

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL  
CIRCUIT OF FLORIDA, IN AND FOR SARASOTA COUNTY**

**CIVIL DIVISION**

**CASE NO.**

**CHRISTINE JENNINGS, Democratic  
Candidate for United States House of  
Representatives, Florida Congressional  
District 13,**

**Plaintiff,**

**vs.**

**HON. KATHY DENT, Sarasota  
County Supervisor of Elections; SUE COBB, Secretary of State of  
Florida,**

**Defendants.**

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**AMENDED EMERGENCY PETITION FOR INJUNCTIVE  
RELIEF TO SECURE/SEGREGATE ELECTRONIC VOTING  
SYSTEM MACHINES AND DATA TO PROTECT SANCTITY  
OF EVIDENCE PENDING ELECTION CERTIFICATION AND  
ALLOWABLE LEGAL CHALLENGES; REQUEST FOR  
EXPEDITED CONSIDERATION; SUPPORTING  
MEMORANDUM OF LAW**

**I. INTRODUCTION.**

1. Plaintiff Christine Jennings, the Democratic Candidate for United States House of Representatives, Florida Congressional District 13, asks this court to issue an expedited injunction to protect and prevent any

tampering with, alteration of, or destruction of, all vital and pertinent voting machinery and data utilized in Sarasota County during the November 7, 2006 general election (including the early voting process). This action is needed to safeguard all voting systems, instruments, and data including software and firmware, so as to facilitate the correct and orderly canvassing of voting returns; to ensure an accurate recount of every intended vote that was cast; and to accurately record, preserve and safeguard every intended vote that was cast as required by Florida law; as well as the preservation of evidence pending the outcome of any election contest that follows certification of the vote totals.

2. This complaint proceeds in accordance with principles of due process, fundamental fairness, equal protection, the Florida Election Code, the Help America Vote Act (“HAVA”), and the Voting Rights Act. The pervasive problems manifest in the Sarasota County voting mechanisms for Congressional District 13 can only be remedied through judicial protection in order to secure the safety and efficacy of the vote. The conduct of the Sarasota County elections department throughout this general election raises serious questions about its ability to accurately record, preserve and safeguard every intended vote that was cast, and

causes grave concerns for the preservation of all indicia of the vote. The recent announcement by the Florida Secretary of State to conduct an audit of Sarasota County's voting system and attendant procedures follows from the significant and alarming aberrations in undervotes in the voting totals for Congressional District 13, in Sarasota County. Expedited relief is required due to the impending audit, the limited time allowed for a manual recount, and the deadline for filing an election contest. Without expedited relief, the safeguarding and counting of all ballots cast, to determine the intentions of the voters, is in significant jeopardy, thereby infringing on the right of Florida citizens within Florida Congressional District 13 to have all intended votes accurately counted.

## **II. PARTIES.**

3. Christine Jennings is the Democratic Party candidate for the United States House of Representatives, Florida Congressional District 13, appearing on the November 7, 2006 ballot in Sarasota County.

4. Kathy Dent is the Sarasota County Supervisor of Elections, charged with the responsibility of conducting elections in Sarasota County. See § 98.015, Fla. Stat. (2006).

5. The Defendant, Sue Cobb, is the Secretary of State of Florida.

As Secretary of State, the Defendant Sue Cobb is the chief election officer of the State of Florida and has a responsibility pursuant to the above listed statutory section for general supervision and administration of the election laws including those provisions pertinent to voting systems.

### **III. RELEVANT FACTS.**

6. On November 7, 2006, the Sarasota County Supervisor of Elections conducted a general election.

7. Sarasota County uses an electronic voting machine system for all Election Day and early voting. This voting system is manufactured by Electronic Systems & Software of Omaha.

8. Absentee ballots utilized in Sarasota County are in the form of optical scan paper ballots.

9. Among the elective offices appearing on the November 7, 2006 general election ballot (including the early voting period) was the election for U.S. Representative in Congress, 13<sup>th</sup> Congressional District. On that ballot item, Christine Jennings was the Democratic Party Candidate, while Vern Buchanan was the Republican Party Candidate.

#### **A. Significant Undervotes Reported in Sarasota County.**

10. The total unofficial general election results for Congressional District 13 in Sarasota County recorded 65,367 votes (52.76%) for Christine Jennings, and 58,534 votes (47.24%) for Vern Buchanan. Additionally, there were a total of 18,382 “undervotes” reported in that race in Sarasota County. (§97.021(37) Fla. Stat. states: "Undervote" means that the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question.) Therefore, out of a total of 142,284 ballots cast in that race, in Sarasota County, there was a 12.92% rate of undervotes, which is a statistical aberration.

**B. Machine Undervotes Are Significantly Greater.**

11. Of the votes cast in this race on Election Day in Sarasota County, on the electronic voting machines, there were a total of 88,927 ballots cast. Christine Jennings received 39,930 votes, and Vern Buchanan received 36,619 votes. However on Election Day, in this race, in Sarasota County there were 12,378 undervotes. Therefore, the total undervote rate in Sarasota County in this race on Election Day, on the electronic voting machines, represents 13.92% of the ballots cast, which is a statistical aberration.

