Gore V. Harris

LADIES AND GENTLEMEN, YOU THE FLORIDA SUPREME COURT. PLEASE BE SEATED. -- LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING, AND WELCOME, ONCE AGAIN, TO THE FLORIDA SUPREME COURT, WHERE WE WILL HAVE ORAL ARGUMENT, THIS MORNING, IN THE CASE OF GORE VERSUS HARRIS. AND AS AN INTRODUCTION, AS WE DID WHEN WE HAD ORAL ARGUMENT IN THIS COURT, APPROXIMATELY TEN DAYS AGO, IN THIS CASE, WE WELCOME THE VISITORS, HERE, BECAUSE OF THE LIMITATIONS ON TIME, IT IS ABSOLUTELY NECESSARY THAT WE MAINTAIN ORDER IN THE COURT AT ALL TIMES. AND WE ASK, FURTHER, THAT, AT THE END OF THE ARGUMENT, THAT COUNSEL BE ALLOWED TO LEAVE THE BUILDING, TOGETHER WITH THEIR PARTIES, PRIOR TO THE TIME THAT ANY OF THE VISITORS LEAVE THE BUILDING, AND THEN HOLD ALL INTERVIEWS OUTSIDE THE BUILDING. ONCE AGAIN, COUNSEL, WE ARE IN NEED, BECAUSE OF THE LIMITED TIME, TO GET RIGHT TO THE ISSUES AT HAND, AND SO I BELIEVE, IT IS MY UNDERSTANDING, MR. BOIES, THAT YOU ARE GOING TO PROCEED FIRST.

YES, YOUR HONOR. THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS DAVID BOIES, AND I REPRESENT THE VICE PRESIDENT AND SENATOR LIEBERMAN. MR. CHIEF JUSTICE: MR. BOIES, LET ME START RIGHT OFF. WHEN THE CASE WAS HERE PREVIOUSLY, IN THE PROTEST PART OF THE PROCEEDINGS, NO COUNSEL FOR ANY PARTY, IN BRIEFS OR IN ARGUMENT, RAISED, WITH THIS COURT, THE U.S. SUPREME COURT CASE OF McPHERSON VERSUS BLACKER, SEEMINGLY BECAUSE COUNSEL DID NOT BELIEVE THAT IT WAS IMPORTANT FOR OUR CONSIDERATION. HOWEVER, THAT CASE WAS FORCEFULLY ARGUED TO THE U.S. SUPREME COURT, AND THE U.S. SUPREME COURT HAS, NOW, CALLED THAT CASE TO THIS COURT'S ATTENTION IN THE OPINION THAT CAME OUT THIS MONDAY. ONCE AGAIN, NO COUNSEL HAS ARGUED THAT CASE TO THIS COURT, BUT I WANT TO KNOW FROM EACH COUNSEL ITS IMPORTANCE HERE. MY READING OF THAT CASE IS THAT THE US SUPREME COURT HAS SAID THAT THE STATE LEGISLATURE HAS PLENARY POWER, FULL POWER, IN RESPECT TO APPOINTMENT OF PRESIDENTIAL ELECTORS, AND THAT POWER CANNOT BE ERODED, EVEN BY THE STATE CONTUSION. -- CONSTITUTION. NOW, ACCEPTING THAT AS CONTROLLING LAW, WHY DOES THAT NOT MEAN THAT THE COURTS OF THIS STATE CAN ONLY BE INVOLVED IN RESOLVING CONTROVERSIES AND CONTESTS, WHERE THE LEGISLATURE EXPLICITLY GIVES THIS COURT THAT POWER OR A COURT THAT POWER, WHICH HAD HAS NOT DONE, IN RESPECT TO PRESIDENTIAL ELECTORS, IN 102.168, AND SECONDLY, EVEN IF 102.168 IS READ TO IMPLICITLY APPLY TO PRESIDENTIAL ELECTORS, WHY IS IT NOT JUDICIAL REVIEW GIVEN TO THE CIRCUIT COURT AND NOT THIS COURT, SINCE THE ONLY MEANS BY WHICH THERE IS A RIGHT TO APPELLATE REVIEW IN FLORIDA IS THROUGH THE STRAIGHT CON -- IS THROUGH THE STATE CONSTITUTION. WOULD YOU PLEASE AT DRESSES -- WOULD YOU PLEASE ADDRESS THAT, AND I WOULD LIKE OTHER COUNSEL TO ADDRESS THAT.

FIRST, AS TO THE IS THIS THE APPROPRIATE FORUM, THIS COURT OR THE DISTRICT COURT OF APPEALS. FIRST OF ALL, THIS IS A MATTER OF GREAT PUBLIC IMPORTANCE AND NEEDS IMMEDIATE ATTENTION.

I UNDERSTAND THAT. MY EXPRESS QUESTION IS APPELLATE REVIEW THAT IS NOT GIVEN IN 168.

WE WOULD SAY, YOUR HONOR, THAT, UNDER 168, THIS COURT HAS THE POWER TO REVIEW, BOTH DIRECTLY, BECAUSE IT HAS BEEN CERTIFIED UP, AND UNDER THIS COURT'S MANDAMUS POWER, WHICH WE HAVE, ALSO,ALITYTIVELY PUT FORWARD IN OUR BRIEF.

WHERE IS IT --ALTERNTIVELY PUT FORWARD IN OUR BRIEF.

WHERE IS IT THAT WE GET OUR AUTHORITY? UNDER THE RULES OR UNDER THE CONSTITUTION, AND DOESN'T THAT CREATE A FEDERAL QUESTION?

YOUNKS, YOUR HONOR, BECAUSE WHAT YOU ARE DOING IS YOU ARE -- I DON'T THINK SO, YOUR HONOR, BECAUSE WHAT YOU ARE DOING IS REVIEWING, IN AN ORDINARY WAY, THE STATUTES OF THIS STATE. I DON'T THINK THE CONSTITUTION OF THE UNITED STATES MEANS, IN ANY WAY, MEANS THAT THE LEGISLATURE HAS TO SIT, BOTH AS LAETH I HAVE BODY AND A JUDICIAL BODY, JUST BECAUSE AN ELECTION OF PRESIDENTIAL LEGISLATORS IS INVOLVED. -- OF PRESIDENTIAL ELECTORS IS INVOLVED.

WHY ISN'T THIS LIKE SOVEREIGN IMMUNITY, WHERE COURTS ONLY HAVE THE POWER TO DISSOLVE DISPUTES AND CLAIMS THAT IS EXPRESSLY GIVEN TO IT BY THE LEGISLATURE, WHERE, IF THE LEGISLATURE IN THIS STATE SAYS COURTS ARE NOT TO DECIDE CLAIMS IN EXCESS OF $100,000, THOSE ARE MATTERS THAT ARE TAKEN TO THE LEGISLATURE, IN A CLAIMS BILL. WHY ISN'T THIS ANALOGOUS TO THAT?

BECAUSE WHAT I WOULD RESPECTFULLY SUGGEST, YOUR HONOR, IS THAT THE LEGISLATURE HAS PROVIDED THIS COURT WITH THE AUTHORITY TO INTERPRET THESE LAWS, THAT, WHENEVER THE LEGISLATURE PASSES A LAW, WHAT THE LEGISLATURE IS DOING IS PASSING A LAW THAT IS KNOWN TO BE -- GOING TO BE INTERPRETED BY THE COURTS. THAT IS, IN TERMS OF SECTION 168, THIS IS A LAW THAT THE LEGISLATURE DID NOT SAY WE ARE ONLY GOING TO APPLY THIS LAW TO NONPRESIDENTIAL ELECTIONS. PRIOR TO THIS CASE, I DON'T THINK ANYONE WOULD HAVE CONTEMPLATED THAT THIS LAW DID NOT APPLY TO PRESIDENTIAL ELECTIONS, AND CERTAINLY NO ONE, NOT THIS COURT, AND NOT EITHER PARTY, SO CONTEMPLATED, THE LAST TIME WE WERE HERE, BEFORE THE COURT. THIS IS A SITUATION IN WHICH YOU HAVE A STATUTE THAT THE LEGISLATURE HAS PASSED, THAT PROVIDES VERY SPECIFIC REMEDIES. AND WE THINK THAT THOSE REMEDIES ARE THE REMEDIES THAT THIS COURT HAS THE JURISDICTION TO ENFORCE, BOTH IN TERMS OF APPELLATE REVIEW AND UNDER ITS ORIGINAL MANDAMUS AUTHORITY. THIS IS NOT A SITUATION IN WHICH THE CONSTITUTION OF THE UNITED STATES HAS SAID A STATE LEGISLATURE HAS TO SET, AS A JUDICIAL BODY, IN ENFORCING THE LAW, WITH RESPECT TO ELECTIONS. IT HAS MERELY SAID THAT THE LEGISLATURE CAN SPECIFY THE MANNER OF THE APPOINTMENT OF HE ELECTORS. INSIDE -- OF HE ELECTORS. -- OF LEGISLATORS. INCIDENTALLY -- EVER ELECTORS. INCIDENTALLY, NOVEMBER 7 IS THE TIME AND IT HAS BEEN SET.

YOU WOULD AGREE THAT, WHEN THE STATE SUPREME COURT SAYS THERE IS PLENARY POWER IN THE LEGISLATURE, THAT THAT MEANS THEY HAVE FULL POWER?

I THINK THAT THEY HAVE THE POWER TO DETERMINE THE MANNER OF SELECTION. I DON'T THINK THEY HAVE GOT THE PLENARY POWER TO DETERMINE THE TIME OF CHOOSING, BECAUSE THAT, UNDER THE UNITED STATES CONSTITUTION, IS DETERMINED BY THE CONGRESS OF THE UNITED STATES, AND THE CONGRESS OF THE UNITED STATES HAS SET THE TIME OF CHOOSING, WHICH IS NOVEMBER 7, SO I THINK THAT THERE IS A DISTINCTION BETWEEN THE TIME THAT THE ELECTORS HAVE BEEN CHOSEN AND THE MANNER IN WHICH THEY ARE CHOSEN. THE STATE SET THE MANNER IN WHICH THEY WERE CHOSEN, AND THAT MANNER IS PURSUANT TO THE PEOPLE, AND PURSUANT TO THAT DECISION BY THE LEGISLATURE AND THAT DECISION BY THE CONGRESS OF THE UNITED STATES, THAT THE TIME OF THAT SELECTION WAS TO BE NOVEMBER 7, THERE WAS A SELECTION ON NOVEMBER 7, AND WE THINK THAT THAT IS THE ISSUE THAT IS BEFORE THE COURT, NOW, WHICH IS A CONTEST OF THAT ELECTION, WHERE WE HAVE IDENTIFIED, SEPARATELY, FIVE GROUPS OF BALLOTS THAT WE BELIEVE EITHER SHOULD HAVE BEEN RECEIVED AND WERE NOT OR, IN ONE CASE, WERE RECEIVED AND SHOULD NOT HAVE BEEN, UNDER SPECIFIC FLORIDA STATE LAW.

IF WE ACCEPT YOUR JURISDICTIONAL POSITION, WE GET ACROSS THE JURISDICTIONAL ISSUE, THE CONCEPT OF REJECTION OF LEGAL VOTES IS SOMEWHAT CONCERNING. WE CAN LOOK TO OTHER STATES. NEW JERSEY HAS A SIMILAR ALTHOUGH NOT IDENTICAL, AND THE APPLICATION BECOMES PRETTY CLEAR, WHEN INDIVIDUALS ARE PROHIBITED FROM TENDERING A BALLOT. HOWEVER, IT BECOMES LESS CERTAIN, WHEN THERE IS SOMETHING WITH REGARD TO HOW THAT BALLOT IS READ. HERE YOU ARE CHALLENGING, IT SEEMS, A CATEGORY OF UNDER VOTES, AND THAT IS NOT THE SAME AS ONE PERSON COMING TO THE PRECINCT, SEEKING TO VOTE. IF THE CATEGORY EXISTS, IT SEEMS, AS THOUGH IT MUST EXIST STATEWIDE, IF WE HAVE UNDER VOTES IN ONE LOCATION AND THOSE ARE CONSIDERED, THEN YOU HAVE DEMONSTRATED THAT THERE IS LEGAL VOTES THAT HAVE NOT WEAN COUNTED -- THAT HAVE NOT BEEN COUNTED. WHY WOULD THAT NOT EXIST IN OTHER COUNTIES, AND WHY WOULD THIS NOT REQUIRE, IN ANY JUDICIAL RELIEF, THAT BE APPLIED, IN THE STATEWIDE UNDER VOTE?

