No. A-

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Applicants,

v.

ALBERT GORE, JR., *et al.*,
Respondents.

EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as Nominee of the Republican Party of the United States for President of the United States; as Richard Cheney, Nominee of the Republican Party of the United States for Vice President of the United States; Albert Gore, Jr., as Nominee of the Democratic Party of the United States for President of the United States; Joseph I. Lieberman, as Nominee of the Democratic Party of the United States for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence D. King, Myriam Lehr and David C. Leahy as members of the Miami-Dade Canvassing Board; David Leahy individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King and David Howard (or, in the alternative Marianne P. Marshall), as members of the Nassau County Canvassing Board; Shirley N. King individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton and Carol Roberts, as members of the Palm Beach Canvassing Board; Theresa LePore individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. §§ 1651(a) and 2101(f), Applicants George W. Bush and Richard Cheney respectfully request a stay of enforcement of the judgment below pending the filing and disposition of a petition for a writ of certiorari to the Supreme Court of Florida in this case. The decision below attempts to apply to the November 7, 2000 presidential election retroactive judicial changes in Florida law governing the appointment of presidential electors. The decision below violates Article II of the United States Constitution, conflicts with 3 U.S.C. § 5, and violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. A stay pending this Court's review of these substantial federal questions is essential to prevent Applicants from suffering irreparable injury as a direct result of the

erroneous decision below. A stay is also consistent with this Court's unanimous decision on December 4, 2000, vacating the judgment of the Florida Supreme Court and remanding the case for further proceedings consistent with this Court's opinion. *See Bush v. Palm Beach County Canvassing Board*, No. 00-836, Slip op. (U.S. Dec. 4, 2000) (attached hereto as Exh. D). The Florida Supreme Court has not yet acted on that decision, nor has it shown that its actions are consistent with that decision. Applicants intend to file a petition for a writ of certiorari within twenty-four hours.[1]

I. INTRODUCTION

More than one month after Election Day, events in the State of Florida have thrown the results of the November 7 presidential election into intense turmoil and controversy. The period between November 7 and today has, unfortunately, been characterized by chaotic and standardless manual recounts requested by Democratic presidential candidate Vice President Gore in four heavily Democratic counties and by an outburst of litigation flowing from that process. This Court has already granted certiorari and decided one case involving the Florida election dispute. *See Bush*, Exh. D.

This Court's review is also essential in this case in order to protect the integrity of the electoral process for President and Vice President of the United States and in order to correct the serious constitutional errors made by the Florida Supreme Court. A stay is

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[1] In the alternative, the Court may wish to treat this application as a petition for a writ of certiorari. *See*, *e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1011, 423 U.S. 1027 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970), 401 U.S. 402, 406 (1971).

necessary in order to prevent irreparable harm to Applicants, to the electoral process, and to the Nation as a consequence of the flawed decision below.

II. OPINIONS BELOW

The opinion of the Supreme Court of Florida in the contest proceeding (Exh. A) is not yet reported. The order of the Circuit Court for the County of Leon, Florida in that proceeding (Exh. B (Final Judgment) and Exh. C (transcript of ruling from bench)) is not reported. The November 21, 2000, opinion of the Supreme Court of Florida is reported at __ So.2d __, 2000 WL 1725434 (Fla. Nov. 21, 2000) ("*Harris*"). The December 4, 2000, per curiam decision of this Court in 00-836 (Exh. D), vacating the decision of the Supreme Court of Florida in *Harris* and remanding for further proceedings not inconsistent with this Court's decision, is reported at __ S. Ct. __, 2000 WL 1769093.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, Section 1, Clause 2 of the Constitution of the United States provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or

Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

Title 3, Section 5 of the United States Code provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, and Article V of the Florida Constitution, as well as all other pertinent provisions of the Constitution of the United States, the United States Code, and the Florida Statutes are reproduced at Exh. E hereto.

IV. STATEMENT

A. Facts

The voters of Florida cast their ballots for President on November 7, 2000. Those ballots were counted on November 7, and—pursuant to an existing statutory provision—recounted on November 8. In each case, Governor Bush received the most votes for President. Following those two counts, Vice President Gore filed election protests (*see* Fla. Stat. § 102.166) and requested that four heavily Democratic counties—Broward, Miami-Dade, Palm Beach, and Volusia—out of Florida's sixty-seven counties, manually recount the ballots cast. As this Court is aware, those manual recounts were conducted in different manners from county to county according to amorphous and newly developed "standards" that changed during the recounts. *See Siegel v. LePore*, No. 00-15981, 2000 WL 1781946, at *22 (11th Cir. Dec. 6, 2000) (Birch, J., dissenting).

The laws enacted by the Florida Legislature before the November 7 election set procedures governing the manner in which presidential electors would be appointed. Among these laws were two sections that require local county canvassing boards to certify their election returns to the Department of State no later than 5:00 p.m. on the seventh day following the election. *See* Fla. Stat. §§ 102.111 and 102.112.[2] Section 102.112 indicates that returns filed after that deadline may be ignored by the Secretary of State. That seven-day deadline expired on November 14, 2000, and the Secretary of

[2] The Florida election code and all other relevant statutes and constitutional provisions are reproduced at Exh. E hereto.

State, after considering proffered justifications for failing to comply with the deadline, announced that she would exercise her discretion and refuse to tabulate late-submitted returns.

Florida law provides that, prior to the seven-day certification deadline, disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. § 102.166(1)-(2), and/or a request for a manual recount, *see* Fla. Stat. § 102.166(4)-(10). The county canvassing boards have the discretion to reject or accept the request for a recount. Fla. Stat. § 102.166(4)(c) ("The county canvassing board *may* authorize a manual recount.") (emphasis added). If the canvassing board decides to perform a manual recount, it must first conduct a sample manual recount. Fla. Stat. § 102.166(4)(d). If the sample manual recount indicates "an error in the vote tabulation which could affect the outcome," the county canvassing board may conduct a full manual recount, correct the error and recount remaining precincts with the vote tabulation system or request verification of the tabulation software. Fla. Stat. § 102.166(5).

