

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GEORGE W. BUSH AND :

4 RICHARD CHENEY, :

5 Petitioners, : No. 00-949

6 v. :

7 ALBERT GORE, JR., ET AL. :

8 - - - - - X

9 Washington, D.C.

10 Monday, December 11, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:00 a.m.

14 APPEARANCES:

15 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf
16 of the Petitioner.

17 JOSEPH P. KLOCK, JR., ESQ., Miami, Florida; on behalf
18 of Respondents Katherine Harris, et al., In
19 support of Petitioner.

20 DAVID BOIES, ESQ., Armonk, New York; on behalf
21 of Respondents.

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P R O C E E D I N G S

[11:00 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 00-949, George W. Bush and Richard Cheney, versus Albert Gore, et al. Before we begin the arguments, the Court wishes to commend all of the parties to this case on their exemplary briefing under very trying circumstances. We greatly appreciate it. Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF THE PETITIONERS.

MR. OLSON: Mr. Chief Justice, thank you, and may it please the Court:

Just one week ago, this Court vacated the Florida Supreme Court's November 21 revision of Florida's election code, which had changed statutory deadlines, severely limited the discretion of the State's chief election officer, changed the meaning of words such as shall and may into shall not and may not, and authorized extensive standardless and unequal manual ballot recounts in selected Florida counties.

Just four days later, without a single reference to this Court's December 4 ruling, the Florida Supreme Court issued a new, wholesale post-election revision of Florida's election law. That decision not only changed Florida election law yet again, it also explicitly

1 referred to, relied upon, and expanded its November 21
2 judgment that this Court had made into a nullity.

3 QUESTION: Mr. Olson --

4 QUESTION: Can you begin by telling us our
5 federal jurisdiction, where is the federal question here?

6 MR. OLSON: The federal question arises out of
7 the fact that the Florida Supreme Court was violating
8 Article II, section 1 of the Constitution, and it was
9 conducting itself in violation of section 5 of Title III
10 of federal law.

11 QUESTION: On the first, it seems to me
12 essential to the republican theory of government that the
13 constitutions of the United States and the states are the
14 basic charter, and to say that the legislature of the
15 state is unmoored from its own constitution and it can't
16 use its courts, and it can't use its executive agency,
17 even you, your side, concedes it can use the state
18 agencies, it seems to me a holding which has grave
19 implications for our republican theory of government.

20 MR. OLSON: Justice Kennedy, the Constitution
21 specifically vested the authority to determine the manner
22 of the appointment of the electors in state legislatures.
23 Legislatures, of course can use the executive branch in
24 the states, and it may use in its discretion the judicial
25 branch.

1 QUESTION: Then why didn't it do that here?

2 MR. OLSON: It did not do that here because it
3 did not specify -- it did use the executive branch. In
4 fact, it vested considerable authority in the Secretary of
5 State, designating the Secretary of State as the chief
6 elections official, and as we point out, the very first
7 provision in the election code requires the Secretary of
8 State to assure uniformity and consistency in the
9 application and enforcement of the election law. The
10 Secretary of State as the executive branch is also given
11 considerably -- considerable other responsibilities, when
12 but -- and to a certain extent, especially in connection
13 with the contest phase of the election, certain authority
14 was explicitly vested in the Circuit Court of the State of
15 Florida, which is the trial court.

16 QUESTION: Oh, but you think then there is no
17 appellate review in the Supreme Court of what a circuit
18 court does?

19 MR. OLSON: Certainly the legislature did not
20 have to provide appellate review.

21 QUESTION: Well, but it seemed apparently to
22 just include selection of electors in the general election
23 law provisions. It assumed that they would all be lumped
24 in together somehow. They didn't break it out.

25 MR. OLSON: Well, there are -- there is a

1 breakout with respect to various aspects of Florida
2 statute and Florida election law. There is a specific
3 grant of authority to the circuit courts. There is no
4 reference to an appellate jurisdiction. It may not be the
5 most powerful argument we bring to this Court.

6 QUESTION: I think that's right.

7 MR. OLSON: Because notwithstanding,
8 notwithstanding -- well, the fact is that the
9 Constitution may have been invoked.

10 QUESTION: Well, this is serious business
11 because it indicates how unmoored, untethered the
12 legislature is from the constitution of its own state, and
13 it makes every state law issue a federal question. Can
14 you use this theory and say that it creates some sort of
15 presumption of validity that allows us to see whether this
16 court or the executive has gone too far? Is that what
17 you're arguing?

18 MR. OLSON: No, I would say this with respect
19 -- it would have been a perfectly logical, and if you read
20 the statutes, a perfectly logical, especially in the
21 context of a presidential election, to stop this process
22 at the circuit court, and not provide layers of appeal
23 because given the time deadline, especially in the context
24 of this election, the way it's played out, there is not
25 time for an appellate court.

1 QUESTION: I have the same problem Justice
2 Kennedy does, apparently, which is, I would have thought
3 you could say that Article II certainly creates a
4 presumption that the scheme the legislature has set out
5 will be followed even by judicial review in election
6 matters, and that 3 U.S. code section 5 likewise suggests
7 that it may inform the reading of statutes crafted by the
8 legislature so as to avoid having the law changed after
9 the election. And I would have thought that that would be
10 sufficient rather than to raise an appropriate federal
11 question, rather than to say there's no judicial review
12 here in Florida.

13 MR. OLSON: I think that I don't disagree with
14 that except to the extent that I think that the argument
15 we presented and amplified on in our briefs is a good
16 argument, it's a solid argument. It is consistent with
17 the way the code is set up, and it's particularly
18 consistent with the timetable that's available in a
19 presidential election. However --.

20 QUESTION: Well, it's pretty close. You can say
21 it could be interpreted that way by the Florida Supreme
22 Court, I suppose. You think it must be? Or is your point
23 that even in close calls we have to revisit the Florida
24 Supreme Court's opinion?

25 MR. OLSON: No, I think that it is particularly

1 in this case where there's been two wholesale revisions,
2 major restructuring of the Florida Election Code, we don't
3 even get close to that question at all. It would be
4 unfortunate to assume that the legislature devolved this
5 authority on its judiciary sub silentio. There is no
6 specific reference to it. But in this case, as we have
7 pointed out, especially the decision of last Friday, there
8 was a major overhaul in almost every conceivable way.

9 QUESTION: Mr. Olson, as I understand your
10 argument, you rely on Leser v. Garnett and Hawke v. Smith,
11 and is it critical to your Article II argument that we
12 read the word legislature as narrowly, I mean the power
13 granted the legislature as similar to that granted in
14 Article V of the Constitution, as those cases dealt with?

15 MR. OLSON: No, I don't think it's necessary.

16 QUESTION: So your reliance on -- you really
17 are not relying on those cases.

18 MR. OLSON: Well, I think those cases support
19 the argument, but as we said --.

20 QUESTION: But if you've got to choose one
21 version of the word legislature or the other --.

22 MR. OLSON: I think in a different context, it's
23 not necessarily the case, and certainly it is true that
24 legislatures can employ the legislative process that might
25 include vetoes by a state chief executive, or a

1 referendum, when the state deliberately chooses to choose
2 a legislative method to articulate a code. The point I
3 think that's most important and most --.

4 QUESTION: But is it the choice of the
5 legislature or was it constitutionally limited to this
6 provision? I'm a little unclear on what your theory is.
7 Is it your theory, in other words, that they voluntarily
8 did not permit appellate review of the lower courts in
9 these election contests or that Article II prohibited them
10 from allowing it?

11 MR. OLSON: No, Article II -- we do not contend
12 that Article II would prohibit them from fulfilling that
13 process.

14 QUESTION: Of course Article V would have, and
15 under Leser against Garnett and those cases, but you --.

16 MR. OLSON: In the context of this case we're
17 saying that they can include the judicial branch when they
18 wish to do so, but under no circumstances is it consistent
19 with the concept of the plan in the Constitution for the
20 state, sub siletio, the state legislature sub siletio to
21 turn over to the judiciary the power to completely
22 reverse, revise, and change the election code in all of
23 the major respects --.

24 QUESTION: Mr. Olson, with respect to the role
25 of judicial review, you rely very much on the McPherson

1 case, and two things strike me about that case. One is,
2 if you're right on your jurisdiction theory, then should
3 not this Court have vacated instead of affirmed the
4 decision of the Michigan Supreme Court in that case
5 because the Michigan legislature didn't confer upon the
6 Michigan Supreme Court in that case any special authority
7 of judicial review?

8 MR. OLSON: That's entirely possible that that
9 might be the case, Justice Ginsburg, but the entire text
10 of the McPherson decision and its recitation of the
11 legislative history or the history of legislation and acts
12 by state legislatures to comply with it make it quite
13 clear that the power is vested in the legislature itself.

14 QUESTION: But there was a decision by the court
15 reviewing, which we affirmed. Under your jurisdiction
16 theory as I see it, there was no role for the Michigan
17 Supreme Court to play because Article II, section 1 gives
18 the authority exclusively to the legislature, and the
19 legislature has not provided for judicial review
20 especially for that measure.

21 MR OLSON: I think the context of that case is
22 different, and that it's entirely possible for the Court
23 to have come to the conclusion it did in that case and we
24 believe that case is compelling for the principle that we
25 are arguing in this case, that there is no, the entire

1 structure of what Florida did, its election code, in its
2 effort to comply not only with Article II, but with
3 Section 5 of Title 3, is such that it did not intend in
4 any way to divest itself of the power to determine how the
5 appointment of electors would be determined in a federal
6 presidential election and most importantly, the resolution
7 of cases and controversies, and disputes, with respect to
8 the appointments --.

9 QUESTION: Three times, at least as I counted in
10 McPherson itself, it refers to what is done by the
11 legislative power under state constitutions as they exist.
12 This is not the most clearly written opinion, and yet
13 three times, they refer to the legislative power as
14 constrained by the state's constitution.

15 MR. OLSON: And I think that that's important.
16 I agree with you, Justice Ginsburg. It's not the most
17 clearly written opinion. But I think that in the context
18 of that case, the relationship of the legislature to the
19 Constitution in that case and the way that power was
20 exercised, that ought to be reconciled with what we are
21 urging the Court today, that a wholesale revision and
22 abandonment of the legislative authority can't be turned
23 over, especially sub silentio, by a legislature simply
24 because there is a constitution.

25 There is a constitution in every state. There

1 is a judiciary in every state. The judiciary performs
2 certain functions in every state, and to go that length,
3 one would assume that the judiciary in every state under
4 that argument could overturn, rewrite, revise, and change
5 the election law in presidential elections notwithstanding
6 Article II, at will.

