

Sent Via Email

October 29, 2024

Dear Members of the Canvassing Boards and Alternates
c/o Supervisors of Elections

Re: Request to Commit to Certify the Results of the General Election

Dear Members of the Canvassing Boards and Alternates:

On behalf of the Legal Defense Fund, the Advancement Project, the Southern Poverty Law Center, and the League of Women Voters of Florida, we want to thank you for your hard work and commitment to protecting the voting process. We know that you are facing some strong headwinds and pressure to take actions that are not in compliance with Florida law, and we urge the County Canvassing Board (“the Board”) and each of its individual members to continue to uphold your duties to certify the results of the November 2024 general elections, in compliance with Florida state law. Given the heightened pressure from third parties not to certify elections, we hope that our letter can serve as roadmap of what is expressly included in Florida state law about this mandatory, non-discretionary duty to certify election results.

In light of recent attempts by some election officials across the country to delay or withhold certification, as well as outside groups inappropriately weighting in on this duty, it is critically important that at this time the Board affirms its duty to certify the results of the upcoming election based on the votes cast¹ and no other external factors, as required by Florida law. There are processes codified in Florida law to address issues with the results, but those processes are separate and independent of certification—and furthermore, can be accessed only after you fulfill your duty to certify. If a County Canvassing Board fails to perform the non-discretionary duty to certify the results of this year’s general election by November 18, 2024, the Board or individual Board members could be exposed to criminal and civil liability. We very much appreciate your efforts to ensure that this election and the post-election process will be administered in a transparent manner compliant with state law.

1. Election Certification Is Mandatory Under Florida Law

Certification by counties and the state is a straightforward but important step in the electoral process. As you are aware, the deadline for County Canvassing Boards to certify results in Florida this year is November 18, 2024. Certification occurs after votes have already been canvassed, counted, and reported. That means certification is the final administrative step in

¹ The votes counted include: the votes as shown by the returns then on file in the office of the supervisor from the Early Voting period, Election Day, vote-by-mail ballots, absent electors’ ballots, and validated provisional ballots. Fla. Stat. § 102.141.

formalizing and communicating election returns that have already been thoroughly vetted through the hard work of the Board and county election administrators.²

Despite some third parties' statement to the contrary³, Florida law is clear that certification is not optional; it is a mandatory, non-discretionary action that Florida law requires each County Canvassing Board to carry out. Florida Statutes § 102.112(1) requires that a County Canvassing Board "shall file" certified returns with the Department of State, and Florida Statutes § 102.151 requires that the County Canvassing Board "shall" make and sign certificates of the election results and "shall" transmit those certificates to the state. The word "shall" imposes a mandatory duty under Florida law.⁴ That is why Florida courts have long interpreted the responsibility of certifying election results as a ministerial duty.^{5,6}

Moreover, certification is simply an administrative process for aggregating and formalizing returns. The responsibility at this stage of the process is to confirm that the number of votes reflected in the returns is consistent with the number of ballots that were cast. *See* Fla. Stat. §§ 102.112(1), 102.141(3). If there is any dispute with the results of the vote, Florida law provides that any "contestant shall file a complaint . . . with the clerk of the circuit court **within 10 days after** midnight of the date the last board responsible for certifying the results **officially certifies the results** of the election being contested." Fla. Stat. § 102.168(2).⁷ Therefore, there can be no contest to the election results until **after the County Canvassing Board officially certifies the results**.

As such, Florida law prescribes a specific set of procedures leading to certification. A County Canvassing Board is required to base certified results on a simple aggregation of the returns collected from polling places, combined with the canvass of vote by mail and provisional ballots. *See* Fla. Stat. § 102.141(3) ("The canvass, except the canvass of absent electors' returns and the

² We appreciate County Canvassing Boards' compliance with ensuring the canvassing of the votes are available for the public to observe. Fla. Stat. § 102.141(2)(a).

³ Please also share with third parties that threaten you or your processes or that try to pressure you into taking an incorrect action that the Florida legislature has addressed how to handle situations where there is any intentional malfeasance by a Canvassing Board.

⁴ *See, e.g., Sanders v. City of Orlando*, 997 So.2d 1089, 1095 (Fla. 2008) ("The word 'shall' is mandatory in nature.").

