

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA
CASE NO. _____
LT NO. 2006 CA 2973

CHRISTINE JENNINGS,

Petitioner,

v.

ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA;
SARASOTA COUNTY CANVASSING BOARD;
KATHY DENT, as SARASOTA COUNTY SUPERVISOR OF ELECTIONS;
SUE M. COBB, as SECRETARY OF STATE OF THE STATE OF FLORIDA;
DAWN K. ROBERTS, as DIRECTOR OF THE DIVISION OF ELECTIONS
OF THE STATE OF FLORIDA;
VERN BUCHANAN; and
ELECTION SYSTEMS & SOFTWARE, INC.,

Respondents.

EMERGENCY PETITION FOR A WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the Circuit Court
of the Second Judicial Circuit, in and for Leon County
Honorable William L. Gary

Kendall Coffey
COFFEY & WRIGHT, LLP
2665 South Bayshore
Drive
PH-2, Grand Bay Plaza
Miami, FL 33133
(305) 857-9797

Mark Herron
MESSER, CAPARELLO &
SELF, P.A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720

Donald B. Verrilli, Jr.
Sam Hirsch
Jessica Ring Amunson
JENNER & BLOCK LLP
601 13th Street, N.W.
Suite 1200
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

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INTRODUCTION

This is a rare election-contest case because it involves a race that wasn't even close. According to experts for both sides in this case, about 3,000 more voters in Florida's Thirteenth District intended to cast their ballots for congressional candidate Christine Jennings than for her opponent, Vern Buchanan. But when all the votes were tallied, the official state certification showed Buchanan with a 369-vote winning margin. And it also showed 18,000 "undervotes" — 18,000 ballots with *no* vote for *either* congressional candidate — in Sarasota County, the epicenter of what had been one of the most hotly contested, high-profile U.S. House races in Florida's history. Experts for both sides also agree that these undervotes were *unintended*, the unfortunate consequence of something that went very wrong with Sarasota County's iVotronic electronic touch-screen voting system.

But there, the litigants and their respective experts part company. Jennings, the plaintiff below, contends that the electronic voting machines malfunctioned. Buchanan, one of the defendants, claims that it was the voters who malfunctioned. Jennings alleges that votes legally cast for one candidate or the other were rejected by the machines and misrecorded as undervotes, probably due to a software "bug" not unlike the programming glitches people routinely encounter on their home or office computers. Buchanan alleges that voters, particularly Sarasota's senior

citizens, never actually cast their intended congressional votes, as they simply overlooked Jennings's and Buchanan's names on the electronic touch-screens, and then overlooked the race again when they got to the summary screen at the end of the ballot, and then missed the warning, in bright red letters, saying "No Selection Made."

To prove her case, Jennings moved to compel state and county election officials to produce components of Sarasota's iVotronic system, so that her own computer-science experts could examine and test them. Defendants, exhibiting a disturbing lack of confidence in their own election technology and an even more disturbing lack of concern for the public's trust in our democratic processes, have thrown up the "trade-secret privilege," claiming that Jennings's discovery requests represent a grave threat to the reputation and business interests of the iVotronic system's manufacturer, Election Systems and Software, Inc. (ES&S), a privately held corporation.

Late last Friday, the Circuit Court of the Second Judicial Circuit ruled in favor of ES&S and against a full and fair evaluation of what went wrong in this election. In so ruling, the trial court committed two clear legal errors. *First*, the court applied the wrong legal test when it held that Jennings had not shown a "reasonable necessity" for access to ES&S's trade secrets. The court apparently confused the "reasonable necessity" standard applicable to trade-secret disputes in

discovery with the “reasonable likelihood of success on the merits” standard applicable to motions for temporary injunctions. “Reasonable necessity” must be measured in light of the movant’s need for the material, not her likelihood of ultimately succeeding on her theory of the case — otherwise the court is deciding the merits of the case before discovery can even get underway. Given that a protective order would fully safeguard ES&S’s interests, there was no conceivable reason for denying this discovery. *Second*, the court rested its ruling on a report — which was blatantly inadmissible as hearsay, as its author never took the stand — from the State Defendants’ staff, who purported to have tested a handful of Sarasota County’s iVotronic machines and found them “100% accurate.” But as Jennings’s computer-science expert testified at length, the tests themselves were thoroughly unreliable, as they failed to replicate Election Day conditions in at least a half-dozen key respects.

In the wake of the trial court’s erroneous discovery ruling, Defendants, pleading *voter confusion* as the explanation for the thousands of unintended undervotes, will continue to have all the access they need to Sarasota County’s allegedly confused voters. Plaintiff Jennings, pleading *machine malfunction* as the explanation, will now be denied access to Sarasota County’s allegedly malfunctioning iVotronic machines. Without that access, her ability to develop the facts and present her case will be crippled. And the voters of Florida’s Thirteenth

District will be left with no explanation for what actually happened to 18,000 of their ballots, and no explanation for why they are represented in Congress by the candidate who was their second choice.

Because this is an election-contest case for a public office whose term begins this week and will end in just 24 months, the harm done by the trial court's order cannot be corrected on appeal from the final judgment. Jennings therefore respectfully asks this Court to rule on this Petition on an expedited basis, to quash the trial court's order, and to empower *all* parties to this litigation to get to the bottom of what went wrong in Sarasota County on Election Day 2006.

BASIS FOR INVOKING JURISDICTION

Article V, Section 4(b)(3) of the Florida Constitution grants the District Courts of Appeal jurisdiction to issue writs of certiorari. *See also* FLA. R. APP. P. 9.030(b)(2)(A). The order to be reviewed here was issued on Friday afternoon, December 29, 2006. A 806. This Petition is timely under Rule 9.100(c)(1).

STATEMENT OF FACTS

I. The Statistically Anomalous Undervote Rate in Florida's Thirteenth Congressional District Undermined the Election's Legitimacy.

On November 7, 2006 ("Election Day"), the State of Florida conducted an election for numerous offices, including Representatives in Congress. Appendix at 211 [hereinafter "A"]. Early voting and voting by absentee ballot were permitted for this election (as for all elections in Florida). *Id.* Both for early voting (from

October 23 to November 5) and for Election Day voting (on November 7), Sarasota County used an electronic voting system, called the “iVotronic” touch-screen voting system, manufactured by ES&S, a privately held corporation. *Id.* Sarasota County does not use the iVotronic electronic voting system (or any other electronic voting machines) for absentee balloting. *Id.* For absentee balloting, Sarasota County uses paper ballots read by optical-scanning equipment. *Id.*

The vote tallies for electronic voting and for paper voting were wildly divergent. Nearly 15% of the Sarasota County *electronic* ballots — roughly 18,000 ballots — were reported as “undervotes,” meaning that no vote was recorded for either the Republican candidate, Respondent Vern Buchanan, or the Democratic candidate, Petitioner Christine Jennings. *Id.* at 212. By contrast with the nearly 15% undervote rate for Sarasota County’s *electronic* ballots, only 2.5% of the Sarasota County *paper* ballots in the very same congressional election were recorded as undervotes. *Id.* at 213. Furthermore, in the other counties partly or wholly contained in Florida’s Thirteenth District, the undervote rate in the same congressional election also was only 2.5% — one-sixth the undervote percentage recorded for electronic ballots in Sarasota County. *Id.* And in 2002, in the last midterm congressional election, the undervote rate for Sarasota County’s electronic ballots was only 2.2% — one-seventh the rate recorded in the same county, for the same office, in 2006. *Id.*

II. Contemporaneous Evidence Pointed to Pervasive Malfunctioning of Sarasota County's iVotronic System.

Even before these aberrational returns started coming in on Election Night, eyewitness accounts from hundreds of Sarasota County voters and contemporaneous records from the Sarasota County Supervisor of Elections' office documented that the iVotronic paperless electronic voting machines had systematically failed to record votes cast for candidates in the Thirteenth District congressional race — particularly votes cast for Jennings. A 215-25. For example, one Sarasota County voter filed an affidavit stating:

I went through the ballot making my selections on the iVotronics touch-screen voting machine and took my time making sure that I voted in every race. I am certain that I cast a vote for Christine Jennings. When I reviewed the ballot at the end of the voting process, I noted that the race for the 13th congressional district . . . indicated that I had made no selection. . . . I have more than 15 years experience in selling computer systems, five of those years are in selling touch-screen systems. Based on my experience, I believe there was a software bug in the voting machine software causing the software not to register the touch.

Id. at 216.

Similarly, one poll watcher witnessed precinct poll workers “instruct[ing] voters to hold their finger on the touch-screen for more time, rather than just touch [the] screen to get the vote to register. I heard several voters tell poll workers the iVotronic touch-screen voting machine was not recording their vote.” *Id.* at 224.

