No.

IN THE

# Supreme Court of the United States

NED L. SIEGEL, *ET AL.*,

*Petitioners*,

v.

THERESA LEPORE, *ET AL.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

GEORGE J. TERWILLIGER III
TIMOTHY E. FLANIGAN
MARCOS D. JIMÉNEZ
WHITE & CASE LLP
200 South Biscayne Blvd.
Suite 4900
Miami, Florida 33131
(305) 371-2700

THEODORE B. OLSON
*Counsel of Record*
DOUGLAS R. COX
THOMAS G. HUNGAR
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891

*Counsel for Petitioners*

## QUESTION PRESENTED

Whether the use of selective, arbitrary, and standardless manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection Clause, the Due Process Clause, and the First Amendment.

## PARTIES TO THE PROCEEDING

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

Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly, as Florida registered voters; Governor George W. Bush and Dick Cheney, as candidates for President and Vice President of the United States of America; Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzburger, Robert Lee, David Leahy, Lawrence King, Jr., Miriam Lehr, Michael McDermott, Deannie Lowe, and Jim Ward, in their official capacities as members of the County Canvassing Boards of Palm Beach, Miami-Dade, Broward and Volusia Counties, respectively; Florida Democratic Party; Robert A. Butterworth, as Attorney General of Florida; Kenneth A. Horowitz, Catherine Ann Bowser, Sylvia Szymoniak, Joseph Morris, Karilee Halo Shames, Leona Jacques, and Laura Hamilton, as Palm Beach County voters.

## TABLE OF CONTENTS

**Page**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Ned L. Siegel, Georgette Sosa Douglas, Gonzalo Dorta, Carretta King Butler, Dalton Bray, James S. Higgins, and Roger D. Coverly (collectively, the "Voter Plaintiffs"), George W. Bush, and Dick Cheney respectfully pray that a writ of certiorari before judgment be issued in this case, which is now pending before the United States Court of Appeals for the Eleventh Circuit. Petitioners are Florida voters and the Republican Party candidates for President and Vice President of the United States. Those candidates—George W. Bush and Dick Cheney—have received the most votes cast by Floridians in the Presidential election held November 7, 2000. Nonetheless, in clear violation of the federal Constitution, the Supreme Court of Florida has barred the responsible state officials from certifying Governor Bush and Mr. Cheney as the prevailing candidates in the election in accordance with the popular vote, thereby placing in jeopardy the ability of Florida's duly appointed presidential electors to cast their votes on December 18, 2000. Petitioners seek this Court's immediate review of the unconstitutional procedures that are currently being used in Florida in an apparent effort to change the outcome of the Presidential election. Time is of the essence in this case, which raises important questions of historical significance.

## OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit denying an injunction pending appeal (App., *infra*, 37a-46a) is not reported. The opinion of the United States District Court for the Southern District of Florida denying a preliminary injunction (App., *infra*, 1a-26a) is not reported.

## JURISDICTION

The judgment of the district court was entered on November 13, 2000. App., *infra*, 26a. A timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed on November 14, 2000. App., *infra*, 28a.

This petition is filed under this Court's Rule 11. The court of appeals, in which this case has been duly docketed, has entered interim orders in this case but has not yet entered judgment, and has directed all parties to file additional briefs during the week of November 27, 2000. The court today announced that if oral argument is scheduled, it would take place on November 29, 2000. Due to the importance and time-sensitivity of this appeal, as recently heightened by the decision of the Supreme Court of Florida in a related case, petitioners are seeking issuance of a writ of certiorari before judgment in the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (which provides that this Court may exercise certiorari jurisdiction "before or after rendition of judgment or decree" by a federal court of appeals). *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment").

Petitioners recognize that this Court only rarely grants certiorari before judgment. This case, however, is extraordinary. For two weeks, the outcome of the November 7, 2000 presidential election has been uncertain due almost entirely to the lack of a certified winner in the State of Florida. This is true despite the fact that Gov. Bush and Mr. Cheney have garnered more of the votes cast in Florida than their opponents, as initially counted and as recounted (and, in many cases, recounted again and again). Nevertheless, state election officials have been precluded by the state courts from certifying the results of the election (thus preventing any contests

from being lodged under Florida law) and documenting the appointment of electors in accordance with the vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only three heavily populated, predominantly Democratic counties selected by Florida Democrats.