I THINK THERE ARE TWO QUESTIONS THERE. LET ME TRIAD DRESS THEM SEPARATELY. THE FIRST QUESTION IS WHETHER A REJECTION OF LEGAL VOTES APPLIES TO THE UNDER VOTE CATEGORY OR WHETHER IT ONLY APPLIES, WHEN SOMEBODY COMES TO VOTE AND IS TURNED AWAY. I THINK, GOING BACK TO 1917 AND DERBY AGAINST STATE -- IN DASH I AGAINST STATE -- IN DARBI AGAINST STATE, THIS HAS LOOKED AT THE CONTROVERSY WHERE SOMEBODY HAS COME AND LOOKED AT A BALLOT BUT, FOR SOME REASON THAT, BALLOT HAS NOT BEEN COUNTED. IN THE EARLY DAYS, THAT OFTEN MEANT THAT THE X WAS ON THE WRONG SIDE OF THE PAPER OR MAYBE IT WAS BENEATH THE ELECTORS' NAME, AND IN THIS CASE IT WAS DETERMINED, WHERE THE INTENT OF THE VOTER COULD BE MADE CLEAR. JUMPING FROM THE EARLY DAYS TO THE MOST RECENT CASE, WHICH IS THE BECKSTROM CASE, IN THAT CASE, THE COURT LOOKED AT BALLOTS, OPTICAL BALLOTS NOT PUNCH CARD BALLOTS, BUT THEY WERE OPTICAL BALLOTS THAT WERE DEFECTIVELY MARKED. THAT IS THEY HAD NOT BEEN USED A NUMBER TWO PENS HE WILL -- PENCIL OR IT WAS DEFECTIVE IN SOME WAY, AND THIS COURT HELD THAT THEY COULD NOT BE REJECTED, SO I THINK THAT WHAT CONSTITUTES LEGAL VOTES, UNDER SECTION 168 --

MR. BOIES, JUSTICE HARDING.

WHY DOES THAT NOT HAVE STATEWIDE APPLICATION?

YOUR HONOR, I THINK THAT DOES HAVE STATEWIDE APPLICATION, IF ANYBODY CONTESTS BALLOTS, OTHER THAN IN THE PARTICULAR CATEGORIES THAT WE HAVE CONTESTED BALLOTS.

BUT JUDGE SAULS, IN HIS ORDER, REFERRED TO THE OPINION OF THE ATTORNEY GENERAL THAT INDICATED THAT, IF THIS TYPE OF RESULT HAPPENED, THAT THERE WOULD BE SERIOUS OR POTENTIAL FEDERAL AND STATE CONSTITUTIONAL QUESTIONS, AND THAT THE VOTE WOULD BE IN JEOPARDY.

YOUR HONOR, I THINK -- THERE ARE TWO POINTS TO THAT. FIRST, IF MERELY HAVING A MANUAL RECOUNT IN SOME AREAS AND NOT IN OTHERS WOULD MAKE THE ELECTION DEFECTIVE, THEN THIS ELECTION WOULD ALREADY BE DEFECTIVE, BECAUSE THERE WERE MANUAL RECOUNTS IN A NUMBER OF COUNTIES THAT WERE INCLUDED IN THE CERTIFIED RESULTS OF THE SECRETARY OF STATE. SECOND, WITH RESPECT TO THE ATTORNEY GENERAL'S OPINION, I THINK THAT OPINION WAS APPOINTED TO THE POINT THAT, IF A MANUAL RECOUNT WAS REQUESTED AND RECEIVED IN ONE PLACE AND REQUESTED AND NOT RECEIVED, PURSUANT TO STATE LAW, IN ANOTHER CASE, THAT WOULD INVOLVE A DISPARITY. I DON'T THINK THAT OPINION ADDRESSES THE SITUATION WHERE YOU HAVE A REQUEST INSERT COUNTIES BUT NO REQUEST IN OTHER COUNTIES. THERE HAS NEVER BEEN A SUGGESTION, UNDER THE STATE LAW, THAT YOU SHOULD HAVE A RECOUNT WHERE IT WAS NOT REQUESTED. MR. CHIEF JUSTICE: GO AHEAD.

MR. BOIES --

GO AHEAD.

MR. BOIES, 168, IN ITS PRESENT FORM, HAS ONLY BEEN THERE SINCE 1969. NOW, THIS COURT SAID, IN 1981, THAT THERE IS NO COMMON LAW RIGHT TO CONTEST VOTES, THAT JUDICIAL RESTRAINT SHOULD BE EXERCISED, BECAUSE OF THE FACT THAT ELECTIONS ARE POLITICAL QUESTIONS. WE SAID, IN BORDEN, RIGHT BEFORE THAT, THAT WE WOULD GET INVOLVED, COURTS WOULD GET INVOLVED, IF THERE WERE ALLEGATIONS OF FRAUD. NOW, WE LOWERRED THAT THRESHOLD SOMEWHAT, IN BECK STROM, BY SAYING THAT THE COURTS WOULD GET INVOLVED, IF THERE WAS SUBSTANTIAL NONCOMPLIANCE WITH ELECTION LAWS, BUT AREN'T WHAT YOU ARE ASKING THIS COURT TO DO IS TO HAVE THE COURTS OF THIS STATE GET INVOLVED IN ANY INSTANCE, IN WHICH SOMEONE COMES IN AND MERELY ALLEGES THAT THERE WOULD -- THERE NEEDS TO BE A COUNT, BECAUSE THERE WERE LEGAL VOTES LEFT OUT, NOT GOING THROUGH THE CANVASSING BOARDS BUT LEGAL VOTES LEFT OUT, AND THEN -- AND THEN THAT WOULD HAVE TO DO WITH AN ELECTION. SOMEONE WOULD SAY THEY LOST BY 130,000 VOTES IN DADE COUNTY, AND WE WOULD HAVE TO HAVE THE COURT COUNT THOSE VOTES.

YOUR HONOR, I DON'T THINK THAT IS WHAT WE ARE ARGUING. THIS IS NOT A SITUATION IN WHICH SOMEBODY HAS SIMPLY COME IN AND SAID WE HAVE LOST. WE WOULD LIKE TO HAVE A RECOUNT, UNDER THE CONTEST STATUTE. THIS IS A SITUATION IN WHICH WE HAVE IDENTIFIED SPECIFIC VOTES, MANY OF WHICH WERE AGREED BY THE DISTRICT COURT, WERE VOTES IN WHICH YOU COULD CLEARLY DISCERN THE VOTERS' INTENT. YOU HAD 215 BALLOTS THAT ARE NOT INCLUDED IN THE CERTIFIED RESULTS IN PALM BEACH COUNTY, WHERE THE CIRCUIT COURT FOUND, ON UNDISPUTED EVIDENCE, THAT THERE WAS A CLEAR VOTER INTENT EXPRESSED ON THOSE BALLOTS AND THEY WERE NOT COUNTED. YOU HAD 168 BALLOTS IN DADE COUNTY THAT WERE COUNTED BEFORE THAT COUNTY PREMATURELY STOPPED ITS COUNT, WHERE THE CIRCUIT COURT FOUND THAT THESE WERE BALLOTS THAT EXPRESSED THE VOTERS' INTENT, THAT THE CANVASSING BOARD HAD PROPERLY IDENTIFIED THOSE BALLOTS. SO THESE ARE BALLOTS WHERE WE KNOW THAT IS, IF YOU LOOK AT THE UNDER VOTES, YOU FIND BALLOTS THAT CAN CLEARLY HAVE A DISCERNABLE INTENT OF THE VOTER FOUND IN FRONT OF THEM AND YET THEY ARE NOT COUNTED. THIS IS A SITUATION IN WHICH THE EVIDENCE IS CLEAR AND UNDISPUTED THAT THERE ARE VOTER ERRORS AND MACHINE ERRORS THAT CREATE THIS UNDER VOTE AND PUNCH CARD EQUIPMENT -- THIS UNDER VOTE IN PUNCH CARD EQUIPMENT. IN FACT, THE DISTRICT COURT, THE TRIAL COURT FOUND, AT PAGE TEN OF THE OPINION, THAT THIS HAD BEEN KNOWN TO COUNTY OFFICIALS FOR MANY YEARS, SO THIS IS NOT A SITUATION IN WHICH YOU SIMPLY HAVE SOMEBODY COMING IN AND SAYING THERE IS -- WE LOST AND WE WANT TO HAVE ANOTHER CHANCE AT IT. THIS IS A SITUATION --

WHAT DO YOU CONTEND, THEN, AS THE STANDARD THAT YOU HAVE -- THAT WE HAVE TO APPLY TO THIS, IN ORDER TO GET A RECOUNT? THERE ARE TWO ISSUES HERE. ONE IS WHETHER OR NOT YOU DEMONSTRATED YOU WERE ENTITLED TO A RECOUNT OF THOSE 9,000 VOTES. THE OTHER ISSUE IS WHETHER OR NOT YOU WOULD ACTUALLY WIN THE CONTEST, WHICH, I THINK, ARE TWO DIFFERENT ISSUES, SO WHAT IS THE STANDARD TO APPLY TO THE FIRST ONE? THAT IS ARE YOU ENTITLED TO A RECOUNT, AND WHAT DID YOU DEMONSTRATE, TO THE TRIAL COURT, THAT YOU CONTEND TO US DEMONSTRATES THAT ENTITLEMENT?

WE DOM STRAIGHTED, FIRST, THAT THERE WERE A LARGE NUMBER OF BALLOTS THAT WERE NOT COUNTED BY THE PUNCH CARD MACHINES. WE DEMONSTRATED, SECOND, THAT, WHEN YOU HAVE A VERY CLOSE ELECTION, YOU HAVE TO HAVE A MANUAL REVIEW OF THOSE BALLOTS, IN ORDER TO HAVE AN ACCURATE TALLY. THAT WAS NOT JUST OUR EXPERT. THAT WAS THEIR EXPERT, MR. AMEN, WHO TESTIFIED THAT YOU HAD TO HAVE A MANUAL RECOUNT IN A CLOSE ELECTION.

BUT WHY WOULDN'T THAT APPLY TO ALL THE OTHER COUNTIES, AT LEAST THE PUNCH CARD COUNTIES, WHERE THERE ARE UNDER VOTES AND THOSE VOTES HAVEN'T BEEN COUNTED. IF WE ARE LOOKING FOR ACCURACY, WHICH HAS BEEN STATED SINCE DAY ONE, THEN WHY ISN'T THE REQUEST MADE, AND WHY WOULDN'T IT BE PROPER FOR ANY COURT, IF THEY ARE GOING TO

ORDER ANY RELIEF, TO COUNT THE UNDER VOTES IN ALL OF THE COUNTIES WHERE, AT THE VERY LEAST, PUNCH CARD SYSTEMS WERE OPERATING. IN OTHER WORDS, IS THERE SOMETHING DIFFERENT ABOUT DADE, BROWARD AND PALM BEACH AND THEIR USE OF THE PUNCH CARD, THAN THE 17 OTHER COUNTIES THAT, ALSO, USED PUNCH CARDS?

I THINK THE FIRST DIFFERENCE IS THAT THAT IS WHERE BALLOTS WERE CONTESTED. THAT IS WHERE, FIRST, A MANUAL RECOUNT WAS REQUESTED, AND THAT IS WHERE BALLOTS WERE CONTESTED, AND THROUGHOUT THE INTERPRETATION, NOT ONLY OF THE CURRENT VERSION OF 168 BUT PRIOR VERSIONS OF THE CONTEST STATUTE, THIS AND OTHER COURTS HAVE LOOKED, NOT AT THE ENTIRE TYPE OF BALLOT THAT MAY HAVE BEEN INVOLVED BUT ONLY THOSE BALLOTS WHO WERE ACTUALLY CONTESTED BY A PARTY.

