No. 00 A 504

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH AND RICHARD CHENEY, Petitioners

vs.

ALBERT GORE, JR. ET AL., Respondents

BRIEF FOR RESPONDENT/INTERVENORS STEPHEN CRUCE, TERESA CRUCE, TERRY KELLY, AND JEANETTE K. SEYMOUR, IN SUPPORT OF PETITIONERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

Bound up in the questions included in the grant of certiorari is this essential issue:

I. Whether letting the standard for determination of voters' intent vary from county to county in Florida violates an individual voter's constitutional right to equal protection under the law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

The Respondent/Intervenors agree with the Petitioner's list of "Parties to the Proceeding" as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

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OPINIONS BELOW

The Respondent/Intervenors agree that the Petitioner has correctly stated the official and unofficial reports of the opinions and orders entered in the case by the courts below, as stated in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF JURISDICTION

The Respondent/Intervenors agree with the Petitioner's statement of jurisdiction as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent/Intervenors agree with the Petitioner's statement of the constitutional provisions and statutes involved in this matter, as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF THE CASE

The Respondent/Intervenors agree with the Petitioner's statement of the case, as presented in Petitioner's Emergency Application for Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida. In addition, they simply add that these Intervenors are registered and qualified voters and Florida taxpayers from counties located in West Florida. Two of them cast their votes for a president, and two of them did not cast a vote in the 2000 presidential election.

SUMMARY OF THE ARGUMENT

Conducting statewide manual recounts without objective standards to implement violates these Intervenors' equal protection rights, as protected by the Fourteenth Amendment to the United States Constitution. Simply put, if a manual review of ballots is done so that only a portion of the State's ballots is reviewed, then every vote will not be counted on an equal basis, and each voter's fundamental right to vote will be diluted or

debased as a result. Thus, the Supreme Court of Florida erred when it ordered a partial, manual recount of ballots throughout the State.

ARGUMENT

I. APPLYING AN AMBIGUOUS STANDARD TO THE MANUAL COUNTING OF BALLOTS ON A STATEWIDE BASIS VIOLATES AN INDIVIDUAL FLORIDA VOTER'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAW, IN DEROGATION OF THAT VOTER'S RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Being taxpayers and voters from Florida, these Intervenors stand in a position quite different from those of the candidates. Thus, their view of the 2000 presidential election in Florida comes from a statewide perspective, and their concerns lean toward the legitimacy and constitutionality of the election process, more than to their own preference of who ought to win.

In its December 8, 2000, Per Curiam Order, the Supreme Court of Florida overturned the Final Judgment rendered by the Circuit Court, in and for Leon County, Florida. Gore et al. v. Harris, et al., Case No. SC00-2431, December 8, 2000, slip op. at 2 [hereinafter

referred to as the "Gore Decision"].[1] As part of its order on remand, the Florida Supreme Court directed the circuit court:

> **to enter such orders as are necessary to add any legal votes to the total statewide certifications and to enter any orders necessary to ensure the inclusion of the additional legal votes for Gore in Palm Beach County and the 168 additional legal votes from Miami-Dade County.**

Id. at 39. However, the court gave no directions to the Circuit Court as to how it should implement objective standards in such a statewide manual recount and, even though it agreed with the Intervenors that a statewide remedy was necessary, id. at 38, it nevertheless failed to order a statewide recount of all ballots, id. at 39. For example, those ballots that had already been manually checked under varying standards before trial were exempt from the court's mandate.

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[1] Intervenors agree to the presentation of exhibits presented with Petitioner's December 8, 2000, Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for Writ of Certiorari to the Supreme Court of Florida. **Exhibit A** was the Florida Supreme Court's December 8, 2000, per curiam order. **Exhibit B** was the Final Judgment of the Circuit Court, in and for Leon County, Florida (Judge Sauls). **Exhibit C** was the transcript of Judge Saul's December 4, 2000, ruling in open court. **Exhibit D** is this Court's December 4, 2000, per curiam decision in Bush v. Palm Beach County Canvassing Bd., 531 U.S. ___ (2000) (Case No. 00-836).

The Supreme Court of Florida ordered a manual recount of all "undervotes"[2] in those counties where a manual recount had not yet been completed. As quoted above, it also delegated to the Circuit Court broad, and undefined, powers to enter such necessary orders so as to implement its order. The Supreme Court of Florida erred because to order a manual recount, under the circumstances of this case, resulted in an infringement upon the equal protection rights of all Florida voters, in general, and of the Intervenors, in particular.

On remand, the Circuit Court directed the Supervisors of Election and Canvassing Boards in other Florida counties that "have not conducted a manual recount or tabulations of the non-votes or undervotes to do so forthwith." This apparently was intended to include all undervotes and overvotes, but does not specifically direct Supervisors of Elections to recount any absentee ballots that had not already been counted. In any regard, all ballots should have been looked at on an equal basis.

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[2] It is not clear whether the Florida Supreme Court defined "undervotes" as those ballots showing no vote for a presidential candidate or as those ballots rejected by a machine as casting more than one vote for a presidential candidate, i.e., an "overvote." As we use it in this brief, a "no vote" or "non-vote" refers to ballots that are rejected by a machine for one reason or another. An "undervote" is a ballot rejected by a machine because the machine did not detect a vote for a presidential candidate, and an "overvote" is a ballot rejected because the machine detected more than one vote for president.