And a contemporaneous “Incident Report Form” from the Sarasota County Supervisor of Elections’ office noted that a “voter voted on screen — didn’t show up on review . . . asked poll worker for help . . . [c]ancelled ballot and moved to another machine,” and went on to observe “more than one [voter] with trouble on machine.” *Id.* Another incident report observed that “[e]very other voter is complaining about the Christine Jennings contest not coming up.” *Id.* at 224-25. And a report by a Sarasota County technical-support person indicated that a particular iVotronic machine “will not register votes no matter how hard you press screen.” *Id.* at 225. There literally were hundreds of such reports from voters, poll watchers, election officials, and technical-support personnel. *Id.* at 215-25; *see id.* at 593 (citing “evidence of ballots sometimes not appearing on the screen”); *id.* at 598-99 (citing evidence of “[v]isual problems on the [touch-screen] display”). Indeed, even Mr. Buchanan’s wife reported difficulty voting for her husband, apparently pressing the “Vote” button three times before her vote would register.

III. Jennings Filed This Election-Contest Case, but the Trial Court Denied Her Motion for Expedited Discovery of the iVotronic System.

On November 20, 2006, Christine Jennings filed a complaint under Florida’s election-contest statute, Section 102.168, Florida Statutes, in the Circuit Court of the Second Judicial Circuit, in Leon County, Florida. A 1. The case was later consolidated with a second election-contest action brought by a bipartisan group of eleven individual voters. *Id.* at 204. Defendants in these consolidated cases

included various state and county election officials, as well as congressional candidate Vern Buchanan. *Id.*

Immediately upon filing her complaint, Jennings moved to compel expedited discovery of the hardware, software, and source code for Sarasota County's iVotronic system, which had caused thousands of legal votes cast for her to be incorrectly rejected and recorded as undervotes. *Id.* at 122.¹ (The term "source code" refers to a series of statements or instructions written in a human-readable computer programming language; when converted into machine-readable language, these instructions tell the computer how to operate in myriad situations. *Id.* at 525, 559.)

At the November 21 hearing on Jennings's motion, the State Defendants informed the trial court that the Department of State's Bureau of Voting Systems Certification would conduct and videotape a "parallel test" on five of Sarasota County's 1,500 iVotronic machines. *Id.* at 159. The test would attempt to simulate Election Day conditions and then determine whether the machines

¹ In particular, Jennings sought access to eight iVotronic machines that generated particularly high undervote rates and related iVotronic equipment, as well as the ES&S source code to the iVotronic system, to all elements of ES&S's Unity software suite, and to ES&S's personal electronic ballots (PEBs). She also sought the development tools, scripts, "makefiles," and other software used to compile, debug, and test the iVotronic system, the PEBs, and the elements of the Unity software suite. Jennings sought the hardware from the Sarasota County Defendants and the source code from the State Defendants. A 114. The State is required to keep the source code in escrow. *See* FLA. STAT. § 101.5607(1)(a); FLA. ADMIN. CODE R. 1S-2.015(5)(f).

accurately recorded the test voters' selections. Defendants argued that their own test would suffice to resolve this election contest; Jennings argued that the adversarial system generally and Florida's election-contest statute specifically entitle each candidate to conduct his or her own tests. *See id.* at 142-45.

The trial judge denied Jennings's motion for expedited discovery and instead gave Defendants 15 days to respond to Jennings's discovery requests. *Id.* at 174. The judge also denied without prejudice Jennings's request that the State Defendants produce the source code and stated that the request would not be granted unless Plaintiff found a way to ensure that ES&S (which was not yet a Defendant in the case) would have an opportunity to be heard. *Id.* Finally, he ordered Defendants to allow the two candidates' experts to "observe," but not to participate in, the State's upcoming parallel test. *Id.*; *accord id.* at 179. In doing so, he stated, "I'm sure we will be addressing [Defendants' test] again, because whatever they do is going to be unacceptable to somebody. But it may answer the question, too. I'm sure hoping it will." *Id.* at 174.

IV. Jennings Filed New Motions for Expedited Discovery of the iVotronic System and for an Order Protecting ES&S's Purported Trade Secrets.

Following the trial judge's guidance, Jennings filed an amended complaint naming ES&S as a Defendant. A 206. ES&S invoked the trade-secret privilege and resisted the discovery that Plaintiffs again sought from the State and County Defendants.

Jennings filed new motions to compel. *Id.* at 232, 299. To expedite matters, Jennings took two extraordinary steps: first, for purposes of those motions only, she conceded that ES&S's source code and related technology were privileged "trade secrets"; second, although usually protective orders are sought by the trade secret's *owner*, Jennings herself moved for a protective order to assuage any concerns ES&S might have about its purported trade secrets being disclosed to a business competitor. *Id.* at 241.

On Wednesday, December 6, after Defendants had refused to produce the iVotronic materials, Jennings's counsel contacted the judge's chambers to set a two-hour hearing on her motions to compel, but was told that the next available date on the judge's calendar was nine days away, on December 15. So the hearing was set for the morning of Friday, December 15. *Id.* at 353.

The next day, December 7, ES&S filed a motion seeking to postpone the hearing at least until shortly before Christmas. *Id.* at 271. Counsel for ES&S asked for and was granted a one-hour hearing on its motion the next day, on December 8. At that hearing, the court granted ES&S's motion in part and set an evidentiary hearing for December 19 and 20 on Plaintiffs' motions to compel and motion for protective order. *Id.* at 460-62. The December 15 hearing was subsequently canceled.

Also on December 7, Jennings and the individual voter Plaintiffs filed a joint notice setting a case-management conference for Friday, December 15, and requesting prompt entry thereafter of an expedited scheduling order. *Id.* at 403. Florida Rule of Civil Procedure 1.200(a) makes such conferences mandatory upon any party's "notice," without the need to file a motion. *Id.* at 404. Plaintiffs' joint notice set out a detailed proposed schedule, which Defendants largely agreed to, although they proposed a trial date in mid-February 2007 while Plaintiffs proposed one in late January 2007. *Id.* at 408-09. The joint notice also explained that Florida law gives election contests "priority" status, and therefore they must be expedited under the Florida Rules of Judicial Administration. *Id.* at 404; *see* FLA. STAT. § 102.168(2), (6), (7) (expressly setting expedited deadlines for filing complaints, filing answers, holding hearings, and taking testimony in election-contest cases); FLA. JUD. ADMIN. R. 2.215(g), 2.545(c) (requiring that priority cases be "appropriately advanced on the docket," given "priority in scheduling consistent with its priority case status," and "expedite[d] . . . to the extent reasonably possible"); *see also, e.g., Marina v. Leahy*, 578 So. 2d 382, 384 (Fla. 3d DCA 1991); *Jacobs v. Seminole County Canvassing Bd.*, No. 00-CA-2203-16-L, 2000 WL 1720698, *1 (Fla. Cir. Ct. Nov. 20, 2000).

As described above, the block of time set aside on the judge's calendar for Friday morning, December 15, to hear Jennings's motions to compel, came open

when the judge postponed that hearing to the following week. But the judge ruled from the bench at ES&S's December 8 hearing that no case-management conference would be held on December 15 because "we don't do that." *Id.* at 417. Today, nearly a month and a half after Jennings filed this "priority case" under Florida's election-contest statute, the judge has yet to hold a case-management conference or issue a scheduling order.

V. The Trial Court Held a Two-Day Evidentiary Hearing on Jennings's Motions.

On December 19 and 20, 2006, the trial court conducted a two-day evidentiary hearing on Plaintiffs' motions to produce the iVotronic system's hardware, software, and source code, and on Jennings's related motion for protective order. In the opening statement, Jennings's counsel explained that "[t]he trade-secret privilege is not absolute. In each case the court must weigh the importance of protecting the trade secret against the interests in facilitating the trial and promoting the just end to the litigation. . . . It is Defendants' burden to show that, even with an appropriate protective order, they would still suffer harm." A 525-26. Likewise, ES&S told the judge that he "must ultimately undertake" a "balancing of interest[s] . . . in deciding the issues presented in today's motion. . . . [T]he parties seeking production must . . . show that the necessity for this privileged information outweighs the harm that disclosure will cause to the trade-secret owner." *Id.* at 528-29.

Jennings presented one expert on residual votes (*i.e.*, undervotes and overvotes) and statistical analysis of election data — Professor Charles Stewart, the chair of the Political Science Department at the Massachusetts Institute of Technology (MIT) — and one expert on electronic voting technology — Professor Dan S. Wallach of the Computer Science Department at Rice University. Neither Vern Buchanan nor the governmental Defendants who were the targets of Jennings’s motion to compel presented any witnesses. ES&S presented one expert on elections and voting patterns — Professor Michael C. Herron of the Government Department at Dartmouth College.

A. Professor Stewart’s Expert Political-Science Testimony

Professor Stewart testified on three issues: (1) whether the 2006 congressional undervote in Sarasota County was excessive; (2) whether Jennings would have prevailed over Buchanan absent an excess undervote; and (3) possible causes of the excess undervote. A 531.