BUT WE HAVE NEVER HAD A STATEWIDE CONTEST, HAVE WE, IN THIS STATE?

ACTUALLY BACK IN 1916, IN THE GUBERNATORIAL RACE, THERE WAS AN ATTEMPT TO BRING A MANDAMUS BEFORE THIS COURT, BUT I THINK YOU ARE RIGHT, YOU HAVE NOT HAD A STATEWIDE CONTEST, BUT THE STATUTE DOESN'T MAKE A DISTINCTION.

IS THERE A CONNECTION, THEN, BETWEEN THE PROTESTS -- YOU CONTESTED THESE BALLOTS THROUGH THE ORIGINAL PROTEST, SO DO YOU HAVE TO HAVE DONE THAT, IN ORDER TO BRING A CONTEST? A PARTY COULD NOT BRING A CONTEST, WITHOUT HAVING GONE, UNDER SECTION 166, PREVIOUSLY?

NO. I THINK, YOUR HONOR, A PARTY COULD HAVE BROUGHT A CONTEST, WITHOUT HAVING GONE THE 166 ROUTE. I THINK --

BUT NOT OF THE BALLOTS.

NO. I THINK YOU COULD CONTEST THE BALLOTS, EVEN IF YOU HAD NOT PROTESTED THE BALLOTS, I THINK 168 AND 166 ARE ALTERNATIVE REMEDIES, AND I THINK THIS COURT SO HELD, THE LAST TIME WE WERE BEFORE IT, THAT THOSE ARE ALTERNATIVE REMEDIES, AND I DON'T THINK A 166 PROTEST WOULD BE A CONDITION.

HOWEVER, WHERE THERE HAS BEEN A PROTEST, ISN'T -- ISN'T 168 AND 166, AREN'T, INEXTRICABLY LINKED? WHAT WE HAVE GOT IS THAT YOU BRING THE COMPLAINT WITHIN FIVE DAYS AFTER THE PROTEST HAS BEEN COMPLETED BY THE ALASKAN VASING BOARD. -- BY THE LAST CANVASSING BOARD. THE PARTY DEFENDANT TO THE ACTION IS THE COUNTY CANVASSING BOARD AND THE ELECTION CANVASSING BOARD. IT SEEMS TO ME THAT THAT STATUTE, NOW, SINCE 1999, CONTEMPLATES AN EVALUATION OF THE COUNTY CANVASSING BOARD, IF THERE HAS BEEN A PROTEST. WHY IS THAT NOT TRUE?

BECAUSE, YOUR HONOR, THE -- THE 168 STATUTE, CLEARLY, PROVIDES FOR THE CANVASSING BOARD TO TAKE CERTAIN ACTIONS. IN 168, IT IS A PROTESTOR, EXCUSE ME, A CONTEST OF THE ELECTION, AND THERE IS NO DISCRETION OR OTHER RESPONSIBILITIES GIVEN THE CANVASSING BOARD THERE. THE CONTEST PERIOD IS A PERIOD THAT, AS I THINK THIS COURT LAST HELD WHEN WE WERE BEFORE IT, IS DESIGNED TO ALLOW ANY CANDIDATE TO CHALLENGE JUDICIALLY, THE VOTE, AND IT PROVIDES ALTERNATIVE APPROACHES. ONE APPROACH IS, OF COURSE, MISCONDUCT. THAT IS SUBSECTION A, BUT SUBSECTION C, WHICH IS WHAT WE ARE PROVIDING, SIMPLY TALKS ABOUT THE REJECTION OF A SUFFICIENT NUMBER OF --

CAN WE RETURN --

-- LEGAL VOTES.

JUSTICE SHAW.

CAN WE RETURN, FOR A MOMENT, TO JUDGE SAULS' ORDER. HE MAKES CERTAIN FINDINGS. FOR INSTANCE, HE FINDS THAT THERE WAS NO CREDIBLE STATISTICAL EVIDENCE AND NO OTHER COMPETENT SUBSTANTIAL EVIDENCE TO ESTABLISH, BY A PREPONDERANCE OF A REASONABLE PROBABILITY, THAT THE RESULTS OF A STATEWIDE ELECTION IN THE STATE OF FLORIDA WOULD HAVE BEEN DIFFERENT. DO YOU SEE THAT AS A FINDING OF FACT OR A FINDING OF LAW?

WELL, YOUR HONOR, I THINK THAT IT IS A MIXED QUESTION OF LAW AND FACT, TO THE EXTENT THAT IT RELATES TO THE FACTUAL ISSUE. FOR INSTANCE, AT PAGE 442 OF THE TRANSCRIPT, MR. AMEN, WHO IS THEIR WITNESS, TESTIFIED THAT YOU NEEDED TO HAVE A MANUAL REVIEW OF THE BALLOTS. MR. BURTON, WHO WAS THEIR WITNESS, JUDGE BURTON, WHO WAS THEIR WITNESS, TESTIFIED THAT THEY WERE ABLE TO IDENTIFY 215 BALLOTS WHERE THEY COULD CLEARLY ASCERTAIN THE INTENT OF THE VOTERS THAT HAD NOT BEEN COUNTED BY THE MACHINES. WE HAVE 9,000 BALLOTS, IN MIAMI-DADE, THAT ARE ALLEGED -- THAT HAVE NOT BEEN REGISTERED BY THE MACHINE, THAT HAVE NEVER BEEN HAS NOTULELY REVIEWED. -- THAT HAVE NEVER BEEN MANUALLY REVIEWED. EVERY TIME THE BOARDS LOOKED AT THE BALLOTS, THEY FOUND ISSUES.

WHEN A JUDGE MAKES DETERMINATION, BASED UPON THAT, NORMALLY ISN'T THAT A QUESTION OF FACT?

IT IS, YOUR HONOR, BUT HERE THE COURT EXPRESSLY BASED ITS CONCLUSION ON THREE ERRORS OF LAW. FIRST, THAT YOU HAVE TO DO A STATEWIDE RECOUNT, WHICH WE THINK THERE IS NO SUPPORT FOR IT, IN THIS OR ANY OTHER STATE. SECOND, THAT UNDER 168 IT IS AN ABUSE OF DISCRETION STANDARD. WE DON'T THINK, AGAIN, THAT IN TERMS OF WHAT A BALLOT MEANS, WHETHER A BALLOT DOES OR DOES NOT REFLECT A VOTERSER'S INTENT -- A VOTER'S INTENT, THAT IS EXPRESSLY DESIGNED FOR THE CANVASSING BOARD AND, THIRD, IF YOU LOOK AT THE BALLOTS THAT ARE ALREADY ADMITTED IN THE CASE, YOU HAVE TO SHOW A REASONABLE POSSIBILITY THAT IT WILL CHANGE THE ELECTION, BEFORE YOU EVEN LOOK AT THE BALLOTS, AND WE THINK THAT IS INCONSISTENT, FIRST, WITH A STANDARD OF 168, WHICH SAYS "OR PLACE IN DOUBT" AND IS INCONSISTENT WITH THE WAY A TRIAL GOES.

YOU ARE IN YOUR REBUTTAL TIME, BUT WE HAVE ONE QUESTION BY JUSTICE HARDING.

TALKING ABOUT THE BALLOTS, I KNOW THEY WERE INTRODUCED BY THE TRIAL JUDGE, AND I WAS GOING TO ASK THIS QUESTION AS A -- I WAS GOING TO SAY OLD, BUT I MEAN FORMER TRIAL JUDGE. DID ANYBODY EVER PICK UP ONE OF THE BALLOTS AND HOLD IT UP AND SHOW IT TO THE JUDGE AND SAY THIS IS A EXAMPLE OF A BALLOT WHICH WAS REJECTED BUT WHICH A VOTE IS REFLECTED?

NOT A PARTICULAR BALLOT, YOUR HONOR. WE OFFERED THE GROUPINGS OF BALLOTS THAT WE HAD SEGREGATED. ALL OF THOSE, OF COURSE, IN ORDER TO PREVENT CONTAMINATION, WERE NOT GIVEN TO THE LAWYERS. THEY WERE KEPT UNDER THE CONTROL OF THE CLERK OF THE COURT.

BUT NOBODY ASKED THE COURT FOR PERMISSION TO DO THAT OR SHOWED HIM OBJECT OF THOSE -- SHOWED AM ONE OF THOSE BALLOTS -- OR SHOWED HIM ONE OF THOSE BALLOTS?

NO, NOT AS TO ONE PARTICULAR, BUT WE DID ASK HIM TO LOOK AT THE BALLOTS. MR. CHIEF JUSTICE: YOU ARE DEEPLY IN YOUR REBUTTAL TIME, MR. BOIES. I AM SORRY? THANK YOU, MR. DOUGLASS. MR. RICHARDS.

MAY IT PLEASE THE COURT. BARRY RICHARD, ON BEHALF OF GEORGE W. BUSH AND RICHARD CHENEY.

MR. RICHARD, LET ME START WITH MY QUESTION THAT I ASKED MR. BOIES. WHEN THIS CASE WAS HERE, BEFORE, COUNSEL FOR MR. BUSH DID NOT PRESENT ANY ARGUMENT ON MacPHERSON VERSUS BLACKER, YET WHEN IT GOT TO THE SUPREME COURT, COUNSEL FOR MR. BUSH FORCEFULLY ARGUED MacPHERSON VERSUS BECKER -- BLACKER. NOW I NOTE THAT IT IS NOT ARGUED, AGAIN, HERE. IS IT THE POSITION OF MR. BUSH THAT THAT CASE DOES NOT HAVE ANY BEARING ON THIS MATTER?

YOUR HONOR, I THINK THAT THE CASE HAS SUBSTANTIAL BEARING ON THE MATTER. I THINK THAT, WHAT MacPHERSON V BLACKER TELLS US IS EXACTLY AS YOUR HONOR SUGGESTED IT, WHICH IS THAT THIS COURT DOES NOT HAVE THE ABILITY, IN THIS PARTICULAR CASE, INVOLVING PRESIDENTIAL ELECTORS, TO DISREGARD THE STATUTORY SCHEME AND FASHION A REMEDY BASED UPON EXTROORD NARY EQUITABLE POWERS OF THE COURT, SET FORTH IN THE CONSTITUTION.

DO WE HAVE THE RIGHT TO REVIEW THE ACTION OF THE CIRCUIT COURT?

INDEED YOU DO, YOUR HONOR, BUT WE COME HERE IN A SIGNIFICANTLY DIFFERENT POSTURE THAN WE DID BEFORE. WHAT WE COME HERE WITH, NOW, IS BELIED BY THE NATURE OF THE LITIGANTS AND THE PUBLIC INTEREST. IN FACT, THIS IS NOTHING MORE THAN A GARDEN-VARIETY APPEAL, FROM A FINAL JUDGMENT, BY A LOWER COURT THAT REVIEWED AFTER AN ENTIRE, FULL EVIDENTIARY HEARING.

BUT THE LEGISLATURE, HAVING PLENARY POWER, SAID THAT THE CIRCUIT COURT WILL MAKE THAT DETERMINATION.