Florida statutes, as of November 7, provided no specific guidance about how to determine whether a particular ballot reflected a vote or not. *See* Fla. Stat.

§ 101.5614(5).[3] As of November 7, 2000, no provision in Florida law exempted the manual recount process from the seven-day certification deadline.

After certification, candidates and voters may "contest" the certification of an election by filing a complaint in Leon County Circuit Court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2), and involve extensive judicial proceedings, including formal pleadings, discovery, and trial. *See* Fla. Stat. § 102.168(3)-(8).

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[3] As a result, there were wide discrepancies across and within the counties both with regard to determinations about undertaking, or completing, manual recounts and as to how to assess ballots. For example, the standards for evaluating ballots were changed repeatedly during the recounts. Indeed, after tabulating as proper votes only punch card ballots that had been perforated by voters, certain county officials yielded—two weeks after the election—to demands by Democratic Party officials for the adoption of yet another new standard which would permit local officials to validate ballots with mere "discernible indentations" ("dimpled chads"). In Palm Beach County, a court ordered the canvassing board to consider "dimpled" chads even though the board's pre-existing 1990 policy precluded treating mere indentations as valid votes. *See Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL 00-11078 AB, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 22, 2000). On November 20, the Florida Democratic Party asked the Florida Supreme Court to fashion even more expansive new standards *de novo* for the recounting of the ballots in the counties it had singled out for special treatment. Vice President Gore repeated that request to the Florida Supreme Court on November 30, when he urged that court to exercise mandamus jurisdiction to begin counting ballots. Petition for Writ of Mandamus or Other Writ or, In the Alternative Review of Trial Court Ruling and for Enforcement of Injunction, *Gore v. Harris*, at 21-30 (filed Nov. 30, 2000). In that brief, Vice President Gore argued that "as a matter of law, a discernible indentation on the ballot constitutes objective evidence of the voter's intent." *Id.* at 35. The Florida Supreme Court rejected that request, and in this case refused once again to attempt to clarify the standard(s) for determining whether to count "dimpled" ballots, "hanging chad," etc., instead simply leaving these issues to the unfettered discretion of unidentified individuals who will apparently be charged with making those determinations on an ad hoc and completely standardless basis.

B. Prior Proceedings

On November 13, 2000, Vice President Gore and others brought suit in the Circuit Court for Leon County seeking an order directing the Secretary to waive the November 14 deadline established by the Florida legislature for certifying the results of the election. Instead, the Gore campaign sought a judicial amendment to the statute that would allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. The circuit court denied that relief on November 17, holding that the Secretary of State had "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." *McDermott v. Harris*, Case No. 00-2700 (Fla. Cir. Ct. Nov. 17, 2000) (order denying emergency motion to compel compliance with and for enforcement of injunction).

That same day, the Florida Supreme Court, exercising its "equitable powers" under the Florida Constitution, *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. Four days later, on November 21, the Florida Supreme Court issued an opinion reversing the state trial court, holding that the trial court "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." *Harris*, 2000 WL 172543 at *14. The Florida Supreme Court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that "the Secretary may reject a Board's amended returns only

if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Harris*, 2000 WL 1725434 at *14.

Based on this newly fashioned judicial amendment, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through 5:00 p.m. on November 26, 2000. *Id.* at *15. The court also maintained its injunction preventing the Secretary from certifying any election results before that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.*

Manual recounts thus continued in Broward, Palm Beach, and Miami-Dade counties. Results from the manual recounts were submitted to the Secretary of State by Broward County on November 25. On November 22, the Miami-Dade County Canvassing Board unanimously decided to halt its manual recount, after counting 136 of the 635 precincts in the county. The Palm Beach Canvassing Board began a manual recount, but it did not provide the complete results of its manual recount to the Secretary of State by the 5:00 p.m. November 26 deadline set out by the Florida Supreme Court.

As of 5:00 p.m. on November 26, the tabulated results showed once again that Governor Bush had received more votes for President than any other candidate. Accordingly, the Secretary of State certified Governor Bush as having received the most votes for President in Florida, and the Florida Elections Canvassing Commission announced that Governor Bush was the winner of Florida's twenty-five electoral votes for President. In certifying the election returns on November 26, the Secretary of State

made clear her opinion that the final vote totals were due by November 14 (with the exception of overseas military absentee ballots), the deadline specified by Florida statute. Nonetheless, because the Florida Supreme Court had extended that deadline until 5:00 p.m. on November 26, the certified total announced by the Secretary of State included the results of the manual recount in Broward County completed after November 14, but before 5:00 p.m. on November 26.

C. This Court's Earlier Decision

On November 24, 2000, this Court granted a writ of certiorari to review the November 21 decision of the Florida Supreme Court extending the deadline for submitting vote totals. This Court issued a unanimous per curiam opinion on Monday, December 4, 2000, vacating the Florida Supreme Court's decision and remanding the case to the Florida court "for further proceedings not inconsistent with this [Court's] opinion." *Bush*, Exh. D at 6. This Court determined that there was "considerable uncertainty as to the precise grounds for the [Florida Supreme Court's] decision" and thus found reason "to decline at this time to review the federal questions" raised by petitioner. *Id.* This Court, however, cautioned the Florida Supreme Court against overriding the Florida Legislature's "wish" to secure for Floridians the benefits of the "safe harbor" in 3 U.S.C. § 5. *See id.* In vacating the decision and remanding the case to the Florida Supreme Court, this Court specifically sought clarification "as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2" and "as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5." *Id.* at 7.