12. In the early voting process, in Sarasota County, on the electronic voting machines, in this race, there were a total of 30,832 ballots cast. Christine Jennings received 14,509 votes, and Vern Buchanan received 10,890 votes. However in the early voting process, in this race, in Sarasota County, there were 5,433 undervotes. Therefore the undervote rate for the early voting on the electronic voting machines in Sarasota County represents 17.62% of the total ballots cast, which is a statistical aberration.

13. By combining the total electronic voting machine totals, in this race, in Sarasota County, both early voting and on Election Day, 14.87% of the total ballots cast, more than 1 out of every 7, were undervotes, which constitutes a significant statistical aberration.

14. In this race, in Sarasota County, there were a total of 22,525 absentee ballots cast. Christine Jennings received 10,928 votes, and Vern Buchanan received 11,025 votes. There were only 571 undervotes in those absentee ballots, for this race, which equals 2.53% of such absentee ballots cast, and does not constitute a statistical aberration.

15. The total undervote rate for the 13<sup>th</sup> Congressional District in all other counties is only 2.52% the total ballots cast in those counties, in this

race, and such an undervote rate is not a statistical aberration.

16. According to the unofficial election results for the entire 13<sup>th</sup> Congressional District, Christine Jennings is behind by less than 380 votes, representing less than one-quarter of one percent of the total votes cast and counted. The 17,811 undervotes recorded on the electronic voting machines, for the 13<sup>th</sup> Congressional District in Sarasota County alone are more than sufficient to change or place in doubt the result of the election, thus warranting sufficient grounds for an election contest if the election results are certified. Even more significant is that the number of undervotes in the Congressional 13<sup>th</sup> District race (18,382) dwarfs the undervotes in every other partisan, contested race on the ballot in Sarasota County:

<b>RACE</b>	<b>UNDERVOTES</b>	<b>BALLOTS CAST</b>	<b>% Undervote</b>
US Senator	1,617	142,284	1.14%
Governor	1,821	142,284	1.28%
Attorney General	6,203	142,284	4.36%
CFO	6,299	142,284	4.43%
Agriculture Commissioner	7,371	142,284	5.18%
State Rep 69	1,173	45,086	2.60%
State Rep 70	1,971	66,885	2.95%
<b>TOTALS</b>	<b>26,455</b>	<b>823,391</b>	<b>3.21%</b>

17. The undervotes reported in Congressional District 13 arose, at least in significant part, from electronic voting system and machine irregularities, breakdowns, and inadequate maintenance, resulting in votes that were cast but were not counted for that race.

**C. Manual Recount Is Required By Statute.**

18. According to § 102.166(1), Florida Statutes (2006), a *manual recount* is required by law whenever the unofficial returns indicate “a candidate for any office was defeated or eliminated by one-quarter of a percent or less of the votes cast for such office, ... [and] the board responsible for certifying the results of the vote on such race or measure shall order a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office or ballot measure. A manual recount may not be ordered, however, if the number of overvotes, undervotes, and provisional ballots is fewer than the number of votes needed to change the outcome of the election.”

19. In the case of Congressional District 13, the difference between the two candidates' vote totals is less than 1/4 of one percent, and the number of undervotes in Sarasota County alone is more than sufficient to change the outcome of the election. Consequently, a manual recount is

required in this case.

20. A manual recount can only be effective if all voting machines, voting systems, ballots, and data, including software and firmware used for the 13<sup>th</sup> Congressional District election are preserved in the identical state immediately following the closing of the polls. Any manipulation of the machines, systems, or the ballots could alter the integrity of the vote and the subsequent recount.

**D. An Election Contest Is The Remedy For  
Rejection Of Legal Votes.**

21. In accordance with § 102.168, Florida Statutes (2006), the outcome of an election “may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto” by filing a complaint within ten days after a certification of the election results. A basis for an election contest is the rejection of a number of legal votes sufficient to change or place in doubt the outcome of the election. § 102.168(3)(c), Fla. Stat. (2006).

22. The Sarasota County undervotes represent legal votes cast that should have been counted.

23. Voters in Sarasota County were required to utilize electronic

voting machines. That because the machines and related systems and software or firmware were faulty and defective, they did not count all valid votes for the 13<sup>th</sup> Congressional District or failed to include the 13<sup>th</sup> Congressional District votes cast for Jennings on the summary screen.

**E. Preserving Evidence Is Essential To Counting Votes.**

24. Securing the voting machines, instruments and data including software and firmware, is essential to preserve ballots for the manual recount, and to enable forensic evaluation of the election process for any subsequent election contest. Florida law advances a policy of preservation of ballots in order to promote the sanctity of elections. See *State ex rel. Peacock v. Latham*, 125 Fla. 779, 170 So. 469, 472 (1936). Because the “ballots cast in an election are the primary and best evidence of the voters’ will as expressed therein,” the integrity of the ballots must be maintained for preservation of the votes. See *Burke v. Beasley*, 75 So. 2d 7, 9 (Fla. 1954). The preservation of ballots extends to ballot boxes and the contents thereof. *State ex rel. Miller v. Carmichael*, 144 Fla. 319, 197 So. 857 (1940).