WELL, I AGREE WITH YOU, YOUR HONOR, AND I WOULD NOT SUGGEST TO THIS COURT THAT THE CIRCUIT COURT IS NOT SUBJECT TO ANY APPEAL. I BELIEVE THAT THE CIRCUIT COURT IS SUBJECT TO APPEAL, BUT IN A VERY LIMITED FASHION, AND I, ALSO, THINK THAT ONE REASON THAT WE HAVE NOT PLACED EMPHASIS ON MacPHERSON VERSUS BLACKER IS BECAUSE, IN FACT, THIS COURT SAID THE SAME THING, IN AN EARLIER MacPHERSON CASE, WHICH JUSTICE WELLS REFERRED TO MacPHERSON VERSUS FLYNN, IN WHICH THIS COURT SAID, SINCE THERE IS NO COMMON LAW RIGHT TO CONTEST ELECTIONS, ANY STATUTORY GRANT MUST NECESSARILY BE CONSTRUED TO GRANT ANY SUCH RIGHTS AS ARE EXPLICITLY SET OUT BY THE LEGISLATURE. THE LEGISLATURE, IN SECTION 168, HAS GIVEN US FIVE, AND ONLY FIVE, GROUNDS FOR AN ELECTION CONTEST, AND ONE OF THEM IS NOT THAT THERE IS A CLOSE ELECTION IN WHICH VOTAMATIC MACHINES ARE USED.

IF I UNDERSTAND THE BOTTOM LINE OF YOUR ANSWER TO THE CHIEF JUSTICE'S QUESTION, IS THAT THIS COURT DOES HAVE JURISDICTION OVER THE TRIAL COURT'S RULING. DO I UNDERSTAND THAT TO BE YOUR ANSWER?

I THINK THAT THIS COURT DOES HAVE LIMITED JURISDICTION OVER --

IN RESPECT TO THE MacPHERSON CASE, IT DOES NOT AFFECT THAT APPELLATE JURISDICTION?

NO. I THINK THIS COURT HAS THE ABILITY TO REVIEW WHAT THE CIRCUIT COURT DID, TO DETERMINE WHETHER THE CIRCUIT COURT VIOLATED THE TRADITIONAL RULES OF --

MUCH IN THE WAY THAT WE WOULD BE DOING IT, IF IT WAS ANOTHER VOTE, COUNTY COMMISSIONER OR ELECTION FOR SOME OTHER OFFICE, A MEMBER OF CONGRESS, AND A CONTEST WAS BROUGHT.

PRECISELY, YOUR HONOR. THE COURT IS THE GREAT LEVEL OR, IN THE -- LEVELOR, IN THAT IT DOESN'T MAKE A DIFFERENCE WHETHER WE ARE TALKING ABOUT LEGISLATORS OR KINGS OR SCHOOL TEACHERS, IT IS THE SAME. THERE ARE TWO QUESTIONS THAT THIS COURT MUST

ANSWER. WAS THERE SUBSTANTIAL COMPETENT EVIDENCE IN THE COURT BELOW TO SUPPORT THE JUDGE'S FINDINGS, AND DID THE COURT APPLY LONG-ESTABLISHED LAW.

REFERRING TO THE SUBSTANTIAL COMPETENT EVIDENCE ISSUE, ISN'T IT HIGHLY UNUSUAL FOR A TRIAL COURT TO ADMIT, INTO EVIDENCE, CERTAIN DOCUMENTS THAT ONE PARTY CLAIMS WILL BE CONTROLLING, WITH REFERENCE TO THE CLAIM THEY BRING TO THE KOUST, AND YET NEVER EXAMINE THOSE DOCUMENTS, BEFORE MAKING THEIR DECISION, AND DIDN'T THAT HAPPEN HERE, WITH THE TRIAL COURT ADMITTING THE DISPUTED BALLOTS INTO EVIDENCE BUT, YET, NEVER LOOKING AT THOSE DOCUMENTS?

WELL, I THINK THAT THE TRIAL COURT ADMITTED, THEORETICALLY, ADMITTED THE BALLOTS.

THEORETICALLY? THE TRIAL COURT EITHER DID OR DID NOT ADMIT THE BALLOTS INTO EVIDENCE. DID THE TRIAL COURT ADMIT THOSE INTO EVIDENCE?

MY RECOLLECTION IS THAT THE TRIAL COURT DID. THERE WERE THOUSANDS OF BALLOTS THAT WERE EMBARGOED, AND MY RECOLLECTION IS THAT THE TRIAL COURT DID. THERE WAS NOT A SUBSTANTIAL DISPUTE AS TO WHETHER OR NOT THE TRIAL KURT COURT COULD ADMIT -- THE TRIAL COURT COULD ADMIT THOSE INTO EVIDENCE. THE TRIAL COURT DIDN'T HAVE THE ABILITY TO DO THAT, UNTIL THERE WAS LEAVE TO DO SO.

WHAT DID 168 MEAN, IN SECTION 199, AND YOU HAVE TOLD US THAT WE HAVE GOT TO FOLLOW THIS STATUTE, THAT SAYS THAT THE CIRCUIT COURT HAS GOT TO DO WHATEVER IS NECESSARY TO ENSURE, WHICH IS RATHER USUAL LANGUAGE TO USE IN A STATUTE -- IS RATHER UNUSUAL LANGUAGE TO USE IN A STATUTE, TO ENSURE THAT IT IS EXAMINED OR CHECKED. IT SEEMS TO ME THAT, IF THE CIRCUIT COURT IS TO LOOK AT THE VERY BALLOTS -- IF THE CIRCUIT COURT ISN'T TO LOOK AT THE VERY BALLOTS THAT HAVE BEEN BROUGHT TO THE COURT FOR REVIEW, WHAT DOES THAT MEAN IN THE CONTEXT OF THIS LITIGATION?

YOUR HONOR, THAT BRINGS US BACK TO MacPHERSON AND BLACKER. THE COURT HAS DONE NOTHING TO CHANGE THE SCHEME, AND THAT SCHEME IS VERY CLEAR. THIS COURT RECOGNIZED, TEN DAYS AGO IN THE HARRIS CASE, THIS COURT SAID WHETHER A MANUAL RECOUNT IS VESTED IN THE BOARD AND DECIDED HOGAN. THE HOGAN CASE WAS INDEED PRECISELY THE SAME AS THIS CASE. IT WAS A CASE IN WHICH THE CANVASSING BOARD ELECTED NOT TO CONDUCT A MANUAL RECOUNT, AND THIS COURT REFERENCED THAT CASE, IN WHICH THEY SAID THAT THE APPLICATION OF SECTION 168 DOES NOT CHANGE THE NECESSITY TO SHOW AN ABUSE OF DISCRETION WHEN IT ARRIVES AT THE COURT. WE HAD AN ABSOLUTE FAILURE, ON THE PART OF THE PLAINTIFFS HERE. THIS COURT GAVE THE PLAINTIFFS THE OPPORTUNITY TO HAVE A TRIAL, TO PROVE THEIR CASE, AND THERE WAS AN ABSOLUTE FAILURE, IN THE RECORD OF THIS CASE, TO ESTABLISH AN ABUSE OF DISCRETION BY ANY OF THE CHALLENGED CANVASSING BOARDS.

EXCUSE ME. COUNSEL, YOU SEEM TO BE SUGGESTING, THEN, THAT YOU CAN NEVER HAVE A CONTEST, UNLESS WHAT HAS OCCURRED HAS, ALREADY, BEEN THROUGH THE PROTEST PROCESS, UNDER 166. WHAT WOULD COUNSEL DO TO CIRCUMSTANCES THAT COME TO LIGHT LATER? FOR EXAMPLE THE PRECINCTS OF THE -- THE BALLOTS OF ONE PRECINCT JUST SIMPLY DID NOT GET INCLUDED IN THE CERTIFICATION. THAT WOULD NOT BE PART OF THE PROTEST. SITUATIONS WHERE IT COMES TO LIGHT THAT VIOLENCE IS USED TO KEEP PEOPLE AWAY FROM THE POLLS. THAT WOULD NOT COME TO LIGHT, DURING THE PROTEST. ARE YOU SUGGESTING THAT THOSE KINDS EVER CIRCUMSTANCES, THEN, CANNOT BE ADDRESSED, UNDER A CONTEST?

NO, SIR. WE DON'T FIND OURSELVES IN THAT POSTURE. WE FIND OURSELVES IN A POSTURE IN WHICH CANVASSING BOARDS TO WHICH THE LEGISLATURE HAS DELEGATED THE AUTHORITY, HAVE MADE DECISIONS, AND THIS IS NO DIFFERENT THAN ANY OF THE HUNDREDS OF CASES THAT COME TO OUR DISTRICT COURTS OF APPEAL AND ULTIMATELY, SOMETIMES, TO THIS COURT, IN WHICH AN ADMINISTRATIVE AGENCY, GIVEN DISCRETION HAS EXERCISED THE DISCRETION AND

THE RULE FOR TIME IMMEMORIAL HAS BEEN THAT THE STANDARD OF REVIEW IS WHETHER OR NOT THAT AGENCY HAS ABUSED ITS DISCRETION ONE OF THE HIGHEST STANDARDS KNOWN TO THE LAW.

WE HAVE A RULING HERE, DO WE NOT, FROM A DISTRICT COURT OF APPEAL, THAT, ON AN APPLICATION FOR MANDAMUS, THAT HAS SAID THAT THE DADE COUNTY CANVASSING BOARD HAD A MANDATORY DUTY TO CONTINUE THE COUNTING OF THE BALLOTS, ONCE THEY DECIDED TO HAVE A RECOUNT, AND THAT ONLY BECAUSE IT COULD NOT MEET A FILING DATE, WOULD THEY NOT GRANT WRIT OF MANDAMUS, SO, INDEED, WE HAVE A REVIEW, DO WE NOT, OF THE VERY SPECIFIC CANVASSING BOARD THAT MADE A DECISION, HERE, AND WE HAVE A LEGAL RULING, BY A DISTRICT COURT OF APPEAL, AS YOU SAY, THAT HAS HELD THAT THEY ERRED IN THAT, THAT THEY DID HAVE A MANDATORY OBLIGATION TO CONTINUE THE COUNT. HOW CAN WE OVERTURN THAT RULE SOMETHING.

THE DISTRICT COURT OF APPEAL DETERMINED NOT TO CONTINUE THE COUNT FOR TWO REASONS. THE FIRST REASON WAS THAT THERE WAS --

THE DISTRICT COURT OF APPEAL OR THE CANVASSING BOARD?

I AM SORRY. THE CANVASSING BOARD DETERMINED NOT TO CONTINUE THE COUNT FOR TWO REASONS. THE FIRST REASON WAS THAT, AFTER THEY HAD DONE THE INITIAL ONE PERCENT PRECINCT COUNT, THEY FOUND SIX VOTES DIFFERENCE IN FAVOR OF VICE PRESIDENT GORE. THE CANVASSING BOARD MADE THE DETERMINATION THAT, BASED UPON THAT SIX VOTES, THERE WAS NO REASON TO BELIEVE THAT THERE WOULD BE A CHANGE IN THE RESULT OF THE ELECTION, ONE OF THE CRITICAL ELEMENTS OF SUBSECTION 168. NOW, THAT ISSUE WAS TRIED BEFORE JUDGE SAULS, AND HE RESOLVED CONFLICTING EVIDENCE, IN FAVOR OF THE FACT --

WHERE IS THERE ANY FINDING BY JUDGE SAULS THAT THE REASON THAT THE RECOUNT WAS DISCONTINUED IN DADE COUNTY WAS BECAUSE THE CANVASSING BOARD HAD INITIALLY DECIDEDED THAT THERE WOULD BE NO MERIT TO HAVING A RECOUNT? IS THERE SUCH A FINDING?

HE DOES NOT MAKE THAT FINDING, BUT HE DOES MAKE THE FINDING THAT THERE WOULD NOT HAVE BEEN A DIFFERENCE IN THE RESULT, AND THAT WAS WITHIN HIS DISCRETION TO MAKE THAT FINDING, BECAUSE HE HAD CONFLICTING EVIDENCE.

DO YOU AGREE THAT, IN THE THIRD DISTRICT'S OPINION, THAT THEY ONLY SET OUT THAT THERE WAS A SINGLE REASON, A SINGLE REASON FOR STOPPING THE RECOUNT, AND THE SINGLE REASON WAS THE INABILITY TO MEET A DEADLINE?

YES, SIR, AND I WILL ADDRESS THAT REASON, AS WELL, BUT --

HELP ME WITH THE RECORD, IN THIS CASE, THAT WE HAVE, WHERE IT SHOWS A CONTRARY FINDING OR HOLDING, WITH THAT HOLDING OF THE THIRD DISTRICT COURT OF APPEAL. IN OTHER WORDS WHERE WOULD I LOOK IN THIS RECORD?