⁵ *See State ex rel. Clendinen v. Dekle*, 173 So. 2d 452, 456 (Fla. 1965) (compelling certification as a ministerial duty of the statewide canvassing commission); Anne E. Melley, 21 Fla. Jur. 2d Elections § 180 (collecting additional cases).

⁶ As recently as October 2024, courts in other states have held that similar language in state election codes confer a "mandatory fixed obligation" and that there is no room for county officials to delay or withhold certification. ("[Election officials] are rule-writers, personnel trainers and managers, logisticians, marketers, and accountants. Much of what they do is left to their broad, reasoned discretion. But not everything -- some things an election [official] *must* do, either in a certain way or by a certain time, with no discretion to do otherwise. Certification is one of those things." *Adams v. Fulton Cty.*, No. 24CV011584 (Fulton Cty. Super. Ct. Oct. 14, 2024) (emphasis in original), available at https://www.democracymocket.com/wp-content/uploads/2024/10/Preview_48f04c5c-0fe6-4045-9d04-77e49ec2dd57.pdf).

⁷ There is also an alternative contest procedure for races for the state legislature, but those contests must also occur after the certification of the election results. *See* Fla. Stat. § 102.171.

canvass of provisional ballots, shall be made from the returns and certificates of the inspectors as signed and filed by them with the supervisor. . . .”). As part of that process, the Board is expressly forbidden to “change the number of votes cast for a candidate, nominee, constitutional amendment, or other measure submitted to the electorate of the county, respectively, in any polling place, as shown by the returns.” Fla. Stat. § 102.141(3).

In the rare case where the Board’s review identifies a discrepancy that suggests an obvious error or oversight in the returns, the law specifies that such errors are to be corrected only through carefully circumscribed procedures. For example, if any precinct’s returns are “missing” or contain “omissions” that render them incomplete, the correct remedy is to order a “retabulation” from that precinct. Fla. Stat. § 102.141(3). The same process is provided for if the Board’s review identifies an “obvious error on” the returns. *Id.* A County Canvassing Board may *not*, however, initiate its own investigation of the election results that go beyond this straightforward process of checking for errors that are evident on the face of the returns. Nor may the Board otherwise use the certification process to raise doubts about the number or legitimacy of ballots that were determined to be valid through the canvassing process and tabulated accordingly. Any such actions would be particularly inappropriate and inconsistent with Florida law if prompted by claims or alleged evidence received from outside groups, rather than information provided by precinct-level officials and election administrators with official responsibility for canvassing, tabulating, and faithfully reporting the tabulations and returns on which a County Canvassing Board is required to base its certification.

In summary, Florida law does not permit withholding or delaying certification of election returns in any instance. Under Florida law, it is clear that the County Canvassing Board’s important role is to focus on identifying and resolving any clear omissions or errors in the returns, aggregate the various tabulations before you, and confirm they include all of the validated ballots that were cast. This is a ministerial duty that must be timely carried out as a necessary step in the administration of an orderly election process. We will discuss some of these other processes below.

2. Florida State Law Provides Multiple Avenues for Resolving Discrepancies or Questions About the Results, None of Which Include Refusing or Delaying Certifying the Election

While, as described above, there is only a limited, statutorily prescribed process for reconciling any discrepancies in returns at the certification stage, other avenues are available to address potential concerns about the vote. Refusing or delaying certification would only undermine or delay resolution of questions that should be raised, if at all, only through those prescribed channels.

First, if any affected candidate or citizen has a concern about discrepancies that could affect the result of an election, Florida law provides for them to bring a challenge to the *certified* results, meaning that the results must be certified before any challenge. *See* Fla. Stat. § 102.168(1). That

challenge would be heard in a court, where any concern about the election results can be adjudicated by judges under established dispute resolution procedures. *Id.* The only limited exception is for elections to the Florida Legislature, which by law has the authority to hear contests to the eligibility of its own members. *See Fla. Stat. § 102.171.* Whether a court or the legislature is the proper forum, it is never the County Canvassing Board’s purview to entertain a challenge founded on similar concerns as a basis for withholding or delaying certification.

