515, Florida Statutes, equal protection under the law under Article 1, section 2, of the Florida Constitution, or any other applicable law.

C. No Fraud, Misconduct, Corruption, Gross Negligence or Intentional Wrongdoing

As previously set forth, one of the grounds Appellants were required to establish in contesting an election under Section 102.168(3)(a) was "**misconduct, fraud, or corruption**" on the part of any election official or any member of the canvassing board. Additionally, this Court stated in Boardman that one of the three factors to be considered in determining the effect of irregularities on the validity of absentee ballots cast was the presence or absence of "**fraud, gross negligence, or intentional wrongdoing**". 323 So.2d 259 at 269. The circuit court correctly found that the evidence presented by Appellants did not support a finding of fraud, gross negligence, or intentional wrongdoing in connection with any absentee ballots. The evidence also failed to show any misconduct or corruption.

Appellants contend that Ms. Goard's actions in permitting a Republican representative to supply missing information on the applications for absentee ballots after they had already been submitted by the voter, as well as the circumstances under which the representative had access to the forms, constituted misconduct, fraud or corruption under the statute. Appellants made conclusory and unsupported allegations in their Complaint and at trial that the Republican representatives "fraudulently caused the issuance of several thousand invalid absentee ballots that were thereafter were cast in Seminole County… in contravention of section 104.047, Florida Statutes." (¶ 31, Complaint). Appellants

asserted that the Supervisor of Elections fraudulently provided the Republican representatives access to boxes containing thousands of void Republican request forms (¶ 29, Complaint), and that the representatives fraudulently altered the absentee request forms by adding missing voter identification numbers to forms that had already been signed by the designated elector appearing on each form. (¶ 30, Complaint).

Although Section 104.047(2) makes it a crime to request a ballot on behalf of another voter, it is undisputed in this case that the voters themselves requested the absentee ballots. The correction of missing or incorrect digits on the pre-printed application forms was not a request on behalf of another voter. See advisory opinion D.E. 98-14 (September 16, 1998) (concluding that a political party does not make a "request" under the statute by furnishing a request form to a potential elector).

Appellants' implication is that some sort of fraud **could** have occurred while the Republican representatives had the request forms. The evidence, however, fails to indicate that any such fraud occurred. Not one of the request forms was filled out so as to request a ballot for an ineligible voter, and no absentee ballot was cast by an ineligible voter. Nor were any votes bought. See, F. 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 and Absentee Ballots in November 4, 1997 election for City of Miami, 707 So. 2d 1170 (Fla. 3rd DCA 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).

Where noncompliance with election laws creates the mere opportunity for fraud, the results of an election will nevertheless stand. Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998). In Beckstrom, certain absentee ballots were unreadable by the County's optical scanner, and election workers re-marked ballots with a felt-tip marker so that the machine would be able to read the votes. Although 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 an opportunity for fraud, the Court sustained the election result because no fraud had been shown to occur.

If the potential for fraud in Beckstrom was insufficient to change the result, it is also insufficient here, where any potential for fraud is unsupported by the evidence. Although the Republican representatives were permitted unsupervised access to the application forms, there was no evidence that fraud or misconduct of any sort occurred. The Republican representatives did not have passwords to any computers in the Supervisor's office and did not ever access any of the office's

computers. They did not access office documents, voting equipment, ballots, or absentee ballot request forms other than the forms they had requested to correct, i.e., the Republican forms with missing voter registration numbers. The representatives did not alter any information already on the requests.

The Republican representatives' unsupervised access to the forms, filling in information on the forms, and being present in a high traffic area of the office with computers present also did not constitute evidence of gross negligence, misconduct, corruption or intentional wrongdoing. The circuit court recognized that these occurrences, at most, constituted questionable judgment calls on the part of the Elections Supervisor, but that there was no evidence of wrongdoing that resulted.