LET ME ADDRESS BOTH OF YOUR QUESTIONS, AND SO LET ME BEGIN WITH THE ONE THAT YOU ASKED. THE CANVASSING BOARD, IT IS BEYOND DISPUTE, MADE THE DECISION NOT TO CONTINUE, BECAUSE THEY DETERMINED THAT, ONCE THIS COURT HAD SET A DEADLINE OF NOVEMBER 26, THAT THEY COULD NOT POSSIBLY MEET THAT DEADLINE. NOW, I PAWS, HERE, TO NOTE -- NOW, I PAUSE, HERE, TO NOTE THAT IN RETROSPECT THEY MADE THE RIGHT DECISION, BECAUSE PALM BEACH COUNTY, WHICH IS A SMALLER COUNTY, WAS WELL INTO THEIR COUNT AT THAT TIME AND WAS UNABLE TO MEET THAT DEADLINE, AND THE LAW OF THIS STATE, FROM TIME IMMEMORIAL, SAYS THAT NO GOVERNMENT AGENCY AND NO PERSON IS REQUIRED, BY LAW, TO ENGAGE IN A FUTILE ACT. THAT, ALONE, IS SUFFICIENT TO UPHOLD THE DECISION OF THE

CANVASSING BOARD, BECAUSE THEY CLEARLY -- ONE CANNOT SAY THAT REASONABLE MEN COULD NOT DIFFER AS TO THAT DECISION.

BUT WOULD YOU HOLD THAT THOUGHT FOR A MOMENT, BECAUSE IN OUR EARLIER DECISION, INTERPRETING THE STATUTES, WITH REFERENCE TO THE FILING DATE, WE, IN ESSENCE, SAID THAT THE SECRETARY OF STATE COULD REFUSE A FILING BY A PARTICULAR COUNTY ONLY, IF, ONE, IT WOULD INTERFERE WITH A FEDERAL OBLIGATION TO HAVE THE ELECTORS DETERMINED BY A FIXED DATE OR, TWO, THAT IT WOULD INTERFERE WITH A CONTEST. NOW, HAS THERE BEEN ANY SHOWING, IN THIS CASE, THAT EITHER OF THOSE ISSUES APPLIED TO THE DECISION BY THE CANVASSING BOARD, TO STOP THEIR COUNTING?

NO, SIR, BUT THIS COURT, ALSO, SAID YOU MUST HAVE YOUR VOTES IN BY NOVEMBER 26, AND THE CANVASSING BOARD, HAVING MADE THE DECISION IT WAS IMPOSSIBLE, HAD TWO CHOICES. ONE WAS TO NOT CONTINUE THE COUNT, AND THE SECOND WAS TO SEND UP PARTIAL COUNT, WHICH, ACCORDING TO THE EVIDENCE BEFORE THE BOARD, WOULD HAVE CUTOFF A SUBSTANTIAL NUMBER, NOT ONLY OF PRECINCTS THAT MIGHT HAVE BEEN SIGNIFICANTLY DIFFERENT IN THE RESULT BUT, ALSO, THAT WOULD HAVE DISENFRANCHISED A PARTICULAR MINORITY, WITHIN DADE COUNTY. ONE CANNOT SAY THAT REASONABLE MEN AND WOMEN WOULD NOT BE ABLE TO DIFFER, AS TO THE DECISION OF THAT CANVASSING BOARD, BUT THE OTHER POINT THAT I WOULD LIKE TO MAKE IS THAT, SUBSEQUENT TO THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, THERE WAS A TRIAL, AND IN THAT TRIAL, JUDGE SAULS RESOLVED CONFLICTING EVIDENCE AS TO THE QUESTION OF WHETHER, IN FACT, THERE WOULD HAVE BEEN A CHANGE IN THE ELECTION, REGARDING DADE COUNTY, AND DETERMINED THAT THERE WOULD NOT HAVE BEEN. THERE WAS SUBSTANTIAL COMPETENT --

YOU KEEP ON USING THE LANGUAGE THAT THERE SHOULD AND REASONABLE PROBABILITY OF A CHANGE, AND YOU HAVE SAID THAT, AGAIN, WE HAVE GOT TO STICK TO THE STATUTE. MY READING OF THE STATUTE SAYS SUFFICIENT TO CHANGE OR PLACE IN DOUBT THE RESULTS OF THE ELECTION. PLACE IN DOUBT IS A DIFFERENT STANDARD THAN A REASONABLE PROBABILITY OF A DIFFERENT RESULT. DO YOU AGREE WITH THAT?

I AM NOT SURE, JUSTICE PARIENTE, BUT I DON'T THINK THAT WE NEED TO ADDRESS THAT ISSUE AT THIS TIME, BECAUSE THERE WAS NO EVIDENCE IN THE RECORD UPON WHICH ONE COULD CONCLUDE -- THERE WAS NO EVIDENCE OF ANY SINGLE VOTING MACHINE THAT MISS OPERATED. THERE WAS -- THAT MISOPERATED. THERE WAS NO EVIDENCE THAT ANY VOTING MACHINE WAS UNDER REPORTED.

THE FAILURE OF A MACHINE TO READ A VOTE THAT MIGHT OTHERWISE BE PROPERLY CAST FOR THE A CANDIDATE, WOULD YOU AGREE THAT IT IS NOT THE ROLE OF THE JUDICIARY, IN A CONTEST, TO EVALUATE UNDER VOTES. IS THAT YOUR POSITION TODAY?

MY POSITION IS TWOFOLD. THE FIRST ONE IS --

IS THAT ONE POSITION, THAT THIS ELECTION CONTEST STATUTE DOES NOT VEST WITHIN THE JUDICIARY, THE AUTHORITY TO REVIEW VOTES THAT WERE PROPERLY CAST BUT NEVER COUNTED?

WELL, NUMBER ONE, IT IS NOT THE ROLE OF THE JUDICIARY TO DO SO, WHEN A CANVASSING BOARD HAS ALREADY DONE SO AND HAS MADE A REASONABLE DECISION, AND THAT HAPPENED IN PALM BEACH COUNTY, AND I CAN CONCEIVE OF NO STANDARD THAT THIS, OR ANY OTHER COURT, WOULD IMPOSE UPON THE PALM BEACH COUNTY CANVASSING BOARD --

LET'S REFER TO DADE COUNTY, WHERE IT IS DISPUTED THAT 9,000 VOTES THAT HAVE BEEN THE SUBJECT OF REQUESTS, SINCE NOVEMBER 9, HAVE NEVER BEEN COUNTED?

I THINK IT IS DISPUTED, JUSTICE PARIENTE. ALL WE KNOW, IN DADE COUNTY, IS THAT THE VOTING APPARATUS, WHICH NOBODY PROVED WAS DEFECTIVE, DETERMINED THAT 9,000 VOTES WERE NOT PROPERLY RECORDED BY THE VOTER.

BUT WE KNOW THAT, IN THE FIRST 20 PERCENT, THAT 434, SOMETHING, MORE OR LESS, WERE LEGAL VOTES WERE RECOVERED. WE HAVE, ALREADY, SAID THAT WE SHOULDN'T CHALLENGE PALM BEACH COUNTY. WE KNOW THAT SOMEWHERE BETWEEN 174 TO 215 VOTES WERE RECOVERED, AND BROWARD COUNTY, WHOSE CERTIFICATION HAS BEEN INCLUDED, HAS SEVERAL HUNDRED VOTES, ALL WITH THE SAME TYPE OF MACHINE. ARE YOU, REALLY, SAYING THAT THE VOTES, THE 9,000 VOTES IN DADE COUNTY WERE THE EXACT SAME VOTES THAT WERE LOOKED AT IN PALM BEACH COUNTY AND BROWARD COUNTY SHOULD NOT BE LOOKED AT, IN A CONTEST ACTION?

NOT AT THIS POINT, YOUR HONOR, FOR TWO ROPES. THE FIRST IS THAT THE CANVASSING BOARD MADE THE JUDGMENT THAT, AT THE DEADLINE THAT THIS COURT SET FOR EVERYBODY, IT COULD NOT CONCEIVABLY COMPLETE THEIR COUNT, AND I WOULD SUGGEST TO THIS COURT THAT, BASED UPON WHAT THE FLORIDA LEGISLATURE HAS TOLD US, THAT THEY DID NOT HAVE THE AUTHORITY TO SUBMIT A PARTIAL COUNT, ONLY A FULL COUNT, AND HAD THEY DONE SO, THEY PROBABLY WOULD HAVE VIOLATED THE FEDERAL VOTING RIGHTS ACT AND THE UNITED STATES CONSTITUTION. THAT IS THE FIRST REASON, AND THIS COURT HAS NO BASIS, IN THIS RECORD, TO DETERMINE THAT THE CANVASSING BOARD ABUSED ITS DISCRETION IN MAKING THAT DECISION.

LET ME GET AN UNDERSTANDING OF WHAT YOUR POSITION IS THAT WE ARE TALKING ABOUT, WHEN WE SAY "AN UNDER VOTE". ARE THESE VOTES -- HAVE THESE BALLOTS BEEN SENT THROUGH THE MACHINE?

THEY HAVE, YOUR HONOR.

I GOT, FROM READING SOMEWHERE, THAT WHAT WE ARE DEFINING OR WHAT IS BEING ARGUED HERE IS AN UNDER VOTE IS -- ARE BALLOTS WHICH HAVE NOT BEEN MANUALLY COUNTED. IS THAT --

THAT'S CORRECT, YOUR HONOR. THE RECORD INDICATES THAT EVERYONE OF THESE VOTES WAS SENT THROUGH THE MACHINE. THEY WERE REJECTED BY THE MACHINE, BECAUSE OF THE PARAMETERS THAT HAD BEEN SET. THE MACHINE DETERMINED THAT THE VOTES HAD NOT BEEN PROPERLY MARKED ON THE BALLOTS.

THAT GOES TO THE REJECTION ISSUE. YOU WOULD AGREE WITH THAT? IS THAT YOU ARE SAYING THAT THEY HAVE GONE THROUGH THE EQUIPMENT, SO THEREFORE THEY WERE NOT REJECTED. IS THAT A FAIR READING OF YOUR ARGUMENT?

YES, YOUR HONOR. THE SAME --

THE NEXT STATEMENT, AND LET'S TAKE IT ONE STEP FURTHER. IF THAT IS NOT ACCEPTABLE OR IS CONTRARY TO FLORIDA LAW THAT THOSE ARE CONSIDERED TO BE REJECTED, DO YOU AGREE, WITH THE STANDARDS THAT HAVE BEEN APPLIED IN OTHER STATES, WITH REGARD TO VERY SIMILAR STATUTORY LANGUAGE, AS TO WHAT YOU DO TO DETERMINE IF THERE COULD BE A CHANGE IN THE ELECTION OR A DOUBT AS TO THE RESULT IN THE ELECTION, I.E. LOOK TO SEE, AS TO, FIRST, WHETHER THERE WERE ENOUGH VOTES THAT WERE NOT COUNTED, NOT AS TO WHO THEY WOULD BE FOR. DO YOU AGREE WITH THAT STANDARD?

I DON'T AGREE THAT IT APPLIES UNDER THESE CIRCUMSTANCES, YOUR HONOR.