This Court's Rule 11 recognizes that certiorari before judgment may be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." For the reasons outlined above and discussed in more detail below, this is plainly such a case. The election of our Nation's highest elective office may turn on the Court's resolution of the issues presented. And, due to the protean nature of the state-court proceedings, this Court's immediate intervention is warranted in order to ensure that the rule of law is adhered to in this time of great national concern. As the intense public interest in this issue will attest, this case presents questions of similar magnitude to those in which the Court has previously granted certiorari before judgment. *See*, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942).

Petitioner George W. Bush has separately petitioned this Court to review the November 21, 2000 decision of the Florida Supreme Court raising closely related questions. *Bush v. Palm Beach County Canvassing Board*, No. 00-____ (filed contemporaneously herewith). In the event the Court grants certiorari in that case, it would be appropriate also to grant review in this case in order that all the issues can be resolved at once. *See Taylor v. McElroy*, 360 U.S. 709, 710 (1959); *Brown v. Board of Education*, 344 U.S. 1, 3 (1952).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 37a-46a.

## STATEMENT OF THE CASE

This petition seeks to remedy Florida's widespread and systemic infringement upon and dilution of the right to vote in the November 7 presidential election in that State. The right to vote is the preeminent constitutional right in this nation; it is preservative of all rights. And the right to vote in a presidential election implicates uniquely important national interests; it is the most important of all votes for American citizens. The unequal, constantly changing, and standardless selective manual vote recount underway for the past two weeks in Florida is a patently unfair process that is having an impact far beyond Florida's borders, and that cries out for correction by this Court.

The essential facts are not reasonably disputable. A routine tabulation of Florida's presidential election ballots by conventional means and a recount by the same time-tested objective methods revealed that the Republican candidates held the lead. At that point, the Democratic Party demanded manual recounts in four carefully selected, heavily populated, Florida counties where the tabulated votes in the election had been predominately Democratic.

Although Florida law calls for certification of votes seven days after the election (except for overseas absentee ballots), those manual recounts are still underway 15 days later in three of those counties. The recounts are being conducted without uniform standards and differently in each of the three counties. They include pronouncements by persons with a stake in the outcome of the election of the ambiguously revealed "intentions" of thousands of individual voters. Two counties initially voted *not* to conduct county-wide recounts and then reversed those decisions in the face of pressure from interested parties.

Standards for evaluating ballots have 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"). On November 20, the Florida Democratic Party actually 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 attention. This, presumably, would require starting the process over again.

The repeated processing of ballots by machines (at least three times in one county), and by hand manipulation by numerous persons, is unavoidably causing

physical degradation of ballots, changing them irrevocably. And selective manual recounts inevitably evaluate votes considerably more permissively in some counties than in others.

Whatever Florida's interests in the scrupulous evaluation of ballots cast in its election, those interests are not being served by a selective, capricious, and discriminatory process that sacrifices individual constitutional rights, compelling interests in the finality of the vote-tabulating process, and the integrity of our Nation's most important election in order to fulfill the ambition of one political party to secure a more favorable outcome.

## A. Factual Background

### 1. The Presidential Election

On November 7, 2000, the quadrennial Presidential election was held throughout the United States. In Florida, voters cast ballots for several offices, including for the appointment of electors for President and Vice President of the United States. App., *infra*, 3a. The ballots counted in Florida showed that Governor George W. Bush and Dick Cheney received more votes than their opponents, Vice President Al Gore and Senator Joseph Lieberman, by a margin of 1,784, or 0.0299% of the total Florida vote. *Id.*

Florida law provides that, if a candidate is defeated or eliminated by one-half of one percent or less of the votes cast for an office, the State's Elections Canvassing Commission shall order a recount of the votes cast with respect to that office, unless the defeated candidate "request[s] in writing that a recount not be made." FLA. STAT. § 102.141(4) ("the .5% recount"). The 5% recount is performed in the same manner as the original count. *Id.* § 102.141(4); *see also id.* §§ 97.021(2)(c), 101.5603, 102.166(3)(c); App., *infra*, 5a.