7 Now, this was a major, major revision that took
8 place on Friday.

9 QUESTION: Mr. Olson, isn't that one of the
10 issues in the case as to whether it was a major revision?
11 Your opponents disagree, and I know you rely very heavily
12 on the dissenting opinion in the Florida Supreme Court,
13 but which opinion do we normally look to for issues of
14 state law?

15 MR. OLSON: Well, I think that the dissenting
16 opinion and the two dissenting opinions are very
17 informative. We are relying on what the court did. If
18 one looks at, for example, the recount provisions, before
19 this revision under Florida law, manual recount under the
20 protest provisions were discretionary, completely
21 discretionary, conducted by canvassing boards during the
22 protest phase of the election, post-election period,
23 pursuant to legislatively defined procedures as to who
24 could be present, for seven days after the election with
25 respect to all ballots in a county, that was mandatory and

1 only available, as we heard last week, for tabulation
2 error up until this election.

3 After the decision of December 8th in this
4 context, those remand provisions, I mean those recount,
5 manual recount provisions became mandatory instead of
6 discretionary pursuant to judicial rather than executive
7 supervision during the contest phase rather than the
8 protest phase, even though it's not even mentioned in the
9 statute with respect to the contest phase, pursuant to ad
10 hoc judicially established procedures rather than the
11 procedures that are articulated quite carefully in the
12 statute.

13 QUESTION: Well, on ad hoc judicially created
14 procedures, the point of subsection 8 of 168. I mean,
15 once we get into the contest phase, subsection 8 gives at
16 least to the circuit court, leaving aside the question of
17 appellate jurisdiction, about as broad a grant to fashion
18 orders as I can imagine going into a statute.

19 MR. OLSON: Well, to read that, to read that
20 provision and it's written quite broadly, but to read
21 that, one has to read that in the context of the entire
22 statutory framework. If one reads it the way the Florida
23 Supreme Court did, the entire process is tilted on its
24 head. Where there used to be the decision that was in the
25 election officials, it now becomes in the court. All of

1 the limitations on the remand process that existed during
2 the protest phase, where the standards should be lower
3 because it's earlier in the process are thrown out the
4 window. The time tables are thrown out the window. The
5 process that exists are there and one has to -- .

6 QUESTION: What's the timetable in 168?

7 MR. OLSON: There is no timetable.

8 QUESTION: That's right. There is no timetable
9 there. So that seems to undercut your timetable argument
10 once you get into the contest phase from the protest
11 phase.

12 MR. OLSON: But that's only if you untether 168
13 entirely from the statute and the steam by which the
14 protest phase takes place over a period of seven to 10
15 days in the context of this election, and the contest
16 phase occurs over the next four weeks.

17 QUESTION: It may well be and I'll grant you for
18 the sake of argument that there would be a sound
19 interpretive theory that in effect would coordinate these
20 two statutes, 166 and 168, in a way that the Florida
21 Supreme Court has not done. But that's a question of
22 Florida Supreme Court statutory construction and unless
23 you can convince us, it seems to me, that in construing
24 168, which is what we are concerned with now, and its
25 coordination or lack of coordination with 166, the Florida

1 Supreme Court has simply passed the bounds of legitimate
2 statutory construction, then I don't see how we can find
3 an Article II violation here.

4 MR. OLSON: Well, I am hoping to convince you
5 that they passed far beyond the normal limits of statutory
6 construction. The changing of the meaning -- .

7 QUESTION: You have convinced us certainly that
8 there is a disagreement about how it should be construed,
9 and that disagreement is articulated by the dissents in
10 the most recent case. But I don't quite see where you
11 cross the line into saying that this has simply become a
12 nonjudicial act. It may or may not be good statutory
13 construction, but I don't see it as a nonjudicial act.

14 MR. OLSON: It is, it is, we submit an utter
15 revision of the timetables, the allocation.

16 QUESTION: But Mr. Olson, we're back to the --
17 there is no timetable in 166.

18 MR. OLSON: That's correct.

19 QUESTION: And what your argument boils down to,
20 I think, is that they have insufficiently considered 168,
21 I'm sorry, that they have insufficiently considered 166 in
22 construing 168, and you may be right, but you have no
23 textual hook in 168 to say untethered timetables imply in
24 effect a nonjudicial act.

25 MR. OLSON: We are not just saying timetables.

1 We are saying that it has wrenched it completely out of
2 the election code which the legislature very carefully
3 crafted to fit together and work in an interrelated
4 fashion. It isn't just the timetable. The fact that
5 there are timetables which are very important in a
6 presidential election, we are today smack up against a
7 very important deadline, and we are in the process where
8 -- .

9 QUESTION: Yes, you are. But that is a deadline
10 set by a safe harbor statute for the guidance of Congress
11 and it's a deadline that has nothing to do with any text
12 in 168.

13 MR. OLSON: Well, I believe that the Supreme
14 Court of Florida certainly thought that it was construing,
15 it certainly said so this time, that it was construing the
16 applicability of Section 5 and it was expressing the hope
17 that what it was doing was not risking or jeopardizing the
18 conclusive effect -- .

19 QUESTION: And it took that into consideration
20 in fashioning its orders under subsection 8.

21 MR. OLSON: And we submit that it incorrectly
22 interpreted and construed federal law in doing that
23 because what they have inevitably done is provide a
24 process whereby it is virtually impossible, if not
25 completely impossible, and I think it is completely

1 impossible, to have these issues resolved and the
2 controversies resolved in time for that federal statutory
3 deadline. Furthermore, it is quite clear, we submit, that
4 the process has changed.

5 QUESTION: Well, if your concern was with
6 impossibility, why didn't you let the process run instead
7 of asking for a stay?

8 MR. OLSON: Well, because we said -- .

9 QUESTION: We'd find out.

10 MR. OLSON: Because we argued, and I believe
11 that there is a very firm basis for saying that that
12 process already had violated Article II of the
13 Constitution. It was also already throwing in jeopardy
14 compliance with Section 5 of Title 3 because the laws had
15 been changed in a number of different respects and we have
16 recited them. The timetables are important.

17 QUESTION: Oh, and I thought your point was that
18 the process is being conducted in violation of the Equal
19 Protection Clause and it is standardless. MR. OLSON:
20 And the Due Process Clause, and what we know is now the
21 new system that was set forth and articulated last -- .

22 QUESTION: In respect to that --.

23 MR. OLSON: Pardon me?

24 QUESTION: In respect to that, if it were to
25 start up again, if it were totally hypothetically, and you

1 were counting just undercounts, I understand that you
2 think that the system that's set up now is very unfair
3 because it's different standards in different places.
4 What in your opinion would be a fair standard, on the
5 assumption that it starts up missing the 12th deadline but
6 before the 18th?

7 MR. OLSON: Well, one fair standard, and I don't
8 know the complete answer to that, is that there would be a
9 uniform way of evaluating the manner in which -- there
10 was Palm Beach, for example --.

11 QUESTION: All right, a uniform way of
12 evaluating. What would the standard be, because this is
13 one of your main arguments --.

14 MR. OLSON: Well, the standard -- .

15 QUESTION: You say the intent of the voter is
16 not good enough. You want substandards.

17 MR. OLSON: We want -- .

18 QUESTION: And what in your opinion would be the
19 most commonly used in the 33 states or whatever, or in
20 your opinion, the fairest uniform substandard?

21 MR. OLSON: Well, certainly at minimum, Justice
22 Breyer, the penetration of the ballot card would be
23 required. Now, that's why I mentioned the Palm Beach
24 standard that was articulated in writing and provided
25 along with the ballot instructions to people voting, that

1 the chad ought to be punctured.

2 QUESTION: You're looking at, then, basically
3 Indiana. Is Indiana, in your opinion or pre -- or 1990
4 Palm Beach, are either of those fair, or what else?

5 MR. OLSON: It's certainly a starting point, and
6 the --.

7 QUESTION: Well, would the starting point be
8 what the Secretary of State decreed for uniformity? Is
9 that the starting point --.

10 MR. OLSON: That is correct.

11 QUESTION: -- Under the Florida legislative
12 scheme?

13 MR. OLSON: I would agree with that, Justice
14 O'Connor.

15 QUESTION: And what standard did the Secretary
16 of State set?

17 MR. OLSON: She had not set one, and that's one
18 of the objections that we had with respect to the process
19 that -- the selective process that existed and that we
20 discussed in conjunction with the December -- the
21 November 21st position. Not only was there not a
22 standard, but there was a change two or three times during
23 the course of this process with respect to the standard
24 that I was just discussing.

25 QUESTION: I understand that she has the

1 expertise and let's assume that under Florida state law
2 she's the one with the presumptive competence to set the
3 standard. Is there a place in the Florida scheme for her
4 to do this in the contest period?

5 MR. OLSON: I don't think there is. There is no
6 limitation on when she can answer advisory opinions.

7 QUESTION: Even in the contest period?

8 MR. OLSON: I don't -- I think that that's
9 correct. Now, whether or not if there was a change as a
10 result of that, of the process, whether there would be
11 problems with respect to section 5 I haven't thought
12 about , but --.

13 QUESTION: No, if there's --.

14 QUESTION: If this were remanded --.

15 QUESTION: Go ahead.

16 QUESTION: I'm sorry.

17 QUESTION: If this were remanded to the Leon
18 County Circuit Court and the judge of that court addressed
19 the Secretary of State, who arguably either is or could be
20 made a party, and said please tell us what the standard
21 ought to be, we will be advised by your opinion, that
22 would be feasible, wouldn't it?

23 MR. OLSON: I think it would be feasible. Now,
24 counsel for the Secretary of State will be up in a moment,
25 immediately after me. As I understand, however, the

1 election code, she would have the power to respond to that
2 inquiry. In fact, under the very first, as I mentioned,
3 the very first section of the election code, sub 1, she is
4 not only the chief election officer, but has
5 responsibility --.

6 QUESTION: But I would still like to get your
7 view as to what would be the fair standard.

8 MR. OLSON: Well, certainly one that would -- I
9 don't -- I haven't crafted it entirely out. That is the
10 job for a legislature.

11 QUESTION: I would still like to get your
12 opinion insofar as you could give it.

13 MR. OLSON: I think part of that standard is it
14 would have to be applied uniformly. It would have to be
15 -- I would think a reasonable standard is, would have to
16 be at minimum a penetration of the chad in the ballot,
17 because indentations are no standards at all. There are
18 other procedural standards in the --.