THE STANDARD IS WHAT I AM LOOKING TO. DO YOU DISAGREE WITH THAT STANDARD OR WHAT

STANDARD WOULD YOU HAVE APPLIED, IF YOU ASSUME THAT THEY WERE REJECTED. HOW DOES ONE PROVE THAT THERE WOULD HAVE BEEN A CHANGE IN RESULT OR DOUBT AS TO THE RESULT? THAT HAS NOT BEEN ESTABLISHED --

IF WE ARE IN A CIRCUMSTANCE IN WHICH IT IS APPROPRIATE TO LOOK AT BALLOTS, THEN IT IS THE JOB OF THE CANVASSING BOARD TO DO PRECISELY WHAT THE PALM BEACH CANVASSING BOARD DID, AND THAT IS TO USE THE STANDARD THAT THE PALM BEACH CANVASSING BOARD USED. NOW, I PAWS, HERE, TO POINT OUT THAT -- NOW, I PAUSE HERE TO POINT OUT, BECAUSE IT IS OUR BELIEF THAT THE PALM BEACH COUNTY CANVASSING BOARD CHANGED MIDSTREAM AND THEY DID NOT HAVE ANY DIMPLES, AND THEY CHANGED THAT, BUT TO MAKE A STANDARD, THIS COURT, BY REFERENCE TO PULLEN, ADOPTED THAT STANDARD, AND THAT IS EXACTLY WHAT THE PALM BEACH CANVASSING BOARD DID, BUT WE NEVER REACHED THAT STAGE. THERE ARE 64 COUNTIES IN THE STATE OF FLORIDA THAT DID NO MANUAL RECOUNT, AND WHAT MR. BOIES IS SUGGESTING IS THAT EVERYONE OF THOSE COUNTIES, SIMPLY BECAUSE THEY HAD A PUNCH CARD SYSTEM, MUST, AUTOMATICALLY, DO A MANUAL RECOUNT.

I AM NOT SPEAKING OF THE STANDARD OF THE MANUAL BALLOT. I AM SPEAKING OF HOW DOES ONE DEMONSTRATE THAT THERE WOULD BE SUFFICIENT TO CHANGE OR PLACE IN DOUBT? FOR EXAMPLE, NEW JERSEY SEEMS TO HAVE SAID, IN DETERMINING A VERY SIMILAR STATUTE, THAT YOU WOULD LOOK TO SEE THAT THEY HAD ENOUGH VOTES THERE AND YOU WOULD ASSUME THAT THEY WOULD BE FOR THE CHALLENGING CANDIDATE, AND THAT IS ENOUGH TO PLACE OR CHANGE THE RESULTS. ARE YOU SUGGESTING A DIFFERENT STANDARD THAN THAT?

NO. I THINK THE STANDARD IS THE SAME STANDARD OF BURDEN THAT EVERY PLAINTIFF CARRIES IN EVERY CASE, WHICH IS TO COME INTO COURT AND TO PROVE THAT THERE IS SOMETHING WRONG WITH SOME BALLOT OR SOME MACHINE SOMEWHERE, AND THAT THERE ARE ENOUGH OF THOSE THAT WE CAN SAY THAT, WHATEVER WE CALL IT, IT WOULD PLACE THE ELECTION IN DOUBT. THIS PLAINTIFF DID NOT DO SO.

WELL, IF YOU ACCEPT THAT FIRST PRONG THAT JUSTICE LEWIS HAS ASKED YOU IF YOU HAVE AGREED WITH, AND AT LEAST -- I AM NOT SURE WHETHER -- IT SEEMS THAT YOU HAVE SAID THAT YOU DO AGREE WITH, AND THAT IS THAT OTHER COURTS HAVE SAID THAT, FIRST, YOU HAVE TO SHOW THAT THERE ARE A SUFFICIENT NUMBER OF CONTESTED OR CHALLENGED, QUESTIONABLE BALLOTS THAT WOULD MAKE A DIFFERENCE. NOW, IF YOU DO ACCEPT THAT STANDARD, THAT HAS BEEN SET OUT IN SOME OTHER STATE COURTS' DECISIONS, WOULDN'T YOU AGREE THAT, AT LEAST AND FOR THAT PRELIMINARY STEP THAT, THE PLAINTIFFS, HERE, HAVE MET. THAT THAT IS THEY HAVE SUBMITTED THAT THERE ARE, LIKE, 9,000 OR WHATEVER THE NUMBER IS, CHALLENGED BALLOTS, AND THAT THERE IS A DIFFERENCE IN THE OUTCOME OF THE ELECTION THAT IS PRESENTLY MEASURED ONLY IN HUNDREDS OF BALLOTS, SO AT LEAST THAT PRELIMINARY STEP OF SAYING THE NUMBER OF CHALLENGED BALLOTS WOULD PLACE IN QUESTION THE OUTCOME OF THE ELECTION, THAT THEY HAVE AT LEAST MET THAT PRELIMINARY STEP?

NO, SIR. I EMPHATICALLY DISAGREE WITH THAT.

AND DO YOU DISAGREE ON THE BASIS OF APPLYING THAT STANDARD, OR DO YOU AGREE -- DISAGREE ON THE BASIS THAT THEY HAVE NOT MET THAT STANDARD?

NO, SIR. THEY HAVE NOT MET THEIR BURDEN OF PROOF, AND THE ONLY THING THEY DID WAS PUT TWO WITNESSES ON THE STAND TO SAY THAT THEY WERE INSPECTING AND VOTE AMATIC MACHINES ARE INHERENTLY UNRELIABLE, AND WHAT THEY ARE SUGGESTING IS THAT, ANY TIME SOMEBODY USED A VOTAMATIC MACHINE IS USED AND SOMEBODY MISS COUNTS A BALLOT, THEN --

I THINK JUSTICE SHAW HAS A QUESTION. AND YOU ARE IN LINE IF -- YOU ARE IN LINE WITH YOUR

TIME.

EARLIER ON, THERE WAS A QUESTION, IT SEEMS JUDGE SAULS SET A THRESHOLD AND SET THAT, IN EFFECT, THAT THE PLAINTIFFS COULD NOT PREVAIL, EVEN IF NO EVIDENCE WAS PUT ON, UNTIL THEY MET THIS THRESHOLD. AND ULTIMATELY HE DECIDED THAT HE BETWEEN NOT HAVE TO LOOK -- THAT HE DID NOT HAVE TO LOOK AT THE BALLOTS, BECAUSE THAT THRESHOLD HAS NOT BEEN MET. IS THAT A CORRECT --

THAT'S CORRECT, YOUR HONOR. THAT'S CORRECT.

-- CORRECT STATEMENT?

WHAT DID YOU SEE THAT THRESHOLD AS BE SOMETHING.

TO MEET THE ELEMENTS OF THE CASE, AND IN THIS PARTICULAR INSTANCE, TO SHOW THAT THERE WAS ANY REASON TO BELIEVE THAT A VOTER WAS DENIED THE RIGHT TO VOTE BECAUSE OF SOMETHING OTHER THAN THE VOTER'S OWN FAULT. THERE WAS NOT A SINGLE SHRED OF EVIDENCE IN THIS CASE FROM A SINGLE VOTER TO SHOW. THAT THERE WAS NOTHING, HERE, BUT THE SPECULATION OF TWO WITNESSES THAT VETVOTAMATIC MACHINES DO NOT MEET THAT STANDARD.

WHERE DO YOU SHOW THAT THAT MISTAKE WAS MADE, THROUGH NO FAULT OF THE VOTER?

IT SEEMS TO ME THAT WE HAVE GOTTEN OFF OF WHAT THE STANDARD IS FOR SHOWING A REJECTION OF VOTES, AND IT SEEMS TO ME THAT THE STATUTE, SUBSECTION THREE, SAYS THAT REJECTION OF VOTES, WHICH MAY PUT IN DOUBT THE RESULT OF THE ELECTION, AND SO THAT IS NOT THAT YOU HAVE TO DEMONSTRATE THAT THE ELECTION, REALLY, THAT I AM GOING TO WIN, BUT IT IS IN DOUBT THAT I DID NOT WIN. SO ISN'T THAT A DIFFERENT STANDARD? I AM, REALLY, HAVING A PROBLEM WITH THE REASONABLE PROBABILITY OF A DIFFERENT RESULT STANDARD THAN JUDGE SAULS TALKS ABOUT, VERSUS THE REJECTION OF VOTES THAT WOULD PUT THE ELECTION IN DOUBT. COULD YOU EXPLAIN THE DIFFERENCE IN THE TWO.

I DON'T THINK IT'S NECESSARY FOR US TO DISTINGUISH, GIVEN THE RAZOR THIN RECORD WE HAVE IN THIS CASE. THE ONLY WAY THAT ONE CAN CONCLUDE THAT EITHER OF THOSE STANDARDS WAS NOT MET, IN THIS CASE, BASED UPON THIS RECORD, IS TO CONCLUDE THAT, IN EVERY CASE IN WHICH A VOTE AMATIC MACHINE IS USED AND THE RACE IS CLOSE THAT, WE MUST RECOUNT IN EVERY COUNT THAT USED THOSE MACHINES, BECAUSE THAT IS WHAT THE EVIDENCE WAS IN THIS CASE.

WE BETTER GIVE MR. KLOCK A CHANCE --

I HAVE ONE OTHER THING --

I WANT TO WARN COUNSEL THAT WE ARE GOING TO OBSERVE OUR TIME LIMITS HERE, BUT YOU AND MR. KLOCK PROCEED.

THIS WILL TAKE ONE SECOND HERE, AND THAT IS TO ESTABLISH THE FACT THAT YOU HAVE TO ESTABLISH THE SECOND ELEMENT, WHICH IS THAT WHATEVER STANDARD YOU USED, IT WOULD HAVE CHANGED THE RESULT OF THE ELECTION, IF YOU LOOK AT THE EVIDENCE HERE, AND YOU LOOK AT THE LOWER COURT JUDGE'S DETERMINATION, NO MATTER WHICH STANDARD YOU USE, THERE WAS INSUFFICIENT EVIDENCE TO INDICATE THAT, AND THIS COURT CANNOT REVERSE THE LOWER COURT JUDGE, UNLESS THERE IS A COMPLETE LACK OF SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT HIS DECISION, REGARDLESS OF THE STANDARD. THANK YOU.

MR. KLOCK.

MAY IT PLEASE THE COURT. I THINK I REMEMBER THE FIRST QUESTION. WE DID NOT ARGUE BLACKER, IN THE SUPREME COURT, ON BEHALF OF THE SECRETARY AND THE CANVASSING COMMISSION, BUT I THINK THE ANSWER TO YOUR QUESTION IS THIS, THAT THE JUDICIARY, OBVIOUSLY, HAS THE APPELLATE POWER TO REVIEW WHAT A CIRCUIT COURT DOES. THERE IS A CONSTRICTION, HOWEVER, AND I THINK THAT CONSTRICTION IS PICKED UP IN THE LANGUAGE OF THE SUPREME COURT, AND THAT HAS TO DO WITH THE CONCERN, IN THIS KIND OF ELECTION, HAVING TO DO WITH PRESIDENTIAL HE ELECTORS, WHICH -- HE ELECTORS, WHICH IS DIFFERENT THAN THE KIND OF ELECTION REFERRED TO BY JUSTICE ANSTEAD, AND THAT IS PAGE 6 SAYS, SINCE ELECTION LAW WOULD DETERMINE THE FINALITY OF THE STATE'S ELECTION, IF MADE% UNIT TO OR BEFORE THE ELECTION, UNLESS A WISH TO CONTINUE THE SAFE HARBOR, WITH COUNSEL, WITH ANY CONSTRUCTION OF THE ELECTION CODE WHICH COUNSEL MIGHT DEEM TO BE IN CONFLICT WITH THE LAW. THAT IS THE POWER THAT YOU HAVE. THE LEGISLATURE HAS THE POWER TO SELECT HE ELECTORS. IN FLORIDA, THAT DECISION IS UP TO THE PEOPLE, BUT I THINK YOU HAVE TO BE CAREFUL TO CONSTRUE CONSTRUCTION OF STATUTES OR REMEDIES TO NOT DO ANYTHING THAT WOULD CONSTITUTE A CHANGE IN THE LAW, BECAUSE IF THAT IS DONE, IT WOULD PLACE, IN JEOPARDY, THE SAFE HARBOR, IF THE SUPREME COURT INTENDS TO DO THAT, OR IT WOULD PLACE IN JEOPARDY ANY --

WHY ISN'T THERE CONFLICT WITH OUR PREVIOUS DECISION, WITH REGARD TO THE FACT THAT YOU HAVE A FEDERAL SCHEME THAT HAS CERTIFICATIONED DATES OR A CALENDAR IN PLACE, AND THAT WE HAVE INTERPRETED TO STATUTE TO BE CERTAIN THAT THE VOTES ARE COUNTED AND FINALLY COUNTED, BEFORE THAT FIXED DATE COMES INTO PLAY? WHY DOESN'T IS THAT THAT TAKE -- WHY DOESN'T THAT TAKE CARE OF IT? I DON'T KNOW THAT YOU ARE SAYING THAT IT DOESN'T. I AM ASKING YOU.