D. Proceedings Below

On November 27, 2000, the day after the Secretary of State certified the results of the November 7 election and the Florida Elections Canvassing Board declared Governor Bush the winner of Florida's twenty-five electoral votes, Vice President Gore and Senator Lieberman (the "Gore Respondents") filed a complaint in the Circuit Court for Leon County pursuant to Fla. Stat. § 102.168 to contest the certification of Governor Bush as the winner. Although the complaint contended that Governor Bush did not receive "more votes in the Presidential election in the State of Florida than Al Gore," it—like the earlier protest actions—sought relief only with respect to heavily Democratic counties. The complaint alleged that the results certified by the Secretary of State: (1) improperly failed to include a manual recount of ballots in Miami-Dade County that the Miami-Dade Canvassing Board unanimously decided not to complete; (2) improperly failed to include results of a manual recount in Palm Beach County that were not submitted by the November 26, 5:00 p.m. deadline set out by the Florida Supreme Court; and (3) improperly included the results from Nassau County's November 7 machine count of ballots, rather than Nassau County's incomplete November 8 machine recount of ballots. The complaint also asked the court to evaluate 3,300 ballots from Palm Beach County and some 9,000 ballots from Miami-Dade County that the Gore Respondents contend were not properly counted.

Governor Bush and Secretary Cheney filed an answer and raised several affirmative defenses to the contest, including constitutional challenges. *See* Exh. F (Answer And Affirmative Defense Of Defendants George W. Bush And Richard Cheney

To Complaint To Contest Election); *see also* Exh. N (Motion And Memorandum In Support Of Defendants George W. Bush And Dick Cheney's Motion To Dismiss For Lack Of Subject-Matter Jurisdiction, Failure To Name Indispensable Parties, And Failure To State A Claim). The affirmative defenses included, among others, that: the relief requested by the Gore Respondents is barred because it would violate Article II, § 1 of the U.S. Constitution; the Gore Respondents' request to recount votes in only two selected counties differently than in Florida's remaining sixty-five counties would violate the Equal Protection and Due Process Clauses of the U.S. Constitution; the post-election judicial limitations imposed by the Florida courts on the discretion of state executive officials to certify election results and the standards applied to resolve any controversies violate the Due Process Clause of the Fourteenth Amendment and fail to comply with the requirements of 3 U.S.C. § 5; the Broward, Miami-Dade and Palm Beach County Canvassing Boards altered standards for evaluating votes after the November 7 election, in violation of the Due Process Clause and 3 U.S.C. § 5; and including the results of the partial manual recount in Miami-Dade County would violate the Voting Rights Act of 1965, 42 U.S.C. § 1973.[4]

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[4] As part of that contest action, Governor Bush and Secretary Cheney also filed a third-party complaint against Broward and Volusia counties contending that in the event the court granted the Gore Respondents' request for a recount in Miami-Dade and Palm Beach counties, then it must also conduct a recount in Broward and Volusia counties under the same standards. Exh. G (3P ¶ 7) at 3. That third-party complaint also alleged that the shifting standards for considering ballots by the Broward County Board violated the Due Process Clause and 3 U.S.C. § 5. Exh. G (3P ¶¶ 15-40) at 4-11. The court below rejected Applicants' arguments in this regard without comment.

On December 4, 2000, after hearing two full days of evidence, the Leon County Circuit Court rejected the contest and denied relief to the Gore Respondents. The Circuit Court made several factual findings in support of its holding, including findings that there was no credible evidence establishing a reasonable probability that the Florida election results would be different if the requested relief were granted to the Gore Respondents; that the Miami-Dade County Canvassing Board did not abuse its broad discretion in its decision not to perform a complete manual recount; and that the Palm Beach County Canvassing Board did not abuse its discretion in considering the 3,300 ballots the Gore Respondents sought to have reviewed by the Circuit Court.

The Circuit Court also made a factual finding that the Palm Beach County "process and standards [for evaluating ballots] were changed from the prior 1990 standards." Exh. C at lines 0011-7 to 0011-8. The Circuit Court went on to state that these changes were "perhaps contrary to Title III, Section (5) of the United States Code." *Id.* at lines 0011-8 to 0011-9. The Circuit Court also expressed its concern that implementing a different standard for evaluating the 3,300 disputed Palm Beach County ballots would create a two-tier system not only within that county, but also with respect to other counties. That two-tier system, explained the Circuit Court, citing and relying on an opinion letter from Florida's Attorney General, "would have the effect of treating voters differently depending upon what county they voted in. . . . [thereby raising] legal jeopardy under both the United States and state constitutions." *Id.* at lines 0011-21 to 0011-22 (quoting November 14, 2000 letter of Florida Attorney General).

On December 8, 2000, the Florida Supreme Court, by a margin of 4-3, reversed the circuit court, ordering the following: (1) the inclusion of 176 or 215 net votes for the Gore Respondents as "identified" by the Palm Beach Canvassing Board, but submitted to the Secretary of State after the Florida Supreme Court's November 26 deadline, Exh. A at 4; (2) the inclusion of 168 net votes for the Gore Respondents "identified in a partial recount" by the Miami-Dade Canvassing Board, but never submitted to the Secretary of State, *id.*; (3) the trial court to "examine the approximately 9000 additional Miami-Dade ballots placed in evidence, which have never been examined manually." *Id.* at 5. The majority also ordered the Supervisor of Elections and Canvassing Boards "*in all counties* that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith." *Id.* at 38-39 (emphasis added).

Remarkably, the majority opinion did not respond to the questions posed by this Court's December 4 opinion vacating the Florida Supreme Court's decision in *Harris*. Indeed, although the majority recognized that the "need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law," *id.* at 36, it nonetheless embarked upon a recount plan that it knew could not be fulfilled and that would, by definition, conflict with 3 U.S.C. § 5. *See* Exh. A at 38 n.21 ("we agree that practical difficulties may well end up controlling the outcome of the election"); *id.* at 67 (Harding, J., dissenting) (majority "provid[ed] a remedy which is impossible to achieve and which will ultimately lead to chaos").

Chief Justice Wells wrote a strong dissent in which he concluded that the majority's order to conduct a partial recount "*appears to me to be in conflict with the United States Supreme Court decision [in Harris].*" Exh. A at 55. He also warned that Florida's "[c]ontinuation of [a] system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress." *Id.* at 51. Chief Justice Wells also concluded that the order directing the trial court to conduct a manual recount of ballots violates Article II of the United States Constitution, because "neither th[e Florida Supreme Court] nor the circuit court has the authority to create the standards by which it will count the under-voted ballots." *Id.* a 53.