19 QUESTION: Mr. Olson, was the Palm Beach
20 standard that you referred in your brief applied statewide
21 and uniformly? You refer to the Palm Beach standard
22 having changed. Was the Palm Beach standard ever applied
23 on a statewide basis?

24 MR. OLSON: I believe it was not, Justice
25 Stevens.

1 QUESTION: And can we possibly infer from the
2 failure of the Secretary of State to promulgate a
3 statewide standard that she might have inferred that the
4 intent of the voter is an adequate standard?

5 MR. OLSON: No, I don't think it's a fair
6 inference either way. Remember in response to the
7 question from I think it was Justice Scalia the last time
8 we were here, this is the first time we've had a manual
9 recount for anything other than arithmetic tabulation
10 error. This is something that is unprecedented in the
11 State of Florida. That's another change that took place.

12 QUESTION: Mr. Olson, you have said the intent
13 of the voters simply won't do, it's too vague, it's too
14 subjective, but at least, at least those words, intent of
15 the voter, come from the legislature. Wouldn't anything
16 added to that be -- wouldn't you be objecting much more
17 fiercely than you are now if something were added to the
18 words that the all powerful legislature put in the
19 statute?

20 MR. OLSON: Well, I think we have to distinguish
21 between whether we're talking about a prospective uniform
22 standard as opposed to something that changes the process
23 in the middle of the counting and evaluating of disputes.
24 But it certainly would --.

25 QUESTION: But if we're talking about the

1 contest period, and the statute, as Justice Souter pointed
2 out, speaks with amazing breadth. It says that "the
3 circuit judge" -- this is the text -- "shall fashion any
4 order he or she deems necessary to prevent or correct any
5 wrong and to provide any relief appropriate under the
6 circumstances". I couldn't imagine a greater conferral of
7 authority by the legislature to the circuit judge.

8 MR. OLSON: But we submit in the context of the
9 entire election code itself. Now, the intent of the voter
10 standard, the one that's been cited and relied upon by our
11 opponents most, is a provision that's contained in the
12 provision of the election code that deals with damaged or
13 spoiled ballots.

14 QUESTION: Okay, but we have -- there's no
15 question that the closest we can come now under Florida
16 law is an intent of the voter standard. Is it your
17 position that if any official, judicial or executive, at
18 this point were to purport to lay down a statewide
19 standard which went to a lower level, a more specific
20 level than intent of the voter, and said, for example,
21 count dimpled chads or don't count dimpled chads. In your
22 judgment, would that be a violation of Article II?

23 MR. OLSON: I don't think it would be a
24 violation of Article II provided that -- I mean, if the
25 first part of your question --.

1 QUESTION: All right, so --.

2 MR. OLSON: If we went from the standard that
3 existed before, the dimpled chads, that that had not been
4 a standard anywhere in Florida, if that change was made,
5 we would strongly urge that that would be a violation of
6 Article II.

7 QUESTION: Mr. Olson --.

8 MR. OLSON: It would be a complete change.

9 QUESTION: It is also part of your case, is it
10 not, that insofar as that language just quoted is
11 concerned, the power of the circuit judge to prevent or
12 correct any alleged wrong, it's part of your submission, I
13 think, that there is no wrong when a machine does not
14 count those ballots that it's not supposed to count?

15 MR. OLSON: That's absolutely correct, Justice
16 Scalia.

17 QUESTION: The voters are instructed to detach
18 the chads entirely, and the machine, as predicted, does
19 not count those chads where those instructions are not
20 followed, there isn't any wrong.

21 MR. OLSON: That's correct, they've been
22 euphemistically -- this has been euphemistically referred
23 to as legal votes that haven't been counted. These are
24 ballots where the system created by Florida, both with
25 respect to the initial tabulation and the preferred system

1 for the recount, the automatic recount in close elections,
2 is to submit those ballots to the same mechanical
3 objective scrutiny that the initial count was done, and
4 those were not counted either because there were votes for
5 more than one candidate, which would make them overvotes,
6 I guess they're calling them, or that they read as no
7 vote, which many people do, many people do not vote in the
8 presidential election even though they're voting for other
9 offices.

10 QUESTION: But as to the undervotes, and as to
11 the undervotes in which there is arguably some expression
12 of intent on the ballot that the machine didn't pick up,
13 the majority of the Florida Supreme Court says you're
14 wrong. They interpreted the statute otherwise.

15 Are you saying here that their interpretation
16 was so far unreasonable in defining legal vote as not to
17 be a judicial act entitled, in effect, to the presumption
18 of reasonable interpretation under Article II?

19 MR. OLSON: Yes, that is our contention, and
20 that has to be done. That contention is based upon
21 everything else in the Florida statute, including the
22 contest provisions. The manual recount provisions --.

23 QUESTION: What is it in the contest provision
24 that supports the theory that that was a rogue, illegal
25 judicial act?

1 MR. OLSON: Because there is no reference to
2 them, even though that process is referred to --.

3 QUESTION: There's no definition. There's no
4 definition. Doesn't the court have to come up with a
5 definition of legal votes?

6 MR. OLSON: In the context, in the context of
7 the statute as a whole, manual recounts are treated quite
8 extensively as a last resort for tabulation error at the
9 discretion of canvassing officials.

10 QUESTION: At the protest stage?

11 MR. OLSON: That's correct.

12 QUESTION: Mr. Olson --.

13 MR. OLSON: We submit -- and I would like to
14 reserve the balance of my time.

15 QUESTION: Mr. Olson, is it critical to your
16 position that the Florida Supreme Court erred in its
17 resolution of the shall/may controversy in its first
18 opinion?

19 MR. OLSON: I'm sorry, I missed --.

20 QUESTION: Is it critical to your position,
21 because you're tying the two cases together, that the
22 Florida Supreme Court made that kind of error in its
23 resolution of the conflict between shall and may in the
24 disparate statute?

25 MR. OLSON: I don't think it's critical. What

1 we're saying is that the court expanded upon its previous
2 decision that was vacated in this case, it used the time
3 period that it opened up to do this manual recount to then
4 build upon in the December 8th opinion.

5 QUESTION: Very well, Mr. Olson. Mr. Klock,
6 we'll hear from you.

7 ORAL ARGUMENT OF JOSEPH P. KLOCK, JR.

8 ON BEHALF OF RESPONDENTS KATHERINE HARRIS, ET AL.,
9 IN SUPPORT OF PETITIONERS.

10 MR. KLOCK: Mr. Chief Justice, and may it
11 please the Court:

12 If I could start by addressing a question of
13 Justice Souter with respect to the standards, 166 does
14 have time limits. The time limit of 166 is set by the
15 certification, which is seven days after the election.
16 The time of the contest, there are time limits there as
17 well. You have ten days to file a complaint, ten days to
18 file an answer, and in the context of a presidential
19 election, you then of course have the December 12
20 deadline.

21 So therefore, there are time --

22 QUESTION: Which is federal, not state, and
23 occurs in the safe harbor statute, or as a result of the
24 safe harbor statute.

25 MR. OLSON: Yes, Your Honor, but this Court in

1 its opinion that it handed down in the initial Harris case
2 pointed out that it was clear that there was a desire in
3 which by the legislature to preserve the safe harbor.

4 QUESTION: Oh, there is no -- .

5 QUESTION: I thought the Florida court accepted
6 that, too, in its current opinion.

7 MR. KLOCK: They did say that exactly, Your
8 Honor.

9 QUESTION: Mr. Klock, will you -- you refer to
10 the first Harris case. We think of it as the first Bush
11 v. Gore case. You are talking about the same -- .

12 MR. KLOCK: Yes, Your Honor.

13 QUESTION: Mr. Klock, will you address Justice
14 Breyer's question of a moment ago, if there were to be a
15 uniform standard laid down, I suppose at this point by the
16 Leon County Circuit Court or in any other valid way in
17 your judgment, what should the substantive standard be?

18 MR. KLOCK: I'll try to answer that question.
19 You would start, I would believe, with the requirements
20 that the voter has when they go into the booth. That
21 would be a standard to start with. The voter is told in
22 the polling place and then when they walk into the booth
23 that what you are supposed to do with respect to the punch
24 cards is put the ballot in, punch your selections, take
25 the ballot out, and make sure there are no hanging pieces

1 of paper attached to it. The whole issue of what
2 constitutes a legal vote which the Democrats make much ado
3 about presumes that it's a legal vote no matter what you
4 do with the card. And presumably, you could take the card
5 out of the polling place and not stick it in the box and
6 they would consider that to be a legal vote. The fact is
7 that a legal vote at the very basics has to at least be
8 following the instructions that you are given and placing
9 the ballot in the box.

10 QUESTION: No, we're asking, I think --.

11 MR. KLOCK: No.

12 QUESTION: Not what the Florida election law is
13 at this point in your opinion, but rather if under the
14 Equal Protection Clause, and I'm drawing on your
15 experience as a person familiar with elections across the
16 country. You have looked into this.

17 MR. KLOCK: Yes, sir.

18 QUESTION: What would be a fair subsidiary
19 standard applied uniformly, were it to be applied
20 uniformly across all the counties of Florida, including
21 Broward, a fair uniform standard for undervotes.
22 Remember, Indiana has a statute, Michigan has a statute,
23 33 states have a statute where they just say intent of
24 voter, but in your opinion because of the hanging chad,
25 etc., etc., what is a fair, not necessarily Florida law,

1 but a fair uniform standard?

2 MR. KLOCK: Without being disrespectful, Your
3 Honor, I think you have answered the question in terms of
4 phrasing the question. There are any number of statutory
5 schemes that you could select from if you were a
6 legislature, but as a court, I don't think that the
7 Supreme Court of Florida respectfully, or any other court
8 can sit down and write the standards that are going to be
9 applied. If you are a legislature --.

10 QUESTION: But in your opinion, if you were
11 looking for a basically fair standard, to take one out of
12 a hat, Indiana, or Palm Beach 1990, in your opinion would
13 be a basically fair one?

14 MR. KLOCK: If I were to take one out of a hat,
15 Your Honor, if I was a legislature, what I would do is I
16 would hold that you have to punch the chad through on a
17 ballot. In those situations where you have a ballot where
18 there are only indentations in every race, you might then
19 come up with a different standard, but the only problem
20 that we have here is created by people who did not follow
21 instructions.

