SUPREME COURT OF THE UNITED STATES

No. 00-949 (00A504)

GEORGE W. BUSH ET AL. *v.* ALBERT GORE, JR. ET AL.

ON APPLICATION FOR STAY

[December 9, 2000]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

To stop the counting of legal votes, the majority today departs from three venerable rules of judicial restraint that have guided the Court throughout its history. On questions of state law, we have consistently respected the opinions of the highest courts of the States. On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously. On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion. The majority has acted unwisely.

Time does not permit a full discussion of the merits. It is clear, however, that a stay should not be granted unless an applicant makes a substantial showing of a likelihood of irreparable harm. In this case, applicants have failed to carry that heavy burden. Counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to the respondents– and, more importantly, the public at large– because of the risk that "the entry of the stay would be tantamount to a decision on the merits in favor of the applicants." *National Socialist Party of America* v. *Skokie*, 434 U. S. 1327, 1328 (1977) (STEVENS, J., in

chambers). Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.

It is certainly not clear that the Florida decision violated federal law. The Florida Code provides elaborate procedures for ensuring that every eligible voter has a full and fair opportunity to cast a ballot and that every ballot so cast is counted. See, *e.g.*, Fla. Stat. §§ 101.5614(5), 102.166 (2000). In fact, the statutory provision relating to damaged and defective ballots states that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(5) (2000). In its opinion, the Florida Supreme Court gave weight to that legislative command. Its ruling was consistent with earlier Florida cases that have repeatedly described the interest in correctly ascertaining the will of the voters as paramount. See *State ex rel. Chappell* v. *Martinez*, 536 So. 2d 1007 (1998); *Boardman* v. *Esteva*, 323 So. 2d 259 (1976); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (1944); *State ex rel. Peacock* v. *Latham*, 169 So. 597, 598 (1936); *State ex rel. Carpenter* v. *Barber*, 198 So. 49 (1940). Its ruling also appears to be consistent with the prevailing view in other States. See, *e.g.*, *Pullen* v. *Milligan*, __ Ill.2d __, 561 N. E. 2d 585, 611 (Ill. 1990). As a more fundamental matter, the Florida court's ruling reflects the basic principle, inherent in our Constitution and our democracy, that every legal vote should be counted. See *Reynolds* v. *Sims*, 377 U. S. 533, 544–555 (1964); cf. *Hartke* v. *Roudebush*, 321 F. Supp. 1370, 1378–1379. (SD Ind. 1970) (STEVENS, J., dissenting); accord *Roudebush* v. *Hartke*, 405 U. S. 15 (1972).

Accordingly, I respectfully dissent.