No. 06-_____

IN THE

Supreme Court of the United States

ROBERT WEXLER, ADDIE GREENE,
BURT AARONSON, AND TONY FRANSETTA,

Petitioners,

v.

ARTHUR ANDERSON, KAY CLEM, AND
FLORIDA SECRETARY OF STATE GLENDA E. HOOD,

Respondents.

Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After the events that gave rise to *Bush v. Gore*, 531 U.S. 98 (2000), States, with federal encouragement, purchased new voting mechanisms to overcome problems associated with the older equipment. In Florida, as in many States, voting equipment is purchased on a county by county basis. As a result, counties within the same electoral jurisdiction can purchase different equipment that produce dramatically different records for purposes of mandatory manual recounts in especially close elections. In this case, the Eleventh Circuit decided that a State's failure to recount all ballots in substantially the same manner is analyzed under the rational-relationship test and that the constitutional requirement that all voters be treated with equal dignity applies only to the initial round of vote counting and not to a State-mandated manual recount. The questions presented are:

1. Whether manually recounting some ballots, as required by statute, while relying on machine verification of others in closely contested public elections is subject to rational relationship review, rather than heightened scrutiny, when challenged as a violation of the Equal Protection Clause?

2. Whether, when a State endeavors to provide a manual recount procedure in close elections, the disparate treatment of ballots on the basis of voting system used amounts to an issue of constitutional dimension, or whether constitutional concerns arise only at the original vote-count stage?

3. Whether use of different voting technologies, some of which lack the capacity to provide a paper trail for purposes of a state-mandated manual recount, can be justified against a constitutional challenge by "important regulatory interests," even though the problematic

equipment can be retrofitted to enable the error-checking function of a recount?

4. Whether constitutional Equal Protection and Due Process requirements are violated, when, in a closely contested election, voters on one type of equipment will have their ballots manually scrutinized and counted when a machine fails to register their vote, while other voters using different equipment that failed to register their vote will not?

PARTIES TO THE PROCEEDINGS

Petitioners are Robert Wexler, a United States Congressman from Florida and voter, Addie Green, a Palm Beach County Commissioner and Florida voter, Burt Aaronson, a Palm Beach County Commissioner and Florida voter, and Tony Fransetta, a Florida voter. Respondents are Arthur Anderson, Supervisor of Elections for Palm Beach County, Florida, Kay Clem, Supervisor of Elections for Indian River County, Florida and President of the Florida Association of Supervisors of Elections at the time the lawsuit was filed, and Glenda E. Hood, Secretary of State of Florida.

These parties are identical to those who were before the U.S. Court of Appeals for the Eleventh Circuit at the time of decision. During the pendency of the case before that court, Arthur Anderson was substituted for Theresa LePore as her successor in office.

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PETITION FOR A WRIT OF CERTIORARI

Robert Wexler, Addie Greene, Burt Aaronson, and Tony Fransetta respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the 11th Circuit (App., *infra*, A - 2a) is reported at 452 F.3d 1226. The decision of the U.S. District Court for the Southern District of

Florida (App., *infra,* C – 18a) is reported at 342 F. Supp.2d 1097 (S.D. Fla. 2005).

An earlier decision by the U.S. District Court for the Southern District of Florida to abstain is reported at 319 F. Supp. 2d 1354. The U.S. Court of Appeals for the 11th Circuit reversed and vacated that decision, which is reported at 385 F.3d 1336 (11th Cir. 2004) (per curiam).

JURISDICTION

The judgment of the U.S. Court of Appeals for the 11th Circuit was entered June 20, 2006. App. B. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (federal question), 1343(a)(3), and 2201, as well as 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX)

The Fourteenth Amendment to the United States Constitution is reproduced at App. D, *infra*, 43a.

The relevant portions of the applicable Florida statutes, Fla. Stat. §§ 97.021, 102.141, and 102.166, are reproduced at App. E, *infra*, 44a.

The relevant provision of Florida Department of State, Division of Elections Rule 1S-2.031 is reproduced at App. F, *infra*, 54a.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

In the aftermath of the controversy surrounding the 2000 presidential election, Florida purchased new voting systems. As Secretary of State, Defendant Hood, pursuant to

Fla. Stat. § 101.015, has responsibility for adopting minimum standards for new voting machines and updating certification standards on a continuing basis. Hood also has responsibility for approving or disapproving each voting system. Each Florida county may choose voting machines from among those systems approved by the Secretary. The same state statute requires county elections supervisors, including Defendants Anderson and Clem, to establish written procedures to assure the accuracy and security of the adopted voting systems.

Florida has also adopted a two-tiered approach to conducting recounts in close elections in recognition that all voting systems are subject to errors. When the margin of difference between the leading candidates is one-half of one percent or less, a "machine recount" must take place. Fla. Stat. § 102.141(6). In the closest of all election contests, where the margin is one-quarter of one percent or less, a manual recount must take place. Fla. Stat. § 102.166(1). The statute also permits a candidate to demand and receive a manual recount when the machine recount margin falls between one-quarter and one-half of a percent. Fla. Stat. § 102.166(2)(a). The Legislature considered but declined to exempt DREs from this manual-recount requirement.

Machine recounts are conducted by rerunning the tabulations on the voting machine or examining the counters for machines that do not use paper ballots. Fla. Stat. § 102.141(6)(b). Manual recounts require visual observations of individual ballots by the canvassing board to determine "if there is a clear indication on the ballot that the voter has made a definite choice." Fla. Stat. § 102.141(6)(a). Thus, the legislative scheme evinces a distrust of a mere machine recount for the most closely contested elections.

By law, recounts focus on residual votes, called overvotes and undervotes. Fla. Stat. § 102.166(1). Overvotes occur when the voting system determines that the voter has

cast more votes than permitted in a particular race, Fla. Stat. § 97.021(21), while undervotes occur when the voter fails to designate a choice or when the voting equipment records that the voter has cast no vote in a particular race, notwithstanding the voter's intent to vote. Fla. Admin. Code 1S-2.031(4).

After the Secretary of State approved a variety of equipment for use in public elections, without regard to their ability to comply with Florida's mandatory manual recount statute, 15 Florida counties opted to purchase touchscreen, or direct recording electronic (DRE), voting equipment, incapable of producing paper records of each cast ballot. On this equipment, the voter literally touches a computer screen to indicate electoral choices and cumulative totals are recorded in a memory module in the machine.

The remaining fifty-two Florida counties purchased optical-scan, or "marksense," equipment. On the marksense equipment, a voter fills in a circle or a box by the name of the candidate of choice with a pencil and that ballot is then scanned into the voting machine, where it is recorded and retained for inspection in the event of a manual recount. Absentee voters and voters who utilize provisional ballots in counties utilizing DRE equipment vote on marksense equipment in order to preserve their ballots for later scrutiny.

At the time this lawsuit was first filed, the Secretary of State policy flatly exempted DREs from the manual recount requirement because, she determined, that equipment was incapable of producing any discernible indicia of the voter's choice in a closely contested race.

B. COURSE OF PROCEEDINGS.

On March 8, 2004, four Plaintiffs instituted this action, alleging that the election officials' decision to forego manual recounts for those voters whose ballots were cast on

DRE machines violated the Fourteenth Amendment's Equal Protection and Due Process guarantees. Three Plaintiffs are both voters and elected officials, who were seeking reelection at the time: U.S. Representative Robert Wexler and Palm Beach County Commissioners Addie Greene and Burt Aaronson. The fourth plaintiff, Tony Fransetta, is a registered voter, who had voted in past elections and intended to vote in the 2004 and subsequent elections.

On May 24, 2004, the District Court granted Defendant Secretary of State Glenda E. Hood's motion to abstain on the basis that federal plaintiff Wexler had previously filed a similar state constitutional challenge in state court. While Plaintiffs appealed that ruling, an administrative law judge in a separate proceeding ruled that Florida law did not permit the Secretary of State to dispense with manual recounts for DRE equipment. *ACLU v. Department of State*, Case No. 04-2341RX (Div. of Admin. Hrngs., Aug. 27, 2004). On September 27, 2004, the U.S. Court of Appeals for the 11th Circuit reversed and vacated the District Court's abstention order in this case. *Wexler v. LePore,* 385 F.3d 1336 (11th Cir. 2004) (per curiam). That court subsequently denied Defendants' motion for reconsideration *en banc*.

Trial was scheduled to begin Monday, October 18, 2004. On the eve of trial, specifically on Friday, October 15, 2004, at 4:08 p.m., Defendant Hood issued an emergency rule, revising her position that no manual recount could or would be conducted on DRE equipment. Because manual inspection of individual ballots remained impossible, the emergency rule provided for inspection of what the Department called machine-generated "ballot image summaries," which, in fact, neither record nor summarize an image of any ballot. The sample summaries produced in support the emergency rule were, in fact, the same printouts produced in discovery earlier in this litigation as proof that the machines could not provide anything to recount, but

were instead a meaningless regurgitation of the count already produced by the machine.

At the commencement of trial, District Court Judge James Cohn ruled that the case would now proceed as a challenge to the new emergency rule. The case was tried over a three-day period and resulted in final judgment for the Defendants. Judge Cohn ruled that the Equal Protection Clause guarantees merely that voters who use the same equipment be treated the same and that equality of treatment across machines was not required. The district court did not address Plaintiffs' due process arguments. Plaintiffs' motion for reconsideration was denied on November 19, 2004.

While Plaintiff's appeal was pending before the Eleventh Circuit, the Florida Secretary of State promulgated a permanent rule substantially like the emergency rule she had issued earlier. The Eleventh Circuit later affirmed the District Court's judgment, though it adopted new reasoning. It stated that Plaintiffs' case erroneously focused on equal treatment of voters whose ballots are subject to a manual recount. Instead, it held that the rational-relationship test applied and that the only issue of "constitutional dimension" was whether voters were treated the same in the initial counting of their votes, rather than in the recount. App. A – 13a. That some ballots cast might receive less scrutiny in a manual recount, the court further held, was "borne of a reasonable, nondiscriminatory regulation," and justified by vague but "important regulatory interests".

REASONS FOR GRANTING THE PETITION

Nothing is more fundamental to our democratic republic than the people's right to vote. Yet, for all our experience with voting, States face persistent questions about the integrity of their vote-counting capacities. The use of new, technologically sophisticated voting mechanisms has

neither quelled that public concern nor instilled public confidence in the resulting vote count. Instead, it has exacerbated the public's discomfort because of frequent news reports of programming, security, training, and operational errors, as well as instances when votes have been lost and election results could not be verified.

The State of Florida has had unfortunate experience in this regard. A closely contested presidential election in 2000 required this Court's attention because the State endeavored to conduct a recount that treated different ballots differently. *See Bush v. Gore,* 531 U.S. 98 (2000) ; *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). In the aftermath of that experience, Florida, like many States, revamped its election laws and its voting equipment. As in many other States, Florida voters cast their ballots on at least two very different types of voting machines, one of which retains a paper trail and one of which does not (even though the latter could be outfitted to do so).

The lack of a paper trail renders problematic the state-mandated manual recount required by Florida in extremely close elections. For example, in January 2004, a special election was held to fill a vacancy in Florida Legislature District 91. The contest was decided by a margin of 12 votes. The voting machines utilized in the election were new DRE mechanisms that did not produce paper ballots for the mandatory manual recount. As a result, the recount did not take place. The DRE voting machines recorded that 134 ballots were cast in which no candidate was selected and these were deemed "undervotes." Because no other office was on the ballot, it strains credulity to suppose that voters might have stood in line, signed in, entered the voting booth, and then decided to cast no vote for any candidate. The most logical explanation is that at least some votes cast, enough to determine the outcome of the election, were not recorded by the equipment and thus were lost.

A similar experience took place in Wellington Village, Florida in 2002, where the margin of victory for a DRE-cast council race was four votes, and 78 ballots, easily more than enough to determine the election, were deemed undervotes. Once again, no manual recount was conducted. The switch to new equipment, in light of experiences like these, cannot be said to have bolstered public confidence in the integrity of the vote count.

This case raises vitally important constitutional issues at the intersection of constitutional law and election law without the result of any specific election contest hanging in the balance. First, confusion and conflict reign among the circuits over the level of scrutiny to be applied in equal protection challenges to election laws and practices and the application of the flexible framework enunciated by this Court in *Burdick v. Takushi*, 504 U.S. 428 (1992).

Second, conflict exists on whether a State that undertakes to hold a mandatory recount can dispense with equal treatment of voters because, as the Eleventh Circuit held here, the only issue of constitutional dimension is whether voters involuntarily assigned to use particular voting technologies have an equal opportunity to have their vote counted at the outset of the tallying process.

Third, this case presents an opportunity to explain what type of "important regulatory interests" are sufficient to overcome Equal Protection concerns raised by the differential treatment of recount ballots. The Eleventh Circuit held that administrative convenience and the accommodation of one class of voters through the choice of equipment constituted sufficiently "important regulatory interests," in conflict with rulings of this Court and other circuits. Finally, this case presents an important constitutional issue that goes to the integrity of our election process and concerns whether the Fourteenth Amendment's Equal Protection and Due Process Clauses require a state to

afford substantially equivalent treatment to ballots subject to a manual recount, regardless of the type of voting mechanism upon which the ballots were first cast. The Eleventh Circuit ruled that election officials may manually recount some votes but not others cast in the same race, simply because of the different capabilities of the equipment it assigns voters to utilize.

Plaintiffs contend that where the State has undertaken to require the error-correcting safeguard of a manual recount in those extremely close elections where either machine or voter error can change the result, it is obligated to treat all voters with equal dignity by recounting all votes in a substantially uniform manner. As a result of Florida's implementation of its mandatory manual recount law, two voters in the same electoral district, utilizing different equipment by happenstance of their county's selection of equipment, will be treated differently in the only instances where a recount can change the result. The voter who cast a ballot on DRE voting machines will not have a true manual recount conducted and will be recorded as voting precisely as the machine itself originally reported, despite that equipment's known error rate. Meanwhile, the voter who cast a ballot on marksense equipment will have that ballot visually scrutinized to determine whether the machine accurately read the ballot or whether the voter made a definite choice that the machine did not read.

This selective and systematic form of disenfranchisement exceeds, in kind and not merely in degree, the compromise to uniformity of manual ballot review that was at issue in *Bush v. Gore*, which involved varying interpretations of direct indicia of voter intent. The problem here is the selective refusal to consider such direct indicia, despite a statute mandating its examination. The problem presented here is also distinct from disparities in "residual vote rates" among varying voting systems that some recent cases raised. *See, e.g., Stewart v. Blackwell*, 444

F.3d 843 (2006), *vacated pending reh'rng en banc* and *Southwest Voter Registation Educ. Proj., v. Shelley,* 344 F.3d 914 (9th Cir. 2003) (en banc). Plaintiffs further contend that heightened scrutiny should be applied in analyzing this issue, though the violation remains palpable even under minimal scrutiny.

I. THE ELEVENTH CIRCUIT'S RULING THAT THE ALLEGED EQUAL PROTECTION VIOLATION IN THE CONDUCT OF RECOUNTS SHOULD BE EVALUATED UNDER THE RATIONAL RELATIONSHIP TEST CONFLICTS WITH THIS COURT'S PRECEDENTS AND WITH RULINGS IN OTHER CIRCUITS

Voting holds an exalted position in the pantheon of constitutional values. It is indisputably "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). *See also Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979) (the right to vote is "of the most fundamental significance under our constitutional structure."). In fact, this Court has said "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964).

Thus, "all qualified voters have a constitutionally protected right 'to cast their ballots and have them . . .' correctly counted and reported." *Gray v. Sanders,* 372 U.S. 368, 380 (1963) (citation omitted). *See also Reynolds v. Sims,* 377 U.S. 533, 554 (1964); *Baker v. Carr*, 369 U.S. 186 (1962), *citing United States v. Classic,* 313 U.S. 299 (1941) (recognizing that the right to vote is infringed by a false tally). Assuredly, there is no constitutional right to a recount. However, where a state endeavors to provide for recounts, they become an integral part of the election process. *Roudebush v. Hartke,* 405 U.S. 15, 25 (1972).