As fully stated in Governor Bush's Motion for Stay[3] [hereinafter referred to as Bush's December 8 Petition], the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.**

Bush's December 8 Petition at 4. And, according to this Court in Gray v. Sanders, 372 U.S. 368, 379-80, 83 S. Ct. 801, 808-09, 9 L. Ed. 2d 821 (1963),

> Once the geographical unit for which a representative is to be chosen is designated, **all who participate in the election are to have an equal vote** – whatever their race, whatever their sex, whatever their occupation, whatever their income, and whatever their home may be in that geographical unit. **This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in the State, when he casts his ballot in favor of one of the several competing candidates, underlies many [United States Supreme Court] decisions.**

Even though Gray v. Sanders is an apportionment case, the concepts apply equally to the extraordinary set of circumstances in which the Intervenors now find themselves. Our research has not revealed any controlling case law applying the Fourteenth Amendment to the precise set of facts found here.

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[3] Pursuant to this Court's December 9, 2000, Order on Application for Stay, Governor Bush's Motion shall be treated as a Petition for Writ of Certiorari. We will hereinafter refer to it as his December 8 Petition.

Under the circumstances of this case, the ballots cast by Florida voters will be treated in a disparate manner if any manual recounts are done. Even if a statewide manual recount were to be done, those who followed the rules and properly cast their ballots so that a machine could count their votes would have the value of their properly-cast ballot diluted. On the other hand, those who may have failed to follow the directions by first marking one choice for president and then by marking, perhaps by accident, another choice for president would be given special consideration. In other words, Florida's elections laws would be applied in an unequal manner to each individual voter, depending on how he or she filled in his or her ballot.

To allow a presidential election candidate to "cherry-pick" the counties from which he or she wishes to harvest more votes would be to allow that contestant to identify those ballots that, legally, have not qualified as a "legally cast vote," but that nevertheless can be resurrected as a valid vote by individuals who must read the mind of the voter and decipher the true intent of that voter.

Where is the bright line over which this process of resurrecting votes cannot cross? Contestants obviously cannot bring in additional voters who failed to cast a vote on election day. Likewise, contestants may not resurrect ballots where the voter, out of indecision, failed to mark one of the presidential ballots so that the contestant can add that vote to his or her tally. It is similarly unwise to allow contestants -- who are motivated to find every available vote – to allow them to bring ambiguously marked ballots to election officials

(who may or may not be of a similar party affiliation) and ask those officials to review the ballots for legally permissible votes. Such a system rests on an undesireable potential for abuse, and such a system is contrary to the principle that "all votes are equal." Additionally, in a *post election setting*, allowing ballots to be reviewed on a basis different than that imposed on Election Day effectively changes the "rules of the game" after the contest.

As was recently stated by Justice Tjoflat, by "changing the 'rules of the game' after it was played, the supreme court [of Florida] debased the votes of thousands of Florida voters and denied them the equal protection of the laws guaranteed by the Fourteenth Amendment." Touchston v. McDermott, 11th Cir., Case no. 00-15985, December 6, 2000, slip op. at 3 (Tjoflat, J., dissenting). These Intervenors agree with Justice Tjoflat's arguments and acknowledge that those arguments are much more eloquent and compelling than those arguments found herein. Therefore, to the extent Justice Tjoflat's arguments apply to these circumstances, we incorporate them by reference and encourage the Court to read his opinion in its entirety.

This Court has held that "the right to suffrage can be 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 v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506 (1964). Thus, in the instant case, the Intervenors' fundamental right to vote has been effectively denied by the debasement and dilution of their vote. Specifically, their

individual votes were counted, or perhaps not[4] but, because they do not live in counties were the Respondent, Albert Gore, Jr., sought more votes, their ballots were not initially reviewed. After the Supreme Court's Gore decision, their votes may be considered, but the standard to be applied will be different than those applied throughout the rest of the state.

As Justice Tjoflat stated in his opinion, Florida's vote tabulation machines are not merely "screening" the ballots; otherwise, the county canvassing boards would not have been lawfully authorized to certify the results of the machine count--not once, but twice, following the machine count and the mandatory machine recount. Presumably, the Florida Legislature mandated an automatic machine recount following the election, simply because the difference between the two candidates was less than ½ of 1% of the total votes (per Section 102.141(4), Florida Statutes). To require a manual recount now, as if machine recounts have always been inaccurate and untrustworthy, means either the Supreme Court changed the rules after the election or the canvassing boards in all 67 counties shirked their duties on November 7 and November 8 by not immediately conducting a manual recount so as to "validate" the result. Given Florida' election scheme, this seems illogical.

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[4] Intervenor Teresa Cruce testified she cast her ballot for a presidential candidate before November 7, via absentee ballot, and does not know whether it was ever counted as a vote. Concepts of fairness require that her vote be treated the same as others.