Finally, the majority held that in tabulating the ballots, the standard to be applied in determining whether a vote is "legal" is whether there is a "clear indication of the intent of the voter." Exh. A at 39 (citing Fla. Stat. § 101.5614(5)). However, as the dissents point out, that standard is a departure from the standard in effect on November 7. Justice Harding, joined by Justice Shaw, concluded that "the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case." *Id.* at 67 (Harding, J., dissenting). Similarly, Chief Justice Wells concluded that the majority's decision "not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000." *Id.* at 53 (Wells, C.J., dissenting).

On December 8, 2000, Applicants filed with the Florida Supreme Court a petition to stay its ruling pending the filing of a petition for a writ of certiorari. Although the

Florida Supreme Court has yet to rule on that petition, this case certainly presents "extraordinary circumstances" that warrant relief from this Court. *See* Sup. Ct. R. 23.3.

V. JURISDICTION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257(a).

Applicants seek review of the Supreme Court of Florida's decision, which, as demonstrated below, violates Article II of the United States Constitution, 3 U.S.C. § 5, and the Fourteenth Amendment to the Constitution. Applicants properly raised these federal claims in the court below. *See* Exh. H (Amended Brief Of Appellees George W. Bush And Dick Cheney) at 45-46; *see also* Exh. M (Clarification Of Argument For Appellees George W. Bush And Dick Cheney) at 2-8. Accordingly, the questions to be presented in the petition plainly fall within the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "[t]here have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic Natural Gas Co. v. Oklahoma*,

334 U.S. 62, 68 (1948). As discussed below, absent an immediate stay from this Court, Applicants face irreparable harm from the judgment below.

Moreover, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be held in the state courts. The fourth such category permits review even in "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483; *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

The fourth *Cox Broadcasting* category is plainly applicable here. The federal questions presented by this case have been finally decided by the court below, which squarely rejected Applicants' arguments that the Article II and 3 U.S.C. § 5 preclude the

relief ordered by the court below, and that the selective and standardless manual recounts approved and mandated by the court below would violate the federal Constitution and other federal laws. Exh. H (Florida Supreme Court Brief) at 45-46. Accordingly, a federal issue has been conclusively resolved, and there is no need for further state court proceedings to finalize or crystallize the lower court's disposition of those federal questions. It is equally clear that, absent immediate review, Applicants "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." 420 U.S. at 482. The case was remanded for the selective manual recounts to occur, and it is certainly possible that the results of those recounts could eliminate Applicants' need to litigate further, thereby depriving this Court of an opportunity to decide the important constitutional and statutory issues at stake.

Moreover, reversal of the court below on any of the federal questions presented in this case "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83. If, as Applicants contend, the court below lacked authority to issue the judgment below and the selective manual recounts ordered below violate the federal Constitution or otherwise are inconsistent with federal law, then the determination of those federal issues would be preclusive of any further state court litigation on the issue of recounts.

Finally, it is readily apparent that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 483. The holding of the Florida Supreme Court that the United States Constitution permits judicially-ordered selective, ever-shifting, and standardless hand-counting, if allowed to remain in effect,

would seriously erode fundamental federal policies, including the right to vote—the most basic right of citizenship bestowed by the Constitution, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)—and the vital public interest in the lawful and consistent handling and tabulation of ballots and the fairness and finality of elections for federal office, particularly for the President of the United States. Accordingly, *Cox* and related cases warrant immediate review of "the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83; *accord Goodyear Atomic Corp*, 486 U.S. at 178-79 (applying this exception where "the unreviewed decision of the Ohio Supreme Court might seriously erode federal policy in the area of nuclear production").

VI. REASONS FOR GRANTING THE STAY

This application fully satisfies the criteria that govern the propriety of granting a stay, because (1) there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); (2) there is "a fair prospect that five Justices will conclude that the case was erroneously decided below," *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); and (3) it is likely that irreparable injury will result if a stay is denied. *Id.*; *California v. American Stores Co.*, 492 U.S. 1301, 1304-07 (1989) (O'Connor, J., in chambers). In appropriate cases, the Circuit Justice may "balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas*, 486 U.S. at 1304. These factors clearly justify issuance of a stay here.

A. There Is A Reasonable Probability That At Least Four Members Of This Court Would Conclude That This Case Warrants Plenary Consideration

There is a reasonable probability that four or more Members of this Court would vote to grant certiorari.

1. This Court previously granted certiorari to review a closely related case arising out of the same election dispute in Florida. *See Bush,* Exh. D. The petition for a writ of certiorari that will be filed in this case will present similar questions under Article II of the United States Constitution and 3 U.S.C. § 5, as well as the Fourteenth Amendment.

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses an imminent danger to that right.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "in the context of a presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the

impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95 (footnote omitted). Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with both federal laws and the laws established by the Florida Legislature pursuant to the authority conferred on it under Article II of the United States Constitution. In the wake of the Florida Supreme Court's decisions, counties in Florida have participated in a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the voters. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision undermines the statutory scheme Florida has established, pursuant to the grant of authority through Article II of the United States Constitution, and consistent with Section 5, to elect electors for President.

2. This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal constitutional and statutory restraints on the ability of States to impose *post hoc* requirements on the appointment of

presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court—including this Court's December 4, 2000 decision in *Bush v. Palm Beach County Canvassing Board*—and of the courts of appeals regarding the scope of the Fourteenth Amendment protections for the fundamental right to vote and the application of 3 U.S.C. § 5. Moreover, these important questions are presented within a few days of December 12, the date on which the State of Florida may make a final determination concerning the appointment of its electors to take advantage of the "safe harbor" under 3 U.S.C. § 5.