1. The congressional undervote in Sarasota County was excessive.—

Professor Stewart found a total “excess undervote” of roughly 14,000 congressional undervotes — 12% of all votes cast on Sarasota County’s electronic ballots. *Id.* Sarasota County, Jennings’s political stronghold, accounted for “a bit over half” the district’s total congressional votes, but fully 86% of the district’s congressional undervotes (18,412 out of 21,368 undervotes). *Id.* at 532.

	<u>Buchanan</u>	<u>Jennings</u>	<u>Undervote</u>
Sarasota County:	58,632	65,487	18,412
The Four Other Counties:	60,677	53,453	2,956
TOTAL:	119,309	118,940	21,368

Id. at 570. Based on a statistical analysis of undervote rates for both paper ballots and electronic ballots in 28 contests on Sarasota County’s November 2006 ballot, Professor Stewart estimated that the “normal undervote” rate for the Thirteenth District congressional race there was roughly 3% (approximately 4,000 votes) and the “excess undervote” rate was roughly 12% (approximately 14,000 votes). *Id.* at 532-34, 549; *see also id.* at 571-72.

2. Jennings would have prevailed over Buchanan absent the excess undervote.— Professor Stewart testified that “Jennings would have won had the excess undervote been reallocated to the two candidates.” *Id.* at 534. His best estimate of her “likely winning margin” was nearly 3,200 votes. *Id.*; *see id.* at 573-75.

Professor Stewart derived that estimate by statistically analyzing the “ballot-image logs” for every individual ballot cast electronically in Sarasota County’s November 2006 general election. *Id.* at 534. Studying voters’ preferences not only for the congressional race but also for the statewide races for U.S. Senator, Governor, Attorney General, Chief Financial Officer, and Agriculture

Commissioner, Professor Stewart determined that the voters whose congressional ballots were recorded as undervotes likely supported Jennings over Buchanan by a margin of approximately 63% to 37%. *Id.* So if the roughly 14,000 “excess” congressional undervotes had been properly tallied as votes for one or the other congressional candidate, Jennings would have picked up about 8,800 votes and Buchanan would have picked up only about 5,200 votes, for a net swing of about 3,600 votes toward Jennings, far more than enough to overcome Buchanan’s officially certified 369-vote “winning” margin. *Id.*; *see id.* at 573-74.

Applying the same 63%-to-37% split, Professor Stewart testified that, even if machine malfunction caused only 1,500 “excess” undervotes — less than 10% of the total congressional undervotes reported in Sarasota County — properly tabulating those 1,500 ballots would have changed the election’s outcome, with Jennings narrowly prevailing over Buchanan. *Id.* at 535-36; *see also id.* at 575. Therefore, “if 10 percent of the undervote were attributable to machine malfunction and 90 percent to some other causes” — voter confusion or something else — the election’s outcome “[i]n all likelihood” would have been reversed. *Id.* at 536.

3. Machine failure likely caused the excess undervote that swung the election to Buchanan.— Professor Stewart testified that the low congressional undervote rate among paper ballots in Sarasota County and among all ballots in the

district's four other counties demonstrated that the excess electronic undervote in Sarasota County was "unlikely to be due to the negativity of the campaign or voter revulsion with . . . both candidates," as voters throughout the district overwhelmingly fell into "one media market" and "experienc[ed] basically the same campaign." *Id.* at 536, 544, 554.

Professor Stewart testified that the "excess undervote" associated with Sarasota County's iVotronic system might be attributable *in part* to voter confusion caused by the congressional ballot's format. *Id.* at 554. But he found it implausible that the *entire* excess undervote — 12% of all electronic ballots in Sarasota County, or roughly 14,000 votes — could be attributed to voter confusion. *Id.* at 539-40, 542, 554.

- **First**, the congressional ballot on Sarasota County's iVotronic machines was "fairly straightforward" and "not . . . particularly confusing" visually. *Id.* at 538; *see id.* at 536-38, 576-77.
- **Second**, shortly before any voter could actually cast his vote, he would have seen a "Summary Ballot" review screen warning him in red letters if "No Selection [Was] Made" for "U.S. Representative in Congress" and instructing him on how to correct that undervote. *Id.* at 537-38; *see id.* at 577.
- **Third**, ballots that were far more confusing visually than Sarasota

County's and that lacked any warnings (in red letters or otherwise) typically confused no more than 5% of the electorate — far less than the 12% excess undervote recorded in Sarasota County's congressional election. *Id.* at 538-39, 552. For example, Professor Stewart testified that with the “butterfly ballot” that Palm Beach County used in the 2000 presidential race — “the paradigmatic . . . confusing ballot” — fewer than 1% of the voters erroneously cast their ballots for the third-party candidate Pat Buchanan, and only 4% of the voters erroneously cast “overvotes” by selecting two or more candidates. *Id.* at 538; *see id.* at 578.

Furthermore, Professor Stewart presented statistical evidence pointing directly to a failure of the machines, not of the voters. *Id.* at 540-41, 579-80. He testified that the date when an iVotronic machine was “cleared and tested” by Sarasota County election workers or their contractors (as reflected by “Event Code 01” in the machine's audit log) correlates strongly with the machine's undervote rate: Machines prepared in the final days before the deadline for completing all such preparations exhibited the highest congressional undervote rates. *Id.* at 540. And another strong correlation exists between the number of machines “cleared and tested” on a given date and the undervote rate: As the County's staff or consultants got busier, clearing and testing more machines on a single day, the

congressional undervote rate climbed. *Id.* Both correlations were statistically significant and both provided “evidence that inattention” or sloppiness in preparing the touch-screen machines “may have driven up the undervote rate.” *Id.* at 541. Because this evidence “goes to the physical preparation of the machines,” not to characteristics of the voters, Professor Stewart testified, “it’s totally inconsistent with the notion that the high undervote rate is caused by voter confusion.” *Id.* at 541, 553.

Finally, pulling together his three main findings, Professor Stewart concluded that machine failure likely “altered the outcome of this election.” *Id.* at 541, 554. In any event, he explained, “statistics alone” could never prove that machine malfunction had no effect on the election’s outcome: “You need to look more closely at . . . the machines and the software.” *Id.* at 554.

B. Professor Wallach’s Expert Computer-Science Testimony

Professor Wallach testified that he could prove or disprove Jennings’s claims of machine malfunction within a reasonable degree of scientific certainty in a matter of weeks if — and only if — he had full access to the requested iVotronic hardware, software, and source code. A 558-63. Professor Wallach then presented a simplified one-page example of a software program designed to count votes for candidates, and he showed how the programmer’s inadvertent omission of one

“equals sign” could trigger a misallocation of votes to a particular candidate. *Id.* at 561.

Professor Wallach then catalogued strong candidates for software flaws that might be discovered in the iVotronic system — “latent mistakes or errors in design that [might have] escape[d the] normal testing certification processes.” *Id.* at 588. Specifically, he identified three potential “bugs”:

- **First**, a “bug” in the source code, perhaps combined with poorly calibrated touch-screens, could cause a malfunction between where a voter actually touched the screen and where the machine “understood” it was touched, thus causing votes for a particular candidate to go unrecorded. *Id.* at 561-62, 594-95.
- **Second**, a “bug” in the source code could cause data to be lost or transformed when the voter pressed the red “Vote” button above the touch-screen and his selections were transferred from the machine’s temporary volatile memory to its permanent nonvolatile memory. *Id.* at 561-62, 601. With this type of bug, the voter might well have seen a vote cast for Jennings on his review screen even though no permanent record of the vote ever got recorded.
- **Third**, a “bug” in the source code could cause votes to be miscounted when the election-specific “ballot-definition files” place too many

candidates on a single screen, as when Sarasota County placed the two-candidate congressional race on the same iVotronic screen as the seven-candidate gubernatorial race. *Id.* at 562.

Professor Wallach explained that any of these bugs could be “nondeterministic,” meaning that under identical circumstances the machine might properly record some voters’ selections and improperly record others’. *Id.* at 562-63. Such a nondeterministic bug might well affect 12% or 15% of the votes cast for a particular office or candidate. *Id.* at 563. Depending on the nature of the bug, Professor Wallach testified that he might be able to reconstruct the precise number of votes cast for each congressional candidate that were misrecorded as undervotes. *Id.* at 600.

Professor Wallach also testified at length about a half-dozen significant flaws in the Florida Bureau of Voting Systems Certification’s “parallel testing” of Sarasota County’s iVotronic machines. *Id.* at 559, 586, 588-89, 594-96, 600-02.

Finally, Professor Wallach testified that he would obey and “comply to the letter with any protective order” the court entered, as he has done in past cases involving source code designated as a trade secret. *Id.* at 558, 564. And he described how, in a patent-infringement case, he previously had been entrusted, without incident, with “Microsoft source code that is considered so sensitive that only a handful of employees within Microsoft are given access” to it. *Id.* at 558.