II. The Decision Below Also Violates Basic First Amendment Rights by Singling Out for Heightened Scrutiny the Votes of Citizens Who Chose Not to Vote for Any Candidate for President.

The Florida Supreme Court's critical holding orders election officials "in all counties that have not conducted a *manual recount* or tabulation of the undervotes in this election to do so forthwith." Slip Op. at 38-39. But the term "manual recount" as used in the opinion is a misnomer. What the court had in mind was not a *recounting* of all of the votes as actually cast by voters (and twice tabulated by machine processes that have not been impugned by allegations of error). It envisioned, rather, a selective process in which "a number of legal votes would be *recovered* from the entire pool of the subject ballots." Slip Op. at 23. This so called "recovery" of selected votes (as opposed to a recounting of all of them) is exemplified by the court's holding that, as a matter of law, the circuit court erred by not adding to the official vote totals 176 to 215 "votes" for Vice President Gore "recovered" after the election by the Palm Beach canvassing board. Slip op. at 34-35. At best, Palm Beach precariously assigned these votes to the Vice President ("recovered" them) through *post* hoc gestalt analysis of voters' intentions. See Florida Democratic Party v. Palm Beach County Canvassing Board, No. CL00-11078AB slip. Op. (Fla. 15th Jud. Cir Nov. 15, 2000). At worst, votes were appropriated ("recovered") through exercise of the raw political power. In either case, what occurred in Palm Beach County had little to do with "recounting."

But even the Palm Beach operation, while not a recount in substance, conformed to the appearances of a recount: It involved all of the votes cast in that county. The recovery effort ordered below, by contrast, fails even to keep up appearances. Instead of involving *all* votes, as would a true *re*counting, the court-ordered effort focuses only on a highly selective subset of votes --- votes by voters whose chose not to disclose their preferred candidate for President.

This tightly focused "recovery' process violates Florida voters' First Amendment right *not* to speak; specifically, their right not to speak to the issue of who they would prefer to be President. See, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983) (holding that the First Amendment places limits on state law governing presidential elections). Floridians, like all Americans, enjoy the constitutional right *not* to express a preference for any of the presidential candidates listed on a ballot. A law expressly penalizing those who choose not disclose a preference for any ballot-listed or write-in presidential candidate would therefore run afoul of the established rule that the rights "protected by the First Amendment" include both "the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). For example, laws declaring that voters *must* vote for President in order to see their votes counted for the other contests appearing on the same ballot would violate the First Amendment; the free exercise of the franchise cannot be burdened, however trivially, by laws that fail to further legitimate, election-related

objectives. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (exercise of the franchise may not be burdened by *de mimimis* fee).

So here, Florida may not condition the right to vote for some offices on the sacrifice of the First Amendment right *not* to disclose the voter's preferred presidential candidate. But in contravention of this principle, the decision below singles out for unfavorable treatment the votes of voters who chose *not* to express a preference for any candidate for President (or, interpreted differently, voters who affirmatively expressed their preference for no candidate). Most voters in the Florida counties using punchcard ballots are to have their votes registered as rendered without additional scrutiny. The punchcard ballots of Bush and Gore voters, for example, will not be subjected to *post hoc* gestalt analysis designed to "recover" them as votes for other candidates or for no candidate. But in sharp contrast, voters who chose to express no preference (or who affirmatively expressed their preference for none of the listed presidential candidates) will, under the Florida Supreme Court's decision, have their votes singled out, presumptively deemed lost and in need of "recovery." This is an unconstitutional, content-based penalty on these voters' First Amendment rights.

The case would obviously be different if the Florida Supreme Court's decision rested on factual findings instead of content-based discrimination. Credible evidence of fraud or human or machine error would plainly justify additional scrutiny of a subset of ballots. But the Florida trial court found no evidence of any such failure, nor did the Florida Supreme Court reverse on these grounds. That is unsurprising, for the Florida vote for "none of the

above" appears well within an expected range. Nevada, for instance, was a highly competitive state in this election, with Governor Bush defeating Vice President Gore by approximately 22,000 votes. Nonetheless, the "none of these" option on the Nevada ballot polled more than one percent of the vote and out-polled three ballot-listed candidates. *Cf.* Nev. R. Stat. 293B.075 ("A mechanical voting system must permit the voter to .... indicate a vote against all candidates."). That Nevada percentage for "none of the above" is slightly more that the percentage of the Florida vote (approximately 43,000 of 6 million votes, or three-fourths of one percent).that was inexplicably targeted for unnecessary and unconstitutional "recovery" by the court below.

It is not surprising that the mind of the politically obsessed can find it improbable that voters should speak through registering a preference for none of the available candidates or for third-party candidates with scant prospects for victory. But the fact remains that voters, in Nevada, Florida and elsewhere, *do* express preferences both for third-party candidates and for no candidate at all, even in close elections. These voters enjoy a constitutional right to be taken at their word.

CONCLUSION

The Supreme Court of Florida erred when it ordered a partial manual recount because to do so will adversely affect the Intervenors' right to vote and will fail to recognize the need to treat their vote on an equal basis with votes cast by others. Thus, the Supreme Court of Florida's December 8, 2000, decision should be reversed.

Respectfully Submitted

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