3. There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court authoritatively to decide. Indeed, because of the Florida Supreme Court's judicial amendments to the legislative structure for choosing Florida's electors, absent a decision by this Court, the election results from Florida will remain under a cloud of uncertainty. The consequence could be a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

B. Applicants Are Likely To Prevail On The Merits

There is at least a "fair prospect" that Applicants will prevail on the merits in this case.

1. The Florida Supreme Court's Decision Violates Article II Of The Constitution Of The United States

The Framers expressly granted the legislatures of the several States plenary power over the appointment of electors, providing that each State shall choose electors "in such Manner as the Legislature thereof may direct." U.S. CONST., art. II, § 1, cl. 2. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object [of appointing electors]." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, the Framers' "insertion of those words" in Article II—"in such Manner as the Legislature . . . may direct"—undeniably "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Bush*, Exh. D at 5 (Dec. 4, 2000) (quoting *McPherson*, 146 U.S. at 25).

As described above, the Florida legislature enacted a carefully-crafted statutory scheme to govern the appointment of presidential electors. In so doing, "the legislature [was] not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush*, Exh. D. at 4. By rewriting that statutory scheme—thus arrogating to itself the power to decide the manner in which Florida's electors are chosen—the Florida Supreme Court substituted its judgment for that of the legislature and violated Article II. Such a usurpation of constitutionally-delegated power defies the Framers' plan. The Florida legislature never provided for such judicial meddling in its legislative structure. Indeed, only by resort to its "equitable powers" to provide extraordinary relief under the Florida Constitution could this one Florida court find authority to act.

The decision below overrides numerous provisions of the detailed and specific statutory scheme enacted by the Florida legislature. In the first place, contrary to the ruling below (Exh. A at 1), the Supreme Court of Florida lacked jurisdiction (as a matter of federal law) to enter the judgment below.[5] As this Court recently reemphasized, Article II, § 1 authorizes the States to appoint electors only in "such Manner as the Legislature thereof may direct," and thus the federal Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. *Bush*, Exh. D at 5 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). Under Florida law, assuming *arguendo* that the legislature has authorized contest actions in presidential elections, only the Circuit Court of Leon County possessed legislatively conferred jurisdiction to resolve the Gore respondents' claims. Fla. Stat. § 102.168(1) (permitting election certifications to be "contested in the circuit court"); *id.* § 102.168(8) (authorizing "[t]the circuit judge to whom the contest is presented" to resolve contests).

[5] Applicants specifically raised this point in their post-argument brief in the court below, noting that Article II confers sole authority on state legislatures to determine the manner of appointing electors (Exh. M at 2), and that the legislature's authority "'cannot be taken from them or modified by their State constitutions . . . .'" Exh. M at 2 n.1 (citations omitted). As Applicants pointed out, "equitable relief cannot lie because . . . 'the original and appellate jurisdiction of the courts of Florida is derived entirely from article V of the Florida Constitution, *not* by the Florida legislature.'" Exh. M. at 5-6 (citation omitted). In pointing out the absence of any legislatively conferred basis for the Supreme Court of Florida's exercise of jurisdiction in this case, Applicants corrected any misimpression that may have been caused by their counsel's response to questions from Chief Justice Wells during oral argument below. The court below apparently relied on the parties' "agree[ment] that this appeal is properly before this Court" (Exh. A at 1 n.1), but of course "'the parties cannot stipulate to jurisdiction over the subject matter where none exists.'" *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

By contrast, the Florida Legislature granted no such jurisdiction to the Florida Supreme Court. The sole basis for the judgment below was instead the Florida Constitution, which confers original and appellate jurisdiction on the state supreme court in certain circumstances. FLA. CONST. art. V, § 3(b). Because Article II, § 1 of the federal Constitution does not permit state constitutions to override a state legislature's selection of the manner of choosing electors, and because the Florida Legislature has given the Florida Supreme Court no role in reviewing any contest to the results of a presidential election, the court below lacked jurisdiction to enter its judgment, and the judgment below should be vacated.

Second, the judgment below also conflicts with federal law because it ignores the fact that there is no basis or precedent in Florida law for applying the ultimate judgment of a successful § 102.168 contest proceeding to a presidential election. By its terms, the § 102.168 remedy does not apply to presidential elections, and it certainly does not authorize a contest action by a candidate for President (rather than by an unsuccessful candidate for presidential elector). Florida law instead establishes separate procedures for certifying the election of presidential electors and for replacing electors when appropriate, but made no provision for a "contest" of the presidential election. *See* Fla. Stat. §§ 103.011, 103.021(5). Thus, the judgment below violates Article II, § 1, and fails to comply with 3 U.S.C. § 5 because it rests upon a newly announced judicial extension of the § 102.168 remedy that was not authorized by the Florida Legislature. *See Fladell v. The Elections Canvassing Comm'n of the State of Fla.*, Nos. CL00-10965AB et al. (Fla. Cir. Ct. Nov. 20, 2000) (attached as Exhibit I hereto), *aff'd on other grounds*,

Fladell v. Palm Bch. County Canvassing Bd., Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

Third, the court essentially overruled Fla. Stat. §§ 102.166(4)(d) and 102.166(5)(c), which mandate that a "county canvassing board *shall*," among other options, "[m]anually recount *all* ballots" (emphasis added). By ordering that the results of the *partial* recount conducted by the Miami-Dade Canvassing Board be included in the certified election results, the Florida Supreme Court rejected the judgment of the legislature, which expressly *denied* the canvassing boards the authority to recount or certify only a portion of the ballots.

Fourth, the court violated the mandate of this Court in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), by relying in substantial part on its vacated November 21 decision. For example, in justifying its order that additional votes from Palm Beach County must be added to the certified totals despite the fact that those votes were the product of a manual recount that met neither the statutory seven-day deadline nor the November 26 deadline fashioned out of whole cloth by the court below in its now-vacated opinion, the court below expressly relied on the now vacated judgment as the sole basis for that determination. Exh. A at 34-35 (citing holding of November 21 decision as the basis for extending the November 26 deadline). Moreover, by upholding the inclusion of the additional Broward County votes resulting from the untimely manual recount in that county, the court below necessarily and impermissibly relied on the validity of November 21's extension of the deadline for submission of those vote totals, even though the November 21 decision stands vacated by this court.