22 QUESTION: Okay. Can I ask you a different
23 question on Florida law?

24 MR. KLOCK: Yes, sir.

25 QUESTION: And the question on Florida law is

1 simply this, what the statute is. I take it the contest
2 statute lists grounds for contesting, one of those grounds
3 is rejecting a sufficient number of legal votes sufficient
4 to place the election in doubt, and then the circuit judge
5 is given the power to investigate that allegation, just to
6 look into it.

7 MR. KLOCK: Yes. There were no --.

8 QUESTION: So why would it be illegal under
9 Florida law to have a recount just to investigate whether
10 this allegation is or is not so?

11 MR. KLOCK: The Justice's question assumes that
12 they are legal votes.

13 QUESTION: There might be some in there that are
14 legal under anybody's standard.

15 MR. KLOCK: Your Honor, if they are not
16 properly, if the ballot is not properly executed, it's not
17 a legal vote. The only case in Florida that even touches
18 upon this in terms of a machine ballot is the Hogan case
19 from the Fourth District Court of Appeal. In the Fourth
20 District Court of Appeal, that candidate lost by three
21 votes, and he went during the protest phase to the
22 canvassing board and asked for a manual recount to be done
23 and they exercised their discretion and said no. And in
24 that case, there is a discussion. He raised the argument
25 that there were ballots in there that had hanging chads

1 and this that and the other thing. They would hear none
2 of it and when it went up on appeal, it was affirmed. So
3 the fact of the matter is that the only case that we have
4 that deals with this handles it in that fashion, and I
5 would respectfully suggest that a ballot that is not
6 properly punched is not a legal ballot.

7 And I think also, sir, if you go through an
8 analysis of the Vice President's arguments in supporting
9 what the Supreme Court does, there is sort of an omelet
10 that is created by going and picking through different
11 statutes.

12 For instance, the clear intent standard comes
13 from a statute that deals with a damaged ballot where you
14 have to create, to put through the machine, a substitute
15 ballot, and there are very clear directions as to what to
16 do to preserve the integrity of the ballot. And the
17 Beckstrom case, which you will no doubt hear much about as
18 the argument proceeds, dealt with that kind of situation.
19 There was a manual recount there; the court did not pass
20 on the propriety of it. The issue was if the election
21 officials took ballots and marked over the ballots instead
22 of creating a separate substitute ballot, they took that
23 ballot and marked it over so it could go through an
24 optical scanner, which the court found to be gross
25 negligence whether they would discount the votes. That

1 was the issue that was present there. So I think if you
2 look through Florida law it is relatively clear that there
3 was no basis whatsoever to be able to find -- .

4 QUESTION: Let me just ask this question. If
5 you did have a situation, I know your position is
6 different, where there were some uncounted ballots due to
7 a machine malfunction, for example, would it not make
8 sense to assume that the standard used for damaged ballots
9 would be the same standard you use in that situation?

10 MR. KLOCK: I don't think so, sir.

11 QUESTION: What standard would you use in the
12 situation I propose, then?

13 MR. KLOCK: Well, Justice Brennan, the
14 difficulty is that under -- I'm sorry. That's why they
15 tell you not to do that.

16 The standard that is in 166 is in, is dealing
17 with the protest phase, and it was brought about in 1988.

18 QUESTION: I understand, but my question is if
19 you don't use that standard, what standard would you use
20 for my hypothetical?

21 MR. KLOCK: The legislature would have to create
22 one, sir. I don't know what standard -- .

23 QUESTION: You are saying that they can't
24 interpret a statute in which there is no explicit
25 definition.

1 MR. KLOCK: What I'm saying is -- .

2 QUESTION: They have to throw their hands up?

3 MR. KLOCK: No. Justice Breyer, what I'm saying
4 is that -- .

5 QUESTION: I'm Justice Souter -- you'd better
6 cut that out.

7 MR. KLOCK: I will now give up. What I'm
8 saying, sir, is this. That you cannot be in a situation
9 of using the word interpret to explain anything that a
10 court does. The word interpret cannot carry that much
11 baggage.

12 QUESTION: But you go to the opposite extreme
13 and say, it seems to me, that they cannot look, as Justice
14 Stevens suggested, to a statute which deals with, and
15 certainly a closely analogous subject at a near stage, and
16 it seems to me that you in effect go to the opposite
17 extreme that you are excoriating the Florida Supreme Court
18 for and say they can't interpret at all.

19 MR. KLOCK: I think what the Florida Supreme
20 Court should do in that instance is note the very tight
21 restrictions that exist under the protest phase. They
22 require that you find voter intent with respect to a
23 damaged ballot. They also vested in the canvassing board,
24 and the canvassing board is composed of a certain, a
25 defined group of officials, a county judge, the election

1 supervisor, the chairman of the county commission, it is
2 very limited.

3 QUESTION: But that means the court apparently
4 cannot define legal vote.

5 MR. KLOCK: That's correct.

6 QUESTION: Mr. Klock -- I'm Scalia.

7 MR. KLOCK: Yes, sir. I remember that. You
8 correct me. It will be hard to forget.

9 QUESTION: Correct me if I'm wrong, but I had
10 thought that although you don't take into account
11 improperly marked ballots for purposes of determining
12 whether there will be a manual recount, I had thought that
13 when there is a manual recount for some other reason, and
14 you come across ballots of this sort that you can count
15 them, that for that purpose you can decide oh, look at,
16 there is a hanging chad. The machine didn't count it.
17 It's clear what the intent of the voter are. We'll count
18 it. Is that not correct?

19 MR. KLOCK: Yes. Justice Scalia, that is
20 correct. If you have a situation -- .

21 QUESTION: It's correct if you use the intent of
22 the voter standard in that situation?

23 MR. KLOCK: Pardon me, sir?

24 QUESTION: It's correct that you use the intent
25 of the voter situation, standard in that situation?

1 That's what I understand the answer to be.

2 MR. KLOCK: It is correct that that statute
3 provides. That I think that that statute, there could be
4 problems under it, but that statute was designed for a
5 very limited situation where there was a problem with the
6 mechanism of voting. It was not designed to handle voter
7 error and that is absolutely clear because otherwise, Your
8 Honor, what would occur is the following. That in every
9 election that have you that was close, you would have an
10 automatic recount and then irrespective of what the
11 canvassing board does, just load all the ballots together
12 and put them on a truck and send them to Tallahassee
13 because if there is no standard whatsoever and in any
14 election contest that you are unhappy with the election,
15 you can send the ballots to Tallahassee, then have you a
16 problem that is created that would not exist -- .

17 QUESTION: Thank you, Mr. Klock.

18 Mr. Boies, we'll hear from you.

19 ORAL ARGUMENT OF DAVID BOIES

20 ON BEHALF OF THE RESPONDENTS.

21 MR. BOIES: Thank you, Mr. Chief Justice, may
22 it please the court.

23 Let me begin by addressing what happened in the
24 Beckstrom case that Mr. Klock refers to.

25 QUESTION: Could we begin with jurisdiction,

1 first?

2 MR. BOIES: Yes.

3 QUESTION: The Supreme Court of Florida said
4 that it took, that it was cognizant, and the legislature
5 was cognizant of 3 U.S.C. Section 5. And for convenience
6 sake, let's call that new law. That's not exactly the --

7 QUESTION: When the Supreme Court used that
8 word, I assume it used it in a legal sense. Cognizance
9 means to take jurisdiction of, to take authoritative
10 notice. Why doesn't that constitute an acceptance by the
11 Supreme Court of the proposition that 3 USC section 5 must
12 be interpreted in this case?

13 MR. BOIES: I think, Your Honor, and obviously
14 this Court and the Florida Supreme Court is the best
15 interpreter of that opinion, but I think a reasonable
16 interpretation of that opinion is to say that what the
17 Florida Supreme Court meant by cognizant is that it was
18 taking into account the desire to get the election over in
19 time so that everyone would have the advantage of the safe
20 harbor. I think that goes throughout the opinion.

21 QUESTION: Well, the language used in 3 USC
22 section 5 is garden variety language so far as the courts
23 are concerned. We can determine whether or not there is a
24 new law or an old law. That's completely susceptible of
25 judicial interpretation, is it not?

1 MR. BOIES: Yes, I think it is, Your Honor.

2 QUESTION: All right. And it seems to me that if
3 the Florida court, and presumably the Florida legislature
4 have acted with reference to 3 USC section 5 that it
5 presents now a federal question for us to determine
6 whether or not there is or is not a new law by reason of
7 the various Florida supreme -- two Florida Supreme Court
8 decisions.

9 MR. BOIES: Except, Your Honor, what the Florida
10 Supreme Court did I think in its opinion is to say that in
11 terms of looking at how to remedy the situation, it needed
12 to be cognizant of the fact that there was this federal
13 deadline out there that was going to affect Florida's
14 electors if that deadline was not met.

15 QUESTION: Well, of course the deadline is
16 meaningless if there's a new law involved. That's part of
17 the equation, too.

18 MR. BOIES: Yes, but what I would say is that
19 whether or not there is a new law, that is whether there's
20 a change in the enactment in the language of the statute
21 or the constitution, is something that has to be decided
22 in the initial instance by the Florida Supreme Court
23 interpreting Florida law.

24 QUESTION: There really -- Mr. Boies, there are
25 really two parts to that sentence of section 5 we're

1 talking about. One is the law in effect at the time and
2 the other is finally determined six days before the date
3 for choosing the electors. Do you think the Florida court
4 meant to acknowledge -- it seems to me since it's cited
5 generally, they must have acknowledged both of those
6 provisions.

7 MR. BOIES: I don't know exactly what was in the
8 Florida Supreme Court's mind, but I think that in general
9 what the Florida Supreme Court made quite clear is that
10 the thing that was constraining it was the desire to fit
11 its remedy within the safe harbor provision.

12 QUESTION: So that's the finally determined
13 portion of section 5?

14 MR. BOIES: Yes, Your Honor, yes, I think that's
15 right. And I think it does not reflect a desire to change
16 the law or in any way affect what the substantive law is.
17 What the court is saying is --.

18 QUESTION: Let me ask, could the legislature of
19 the State of Florida, after this election, have enacted a
20 statute to change the contest period by truncating it by
21 19 days?

22 MR. BOIES: You mean by shortening it?

23 QUESTION: Without contravening the section
24 which says that there should be no new law for the safe
25 harbor? Could the Florida Supreme Court have done what

1 the -- could the Florida legislature have done what the
2 supreme court did?

3 MR. BOIES: I think that it would be unusual. I
4 haven't really thought about that question. I think they
5 probably could not --.