Failure to count a ballot properly cast by an eligible voter merely because that county chose one type of voting mechanism rather than another is a form of disenfranchisement for which there can be no justification. *See Reynolds,* 377 U.S. at 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."). Simply put, the Equal Protection Clause safeguards the right of voters to have their valid votes counted along with the valid votes of other voters participating in that election. *United States v. Saylor,* 322 U.S. 385, 388-89 (1944); *United States v. Mosely,* 238 U.S. 383 (1915).

To determine the level of scrutiny that must be brought to bear on an alleged infringement of the right to vote, this Court has instructed that:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citations omitted).

A severe restriction on a plaintiff's voting rights is subjected to strict scrutiny and must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (citation omitted). If a law merely imposes "reasonable, nondiscriminatory restrictions," the "State's important regulatory interests are generally sufficient" to uphold it. *Id.*

(citation omitted). The *Burdick* Court explicitly "distinguished cases in which state activity affected a party's right to vote from cases in which that activity restrained a person's access to the ballot." The former were regarded as severe burdens, and the latter not. *Id*. at 438, *cited in Protect Marriage Illinois v. Orr*, No. 06 C 3835, 2006 WL 2224059 (N.D. Ill. Aug. 6, 2006).

By definition, disenfranchisement is the most severe deprivation that may befall a citizen's exercise of the fundamental right to vote. As this Court has recognized, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds,* 377 U.S. at 554. Even when no voter is physically prevented from casting a ballot, the miscounting of any voter's legally cast ballot amounts to the disenfranchisement of that voter. The Constitution guarantees that voters can rely on having their votes counted without dilution as compared to the votes of others. *Hadley v. Junior College Dist. of Metro. Kansas City,* 397 U.S. 50, 52, 90 (1970). Accordingly, laws and procedures that result in disenfranchisement or dilution should be scrutinized with exacting care. *See Reynolds,* 377 U.S. at 561-62 (requiring "careful[ ] and meticulous[ ] scrutin[y]").

Florida's recount procedures utilize an individualized recount by hand for those ballots cast on marksense equipment but entirely forego that scrutiny for those cast on DREs and thus are patently discriminatory. Instead, a DRE machine generates a printout detailing how many times it recorded no vote for an office. Defendant Secretary of State Hood, in promulgating the rule applicable to DRE equipment, now deems this printout sufficient compliance with the manual recount mandate, even though it does not involve any scrutiny of some indicia of the voter's actual choice. Thus, voters in DRE counties have no chance of having a residual vote counted in an election where it

could make a difference, while voters casting their ballots on other equipment, including those whose vote is considered "provisional,"[1] do. That discriminatory treatment constitutes a form of total disenfranchisement and should require at least heightened scrutiny, if not strict scrutiny.

Nonetheless, the Eleventh Circuit ruled that the burden of not having one's vote counted in a manual recount in those extremely close elections where the vote could be determinative of the election was "a burden, borne of a reasonable, nondiscriminatory regulation," and was "not so substantial that strict scrutiny was required." App. A at 13a. It thus applied the rational-relationship test, following an inapposite ruling in *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (holding that use of paperless touchscreen voting systems *per se* do not "severely restrict the right to vote" and thus does not merit strict-scrutiny analysis) and in evident misapplication of *Burdick's* holding that core violations of the right to vote receive strict scrutiny.

The Eleventh Circuit's decision on the applicable level of scrutiny directly conflicts with applications of heightened scrutiny to similar voting-related burdens by the Fourth and Sixth Circuits, as well as what appears to have been a heightened level of scrutiny in *Bush v. Gore*. *See*

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[1] A provisional voter is a voter whose name does not appear on the list of eligible voters but who asserts that he or she is in the correct polling place, or a voter whose eligibility has been questioned by an election official. *See* Help America Vote Act, § 302(a), 42 U.S.C. § 15482(a) (2002). Under Florida's procedures, provisional voters cast their ballots on marksense voting machines, even in DRE counties, so that their ballots can be physically segregated and preserved pending verification of eligibility. In the event of a close election requiring a recount, the eligible provisional voter's ballot, cast on marksense equipment, will be scrutinized and counted, but the regular DRE ballot of the unquestionably eligible voter, if the DRE machine registered it as an undervote, will not be counted.

Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection in Election Law,* 29 FLA. ST. U. L. REV. 377, 389, 396 (2001) (suggesting that strict scrutiny was applied). The Ninth Circuit appears to have decisions on both sides of the divide. In *Weber,* the rational-relationship test was applied to validate the use of DRE voting equipment against a facial challenge where there was no proof of discriminatory treatment of voters by their involuntary assignment to a particular voting mechanism. However, in *Idaho Coalition United for Bears v. Cenarrussa,* 342 F.3d 1073 (9th Cir. 2003), strict scrutiny was applied to a law that treated nominating petitions unequally on the basis of geography.

The Fourth Circuit's conflicting decision examined an issue very apt to this case. In *Hendon v. North Carolina State Board of Elections,* 710 F.2d 177 (4th Cir. 1983), the court heard a challenge to a state statutory requirement that paper ballots marked with a single exception to a straight party ticket be counted entirely as a straight-ticket vote. Voters who used marksense and electronic punch card equipment, which permitted both straight-ticket voting and individual candidate markings, and who took advantage of both in order to vote a straight ticket with a single exception, had their intentions ignored – indeed, affirmatively misstated. Meanwhile voters using lever machines that permitted one-touch straight-ticket voting but also permitted exceptions by separate levers had all their votes counted as cast.

The Fourth Circuit held that the "Constitution protects the right of qualified citizens to vote and to have the votes counted as cast," and that any conditions placed on that right were subject to strict-scrutiny review. *Id.* at 180. The court acknowledged that a state may employ diverse methods of voting, but held that the state may not select methods that place a "much more onerous burden" on some voters than others. *Id.* at 181. The decision found that voters using certain equipment were unconstitutionally burdened in having their vote counted as cast compared to voters

using other equipment. *Hendon v. North Carolina Board of Elections,* 633 F.Supp. 454 (W.D.N.C. 1986) (characterizing decision).

Similarly, the Sixth Circuit recently applied strict scrutiny in *Stewart v. Blackwell,* 444 F.3d 843, 868-72 (6th Cir. 2006), *vacated pending rehrng en banc* (Jul 21, 2006) (applying strict scrutiny where plaintiffs "alleged vote dilution due to disparate use of certain voting technologies"). In *Stewart,* the dispute centers on differences in the reliability of voting equipment on a county-by-county basis. As explained below, the present case does not turn on the relative error rates of various voting systems, *i.e.,* their relative propensity to mistake a voter's choice in the initial count. *Stewart* is nonetheless instructive in that it recognized that a state's assignment of eligible voters to voting systems less likely to assure that their votes are counted amounts to a severe burden on the right to vote and merits strict scrutiny. 444 F.3d at 868-69.

An earlier Sixth Circuit decision enunciated *dicta* that is in accord with the holding in *Stewart*. In *Mixon v. Ohio*, 193 F.3d 389, 402-03 (6th Cir. 1999), the court upheld a change from an elected to an appointed school board, saying there was no constitutional right to vote for an "administrative body" such as a school board, even if other localities accorded their voters that right. Even so, the court noted, "[i]f the challenged legislation grants the right to vote to some residents [of the locality] while denying the vote to others, then we must subject the legislation to strict scrutiny and determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 403.

The Ninth Circuit applied strict scrutiny in *Idaho Coalition* to invalidate a fixed signature requirement for ballot initiative petitions because wide population variations among counties gave rural areas disproportionate power in the initiative process. The court followed *Moore v. Ogilvie,*

394 U.S. 814 (1969), which held that effective grants of greater and lesser voting strength in such matters based on geographic disparities violated equal protection. In the instant case, the different treatment occurs on a geographic basis as well because the selection of different voting equipment occurs on a county-by-county basis.

A different Ninth Circuit panel in *Weber* decided that strict scrutiny was not applicable to a facial challenge to California's post-2000 transition to paperless DRE voting equipment. The plaintiffs in *Weber,* however, made only a conditional claim, that electronic voting left the original tally vulnerable to computer fraud, which would be difficult to detect without paper records. 347 F.3d at 1106. The court had no occasion to consider the clear disparities alleged here, where voters are treated unequally in a state-mandated manual recount because some of them voted on machinery that produced no output for real manual review while others receive full recount treatment.

The Eleventh Circuit decision, with little analysis, treats the significant deprivation of equal voting opportunity here as if it were a trivial irregularity meriting only rational-relationship review.[2] This Court itself has acknowledged that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359 (1997). As a result, lower courts have expressed considerable difficulty in determining when to apply strict scrutiny to a deprivation or abridgment of voting rights. *See, e.g., Common Cause Southern Christian Leadership Conf. of Greater Los Angeles v.*

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[2] For example, the opinion characterized DRE voting systems as failing to record "ambiguous indicia of voter intent," App. A at 14a, 452 F.3d at 1233, in disregard of the Florida Legislature's statutory determination that manual reviews provide the best means of determining the intent of a voter, an intent that a machine cannot discern or may affirmatively misstate.

Jones, 213 F. Supp.2d 1106 (C.D. Cal. 2001) ("The Supreme Court, however, has not clearly articulated the level of scrutiny which courts are to give to alleged infringements of the fundamental right to vote."). *See also Campbell v. Buckley,* 203 F.3d 738 (10th Cir. 2000) ("The cases discussed above which applied strict scrutiny do not lend themselves to a simple synthesis."); *Friedman v. Snipes,* 345 F. Supp.2d 1356, 1374 (S.D. Fla. 2004) (absentee ballot return deadline not unconstitutional) (misconstruing *Burdick* to categorize all "state election laws which regulate the mechanics of the electoral process" as automatically "reasonable [and] nondiscriminatory" and not entitled to heightened scrutiny).

A further example of this confusion is the unpublished *per curiam* panel opinion in *Coalition to End Permanent Congress v. Runyon*, 971 F.2d 765 (D.C. Cir. 1992) (table), which invalidated an expanded franking privilege for mass mailings from incumbent members of Congress for communications to voters brought into their districts via redistricting. In two separate concurrences and one dissent, the three panel judges each applied the *Burdick* severity test differently. Judge Silberman favored applying "some form of heightened scrutiny" to the effective subsidy of incumbents' re-election campaigns. Judge Randolph believed the scheme was invalid under rational-basis review. And Judge Wald, in dissent, would have upheld the expanded frank as a legitimate policy that reached out to "orphan" constituents and subject to relevant postal regulations that forbade the franking of overt campaign material.

The difficulties courts have experienced in determining when to apply strict scrutiny in the election context are magnified by the Eleventh Circuit's cursory treatment of that issue in this case. This Court should provide greater guidance on the dividing line between mere procedural and administrative regulation of little constitutional dimension and those types of discriminatory

disenfranchisements or dilutions of the vote that deserve more exacting scrutiny.

II. THE ELEVENTH CIRCUIT'S RULING THAT EQUAL PROTECTION DOES NOT ATTACH TO THE RECOUNT PHASE OF AN ELECTION CONFLICTS WITH THIS COURT'S PRECEDENTS AND RULINGS IN OTHER CIRCUITS

The question the court below chose to answer makes only the initial vote tally a question of constitutional dimension. App. A - 10a. According to the Eleventh Circuit, as long as different voting equipment have substantially similar accuracy rates, no equal protection deprivation can occur. By rejecting the perspective of the residual voter, App. A - 11a, whose vote is critical to the outcome of a close election because that vote is only credited to a candidate in a manual recount, the court below has rejected this Court's teachings that, when a state provides for a manual recount, that recount is an integral part of the election process.

In *Roudebush,* this Court found that, where a state provides for a recount "to guard against irregularity and error in the tabulation of votes," the recount "is an integral part of the [State's] electoral process." 405 U.S. at 25. The Eleventh Circuit's ruling also conflicts with this Court's decision in *Moore v. Ogilvie,* 394 U.S. 814, 818 (1969), which held that "[a]ll procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." Moreover, this Court has insisted that the "concept of political equality in the voting booth . . . extends to all phases of state elections." *Gray,* 372 U.S. at 380.

The flaw in the Eleventh Circuit's analysis duplicates the argument Rhode Island's election officials, unsuccessfully put forth in *Ayers-Schaffner v. DiStefano,* 37 F.3d 726 (1st Cir. 1994). There, after voters were mistakenly

permitted to vote for two candidates for a school board position, the state board of elections ordered a curative election in which voters could only choose one candidate. It further ordered that only candidates and voters who participated in the original election were eligible to participate in the second vote. The election officials defended their action by claiming that the second election "is not a new, independent election, but simply a recreation of the defective primary" and therefore no constitutional infringement could attach. *Id*. at 727. The First Circuit struck down the franchise limitation because the defective and unreliable results of the first election caused the officials to conduct a new tally. *Id*. at 728. The requirement that voters be treated equally attached to the new tally, just as it should to Florida's recount here.

III. THE ELEVENTH CIRCUIT'S RULING THAT FLORIDA'S UNEQUAL TREATMENT OF RECOUNT BALLOTS ARE SUPPORTED BY "IMPORTANT REGULATORY INTERESTS" CONFLICTS WITH THIS COURT'S PRECEDENTS AND RULINGS IN OTHER CIRCUITS

The Eleventh Circuit found that Florida's manual recount procedures, which it said imposed only an insubstantial burden on residual voters were justified by several "important regulatory interests." App. A at 15a. The court identified those interests as (1) a necessary accommodation of the "differences in the technologies themselves and the types of errors voters are likely to make in utilizing those technologies;" and (2) suggested that use of the DRE equipment had "certain benefits for disabled voters" while "prevent[ing] some of the voter errors that are characteristic of the optical scan voting systems." App. A at 14a-155a.

The court's first reason is, at best, circular. The Court's first purported justification is, at best, circular:

because some voting machines cannot capture direct voter intent information, recounts of votes cast on those machines need not take account of it, even though state law requires manual review to ascertain the intent of all voters on all equipment. This reasoning effectively licenses election officials to carve up the equal protection guarantee to fit whatever degree of equality their policy choices happen to afford. Yet, Officeholders "represent people, not trees or acres," *Reynolds,* 377 U.S. at 562, *and not voting equipment.* Thus, the court's focus on defining constitutional rights by equipment is misdirected. As Justice Souter noted in his *Bush* dissent, the choice of different voting equipment within the state may be justified so long as there is some rational basis for the technology choice. *Bush,* 531 U.S. at 134 (Souter, J., dissenting). Here, rather than require some rational explanation, the Eleventh Circuit merely accepted Florida's choice of allowing *some* counties to use the more expensive DRE equipment without the capacity to provide individual ballots for a manual recount and then justified the procedures subsequently adopted as the best that can be done once that choice is made. Plaintiffs submit that, instead of demonstrating a rational basis, the decision to deploy this type of DRE equipment was arbitrary and discriminatory.

If those who control the choice of equipment can later justify their inability to treat similarly situated voters are alike by claiming that the disparity is inherent in the design of the equipment, then virtually all Equal Protection concerns about voting procedures can be evaded. This Court has repeatedly held that discriminatory procedures cannot be justified by claiming mere administrative inconvenience. *See Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 152 (1980). In fact, rejecting exactly that rationale, this Court has stated that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash,* 380 U.S. 89, 96 (1965).

The Eleventh Circuit's offhand recognition that DRE equipment has benefits for some disabled voters and prevents some types of errors is equally disturbing. That these benefits may flow from use of this equipment does not comprise "important regulatory interests" that justify the difference in the treatment of ballots for a manual recount. First, the concept that government may restrict the constitutional rights of some elements of our society in order to accommodate others is wholly foreign to our Constitution. Compare *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Use of DREs that produce a paper trail accomplish Florida's presumed goal of assisting disabled voters. Florida has assered no justification for paperless DREs that provide that benefit but still infringe the rights of other voters. Moreover, because Florida has seen fit to have marksense voting machines in *every precinct* for absentee and provisional voters, the use of DREs cannot be justified as being less prone to error. In fact, according to state election statistics in the record of this case, DREs have a slightly higher error rate than marksense equipment.