NO. JUSTICE ANSTEAD, I THINK THE PROBLEM IS THERE IS NO WAY OF READING HARRIS. HARRIS WAS NOT LIMITED TO DEALING WITH PRESIDENTIAL ELECTION CONTESTS, OBVIOUSLY. THE SUPREME COURT OF FLORIDA WAS DEALING WITH ISSUES THAT HAD TO DO WITH THE FLORIDA ELECTION CODE.

AND THE FLORIDA ELECTION CODE, AS ENACTED BY THE LEGISLATURE, IS A SINGLE ELECTION CODE, IS IT NOT?

-- THAT IS THAT THE FLORIDA LEGISLATURE, AFTER SUBMITTING TO THE VOTERS OF FLORIDA, THE AUTHORITY TO PICK THEIR PRESIDENTIAL HE ELECTORS, HAS NOT -- PRESIDENTIAL HE ELECTORS, HAS NOT SAID WE ARE GOING TO HAVE ONE ELECTION CODE, NOW, TO REVIEW THAT ELECTION, AND WE ARE GOING TO HAVE ANOTHER ELECTION CODE TO REVIEW ALL OTHER ELECTIONS, HAVE THEY?

YOUR HONOR, THE FLORIDA ELECTION CODE IS A SHORT FORM FOR INCLUDING ALL OF THE VARIOUS STATUTES THAT DEAL WITH ELECTIONS IN FLORIDA. THERE IS ONE COLLECTION OF LAWS THAT DEAL WITH THAT, BUT THERE ARE DIFFERENT PROVISION THAT IS DEAL WITH PRESIDENTIAL ELECTIONS, IN 103, THAN DEAL WITH OTHER ELECTIONS. I THINK THE DIFFICULT --

WELL, IN TERMS OF ANY OF THE ISSUES THAT WE HAVE BEEN TALKING ABOUT, AS FAR AS COUNTING VOTES AND BALLOTS AND FILING THEM, AND RETURNS, AND ALL OF THOSE THINGS, THERE IS SIMPLY A SINGLE SCHEME, IS THERE NOT?

YOUR HONOR, I DON'T THINK THAT THERE, REALLY, IS. I THINK HARRIS IS A SUBSTANTIAL DEPARTURE. IF THE TEST IS --

TELL ME WHERE THERE IS A SEPARATE SCHEME FOR CONSIDERING THE OUTCOME OF THE HE ELECTORS FOR PRESIDENT, AND THIS PROCEEDING IS A GOOD EXAMPLE OF THIS, AND THAT IS

THAT WE HAVE HAD A CONTEST, OKAY, FILED IN THE CIRCUIT COURT. DO YOU AGREE THAT THE CONTEST STATUTE APPLIES TO THE SELECTION, THE ELECTION, BY THE PEOPLE OF FLORIDA, OF THEIR PRESIDENTIAL ELECTORS?

I THINK THAT THE CONTEST STATUTE CAN APPLY IN THIS SITUATION, IF IT IS APPLIED PROPERLY.

DOES IT APPLY?

YES.

AND IT IS A CONTEST STATUTE THAT APPLIES TO ALL ELECTED OFFICIALS, DOES IT NOT?

NO, BUT, YOUR HONOR, THE PROBLEM IS THAT YOU, THEN, CAN'T TAKE THE NEXT STEP. THE FACT IS THE COURT CAN'T CHANGE THE LAW. IF THE COURT CHANGES THE LAW, THEN YOU RUN AFOUL OF SECTION FIVE AND THE SAFE HARBOR.

BUT YOU ARE NOT SUGGESTING THAT THE CONSTRUCTION OR CHANGE IN A SENTENCE IS A CHANGE IN LAW, ARE YOU? CERTAINLY THE FIRST TIME, IF A DISPUTE ARE A OOISZ, SOMEBODY MUST -- ARISES, SOMETHING MUST SAY, IF A DISPUTE CONVENES, SOMEBODY MUST DECIDE THE WAY IT IS DONE.

BUT JUSTICE ANSTEAD THERE, IS BAGGAGE THAT THE LEGISLATURE MUSCARE ON ITS BACK, BEFORE -- MUST CARRY ON ITS BACK, BEFORE A DETERMINATION BY THE SUPREME COURT. GOING FROM 17 DAYS TO 19 DAYS, THAT IS A LOT OF BAGGAGE FOR THE WORD TO CARRY IN THAT REGARD. I THINK THAT THE HARRIS DECISION WAS BASED ON A NUMBER OF PRINCIPLES, COMMON LAW PRINCIPLES, CONSTITUTIONAL PRINCIPLES, EQUITABLE PRINCIPLES, BUT IF YOU WANT TO GO BACK TO STATUTORY CONSTRUCTION, YOU HAVE A PROBLEM, BECAUSE THE INTERPRETATION IS SUFFICIENTLY BROAD THAT, I THINK, IF FAIRLY REVIEWED, IT CONSTITUTES A CHANGE IN THE LAW, TITLE THREE.

LOOKING AT 168, I AM LOOK ING AT THE ONE SENTENCE THAT, REALLY, SEEMS TO BE IN DISPUTE HERE, AND THAT IS THAT LEGAL VOTES WERE REJECTED, AND IT WOULD HAVE MADE OR CHANGED THE RESULT OR PLACED IN DOUBT THE RESULT. NOW, IS IT IMPOSSIBLE FOR THIS COURT TO APPLY THAT TO THE FACTS THAT WE HAVE? WITHOUT DOING A CHANGE IN THE LAW?

YES, YOUR HONOR, BECAUSE THE PROBLEM IS THAT YOU HAVE TO CREATE A PILE OF LAW TO DO IT. YOU HAVE TO DO A NUMBER OF THINGS. YOU HAVE TO, FIRST, FIND THAT, IN A PRESIDENTIAL RACE WHERE YOU ARE ELECTING 27 ELECTORS, THAT YOU CAN DO IT ON A COUNTY BY COUNTY BASIS, THEN YOU HAVE TO FIGURE OUT AWAY TO HAVE THE CONTEST STATUTE YOODZ USED, TO AND -- USED, TO APPLY A STANDARD, WHERE THE ONLY STANDARD WE HAD FOR A RECOUNT, WERE SITUATIONS PURSUANT TO 166, BECAUSE THAT IS PUT ASIDE, IS THE ONLY BASIS TO, COMMON LAW, HAVE A MANUAL RECOUNT, IS SECTION 166, AND THAT CALLS FOR FINDING THE VOTERS' INTENT, BUT IT, ALSO, ADDS THREE SPECIFIC PEOPLE THAT ARE IN A UNIFORM BASIS THROUGHOUT THE STATE, THE COMBINATION OF WHATEVER THE VOTERS' INTENT IS PLUS THE THREE PEOPLE IS WHATEVER IS DONE THERE. WE GO FROM THERE TO A CIRCUIT JUDGE IN LEON COUNTY WHOM, I SUPPOSE, HAS TO COME UP WITH A STANDARD THAT IS NOT ARTICULATED IN THE LAW, AND AS YOUR HONOR POINTED OUT, EACH TIME YOU ASKED THE QUESTION, YOU TALKED ABOUT LEGISLATION IN OTHER STATES. THAT IS WHERE IT HAS TO COME FROM. THERE IS NO INDICATION THAT THE FLORIDA LEGISLATURE INTENDED, BY ACKNOWLEDGING AND RESPECTING THE POWER OF THE STATE JUDICIARY TO INTERPRET LAWS, THAT THE JUDICIARY WOULD BE IN A POSITION OF HAVING TO CREATE THE STANDARDS THAT WOULD BE APPLIED IN THIS KIND OF SITUATION. THAT IS THE PROBLEM WE HAVE.

MR. KLOCK, I THINK YOUR TIME IS UP. THANK YOU VERY MUCH. MR. BOIES, I WILL GIVE YOU ONE EXTRA MINUTE, SINCE MR. KLOCK'S ANSWER TO THAT QUESTION --

THANK YOU YOUR HONOR. LET ME BEGIN BY EMPHASIZING WHAT I THINK ALL THREE COUNSEL, WHO HAVE SPOKEN TODAY, AGREE ON. FIRST, IS THAT THIS COURT HAS JURISDICTION OVER THIS CASE. SECOND, THAT 168 APPLIES TO PRESIDENTIAL ELECTIONS. THE THIRD POINT THAT I THINK THERE IS AGREEMENT ON, AND THAT IS THAT THIS COURT SHOULD NOT CHANGE THE LAW. IT MAY HAVE TO INTERPRET THE LAW THAT EXISTS. IT SHOULD NOT CHANGE THE LAW.

MR. BOIES, LET ME ASK YOU ABOUT ANOTHER -- THE PART OF THAT US SUPREME COURT OPINION OF MONDAY THAT MR. KLOCK JUST REFERRED TO. AND THAT IS THAT THE US SUPREME COURT DID SAY THAT A LEGISLATIVE WISH TO TAKE ADVANTAGE OF THE SAFE HARBOR WOULD COUNSEL AGAINST ANY CONSTRUCTION OF THE ELECTION CODE THAT CONGRESS MIGHT BE DEEMED TO BE A CHANGE IN THE LAW. HOWEVER, DOESN'T THAT, ALSO, MEAN THAT, IF WE ARE GOING TO HAVE -- TAKE ADVANTAGE OF SECTION FIVE, THAT ALL OF THESE CONTESTS HAVE TO BE CONCLUDED, AS YOU TOLD ME BEFORE, WHEN WE WERE HERE BEFORE, BY DECEMBER 12, AND WE DON'T HAVE A REMEDY, HERE, THAT CAN DO THAT BY DECEMBER 12.

YOUR HONOR, I THINK YOU DO HAVE DREM DI THAT CAN -- REMEDY THAT CAN DO THAT BY DECEMBER 12. I THINK, FIRST, ALMOST ALL OF THE ISSUES, IN TERMS OF NUMBER OF ISSUES, ALTHOUGH NOT IN TERMS OF THE NUMBER OF BALLOTS, ARE, NOW, LEGAL ISSUES BEFORE THE COURT. THE 215 BALLOTS IN NET VOTES FOR VICE PRESIDENT GORE THAT HAVE, ALREADY, BEEN IDENTIFIED AS LEGAL VOTES, BY THE PALM BEACH CANVASSING BOARD AND ARE NOT DISPUTED BY THE DEFENDANTS --

ON THAT, THERE WAS, IN GOVERNOR BUSH'S BRIEF, A REFERENCE TO AN AUDITED RETURN THAT SHOWED 174, AND SINCE NUMBERS SEEM TO BE PRETTY CRITICAL HERE, WHEN THERE IS SUCH A SMALL DIFFERENCE, DO YOU AGREE THAT, WITH THAT LATER NUMBER FROM PALM BEACH COUNTY?

WE DON'T AGREE TO IT, BUT EVEN THEIR OFFER OF PROOF, WHICH WAS SUBMITTED AFTER THE TRIAL WAS OVER AND WHICH IS WHERE THAT NUMBER COMES FROM, I THINK, ONLY, RELATED TO THE NUMBER SUBMITTED AS OF 5:00 P.M.. THE 215 NUMBER IS A NUMBER THAT GOES THROUGH 90 MINUTES AFTERWARDS, WHEN THEY COMPLETED THEIR COUNT.

THAT INFORMATION IS IN THIS RECORD?