On November 8, pursuant to Fla. Stat. § 102.141(4), each of the canvassing commissions of Florida's 67

counties began a recount of the returns. App., *infra*, 5a; Record on Appeal in the United States Court of Appeals for the Eleventh Circuit ("C.A. Rec.") 2 at 7 ¶ 30. At the completion of that recount, although the numerical totals were different, the outcome was the same as the initial vote count: The Bush-Cheney ticket prevailed over the Gore-Lieberman ticket. *See id*.

### 2. The Selective Manual Recounts

After the second statewide counting of ballots, on or about November 9, 2000, Florida Democratic officials filed requests for manual recounts of ballots in Broward, Miami-Dade, Palm Beach, and Volusia Counties. App., *infra*, 5a.[1]

Florida Statutes § 102.166(4) provides that any candidate or his party (but not a voter) may file a written request with a county canvassing board for a "*manual* recount" within 72 hours after midnight of the date of the election or prior to the time the canvassing board certifies the results of the election, whichever occurs later. Fla. Stat. § 102.166(4) (emphasis added); *see* App., *infra*, 5a. It further provides that the request for a manual recount must "contain a statement of the reason the manual recount is being requested." Fla. Stat. § 102.166(4)(a).

As of November 7, Florida statutes set forth no standards to guide county canvassing boards in determining whether to initiate a manual recount. *See* Fla. Stat. § 102.166(4)(c) (stating simply that "[t]he county

---

[1] Petitioners acknowledge and are considering an appropriate response to the arguments below of the members of the Volusia County Canvassing Board, that they have already certified results to the Secretary of State and that Volusia does not use punch card ballots.

canvassing board may authorize a manual recount"); *see also* App., *infra*, 13a-14a. Respondent County Boards have therefore asserted and exercised essentially limitless discretion in making that decision.[2]

Florida law provides that "[t]he manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate." Fla. Stat. § 102.166(4)(d); *see* App., *infra*, 5a, 13a-14a. "The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts." Fla. Stat. § 102.166(4)(d). If the board concludes that this manual recount indicates an error in the vote tabulation that could affect the outcome, the county canvassing board has three options: (a) correct the error and recount the remaining precincts

---

[2] Under Florida law as it existed prior to the election, the "judgments" of the Secretary of State in fulfilling her specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975); *see also Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute.") The Florida Supreme Court's post-election decision in *Palm Beach County Canvassing Bd. v. Harris*, however, has reversed that preexisting doctrine of Florida law, overridden the Secretary's decision regarding the law governing the acceptance of late-filed returns, and now arrogates to the state courts the new-found authority to legislate exceptions to state election law.

by machine; (b) ask the Florida Department of State to verify the tabulation software used; or (c) manually recount all ballots. Fla. Stat. § 102.166(5)(a)-(c); App., *infra*, 14a. As of the date of the election, Florida law did not specify criteria for determining which of these options to select in a particular case. The recount process authorizes the county canvassing board to determine the voter's "intent," but no statutory standards were set forth to guide or constrain such determinations, leaving such decisions to *ad hoc* determinations by canvassing boards.

On Saturday, November 11, 2000, the Palm Beach County Canvassing Board began a manual review of the ballots cast in the four precincts selected for review. That review of only 1 percent of the ballots cast in Palm Beach continued until the early morning hours of Sunday, November 12, 2000. C.A. Rec. 11 at 2. Errors and irregularities of various sorts marked the process. Observers noted, for example, that the ballot cards were laid carelessly about the counting room and that security precautions were lacking. *Id*. One member of the Palm Beach Board, Carol Roberts, was overheard asking only Democratic observers for their views on ballot cards, thus bringing only those monitors of one party into the decision making process. *Id*. at 5-6.