The decision below conflicts with the approach taken by the Sixth Circuit in *Rosen v. Brown,* 970 F.2d 169 (6th Cir. 1992). There, the State of Ohio wanted to avoid placing the designation "independent" under certain candidates' names, even though the major party candidates had their affiliations identified. Ohio defended on administrative convenience grounds, suggesting that it was avoiding voter confusion and producing a more manageable ballot. The court found these justifications to be pretextual and, using rational-basis analysis, invalidated the practice. Given the ineffectiveness of Florida's justifications, the asserted "important regulatory interests" are equally specious and cannot provide a rational basis to support the state's failure to accord equal manual recount treatment to DRE voters.

For more important administrative considerations, the Fourth Circuit has recognized that the lead time required

to print ballots can justify timing considerations in ballot-access petitions, so long as the interests of those adversely affected, in that case minority parties, are accommodated. *See Wood v. Meadows,* 207 F.3d 708 (4th Cir. 2000).

Here, the interests of DRE voters are not accommodated in the least. Instead, the rules have been rewritten, in discriminatory fashion, to accommodate a choice of voter equipment that simply cannot produce indicia of voter choice for a manual recount. The consequences of that incapacity could have been avoided if the State had merely withheld certification for the equipment until it was retrofitted with the capability of printing out a paper receipt that the voter could verify and then leave in the machine for use in the case of a manual recount.

IV. THE ELEVENTH CIRCUIT ERRED IN RULING THAT BALLOTS DO NOT NEED TO BE TREATED SIMILARLY FOR THE PURPOSE OF A MANDATORY MANUAL RECOUNT

The Eleventh Circuit's ruling that the Constitution does not require that ballots in closely contested elections have to be recounted in a substantially similar fashion is erroneous. This Court established long ago that "all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted.' . . . [The ballots] must be correctly counted and reported." *Gray,* 372 U.S. at 380. *See also Reynolds,* 377 U.S. at 554; *Baker*, 369 U.S. at 208.

There is no constitutional requirement that a State provide a recount procedure to assure the accuracy of vote tallies in close elections. However, once a State undertakes to provide for a recount, as Florida has here, then that recount is an integral part of the election process and must be carried out in an evenhanded manner, treating all votes with equal dignity. Thus, all eligible voters have a right to have their votes counted – and, when a recount takes place, to have

their votes recounted. Current Florida procedures for DRE equipment fail to afford that recount guarantee, a constitutional violation that could be remedied by retrofitting the equipment with a paper trail or by using different equipment. As long as Florida law mandates a recount that must be performed by a visual inspection of a ballot that contains indicia of the voters' intent, the state may not forego compliance for some voters because the machine they were involuntarily assigned to use is incapable of providing indicia.

The geographic discrimination that occurs compounds the constitutional violation. Because voting machines are selected on a county-by-county basis, voters in some counties fail to receive the benefit of a true manual recount, while voters in neighboring counties, voting for candidates in the same electoral district, will have their ballots manually recounted. When the election hinges on a tally of those votes lost by the machine, the continued failure to count that vote, as occurs under Defendants' system, constitutes an injury of enormous magnitude – namely, disenfranchisement – for which there can be no justification. *See Reynolds,* 377 U.S. at 563. The State's interest in fair and honest elections.[3] There is no need to burden Plaintiffs' rights to advance.

This Court has also forthrightly held that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). *See also Gray,* 372 U.S. at 379 ("Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit.). It does not matter that all voters are provided with a voting

[3] *See* R4-129-170 through R4-129-200; R5-130-329 through R5 130-337; R5-130-350 through R5-130-359.

machine on which to vote. If some votes are not counted when others, suffering from the same disability (whether machine malfunction or voter error) are, voters are not accorded the equal dignity that the Constitution guarantees. That is why the Constitution protects the right to vote "as established by the laws and constitution of the state." *McPherson v. Blacker,* 146 U.S. 1, 39 (1892).

In support of its ruling, the Eleventh Circuit cited this Court's statement in *Bush,* that "[h]aving once granted the right to vote on equal terms, the state may not, by later arbitrary treatment, value one person's vote over that of another." App. A at 11a (quoting *Bush,* 531 U.S. at 104-05). The quotation is precisely to the opposite effect. Rather than singling out for Equal Protection consideration the initial calculation of electoral results as the only proper constitutional concern, the *Bush* decision makes no distinction between the first-round count and any subsequent recount. Indeed, the *Bush* decision addressed "whether the *recount procedures* [adopted in Florida after the 2000 presidential election were] consistent with [the State's] obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush,* 531 U.S. at 105 (emphasis added). *Bush* thus dealt with inconsistent standards for court-supervised manual recounts where direct indicia of voter intent was available but were being variously and subjectively interpreted.

Here, the state's disparate treatment is objective and absolute, and visits harm on all touchscreen voters in those sufficiently close elections where an error can affect the outcome. Every voter who uses touchscreen equipment is guaranteed a denial of any manual review of his or her definite choice of a candidate, while all other voters receive such review.

The passage from *Bush* quoted by the Eleventh Circuit simply reflects the same concern this Court has

expressed a number of times, both within and without the context of election issues. In *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), this Court similarly declared that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 665. In another context, this Court recognized that, although there was no right to welfare benefits, once a State undertakes to provide them, it was obligated to comply with constitutional requirements. *Goldberg v. Kelly,* 397 U.S. 254 (1970).

The right to equal treatment attaches to the counting of residual votes, and the Eleventh Circuit was wrong to hold otherwise. Moreover, whether one applies strict scrutiny or the more lenient balancing test derived from *Burdick,* Florida's disparate treatment of residual votes constitutes an arbitrary deprivation that offends the constitutional guarantee of Equal Protection. In holding that this categorical denial of equal voting opportunity is of no "constitutional dimension," the Eleventh Circuit's decision in effect cuts off the constitutional right to vote at the initial election-night machine count. It extinguishes the right of citizens to equal treatment in the counting of residual votes, even though the State has undertaken to provide that review manually for all voters in those elections where a few votes could change the outcome. A voter's constitutional interest in the equality and dignity of his or her vote only intensifies in the manual recounts contemplated by Florida election law, since they take place only when elections are exquisitely close. The closer the election result, the more likely one cote can turn its outcome, and the more significant is the inequality of treatment where some but not all voters receive manual review of their intentions. The interest of citizens in the effective exercise of their franchise is at its apogee, and the state's justification for denial of equal treatment to all voters is at the lowest ebb, when the election

is at the closes – when miscounting or failing to count even a single valid vote can determine the outcome.

In short, Florida has created a system that deems a manual recount essential to ensure the integrity of its closest elections, yet refuses to include in that process all voters on equal terms. That DRE equipment has an error rate that is equal to or higher than marksense equipment renders this refusal arbitrary and illogical. Such a refusal hardly comprises the type of "reasonable, nondiscriminatory restrictions," short of disenfranchisement, that *Burdick* held generally justifiable in furtherance of legitimate state interests in election administration. Instead, it is overt discrimination at the core of the right to vote and a greater justification than a vague furtherance of "important regulatory interests" is required of the State. This Court should not countenance the continued distortion of its equal protection pronouncements to such an end, but should step in to resolve the doubt and confusion that today surround this critical area of the law of democracy.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

September 18, 2006

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Appendix

APPENDICES

A. Decision of the U.S. Court of Appeals for the 11th Circuit (June 20, 2006), 452 F.3d 1226

United States Court of Appeals, Eleventh Circuit.

Robert WEXLER, Congressman, Addie Greene, Commissioner, Burt Aaron, Commissioner, Tony Fransetta, Plaintiffs-Appellants,
v.
Arthur ANDERSON, Supervisor of Elections for Palm Beach County, Kay Clem, Supervisor of Elections for Indian River County, Florida and President of the Florida Association of Supervisors of Election, Florida Secretary of State, Glenda E. Hood, Defendants-Appellees.

No. 04-16280.

Decided June 20, 2006.

Robert S. Peck, Center for Constitutional Lit., Washington, DC, Jeffrey M. Liggio, Liggio, Benrubi & Williams, PA, West Palm Beach, FL, for Plaintiffs-Appellants.

Ronald A. Labasky, Young Van Assenderp, P.A., Erik M. Figlio, Christopher M. Kise, Florida Sol. Gen., Tallahassee, FL, for Defendants-Appellees.

Cindy A. Cohn, Electronic Frontier Found., San Francisco, CA, for Amici Curiae.

Appeal from the United States District Court for the Southern District of Florida.

Before DUBINA and KRAVITCH, Circuit Judges, and STROM*, District Judge.

* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

KRAVITCH, Circuit Judge:

The issue presented in this appeal is whether Florida's manual recount procedures in those counties employing paperless touchscreen voting machines violate the rights of voters in those counties to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution. For the reasons that follow, we hold that they do not. [FN1]

> FN1. Prior to oral argument, the parties submitted supplementary briefs on the issue of whether the present appeal was rendered moot by either: (1) the passage of the Help America Vote Act ("HAVA") or (2) the expiration of the emergency rule that formed the basis of the district court's decision. We conclude that because the parties' differing interpretations of HAVA's requirements to a certain extent restate the present controversy and because the lapsed emergency rule has been replaced by a substantively identical permanent rule, the instant appeal is not moot.

I. Facts

Florida's Voting System

Florida's Electronic Voting Systems Act makes Florida's Department of State responsible for developing and adopting standards for electronic voting and for certifying electronic voting systems for use in the state. *See* Fla. Stat. §§ 101.5601-101.5614. Each county may then choose its own voting equipment from among those systems certified by the Department of State. Fla. Stat. § 101.5604; *see also* Fla. Stat. § 101.294. In fifteen of Florida's sixty-seven counties, voters cast their votes using paperless touchscreen voting machines, which require that voters make their selections

directly on computer screens by literally touching the screen as indicated. In the remaining fifty-two counties, voters cast optical scan ballots. To vote using an optical scan ballot, a voter uses a pencil to fill in a bubble or arrow by the name of the candidate he wishes to vote for; the ballot is then run through an automatic tabulation machine. Voters casting absentee or provisional ballots in touchscreen counties also submit optical scan ballots.

Manual Recount Procedures

Florida law provides for a two-stage recount procedure in certain close elections. First, if the margin of victory is one-half of a percent or less, election officials conduct a "machine recount," which entails re-tabulating ballots in precincts using optical scan ballots, Fla. Stat. § 102.141(6)(a), and, in touchscreen voting precincts, examining "the counters on the precinct tabulators to ensure that the total of the returns on the precinct tabulators equals the overall election return." Fla. Stat. § 102.141(6)(a). Second, if the results of the machine recount indicate a margin of victory of one-quarter of a percent or less, officials conduct a manual recount of all "overvotes" and "undervotes" (collectively, "residual votes"). Fla. Stat. § 102.166. An overvote results when "the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question." Fla. Stat. § 97.021(23). An undervote results when "the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question." Fla. Stat. § 97.021(37).

During the manual recount phase, auditors review residual votes to determine if there is a "clear indication on the ballot that the voter has made a definite choice." Fla. Stat. § 102.166(5)(a). To that end, the Department of State is charged with: (1) adopting "specific rules for each certified voting

system prescribing what constitutes a 'clear indication on the ballot that the voter has made a definite choice,' " *id.* at § 102.166(5)(b), and (2) issuing "detailed rules prescribing additional recount procedures for each certified voting system which shall be uniform to the extent practicable." *Id.* at § 102.166(6)(d).

The manual recount is a fairly straightforward process in optical scan counties; auditors look for stray marks that may have misled the machines or other indicia that a voter has made a definite choice. For example, a voter might circle a candidate's name rather than making the prescribed mark to indicate his choice. In touchscreen counties, however, this process has proved more difficult. It is impossible to overvote in a touchscreen county; the touchscreen voting machines will not allow it. It is possible to undervote when using touchscreen voting machines, however, although the machines prompt a voter when he undervotes, providing him with an opportunity to choose a candidate for that race.

Emergency Rule

Because a touchscreen voter never records his vote onto paper, and there is no provision in these counties for contemporaneous print-outs of individual ballots, a "manual recount" in touchscreen counties does not allow for the same type of review of ballots for voter or machine error provided in optical scan counties. In light of these characteristics of touchscreen voting systems, the Florida Department of State originally did not require manual recounts in touchscreen counties. [FN2] An administrative law judge struck down the original rule that failed to require manual recounts, however, and the Secretary of State promulgated Emergency Rule 1SER04-1 in its place. The substance of the emergency rule was incorporated into the permanent rule governing manual recounts on November 3, 2005. [FN3] *See* Florida Department of State, Division of Elections Rule 1S-2.031 ("Rule 1S-2.031").

> FN2. Rule 1S-2.031, which sets forth the procedures for conducting manual recounts, originally stated, in pertinent part:
>
> When a manual recount is ordered and touchscreen ballots are used, no manual recount of undervotes and overvotes cast on a touchscreen system shall be conducted since these machines do not allow a voter to cast an overvote and since a review of undervotes cannot result in a determination of voter intent as required by Section 102.166(5), F.S. In this case, the results of the machine recount conducted pursuant to paragraph (5)(c) shall be the official totals for the touchscreen machines.
>
> Fla. Admin. Code Rule 1S-2.031(7).
>
> FN3. Hereinafter, we refer to provisions of the amended permanent rule governing manual recounts rather than to the emergency rule.

Rule 1S-2.031 provides that if a manual recount becomes necessary, the canvassing board shall order the printing of one official copy of the ballot image report [FN4] from each touchscreen voting machine that has recorded undervotes for the affected race. Rule 1S-2.031(4)(b)1. If the certified voting system is capable of electronically sorting and identifying undervotes, then the canvassing board shall order the printing of a report indicating the undervotes. *Id.* The ballot image report shall then be examined by the counting teams to identify and highlight ballot images containing undervotes for the affected race to determine if there is a clear indication on the ballot image that the voter made a definite choice to undervote. Rule 1S-2.031(4)(b)2. For those machines capable of electronically sorting, the undervotes shall be identified by the machine. *Id.*

> FN4. A "ballot image" is an electronic record of the content of a ballot cast by a voter and recorded by a voting device, Rule 1S-2.031(1)(g)1, and a "ballot image report" is a printout of ballot images for each machine or precinct. Rule 1S-2.031(1)(g)2.

After identifying the undervotes, the counting teams shall maintain a running tally of the number of undervotes totaled per touchscreen voting machine in each precinct and then tabulate the total number of undervotes from all machines in that precinct. The counting teams shall then compare the total number of undervotes manually recounted for each precinct to the total number of undervotes reported by the voting system in the complete canvass report. Rule 1S-2.031(4)(b)5. If the comparison of the undervotes for each precinct matches the total number reported for such precinct, then the counting team shall certify the results of the machine recount to the canvassing board. Rule 1S-2.031(4)(b)6. If a discrepancy exists, however, the counting teams are to re-tabulate the number of undervotes for such precinct at least two additional times and, if necessary, the canvassing board must investigate and resolve the discrepancy. *Id.*

The emergency rule instructs that "[t]he clear indication that the voter has made a definite choice to undervote shall be determined by the presence of the marking, or the absence of any marking, that the manufacturer of the certified voting system indicates shall be present or absent to signify an undervote." Rule 1S-2.031(4)(a)2. The rule goes on to specify how an undervote is designated for each of the three types of touchscreen voting machines currently certified for use in Florida. *See* 1S-2.031(4)(a)2a-c.