C. Professor Herron's Expert Political-Science Testimony

Because the testimony of Professor Herron, Defendants' sole witness at the evidentiary hearing, is neither cited nor even alluded to in the order below, it merits little discussion here. Two points, however, were notable.

First, Professor Herron agreed with Professor Stewart on several findings:

- Sarasota County's electronic ballots generated an "extraordinarily high" undervote rate — between 14,000 and 15,000 more undervotes than expected. *Id.* at 621-22. While Professor Stewart referred to them as "excess undervotes," Professor Herron had used the term "suppressed votes" prior to being retained by ES&S. *Id.* at 622, 626.
- Like Professor Stewart, Professor Herron found it "hard to imagine [that] the Sarasota result reflects deliberate voter choices" because, if "voters were driven away from participating in their congressional race by a blitz of last-minute negativity, this would have affected all [five] counties in the District 13 race and not just Sarasota." *Id.* at 622.
- The Sarasota County voters who unintentionally cast the 14,000-plus "suppressed votes" for Congress tilted heavily Democratic and therefore, had their votes been counted, Jennings clearly "would have won." *Id.* at 623.

- No “purely . . . statistical exercise” can “directly address the possibility that engineering lies underneath the undervote rates” in Sarasota County’s iVotronic ballots; and “ultimately, no statistical analysis of observed voting data can distinguish between ballot-format effects [that confuse voters] and engineering flaws that mimic ballot-format effects.” *Id.* at 630.

Second, ultimately, Professor Herron could offer nothing to contradict Jennings’s evidence that examining and testing the iVotronic hardware, software, and source code are reasonably necessary to prove or disprove her claim of machine malfunction. The main area of disagreement between the two political scientists involved the likely cause of the elevated undervote rate in Sarasota County: Unlike Professor Stewart, Professor Herron concluded that voter confusion based on “ballot-format effects” — especially on the part of voters over the age of 75 — by itself explained the *entire* elevated undervote rate. *Id.* at 620. But every example of high undervote rates that Professor Herron cited as demonstrating “voter confusion” from “ballot-format effects” involved the very same iVotronic technology that Sarasota County uses. *Id.* at 554, 624-25, 629-30. Therefore, Professor Herron lacked any sound basis to conclude that the real culprit was voter confusion based on ballot format, rather than machine malfunction based on a “bug” in the iVotronic source code or software. *See id.* at 588.

D. The State's "Parallel Test Summary Report"

Because the trial court's order made no mention of Professor Herron's testimony, the only evidence proffered by Defendants that ultimately mattered was a December 18, 2006 "Parallel Test Summary Report" from the Florida Division of Elections' Bureau of Voting Systems Certification. The Report stated that the parallel-test results "were successful in demonstrating 100% accuracy in recording the vote selections." A 659. The trial court's order repeated that conclusion almost verbatim, stating that the test results revealed "100% accuracy of the equipment in reporting the vote selections." *Id.* at 808.

Plaintiffs' counsel objected to this Report on the ground that it was inadmissible hearsay and could come into evidence only if the Report's author, the Chief of the Bureau of Voting Systems Certification, took the stand and was subject to cross-examination. *Id.* at 604. In overruling the hearsay objection, the judge offered this rationale: The Report "is a certification from the Department of State, who is not only authorized, but is the one agency that can issue those things and the only agency that can certify the accuracy of the testing." *Id.*

VI. The Trial Court Denied Jennings's Motions to Compel Discovery.

On Friday afternoon, December 29, 2006, the trial court issued a 16-sentence order denying all of Plaintiffs' discovery motions. The order began by explaining that, because "[a]ll parties agree for the purposes of the motions that the

Source Code and Proprietary Technology . . . constitute[] a trade secret,” the “*sole* issue for determination is whether or not Plaintiffs can demonstrate a reasonable necessity to gain access to the trade secret.” A 807 (emphasis added). The order then stated that “[t]wo parallel tests were conducted” on the iVotronic system “to verify its accuracy,” with “representatives of both Plaintiffs and Defendants . . . present”; that “[t]he test results revealed 100% accuracy of the equipment in reporting the vote selections”; and that “Plaintiffs have presented no evidence to demonstrate that the parallel testing was flawed and/or the results not valid.” *Id.* at 808. The order found that Plaintiff’s expert testimony was “nothing more than speculation and conjecture” and then concluded that granting Plaintiffs’ motions to compel would “destroy[] or at least gut[] the protections afforded those who own the trade secrets.” *Id.*

NATURE OF RELIEF SOUGHT

This Petition seeks a writ of certiorari quashing the trial court’s December 29 order, which denied Jennings’s discovery motions.

PROCEEDING ON AN EXPEDITED BASIS

Petitioner Jennings respectfully asks this Court to grant her Petition on an expedited basis, and she has thus given notice to all parties pursuant to Rule 9.300(c). The voters of Florida’s Thirteenth Congressional District are entitled to know as soon as possible whether Sarasota County’s iVotronic system rejected

thousands of legal votes cast for Christine Jennings and resulted in the “election” of the candidate who was the voters’ second choice. The answer to that question cannot be ascertained until Jennings receives the discovery she is seeking.

ARGUMENT

Under the Florida Rules of Civil Procedure, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action.” FLA. R. CIV. P. 1.280(b)(1). The basis of Jennings’s complaint is that the iVotronic system Sarasota County used in the November 2006 general election rejected thousands of legal votes cast for Christine Jennings, recorded those legal votes as “undervotes,” and thereby swung the election to the less popular candidate. Access to the system’s source code as well as the iVotronic machines and related equipment is critical to any effort to determine whether the paperless electronic voting system caused the massive undervote. Therefore, the iVotronic software and hardware are not just relevant but essential to the subject matter of the pending action. This Court should grant the Petition, issue the writ, and quash the trial court’s order refusing to compel production of the relevant hardware and software, including the source code.

Although “an order denying discovery is not ordinarily reviewable by certiorari,” Florida courts have often recognized exceptions to this rule. *Medero v. Florida Power & Light Co.*, 658 So. 2d 566, 567 (Fla. 3d DCA 1995); *see, e.g.*,

Expert Installation Serv., Inc. v. Fuerte, 933 So. 2d 1231, 1233 (Fla. 3d DCA 2006); *Beekie v. Morgan*, 751 So. 2d 694, 698 (Fla. 5th DCA 2000); *Sabol v. Bennett*, 672 So. 2d 93, 94 (Fla. 3d DCA 1996); *Ruiz v. Steiner*, 599 So. 2d 196, 197-98 (Fla. 3d DCA 1992).

The standard for granting certiorari in such circumstances is well established: “(1) the order to be reviewed must constitute a departure from the essential requirements of law; (2) the order must cause material injury through subsequent proceedings; and (3) the injury must be irreparable, i.e., one for which there will be no adequate remedy after final judgment.” *Sheridan Healthcorp., Inc. v. Total Health Choice, Inc.*, 770 So. 2d 221, 222 (Fla. 3d DCA 2000). All three prongs are met here. Because the last two requirements are jurisdictional, they are addressed first.

I. The Trial Court’s Refusal to Compel Discovery Would Materially Injure Jennings.

The parties all agree that the congressional election in Florida’s Thirteenth District resulted in a statistically bizarre undervote rate. Jennings intends to argue at trial that the iVotronic system malfunctioned, rejecting thousands of legal votes cast for her and instead recording them as undervotes. Defendants seek to attribute the undervote to other causes, but cannot even agree among themselves about the source of the malfunction. ES&S asserts that “[a]ny undervote was due to factors such as ballot layout” (A 482), while the Sarasota County election supervisor

asserts that the “ballot form did not cause significant undervotes” (*id.* at 467). And the State Defendants have even suggested that individual voters’ drug use is to blame for the aberrant undervote rate. *See, e.g., id.* at 527.

Although Defendants’ theories are both contradictory and offensive to the voters of Sarasota County, now is not the time to evaluate them. Rather, this Court need only consider whether the trial judge’s refusal to compel production of the iVotronic software and hardware materially injures Jennings’s ability to pursue *her* theory about the actual cause of the undervote.

It clearly does. Without access to these materials, Jennings’s computer-science expert, Professor Wallach, will be unable to provide expert testimony at trial as to the cause of the undervote. That alone provides ample grounds for material injury sufficient to grant a writ of certiorari. *See Helmick v. McKinnon*, 657 So. 2d 1279, 1280 (Fla. 5th DCA 1995) (“[I]t is unlikely that Helmick will be able to offer an adequate expert opinion in his defense if the requested materials are not furnished. Thus, he will not be able to make a sufficient proffer on appeal to show error below justifying a reversal for new trial. . . . Accordingly, we grant the petition for writ of certiorari, and quash the order denying discovery.”).