As manual recounts commenced and recommenced in the other three selected counties, the standardless, capricious, and continuously changing nature of the manual recounts became even more pronounced. Far from enhancing the accuracy or reliability of the results produced by two statewide machine counts, selective manual recounts conducted in this manner serve only to undermine confidence in the outcome and provide limitless opportunity for error, manipulation, and inconsistent decisions regarding the interpretation of ballots.

### 1. Physical Manipulation And Degradation Of Ballots

The selective manual recount process has unquestionably damaged ballot integrity. Representatives of the County Respondents have admitted that the more the ballots are handled, the more chads will fall off, making it more likely that the ballot recount (and any future recount under constitutional standards) will produce different numbers from this cause alone. C.A. Rec. 6 at ¶ 6c. Observers of the manual recounts have consistently reported that ballots have been bent, prodded, poked, and aggressively handled. *E.g.*, C.A. Rec. 11 at 5-7. Ballots have been twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. C.A. Rec. 11 at 25 ¶ 7 ("I personally observed Canvassing Board counters 'twisting' and otherwise manipulating the paper ballots in an attempt to dislodge chads from the ballots themselves."); Appellants' Second Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. II Rec.") tab 37 at ¶ 3a(ii); Supp. II Rec. tab 39 at ¶ 3. In some instances, the ballots were even used as fans. Supp. II Rec. tab 44 at ¶ 3.3.

Unsurprisingly, this aggressive mishandling of ballots, especially after two or more machine counts of the ballots, dislodged large numbers of chads, which littered the floors of the recount rooms. *E.g.*, Supp. II Rec. tab 25 at ¶¶ 5-6, 18; C.A. Rec. 11 at 7. When observers attempted to memorialize the presence of dislodged chads, Democratic officials and county employees attempted to sweep away the chads rather than have the physical degradation documented. Supp. II Rec. tab 26 at ¶ 3; Supp. II Rec. tab 24 at ¶3. Thus, ballots that survive the repeated mechanical and manual recounts to which they have been subjected may not resemble the ballots Floridians actually cast on November 7, and the tabulations that result from this process cannot be said to be an ac-

curate, fair or consistent tabulation of the votes cast by Floridians in that election.

### 2. Irregularities In Counting Methods

The manual recount process is chaotic, changing and uncertain. Differing and sometimes self-contradictory guidelines were issued and then retracted. Other rules were not communicated to the ballot counters. The inevitable result was a complete lack of uniformity across the four counties and within the counties.

For example, a representative of the Palm Beach Board admitted that during the initial manual recount the board had applied inconsistent tests and procedures for determining which ballots to count and had changed its approach to that crucial issue midstream. C.A. Rec. 11 at 13 [("[t]he canvassing board . . . just moments ago . . . decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, . . . then that will be a vote"); *id.* at 16 ("[T]hey were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote.").] According to another Palm Beach Board official, the standard for determining which ballots to count manually "is very vague in the law," and "[t]he canvassing board . . . make[s] the rules. . . . They can do what they want as far as once they decide amongst themselves." *Id.* at 12, 19.

In Miami-Dade County, the supervisor of elections asked the canvassing board to define the criteria that would be employed in conducting the remaining partial manual recount. Appellants' Emergency Motion To Supplement The Record On Appeal In The United States Court Of Appeals For The Eleventh Circuit ("Supp. Rec.") 10 at 99, 101. In response, the chairman of the board stated that he could not know whether to count a ballot "until I reasonably see" it. Supp. Rec. 10 at 102. As he elaborated, "I don't think we should limit

ourselves in the parameters by which we consider. . . . I believe that we will know when we see, so to speak, what we are looking at . . . ." Supp. Rec. 10 at 102-03. The board thus declined to set any standards, Supp. Rec. 10 at 131, leaving the question of which ballots were to be counted to *ad hoc*, case-by-case discretion applied by officials acting with full knowledge of the election results elsewhere.