State Lawsuit

On January 16, 2004, United States Congressman Robert Wexler filed a complaint in state circuit court against

Theresa LePore, who at that time was Supervisor of Elections for Palm Beach County,[FN5] Secretary of State Glenda E. Hood and the Palm Beach County Board of County Commissioners. Wexler sought declaratory and injunctive relief on the grounds that the defendants, in approving touchscreen voting machines for use in Palm Beach County, violated the right to vote of Palm Beach County citizens guaranteed by the Florida Constitution. Specifically, the state complaint asserted that Florida should not have approved and certified the Sequoia AVC Edge Voting System Release 3.1 for use in Palm Beach County because, as a paperless voting system, it does not allow for the manual recounts provided for by §§ 102.141 and 102.166 of the Florida statutes.

FN5. Arthur Anderson has replaced Theresa LePore as Supervisor of Elections for Palm Beach County.

The state circuit court dismissed the action on the grounds that Wexler lacked standing to pursue the claims. The court further found that Wexler failed to state a cause of action for injunctive relief because "the Florida statutory scheme does not clearly require a voter verified paper ballot." Wexler appealed the circuit court's order to the Fourth District Court of Appeal, which affirmed the dismissal. The Fourth District Court of Appeal found that the Secretary of State had adopted regulations regarding methods for recounting votes pursuant to the statutes, rendering Wexler's request for declaratory relief moot, as he would first have to challenge the adopted rules in an administrative setting.

Federal Lawsuit

On March 8, 2004, Wexler, Palm Beach County Commissioners Addie Greene and Burt Aaronson, and registered Florida voter Tony Fransetta brought the present action against Secretary of State Hood, LePore (Arthur Anderson's predecessor as the Supervisor of Elections for

Palm Beach County) and Kay Clem, the Supervisor of Elections for Indian River County. Initially, the district court dismissed their complaint under the *Younger* abstention doctrine. This court vacated that order, however, and remanded for consideration of whether the use of touchscreen voting systems that do not produce a paper record of votes and allegedly lack a manual recount procedure violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See Wexler v. Lepore,* 385 F.3d 1336 (11th Cir.2004) (per curiam).

Following a bench trial, the district court ruled for defendants, holding that Emergency Rule 1SER04-1 established a manual recount procedure for touchscreen voting systems that both complies with Florida law and establishes a uniform, nondifferential standard for conducting manual recounts, satisfying the requirements of equal protection and due process. Plaintiffs now appeal.

II. Standard of Review

Following a bench trial, we review a district court's conclusions of law *de novo* and its findings of fact for clear error. *A.I.G. Uru. Compania de Seguros, S.A. v. AAA Cooper Transp.,* 334 F.3d 997, 1003 (11th Cir.2003).

III. Discussion

The basic theory of Plaintiffs' case is that by certifying touchscreen voting systems that are incapable of providing for the type of manual recounts contemplated by Florida law, the defendants have violated the equal protection and due process rights of voters in touchscreen counties. Although we agree with the district court that Florida's manual recount procedures for touchscreen counties comply with Florida law, the constitutional questions do not turn on that inquiry. Instead, we consider whether Florida's manual

recount procedures, which vary by county according to voting system, accord arbitrary and disparate treatment to Florida voters, thereby depriving voters of their constitutional rights to due process and equal protection. *See Bush v. Gore,* 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam).

Equal Protection

Plaintiffs argue that the manual recount procedure for touchscreen counties fails to provide for meaningful review of undervotes. They contend that the ballot image summaries generated during recounts "do not permit the canvassing board to determine whether the voter made an intentional choice to undervote or that the machine failed to record the vote due to voter mistake, human error, or system error." Plaintiffs thus argue that Florida voters are not accorded equal treatment because those residing in optical scan counties will have an opportunity to have their residual votes reviewed in a meaningful way in certain very close elections whereas those residing in touchscreen counties will not. [FN6]

> FN6. Plaintiffs also suggest that one problem with paperless voting systems is the possibility of machine malfunction that cannot thereafter be revealed through a manual recount. Plaintiffs argue that but for the potential for malfunction, manual recounts would not be necessary. This is incorrect. Florida's manual recount procedures are designed to uncover a variety of both human and machine errors. Moreover, because Florida's procedures dictate that only residual votes be considered in a manual recount, many types of machine malfunction discussed by witnesses at trial would not be discovered even in a manual recount of the sort Plaintiffs envision. Finally, we agree with the district court that issues of security, configuration, and

> system malfunction are dealt with by the State during the certification process and are not relevant to the question before this court except to the extent they make it less likely that voters using those systems will cast effective votes.

Plaintiffs' fundamental error is one of perspective. By adopting the perspective of the residual voter, they have avoided the question that is of constitutional dimension: Are voters in touchscreen counties less likely to cast an effective vote than voters in optical scan counties? [FN7] It is this question, and not the question of whether uniform procedures have been followed across a state regardless of differences in voting technology, that the Supreme Court consistently has emphasized in its voting jurisprudence. [FN8] *See, e.g., Bush,* 531 U.S. at 104-05, 121 S.Ct. 525 ("Having once granted the right to vote on equal terms, the state may not, by later arbitrary treatment, value one person's vote over that of another."); *Dunn v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Reynolds v. Sims,* 377 U.S. 533, 563, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."); *Wesberry v. Sanders,* 376 U.S. 1, 7-8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) ("[A]s nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's.").

> FN7. The question of what magnitude of difference between voting systems' accuracy rates is necessary to raise constitutional concerns is not before this court.

> FN8. The problem with Plaintiffs' argument is clear when one considers that, according to Plaintiffs'

> theory, a hypothetical touchscreen voting system that is so nearly accurate that residual vote rates approach zero would nevertheless be constitutionally suspect if it was not susceptible to a substantially similar manual recount procedure to that applied in counties with far less accurate voting systems.

The right to vote is fundamental, forming the bedrock of our democracy. *See Ill. Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Wesberry,* 376 U.S. at 17, 84 S.Ct. 526 ("Other rights, even the most basic, are illusory if the right to vote is undermined."). Nevertheless, states are entitled to burden that right to ensure that elections are fair, honest and efficient. *See Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Recognizing that "[e]lection laws will invariably impose some burden upon individual voters," the Supreme Court has explained that the level of scrutiny courts apply to state voting regulations should vary with the degree to which a regulation burdens the right to vote. *Burdick,* 504 U.S. at 433-34, 112 S.Ct. 2059; *see also Siegel v. LePore,* 234 F.3d 1163, 1180-81 (11th Cir.2000) (en banc) (applying *Burdick* balancing to an equal protection claim in a voting case that was unrelated to ballot access). Specifically, the Court has instructed that

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434, 112 S.Ct. 2059 (citations omitted). When a state election law imposes only "reasonable, nondiscriminatory restrictions" upon voters' rights, the "State's important regulatory interests are generally sufficient" to sustain the regulation. *Id.*

The plaintiffs argue that because voters in touchscreen counties have no opportunity to have their residual votes counted manually whereas voters in optical scan counties have such an opportunity, Florida's disparate treatment of these groups warrants strict scrutiny. The plaintiffs, however, did not plead that voters in touchscreen counties are less likely to cast effective votes due to the alleged lack of a meaningful manual recount procedure in those counties. [FN9] Thus, if voters in touchscreen counties are burdened at all, that burden is the mere possibility that should they cast residual ballots, those ballots will receive a different, and allegedly inferior, type of review in the event of a manual recount. Such a burden, borne of a reasonable, nondiscriminatory regulation, is not so substantial that strict scrutiny is appropriate. *See id.* at 434, 112 S.Ct. 2059 (holding that a regulation imposing "severe" restrictions must be "narrowly drawn to advance a state interest of compelling importance"); *Weber v. Shelley,* 347 F.3d 1101, 1106 (9th Cir.2003) ("We cannot say that use of paperless, touchscreen voting systems severely restricts the right to vote."); *cf. Stewart v. Blackwell,* 444 F.3d 843, 868-72 (6th Cir.2006) (applying strict scrutiny where plaintiffs "alleged vote dilution due to disparate use of certain voting technologies"). [FN10] Thus, we review Florida's manual recount procedures to determine if they are justified by the State's "important regulatory interests." *See Burdick,* 504 U.S. at 434, 112 S.Ct. 2059.

> FN9. The district court accordingly made no findings of fact with respect to the accuracy of the competing voting systems. At trial, experts gave

> conflicting testimony regarding accuracy rates, and although the parties introduced some academic research on the question along with data on residual vote rates in Florida counties, the evidence in the record is sparse on this question.
>
> FN10. In *Stewart v. Blackwell,* plaintiffs challenged Ohio's continued use of punch card voting systems in certain counties under the Voting Rights Act and the Equal Protection and Due Process clauses of the Fourteenth Amendment. 444 F.3d 843. The plaintiffs argued that their right to have their votes counted on equal terms with other citizens had been denied, relying on evidence showing higher residual vote rates among voters using punch card equipment than among those using other types of equipment, including touchscreen voting machines. *Id.*

Here, Florida has important reasons for employing different manual recount procedures according to the type of voting system a county uses. The differences between these procedures are necessary given the differences in the technologies themselves and the types of errors voters are likely to make in utilizing those technologies. Voters casting optical scan ballots can make a variety of mistakes that will cause their ballots not to be counted. For example, a voter casting an optical scan ballot might leave a stray pencil mark or circle a candidate's name rather than filling in the appropriate bubble. Thus, although an optical scan tabulation machine may register an undervote for a particular race on a particular ballot, there may be sufficient indicia on the ballot that the voter actually chose a candidate in that race such that the vote would be counted in a manual recount. In contrast, a voter in a touchscreen county either chooses a candidate for a particular race or does not; the touchscreen machines do not record ambiguous indicia of voter intent that can later be reviewed during a manual recount.

Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, "local variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on." *Bush,* 531 U.S. at 134, 121 S.Ct. 525 (Souter, J., dissenting). Among other things, witnesses for the State testified that touchscreen machines have certain benefits for disabled voters and they prevent some of the voter errors that are characteristic of optical scan voting systems. Accordingly, we hold that Florida's manual recount procedures are justified by the State's important regulatory interests and, therefore, they do not violate equal protection. *See Burdick,* 504 U.S. at 434, 112 S.Ct. 2059.

Due Process

Plaintiffs argue that Florida's manual recount procedures are devoid of "fundamental fairness," thereby depriving voters of due process. *See Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 161, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). However, as we noted above, whatever burden, if any, Florida's manual recount procedures place on voters, that burden is justified by the important regulatory interests outlined above. Therefore, we hold that Florida's manual recount procedures do not deprive voters of due process.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

B. Judgment of the U.S. Court of Appeals for the 11th Circuit (June 20, 2006)

United States Court of Appeals, Eleventh Circuit.

Robert WEXLER, Congressman, Addie GREENE, Commissioner, Burt AARONSON, Commissioner, Tony FRANSETTA,
Plaintiffs-Appellants,
v.
Theresa LEPORE, Supervisor of Elections for Palm Beach County, Florida, Kay CLEM, Supervisor of Elections for Indian River County, Florida and President of the Florida Association of Supervisors of Elections, Glenda E. HOOD, Secretary of State of Florida,
Defendants-Appellees.

No. 04-16280.

Decided June 20, 2006.

Robert S. Peck, Center for Constitutional Lit., Washington, DC, Jeffrey M. Liggio, Liggio, Benrubi & Williams, PA, West Palm Beach, FL, for Plaintiffs-Appellants.

Ronald A. Labasky, Young Van Assenderp, P.A., Erik M. Figlio, Christopher M. Kise, Florida Sol. Gen., Tallahassee, FL, for Defendants-Appellees.

Cindy A. Cohn, Electronic Frontier Found., San Francisco, CA, for Amici Curiae.

Appeal from the United States District Court for the Southern District of Florida.

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 20, 2006
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

C. Decision of the U.S. District Court for the Southern District of Florida (October 25, 2004), 342 F. Supp.2d 1097

United States District Court, S.D. Florida.

Congressman Robert WEXLER; Commissioner Addie Greene, Commissioner Burt Aaronson and Tony Fransetta, Plaintiffs,
v.
Theresa LEPORE, Supervisor of Elections for Palm Beach County, Florida; Kay Clem, Supervisor of Elections for Indian River County, Florida, and President of the Florida Association of Supervisors of Election; Glenda E. Hood, Secretary of State of Florida, Defendants.

No. 04-80216-CIV.

Decided Oct. 25, 2004.

Jeffrey M. Liggio, Liggio Benrubi & Williams, West Palm Beach, FL, for Plaintiffs Robert Wexler, Addie Greene, Burt Aaronson and Tony Fransetta.

Ronald A. Labasky, Landers & Peters, P.A., Tallahassee, FL, for Defendants Theresa Lepore and Kay Clem.

Jason Vail, James A. Peters, George Lee Waas, Office of the Attorney General, Department of Legal Affairs, Tallahassee, Paul C. Huck, Jr., Office of the Attorney General, Norman M. Ostrau, Blosser & Sayfie, Ft. Lauderdale, FL, for Defendant Glenda E. Hood.

MEMORANDUM OPINION

COHN, District Judge.

THIS CAUSE came before the Court upon Plaintiffs's

Complaint alleging violations of the United States Constitution and is brought pursuant to 42 U.S.C. § 1983.

INTRODUCTION

Plaintiffs, Robert Wexler, a Congressman representing the 19th Congressional District of Florida; Addie Greene and Burt Aaronson, Palm Beach County Commissioners; and Tony Fransetta, a registered Florida voter, seek declaratory and injunctive relief against Defendants Glenda Hood, Secretary of State; Theresa Lepore, Supervisor of Elections for Palm Beach County; and Kay Clem, Supervisor of Elections for Indian River County. Plaintiffs contend that the touchscreen paperless voting systems used in fifteen of Florida's sixty-seven counties lack a manual recount procedure which is available in the remaining fifty-two counties which use an optical scan voting system. Plaintiffs allege that this "non-uniform, differential standard" violates their rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

The case was tried to the Court on October 18, 19 and 20, 2004. Given the expedited nature of the case, the Court directed the parties to submit Proposed Findings of Fact and Conclusions of Law and briefs regarding the issue of liability prior to the start of trial. Upon consideration of the testimony and other evidence presented, the parties' Proposed Findings of Fact and Conclusions of Law [DE 88, 94, 97], the parties' briefs regarding liability [DE 62, 71], and argument of counsel, pursuant to Federal Rule of Civil Procedure Rule 52, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT [FN1]

FN1. To the extent any of these Findings of Fact constitute Conclusions of Law, they are hereby adopted as both.

A. Statutory Framework

Florida's election system consists of the Legislature, the Department of State, and the Supervisors of Elections for Florida's sixty-seven counties. Within the statutory framework governing elections, the Legislature has authorized the Department of State to issue binding interpretations of the election laws. Fla. Stat. §§ 97.012(1), 106.23(2).

In the 1970s, the Florida Legislature enacted the Electronic Voting Systems Act ("the EVSA"), approving electronic equipment for use in the state. Fla. Stat. §§ 101.5601-101.5614. Section 101.5606 of the EVSA specifically sets forth certain requirements that an electronic or electromechanical system must meet in order to be approved by the Department of State. *See* Fla. Stat. §§ 101.5605, 101.5606. In addition to these requirements, the Department of State is responsible both for adopting rules that establish minimum standards for electronic voting systems and for reviewing such rules each odd-numbered year. Fla. Stat. § 101.015. Based on compliance with these requirements and standards, the Department of State has the authority to approve or disapprove any voting system. *See* Fla. Stat. §§ 101.5605, 101.015. Additionally, the Department of State is responsible for adopting uniform rules for the purchase, use, and sale of voting equipment in the state. Fla. Stat. § 101.294.

The decision to use a particular electronic voting system in a county is left to each county's board of county commissioners. "The board of county commissioners of any county⋯ may, upon consultation with the supervisor of

elections, adopt, purchase or otherwise procure, and provide for the use of any electronic or electromechanical voting system approved by the Department of State in all or a portion of the election precincts of that county." Fla. Stat. § 101.5604; *see also* Fla. Stat § 101.294.