25. The electronic voting machines, instruments and data including software and firmware, used in Sarasota County are responsible for the

aberrant undervoting and are therefore necessary components of the vote, thus mandating the protection, sequestration, and preservation of the electronic voting machines, instruments and data including software and firmware, pending the outcome of the statutory recount and any contest action. Certainly, a full, open, and fair audit of such system is necessary. As the Florida Supreme Court acknowledged in *Gore v. Harris*, 772 So. 2d 1243, 1253-1254 (Fla. 2000)<sup>1</sup>, the presence of a significant undervote, reflected by ballots for which no vote was registered by the electronic counting mechanism, may well have resulted in the rejection of a number of legal votes sufficient to change or place in doubt the outcome of an election, one of the statutory grounds for an election contest. In the present situation, a contest action, if pursued by either candidate, will seek to examine and count all undervotes cast in the Congressional District 13 election, including those in Sarasota County.

#### **IV. LEGAL AUTHORITY.**

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<sup>1</sup> The United States Supreme Court reversed the Florida Supreme Court's order directing a manual recount of a portion of the undervotes in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000). Plaintiff will seek a recount of all undervotes, but only the Sarasota County electronic voting machines are in need of preservation because of their likely manipulation or corruption, in view of the statistically significant

26. Courts have the authority to order the preservation of relevant evidence even prior to the filing of an action, once a defendant reasonably anticipates an action may be forthcoming. See *Silvestri v. General Motors*, 271 F.3d 583, 590 (4<sup>th</sup> Cir. 2001); *Kronisch v. United States*, 150 F.3d 112, 126 (2<sup>nd</sup> Cir. 1998); see also *Beck v. Haik*, 377 F.3d 624, 641 (6<sup>th</sup> Cir. 2004). In the remarkably relevant case of *King Lincoln Bronzeville Neighborhood Association v. Blackwell*, 448 F. Supp.2d 876, 2006 WL 2591393 (S.D. Ohio 2006), District Judge Marbley held the court had the inherent power to issue an order directing the preservation of election ballots in order to preserve the subject matter of an election law suit.

27. Plaintiff is entitled to the full protection of Florida's election code, including the ability to count all votes (including undervotes) and contest the outcome of an election in which the rejection of a sufficient number of legal votes occurred to change or place in doubt the election outcome. Principles of due process and fundamental fairness mandate the preservation of all evidence needed to prove that legal votes were rejected. In the case of electronic voting systems, preserving the electronic voting apparatus is essential to a determination of whether all valid votes were

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undervotes.

counted. Constitutional principles of equal protection mandate that each valid vote cast by every elector be counted. The federal Help America Vote Act, intended to preserve the integrity of every vote, supports plaintiff's efforts to preserve all evidence needed to insure that every vote is counted. Although a full, open, and fair audit of the system is necessary, the Plaintiff should be able to participate in such audit.

#### **V. NEED FOR EXPEDITED CONSIDERATION.**

28. As the court held in *Adams v. Canvassing Board of Broward County*, 421 So. 2d 34, 35 (Fla. 4<sup>th</sup> DCA 1982), “[p]art of the purpose of the protest and contest provisions of the election code is to effect a speedy resolution of such conflicts, with minimal disruption of the electoral process.” This court thus has the obligation to expedite this matter to insure the prompt preservation of evidence for ultimate adjudication.

#### **VI. GROUNDS FOR INJUNCTIVE RELIEF SATISFIED.**

29. As required by Rule 1.610 of the Florida Rules of Civil Procedure, this injunctive request is needed to avoid the irreparable harm that will occur if the electronic voting systems are not sequestered and secured, thus making unavailable the evidence needed for a recount and contest. Plaintiff has no adequate remedy at law, as the preservation of the

electronic voting systems, instruments, and data including software and firmware is essential to the ability to mount a meaningful manual recount and a statutory contest. Plaintiff has a sufficient likelihood of success on the merits, in view of the narrow margin between the two candidates (less than 380 votes) and the statistically significant number of unexplained undervotes. The compelling need of the public for an immediate preservation of all evidence in order to preserve the sanctity of a complete count of all eligible votes favors the grant of injunctive relief.

## **VII. CONCLUSION.**

30. For the reasons set forth, the plaintiff asks this court to direct the immediate sequestering and preservation of the electronic voting machines, voting cartridges, electronic voting systems, instruments, and data including software and firmware used in Sarasota County in the election for Congressional District 13. Further, Plaintiff respectfully requests this court to direct that if the Defendants wish to conduct an audit of the Sarasota County electronic voting system, that she be permitted to participate in such audit, to ensure that such audit is full, open, and fair.

## **VIII. VERIFICATION.**

Under penalties of perjury, we the undersigned declare that we have read

the foregoing petition and that the facts stated in it are true to the best of our information and belief.

Respectfully submitted,

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