6 QUESTION: Consistently, because that would be a
7 new law under section 5, wouldn't it?

8 MR. BOIES: Yes, because it would be a
9 legislative enactment as opposed to a judicial
10 interpretation of an existing law. Remember --.

11 QUESTION: And in fact it would be a new law
12 under our pre-clearance jurisprudence, wouldn't it?

13 MR. BOIES: I think not, Your Honor, because if
14 you go back to the State against Chappell in 1988, where
15 the Florida Supreme Court faced the very question of
16 whether or not that seven-day period was an iron curtain
17 that came down, the Florida Supreme Court said it was not.
18 The Florida Supreme Court said that you had to look as to
19 whether there was substantial compliance. In that case
20 three days was found to be substantial compliance. That
21 was a situation in which there was telephone notice, which
22 was not adequate for certification. That was then
23 followed up --.

24 QUESTION: But if we assume the legislature
25 would run contrary to the new law prohibition in the

1 statute, wouldn't the Supreme Court do it if it does
2 exactly the same thing?

3 MR. BOIES: Except what I'm saying, Your Honor,
4 is that it wasn't doing exactly the same thing because it
5 wasn't passing a new law. It was interpreting the
6 existing law. If the legislature had said, for example
7 the legislature --.

8 QUESTION: I'm not sure why -- if the
9 legislature does it it's a new law and when the supreme
10 court does it, it isn't. Both would have to require --
11 you have to pre-clear judicial rulings and see whether
12 they make new laws, don't you?

13 MR. BOIES: What I'm saying, Your Honor, is that
14 if the supreme court had rewritten the law the way you
15 hypothesized the legislature rewrote the law, it might
16 very well be a difference. What I'm saying is that the
17 Florida Supreme Court did not rewrite the law in the way
18 that you hypothesized. What the Florida Supreme Court was
19 confronted with was a statute, and that statute said that
20 -- and it was the later passed statute, we get back into
21 the may and the shall.

22 The may statute was the later passed statute,
23 and so what the Florida Supreme Court said is we have to
24 look at what is the criteria by which you decide whether
25 you may ignore and will ignore these returns, and what the

1 Florida Supreme Court said, we're going to interpret that
2 exactly the way we've interpreted it for 25 years, and 12
3 years before the Florida Supreme Court made this decision,
4 it had made the State against Chappell decision in which
5 it had approached it from exactly the same policy grounds.

6 QUESTION: Well, it was quite a different -- I
7 mean, there, indeed, telephone notification had been given
8 within the deadline, and the actual written material was
9 not submitted until a few days after. I think that's
10 quite a bit different from extending the period generally
11 and for all submissions for, you know -- but if I could
12 -- I'm not sure that you and Justice Kennedy are
13 disagreeing on very much. It seems to me you acknowledge
14 that if the Florida Supreme Court's interpretation of this
15 law were not a reasonable interpretation, just not one
16 that would pass normal judicial muster, then it would be
17 just like the legislature writing a new law, but your
18 contention here is that this is a reasonable
19 interpretation of Florida law.

20 MR. BOIES: I think the way I would put it, Your
21 Honor, is that if you conclude that the Florida Supreme
22 Court's interpretation of Florida law is either a sham or
23 it is so misguided that it is simply untenable in any
24 sense --.

25 QUESTION: Right.

1 MR. BOIES: I think at that point then you can
2 conclude that what it has done is it has changed the law,
3 but I think the standard is the standard this Court has
4 generally applied in giving deference to state supreme
5 court decisions.

6 QUESTION: But is it in light of Article II?
7 I'm not so sure. I mean, I would have thought that that
8 bears on the standard, frankly, when it contemplates that
9 it is plenary power in the legislature. Does that not
10 mean that a court has to, in interpreting a legislative
11 act, give special deference to the legislature's choices
12 insofar as a presidential election is concerned? I would
13 think that is a tenable view anyway, and especially in
14 light also of the concerns about section 5.

15 MR. BOIES: I think, Your Honor, that if the
16 Florida Supreme Court in interpreting the Florida law, I
17 think the Court needs to take into account the fact that
18 the legislature does have this plenary power. I think
19 when the Florida Supreme Court does that, if it does so
20 within the normal ambit of judicial interpretation, that
21 is a subject for Florida's Supreme Court to take.

22 QUESTION: You are responding as though there
23 were no special burden to show some deference to
24 legislative choices. In this one context, not when courts
25 review laws generally for general elections, but in the

1 context of selection of presidential electors, isn't there
2 a big red flag up there, watch out?

3 MR. BOIES: I think there is in a sense, Your
4 Honor, and I think the Florida Supreme Court was grappling
5 with that.

6 QUESTION: And you think it did it properly?

7 MR. BOIES: I think it did do it properly.

8 QUESTION: That's, I think, a concern that we
9 have, and I did not find really a response by the Florida
10 Supreme Court to this Court's remand in the case a week
11 ago. It just seemed to kind of bypass it and assume that
12 all those changes and deadlines were just fine and they
13 would go ahead and adhere to them, and I found that
14 troublesome.

15 MR. BOIES: Your Honor, if I could, one of the
16 things that was argued from the beginning by
17 Governor Bush's counsel and accepted by the Florida
18 Supreme Court was that the protest statute and the contest
19 statute were very separate procedures. There was a time
20 limit in the protest contest prior to certification, but
21 there is no time limit in the contest statute process,
22 which is what we are in now, and I think that the Florida
23 Supreme Court was focusing on this contest period, which
24 is what is really before, was before them and is before
25 you, and in the contest --

1 QUESTION: But I thought, and maybe I'm
2 mistaken, but I thought it directed that certain votes
3 that had been tabulated after the expiration of the
4 original certification date were to be included now
5 without reference to the point at all that their opinion
6 had been vacated. I just didn't know how that worked.

7 MR. BOIES: Well, there are three different
8 groups of votes, okay? And with respect -- Broward, Palm
9 Beach, and Miami-Dade. With respect to Miami-Dade and
10 Palm Beach, there was a trial. There was a contest trial.
11 It is the appeal from that trial that is before this
12 Court. And the petitioners don't really refer to what's
13 in the trial record but in that trial record, there was
14 undisputed evidence that the votes that were counted there
15 were valid legal votes. Now, whether those votes were
16 counted as part of the certification process or not --.

17 QUESTION: This was a --.

18 MR. BOIES: Once you know they are valid votes
19 -- .

20 QUESTION: This was a trial, Mr. Boies, in the
21 circuit court of Miami-Dade?

22 MR. BOIES: Yes. No. In the Circuit Court of
23 Leon County. Because it's a statewide election, the
24 contest procedure takes you to Leon County, regardless of
25 where the votes are cast. But what the, what the, what

1 the court found there, and there was undisputed evidence,
2 and Mr. Richard, who was Governor Bush's counsel here,
3 conceded that the Palm Beach Board had applied the
4 appropriate standard in identifying votes, the so-called
5 215 additional net votes for Vice President Gore and
6 Senator Lieberman. What you had there was undisputed
7 evidence, it was found as a matter of fact, and the
8 Supreme Court reviewing that trial said you've had these
9 votes identified by Miami-Dade, 168 net votes, by Palm
10 Beach, 215 net votes, and those votes need to be included.
11 Not because -- .

12 QUESTION: It not only said --.

13 MR. BOIES: -- It's a part of the certification
14 process.

15 QUESTION: It not only said that. It said that
16 those votes have to be certified.

17 MR. BOIES: Yes, Your Honor.

18 QUESTION: It said that those votes had to be
19 certified, which certainly contravenes our vacating of
20 their prior order.

21 MR. BOIES: I think not, Your Honor, because
22 when you look at the contest statute, it is a contest of
23 the certification. That is, the process is the results
24 are certified and then what happens is you contest whether
25 that certification is right.

1 QUESTION: I understand, but this, but what the
2 Florida Supreme Court said is that there shall be added to
3 the certification these additional numbers.

4 MR. BOIES: But that's true in any contest.
5 Every single contest -- .

6 QUESTION: It's not added to the certification.

7 MR. BOIES: Yes, of course it is, Your Honor.

8 QUESTION: You may do review of the ballots and
9 add more numbers, but as I read the Florida Supreme Court
10 opinion, it said the Secretary of State will certify these
11 additional --.

12 MR. BOIES: Yes. Because the contest procedure
13 is a procedure to contest the certification. What you are
14 doing is you are saying this certification is wrong.
15 Change it. That's what every contest proceeding is. And
16 what the Florida Supreme Court was saying after this trial
17 is yes, you proved that this certification is missing 250
18 votes.

19 QUESTION: The certification as rendered by the
20 Secretary of State did not include those additional
21 ballots for your client, and the Supreme Court directed
22 that the certification would be changed to include those.

23 MR. BOIES: But, but Your Honor, that is what
24 happens every time there is a successful contest. The
25 contest is a contest of the certification. You have the

1 certification results first.

2 QUESTION: It doesn't make any sense to me. You
3 have a certification which is made by the Secretary of
4 State. That is what is contested.

5 MR. BOIES: Right.

6 QUESTION: And here the certification was
7 directed to be changed. Let -- .

8 QUESTION: By the way, does it matter
9 if they said in Palm Beach and, Palm Beach and Miami-Dade,
10 the ones that the court said you must certify, if they
11 were thrown into the other, said recount them. If it's
12 uncontested in the trial, I guess that you would get to
13 the same place.

14 MR. BOIES: I think you get to exactly the same
15 place.

16 QUESTION: So it doesn't really matter.

17 MR. BOIES: I think it doesn't really matter
18 what they said.

19 QUESTION: But Broward might?

20 MR. BOIES: But Broward might.

21 QUESTION: Would you object if they have a
22 different standard to recounting those?

23 MR. BOIES: Broward is a different situation.

24 QUESTION: Yes.

25 MR. BOIES: With respect to Broward, what you

1 have is you have these votes that have been counted, and
2 were included in the certification, and if were you to
3 assume that that certification that came in on November
4 26th is somehow void, then those ballots would have to be
5 considered just like the Dade and Palm Beach ballots, so I
6 think there is a distinction between Broward and -- .

7 QUESTION: Do you think that in the contest
8 phase, there must be a uniform standard for counting the
9 ballots?

10 MR. BOIES: I do, Your Honor. I think there
11 must be a uniform standard. I think there is a uniform
12 standard. The question is whether that standard is too
13 general or not. The standard is whether or not the intent
14 of the voter is reflected by the ballot. That is the
15 uniform standard throughout the State of Florida.