Florida's recount procedures are governed by sections 102.141 and 102.166 of the Florida statutes, which create a two-stage process for recounts. During the first stage, if the margin of victory is one-half of a percent or less, a machine recount occurs. Fla. Stat. § 101.141(6). In counties with voting systems using paper ballots, this recount consists of putting each ballot through the automatic tabulating equipment and determining whether the returns correctly reflect the votes cast. Fla. Stat. § 101.141(6)(a). The recount in counties not using paper ballots consists of examining the counters on the precinct tabulators to ensure that the total returns on the tabulators equals the overall election return. Fla. Stat. § 101.141(b).

The second stage of the recount process occurs if the margin of victory is one-quarter of a percent or less. Fla. Stat. § 102.166. [FN2] In such an instance, "a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure" shall be conducted. *Id.* When conducting the manual recount, a "vote cast for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice." Fla. Stat. § 102.166(5)(a). The statute further dictates that the "Department of State shall adopt specific rules for each certified voting system prescribing what constitutes a 'clear indication on the ballot that the voter has made a definite choice,' " and also "adopt detailed rules prescribing additional recount procedures for each certified voting system which shall be uniform to the extent practicable." Fla. Stat. §§ 102.166(5)(b) & (6)(d).

FN2. A candidate has the right to demand a manual recount if the margin is between one-quarter and one-half of a percent. Fla. Stat. § 102.166(2)(a).

B. Voting Systems

Currently, there are two types of electronic voting systems certified for use in Florida: the optical scan system and the touchscreen system. [FN3] The parties presented evidence at trial regarding both types of voting machines and how they function. A voter using the optical scan system marks a paper ballot by filling in the bubble or completing the arrow next to the candidate of his/her choice, after which the ballot is run through the optical scan machine for tabulation. In contrast, when using a touchscreen system, a voter does not mark a paper ballot but instead makes selections on a computer screen. The touchscreen system gives the voter the opportunity to review the selections and it is only after the voter indicates approval, that the selections are recorded in the machine's electronic memory.

FN3. There are three distinct brands of touchscreen systems, each slightly different from the other. These brands are referred to as ES & S, Sequoia, and Diebold.

According to the testimony presented at trial, the ballot on a touchscreen machine appears on several succeeding screen images rather than on a single sheet of paper as with optical scan machines. As a voter completes his/her selection process on a given screen, the machine instructs the voter to touch the screen to continue to the next page. Theresa Lepore testified that on the Sequoia touchscreen voting system, if a voter chooses not to cast a vote for a particular race or issue, the machine notifies the voter that he/she has not made a selection. After receiving this notification, the voter may continue to the next screen, whether or not he/she chooses to make a selection before continuing. Once

the voter has navigated through all of the screen images and reaches the end of the ballot, the touchscreen machine provides the voter with a review of all of his/her selections for all of the races and/or issues on the ballot. The voter then casts his/her ballot by pressing the vote button to accept the selections. [FN4] If a voter has not voted for a particular race or issue, the machine indicates this fact to the voter on the review screen. The voter is then given an opportunity to go back to the screen on which that race or issue appears and make a selection, or to cast his/her ballot without making a selection for that particular race or issue.

> FN4. On the ES & S voting system, the voter presses the flashing red "vote" button to cast his or her ballot, while on the Diebold and Sequoia, the voter touches the screen to cast his or her ballot.

In the past, ballot problems have occurred in the form of either overvotes or undervotes. The Florida Statutes define an overvote as occurring when "the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question." Fla. Stat. § 97.021(21). An undervote occurs when "the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question." Fla. Stat. § 97.021(34). Overvotes and undervotes collectively can be referred to as residual votes. The touchscreen machines do not allow a voter to cast a vote for more than one candidate in a particular race and thereby eliminate overvotes. [FN5] (*See* Complaint, Exhibit C, Florida Systems Standards at 21). With respect to undervotes, touchscreen machines only permit an undervote after notifying the voter at least once that he/she has not selected a candidate for a particular race as well as giving the voter an opportunity to review the selections before casting his/her ballot.

FN5. Plaintiffs' counsel conceded during closing arguments that the touchscreen machines do not permit an overvote to be cast.

C. Emergency Rule

Pursuant to the mandates of Fla. Stat. § 102.166, the Department of State issued Rule 1S-2.031 pertaining to recount procedures. [FN6] Subsection (6) dictates the procedures to be followed for conducting a manual recount in those counties using optical scan machines. Subsection (7) dealt with recount procedures for touchscreen machines. Rule 1S-2.031(7) provided as follows:

FN6. Secretary Hood first promulgated the rule as a proposed administrative rule in December 2003. (*See* Complaint, Exhibit D.) It underwent several amendments, the latest of which was promulgated on April 13, 2004. *See Final Order, ACLU v. Department of State,* Case No. 04-2341RX, slip op. at ¶ 18 (Division of Administrative Hearings, Aug. 27, 2004).

When a manual recount is ordered and touchscreen ballots are used, no manual recount of undervotes and overvotes cast on a touchscreen system shall be conducted since these machines do not allow a voter to cast an overvote and since a review of undervotes cannot result in a determination of voter intent as required by Section 102.166(5), F.S. In this case, the results of the machine recount conducted pursuant to paragraph (5)(c) shall be the official totals for the touchscreen machines.

Florida Administrative Code Rule 1S-2.031(7).

A group of entities unrelated to Plaintiffs brought a rule challenge, pursuant to Fla. Stat § 120.56(3), to determine the validity of the above rule. On August 27, 2004, Judge Susan

B. Kirkland of the Division of Administrative Hearings issued an opinion in the matter of *ACLU v. Department of State,* Case No. 04-2341RX. Judge Kirkland ruled that the Department of State exceeded its rulemaking authority in promulgating Rule 1S-2.031(7). Though she did not conclude that the Department of State acted arbitrarily or capriciously when it promulgated the rule, Judge Kirkland did determine that Florida statutes clearly contemplate manual recounts to be done on each certified voting system, including touchscreen machines. *See Final Order, ACLU v. Department of State,* Case No. 04-2341RX, slip op. at ¶ 34 (Division of Administrative Hearings Aug. 27, 2004). In concluding that the Department of State exceeded its grant of rulemaking authority, Judge Kirkland stated as follows:

> [The Department of State] has the authority to promulgate procedures for manual recounts in addition to those set forth in section 102.166, Florida Statutes (2004), and is required to address minimum areas in those rules, but it does not have the authority to abolish manual recounts for certain types of voting equipment.

Id. at ¶ 36.

The Department of State did not appeal the decision. Rather, the Department of State engaged in emergency rulemaking pursuant to chapter 120 of the Florida Statutes and promulgated Emergency Rule 1SER04-1 regarding manual recount procedures for touchscreen voting systems. The emergency rule was filed on Friday, October 15, 2004 at 4:09 p.m. The Department of State determined that emergency rulemaking was necessary for the following reasons: "1)To put in place specified and uniform standards for conducting manual recounts of touchscreen voting systems prior to the 2004 General Election and 2) To ensure and maintain the efficiency, integrity and public confidence in the electoral process." Rule 1SER04-1, Specific Reasons for

Finding an Immediate Danger to the Public Health, Safety and Welfare.

The emergency rule explains that a "ballot image" means an electronic record of the content of a ballot cast by a voter and recorded by a voting device. Rule 1SER04-1(4)(a). Testimony at trial clarified that the touchscreen machines are capable of storing a copy of each ballot cast by a voter that can later be retrieved if necessary. Pursuant to the emergency rule, a "ballot image report" means the printout of ballot images for each machine or precinct generated. Rule 1SER04-1(4)(b). The "complete canvass report" means the voting system report from the machine recount that contains the results for each contest in each precinct. Rule 1SER04-1(4)(c).

If a manual recount becomes necessary, the canvassing board shall order the printing of one official copy of the ballot image report from each touchscreen voting machine that has recorded undervotes for the affected race. Rule 1SER04-1(7)(a). If the certified voting system is capable of electronically sorting and identifying undervotes, then the canvassing board shall instead order the printing of the report using such capabilities. *Id.* The ballot image report shall then be examined by the counting teams to identify and highlight ballot images containing undervotes for the affected race to determine if there is a clear indication on the ballot image that the voter made a definite choice to undervote. Rule 1SER04-1(7)(b). For those machines capable of electronically sorting, the undervotes shall be identified by the machine. *Id.*

After identifying the undervotes, the counting teams shall maintain a running tally of the number of undervotes totaled per touchscreen voting machine in each precinct and then tabulate the total number of undervotes from all of the machines in that precinct. The counting teams shall then compare the total number of undervotes manually recounted for each precinct to the total number of

undervotes reported by the voting system in the complete canvass report. Rule 1SER04-1(7)(e). If the comparison of the undervotes for each precinct matches the total number reported for such precinct, then the counting team shall certify the results of the machine recount to the canvassing board. Rule 1SER04-1(7)(f). If a discrepancy exists, however, then the counting teams are to re-tabulate the number of undervotes for such precinct up to two additional times to resolve the discrepancy. *Id.* After the re-tabulation, if the discrepancy remains, then the canvassing board is to investigate and resolve the discrepancy with respect to such precinct. *Id.*

With respect to the process of tabulating the undervotes, the emergency rule explains how the certified touchscreen machines identify an undervote. "The clear indication that the voter has made a definite choice to undervote shall be determined by the presence of the marking, or the absence of any marking, that the manufacturer of the certified voting system indicated shall be present or absent to signify an undervote." Rule 1SER04-1(6)(b). The statute goes on to specify how an undervote is designated for the three types of touchscreen voting machines currently certified: 1) ES & S iVoting touchscreen voting system, 2) Sequoia touchscreen voting system, and 3) Diebold touchscreen voting system.

In the ES & S, an undervote is simply determined by the word "undervote" on the ballot image for the affected race or issue. Rule 1SER04-1(6)(b)(1). On the Diebold, an undervote is determined by the absence of an "X" within brackets located next to the candidates or choices for the affected race or issue. Rule 1SER04-1(6)(b)(2). Finally, in the Sequoia voting system, an undervote is determined by examining numeric codes. In this voting system, a candidate or issue is identified by a specific numeric code. When a voter does not vote for a race or issue, numeric codes fail to appear designating a particular candidate or issue. Thus, in the Sequoia voting system an undervote is determined by

the absence on the ballot image of any numeric codes for the candidate or choices for the given race or issue, or by the presence of less than the maximum number of numeric codes that may be present for any race in which the voter is permitted to select more than one candidate. Rule 1SER04-1(6)(b)(3). For instance, if the voter is permitted to choose three candidates in a given race, but only chooses two, an undervote is reflected by the presence of two rather three numeric codes for the designated candidates.

D. Procedural History of the State and Federal Suits

On January 16, 2004, Congressman Robert Wexler filed a complaint in state circuit court against Theresa Lepore, Secretary of State Glenda E. Hood, and the Palm Beach County Board of County Commissioners. This state action seeks declaratory and injunctive relief on the grounds that Defendants, in approving a touchscreen voting machine for use in Palm Beach County, violated the right to vote of Palm Beach County citizens guaranteed by the Florida Constitution. Specifically, the state complaint asserts that the Sequoia AVC Edge Voting System Release 3.1 should never have been approved and certified for use in Palm Beach County because as a paperless voting system, it does not allow for a manual recount as specified under sections 102.141 and 102.166 of the Florida statutes. (*See* state court complaint, *Wexler v. Lepore et al.,* No. 50 2004 CA 000491).

On February 11, 2004, the state circuit court issued its order dismissing the action on the grounds that plaintiff Wexler lacked standing to pursue the alleged claims. *See Wexler v. Lepore et al.,* No. 50 2004 CA 000491 (Fla.Cir.Ct. Feb. 11, 2004). The court also found that Wexler failed to state a cause of action for injunctive relief because "the Florida statutory scheme does not clearly require a voter verified paper ballot." *Id.* at 7. The state circuit court issued a Final Order of Dismissal With Prejudice on February 26, 2004.

On March 4, 2004, Plaintiff Wexler appealed the state circuit court order to the Fourth District Court of Appeal. The state appellate court filed its opinion affirming the circuit court's dismissal of Wexler's complaint with prejudice on August 6, 2004. *Wexler v. Lepore,* 878 So.2d 1276 (Fla. 5th DCA 2004). Though the appellate court disagreed with the circuit court's determination that Wexler lacked standing, it nevertheless affirmed the circuit court's dismissal. *See id.* The court found that the Secretary of State had adopted regulations regarding voting methods for recounting votes pursuant to the statutes. [FN7] The adoption of these rules rendered Wexler's request for a declaratory judgment moot since, at that point, the proper procedure was for Wexler to challenge the adopted rules. To this end, the court stated that "[w]hether these rules and regulations constitute an invalid exercise of delegated legislative authority is first subject to administrative challenge." *Id.* at 1281.

> FN7. Specifically, the Secretary had adopted Rule IS-2.031, which required no manual recount for touchscreen machines, as will be discussed in greater detail below.

The state suit is currently pending before the Florida Supreme Court as Wexler has filed a notice, pursuant to Fla. R.App. P. 9.120, seeking to invoke the Court's discretionary jurisdiction as described in Fla. R.App. P. 9.030(a)(2)(A).

This federal action began when Plaintiffs filed their complaint on March 8, 2004. On May 24, 2004, this Court issued an order dismissing the Plaintiffs' complaint under the *Younger* abstention doctrine since it found that the federal suit would interfere with the state court action. *See Wexler v. Lepore,* 319 F.Supp.2d 1354, 1359 (S.D.Fla.2004). Plaintiffs appealed the decision to the Eleventh Circuit Court of Appeals. On September 27, 2004, a panel of the Eleventh Circuit vacated this Court's decision to abstain under *Younger* and remanded this action "for a determination of

Appellant-Plaintiffs' claim." *Wexler v. Lepore,* 385 F.3d 1336, 1341 (11th Cir.2004). After denying Defendants' petition for rehearing *en banc,* the Eleventh Circuit entered its mandate on October 7, 2004 remanding the case to this Court [DE # 52]. The Court recognizes that the Eleventh Circuit framed the issue in the federal suit for consideration on remand as follows:

Fifteen Florida counties use a paperless, touchscreen method of voting. As is alleged, these touchscreen systems do not produce a paper record of votes. Accordingly, the fifteen counties where they are employed lack a manual recount procedure, which is available in Florida's remaining fifty-two counties. In the federal claim, Plaintiffs allege this "non-uniform, differential standard" violates their rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

385 F.3d 1336, 1338.

Upon notification of entry of the Eleventh Circuit's mandate on October 7, 2004, this Court set a status conference for October 8, 2004. At the status conference, the Court directed that the bench trial would start October 18, 2004. The trial concluded late in the afternoon on Wednesday, October 20, 2004.

CONCLUSIONS OF LAW [FN8]

> FN8. To the extent any of these Conclusions of Law constitute Findings of Fact, they are hereby adopted as both.

Before commencing the legal analysis, it is important to properly frame the issue before the Court. On Friday, October 15, 2004, just prior to the start of the trial, the Department of State issued emergency rule 1SER04-1 establishing standards and procedures for conducting a manual recount on the touchscreen voting machines. Having

established such standards and procedures, the Court must now determine whether the emergency rule complies with federal mandates governing equal protection and due process. In other words, the Court must decide if the rule creates a uniform, nondifferential standard for conducting a manual recount in the fifteen counties using certified touchscreen machines. [FN9] As part of this analysis, the Court must also examine whether the emergency rule complies with Florida's manual recount statutes.

FN9. As noted above, the Eleventh Circuit also framed this as the issue before the Court. *See Wexler v. Lepore,* 385 F.3d 1336, 1338 (11th Cir.2004).