As Respondent Florida Democratic Party conceded in its Answer Brief in the Florida Supreme Court, "Different canvassing boards are using different standards." In fact, the Florida Democratic Party ("FDP") has sued to insure this divergence occurs. Supp. II Rec. tab 19.[3]

These widely varying policies (or lack of policies), and the confusing legal challenges to them, have translated into severe problems in the vote tabulating process itself. In Broward County, for example, the two-corner rule has apparently not been well-communicated to the counters (Supp. II Rec. tab 37 at ¶3a) – and is, in any event, under legal attack. Other internal counting rules, such as double-counting final stacks of ballots, have

---

[3] Respondent FDP filed a lawsuit against the Palm Beach County Canvassing Board over its initial decision to apply a uniform "detached chad" policy. The FDP preferred an open-ended "totality-of-the-circumstances" test. Supp. II Rec. tab 19 at ¶25. The Circuit Judge ruled on November 15 that Palm Beach County could not adopt a definite rule requiring that certain types of ballots be rejected, in effect mandating an ad hoc, standardless approach. Supp. II Rec. tab 12. FDP also sued to compel Broward County Canvassing Board to adopt a "totality-of-the-circumstances" rule rather than the more definite "two corner" rule, and also to compel the acceptance of so-called "dimpled" and "pregnant" chads. The Broward County Circuit Judge orally indicated that the two-corner-rule was too restrictive but has not issued a written ruling. Supp. II Rec. tab 17 at 8. While waiting for a ruling, Broward continues to use its two-corner rule. *Id.*

been announced, temporarily applied, and then rescinded. Supp. II Rec. tab 47 at ¶3. In general, confusion, disarray and mistakes are commonplace in the vote-counting process. Supp. II Rec. tabs 29, 33 & 46. The lack of intelligible, uniform standards fatally undermines any claim that manual recounting actually captures the intent of the voters.

### 3. Political Pressure

The atmosphere has become politically-charged with pressure being exerted on the county boards and their lawyers by prominent political figures such as former Secretary of State and current Gore campaign spokesperson Warren Christopher and Florida Attorney General Robert Butterworth. Supp. II Rec. tab 14. Indeed, observers also noted that the elections officers exhibited partisan bias and even hostility. C.A. Rec. 11 at 57 (guidance to ballot counters expressed hostility to Republican attorney observers and implied that a Republican President would endanger the economy and increase the chances of war). Such external political pressure obviously increases the likelihood that conscious or unconscious bias will further taint the recount.

Other signs of politically driven decisionmaking proliferate. For example, the Broward County Canvassing Boards originally decided not to authorize a countywide manual recount, but then reversed that decision in a 2-1 vote after extensive political lobbying. Supp. II Rec. tab 14 at 5. Media reports have widely recounted the erratic nature of the various canvassing boards and their decisions whether to proceed with manual recounts. *See* Supp. Rec. 6 (noting decision change by Miami-Dade county), 8 (noting decision change by Broward county), & 9 (same). The on-again, off-again process further illustrates the unchecked nature of the County Respondents' discretion, and demonstrates that the recounts do not provide a stable, fair, deliberate, and objective counting of ballots.

### B. Proceedings In The District Court

On November 11, 2000, Petitioners filed this action in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to enjoin the violation of their constitutional rights arising out of the selective, arbitrary, capricious, and discriminatory manual recounting of ballots and to protect the integrity of, and bring finality to, the November 7 Presidential election. Petitioners also filed a motion for a temporary restraining order or, in the alternative, a preliminary injunction to enjoin the members of the canvassing boards of Broward, Miami-Dade, Palm Beach, and Volusia Counties, Florida (the "County Respondents") from violating Petitioners' constitutional rights. After a hearing, the district court denied Petitioners' motion on November 13, 2000. App., *infra*, 1a-26a. Plaintiffs filed a notice of appeal the following day. *Id.* at 27a-28a.

### C. Proceedings On Appeal

On November 15, 2000, Petitioners filed their opening brief on appeal, together with a motion for an injunction pending appeal and a motion to expedite the appeal. On that same day, the court of appeals voted to hear the case en banc. Thereafter, on Friday, November 17, 2000, the court of appeals denied the motion for injunction pending appeal without prejudice (App., *infra*, 31a), and granted Petitioners' motion to expedite the appeal. The court subsequently ruled that briefing would be completed by November 28, 2000, and oral argument, if any, would be held November 29, 2000.