Finally, the court's refusal to reject reliance on "dimpled" or indented ballots (such as those counted in Broward County) violates Fla. Stat. § 101.5614(5), which expressly provides that a ballot will be considered valid "if there is a *clear indication* of the intent of the voter as determined by the canvassing board" (emphasis added).[6] By permitting ballots with the slightest of indentations to be counted as valid votes, and by authorizing courts (rather than "*the canvassing board*" vested with statutory authority) to make such determinations, the court below substituted its judgment for that of the legislature.

This Court has recognized that the legislature's Article II power of appointment is exclusive. *See McPherson*, 146 U.S. at 34-35 ("The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.") (quoting with approval Senate Rep. 1st Sess. 43 Cong. No. 395 (Sen. Morton)). Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g*., U.S. CONST. art. I, § 8, cl. 16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g*., U.S. CONST., art. I, § 2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers,

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[6] To the extent that the Florida legislature has empowered the canvassing boards to determine what constitutes a "clear indication" of voter intent, the decision below also substitutes judicially-mandated standards for standards issued pursuant to legislatively-delegated authority. *See* Exh. J (Palm Beach County Guidelines On Ballots With Chads Not Completely Removed (Nov. 2, 1990)) (providing that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote") (entered into evidence as P.E. 46).

the Framers' decision to vest specific authority in state legislatures must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors; where the Constitution assigns a particular function to a particular branch of state government, fulfillment of the constitutional design requires that such an assignment be accorded legal meaning. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

It is no answer to characterize the Florida Supreme Court's decision as an ordinary exercise of judicial review. The Florida Supreme Court does not have original jurisdiction in this matter. The sole jurisdictional basis relied upon by the court below is Article V of the Florida *Constitution*, but the exercise of authority conferred by the state constitution to intrude into the process for selecting presidential electors would violate Article II of the federal Constitution by exercising a power not given to it by the Florida legislature. Mandamus or other equitable relief cannot lie because, as the Florida Supreme Court itself has frequently noted, "the original and appellate jurisdiction of the courts of Florida is derived entirely from Article V of the Florida Constitution, *not* by the Florida legislature." *Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000). *See also Dresner v. City of Tallahassee*, 134 So.2d 228, 229 (Fla. 1961) ("This Court derives its appellate jurisdiction from article V, Florida Constitution."). *See* Exh. M at 5-6.

Furthermore, by authorizing extended (and partial) manual recounts in selected counties, and by unilaterally altering the statutory deadlines for certifying election returns, the court below plainly altered the "manner" of appointing electors. Although

the Framers recognized that a state legislature could *permit* state courts to play a more active role in the process—it could, if it chose, even grant the state judiciary the authority to determine the manner of appointment, *see McPherson*, 146 U.S. at 34-35—the Florida legislature has done no such thing here. The unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it "judicial review" of a contest proceeding.

2. The Florida Supreme Court's Decision Fails To Comply With 3 U.S.C. § 5

Congress has provided that when "controversies or contests concerning the appointment of" presidential electors from a State arise, such disputes are to be resolved "pursuant to" those "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). If this "principle of federal law" is complied with, *Bush*, Exh. D at 6, a resulting determination of the controversy is entitled to "conclusive" effect and "shall govern in the counting of the electoral votes," 3 U.S.C. § 5. As the language of the statute makes clear, Congress has asserted its federal role in the context of presidential elections to ensure that States will be "assure[d] finality" in their determinations when they resolve such disputes in compliance with Section 5. *Bush*, Exh. D at 6. Thus, "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of [state law] that Congress might deem to be a change in the law." *Id.*

Despite this Court's recent suggestion to the Florida Supreme Court that it is not free to disregard the Florida Legislature's decision to avail itself and the citizens of Florida of the benefits of § 5, and despite that court's recognition that "because the

selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict" (Exh. A at 18 n.11), the court below has again ordered relief that fails to adhere to § 5's requirements, with the result that the electoral process in Florida has been thrown into complete confusion and chaos only 4 days before the December 12 deadline imposed by § 5. Swift action from this Court is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress.

The Florida Supreme Court's decision effectively announces several new *post hoc* changes in Florida law. First, prior to the state court's determination in this case, existing Florida law granted discretion to the local county canvassing boards to determine whether to conduct manual recounts and, if so, the methods by which to count ballots. When confronted with cases in which counties declined to conduct manual recounts, courts have deferred to the canvassing board's determination, even when challenged under the contest provision of Fla. Stat. § 102.168. *See*, *e.g.*, *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992) ("Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166. The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the

canvassing board.").[7] The case law had also remained faithful to the statutory language embodied in Fla. Stat. §§ 102.166(4)(c), (5)(a)-(c), which clearly leaves the determination of whether to conduct a manual recount to the county canvassing boards. By now ordering counties to conduct manual recounts that they determined not to undertake, the Florida Supreme Court has changed preexisting law by departing from the statutory language (and also from the prior case law construing that language) and by effectively announcing a new standard that manual recounts are *required* in cases of claimed voter error.[8]

Similarly, as the law existed before the November 7 election, there was no statewide standard that acceptable ballots included "dimpled" ballots under Florida law. The Election Code provides only that the canvassing board is to look for "a clear indication of the intent of the voter." Fla. Stat. § 101.5614(5). This begs the question, of course, of what constitutes a "clear indication." Whatever may be a proper answer, one

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[7] Indeed, the Fourth District Court of Appeals reversed a trial court's decision that a local canvassing board had erred in refusing to conduct a manual recount. *See Broward County Canvassing Bd.*, 607 So. 2d at 509. In upholding the board's discretion to reject the candidate's request for a manual recount after an initial machine recount changed the margin of victory from five votes to three, the court noted the board's reasoning: "Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes." *Id.*