A. *Bush v. Gore*

In analyzing the equal protection and due process challenge, the Court must inevitably look to *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The context of that decision was the 2000 Presidential election, in which Florida engaged in a limited manual recount pursuant to Florida Statutes as a result of the margin of votes between George W. Bush and then Vice President Albert Gore, Jr. [FN10] During the manual recount, questions arose in interpreting what constituted a legal vote, which the Florida Supreme Court had stated was "one in which there is a 'clear indication of the intent of the voter.' " *Id.* at 102, 121 S.Ct. 525 (citing *Gore v. Harris,* 772 So.2d 1243, 1257 (Fla.2000)). The United States Supreme Court found a violation of the equal protection clause because "[t]he recount mechanisms implemented in response to the decision of the Florida Supreme Court d[id] not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote *Id.* at 105, 121 S.Ct. 525.

FN10. Vice President Gore sought a manual recount in Volusia, Palm Beach, Broward, and Miami-Dade

> Counties, pursuant to Florida's election protest provisions then in effect.

The crux of the problem was not with the definition of a legal vote, which looked to voter intent, but with its application during the recount process. *See id* at 106, 121 S.Ct. 525. As the Court explained, much of the controversy revolved around the punch-card voting system in which a ballot card is perforated by a stylus to indicate a vote. Either through error or deliberate omission, certain cards were not perforated with sufficient precision for a machine to register the perforations as votes. See *id* at 105, 121 S.Ct. 525. When conducting the manual recount, the counting teams had to determine whether to count as legal votes instances where a piece of the perforated card, or "chad," was hanging by one or several corners, as well as instances where there was no separation at all, but just an indentation. The county canvassing boards also disagreed as to whether to count a "dimpled chad" where the voter was successfully able to dislodge the chad in every other contest on the ballot. *Id.* at 106, 121 S.Ct. 525 (citing *Gore v. Harris,* 772 So.2d at 1267 (Wells, C.J., dissenting)). The result was the unequal evaluation of ballots in various respects throughout the affected counties. "[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.*

In finding an equal protection violation under these circumstances, the Court stated that "[t]he problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106, 121 S.Ct. 525. Without such standards, equal weight was not accorded to each vote, resulting in the arbitrary and disparate treatment of the members of the electorate. *Id.* at 104-105, 121 S.Ct. 525. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* The Court

concluded that "[t]he formation of uniform standards to determine intent" was "practicable and ⋯ necessary." *Id.* at 106, 121 S.Ct. 525. Based on this conclusion, the question currently before the Court is whether the State has established standards for conducting a manual recount that comport with equal protection.

B. Current Manual Recount Standards

Pursuant to section 102.166 of the Florida Statutes, the Department of State is given the responsibility to "adopt specific rules for each certified voting system prescribing what constitutes a 'clear indication on the ballot that the voter has made a definite choice,' " as well as to "adopt detailed rules prescribing additional recount procedures for each certified voting system which shall be uniform to the extent practicable." Fla. Stat. § 102.166(5)(b) & (6)(d). The Department of State has promulgated procedures and standards for conducting a manual recount for *each* certified voting system. Rule 1S-2.031(6) sets forth the procedures for conducting a manual recount with respect to the optical scan voting systems and Rule IS-2.027 establishes the standards to determine what constitutes a legal a vote on these machines. Rule 1S-2.027 specifically delineates which stray marks on an optical scan ballot constitute a valid vote. Similarly, Emergency Rule 1SER04-1 sets forth the procedures for conducting a manual recount on touchscreen machines as well as the standards for determining what constitutes an undervote on the ES & S iVotronic, Sequoia, and Diebold systems. Through these rules, the Department of State has now established a standard for manual recounts in counties using optical scan systems as well as a standard for counties using touchscreen voting systems.

Plaintiffs do not contest the creation of two sets of standards, one for each type of voting machine, since they do not contend that equal protection requires a state to employ a single kind of voting machine. Rather, Plaintiffs contest the

standard itself in that it does nothing more than re-tabulate, by means of the ballot image reports, the number of undervotes in each touchscreen machine. Because there is no way of accurately determining a voter's definite choice through this process of re-tabulation, Plaintiffs argue that paperless touchscreen machines are incapable of conducting a manual recount. They specifically argue that there is no way of knowing from the ballot images whether an undervote recorded by the machine reflects the voter's deliberate choice not to vote, a mistake by the voter in choosing not to vote, or a mistake by the machine in recording an undervote. With optical scan equipment, in contrast, a voter's choice can be interpreted from stray marks on the ballot such as a circle around the name of a candidate or an arrow pointing to the candidate's name. Plaintiffs assert that this inability to determine whether a voter has made a definite choice after a ballot has been cast results in differential treatment of voters between counties using optical scan machines and those using touchscreen equipment. Defendants contend that manual recount standards are now in place, therefore equal protection concerns have been met.

Analyzing this issue, therefore, necessitates an examination of two interrelated and intertwined matters: 1) whether the standards established by the Department of State comply with the equal protection requirements of *Bush v. Gore,* and 2) whether the emergency rule complies with Florida statutes in determining whether an undervote on a touchscreen machine reflects a voter's definite choice. [FN11]

> FN11. These matters are equally important and are discussed in this order simply because this Court's jurisdiction derives from the federal law issue. The Court believes that if the Emergency Rule failed to comport with Florida law, that fact alone could have led to a decision in the Plaintiffs' favor.

1. Equal Protection Requirements in Establishing a Uniform, Nondifferential Standard

In *Bush v. Gore,* the Court found that standards were lacking for interpreting voter intent with respect to each kind of machine. The opinion described at great length the problems with the punch card voting system, which required interpretations of intent from hanging chads and indentations, and concluded that "uniform rules to determine intent based on *these* recurring circumstances" were practicable and necessary. 531 U.S. at 106, 121 S.Ct. 525. Equal protection concerns arose when disparate rules were applied to determine voter intent on "identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics." *Id.* at 134, 121 S.Ct. 525 (Souter, J. Dissenting). [FN12] In addition, the Court determined that uniform *statewide* standards in the treatment of votes during a manual recount were lacking. It found that in three counties, recounts were not limited to undervotes, but extended to all of the ballots. *Id.* at 107-08, 121 S.Ct. 525. The Court found the distinction to have real consequences, stating as follows:

> FN12. As noted by the majority opinion, Justice Souter, along with Justice Breyer, agreed that the Florida Supreme Court's standardless recount violated equal protection principles, but differed with the majority over the remedy. Id. at 111.

As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by the machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the same indicia of intent.

Id. at 108, 121 S.Ct. 525. Vote counts based on these variant standards also violated equal protection.

In response to the election problems of 2000, the Florida legislature revised Florida's election laws in 2001. As part of that reform, the manual recount statute, 102.166, was amended to specify that a manual recount be conducted of both the overvotes and undervotes. *See* Senate Bill 1118, April 25, 2001, at 1271-72 [FN13]; *see also* Review of Voting Irregularities of the 2000 Presidential Election, Report Number 2001-201, at 38, Plaintiff's Exhibit 7. The Statute was also amended to delete the section that allowed the candidate requesting a manual recount to select which precincts to be counted. Section 102.166(4)(d) previously prescribed that the manual recount had to include at least three precincts and "the person who requested the recount shall choose three precincts to be recounted." [FN14] See Senate Bill 1118 at 1272. Under the current statute, a manual recount includes "the entire geographic jurisdiction of such office or ballot measure." Fla. Stat. § 102.166(2)(a). Most importantly, as discussed above, the amendments also added language directing the Department of State to adopt specific rules for each certified voting system, prescribing what constitutes a voter's definite choice. *See* Fla. Stat. § 102.166(5)b).

> FN13. Senate Bill 1118 was the final bill that enacted the 2001 revisions to Florida's election laws.
>
> FN14. In the Report regarding the Voting Irregularities of the 2000 election, the Committee on Ethics and Elections reasoned that this standard of allowing the candidate to choose the three precincts was "ineffectual." The Committee stated as follows: "Presumably, precincts will be selected where there is the greatest chance to garner additional votes for the challenging candidate, frequently precincts where the vote count for the challenging candidate is

> highest. This can result in a skewed sample not representative of the other precincts in the county … This standard is ineffectual." Review of Voting Irregularities of the 2000 Presidential Election, Report Number 2001-201, at 37-38. Plaintiff's Exhibit 7.

The Court finds that the rules promulgated pursuant to the amended statutes comply with the requirements established by *Bush v. Gore.* Defendants have prescribed uniform, nondifferential standards for what constitutes a legal vote under each certified voting system, and have established procedures for conducting a manual recount of overvotes and undervotes in the entire geographic jurisdiction. *See* Rules 1S-2.031(6), IS-2.027, and 1SER04-1.

2. Compliance With State Statutes

The Court must now turn to the second matter, that of determining whether the emergency rule complies with Florida's statutory requirements. This requires examining whether the rule prescribes what constitutes an undervote on a touchscreen machine, as well as whether it establishes a way to ascertain that a voter has made a definite choice. [FN15] The Court finds that the emergency rule complies with the state statutes in both respects.

> FN15. Fla. Stat. § 102.166(5)(a) states that "[a] vote for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice."

The rule prescribes what constitutes an undervote. It states that "[t]he clear indication that the voter has made a definite choice to undervote shall be determined by the presence of the marking, or absence of any marking, that the manufacturer of the certified voting system indicates shall be present or absent to signify a vote." Rule 1SER04-1(6)(b). The ballot image reports allow the recount teams to

determine if an undervote was cast in a particular race or issue. However, Plaintiffs' problem lies with the second part of the analysis. They argue that it is impossible to ascertain deliberate choice from the ballot image report because there is no way of knowing whether an undervote recorded by the machine reflects the voter's deliberate choice not to vote, a mistake by the voter in choosing not to vote, or a mistake by the machine in recording an undervote. Whether the machine made a mistake in recording an undervote is not an issue before the Court. Concerns about physical and communication security, software configuration, and system malfunction are investigated and dealt with by the State during the certification process. Both prior to and after certifying the machines, the State has procedures and testing mechanisms in place to ensure that the machines work accurately. *See* Fla. Stat. §§ 101.5605, 101.5607, 101.5612. [FN16]

> FN16. Plaintiffs' complaint did not assert claims based upon any alleged deficiencies in the areas of ballot security, software configuration, and system malfunction. Though testimony at trial was elicited on these topics, such claims are not before this Court in this lawsuit.

With respect to the issue of whether the machine records the voter's intent not to vote or a mistake by the voter, the Court concludes that the current language of the statute does not inquire into the intent of the voter in attempting to discern a legal vote; rather the statute seeks to ensure that the voter has made a definite choice. Plaintiffs use the word intent and choice interchangeably. Yet, the Court finds them to be different. Prior to the 2001 amendments to the election statutes, a legal vote was determined by a clear indication of the intent of the voter. The prior version of the statute, at section 102.166(7)(b), read as follows: “If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board to

determine the voter's intent." *See* Senate Bill 1118, at 1272. Under the current standard, a legal vote is determined by a "clear indication on the ballot that the voter has made a definite choice." *See id.* at 1272; *see also* Fla. Stat. § 102.166(5)(a). When the Legislature makes a change in the statute, it is presumed to mean something by that change. [FN17] The earlier "intent" standard of section 102.166(7)(b) attempted to discern, *ex post,* a voter's state of mind; the amended standard instead looks to whether the ballot indicates that the voter has made a definite selection.

> FN17. *See Carlile v. Game & Fresh Water Fish Comm'n,* 354 So.2d 362, 364 (Fla.1977)("When a statute is amended, it is presumed that the Legislature intended it to have a meaning different form that according to it before the amendment. In making material changes in the language of a statute, the Legislature is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all the enactments on the subject.").

Thus, in the context of touchscreen voting machines, the "definite choice" standard entails determining whether the voter has made a definite selection rather than ascertaining a voter's intent, i.e., did a voter intend not to make a selection or did the voter unintentionally make a mistake in using the equipment. The Court finds that by pressing the button to cast his or her ballot on the touchscreen machines, the voter is making a definite selection. In warning the voter of an undervote and allowing for a review process before the ballot is cast, touchscreen machines provide sufficient safeguards to ensure that a voter's undervote is intentional. As a result, the ballot images printed during a manual recount pursuant to the Emergency Rule reflect a voter's choices under the statutory scheme adopted by the Florida legislature. [FN18]

> FN18. Federal law does not require Florida to have voting equipment which distinguishes between an intentional and unintentional undervote. Following the problems of making such determinations as to punch-card ballots used in the 2000 election, the Florida legislature decided to allow use of touchscreen paperless voting systems which eliminate the need for such determinations.

Ultimately, the inability to later discern during a manual recount of touchscreen machines whether a voter has made a deliberate choice, in contrast to the ability to interpret stray marks on optical scan ballots, has to do with the differences between these two kinds of machines. Touchscreen machines eliminate the problems confronted during the 2000 election in having humans interpret voter intent based upon ambiguous markings of the voter. The machines are designed so that overvotes are impossible and a voter is warned of the presence of an undervote on the ballot. In addition, the machines provide for a review of the ballot by the voter prior to it being cast. Despite the warnings and review process, it is possible that a voter will not understand how the machines function and cast an incorrect vote. In order to minimize voter mistake, counties engage in voter education. *See* Fla. Stat. § 98.255, Voter Education Programs. Regardless of the voting system employed, however, there will always exist voters who do not follow the directions and will make mistakes. As evidenced repeatedly at trial, no voting system is perfect. [FN19] Distrust in an electorate's ability to properly use new technology does not give rise to an equal protection violation. [FN20]

> FN19. The Ninth Circuit in *Weber v. Shelley* also found that "No balloting system is perfect, stating that [t]raditional paper ballots, as became evident during the 2000 presidential election, are prone to overvotes, undervotes, 'hanging chads,' and other

> mechanical and human errors that may thwart intent." 347 F.3d 1101, 1106 (9th Cir.2003).
>
> FN20. This is especially true when the election statutes provide under Voter Responsibilities that a voter is responsible for "[f]amiliariz [ing] himself or herself with the operation of the voting equipment in his or her precinct." Fla. Stat. § 101.031.

Based upon the record evidence, the Court notes the preferable voting system would include a paper printout reviewed by the voter to ensure that it contains his or her selections, which the voter then places in a ballot box to be counted in the event a manual recount is required. However, this Court's authority in this case is not to choose the preferable method of casting a ballot, but to determine whether the current procedures and standards comport with equal protection. The Court concludes that Defendants have established a uniform, nondifferential standard for conducting a manual recount in the fifteen counties using touchscreen machines, and as such, there is no constitutional violation found.

CONCLUSION

Plaintiffs have failed to meet their burden of proving by a preponderance of the evidence that there exists a "nonuniform, differential standard" for conducting manual recounts in those Florida counties using the touchscreen paperless voting systems.

The adoption of Emergency Rule 1SER04-1 by the Department of State establishes a manual recount procedure for touchscreen voting systems, which not only meets the statutory requirements for manual recounts under Florida law, but also establishes a uniform, nondifferential standard for conducting manual recounts in compliance with equal protection guarantees.

Accordingly, it is thereupon

ORDERED AND ADJUDGED that Plaintiffs' claim for declaratory and injunctive relief be DENIED, and Judgment entered in favor of Defendants and against Plaintiffs.

342 F.Supp.2d 1097 (S.D.Fla.,2004)

D. Due Process Clause of the Fourteenth Amendment to the United States Constitution

The relevant provision of the Fourteenth Amendment to the United States Constitution is reproduced below.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

E. Applicable Florida Statutes

The relevant provision of the applicable Florida Statutes are reproduced below.

Fla. Stat. § 97.021

97.021 Definitions.--For the purposes of this code, except where the context clearly indicates otherwise, the term:

* * *

(3) Ballot" or "official ballot" when used in reference to:

(a) Marksense ballots" means that printed sheet of paper, used in conjunction with an electronic or electromechanical vote tabulation voting system, containing the names of candidates, or a statement of proposed constitutional amendments or other questions or propositions submitted to the electorate at any election, on which sheet of paper an elector casts his or her vote.

(b) Electronic or electromechanical devices" means a ballot that is voted by the process of electronically designating, including by touchscreen, or marking with a marking device for tabulation by automatic tabulating equipment or data processing equipment.

* * *

(10) Election" means any primary election, special primary election, special election, general election, or presidential preference primary election.