THAT IS KNOW THE RECORD. -- THAT IS IN THE RECORD. IT IS IN THE PALM BEACH ANSWER TO PARAGRAPH 60 OF THE COMPLAINT, AND IT WAS IN JUDGE BURTON'S TESTIMONY, AT PAGE 278 OF THE TRIAL TRANSCRIPT. ANOTHER ONLY REASON THAT WAS REJECTED WAS BECAUSE OF THE DEADLINE THAT THIS COURT HAD SET, OF NOVEMBER 26, FOR THE CERTIFICATION?

YES, AND AS THIS COURT SAID, IF IN HARRIS, THE CERTIFICATION IS ONE PROCESS BUT THE CONTEST IS ANOTHER PROCESS. IF THOSE VOTES EXISTED AND HAD NEVER BEEN CERTIFIED OR NEVER BEEN COUNTED BUT WE KNEW THOSE VOTES WERE THERE, UNDER THE CONTEST PROCEDURE, THEY WOULD HAVE TO BE INCLUDED.

LET ME ASK YOU ANOTHER QUESTION, REALIZING TIME IS SHORT. GOING BACK TO A COUPLE OF THE QUESTIONS THAT JUSTICE LEWIS ASKED, ABOUT THE PURPOSE OF THIS PARTICULAR PROVISION IN THE CONTEST STATUTE, AS FAR AS LEGAL VOTES, NOT BEING COUNTED OR ILLEGAL VOTES BEING COUNTED. WHY DO YOU THINK 28D BE THAT THE LEGISLATURE WOULD -- WHY DO YOU THINK IT WOULD BE THAT THE LEGISLATURE WOULD SET OUT A TOTALLY DIFFERENT SCHEME FOR RECOUNTS, TO BE DECIDED BY A LOCAL CANVASSING BOARDS, IN ONE SECTION, AND THEREFORE HAVE A PROCEDURE IN PLACE FOR RECOUNTS AND UNDER VOTES AND THAT KIND OF THING, AND YET STILL RESERVE, IN A CONTEST STATUTE, ALLOWING A CIRCUIT COURT TO DO IT ALL OVER AGAIN OR TO DO IT IN ANY CASE, DOES THAT, REALLY, MAKE SENSE, IN AN OVERALL SCHEME HERE? I WANT YOU TO ADDRESS THAT QUESTION, AND THEN MY SECOND

QUESTION, TO YOU, IS WHY WOULDN'T WE CONCLUDE, HERE, THAT AT MOST, ALL THAT YOU HAVE DEMONSTRATED IN THE TRIAL COURT IS A POSSIBILITY THAT THERE MAY BE A DIFFERENCE IN THE OUTCOME, BECAUSE AS YOU HAVE CONCEDED, NO ONE HAS LOOKED AT THE 9,000 VOTES THAT YOU ARE TALKING ABOUT. COULD YOU ANSWER THOSE TWO QUESTIONS?

SURE. WITH RESPECT TO THE REASON FOR 166 AND 168, WE BELIEVE THAT 168 WAS INTENDED, BY THE LEGISLATURE, TO PROMOTE CERTIFICATION PROCESS, TO GET THAT PROCESS DONE, AND THAT IS THE RESPONSIBILITY OF THE CANVASSING BOARDS. AS THIS COURT HELD, IN HARRIS, ONCE THAT CERTIFICATION IS DONE, THE RESPONSIBILITY SHIFTS, FROM THE CANVASSING BOARDS TO THE COURTS. NOW, THERE AREN'T VERY MANY CONTESTS. USUALLY PEOPLE ACCEPT THE RUTS OF THE CANVASSING BOARDS. YOU HAVE A CONTEST, ONLY WHEN SOME PARTY BELIEVES THAT THEY HAVE GOT A LEGITIMATE REASON FOR IT, AND THAT GOES TO THE SECOND QUESTION THAT YOU ASKED, AND THAT IS WHY DO WE BELIEVE WE HAVE SHOWN WHAT WE HAVE SHOWN, AND WE HAVE SHOWN THAT 215 AND THE 168, AND THAT GETS YOU UP TO 382 --

YOU, STILL, HAVE TO GET TO THE DADE COUNTY VOTES, DO YOU NOT, UNDER --

YOU STILL DO, BUT AT THAT POINT YOU ARE DOWN TO 100 VOTES, YOUR HONOR. WHEN YOU GET TO THE DADE COUNTY VOTES, YOU ARE DOWN TO 100 VOTES, AND, REMEMBER, DADE COUNTY WAS FINDING ABOUT ONE OUT OF EVERY FOUR UNDER VOTES TO BE AN UNDER VOTE, UNDER THE PROCEDURE BY THE COURT.

MR. BOIES, IF WE ARE LOOKING AT THIS THROUGH THE PROTEST STATUTE, THEN IT IS CERTAIN THAT THE ONLY RECOUNT, MANUAL RECOUNT THAT THERE COULD BE DONE BY THE, UNDER THE STATUTE, WOULD BE TO RECOUNT ALL THE BALLOTS. THAT IS SPECIFICALLY WHAT THE STATUTE SAYS, IS IT NOT? SHALL RECOUNT, MANUALLY RECOUNT ALL THE BALLOTS.

BUT THE DADE COUNTY BOARD HAD, IT IS TO SAY THAT, BEFORE THEY HAD STOPPEDOLNOVEMBER 22, THEY HAD DECIDED THAT WHAT -- THEY HAD STOPPED, ON NOVEMBER 22, THEY HAD DECIDED THAT THERE WERE 100.

BUT IF THEY WERE TO DECIDE TO MANUALLY RECOUNT ALL THE BALLOTS, THAT WOULD BE STATUTORY.

I THINK, YOUR HONOR, THAT YOU COULD INTERPRET THE LAW IN THAT KAY WEIGH. I THINK YOU COULD -- THAT WAY. I THINK YOU COULD, ALSO, SAY IF EITHER PARTY REQUESTED THE BALLOTS TO BE MANUALLY RECOUNTED. IF NEITHER PARTY REQUESTED THE BALLOTS BE RECOUNTED, UNDER THE VOTES, I DON'T THINK THAT YOU WOULD BE UNDER THE RESPONSIBILITY TO DO THAT. THE DADE COUNTY BOARD RULED THAT IT HAD THE DISCRETION TO MAKE THE DECISION THAT IT MADE. ONE OF THE DECISIONS THAT IT MADE THAT THE DISTRICT TRIAL COURT BELOW SAID IT HAD THE DISCRETION TO MAKE, WAS THE DECISION TO SIMPLY MANUALLY RECOUNT THE UNDER VOTES, AND THEY STOPPED, ONLY BECAUSE THEY DIDN'T HAVE TIME, AND --

IS THAT UNDISPUTED ON THIS RECORD, OR DO YOU AGREE WITH MR. RICHARD, YOUR COLLEAGUE, HERE --.

WHAT?

HE SAYS THAT THAT IS NOT THE ONLY REASON THAT THERE WAS NOT A RECOUNT IN DADE COUNTY.

I DON'T THINK THERE IS ANY OTHER REASON ON THE RECORD, YOUR HONOR. FIRST, MIAMI-DADE QUESTIONED WHETHER TO DO A MANUAL RECOUNT. THEY, THEN, DECIDED TO DO A MANUAL RECOUNT. THEY WERE UNDERTAKING A MANUAL RECOUNT ON THE MORNING OF DECEMBER 22. THEY SAID THEY WERE GOING TO MANUALLY RECOUNT ALL OF THE UNDER VOTES. THEY, THEN,

STOPPED TWELVE HOURS LATER.

IS THE TRANSCRIPT OF THE -- ALL THREE OF THOSE DECISIONS BY THE DADE COUNTY CANVASSING BOARD IN THE RECORD?

IT IS, YOUR HONOR. IN THE RECORD.

SPEAKING OF TIME AND GOING BACK TO WHAT JUSTICE WELLS WAS ASKING, IN TERMS OF THE REMEDY AND, NOW, WE ARE -- SPECIFICALLY AS TO THE MIAMI-DADE VOTES THAT YOU ARE CONTESTING, WHAT IS THE -- WE ARE HERE, TODAY, DECEMBER 7. WHAT IS THE TIME PARAMETER FOR BEING ABLE TO COMPLETE A COUNT OF THOSE UNDER VOTES?

THE RECORD SHOWS THAT THE CANVASSING BOARDS WERE DOING ABOUT 30 ON AN HOUR. -- DOING ABOUT 300 AN HOUR. 250 TO 300 AN HOUR. THAT IS WITH THREE PEOPLE LOOKING AT EVERY BALLOT. THAT WAS, OBVIOUSLY, SLOWER THAN IF IT WERE BEING DONE BY ONE JUDICIAL OFFICER. WE BELIEVE THESE BALLOTS CAN BE COUNTED IN THE TIME AVAILABILITY. OBVIOUSLY TIME IS GETTING VERY SHORT. WE HAVE BEEN TRYING TO GET THESE BALLOTS COUNTED, AS THIS COURT KNOWS, FOR MANY WEEKS NOW.

WITH THE CHIEF'S INDULGENCE, ONE LAST QUESTION, AND IT, REALLY, TIES IN TO SOMETHING, ACTUALLY, THAT YOU BROUGHT BEFORE THE COURT, IN THE FIRST ORAL ARGUMENT THAT WE HAD HERE, AND THAT IS, OF THIS PROBLEM THAT CONTINUES TO RECUR IN THE CASE, OF NOT HAVING RECOUNTS IN OTHER COUNTIES, WHERE THE SAME VOTING MECHANISMS WERE USED AND WHERE THERE MAY HAVE BEEN UNDER VOTES BUT THAT THE PROPORTION OF VOTES, FOR INSTANCE, MAY HAVE FAVORED YOUR OPPONENT, AND THAT WE ARE, NOW, HERE ON DITS 7, WITH DECEMBER -- ON DECEMBER 7, WITH DECEMBER 12 FAST APPROACHING. AT THE LAST PROCEEDING, NEITHER SIDE TOOK US UP ON WHETHER IT WAS AN OFFER OR NOT, AT LEAST IT WAS A CONCERN OF THE COURT, IN TERMS OF THE APPEARANCE OF FAIRNESS OR EQUITY, HOW CAN WE RESOLVE AN ISSUE LIKE THAT, AT THIS LATE DATE?

TWO POINTS, YOUR HONOR. FIRST, THERE HAS NEVER BEEN A RULE THAT SAYS YOU HAVE TO RECOUNT ALL THE BALLOTS IN ELECTION CONTEST. IN FACT, EVERY CASE THAT WE HAVE CITED HAS BEEN A CASE, INCLUDING THE BECK STROM CASE, WHERE ONLY THE CONTESTED BALLOTS WERE REVIEWED. TO MAKE DAVE RENT RULE WOULD BE A CHANGE IN THE LAW. THE SECOND POINT IS THAT EVERY PARTY HAS A RIGHT TO CONTEST BUT NO PARTY IS REQUIRED TO CONTEST. WHAT THE SENSE SEEMS TO BE IS THAT, SOMEHOW GOVERNOR BUSH'S CAMPAIGN SHOULD BE PROTECTED FROM GOVERNOR BUSH'S LAWYERS, THAT THEY DIDN'T ASK FOR A RECOUNT, AND THEREFORE THERE SHOULD BE A RECOUNT, ANYWAY, EVEN IF THEY DIDN'T ASK FOR IT. MR. CHIEF JUSTICE: THANK, MR. BOIES. I THINK YOUR TIME IS UP. WE, VERY MUCH, APPRECIATE ALL COUNSELS' ASSISTANCE IN THE COURT'S RESOLUTION OF THIS MATTER. NOW, PER THE INSTRUCTIONS AT THE BEGINNING, IF EVERYONE WILL REMAIN SEATED, UNTIL COUNSEL AND THE PARTIES HAVE EXITED THE BUILDING, AND THEN WE ASK THAT YOU BE -- RECEDE IN AN ORDERLY WAY, AND WE APPRECIATE, VERY MUCH, THE ORDER AND SERIOUSNESS WITH WHICH EVERYONE HAS ADDRESSED THIS MATTER. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.