16 QUESTION: That's very general. It runs
17 throughout the law. Even a dog knows the difference in
18 being stumbled over and being kicked. We know it, yes.

19 In this case -- in this case what we are
20 concerned with is an intent that focuses on this little
21 piece of paper called a ballot, and you would say that
22 from the standpoint of equal protection clause, could each
23 county give their own interpretation to what intent means,
24 so long as they are in good faith and with some reasonable
25 basis finding intent?

1 MR. BOIES: I think -- .

2 QUESTION: Could that vary from county to
3 county?

4 MR. BOIES: I think it can vary from individual
5 to individual. I think that just as these findings -- .

6 QUESTION: So that, so that even in one county
7 can vary from table to table on counting these ballots?

8 MR. BOIES: I think on the margin, on the
9 margin, Your Honor, whenever you are interpreting intent,
10 whether it is in the criminal law, an administrative
11 practice, whether it is in local government, whenever
12 somebody is coming to government --.

13 QUESTION: But here you have something
14 objective. You are not just reading a person's mind. You
15 are looking at a piece of paper, and the supreme courts in
16 the states of South Dakota and the other cases have told
17 us that you will count this hanging by two corners or one
18 corner, this is susceptible of a uniform standard, and yet
19 you say it can vary from table to table within the same
20 county.

21 MR. BOIES: With respect, it is susceptible of a
22 more specific standard, and some states, like Texas, have
23 given a statutory definition, although even in Texas,
24 there is a catch-all that says anything else that clearly
25 specifies the intent of the voter. So even, even where

1 states have approached this in an attempt to give
2 specificity, they have ended up with a catch-all provision
3 that says look at the intent of the voter.

4 QUESTION: But they have ended up with a
5 catch-all provision because I assume there may be cases in
6 which the general rule would otherwise operate in which
7 there is an affirmative counter indication to what the
8 general rule would provide, but I think what's bothering
9 Justice Kennedy and it's bothering a lost us here is we
10 seem to have a situation here in which there is a
11 subcategory of ballots in which we are assuming for the
12 sake of argument since we know no better that there is no
13 genuinely subjective indication beyond what can be viewed
14 as either a dimple or a hanging chad, and there is a
15 general rule being applied in a given county that an
16 objective intent or an intent on an objective standard
17 will be inferred, and that objective rule varies, we are
18 told, from county to county. Why shouldn't there be one
19 objective rule for all counties and if there isn't, why
20 isn't it an equal protection violation?

21 MR. BOIES: Let me answer both questions.
22 First, I don't think there is a series of objective
23 interpretations, objective criteria that would vary county
24 by county.

25 QUESTION: All right. But on the assumption

1 that there may be, if we were fashioning a response to the
2 equal protection claim, and we assume as a fact that there
3 may be variations, wouldn't those variations as, from
4 county to county, on objective standards, be an equal
5 protection violation?

6 MR. BOIES: I don't think so. I don't think so,
7 Your Honor, because I think there are a lot of times in
8 the law in which there can be those variations from jury
9 to jury, from public official to public official.

10 QUESTION: Yes, but in jury to jury cases, we
11 assume that there is not an overall objective standard
12 that answers all questions definitively. We are assuming
13 that there is detail that cannot be captured by an
14 objective rule.

15 The assumption of this question, and I think, I
16 think it's behind what's bothering Justice Kennedy,
17 Justice Breyer, me and others, is, we're assuming there's
18 a category in which there just is no other -- there is no
19 subjective appeal. All we have are certain physical
20 characteristics. Those physical characteristics we are
21 told are being treated differently from county to county.
22 In that case, where there is no subjective counter
23 indication, isn't it a denial of equal protection to allow
24 that variation?

25 MR. BOIES: I don't think, I don't think so,

1 Your Honor, because -- and maybe I am quarreling with a
2 premise that says there are these objective criteria.
3 Maybe if you had specific objective criteria in one county
4 that says we're going to count indented ballots and
5 another county that said we're only going to count the
6 ballot if it is punched through. If you knew you had
7 those two objective standards and they were different,
8 then you might have an equal protection problem.

9 QUESTION: All right, we're going to assume that
10 we do have that. We can't send this thing back for more
11 fact finding. If, if we respond to this issue and we
12 believe that the issue is at least sufficiently raised to
13 require a response, we've got to make the assumption, I
14 think at this stage, that there may be such variation, and
15 I think we would have a responsibility to tell the Florida
16 courts what to do about it.

17 On that assumption, what would you tell them to
18 do about it?

19 MR. BOIES: Well, I think that's a very hard
20 question.

21 QUESTION: You would tell them to count every
22 vote. We're telling them to count every vote.

23 MR. BOIES: I would tell them to count every
24 vote.

25 QUESTION: Let me ask you, before you answer

1 that question, Mr. Boies --.

2 MR. BOIES: I think, I think I would say that if
3 you're looking for a standard, and I say that not because
4 of the particular aspects of this election -- the Texas
5 standard, if you wanted to specify something that was
6 specific, gives you a pretty good standard.

7 QUESTION: Let me ask you this question, Mr.
8 Boies. Is it really, does not the procedure that is in
9 place there contemplates that the uniformity will be
10 achieved by having the final results all reviewed by the
11 same judge?

12 MR. BOIES: Yes, that's what I was going to say,
13 Your Honor, that what you have here is you have a series
14 of decisions that people get a right to object to is all
15 going through a process, the people are there. They
16 submit written objections, and then that's going to be
17 reviewed by a court.

18 QUESTION: Well, all right. That causes me some
19 problems that pertain not just to the equal protection
20 aspect of this, but to the rationality of the supreme
21 court's opinion, because the supreme court opinion on the
22 one hand said, as you've just repeated, that there was to
23 be de novo review by the circuit judge in Leon County.
24 But on the other hand, it said that he had to accept the
25 counts that had come out of Palm Beach and Broward

1 counties.

2 It was clear that Broward and Palm Beach
3 counties had applied different criteria to dimpled
4 ballots. One of them was counting all dimpled ballots,
5 the other one plainly was not. How can you at one and the
6 same time say it's a de novo standard as to what is the
7 intent of the voter, and on the other hand say, you have
8 to accept, give some deference to, quite differing
9 standards by two different counties? That's just not
10 rational.

11 MR. BOIES: Your Honor, I think what the court
12 held was not include both Broward and Palm Beach. I think
13 it was Palm Beach and Miami-Dade, because Broward was not
14 part of the trial because Broward had been certified, and
15 with respect to Miami-Dade and Palm Beach, I do not
16 believe that there is evidence in the record that that was
17 a different standard. I don't -- and there's no finding
18 at the trial court that that was a different standard.
19 Indeed, what the trial court found was that both
20 Miami-Dade and Palm Beach properly exercised their
21 counting responsibilities, so I don't think --.

22 QUESTION: What do you mean? Properly exercised
23 what? Their discretion, right? Is that what he meant by
24 counting responsibilities?

25 MR. BOIES: I believe what he meant, it was

1 discerning the clear intent of the voter, which is what
2 they were both attempting to do.

3 QUESTION: Was this the trial before Judge
4 Sauls?

5 MR. BOIES: Yes, Your Honor.

6 QUESTION: I thought he ruled against the
7 contestants, said they took nothing.

8 MR. BOIES: Yes, that is, that is right, but he
9 did so based on what the Florida Supreme Court held, and
10 what six justices of the Florida Supreme Court held were
11 two errors of law. First, that we had to prove before he
12 looked at the ballots that there was a probability that
13 the election result would be changed, and second, that we
14 had to prove abuse of discretion.

15 QUESTION: But the fact-finding phase of that
16 trial would be from -- you say these were found as a fact
17 in some -- did he make findings of fact?

18 MR. BOIES: Yes, he did.

19 QUESTION: What did he say with respect to this?

20 MR. BOIES: With respect to this he said -- he
21 said it separately with respect to Miami-Dade and Palm
22 Beach. Because he found that they had properly exercised
23 their discretion. The Palm Beach chairman of the
24 canvassing board actually was a witness, Judge Burton. He
25 came and testified, and he testified that they used a

1 clear intent of the voter standard.

2 QUESTION: As opposed to just intent of the
3 voter?

4 MR. BOIES: Yes, just intent. They used clear
5 intent of the voter. And the statute, sometimes, in one
6 section says clear intent of the voter. That's the one
7 that Petitioners' counsel is referring to. In 166, it
8 refers in subsection 7(b) to the intent of the voter, but
9 Palm Beach used the clear intent of the voter and found
10 hundreds of ballots that they could discern the clear
11 intent of the voter from that were not machine read.

12 Now, in doing so, they were applying Florida
13 law, and like the law of many states, it has a general
14 standard, not a specific standard.

15 QUESTION: Were those dimpled or hanging chads,
16 so to speak?

17 MR. BOIES: Well, what he testified is that you
18 looked at the entire ballot, that if you found something
19 that was punched through all the way in many races, but
20 just indented in one race, you didn't count that
21 indentation, because you saw that the voter could punch it
22 through when the voter wanted to. On the other hand, if
23 you found a ballot that was indented all the way through,
24 you counted that as the intent of the voter.

25 QUESTION: With no holes punched?

1 MR. BOIES: With no holes punched, but, but
2 where it was indented in every way.

3 QUESTION: That was counted as proper in --.

4 MR. BOIES: In Palm Beach.

5 QUESTION: Palm Beach.

6 MR. BOIES: Another, another thing that they
7 counted was he said they discerned what voters sometimes
8 did was instead of properly putting the ballot in where it
9 was supposed to be, they laid it on top, and then what you
10 would do is you would find the punches went not through
11 the so-called chad, but through the number.

12 QUESTION: Well, why isn't the standard the one
13 that voters are instructed to follow, for goodness sakes?
14 I mean, it couldn't be clearer. I mean, why don't we go
15 to that standard?

16 MR. BOIES: Well, Your Honor, because in Florida
17 law, since 1917, Darby against State, the Florida Supreme
18 Court has held that where a voter's intent can be
19 discerned, even if they don't do what they're told, that's
20 supposed to be counted, and the thing I wanted to say
21 about the Beckstrom case is that was a case that used
22 optical ballots. Voters were told, fill it in with a
23 number two pencil. Several thousand didn't. They used
24 everything else, but not a number two pencil. And so the
25 machine wouldn't read it. It was voter error.

1 The Supreme Court in 1998, well before this
2 election, said you've got to count those votes. And in
3 fact, they counted those votes even though the way the
4 canvassing board dealt with them was to go back and mark
5 them over with a big black marker, which made it
6 impossible to check whether the canvassing board had
7 really just marked over the ballot or had put a new mark
8 on the ballot.