In McLean v. Bellamy, 437 So.2d 737, 742-743 (Fla. 1st DCA 1983), the First District was asked by an unsuccessful candidate to void 293 absentee ballots based upon the violation of various statutory requirements including the following:

1The mailing of unrequested ballots to voters. The City Clerk mailed ballots to individuals who had voted absentee in the primary election, but who did not expressly request an absentee ballot for the runoff election;

2.Improper witnessing of 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 actions;

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.

The court noted that the 1977 Legislature "relaxed some of the formal 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. at 743-44.

Significantly, the First District in McLean found that although the election had been managed by officials in a manner other than in strict conformance with applicable voting laws and that such irregularities were the result of negligence on the part of officials, such negligence did not avail the appellant of a remedy because it did not descend to the kind of "gross negligence" that the Supreme Court in Boardman equated with fraud or intentional wrongdoing. Id. at 750. Similarly, the acts complained of by Appellants do not descend to the gross negligence required by Section 102.168 or by the Supreme Court in Boardman.

The circuit court found in this case that, at most, the Supervisor's judgment might be seriously questioned in first rejecting completely the applications in question (in that absence of the voter registration numbers should not have prevented issuance of a ballot to the requesters) and that this error was compounded by allowing third parties to correct the omissions on the forms.

Faulty judgment, however, does not constitute misconduct, fraud, corruption, gross negligence or intentional wrongdoing. Appellants, accordingly, failed to prove in this case either the "misconduct, fraud or corruption on the part of an election official" required for the grounds of a contest under section 102.168(a) or the "presence or absence of fraud, gross negligence or intentional wrongdoing" required under Boardman in determining the effect of irregularities on the validity of absentee ballots.

D.No Evidence to Place in Doubt the Results of the Election

As previously set forth, Section 102.168(3)(a) requires, as grounds for contesting an election under that section, not only evidence of misconduct, fraud or corruption on the part of an election official, but that the misconduct, fraud or corruption be "**sufficient to change or place in doubt the result of the election**." Appellants failed to present any such evidence. Simply put, Appellants failed to demonstrate that "but for" the completion of the absentee ballot application forms by the addition of voter identification numbers, the overall election result and outcome would have been altered. Appellants asked the circuit court, and they ask this Court, to ignore common sense and plain reason by suggesting that voters who exercised enough initiative to request an absentee ballot, but who did not receive their absentee ballot, would have taken no further action to

contact the Supervisor of Elections to correct the problem preventing receipt of their ballot or that they would have failed to vote in person at the polls.

In fact, the evidence presented in the case demonstrated that of the 2,126 absentee-voter application forms corrected by the Republican representatives, only 1,932 voters returned absentee ballots to the Seminole County Office of Elections. Of the 1,932 ballots that were returned, 1,833 were from registered Republicans, and approximately 54 ballots were from registered Democrats. There is absolutely no evidence that the 1,833 registered Republicans either voted or would have voted for the Republican candidates as opposed to the Democratic candidates.

Appellants' expert, Dr. DeLong, testified that he assumed that none of the 2,126 potential voters who had requested the absentee ballots in question would have ever otherwise voted. This testimony is pure speculation. Dr. DeLong, furthermore, failed to meet minimal criteria and failed to possess minimum qualifications as an expert. He admitted that he possessed no knowledge, skill, experience, training or education with respect the area of his proffered testimony (i.e., statistical analysis and projection of behavior by absentee voters who had requested absentee ballots).

In fact, Dr. DeLong admitted that he had never been qualified as an expert in any U.S. Court; had never taught or taken a course in connection with the area of his proffered testimony; could find no scientific data, research, writing, literature or

authoritative materials on the subject of his testimony; had not attempted to and could not obtain exit poll information from Seminole County with respect to non-absentee ballot voters; and was unaware of any information or studies within the State of Florida, much less Seminole County, with respect to absentee ballot voter patterns. Therefore, Dr. DeLong was not credible and was devoid of qualifications sufficient to make his testimony competent. It was within the discretion of the trier of fact to completely reject his testimony.