Moreover, “[w]ithout these materials,” Jennings will be “unable to properly formulate” her case. *Id.* This has often served as the basis for granting a writ of certiorari. *See, e.g., Carroll Contracting, Inc. v. Edwards*, 528 So. 2d 951, 953

(Fla. 5th DCA 1988) (granting a writ of certiorari and reinstating a subpoena after finding that the material sought by petitioner was “necessary and possibly critical in this lawsuit”); *Marshall v. Anderson*, 459 So. 2d 384, 385 (Fla. 3d DCA 1984) (granting a writ of certiorari after finding that the order denying discovery “adversely pervades the entire subsequent conduct of the case in that it renders it virtually impossible for the plaintiff even to determine the basic elements of his cause of action”); *Colonial Penn Ins. Co. v. Blair*, 380 So. 2d 1305, 1306 (Fla. 5th DCA 1980) (granting a writ of certiorari and quashing an order denying discovery after finding it “obvious that the petitioners need the [requested material] to prepare their defense in the present lawsuit”). Here, the requested materials are critical to formulating Jennings’s case.

Furthermore, the requested materials cannot be obtained from any other source. When “there is no substitute for the information [petitioner] seeks,” and it “can be obtained only from defendants,” Florida courts routinely recognize a material injury sufficient to grant certiorari. *Criswell v. Best Western Int’l, Inc.*, 636 So. 2d 562, 563 (Fla. 3d DCA 1994); *see also Carroll Contracting*, 528 So. 2d at 952-54; *Colonial Penn Ins. Co.*, 380 So. 2d at 1306. The precise materials Jennings seeks are in the State and County Defendants’ possession, and she cannot obtain them from any other source. The facts needed to properly litigate the case will never be known unless Jennings is granted access to these materials.

The trial court's order posits that the State's post-election "parallel testing" of a handful of Sarasota County's iVotronic machines should satisfy Jennings's concerns and foreclose her need for the requested discovery. A 808. That is absurd. No state audit — overseen by the same officials who certified the defective voting machines — can substitute for the truth-finding rigors of the adversarial process. When a patient sues for medical malpractice, she is not foreclosed from discovery directed at the doctor simply because the hospital has conducted an audit and cleared the doctor of any wrongdoing. The hospital has a powerful economic interest in clearing the name of any doctor to whom it has granted privileges, and a patient cannot be denied discovery based on results from an investigation conducted by an adverse party. That would be a dangerous precedent to set. *See Moore v. Schlesinger*, 150 F. Supp. 2d 1308, 1313 (M.D. Fla. 2001) (recognizing that discovery "within the adversarial arena" has the benefit of "the attendant safeguards of the judicial process").

Moreover, the State's "parallel testing" was so thoroughly flawed that its results are worthless. As described below (see Point III-B-2 of the Argument, at pages 46 to 49), Professor Wallach testified to no fewer than six features of the tests that did not accurately replicate Election Day conditions. The State's tests were not remotely close to being conclusive on the issues that this case presents.

II. Jennings's Injury Cannot Be Adequately Remedied on Appeal.

"[C]ertiorari review of orders denying discovery has been granted where it was found that the injury caused by the order was irreparable." *Ruiz*, 599 So. 2d at 197. Here, the material injury to Jennings and other citizens of Florida's Thirteenth Congressional District will be irreparable for two reasons.

First, timing truly matters in an election contest. The term of office at issue here is only 24 months long. The cloud hanging over this election should be dispelled as quickly as possible. Given the trial judge's unwillingness to expedite this case, an appealable final judgment could be months away. By the time this Court has reversed that judgment on appeal, the parties on remand have conducted additional discovery (including properly testing the iVotronic system), and the court below has held a new trial, much of the 110th Congress will be history. Because any meaningful remedy will "be foreclosed on plenary appeal," this Court should grant certiorari review now. *Helmick*, 657 So. 2d at 1280.

Second, the harm will be irreparable because without discovery *now* there will be nothing to review on appeal *later*. Florida courts have previously granted review when petitioners have demonstrated that, absent an order compelling discovery, information critical to the case will remain undiscovered and unavailable for subsequent appellate review. "The lack of the information sought in these cases would have effectively prevented litigation of the case and there

would have been ‘no practical way to determine after judgment what the testimony would be or how it would affect the result.’” *Riano v. Heritage Corp. of S. Fla.*, 665 So. 2d 1142, 1144 (Fla. 3d DCA 1996) (quoting *Travelers Indemnity Co. v. Hill*, 388 So. 2d 648, 650 (Fla. 5th DCA 1980)); *see also Criswell*, 636 So. 2d at 563 (granting writ because “on plenary appellate review, there would be no practical way of . . . evaluating how the information [in defendants’ possession] would have affected the case”). That is true here, too. Without an order compelling discovery of the iVotronic hardware, software, and source code, Jennings cannot demonstrate conclusively that a “bug” in the source code or a malfunction of the voting equipment caused the undervote that altered the election’s outcome.

III. The Trial Court Repeatedly Departed from the Essential Requirements of Florida Law in Denying Jennings’s Motions to Compel Production of the iVotronic System Pursuant to a Protective Order.

In refusing to compel production of the core evidence in this case, the trial court departed from the essential requirements of law. As the United States Supreme Court has noted, “orders forbidding *any* disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel or to the parties.” *Federal Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 n.24 (1979) (internal citations omitted; emphasis added). Here, in taking the

extraordinary step of forbidding *all* disclosure and refusing even to allow limited disclosure pursuant to a protective order, the trial court committed two overarching legal errors. *First*, the court applied the wrong legal test. The court apparently confused the “reasonable necessity” standard applicable to discovery disputes involving trade secrets with the “reasonable likelihood of success on the merits” standard applicable to motions for temporary injunctions. That mistake led the court to conclude wrongly that Jennings had failed to carry her burden of showing a “reasonable necessity.” And that mistake in turn led the court to refuse to conduct the required balancing of Jennings’s interests against the harm that allegedly would befall the trade-secret owner, ES&S, if the requested discovery were granted pursuant to a protective order. *Second*, the court rested its ruling on one exhibit that was admitted into evidence despite being rank hearsay, not within any hearsay exception recognized under Florida law; and at the same time, the court ignored all evidence rebutting that hearsay.

A. The Trial Court Failed to Apply the Proper Three-Step Legal Test for Discovery Disputes Involving Trade Secrets.

The trial court applied the wrong legal test for determining whether to allow discovery of materials protected by the trade-secret privilege. The privilege “is not absolute.” *Freedom Newspapers, Inc. v. Egly*, 507 So. 2d 1180, 1184 (Fla. 2d DCA 1987). Florida law provides that the trade secret’s owner “has a privilege . . . to prevent other persons from disclosing” that trade secret only “if the allowance of

the privilege will not conceal fraud or otherwise *work injustice*.” FLA. STAT. § 90.506 (emphasis added). And Florida Rule of Civil Procedure 1.280(c) provides that trade secrets may be discoverable under a protective order if the court concludes that “*justice requires*” protective measures. FLA. R. CIV. P. 1.280(c) (emphasis added). To determine whether allowing the trade-secret privilege to thwart discovery will “work injustice,” Florida courts require a balancing test. The court below failed to undertake that balancing test even though Jennings repeatedly asked it to do so. *See, e.g.*, A 352, 525, 793.

Under Florida’s balancing test, the trial court must decide whether the “necessity for the production of the [trade secrets] outweighs the interest in maintaining their confidentiality.” *Sheridan Healthcorp*, 770 So. 2d at 223. When a plaintiff seeks access to a defendant’s trade secret, this balancing test demands these three steps:

1. the plaintiff bears the burden to show “reasonable necessity” for the requested trade secrets;
2. the defendant bears the burden to show that disclosure, even under a protective order, would be harmful; and
3. the court must weigh the plaintiff’s interest in production against the defendant’s interest in maintaining confidentiality.

See id.; see also *American Express Travel Related Servs., Inc. v. Cruz*, 761 So. 2d

1206, 1209 (Fla. 4th DCA 2000).

Contrary to the trial court's findings, in Step #1, Jennings carried her burden of showing "reasonable necessity" for the iVotronic software and hardware. Yet the court bypassed Steps #2 and #3 entirely. Apparently, the judge concluded as a matter of law that, because "[a]ll parties agree for the purposes of the motions that the Source Code and Proprietary Technology . . . constitute[] a trade secret," the "*sole* issue for determination is whether or not Plaintiffs can demonstrate a reasonable necessity to gain access to the trade secret." A 807 (emphasis added). That conclusion departs from the essential requirements of law, as the issue identified by the trial judge is only the first of three that Florida caselaw requires a trial judge to consider. In any event, even as to the one issue that the trial judge *did* consider — whether Jennings had demonstrated a reasonable necessity to gain access to the iVotronic hardware, software, and source code — the court also departed from the essential requirements of law.