(11) Election board" means the clerk and inspectors appointed to conduct an election.

* * *

(15) Lists of registered electors" means names and associated information of registered electors maintained by the department in the statewide voter registration system or generated or derived from the statewide voter registration system. Lists may be produced in printed or electronic format.

* * *

(23) Overvote" means that the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question.

* * *

(25) Polling place" is the building which contains the polling room where ballots are cast.

(26) Polling room" means the actual room in which ballots are cast on election day and during early voting.

* * *

(28) Provisional ballot" means a conditional ballot, the validity of which is determined by the canvassing board.

* * *

(30) Public office" means any federal, state, county, municipal, school, or other district office or position which is filled by vote of the electors.

* * *

(35) Tactile input device" means a device that provides information to a voting system by means of a voter touching the device, such as a keyboard, and that complies with the requirements of s. 101.56062(1)(k) and (l).

* * *

(37) Undervote" means that the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question.

* * *

(39) Voter interface device" means any device that communicates voting instructions and ballot information to a voter and allows the voter to select and vote for candidates and issues.

* * *

Fla. Stat. § 102.141

102.141 County canvassing board; duties.

* * *

(2) The county canvassing board shall meet in a building accessible to the public in the county where the election occurred at a time and place to be designated by the supervisor of elections to publicly canvass the absentee electors' ballots as provided for in s. 101.68 and provisional ballots as provided by ss. 101.048, 101.049, and 101.6925. Provisional ballots cast pursuant to s. 101.049 shall be canvassed in a manner that votes for candidates and issues on those ballots can be segregated from other votes. Public notice of the time and place at which the county

canvassing board shall meet to canvass the absentee electors' ballots and provisional ballots shall be given at least 48 hours prior thereto by publication once in one or more newspapers of general circulation in the county or, if there is no newspaper of general circulation in the county, by posting such notice in at least four conspicuous places in the county. As soon as the absentee electors' ballots and the provisional ballots are canvassed, the board shall proceed to publicly canvass the vote given each candidate, nominee, constitutional amendment, or other measure submitted to the electorate of the county, as shown by the returns then on file in the office of the supervisor of elections and the office of the county court judge.

(3) The canvass, except the canvass of absentee electors' returns and the canvass of provisional ballots, shall be made from the returns and certificates of the inspectors as signed and filed by them with the supervisor, and the county canvassing board shall not change the number of votes cast for a candidate, nominee, constitutional amendment, or other measure submitted to the electorate of the county, respectively, in any polling place, as shown by the returns. All returns shall be made to the board on or before 2 a.m. of the day following any primary, general, or other election. If the returns from any precinct are missing, if there are any omissions on the returns from any precinct, or if there is an obvious error on any such returns, the canvassing board shall order a retabulation of the returns from such precinct. Before canvassing such returns, the canvassing board shall examine the tabulation of the ballots cast in such precinct and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the tabulation of the ballots cast, the tabulation of the ballots cast

shall be presumed correct and such votes shall be canvassed accordingly.

(4) The canvassing board shall submit on forms or in formats provided by the division unofficial returns to the Department of State for each federal, statewide, state, or multicounty office or ballot measure no later than noon on the third day after any primary election and no later than noon on the fifth day after any general or other election. Such returns shall include the canvass of all ballots as required by subsection (2), except for provisional ballots, which returns shall be reported at the time required for official returns pursuant to s. 102.112(2).

(5) If the county canvassing board determines that the unofficial returns may contain a counting error in which the vote tabulation system failed to count votes that were properly marked in accordance with the instructions on the ballot, the county canvassing board shall:

(a) Correct the error and retabulate the affected ballots with the vote tabulation system; or

(b) Request that the Department of State verify the tabulation software. When the Department of State verifies such software, the department shall compare the software used to tabulate the votes with the software filed with the department pursuant to s. 101.5607 and check the election parameters.

(6) If the unofficial returns reflect that a candidate for any office was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved

or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. The Elections Canvassing Commission is the board responsible for ordering federal, state, and multicounty recounts. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made.

(a) Each canvassing board responsible for conducting a recount shall put each marksense ballot through automatic tabulating equipment and determine whether the returns correctly reflect the votes cast. If any marksense ballot is physically damaged so that it cannot be properly counted by the automatic tabulating equipment during the recount, a true duplicate shall be made of the damaged ballot pursuant to the procedures in s. 101.5614(5). Immediately before the start of the recount, a test of the tabulating equipment shall be conducted as provided in s. 101.5612. If the test indicates no error, the recount tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly. If an error is detected, the cause therefor shall be ascertained and corrected and the recount repeated, as necessary. The canvassing board shall immediately report the error, along with the cause of the error and the corrective measures being taken, to the Department of State. No later than 11 days after the election, the canvassing board shall file a separate incident report with the Department of State, detailing the resolution of the matter and identifying

any measures that will avoid a future recurrence of the error.

(b) Each canvassing board responsible for conducting a recount where touchscreen ballots were used shall examine the counters on the precinct tabulators to ensure that the total of the returns on the precinct tabulators equals the overall election return. If there is a discrepancy between the overall election return and the counters of the precinct tabulators, the counters of the precinct tabulators shall be presumed correct and such votes shall be canvassed accordingly.

(c) The canvassing board shall submit on forms or in formats provided by the division a second set of unofficial returns to the Department of State for each federal, statewide, state, or multicounty office or ballot measure no later than 3 p.m. on the fifth day after any primary election and no later than 3 p.m. on the eighth day after any general election in which a recount was conducted pursuant to this subsection. If the canvassing board is unable to complete the recount prescribed in this subsection by the deadline, the second set of unofficial returns submitted by the canvassing board shall be identical to the initial unofficial returns and the submission shall also include a detailed explanation of why it was unable to timely complete the recount. However, the canvassing board shall complete the recount prescribed in this subsection, along with any manual recount prescribed in s. 102.166, and certify election returns in accordance with the requirements of this chapter.

(d) The Department of State shall adopt detailed rules prescribing additional recount procedures for

each certified voting system, which shall be uniform to the extent practicable.

* * *

Fla. Stat. § 102.166

102.166 Manual recounts.

(1) If the second set of unofficial returns pursuant to s. 102.141 indicates that a candidate for any office was defeated or eliminated by one-quarter of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-quarter of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-quarter of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure. A manual recount may not be ordered, however, if the number of overvotes, undervotes, and provisional ballots is fewer than the number of votes needed to change the outcome of the election.

(2)(a) Any hardware or software used to identify and sort overvotes and undervotes for a given race or ballot measure must be certified by the Department of State as part of the voting system pursuant to s. 101.015. Any such hardware or software must be capable of simultaneously counting votes.

(b) Overvotes and undervotes shall be identified and sorted while recounting ballots pursuant to s. 102.141, if the hardware or software for this purpose

has been certified or the department's rules so provide.

(3) Any manual recount shall be open to the public.

(4)(a) A vote for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice.

(b) The Department of State shall adopt specific rules for each certified voting system prescribing what constitutes a "clear indication on the ballot that the voter has made a definite choice." The rules may not:

1. Exclusively provide that the voter must properly mark or designate his or her choice on the ballot; or

2. Contain a catch-all provision that fails to identify specific standards, such as "any other mark or indication clearly indicating that the voter has made a definite choice."

(5) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) Each duplicate ballot prepared pursuant to s. 101.5614(5) or s. 102.141(6) shall be compared with the original ballot to ensure the correctness of the duplicate.

(c) If a counting team is unable to determine whether the ballot contains a clear indication that the voter

has made a definite choice, the ballot shall be presented to the county canvassing board for a determination.

(d) The Department of State shall adopt detailed rules prescribing additional recount procedures for each certified voting system which shall be uniform to the extent practicable. The rules shall address, at a minimum, the following areas:

1. Security of ballots during the recount process;

2. Time and place of recounts;

3. Public observance of recounts;

4. Objections to ballot determinations;

5. Record of recount proceedings; and

6. Procedures relating to candidate and petitioner representatives.

F. Florida Department of State, Division of Elections Rule 1S-2.031

1S-2.031 Recount Procedures.

(1) General application provisions.

(a) All procedures relating to machine and manual recounts shall be open to the public.

(b) At least two members of the county canvassing board shall be present during all times a machine or manual recount is being conducted.

(c) All recounts are to be ordered by the respective county canvassing board or canvassing commission responsible for certifying the results of the race or races being recounted.

(d) In a machine recounts ordered by the county canvassing board, such board shall notify the candidates or committees in the affected race or races that a machine recount will be conducted. If a machine recount is ordered by the Elections Canvassing Commission, the Division of Elections shall notify the candidates or committees in the affected race or races that a machine recount will be conducted. In addition, notice of all machine recounts shall be posted on the door of the public entrance to the building where the office of the supervisor of elections is housed so that the notice is accessible to the public 24 hours a day.

(e) In all manual recount, after the completion of a manual recount, the county canvassing board shall examine the ballots that were not allocated to any candidate or issue choice to determine if revisions are necessary to Rule 1S-2.027, F.A.C. (Clear Indication of Voter's Choice on a Ballot) and shall notify the Division of Elections if revisions are necessary.

(f) All machine and manual recounts conducted pursuant to this rule must be completed in such a

manner as to provide the county canvassing board sufficient time to comply with the provisions of Section 102.112, F.S. Any returns not received by the department by the time specified in subsection (2) of Section 102.112, F.S., shall be ignored and the results on file at that time shall be certified by the department.

(g) As used in this rule, the term:

1. "Ballot image" means an electronic record of the content of a ballot cast by a voter and recorded by the voting device.

2. "Ballot image report" means the printout of ballot images for each machine or precinct generated pursuant to subparagraph (4)(b)1.

3. "Complete canvass report" means the voting system report from the machine recount that contains the results for each contest in each precinct (such report includes the total votes for each candidate or issue, the total number of undervotes and overvotes for each candidate or issue, and the total ballots cast for each race or issue).

4. "Overvote" means that the elector designated more names than there are persons to be elected to an office or designated more than one answer to a ballot issue.

5. "Undervote" means that the tabulator recorded no vote for the office or issue or that the elector did not designate the number of choices allowed for the office or issue.

(2)(a) Optical Scan Ballot Machine Recounts. The following procedures apply to machine recounts of optical scan ballots involving all county, multicounty, federal or statewide offices or issues required by law to be recounted:

1. The tabulating equipment being used in the recount must be tested pursuant to the provisions of Section 101.5612, F.S. The county canvassing board

may, but is not required to, use the same tabulating equipment that ballots were originally tabulated on. If the test shows no error, the county canvassing board shall proceed with the machine recount. If the test indicates an error, the county canvassing board shall correct the error and proceed with the machine recount.

2. Procedure when only one race is being recounted or where more than one race is being recounted and the voting system will allow for the sorting of overvotes and undervotes in more than one race at the same time:

a. The supervisor of elections shall change the election parameters so that the recounted race or races will be tabulated and so that ballots containing overvotes and undervotes in the recounted race or races can be sorted from the other ballots during the machine recount.

b. The county canvassing board or its representatives shall put each ballot through the tabulating equipment and determine the votes in the recounted race or races. During this process, the overvoted and undervoted ballots in the recounted race or races must be sorted.

c. Sorted ballots shall be placed in a sealed container or containers until it is determined whether a manual recount will be conducted. Seal numbers shall be recorded at the time the ballots are placed in the containers.

3. Procedure when more than one race is being recounted by machine and the voting system does not allow the sorting of overvotes and undervotes on more than one race at a time:

a. The county canvassing board or its representatives shall put each ballot through the tabulating equipment and determine the votes in the affected races.

b. The county canvassing board shall produce vote counts for those races involved in the machine recount.

c. Prior to a manual recount being conducted, the supervisor of elections shall change the election parameters and the ballots for the manually recounted race or races shall be put back through the tabulating equipment and overvotes and undervotes for each race shall be sorted separately.

(b) Touchscreen Ballot Machine Recounts. The following procedures apply to machine recounts of touchscreen ballots involving all county, multicounty, federal or statewide offices or issues required by law to be recounted:

1. The county canvassing board shall be required to produce printed vote totals for the affected race or races for each precinct and early voting site. The county canvassing board shall test the accuracy of the printed vote totals from each precinct and early voting site by comparing the total number of votes for the affected race or races with the total number of voters who signed in to vote at each precinct and early voting site. If an error is detected, the cause therefore shall be ascertained and corrected. The corrected printed vote totals shall then be used as set forth in subparagraph 2.

2. The county canvassing board shall verify that the total votes for the recounted race or races taken from the printed vote totals for each precinct and early voting site are the same as the total votes shown on the county totals from election night. If there is a discrepancy, the county canvassing board shall investigate and resolve the discrepancy.

(3) Optical Scan Ballot Manual Recount. The following procedures apply to manual recounts of optical scan ballots involving all county,

multicounty, federal or statewide offices or issues required by law to be recounted:

(a) Ballots with overvotes and undervotes shall be transported to the location of the manual recount by two members of the county canvassing board and a sworn law enforcement officer. From the time the manual recount is started until completion of the recount, including times of recess, the ballots shall be guarded by a sworn law enforcement officer.

(b) If the manual recount is ordered by the Elections Canvassing Commission, the Division of Elections shall notify the candidates and chairmen of the state executive committee of the political parties, if applicable, entitled to representatives or the chairmen of the political committees, if any, in the case of a ballot issue, that a manual recount has been ordered. The candidates or chairmen are responsible for contacting the supervisor of elections in each county involved in the manual recount to find out when and where the recount will be conducted and the number of representatives such candidate or committee is entitled to have present during the manual recount process.

(c) If the manual recount is ordered by the county canvassing board, the supervisor of elections shall notify the candidates and chairmen of the county executive committee of the political parties, if applicable, entitled to representatives or the chairmen of the political committees, if any, in the case of a ballot issue, that a recount has been ordered and shall provide information regarding the time and the place of the manual recount and the number of representatives such candidate or committee is entitled to have present during the manual recount process.

(d) In addition, each county canvassing board shall provide public notice of the time and place of the

manual recount immediately after determining the need for a manual recount pursuant to Section 102.166, F.S. The notice shall be in either a newspaper of general circulation in the county or posted in at least four conspicuous locations in the county. Because of the time constraints in conducting the manual recount, the canvassing board shall also contact media outlets in the community so that the public is made aware of the recount as soon as possible. The manual recount shall begin as soon as practicable in order for the recount to be concluded in time for the certification of results to be submitted pursuant to Section 102.112, F.S.

(e) The manual recount shall be conducted in a room large enough to accommodate the necessary number of counting teams, the canvassing board members and representatives of each candidate, political party or political committee entitled to have representatives. Members of the public and the press (observers) shall be allowed to observe the recount from a separate area designated by the county canvassing board, which area may be outside of the actual recount area but which will allow the observers to view the activities. In addition to the sworn law enforcement officer guarding the ballots, there shall be a sworn law enforcement officer to keep order in and around the recount area.

(f) The county canvassing board shall determine the number of overvotes and undervotes to be manually recounted. If the recount involves candidates or issues on a statewide or multicounty basis, each county canvassing board shall notify the Elections Canvassing Commission of the number of overvotes and undervotes in the county for the affected race. Any candidate whose ultimate success or failure in the race could be adversely or favorably impacted by the manual recount, presuming recount results most favorable and least favorable to the candidate, shall

be entitled to representatives at the recount as provided in paragraph (g).

(g) Each candidate entitled to representatives as outlined in paragraph (f) is entitled to a number of representatives equal to the number of counting teams plus an additional representative for the county canvassing board. If the race being recounted is a partisan race, each political party with candidates entitled to representatives is entitled to one representative. Each candidate or political party entitled to representatives must provide a list of the names of each representative designated.