In fact, 472 of the absentee-voter application forms that had been corrected by the Republican representatives remained unprocessed as of election day. (Defendants' Exhibit 12, p. 2). Two hundred nine (209) of those applicants received an absentee ballot from another request. Id. Of the 263 remaining application forms, **217** individuals voted. Id. Therefore, of the 472 unprocessed forms, only 46 voters corresponding to those forms did **not** vote. Accordingly, an inference from this evidence is properly drawn that even if the absentee ballot request applications corrected by the Republican party had never been processed, it is likely that the vast majority of these voters would have voted in any event.

It is also interesting to note that of 243 unprocessed "miscellaneous" absentee ballot applications (i.e., they were not application forms sent out by either the Republicans or the Democrats) that had been set aside in the Supervisor of Elections' office as being deficient for one reason or another, 133 individuals either

received an absentee ballot pursuant to another request or voted at the polls.

(Defendants' Exhibit 12, p. 5).

Therefore, the inference that is to be drawn from this evidence is that voters who did not receive their absentee ballots by mail, as the election drew near, would have contacted the Supervisor of Elections to inquire about their ballots to correct any problem in receiving the ballots, or they would have chosen to attend the polls in person. That the 1,936 voters who received absentee ballots based upon the application forms corrected by the Republican representatives would have taken no action is pure speculation upon which Appellants have based their claims that the outcome of the election would be affected.

In Griffin v. Burns, 570 Fed. 1065 (1st Cir. 1978), the First Circuit addressed a similar contention:

> Given the evidence of some [absentee ballot] voters, including two of whom were severely handicapped- that they would have voted in person, the Court could infer that it was more likely than not that a very significant proportion of those voting by absentee ballot would have gone to the polls had such [absentee] ballots not been available.

570 F. 2d at 1080. Thus, not only did Appellants fail to present any evidence that the outcome of the election would have been affected, but any such evidence was purely speculative and incompetent to sustain a finding that the outcome of the election would have been affected.

E. No Adverse Effect on the Sanctity of the Ballot or Integrity of Election

Finally, Appellants failed to present any evidence at trial sufficient to satisfy the last criteria of Boardman, i.e., that 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 affects the sanctity of the ballot. 323 So.2d at 265. It is undisputed in this case that the sanctity of the **ballots** was unaffected. A voter registration number is used on a **request** for an absentee ballot as simply one more way of identifying eligible voters. As set forth previously within this Brief, there are several other sufficient ways to identify whether a voter is qualified, and there was no evidence that those methods were not complied with or that anyone other than a properly registered voter cast a vote in the election. Any alleged irregularities in the pre-election process that occurred in this case were, at most, merely technical and had no effect on the ballots cast.

It is also undisputed that any alleged irregularity in the pre-election process that occurred with respect to absentee voter application forms was merely technical and had no effect on the integrity of the election. There is no evidence that any of the individuals who voted were not qualified to vote or that the numbers supplied by the Republican representative on their application forms were in any way incorrect. Insertion of such numbers did not subvert or interfere with the election

process, but facilitated the election process enabling individuals to exercise their vote.

II.42 U.S.C. SECTION 1971 PREVENTS THE COURT FROM REJECTING VOTES BASED ON ALLEGED TECHNICAL DEFECTS THAT DID NOT AFFECT WHETHER THE VOTER WAS QUALIFIED

The relief sought by the Appellants (i.e. invalidation of all or a portion of absentee ballots in Seminole County) is not only precluded for the reasons identified in Judge Clark's opinion, but also is precluded by Federal law.

Appellants complain that because the pre-printed applications that were employed to **request** absentee ballots failed to contain the voter registration number of Republican voters (but were later corrected after the application had been submitted by the voter), the **absentee votes** themselves should be disregarded. Even if the applications could somehow be deemed deficient under Florida law (which they were not), such error would not permit the County Canvassing Board or the Court to reject the subsequent absentee vote of a qualified voter who received the absentee vote form based upon the application that had been submitted. Federal law 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. section 1971(a)(2)(B) (emphasis supplied). Therefore, the relief requested by the Appellants, if granted, would violate the proscription of 42 U.S.C. section 1971 because an "omission on any record or paper relating to any application, registration, or other act requisite to voting", if not material in determining whether the voter is qualified to vote in the election, shall not prevent such voter's ballots from being counted and included in the appropriate totals of votes cast. 42 U.S.C. section 1971 (e)(1) preempts State election law, the operation of which would interfere with a voter's rights.