1. Jennings Carried Her Burden To Show a Reasonable Necessity for the Requested Trade Secrets.

Jennings carried her burden. A plaintiff seeking discovery of trade secrets must show only a "reasonable necessity" for the requested materials. *Sheridan Healthcorp*, 770 So. 2d at 222; *American Express*, 761 So. 2d at 1208; *see also Freedom Newspapers*, 507 So. 2d at 1184. And the "level of necessity which must be shown is that the information is necessary for the movant to prepare [her] case

for trial, including preparation of the movant's theories and the rebuttal of the opponent's theories." 1 MELVIN F. JAGER, TRADE SECRETS LAW § 5.33 (2006); *see also Pfeiffer v. K-Mart Corp.*, 106 F.R.D. 235, 236 (S.D. Fla. 1985). The test is as simple as it sounds: If a plaintiff shows that she reasonably needs evidence to make her case, she has satisfied the "reasonable necessity" burden.

Although the trial court invoked the term "reasonable necessity" in its order denying Jennings's motions, A 807-08, it effectively applied the higher "reasonable likelihood of success on the merits" standard that courts use when deciding motions for temporary injunctions. *See, e.g., Korn v. Ambassador Homes, Inc.*, 546 So. 2d 756, 757 (Fla. 3d DCA 1989). Demanding that higher standard before *enjoining* a defendant's conduct makes good sense. But here, the issue is a simple discovery dispute, not an injunction. The core issue driving the case is the pervasive malfunctioning of the iVotronic machines that rejected thousands of legal votes cast for Jennings and thus changed the election's outcome. Jennings seeks access to the machines to make her case. It would be entirely backwards to suggest that she must have compelling evidence to prove a reasonable likelihood of success on the merits *before* she has been given access to the very evidence she needs to prove her case on the merits.

Applying the wrong standard led the court, in turn, to conclude that Jennings's expert testimony was too "speculati[ve] and conjectur[al]" to meet the

legal threshold for granting access to ES&S's trade secrets. A 808. Had the court properly applied the "reasonable necessity" standard, it would have found that standard to be easily satisfied by the testimony of Jennings's experts.

In determining "reasonable necessity," context matters enormously. Paperless electronic voting systems are peculiarly difficult to audit. They leave no tangible evidence of a voter's decision to cast a vote (or not) for a candidate; all they leave behind is an electronic record of what the computer software "says" the voter did. There is no paper ballot prepared by the voter that can be reviewed post-election to determine whether the system correctly or incorrectly recorded his vote. The electronic "ballot-image logs" reviewed by the experts who testified at the evidentiary hearing reflect only what the computer program says the voter did, as the individual voters have no opportunity to verify those logs before leaving the polling place. Given these inherent constraints in analyzing the performance of any paperless electronic voting system, Jennings's experts — MIT political scientist Charles Stewart and Rice computer scientist Dan S. Wallach — provided more than ample evidence that access to the iVotronic hardware, software, and source code was reasonably necessary for Jennings to prepare her case for trial.

Professor Stewart testified to the following key facts:

- The later a machine was prepared, and the more machines prepared on a given day, the higher the undervote rate climbed.

- Given that the most convoluted ballot designs (such as the infamous “butterfly ballot” that Palm Beach County used in the 2000 presidential election) have confused fewer than of 5% of the voters, it is highly unlikely that the extraordinary 15% undervote rate on Sarasota County’s iVotronic machines can be explained solely by voter confusion.
- Even if only 1,500 of Sarasota County’s 18,000 congressional undervotes are attributable to machine malfunction, Jennings still would have won the election because Sarasota County was her political stronghold.

Professor Wallach testified extensively to what is already intuitive: To prove or disprove allegations of a malfunction in the iVotronic hardware and software, one needs access to the hardware and software that is alleged to have malfunctioned. This is not a case in which a plaintiff seeks a customer list or some other material that may be tangential to the complaint’s allegations. *Cf. Grooms v. Distinctive Cabinet Designs, Inc.*, 846 So. 2d 652, 655 (Fla. 2d DCA 2003).

Rather, this is a case where access to the requested discovery is essential to proving the allegations.

Professor Wallach identified three potential software flaws that might be discovered in the iVotronic system, and he testified that if they exist he could probably find them within a matter of weeks. But without access to the requested materials, Professor Wallach will be prevented from developing the expert

testimony crucial to Jennings's case. *See Helmick*, 657 So. 2d at 1280.

Professor Wallach's and Professor Stewart's testimony more than sufficed for Jennings to carry her burden of showing a "reasonable necessity" for the iVotronic software and hardware that she requested. Had it applied the proper standard, the trial court would have reached that conclusion as well.

2. Defendants Did Not Carry Their Burden To Show that Disclosure Under an Appropriate Protective Order Would Harm ES&S.

The trial court further erred in ignoring Defendants' failure to carry their burden. After a trial court determines that the requested production constitutes a trade secret and that the party seeking discovery has a reasonable necessity for that trade secret, "the party resisting discovery [must] show 'good cause' for protecting or limiting discovery *by demonstrating . . . that disclosure may be harmful.*"

American Express, 761 So. 2d at 1209 (emphasis added); *see Cytodyne Tech., Inc. v. Biogenic Tech., Inc.*, 216 F.R.D. 533, 536 (M.D. Fla. 2003) (applying Florida law) (holding that, once the trade-secrets owner "has shown the requested discovery to be trade secrets, [the owner] must then demonstrate that disclosure might be harmful"); *Kaiser Aluminum & Chem. Corp. v. Phosphate Eng'g & Const. Co.*, 153 F.R.D. 686, 688 (M.D. Fla. 1994); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985). Furthermore, "[t]he relevant inquiry with respect to injury is not with respect to the harm caused by a public

disclosure. Rather, the inquiry must be measured with respect to the disclosure under an appropriate protective order.” 1 MELVIN F. JAGER, TRADE SECRETS LAW § 5.33 (2006).

ES&S presented absolutely no evidence that disclosure pursuant to an appropriate protective order would cause it harm. Nor could it have presented any credible evidence of harm, as Jennings is not a business competitor of ES&S’s and had agreed to be bound by a stringent protective order that would have prevented any trade secret from leaking out to ES&S’s competitors. *See Seta Corp. of Boca, Inc. v. Office of Attorney General*, 756 So. 2d 1093, 1094 (Fla. 4th DCA 2000) (ordering discovery because the party seeking access to the trade secrets was “not a competitor” and protections could be taken to prevent disclosure to nonparty business competitors); *Freedom Newspapers*, 507 So. 2d at 1184 (“The likelihood of [any] abuse of the discovery process is lessened where, as here, the party seeking discovery appears to have no real interest in the business techniques of the [party invoking the trade-secret privilege].”). So instead of trying to conjure up some evidence of actual harm, ES&S argued (in its post-hearing brief, but never before or at the evidentiary hearing) that harm is simply “presumed” whenever disclosure of a trade secret is at issue. *See A 732-34.*

But as explained above, that misstates the law. So the parties’ concession below that the requested iVotronic materials constitute a trade secret in no way

alleviated ES&S's burden to show how disclosure under an appropriate protective order would be harmful. By denying Jennings's discovery while overlooking ES&S's failure to shoulder its burden, the trial court committed reversible legal error. *See Sabol*, 672 So. 2d at 94 (quashing an order denying discovery because the trial court never expressly found that the party resisting discovery made an "affirmative showing" of the harm it would suffer).

3. The Trial Court Did Not Conduct the Required Balancing Test.

The trial court also erred by performing no balancing of interests.

[Because] the trade-secret privilege is not absolute, . . . [i]n each case the judge must weigh the importance of protecting the claimant's secret against the interests in facilitating the trial and promoting a just end to the litigation. Such factors as the potential impact of disclosure upon the holder's business, protection afforded by copyright and patent laws, and necessity of disclosure to the presentation of the opponent's case may guide the judge in deciding whether to order disclosure.

Inrecon v. Village Homes at Country Walk, 644 So. 2d 103, 105 (Fla. 3d DCA 1994); *see also Fortune Pers. Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of S. Fla.*, 423 So. 2d 545, 546 n.6 (Fla. 4th DCA 1982); *Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 203 (M.D. Fla. 1990).

Here, the judge did not weigh any of these factors. Rather, he simply *assumed* — based on no affirmative evidence offered by ES&S or any other Defendant — that granting Jennings's motions would "destroy[] or at least gut[]

the protections afforded those who own the trade secrets.” A 808. Had the trial court conducted the required balancing, the result surely would have been different, as ES&S had presented *no* evidence of harm.

“The broad judicial discretion which the trial court enjoys in ruling on discovery matters of this type cannot properly be exercised in a vacuum or on a mere whim. The court needs sufficient insight into the relevant factors which must be weighed before deciding the competing interests of the respective parties.” *Beck v. Dumas*, 709 So. 2d 601, 603 (Fla. 4th DCA 1998). Here, the trial court ignored the relevant factors and failed to perform *any* balancing of interests. Those are clear departures from the essential requirements of law.

B. The Trial Court Rested Its Ruling Almost Entirely on a Public Report That Was Inadmissible as Hearsay, While Ignoring Contrary Evidence That Had Been Properly Admitted.