Meanwhile, on November 21, 2000, the Supreme Court of Florida ruled that the County Respondents were entitled to continue their selective manual recounts and certify results based on those recounts, notwithstanding the expiration of the seven-day time limit imposed by Fla. Stat. §§ 102.111 and 102.112. Petitioner George W.

Bush is an intervenor in that state court action, and is filing contemporaneously herewith a petition for a writ of certiorari seeking review of that decision. Because these cases present closely related issues involving the results of the November 7 Presidential election, and in order that this Court might have both of these crucial cases before it sufficiently in advance of the meeting of the Electoral College in order to permit a meaningful decision on the merits, Petitioners determined to file this petition for a writ of certiorari before judgment. Petitioners have also filed a motion to expedite consideration of this petition in order to permit a decision on the merits in a timely manner.

## REASONS FOR GRANTING THE WRIT

### I. Review Is Warranted Because The Questions Presented Are Of Imperative Public Importance, And Review By This Court Is Essential To Bring Finality And Legitimacy To The Presidential Election

This case is extraordinary. It raises issues of imperative public importance seen only once in a generation. Indeed, not since *United States v. Nixon*, 418 U.S. 683 (1974), have questions of similar magnitude to those presented here been brought before this Court.

For two weeks, our Nation has waited to have confirmed the outcome of the November 7, 2000 election for President of the United States. Governor George W. Bush and Dick Cheney have garnered the most votes cast in Florida, as initially counted, as recounted, and as recounted again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of a selective, arbitrary, and standardless manual recount of ballots cast in only a handful of heavily Democratic counties in Florida.

This Court's direct and immediate review of the lower courts' refusal to halt the selective manual recount is warranted because this case "is of such imperative public importance" that the Court should deviate from normal appellate practice. Sup. Ct. R. 11. As discussed in greater detail below, this case presents important questions regarding the First and Fourteenth Amendments' protections for the fundamental right to vote. Moreover, these questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly in an election for the highest office in the land. The constitutionality of the arbitrary recount process currently being implemented by the County Respondents in this crucial election presents precisely the type of question that the Nation justifiably expects should be decided by this Court. Indeed, absent a decision by this Court, the election results from Florida may lack finality and legitimacy. The consequences may well include the ascension of a President of questionable legitimacy, or a constitutional crisis.

## II. Review Is Warranted Because The Lower Courts' Refusal To Halt The Arbitrary, Standardless And Selective Manual Recounts Conflicts With Decisions Of This And Other Courts

This case also warrants this Court's review because it presents important questions relating to the most fundamental of all constitutional rights—the right to vote. Specifically, this case challenges the use of arbitrary, standardless, and selective manual recounts as violative of the Equal Protection Clause, the Due Process Clause and the First Amendment.

### A. The Manual Recount Constitutes a Violation of 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).

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").

While these one-person, one-vote cases involve the intentional unequal weighting of votes, the requirement of equal treatment of voters in different geographical areas has been extended to situations in which a facially neutral voting scheme results, even innocently, in the disparate treatment of voters based on the counties 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*, Florida's selective manual recount provisions, as currently being applied, arbitrarily treat 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 in the four counties undertaking a manual recount, but not counted in any other Florida county. In fact, those ballots may be counted in some of those four counties, but not in others, because each county is free to invent its own standards. Or such standards may be changed from day to day or hour to hour even within a single Florida county. 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).[4]

---

[4] A recent opinion letter of the Attorney General of the State of Florida seems to endorse this principle. In response to a request for an opinion by the Palm Beach Board on whether it should continue with its manual recount, the Attorney General reasoned:

[Footnote continued on next page]

### B. The Manual Recount Violates Due Process

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*, 570 F.2d at 1077-78), *cert. dismissed*, 459 U.S. 1012 (1982), and which manifestly violates the Due Process Clause.