[8] That order is also at odds with what appears to have been previous policy that the counties undertook manual recounts only because of evidence of machine error and not solely because of the failure of certain voters to fully punch through their ballot cards. During oral argument before the U.S. Supreme Court in *Bush v. Palm Beach County Canvassing Board*, the Florida Attorney General's office *could not name a single instance, prior to this year's presidential election, in which manual recounts were undertaken for mere voter error*. *See* Tr. of Oral Arg. at 39-40, attached hereto as Exh. K.

answer not permitted is one created after Election Day. Nevertheless, the Florida Supreme Court has now weighed in, and under its decision "dimpled" ballots have effectively been deemed to constitute valid votes (as in the case of Broward County). This standard was previously unknown to Florida law, and constitutes a change in the legislative standard for counting votes that fails to meet Section 5's requirements.[9]

Finally, the 15th Circuit Court's November 15 decision relied upon and followed by the Palm Beach County Canvassing Board to count patterns of "dimpled" or indented chads as votes was a plain deviation from the County's prior, established written policy.[10] According to the Palm Beach County guidelines on counting ballots issued in November 1990, the County Canvassing Board made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . . an indentation is not evidence of intent to cast a valid vote." Exh. J. That standard of what constitutes a vote was clearly reflected in the instructions given to Palm Beach voters on election day, which stated: "After voting, check your ballot card to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of the

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[9] As discussed below, this differential treatment of votes depending upon county of residence is also a violation of the Equal Protection Clause, and the manifestly unfair change in vote counting standards mid-way through the recount violates the Due Process Clause.

[10] *See Florida Democratic Party v. Palm Beach County Canvassing Board,* No. CL00-11078AB slip. Op. (Fla. 15th Jud. Cir. Nov. 15, 2000)

card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942 at *n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, dissenting).[11]

Despite that previously announced standard, and the clear instructions on the voting card, the 15th Circuit Court ordered the Board to reverse course after the November 7 election and decided that it would count some ballots that would not have complied with its prior policy. This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day. By giving effect to that change in policy, the Florida Supreme Court's decision compounds the noncompliance.

In each of these ways, the Florida Supreme Court's decision conflicts with Section 5's requirements. By announcing new, post-election changes in the law, the Florida Supreme Court's decision has two distinct consequences. First, because it failed to rule "pursuant to" the laws as enacted prior to election day, its decision is not "conclusive" and should not bind the parties or Florida's election officials. Second, the decision places Florida's twenty-five electors in peril, in that the resolution of the contest concerning these electors will not be afforded Section 5's protections for Congress's counting purposes because it was resolved based upon a newly announced rule of law. These actions frustrate the Florida legislature's choices in establishing a statutory scheme

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[11] The instructions provided to voters in Broward County, also a punch-card county, similarly stated: "To vote, hold the stylus vertically. Punch the stylus straight down through the ballot card for the candidates or issues of your choice." *Id.*

consistent with 3 U.S.C. § 5 and, therefore, should be reversed by this Court. These actions also frustrate one of the obvious objectives of both Article II and Title 3—confidence in presidential election results by assuring that elections are determined under rules in effect when the votes are cast.

3. The Florida Supreme Court's Decision Violates The Equal Protection And Due Process Clauses Of The Fourteenth Amendment

a. Equal Protection

"Undeniably the Constitution of the United States protects the right of all qualified citizens to vote . . . ." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is "denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. "The conception of political equality . . . can mean only one thing—one person, one vote . . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id*. at 558 (internal citations omitted). Moreover, as the Fifth Circuit stated in 1980, "qualified voters have not only a constitutional[ly] protected right to vote, but also have the concomitant right to have their votes counted. These rights can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Gamza v. Aguirre*, 619 F.2d 449, 452 (5th Cir. 1980) (internal citations omitted).

It is well established that the Equal Protection Clause prohibits government officials from implementing an electoral system that operates to give the votes of similarly situated voters different effect based on the happenstance of the county or

district in which those voters live. *See*, *e.g.*, *Roman v. Sincock*, 377 U.S. 695, 712 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964) (state apportionment scheme "cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside").

The requirement of equal treatment of voters in different geographical areas extends to situations—like this one—where a facially neutral voting scheme results in the disparate treatment of voters based on the counties or geographic regions in which they live. In *O'Brien v. Skinner*, 414 U.S. 524 (1974), for example, this Court held unconstitutional the New York absentee ballot statute because it made no provision for persons who were unable to vote while they were incarcerated in their county of residence. Under the New York statute, "if [a] citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county." *Id.* at 529. As a result, the Court held, "New York's election statutes . . . discriminate between categories of qualified voters in a way that . . . is wholly arbitrary." *Id.* at 530. The Court therefore concluded that "the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 531.

As in *O'Brien*, the necessarily disparate manual recount ordered by the Florida Supreme Court arbitrarily treats voters differently based solely on where they happen to reside in Florida. For example, where there is a partial punch or mark for one candidate on a ballot, that ballot may be counted as a "vote" in the counties (and now courts as

well) undertaking a manual recount, but not in any other Florida county. The court's order also entails the result that the ballots that are counted as part of the contest proceedings be evaluated under a different standard than those used to evaluate ballots in the other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent they existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county. By permitting further inconsistent and standardless recounts to be conducted during the contest proceeding, the court's order guarantees disparate treatment for similarly situated ballots both in other counties and within the counties subject to the order. The equal protection violations are compounded by the fact that the court adopted a standard of "selective deference" to the decisions of the county canvassing boards that, as discussed above, only benefits the Gore Respondents. This intentional discrimination among voters on the basis of their county of residence, or even the precinct in which they reside, violates the fundamental principle of equal protection that voters cannot be subjected to disparate treatment "merely because of where they reside[ ]." *Reynolds*, 377 U.S. at 557; *see id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious

discriminations based upon factors such as race or economic status.") (citation omitted).[12]

b. Due Process

Florida's failure to provide and apply clear and consistent guidelines to govern the manual recounts constitutes a violation of the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The facts here clearly present "'an officially-sponsored election procedure which, in its basic aspect, [is] flawed,'" *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978)), *cert. dismissed*, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

As explained above, the Florida Supreme Court has deviated substantially from the election law and practices in place prior to election day by ordering that the manual recount occur under circumstances and standards that have never before been established in Florida law. The court has therefore changed the rules yet again as the "game" was being played, and as a result, the contest is being determined by "rules" that were not in place when the votes were cast—in plain violation of the Due Process clause. *See Logan*,

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[12] The recent opinion letter of the Florida Attorney General quoted by Circuit Judge Sauls in his decision endorses the application of that principle to the facts present here. The Attorney General reasoned that "If hand recounts have already occurred in [a] number of . . . counties . . . while similar hand counts are blocked in other counties . . . , a two-tier system for reporting votes results. A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted." Exh. L.