Aside from misapplying each of the three prongs of Florida’s legal test for the trade-secret privilege, the trial court also committed the most basic legal error in misreading Florida’s Evidence Code. Specifically, the court erred first in resting its ruling almost entirely on inadmissible hearsay, and second in ignoring properly admitted evidence rebutting that hearsay.

1. The Key Piece of Evidence on Which the Trial Court Relied Was Inadmissible as Hearsay.

The linchpin of the trial court’s order was its findings that the State had conducted “[t]wo parallel tests” on the iVotronic system with “representatives of

both Plaintiffs and Defendants [both] present,” that the “test results revealed 100% accuracy of the equipment in reporting the vote selections,” and that “Plaintiffs have presented no evidence to demonstrate that the parallel testing was flawed and/or the results not valid.” A 808. Those findings are grounded, however, on a blatant legal error.

At the evidentiary hearing, Defendants’ sole witness offered no testimony on the “parallel tests” of the iVotronic machines that Florida’s Division of Elections had conducted in late November and early December 2006. Indeed, he admitted that he had no expertise in electronic voting systems, “kn[ew] nothing about . . . ballot programming software,” and had no personal knowledge of these parallel tests. *Id.* at 625, 631-32. Defendants’ evidence about the parallel tests thus came instead from ES&S’s Exhibit 7, a certified copy of the December 18, 2006 “Parallel Test Summary Report” prepared by the Florida Division of Elections’ Bureau of Voting Systems Certification. *Id.* at 652.

Plaintiffs objected to the Report as hearsay, arguing that it could come into evidence only if its author — apparently David R. Drury, the Chief of the Bureau of Voting Systems Certification, whose initials appear on the Report’s cover — took the stand and was subject to cross-examination. *Id.* at 604. Plaintiffs argued that recent Supreme Court precedent — *Lee v. Department of Health & Rehabilitative Services*, 698 So. 2d 1194, 1201 (Fla. 1997) — expressly held that

Florida's public-records hearsay exception (unlike its federal counterpart) does not provide for the admission of factual findings resulting from a government agency's investigation or audit and that "in Florida, rather than offering this type of record, a witness must be called who has personal knowledge of the facts." A 604 (quoting *Lee*, 698 So. 2d at 1201).

ES&S's counsel largely avoided the hearsay issue and instead argued a point that was entirely uncontested, namely that the certified copy of the State's Report was self-authenticating:

Your Honor, . . . as a record which is under seal, there is no doubt that this is a record from the Department of State. . . . This is an official declaration by a division of the government of the State of Florida. . . . [S]ince it is the reflection of official action by the State, we would ask that it be admitted into evidence.

Id.

After confirming that the Report "was issued by the Department of State," the court overruled Plaintiffs' objections. The court's entire explanation, just two sentences long, seemingly confused the *authentication* of a public record with the public-records exceptions to the *hearsay* rule:

This case cited here [*Lee v. Department of Health & Rehabilitative Services*] relates to factual findings as a result of determining an investigation made pursuant to authority granted by law. I believe what they [ES&S] have there [in the State's Report] is a certification from the Department of State, who is not only authorized, but is the one agency that can issue those things and the only agency that can certify the accuracy of the testing.

Id.

The trial judge's ruling was wrong as a matter of law, both under the plain text of Florida's Evidence Code and under controlling Florida Supreme Court precedent. The Parallel Test Summary Report was hearsay because ES&S offered it in evidence "to prove the truth of the matter asserted" — the supposed accuracy of the iVotronic machines. FLA. STAT. § 90.801(1)(c). The Report was therefore inadmissible, *see id.* § 90.802, unless it fell within Florida's hearsay exception for public records and reports, *see id.* § 90.803(8). For two reasons, the Report fell outside that exception and therefore was inadmissible.

First, Florida's public-records hearsay exception, unlike its federal counterpart, does *not* cover "factual findings resulting from an investigation made pursuant to authority granted by law." FED. R. EVID. 803(8). This type of public record "was intentionally omitted from section 903.08(8) of [Florida's] evidence code." CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.8 (2006 ed.). "The drafters felt that the results of official investigations lacked sufficient reliability to offset the prejudice that would result to the party against whom an unreliable report is introduced." *Id.* at n.20. Reports containing "evaluations or statements of opinion by a public official, while within the public-record exception to the Federal Rules, are [thus] inadmissible hearsay under the [Florida] Evidence Code." *Id.*

The Supreme Court recently reiterated that very point in *Lee v. Department of Health & Rehabilitative Services*, 698 So. 2d at 1201. And the Court explained that, “[i]n Florida, rather than offering this type of record, a witness must be called who has personal knowledge of the facts.” *Id.* (citation omitted). The State’s Parallel Testing Summary Report falls squarely within the category of inadmissible public records delineated by the Code and by the Supreme Court’s decision in *Lee*.

Second, even if admission of the Report were not foreclosed as a matter of law, the Report would be inadmissible because its “sources of information [and] other circumstances show [its] lack of trustworthiness.” FLA. STAT. § 90.803(8). The Report was completed literally the day before the hearing by the chief of the very bureau that certified the machines Jennings alleges malfunctioned in this case. The core allegation in Jennings’s lawsuit — pervasive malfunctioning of the electronic voting system certified by the Bureau of Voting Systems Certification — renders the Bureau Chief’s Report vindicating the system as “100% accurate” inherently untrustworthy. A Report from the Bureau of Voting Systems Certification whitewashing a Bureau-certified voting system is no more trustworthy than a report from a hospital vindicating one of its own physicians after he has been accused of malpractice.

The judge’s erroneous ruling appears to be grounded in his repeated references to the report being “a **certification** from the Department of State.” A

604 (emphasis added); *see also id.* (“This was issued by the Department of State, correct?”); *id.* (calling the Department of State “the one agency . . . that can certify”). ES&S’s counsel invited this confusion by skirting the hearsay issue and instead addressing certification. *Id.* The whole discussion about certification and authentication, however, was beside the point: “Although a public record has been authenticated, it is not admissible unless it is also admissible under section 90.803(8), the public-records exception to the hearsay rule, and is not disqualified by any of the other rules of exclusion.” CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 901.7 (2006 ed.).

Had the court below focused correctly on the hearsay problem, it would have excluded the State’s Parallel Testing Summary Report, which in turn would have gutted the key finding in the court’s order: that the parallel-test results demonstrated the iVotronic system to be “100% accura[te].” A 808.

2. The Trial Court Ignored Properly Admitted Evidence Rebutting the Hearsay.

The trial court piled one error on the next, as it then went on to find that “Plaintiffs have presented no evidence to demonstrate that the parallel testing was flawed and/or the results not valid.” A 808. Although Jennings certainly could have presented *more* evidence of the parallel tests’ flaws if Defendants had put the Report’s author on the stand, she nonetheless presented ample evidence to discredit the parallel tests and thus to render clearly erroneous the trial judge’s finding.

Specifically, Professor Wallach testified that the State's parallel tests were "incomplete," were "not conclusive in any way," "weren't conducted the way we would have wanted," were subject to "a number of criticisms," did not use the machines the way they actually were used on Election Day, did not involve "enough machines . . . to be a statistical[ly valid] sample," tested only two machines chosen by Jennings (out of roughly 1,500 total machines in Sarasota County), lacked "sufficient test coverage," and could not possibly "rule out the [existence] of a software bug." *Id.* at 588-89, 595, 600-02.

Professor Wallach raised six fundamental flaws in the State's parallel tests that could render their results invalid.

First, he testified that actual voters on Election Day used the touch-screens in a horizontal or nearly horizontal position "at desk height," but the parallel testers used them in a vertical position at shoulder height. *Id.* at 559. That could matter, he explained, because a voter is more likely to rest both hands on a horizontal screen, and there have "been studies that show if, for example, . . . your thumb is [inadvertently] touching the screen on one side while you're touching [the screen with your voting hand] on the other [side], that could cause errors." *Id.* at 595; *see id.* at 602. He also testified that "[b]ecause in the parallel testing the machines weren't operated at a normal angle of view, it's difficult" to determine whether

touch-screen miscalibration contributed to the iVotronic system's malfunction. *Id.* at 596.

Second, Professor Wallach testified that the State's 12 test voters lacked the diversity appropriate for a proper simulated-election study: "[Y]ou would try to assume the behavior of a variety of different voters, whether it's a shaking hand or large fingers or small fingers. You would try a number of different things that weren't considered during the [State's] parallel test." *Id.* at 595; *see id.* at 601-02. He specifically described "a test that the State of California conducted on Diebold [electronic voting] machines, where they discovered that one particular [test] voter had a habit of dragging her finger on the screen, and that [this] behavior induced the machine to crash. Had they not had a broad demographic of test voters, they would never have discovered this particular bug." *Id.* at 602; *see id.* at 563.