The omission of the voter registration number on the absentee ballot application forms in this case was not material in determining whether any of the voters were qualified under State law to vote in the election. The only requirements under Florida law for a voter to be deemed "qualified" is that he or she be 18 years of age, a citizen of the United States, a legal resident of Florida, a legal resident of the County in which he or she is registered to vote pursuant to the Election Code, not mentally incapacitated, and not convicted of a felony. Section 97.041(1)(a) and (1)(b)(2), Florida Statutes, (1999). The absence of a voter registration number on an application to receive an absentee ballot is simply not relevant to the issue of whether a voter is deemed "qualified to vote" under Florida law. Indeed, Appellants have not contended, nor can they contend, that any absentee voter was

not qualified to cast their vote in the Presidential Election being challenged by Appellants.

In Goodloe v. Madison, 610 F.Supp. 240 (U.S.D.C. So. Dist. 1985), the Federal District Court was faced with the question whether failure of **some** absentee ballots to comply with statutory requirements should have the effect of disqualifying **all** absentee ballots that were cast. Under the Mississippi state law in effect at the time, absentee ballot voters were required to cast their ballots in the presence of a notary witness. In one district, two hundred and fifty (250) ballots were executed by the same notary public. In a subsequent election contest, however, evidence was introduced indicating that four (4) of the two hundred and fifty (250) absentee ballots had not actually been filled out in the presence of the notary who had executed the notary acknowledgement. The Board of Elections Commissions therefore decided to invalidate all two hundred and fifty (250) absentee ballots that had been notarized by the notary public.

The Federal district court in Goodloe analyzed the case pursuant to 42 U.S.C. section 1973 (a companion statute to 42 U.S.C. section 1971) which protects the voting rights of minorities. The district court found that disqualifying all two hundred and fifty (250) absentee ballots was a violation of Federal law and served to disenfranchise the absentee ballot voters. The Court, accordingly, reversed the Elections Commission's action in having invalidated all two hundred

and fifty (250) ballots and required the Election Commissioners to convene for the purpose of taking evidence to determine which ballots had been properly notarized and which were not.

The relief being sought by the Appellants in this case is not different. Appellants have sought to disqualify all 15,000 validly cast absentee ballots. No such remedy is permitted by Florida law or by Federal Statute 42 U.S.C. section 1971.

In Griffin v. Burns, 570 Fed. 2d 1065 (1st Cir. 1978), an unsuccessful candidate in a primary election brought suit claiming that the use of absentee ballots was not permitted in a primary election. The Rhode Island Supreme Court agreed and, thereafter, the unsuccessful candidates sought to have all absentee ballots disqualified, thus making the previously unsuccessful candidate the winner. The First Circuit Court of Appeals declined to do so. Even though the state supreme court had ruled, after the fact, that the use of absentee ballots should not have been permitted in the election, the First Circuit refused to disqualify those ballots and thus change the outcome of the election. The court noted that the absentee voters had been "handed ballots by election officials that, unsuspected by all, were valid" and that neither the applicant nor any other candidate or voter had challenged the absentee or shut invalid procedures prior to the primary. 570 F. 2d at 1075-76.

The same principle applies here. Even if Appellants could prove misconduct or failure to comply with State law, the unsuspecting absentee ballot voters of Seminole County cannot have their federally protected right to vote subverted through no fault of their own. Again, it is critical to note that the **qualifications** of the absentee voters who cast their votes are not in dispute. The only matter in dispute is the viability of a hyper-technical argument being made by Appellants that the absentee voters never should have received their ballots because, even though other information contained on the application forms sufficiently identified the voters requesting the ballots, the application form was missing the voter's registration number.