455 U.S. at 432; *Roe v. Alabama,* 43 F.3d 574, 580-81 (11th Cir. 1995); *Duncan*, 657 F.2d at 703; *Griffin,* 570 F.2d at 1077-79.

In *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit invalidated an election board's imposition of *ad hoc* requirements for nominating petitions, agreeing with the plaintiffs' contention that "the Board's failure to issue guidelines clarifying the statutory standards for nominating petitions contravened due process." *Id*. at 1054, 1055. As the Seventh Circuit explained, "protection of the full measure of First and Fourteenth Amendment freedoms commands that state regulation of nominating procedures include a clear statement of the specific requirements by which nominating petitions will be tested." *Id*. at 1058.

The arbitrary, capricious, and standardless manual recount being used here suffers from the same fault as the nomination procedure invalidated in *Briscoe*. If the State of Florida wishes to implement a manual recount procedure, it must ensure that meaningful guidelines are established for determining whether and how to conduct such a recount, rather than leaving such crucial decisions to the unbridled discretion and arbitrary decision making of judges, local election officials, and as-yet unspecified other individuals who may have a keen personal interest in the outcome of an election. The court's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is always the risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by the

officials' desire for a particular result. That risk is heightened significantly here because of the irreversible damage done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts.[13] Further manual recounts, by another varying and inconsistent set of arbitrary "standards," cannot, by definition, be accurate. They will simply compound the arbitrary and standardless process that has been the hallmark of the Florida recount.

C. Applicants Will Suffer Irreparable Harm In The Absence Of A Stay, And The Balance Of The Equities Clearly Favors Issuance Of A Stay

Applicants will suffer irreparable injury unless a stay issues in this case. The Florida Supreme Court's decision imperils Governor Bush's proper receipt of Florida's twenty-five electoral votes. The Florida Supreme Court's decision raises a reasonable possibility that the November 26 certification of Governor Bush as the winner of Florida's electoral votes will be called into doubt—or purport to be withdrawn—at a time when the December 12 deadline for naming Florida's electors could preclude Applicants' ability to seek meaningful review by this Court.[14]

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[13] For example, during the manual recount process, ballots were poked, prodded, rumpled, creased, twisted, dropped, stained, tabbed, and otherwise mishandled. Not surprisingly, this rough treatment caused massive damage to the ballots, including dislodging and removing "chads" from ballots. State and county elections officials admitted that the more the ballots are handled, the more chads fall out, and, thus, the harder it is to conduct an accurate count. Indeed, the counters themselves recognize that they have made substantial errors in counting the ballots handled in this fashion in the counties selected for manual recounts.

[14] Under 3 U.S.C. § 7, the date for the meeting of electors this year is December 18 and thus controversies and contests must be resolved by December 12 for their

[Footnote continued on next page]

Failure to resolve a controversy or contest concerning the appointment of presidential electors pursuant to the law as enacted prior to election day will jeopardize the "conclusive" effect of any such determination for Congress's counting purposes. *See* 3 U.S.C. § 5; *Bush v. Palm Beach County*, No. 00-836, slip op. at 6. Because Section 5 requires disputes over the appointment of presidential electors to be resolved within six days before the time fixed for the meeting of electors, unless this Court acts immediately the Applicants' injury will be irreparable. Reversal of the Florida Supreme Court's decision to correct the clear constitutional errors, however, will eliminate the possibility that a controversy or contest will be ongoing on December 12, because the Florida electors will have been determined by standards in effect prior to election day. *See id.* ("If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors."). The current "contest" can not resolve the controversy because it is irreparably tainted by the Florida Supreme Court's unauthorized and unlawful rewrite of the legislative structure to select Florida's electors.

Furthermore, failure to stay the enforcement of the Florida Supreme Court's order will also irreparably harm the entire electoral process under our federal/state dual scheme. Because December 12 is rapidly approaching, the state court's ruling threatens

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[Footnote continued from previous page]
determination to be given conclusive effect and to govern in Congress's counting of the electoral votes.

to deprive the State of Florida of its proper voice in the presidential election—the very voice Section 5 intends to protect. Having failed to resolve the controversy at issue consistently with Section 5's requirements, the Florida Supreme Court's decision is deprived of the "conclusive" effect that Congress would otherwise accord to it in similar circumstances. Such an outcome will completely frustrate Congress's purposes in enacting Section 5 of ensuring States that the votes of their rightfully appointed presidential electors will be counted by Congress.

It is no answer to claim that Applicants, as the currently certified winners in Florida, face only "speculative" injury as a result of the Florida Supreme Court's order. In the peculiar, important and sensitive circumstances of this case, any delay in the final resolution of this matter threatens Applicants, and any doubt as to the election undermines the national interest.

V. CONCLUSION

Under these circumstances, the effect of a failure to grant a stay could well be to deny Applicants fully effective relief in this case and to inflict material harm on the electoral process. A stay is further justified by the extraordinary importance of the outcome of this case and the extremely time-sensitive nature of relief. Applicants are threatened with irreparable injury, and the equities clearly favor granting a stay, because a stay is the only means of protecting the integrity of the federal electoral process while ensuring proper and orderly access to the judicial system.

Respectfully submitted.

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December 8, 2000