(h) In order to be entitled to representatives at the manual recount, a political committee supporting or opposing a ballot issue which is being recounted must have provided in its statement of organization, on file before the election, that the committee is specifically supporting or opposing the issue in question. If more than one committee is registered as supporting or opposing the issue, each side shall be entitled to one representative per counting team plus one for the county canvassing board, regardless of the number of committees supporting or opposing the ballot issue. The county canvassing board shall notify each committee chairman of the number of representatives it is entitled to have present at the recount, which shall be determined by taking the total number of representatives allowed and dividing it by the number of registered committees on that side of the issue. The committee chairman must provide a list of the names of each representative designated.

(i) In the case of a manual recount regarding the retention of a judicial candidate, the judicial candidate is entitled to representatives equal to the number of counting teams plus an additional representative for the county canvassing board. If there are political committees organized to oppose

the retention of such judicial candidate, those committees are entitled to representatives pursuant to paragraph (h). (j) Representatives and observers must not interfere with or disturb the recount in any way. If the conduct of the representatives or observers impedes the recount process, the recount will stop until the situation is corrected. If the disturbance continues, upon majority vote of the county canvassing board, the persons causing the disturbance shall be removed from the premises by the law enforcement officer charged with maintaining order at the recount.

(k) Prior to the beginning of the manual recount, the county canvassing board, the members of the counting teams and the representatives entitled to be present, shall jointly review the rules and statutes governing recount procedures and what constitutes a clear indication that the voter has made a definite choice. At the beginning of the manual recount, the seal numbers on the containers shall be announced as they are broken and compared to the numbers previously recorded.

(l) Each counting team shall review the ballots before them to determine if there is or is not a clear indication that the voter has made a definite choice, as specified in Rule 1S-2.027, F.A.C. If the counting team is unable to make the determination, or if there is an objection to the decision of the counting team by a designated representative, the ballot shall be set aside for the county canvassing board's determination.

(m) Each counting team shall place the ballots in stacks indicating:

1. Votes for each candidate or issue choice;

2. Ballots which the counting team has determined there is no clear indication that the voter made a definite choice for an office or ballot question; and

3. Ballots to be set aside for the county canvassing board's determination.

(n) The counting team shall count and record the number of votes for each candidate or issue choice, the number of ballots which the counting team has determined there is no clear indication that the voter made a definite choice, and the number of ballots which are to be given to the canvassing board for its determination and shall submit those totals to the county canvassing board.

(o) Each ballot set aside because the counting team was unable to make a determination that there is a clear indication that the voter has made a definite choice must be placed in a separate envelope with a notation of the precinct number, why the team was unable to make the determination, and the names of the members of the counting team. If a ballot was set aside because of an objection to the decision of the counting team by a representative, the envelope must contain the precinct number, the names of the members of the counting team, the counting team's initial determination, the reasoning behind the challenge and the name and representative capacity of the person bringing the challenge.

(p) The county canvassing board shall review each ballot set aside to determine if there is or is not a clear indication that the voter has made a definite choice, as specified in Rule 1S-2.027, F.A.C. All three members of the county canvassing board must be present for this determination and the determination must be by majority vote.

(q) The records of the manual recount shall detail the number of votes each candidate or issue choice received and the number of ballots not allocated to any candidate or issue choice. The county canvassing board shall then certify the number of votes for each candidate or issue choice by combining the totals on

the machine during the sorting process with the totals of the manual recount.

(r) The activities of the county canvassing board in making determinations of ballots to be counted shall be recorded by either audio or audio/video tape. In addition, minutes of the manual recount shall be made and approved by the canvassing board. All tapes and minutes shall be made available to the public within 2 weeks of the time the canvassing board certifies the results of the election.

(s) If ballots were sorted for more than one race during the machine recount, the following additional procedures shall be used:

1. The election parameters shall be changed so that only overvoted and undervoted ballots for one recounted race will be sorted.

2. All ballots previously sorted pursuant to subparagraph (2)(a)2. shall be put back through the tabulating equipment to sort the ballots for the first manually recounted race.

3. If there is another race to be manually recounted, following the first manual recount, the sorted ballots from the first manually recounted race will be combined with the other sorted ballots.

4. The election parameters shall be changed to sort the overvoted and undervoted ballots for the next manually recounted race.

5. All previously sorted ballots shall be put back through the tabulating equipment to sort the ballots for the next manually recounted race.

6. The canvassing board shall make an identifying mark or notation on each sorted ballot, in an area that does not interfere with the counting of the ballot, to indicate that the ballot was a manually recounted ballot for a particular race.

(t) If ballots were not sorted during the machine recount, the following procedures shall be used:

1. The election parameters shall be changed so that overvotes and undervotes in the first manually recounted race are identified and sorted for manual review.

2. Following the manual recount, if there is another race to be recounted, the sorted ballots from the first manual recount must be placed back in with the other ballots. The election parameters shall be changed to identify and sort ballots for the next manually recounted race.

3. The canvassing board shall make an identifying mark or notation on each sorted ballot, in an area that does not interfere with the counting of the ballot, to indicate that the ballot was a manually recounted ballot for a particular race.

(4) Touchscreen Ballot Manual Recount.

Pursuant to Section 102.166, F.S., the purpose of the review of overvotes and undervotes in a manual recount is for the county canvassing board to determine whether such review of an overvoted or undervoted ballot cast by a voter in the recounted race or issue reveals a "clear indication on the ballot that the voter has made a definite choice."

(a) The following standards apply in a manual recount of overvotes and undervotes as provided specifically by Section 102.166, F.S., on a touchscreen voting system, to determine whether there is a clear indication on the ballot image report that the voter has made a definite choice:

1. A clear indication on the ballot that the voter made a definite choice not to cast an overvote shall be determined by the presence on the ballot image of a selection in the race or issue or of an indication of an undervote in the manner proscribed by subparagraph 2. Touchscreen voting systems do not permit a voter to cast an overvote; therefore, the canvassing board shall accept the machine recount as

conclusive that there are no overvotes in the manually recounted race or issue.

2. The clear indication that the voter has made a definite choice to undervote shall be determined by the presence of the marking, or the absence of any marking, that the manufacturer of the certified voting system indicates shall be present or absent to signify an undervote. The following represents the manufacturer indicated markings of an undervote for each respective certified voting system:

a. ES&S iVotronic touchscreen voting system. A clear indication that the voter made a definite choice to undervote shall be determined by the word "undervote" on the ballot image for the affected race or issue, as illustrated in Form DS-DE 72/105 (eff.11-3-05), which is entitled "Samples of Ballot Image Reports for the following certified voting systems: ES&S iVotronic Touchscreen Voting System; Sequoia Touchscreen Voting System; and Diebold Touchscreen Voting System," and is hereby incorporated herein by reference and available from the Division of Elections.

b. Sequoia touchscreen voting system. A clear indication that the voter made a definite choice to undervote shall be determined by the absence on the ballot image of any numeric codes designated for the candidates or choices for the affected race or issue, or by the presence on the ballot image of less than the maximum number of numeric codes that may be present for any affected race in which the voter is permitted to select more than one candidate, each as illustrated in Form DS-DE 72/105 (eff. 11-3-05), which is entitled "Samples of Ballot Image Reports for the following certified voting systems: ES&S iVotronic Touchscreen Voting System; Sequoia Touchscreen Voting System; and Diebold Touchscreen Voting System," and is hereby

incorporated herein by reference and available from the Division of Elections.

c. Diebold touchscreen voting system. A clear indication that the voter made a definite choice to undervote shall be determined by the absence of an "X" within the brackets ([ ]) located next to the candidates or choices for the affected race or issue, or by the presence on the ballot image of Xs within the brackets located next to the candidates for the affected race which total a number less than the number of candidates for which the voter is permitted to cast a vote, each as illustrated in Form DS-DE 72/105 (eff. 11-3-05), which is entitled "Samples of Ballot Image Reports for the following certified voting systems: ES&S iVotronic Touchscreen Voting System; Sequoia Touchscreen Voting System; and Diebold Touchscreen Voting System," and is hereby incorporated herein by reference and available from the Division of Elections.

3. If a voter marks fewer candidates than there are positions to be elected for those offices, the votes for all of those marked candidates shall count. For example, if the voter is allowed to vote for 5 candidates in a special district election ("Vote for 5") and the voter marks 2 candidates, the votes for those two marked candidates shall count.

(b) The following procedures apply to manual recounts of undervotes on touchscreen voting systems involving all county, multicounty, federal or statewide offices or issues required by law to be recounted:

1. The county canvassing board shall order the printing of one (1) official copy of the ballot image report from each touchscreen voting machine that has recorded undervotes for the affected race or issue. If the certified system does not permit the

printing of a ballot image report by touchscreen voting machine, then the canvassing board shall order the printing of the ballot image report for each precinct and early voting site that has recorded undervotes for the affected race or issue. The ballot image report for each certified voting system shall be substantially in the form provided in Form DS-DE 72/105 (eff. 11-3-05), which is entitled "Samples of Ballot Image Reports for the following certified voting systems: ES&S iVotronic Touchscreen Voting System; Sequoia Touchscreen Voting System; and Diebold Touchscreen Voting System," and is hereby incorporated herein by reference and available from the Division of Elections. If the certified voting system is capable of electronic sorting and identifying of undervotes, the canvassing board must order the printing of the ballot image report using such capabilities. The county supervisor of elections shall maintain a custody log for each ballot image report and otherwise assure that the ballot image report remains secure and free of tampering at all times.

2. The ballot image report shall be examined by the counting teams for the race or issue being recounted to identify and highlight ballot images containing undervotes for the affected race or issue and to determine if there is a clear indication on the ballot image containing the undervote that the voter made a definite choice. A certified voting system that includes a means for electronically sorting and identifying undervotes must be used to identify and highlight ballot images with undervotes in place of the counting team process.

3. If an objection is made by a representative (designated pursuant to paragraphs (f)-(i) of subsection

(3) of this Rule) to a decision of the counting team, an attachment shall be made to the ballot image report

that contains the names of the members of the counting team, the counting team's initial determination, the reasoning behind the objection, and the name and representative capacity of the person making the objection. An objection must be based solely on departures from the procedures outlined in this rule for determining the clear indication on the ballot that the voter has made a definite choice to undervote.

4. All objections pursuant to this subsection must be resolved by the county canvassing board. If the canvassing board determines that the counting team departed from the procedures outlined in this rule for determining the clear indication on the ballot that the voter has made a definite choice to undervote, then the canvassing board shall correct such departure by applying the applicable standard.

5. The counting teams shall maintain a running tally of the number of undervotes totaled per touchscreen voting machine in each precinct. After a review of ballot image reports containing undervotes from the voting machine or the precinct, the counting team shall tabulate the total number of undervotes for such precinct. The counting teams shall compare the total number of undervotes manually recounted for each precinct to the total number of undervotes reported by the voting system in the complete canvass report for each precinct.

6. If the comparison of the undervotes in the manual recount matches the total number of undervotes reported for such precinct in the complete canvass report, then the counting team shall certify the results of the machine recount to the canvassing board. If there is a discrepancy between the number of undervotes in the manual recount and the machine recount, then the counting teams shall re-tabulate the number of undervotes for such precinct

up to two additional times to resolve such discrepancy. If, after re-tabulating the number of undervotes for each such precinct, the discrepancy remains, then the county canvassing board shall investigate and resolve the discrepancy with respect only to such precinct. In resolving the discrepancy, the canvassing board shall review the records produced by the voting system and may request the verification of the tabulation software as provided in Section 102.141(5)(b), F.S., and conduct any necessary diagnostic examinations; provided, however, that in no event shall the county canvassing board order or conduct any diagnostic examination that may result in the clearing of any vote totals or in any way affecting the memory of machine.

7. All three (3) members of the county canvassing board must be present for any determination or decision made pursuant to this subsection and the determination or decision must be by majority vote.

8. The following provisions of this rule also apply to manual recounts of touchscreen voting systems:

a. If the manual recount is ordered by the Elections Canvassing Commission, the Division of Elections shall notify the candidates and chairmen of the state executive committee of the political parties, if applicable, entitled to representatives or the chairmen of the political committees, if any, in the case of a ballot issue, that a manual recount has been ordered. The candidates or chairmen are responsible for contacting the supervisor of elections in each county involved in the manual recount to find out when and where the recount will be conducted and the number of representatives such candidate or committee is entitled to have present during the manual recount process.

b. If the manual recount is ordered by the county canvassing board, the supervisor of elections shall

notify the candidates and chairmen of the county executive committee of the political parties, if applicable, entitled to representatives or the chairmen of the political committees, if any, in the case of a ballot issue, that a recount has been ordered and shall provide information regarding the time and the place of the manual recount and the number of representatives such candidate or committee is entitled to have present during the manual recount process.

c. In addition, each county canvassing board shall provide public notice of the time and place of the manual recount immediately after determining the need for a manual recount pursuant to Section 102.166, F.S. The notice shall be in either a newspaper of general circulation in the county or posted in at least four conspicuous locations in the county. Because of the time constraints in conducting the manual recount, the canvassing board shall also contact media outlets in the community so that the public is made aware of the recount as soon as possible. The manual recount shall begin as soon as practicable in order for the recount to be concluded in time for the certification of results to be submitted pursuant to Section 102.112, F.S.

d. The manual recount shall be conducted in a room large enough to accommodate the necessary number of counting teams, the canvassing board members and representatives of each candidate, political party or political committee entitled to have representatives. Members of the public and the press (observers) shall be allowed to observe the recount from a separate area designated by the county canvassing board, which area may be outside of the actual recount area but which will allow the observers to view the activities. In addition to the sworn law enforcement officer guarding the ballots,

there shall be a sworn law enforcement officer to keep order in and around the recount area.

e. The county canvassing board shall determine the number of undervotes to be manually recounted. If the recount involves candidates or issues on a statewide or multicounty basis, each county canvassing board shall notify the Elections Canvassing Commission of the number of undervotes in the county for the affected race. Any candidate whose ultimate success or failure in the race could be adversely or favorably impacted by the manual recount, presuming recount results most favorable and least favorable to the candidate, shall be entitled to representatives at the recount as provided in sub-subparagraph f.

f. Each candidate entitled to representatives as outlined in sub-subparagraph e. is entitled to a number of representatives equal to the number of counting teams plus an additional representative for the county canvassing board. If the race being recounted is a partisan race, each political party with candidates entitled to representatives is entitled to one representative. Each candidate or political party entitled to representatives must provide a list of the names of each representative designated.

g. In order to be entitled to representatives at the manual recount, a political committee supporting or opposing a ballot issue which is being recounted must have provided in its statement of organization, on file before the election, that the committee is specifically supporting or opposing the issue in question. If more than one committee is registered as supporting or opposing the issue, each side shall be entitled to one representative per counting team plus one for the county canvassing board, regardless of the number of committees supporting or opposing the ballot issue. The county canvassing board shall notify each committee chairman of the number of

representatives it is entitled to have present at the recount, which shall be determined by taking the total number of representatives allowed and dividing it by the number of registered committees on that side of the issue. The committee chairman must provide a list of the names of each representative designated.

h. In the case of a manual recount regarding the retention of a judicial candidate, the judicial candidate is entitled to representatives equal to the number of counting teams plus an additional representative for the county canvassing board. If there are political committees organized to oppose the retention of such judicial candidate, those committees are entitled to representatives pursuant to sub-subparagraph g.

i. Representatives and observers must not interfere with or disturb the recount in any way. If the conduct of the representatives or observers impedes the recount process, the recount will stop until the situation is corrected. If the disturbance continues, upon majority vote of the county canvassing board, the persons causing the disturbance shall be removed from the premises by the law enforcement officer charged with maintaining order at the recount.

j. Prior to the beginning of the manual recount, the county canvassing board, the members of the counting teams and the representatives entitled to be present, shall jointly review the rules and statutes governing recount procedures and what constitutes a clear indication that the voter has made a definite choice.

k. The activities of the county canvassing board in making determinations of ballots to be counted shall be recorded by either audio or audio/video tape. In addition, minutes of the manual recount shall be made and approved by the canvassing board. All

tapes and minutes shall be made available to the public within 2 weeks of the time the canvassing board certifies the results of the election.