Third, Professor Wallach testified that the State's test voters, all of whom "work for the same agency that had already certified the equipment and the software," did not provide a sufficiently "broad[] selection of voters" reflecting "the demographic composition of Sarasota" — a factor that he stated "absolutely does matter" in judging the test results' validity. *Id.* at 601.

Fourth, Professor Wallach testified that the test voters should not have been instructed to vote slowly because some actual voters move very quickly across the

touch-screen, and “rapid touches of a computer screen [sometimes cause it] to freeze or otherwise malfunction.” *Id.* at 602.

Fifth, Professor Wallach testified that the State’s parallel tests used too few machines and too few ballots — shortcomings that deprived the test of “a more statistically significant sample.” *Id.*

Sixth, Professor Wallach criticized the state tests’ scripts because they never “used a vote pattern in which a vote for Buchanan was entered” when the screen with the congressional race first appeared; literally every script called for the tester initially either to press Jennings’s name on the screen or to skip the congressional race. *Id.*

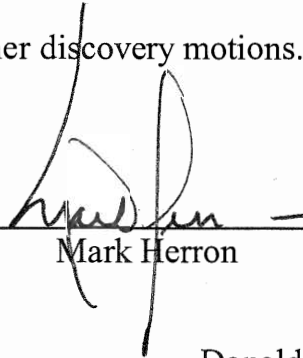
Professor Wallach also testified that the State had rejected specific suggestions that Jennings and her experts had provided about how to improve the parallel tests. *Id.* at 589. He further testified that flawed parallel tests might fail to reveal specific types of iVotronic machine malfunction potentially at issue in this case. *Id.* at 586, 594-95.

Given the sheer mass and detail of Professor Wallach’s critique of the State’s parallel tests, the trial judge’s finding that “Plaintiffs have presented no evidence to demonstrate that the parallel testing was flawed and/or the results not valid” is breathtaking. That the judge gave great weight to Defendants’ hearsay

Report about the parallel tests while ignoring live expert testimony thoroughly discrediting those tests is all the more inexplicable.

CONCLUSION

For the foregoing reasons, Petitioner Christine Jennings respectfully asks this Court to grant a writ of certiorari on an expedited basis and to quash the trial court's December 29, 2006 order denying her discovery motions.



Mark Herron

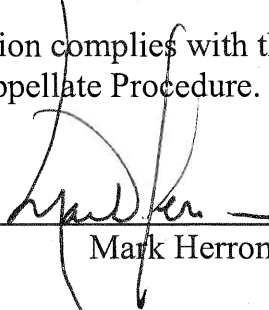
Kendall Coffey
Florida Bar No. 259861
COFFEY & WRIGHT, LLP
2665 South Bayshore
Drive
PH-2, Grand Bay Plaza
Miami, FL 33133
P: (305) 857-9797
F: (305) 859-9919
kcoffey@coffeywright.com

Mark Herron
Florida Bar No. 199737
MESSER, CAPARELLO &
SELF, P.A.
2618 Centennial Place
Tallahassee, FL 32308
P: (850) 222-0720
F: (850) 558-0659
mherron@lawfla.com

Donald B. Verrilli, Jr.
Sam Hirsch
Jessica Ring Amunson
JENNER & BLOCK LLP
601 13th Street, N.W.
Suite 1200
Washington, DC 20005
P: (202) 639-6000
F: (202) 639-6066
dverrilli@jenner.com
shirsch@jenner.com
jamunson@jenner.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure.



Mark Herron

Kendall Coffey
Florida Bar No. 259861
COFFEY & WRIGHT, LLP
2665 South Bayshore Dr.
PH-2, Grand Bay Plaza
Miami, FL 33133
Telephone: (305) 857-9797
Facsimile: (305) 859-9919
E-mail: kcoffey@coffeywright.com

Mark Herron
Florida Bar No. 199737
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
Telephone: (850) 222-0720
Facsimile: (850) 558-0659
E-mail: mherron@lawfla.com

Donald B. Verrilli, Jr.
Sam Hirsch
Jessica Ring Amunson
JENNER & BLOCK LLP
601 13th Street, NW
Suite 1200 South
Washington, DC 20005
Telephone: (202) 639-6000
Facsimile: (202) 639-6066
E-mail: dverrilli@jenner.com
shirsch@jenner.com
jamunson@jenner.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition was furnished to the following by United States Mail, this 3rd day of January, 2007:

Peter Antonacci
Allen C. Winsor
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
E-mail: pva@gray-robinson.com

awinsor@gray-robinson.com
Attorneys for State Defendants

Hayden R. Dempsey
Glenn T. Burhans, Jr.
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
E-mail: dempseyh@gtlaw.com
burhansg@gtlaw.com
Attorneys for Defendant Vern Buchanan

Reginald J. Mitchell
People for the American Way
Foundation
1550 Melvin Street
Tallahassee, FL 32301
Telephone: (850) 877-0307
Facsimile: (850) 402-1999
E-mail: rmitchell@pfaw.org
Attorney for Fedder Plaintiffs

Ronald A. Labasky
Young Van Assenderp, P.A.
225 South Adams Street
Tallahassee, FL 32301
Telephone: (850) 222-7206
Facsimile: (850) 561-6834
E-mail: rlabasky@yvlaw.net
Attorney for Defendant Supervisor Kathy Dent

Frederick J. Elbrecht
Sarasota County Attorney's Office
1660 Ringling Blvd., Floor 2
Sarasota, FL 34236-6870
Telephone: (941) 861-7272
Facsimile: (941) 861-7267
E-mail: relbrecht@scgov.net
Attorney for Defendant Sarasota County Canvassing Board

Miguel De Grandy P.A.
800 S. Douglas Rd., Suite 850
Coral Gables, FL 33134-2088
Telephone: 305-444-7737
Facsimile: 305-443-2616
Email: mad@degrandylaw.com
Attorney for Defendant ES&S

Harry O. Thomas
Radey Thomas Yon & Clark, P.A.
P.O. Box 10967
Tallahassee, FL 32302-2967
Telephone: 850-425-6654
Facsimile: 850-425-6694

Lowell Finley
Voter Action
1604 Solano Avenue
Berkeley, CA 94707
Telephone: (510) 318-2248
Facsimile: (415) 723-7141
E-mail: lfinley@wwc.com
Attorney for Fedder Plaintiffs

Elliot M. Mincberg
Judith E. Schaeffer
People for the American Way
Foundation
2000 M Street N.W. #400
Washington, D.C. 20036
Telephone: (202) 467-4999
Facsimile: (202) 293-2672
E-mail: emincberg@pfaw.org
jschaeffer@pfaw.org
Attorneys for Fedder Plaintiffs

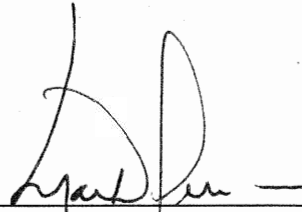
Muslima Lewis
Randall C. Marshall
Aziza Naa-Kaa Botchway
ACLU Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
Telephone: (786) 273-2729
Facsimile: (786) 363-1448
E-mail: mlewis@aclufl.org
rmarshall@aclufl.org
abotchway@aclufl.org
Attorneys for Fedder Plaintiffs

Email: hthomas@radeylaw.com
Attorney for Defendant ES&S

Cindy A. Cohn
Matthew J. Zimmerman
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x127
Facsimile: (415) 436-9993
E-mail: cindy@eff.org
mattz@eff.org
Attorneys for Fedder Plaintiffs

Rebecca Harrison Steele
Zeina N. Salam
ACLU Foundation of Florida, Inc.
West Central Florida Office
P.O. Box 18245
Tampa, FL 33679-8245
Telephone: (813) 254-0925
Facsimile: (813) 254-0926
E-mail: rsteele@aclufl.org
zsalam@aclufl.org
Attorneys for Fedder Plaintiffs

The Honorable William L. Gary
The Circuit Court for the Second Judicial
Circuit
Leon County Courthouse
301 S. Monroe Street
Tallahassee, FL 32301



COUNSEL FOR PETITIONER

Kendall Coffey

Florida Bar No. 259861

COFFEY & WRIGHT, LLP

2665 South Bayshore Dr.

PH-2, Grand Bay Plaza

Miami, FL 33133

Telephone: (305) 857-9797

Facsimile: (305) 859-9919

E-mail: kcoffey@coffeywright.com

Mark Herron

Florida Bar No. 199737

MESSER, CAPARELLO & SELF, P.A.

2618 Centennial Place

Tallahassee, Florida 32308

Telephone: (850) 222-0720

Facsimile: (850) 558-0659

E-mail: mherron@lawfla.com

Donald B. Verrilli, Jr.

Sam Hirsch

Jessica Ring Amunson

JENNER & BLOCK LLP

601 13th Street, NW, Suite 1200 South

Washington, DC 20005

Telephone: (202) 639-6000

Facsimile: (202) 639-6066

E-mail: dverrilli@jenner.com

shirsch@jenner.com

jamunson@jenner.com