9 QUESTION: Mr. Boies, can I come back to this
10 discrepancy between Palm Beach and Broward County? I'm
11 reading from footnote 16 of the Florida Supreme Court's
12 opinion. On November 9, 2000, a manual recount was
13 requested on behalf of Vice President Gore in four
14 counties -- miami-Dade, Broward, Palm Beach, and Volusia.
15 Broward County and Volusia County timely completed a
16 manual recount. It is undisputed that the results of the
17 manual recounts in Volusia County and Broward County were
18 included in the statewide certifications.

19 MR. BOIES: Yes, Your Honor.

20 QUESTION: And those statewide certifications
21 the Supreme Court ordered to be accepted. So it is -- the
22 Supreme Court, while applying a standard of supposedly de
23 novo review of the certifications, is requiring the
24 Circuit Court to accept both Broward County, which does
25 one thing with dimpled ballots, and Palm Beach County,

1 which does something clearly different.

2 MR. BOIES: Your Honor, the de novo review is in
3 the contest phase, and neither Volusia County nor Broward
4 County was a contest filed. What the Supreme Court holds
5 is that you've got de novo review in a contest. A contest
6 relates to specific ballots that are contested. The
7 ballots in Broward and Volusia were not contested by any
8 party.

9 QUESTION: But the determination that the
10 circuit court has to make about whether it's necessary to
11 have a recount is based upon the certifications.

12 MR. BOIES: No. It's only based on the --

13 QUESTION: Which he then accepts --

14 MR. BOIES: No. It's only based on the
15 certifications that are contested. In other words, if you
16 are going to order the manual review of the ballots, the
17 issue is what ballots are contested, and second, is there
18 a judicial review of those ballots.

19 QUESTION: You have to know how close the state
20 election was, don't you?

21 MR. BOIES: Yes. But you --

22 QUESTION: For which purpose you'll accept the
23 certifications.

24 MR. BOIES: Yes. That's true.

25 QUESTION: And here --

1 MR. BOIES: And you had a certification.

2 QUESTION: And here you are telling him to
3 accept it not de novo, but deferring to Broward County.

4 MR. BOIES: I think what the Supreme Court is
5 saying is you have got a certification. That
6 certification shows a certain vote total. Now, you take
7 that certification until it is contested, and it can be
8 contested by either or both parties. You do not have,
9 until it is contested, you do not have contested ballots.
10 Once have you contested ballots, then going back to State
11 against Williams, Nuccio against Williams in 1929, cited
12 in our papers, then it becomes a judicial question, and
13 what the court holds is you then look at that as a
14 judicial matter and that is why you have going on in Leon
15 County the review of the Miami-Dade ballots under the
16 court's supervision.

17 Now, I would point out that we asked to have the
18 Miami-Dade ballots reviewed. We also asked to have the
19 3,300 Palm Beach ballots reviewed, but the supreme court
20 said no to us on that. They said yes, you can have the
21 9,000 Miami-Dade ballots reviewed. They also said, which
22 we didn't ask for, they said as a matter of remedy, we
23 want to review the undervotes all around the state.

24 QUESTION: Mr. Boies, one of the dissenting
25 justices in the Supreme Court of Florida said that meant

1 177,000 ballots. Was he correct in your view?

2 MR. BOIES: No. That is a result of adding the
3 so-called undervotes that were mentioned and the so-called
4 overvotes that were mentioned. Either an undervote where
5 no vote registers for president or an overvote where two
6 or more registers for president are discarded, because you
7 can't vote twice, and if you vote not at all, and in
8 either circumstance, your vote doesn't get counted.

9 QUESTION: So if you disagree that 177,000
10 ballots will be involved in this recount, how many do you
11 think there are?

12 MR. BOIES: It's approximately 60,000, I think,
13 Your Honor. It turns out to be less than that because of
14 the recounts that have already been completed, but I think
15 the total sort of blank ballots for the presidency start
16 at around 60,000.

17 QUESTION: Mr. Boies, can I ask, ask you this
18 question. Does that mean there are 110,000 overvotes?

19 MR. BOIES: That's right.

20 QUESTION: And if that's the case, what is your
21 response to the Chief Justice of Florida's concern that
22 the recount relates only to undervotes and not overvotes?

23 MR. BOIES: Well first, nobody asked for a
24 contest of the overvotes, and the contest statute begins
25 with a party saying that there is either a rejection of

1 legal votes or an acceptance of illegal votes.

2 QUESTION: But as a matter of remedy it's
3 ordered a statewide recount in counties where the ballots
4 were not contested, and that's where I'm having some
5 difficulty, and it goes back to, in part to your answer
6 that you gave to Justice Stevens -- Justice Scalia about
7 Broward County, and in part to the answer you are giving
8 to Justice Stevens now. Why is it that you say on the one
9 hand to Justice Scalia, oh, well, these weren't part of
10 the contest, but now all of a sudden we are talking about
11 statewide, not all of which were contested, but we are not
12 talking about the overvotes?

13 MR. BOIES: Two parts to the answer. The reason
14 that I said what I did to Justice Scalia was that I think
15 that if this Court were to rule that there was something
16 wrong with the statewide recounts, that they were being
17 done by canvassing boards as opposed to directly by the
18 court, or because the court was not supervising the
19 particular expression of voter intent, what the court
20 would have done is simply cut back on a remedy that we
21 didn't ask for.

22 The second part is that when you are dealing
23 with overvotes, remember, this is a machine issue. When
24 you are dealing with overvotes, the machine has already
25 registered two votes. Now, there may be another vote

1 there, a dimpled vote or an indented vote that the machine
2 did not register. But once you get two votes, that ballot
3 doesn't get counted for the presidency.

4 QUESTION: They gave an example. The example
5 they gave in their brief was there is a punch for Governor
6 Bush, and then there is a punch for write-in and the
7 write-in says I want Governor Bush and so I think their
8 implication is that that would have been rejected by the
9 machine, but if you looked at it by hand the intent of the
10 voter would be clear. Now I don't know if there are such
11 votes, but they say there might be.

12 MR. BOIES: There is nothing in the record that
13 suggests that there are such votes. If anybody had
14 contested the overvotes, it would have been a relatively
15 simple process to test that because you could simply test
16 it as to whether the double vote was a write-in vote or
17 was another candidate.

18 QUESTION: I gathered from the opinion of the
19 Supreme Court of Florida that the Vice President did not
20 ask for as broad a recount as the Supreme Court granted,
21 but that it thought that to do just what he wanted would
22 be unfair and therefore out of fairness, they granted the
23 wider recount, am I correct in that?

24 MR. BOIES: I think that's right. I think
25 that's the way I would interpret it, Mr. Chief Justice.

1 QUESTION: Mr. Boies, I have one other
2 perplexity about the scheme that's been set up here. What
3 -- there is a very, as you point out, there is scant
4 statutory provision concerning, concerning the contest.
5 There is quite detailed statutory provision concerning the
6 protest period. And it tells everybody how to act and
7 time limits and all of that.

8 Why would anyone bother to go through the
9 protest period, have these ballots counted by the
10 canvassing boards, have them certify the results? Why go
11 through all that when the whole thing begins again with a
12 contest? There is no, no -- once a contest filed, the
13 certification is meaningless. What advantage is there to
14 win the protest?

15 MR. BOIES: It's not meaningless. It becomes
16 the baseline, and in every contest that has ever taken
17 place, including this one, that has been the baseline that
18 has determined 99-plus percent of the votes, and what is
19 contested are simply those ballots that during the protest
20 phase have been identified as disputed ballots, so that
21 the, the protest phase solves 99 percent of the election
22 or more. What is left over are those ballots that one
23 side or the other has contested, and that's what the
24 contest deals with.

25 QUESTION: My concern is that the contest period

1 as we have been talking about requires the setting of
2 standards, judicial review, and by reason of what I take
3 it to be your earlier position in the litigation, this
4 period has been truncated by 19 days, causing the time
5 frame of which we are all so conscious, making it
6 difficult for appellate review, and it seems to me, and we
7 are getting back to the beginning of this, that the
8 legislature could not have done that by a statute without
9 it being under law, and that neither can the Supreme Court
10 without it being a new law, a new scheme, a new system for
11 recounting at this late date. I'm very troubled by that.

12 MR. BOIES: But, Your Honor, at this -- leaving
13 aside the prior case about the extension of the time for
14 certification, which I think at this stage you have to
15 leave aside because at the contest stage, what you are
16 doing is you are contesting specific ballots whether or
17 not they were included in the certification.

18 It's absolutely clear under Florida law that
19 that's what the contest is about, so at the contest stage,
20 the only question is can you complete the contest of the
21 contested ballots in the time available?

22 Everything that's in the record is, that we
23 could have and indeed we still may be able to, if that
24 count can go forward.

25 QUESTION: Including appeals to the Supreme

1 Court of Florida, and another petition to this Court?

2 MR. BOIES: Excuse me, Your Honor?

3 QUESTION: I said after the circuit judge says
4 that the contest comes out this way, surely there is going
5 to be an appeal to the Supreme Court of Florida and likely
6 another petition to this Court. Surely that couldn't have
7 been done by December 12th, could it?

8 MR. BOIES: Your Honor, I think, I think the
9 appeal to the Florida Supreme Court could have and indeed
10 the schedule that was set up would have made that quite
11 possible. There is about another day or so, except for,
12 except for four or five counties, all of the counties
13 would be completed in about another day. And maybe even
14 those counties could be now because as I understand it
15 some of them have taken advantage of the time to get the
16 procedures ready to count.

17 QUESTION: Just a minute, Mr. Boies. Wouldn't
18 the Supreme Court of Florida want briefs and wouldn't the
19 parties have needed time to prepare briefs?

20 MR. BOIES: Yes, Your Honor, but as we did in
21 this Court, we have done in the Florida Supreme Court a
22 number of times and that is to do the briefs and have the
23 argument the next day and a decision within 24 hours.

24 QUESTION: After the counts are conducted in the
25 individual counties, wouldn't the Leon County circuit

1 judge have to review those counts? After all, it's -- I
2 mean, the purpose of the scheme is to have a uniform
3 determination.

4 MR. BOIES: To the extent that there are
5 contested or disputed ballots --.

6 QUESTION: Right .

7 MR. BOIES: -- I think that may be so, Your
8 Honor.

9 QUESTION: Well, wouldn't that take a fair
10 amount of time and is that delegable? I assume he would
11 have to do that personally.