Again, Florida law specifically provides for a challenge to be brought within 10 days *after* certification is complete. *See Fla. Stat. § 102.168(2).* The certification process itself is not the time or place to resolve concerns about the electoral process or the election results. To the extent such concerns arise, prompt certification of the results by a canvassing board may further facilitate a prompt hearing and resolution of those claims through the court system, where they belong.⁸

Finally, as you are aware, Florida law also provides for recounts to occur, according to specific procedures set forth by law and regulation, when the returns show that the race is within 0.50 percentage points. *See Fla. Stat. § 102.141(7).* This is an important safeguard, and it is distinct from the certification process, which is straightforward and occurs once counting (or re-counting, when the law provides for it) is complete. The certification process is not an opportunity to relitigate vote counts outside of these established procedures.

3. Delaying or Refusing Certification Will Result in Serious Consequences

We know that Canvas Board Members in Florida have complied with the law in the past and have performed their duties very well. We offer this analysis so that Canvass Board members can give confidence to the public, if needed, that certification is a ministerial duty that Florida courts can and will compel if it is delayed or withheld. Delaying or refusing certification may lead to legal action, requiring time and attention from the Board and the county employees who support the Board’s work, and associated expense to the taxpayers of your county. As discussed below, knowing and intentional refusal to carry out any official duties could give rise to consequences.

First, a County Canvassing Board or members thereof who willfully fail to perform legal duties may be subject to removal or other civil consequences. For example, Florida law provides that “[a]ny official who willfully violates any of the provisions of this election code” may be excluded from the polls and be replaced. Fla. Stat. § 104.051(1). And Section 11(a) of the federal Voting Rights Act provides civil remedies against a public official or entity that “willfully fail[s] or refuse[s] to tabulate, count, and report” valid votes. 52 U.S.C. § 10307(a).

⁸ In addition, where a winning candidate has violated certain Florida laws, state officials may also be empowered to bring a court action to prevent that candidate’s taking office. *See Fla. Stat. § 106.27(3); Cullen v. Cheal*, 586 So.2d 1228, 1229 (3d Dist. Ct. App. 1991). But again, the correct forum for such a claim to be considered remains the courts after certification of the results, and not a County Canvassing Board prior to certification.

Second, willful refusal to perform the Board’s duties could have criminal consequences. For example, under § 103.051(2) of the Election Code, “[a]ny official who willfully refuses or willfully neglects to perform his or her duties as prescribed by this election code is guilty of a misdemeanor of the first degree.”

Florida law is clear then that certification based on the votes cast—and the votes cast alone—is an important and mandatory step in the process of all elections, and any willful delay or refusal may result in consequences for a County Canvassing Board or its members.

4. We Request That You Affirm Your Commitment to Certifying the Election

We request that you affirm your commitment to following state law requiring certification of the election results. Doing so will ensure that voters have the confidence that their votes will be counted and the post-election process will be administered appropriately and in compliance with law. It will also be a clear message to third parties that may want to improperly change the canvass board process.

We ask that you respond in writing by November 1, 2024. We welcome any questions, suggestions, or concerns following our letter. Please feel free to contact LDF’s Leah Wong and Michael Skocpol at lwong@naacpldf.org and mskocpol@naacpldf.org.

Sincerely,

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Legal Defense Fund (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that prohibit voter discrimination, intimidation, and suppression and increase access to the electoral process.

Advancement Project (“AP”)

AP is a cutting-edge, no-holds-barred national organization whose team members are dedicated to building local power in communities of color. Centered on a movement lawyering approach, defined as community-centered racial justice lawyering, AP supports grassroots organizations working to eliminate oppressive structures in our laws and institutions and shift narratives towards transformative change. By fighting for liberatory public education, protecting and expanding our right to vote, and supporting community-led public safety that affirm the dignity and humanity of people of color, AP advances real change from the ground up.

Southern Poverty Law Center (“SPLC”)

The SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The Democracy: Voting Rights team's efforts center on dismantling voter suppression tactics; expanding access to the ballot; redistricting and gerrymandering; enforcing federal voter registration and assistance provisions; improving election administration; and community outreach and engagement.

League of Women Voters of Florida (“LVWFL”)

The League of Women Voters of Florida is a nonpartisan political organization encouraging informed and active participation in government, working to increase understanding of major policy issues, and advocating for legislative changes and policies for the public good.