Appellants also do not dispute that each and every voter registration number that was filled in on the application form was correct. Appellants' sole complaint is that the correct registration number was filled in on the application form, after the form had already been submitted by the voter. Curiously, Appellants do not dispute the propriety of a third party filling in the voter's registration number **before** the ballot request form was submitted. In fact, the Democratic Party also mailed absentee ballot request forms to voters on which the information required by the Statute, including the voter registration number was pre-printed. Appellant has not challenged any of these applications as invalid.

As previously stated, 42 U.S.C. section 1971 prohibits denying any person the right to vote because of an omission on their application where the omission is not material in determining whether the individual is qualified under State law to vote. Given that there was sufficient information on the application forms even without the registration number to identify the voter for purposes of determining their qualification to vote, (i.e. name, address and last 4 digits of social security number), it is difficult to conceive of an omission less material than the absence of the voter registration number on the application forms at issue here.

III.FAILURE TO NAME ADDITIONAL INDISPENSABLE PARTIES

As set forth in the argument on Jurisdiction in this brief, no remedy is available to Appellants under Section 102.168. Appellees incorporate by reference that argument as an additional point on appeal. Appellees also assert, without waiver of that argument, that Appellants' Complaint should have been dismissed for failure to join indispensable parties as argued in their Motion for Judgment on the Pleadings, Motion for Summary Judgment and Motion to Dismiss. Section 102.168, if applicable, required the compulsory joinder of each "successful candidate" as an indispensable party. The "successful candidates" under this provision are the 25 Republican Presidential electors who were elected and certified pursuant to section 103.011.

Other indispensable parties also were not named as party defendants in the Complaint. Appellants asked in their Complaint that the circuit court either declare invalid all "those absentee ballots voted in Seminole County in the November 7, 2000 election that were (cast in a manner asserted to be invalid by Appellants)" or declare invalid "all absentee ballots voted in Seminole County in the November 7, 2000 election." (¶¶ 2, 3, Complaint). Although some electors who cast absentee ballots in Seminole County joined in the case as intervenors, the majority of voters who face being disenfranchised were not named as party defendants. Thus, pursuant to Florida Rule of Civil Procedure 1.14(b)(7), Appellants' Complaint should have been dismissed for failure to join indispensable parties.

IV.WAIVER, LATCHES, ACQUIESCENCE, ESTOPPEL

Although the circuit court was not required to reach these issues, the evidence at trial also established Appellees' affirmative defenses of waiver, latches, acquiescence and estoppel. The omission on the pre-printed application forms, and the fact that Republican representatives were correcting the error, 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. Rather than acting before the election, however, 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 a problem with the request forms during morning drive time on October 17, 2000. (Altiero Deposition, 4: 9-16; 4:19-5: 11; 6: 17-7: 13, 31: 20-32: 7). Mr. Altiero testified that his news story warned perspective voters who had used the pre-printed Republican form about the situation. (Altiero Deposition, 7:23-8: 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, his story contained a report of the reaction from Bob Poe, State Chairman of the Florida Democratic Party. In this news report, Poe took the position that the Republican absentee ballot request forms should be "nullified" in part because the absence of the voter identification number. (Altiero Deposition, 15: 12-16; 15: 23-16: 20.

Appellants' claims are barred by waiver, latches, acquiescence and estoppel because Appellants waited until the absentee ballots were canvassed and co-mingled before filing their challenge, and this delay prejudiced both election officials and voters. A challenge to alleged pre-election irregularities cannot be waged after the election has been conducted and ballots obtained through the polls as well as

from absentee voters have been co-mingled and the results of the election certified in accordance with State law.

V.ADDITIONAL POINTS ON APPEAL

Appellees adopt and incorporate by reference, and without waiver of any conflicting arguments made by Appellees in this Answer Brief, the Additional Points on Appeal and issues briefed and argued by the other Appellees in this case.

VI.CONCLUSION

Appellees respectfully request that, for the foregoing reasons, the Court decline to exercise jurisdiction over the appeal and, alternatively, that the Final Order of the circuit court be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile transmission and U.S. Mail on the 11th day of December, 2000 to:

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