12 MR. BOIES: We believe that it could be done in
13 the time available. We also believe that we have
14 available to us the argument that says you finished what
15 we contested. Although the supreme court has said as a
16 matter of remedy it would be a good idea to do these other
17 things that nobody asked for, that if it gets down to the
18 point where you can -- you have done the contest and you
19 simply have not gotten completed all of this other remedy
20 under 168 subsection 8, that we are still entitled under
21 settled Florida law to have our votes counted.

22 QUESTION: The supreme court said you had to do
23 it all in the interest of fairness.

24 MR. BOIES: I think that what --.

25 QUESTION: I thought you agreed with me on that

1 a moment ago.

2 MR. BOIES: I did, Your Honor. I think that
3 what they were saying is that as a matter of remedy this
4 is the fairest way to do it. I don't think they were
5 saying that it would violate fundamental fairness to only
6 take into account what you could get done in the time
7 available. There's nothing in the Supreme Court opinion
8 that would suggest this.

9 QUESTION: Mr. Boies, would you explain to me
10 again how the protest and the contest fits in. You said
11 that the -- let's assume that my complaint that I want to
12 protest is the failure to do undercounts to those ballots
13 that were undercounted, okay? That's my protest.

14 MR. BOIES: Right.

15 QUESTION: Why would I ever bring that in a
16 protest proceeding? Why wouldn't I just go right to the
17 contest because it doesn't matter whether I win or lose
18 the protest proceeding. It's de novo at the contest
19 stage. What possible advantage is there to go through the
20 protest proceeding?

21 MR. BOIES: If you've identified the ballots,
22 you could presumably wait and do it at the contest phase.
23 There's no particular advantage to doing that. The fact
24 --.

25 QUESTION: I thought the advantage might be as

1 described in the Florida case, Boardman v. Esteva, saying
2 that the certified election returns which occur after the
3 protest period are presumptively correct, and they must be
4 upheld unless clearly outside legal requirements. I
5 thought that was Florida law.

6 MR. BOIES: Your Honor --.

7 QUESTION: Which would make it important to have
8 a protest.

9 MR. BOIES: I think that's right. I think that
10 is right. I would point out that --.

11 QUESTION: I think the Florida court has sort of
12 ignored that old Boardman case.

13 MR. BOIES: Your Honor, I think the Boardman
14 case relates not to the counting of votes, it has nothing
15 to do with the standard in terms of the intent of the
16 voter. The Boardman case, the language that you're
17 referring to is at page 268 of the Southern Reporter
18 report of that case, and what is clear from that page and
19 that discussion is it's dealing with the issue of whether
20 or not because the canvassing board threw away the
21 envelopes from the absentee ballots so they could not be
22 checked, whether that invalidated the absentee ballots,
23 and the court says no, it doesn't, because it's important
24 to count all these votes, and because we assume that what
25 they were doing was proper. That does not, I respectfully

1 suggest, at all deal with the question of deference to the
2 voter intent determination which the court has repeatedly
3 said is a matter for judicial determination.

4 The other thing that I would say with respect to
5 intent is I know the Court is concerned about whether the
6 standard is too general or not. Some states have made
7 specific criteria their law. Other states, not just
8 Florida -- 10 or 11 of them, including Massachusetts, in
9 the Dellahunt case that we cited, has stuck with this very
10 general standard.

11 QUESTION: All right, let's assume --.

12 MR. BOIES: There's a sense where that may be an
13 Article II issue.

14 QUESTION: Mr. Boies, let's assume that at end
15 of the day the Leon County, Florida judge, gets a series
16 of counts from different counties, and they heard those
17 counties have used different standards in making their
18 counts. At that point, in your judgment, is it a
19 violation of the Constitution for the Leon County judge to
20 say, I don't care that there are different standards as
21 long as they purported to fall on intent of the voter,
22 that's good enough.

23 QUESTION: I'll extend your time by two minutes,
24 Mr. Boies.

25 MR. BOIES: Yes. I do not believe that that

1 would violate the equal protection of due process clause.
2 That distinction between how they interpret the intent of
3 the voter standard is going to have a lot less effect on
4 how votes are treated than the mere difference in the
5 types of machines that are used.

6 QUESTION: Then the fact that there is a single
7 judge at the end of the process, in your judgment, really
8 is not an answer to the concern that we have raised.

9 MR. BOIES: No, I think it is an answer. I
10 think there are two answers to it. First, I think that
11 the answer that they did it differently, different people
12 interpreting the general standard differently, would not
13 raise a problem even in the absence of judicial review of
14 that.

15 Second, even if that would have raised a
16 constitutional problem, I think the judicial review that
17 provides the standardization would solve that problem.

18 The third thing that I was saying is that any
19 differences as to how this standard is interpreted have a
20 lot less significance in terms of what votes are counted
21 or not counted than simply the differences in machines
22 that exist throughout the counties of Florida.

23 There are five times as many undervotes in punch
24 card ballot counties than in optical ballot counties.
25 Now, for whatever that reason is, whether it's voter error

1 or machine problems, that statistic, you know, makes clear
2 that there is some difference in how votes are being
3 treated county by county. That difference is much greater
4 than the difference in how many votes are recovered in
5 Palm Beach or Broward or Volusia or Miami-Dade, so that
6 the differences of interpretation of the standard, the
7 general standard are resulting in far fewer differences
8 among counties than simply the differences in the machines
9 that they have.

10 QUESTION: Thank you, Mr. Boies.

11 MR. BOIES: Thank you very much.

12 QUESTION: Mr. Olson, you have five minutes
13 remaining.

14 REBUTTAL ARGUMENT OF THEODORE B. OLSON

15 ON BEHALF OF THE PETITIONERS.

16 MR. OLSON: Thank you, Mr. Chief Justice. I
17 would like to start with a point or two with respect to
18 the equal protection due process component of this case.
19 The Florida Democratic Party on November 20 was asking
20 the -- november 20th of this year, was asking the Florida
21 Supreme Court to establish uniform standards with respect
22 to the looking at and evaluating these ballots, a
23 recognition that there were no uniform standards and that
24 there ought to be.

25 Last Tuesday in the 11th Circuit, unless I

1 misheard him, the attorney for the Attorney General of
2 Florida said that the standards for evaluating these
3 ballots are evolving. There is no question, based upon
4 this record, that there are different standards from
5 county to county.

6 QUESTION: And there are different ballots from
7 county to county too, Mr. Olson, and that's part of the
8 argument that I don't understand. There are machines,
9 there's the optical scanning, and then there are a whole
10 variety of ballots. There is the butterfly ballot that
11 we've heard about and other kinds of postcard ballots.
12 How can you have one standard when there are so many
13 varieties of ballots?

14 MR. OLSON: Certainly the standard should be
15 that similarly situated voters and similarly situated
16 ballots ought to be evaluated by comparable standards.

17 QUESTION: Then you would have to have several
18 standards, county by county would it be?

19 MR. OLSON: You're certainly going to have to
20 look at a ballot that you mark in one way different than
21 these punch card ballots. Our point is, with respect to
22 the punch card ballots, is that there are different
23 standards for evaluating those ballots from county to
24 county and it is a documented history in this case that
25 there have been different standards between November 7th

1 and the present with respect to how those punch card
2 ballots are evaluated.

3 Palm Springs is the best example. They started
4 with a clear rule which had been articulated and explained
5 to the voters, by the way, as of 1990. Then they got into
6 the process of evaluating these ballots and changed the
7 standard from moment to moment during the first day and
8 again, they evolved from the standard that the chad had to
9 be punched through to the so-called dimpled ballot
10 standard, indentations on the ballot. There was a reason
11 why that was done. It was because they weren't producing
12 enough additional votes so that there's pressure on to
13 change the standards. And that will happen in a situation
14 which is where the process is ultimately subjective,
15 completely up to the discretion of the official, and
16 there's no requirement of any uniformity.

17 Now, we now have something that's worse than
18 that. We have standards that are different throughout 64
19 different counties. We've got only undercounts being
20 considered where an indentation on a ballot will now be
21 counted as a vote, but other ballots that may have
22 indentations aren't going to be counted at all. The
23 overvotes are in a different category, and in this very
24 remedy the ballots in Miami-Dade are being treated
25 differently. Some of them have been all examined and the

1 balance of the process, the remaining 80 percent will be
2 looked at only in connection with the undercounts.

3 QUESTION: Mr. Olson, do I understand that your
4 argument on the equal protection branch would render
5 academic what was your main argument that's troublesome,
6 that is that we must say that the Florida Supreme Court
7 was so misguided in its application of its own law that we
8 reject that, and we, the Supreme Court of the United
9 States, decide what the Florida law is?

10 MR. OLSON: I'm not sure I know the answer to
11 that question, whether that would render academic the
12 challenge. There is a clear constitutional violation, in
13 our opinion, with respect to Article II because virtually
14 every aspect of Florida's election code has been changed
15 as a result of these two decisions.

16 QUESTION: But the Florida Supreme Court told us
17 that it hasn't been changed and just looking at one of the
18 cases that you cite frequently, the O'Brien against
19 Skinner case, this court said, well, maybe we would have
20 decided the New York law differently but the highest court
21 of the state has concluded otherwise. It is not our
22 function to construe a state statute contrary to the
23 construction given it by the highest court of the state.

24 MR. OLSON: The only thing I can say in response
25 to that is that what this Court said one week ago today,

1 that as a general rule the court defers to a state court's
2 interpretation of a state statute, but not where the
3 legislature is acting under authority granted to it by the
4 Constitution of the United States.

5 The final point I would like to make is with
6 respect to section 5. It is quite clear that the court in
7 both the earlier decision and the decision last Friday was
8 aware and concerned about compliance with section 5. It
9 construed section 5 in a way that allowed it by labeling
10 what it was doing as interpretation to change in dramatic
11 respects the Florida election law, and we submit because
12 it did, so misconstrued the applicability not only with
13 respect to finality but the other part of section 5
14 requires a determination of controversies pursuant to a
15 set of laws that are in place at the time of the
16 elections.

17 QUESTION: If you start with the premise, a
18 clear intent of a vote should count, where there's a clear
19 intent on the ballot, it should count as a vote, can't you
20 reasonably get the majority's conclusion?

21 MR. OLSON: I don't believe so because we know
22 different standards were being applied to get to that
23 point, and they were having different results.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.
25 The case is submitted.

1 (Whereupon, at 12:27 a.m., the case in the
2 above-entitled matter was submitted.)

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