Florida's arbitrary manual recount is unconstitutional, *inter alia*, because it fails to set any meaningful standards for determining whether a manual recount should be initiated, which ballots should be manually counted, and what standards should be applied in determining whether a ballot should or should not be counted. As this Court has made clear, a State cannot deny an individual's liberty or property interest—including the right to vote—in an arbitrary and capricious manner. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). State election laws and practices having that effect constitute a denial of due process.

---

[Footnote continued from previous page]

> The circumstances surrounding these legal issues are extremely serious. 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.

Supp. Rec. 4 at 1 (Letter from Robert A. Butterworth, Attorney General of the State of Florida, to The Hon. Charles E. Burton, Chair, Palm Beach County Canvassing Board, Nov. 14, 2000).

In *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), 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 local election officials, who may have a keen personal interest in the outcome of an election and who administer the election system in counties selected by candidates or political parties who share those interests. The State's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.[5]

---

[5] Before conducting a full manual recount under subsection 5, a county must first conduct a partial manual recount of "at least three precincts and at least 1 percent of the total votes cast." Fla. Stat. § 102.166(4)(d). With respect to that crucial threshold inquiry, the statute supplies no standards to guide the canvassing boards' discretion to open an initial partial manual recount. *See* Fla. Stat. § 102.166(4)(c). Hence, the critical determination to initiate the manual recount process at all is open to arbitrary decision making by county officials.

The manual recount scheme being implemented selectively in Florida is utterly lacking in meaningful standards. The statute by which the mandatory recount is being conducted prescribes no standards whatsoever to guide or constrain Florida's canvassing boards in determining when or how to count any particular ballot. When a statute's "purpose" is as open-ended as the correction of error, and the statute supplies no standards to guide the determination of "error," any such general statement of purpose provides no meaningful standard for its application by county officials. This is particularly the case when the statute authorizes persons, without any standards or constraints, to divine the "intent" of voters. In any event, the existence of statutory procedures for conducting recounts cannot substitute for the articulation of substantive standards to guide the canvassing board's implementation of the manual recount procedures.[6]

Indeed, the arbitrary and standardless nature of the process is confirmed by statements recently made by Mr. Nichols, the county spokesman for Palm Beach County. C.A. Rec. 11 (CNN Transcript: "Manual Vote Count Procedure Varies in Palm Beach County," Nov. 11, 2000). With reference to the question whether partially punched ballots should be counted if one could see

---

[6] For example, the procedural provisions of the manual recount statute address such matters as the composition of counting teams, the process for referring ballots to the canvassing board, and the procedures for verifying tabulation software. Fla. Stat. § 102.166(7)-(10). Such procedures, however, do not guide the canvassing board's discretion in determining whether or not to count a particular ballot. Although Section 102.166(7)(b) instructs the board "to determine the voter's intent," it gives no indication of how that subjective determination is to be made. The resulting discretion leaves an infinite space for arbitrary and unequal treatment of voters.

sunlight through the partial punch (the so-called "sunlight method"), Mr. Nichols explained that the standard is "very vague in the law." *Id.* at 12. As Palm Beach County Attorney Leon St. John further explained, the Palm Beach Board decided both to adopt *and* abandon the sunshine method in the midst of the recount itself. He noted that "[t]he canvassing board . . . just moments ago . . . had decided to not go with the light test, but to go with the test that's reflected on the procedures where, if one of the four corners of the chad is detached, . . . then that will be a vote." *Id.*; *see also id.* (statement of Bob Nichols, Palm Beach County spokesman) ("[T]he policy would be that if you don't – they were using the light test. Now if there is one corner, or three corners attached still, it won't be counted as a vote."); *id.* at 18 (statement of Bob Nichols) ("There was a change in the middle."). Hence, given the circumstances of this case, the next President may be determined not by the votes counted and recounted by neutral, tested equipment made for the express purpose of tabulating and recounting ballots, but by an ephemeral, elusive, and infinitely elastic process that allows officials to change, and change again, without reference to established law, in the course of the process itself. And these officials are the very officials selected by the partisans in the election by virtue of the unlimited discretion by which counties for manual recounts are selected, and are acting with knowledge that their decisions may change the outcome of the Presidential election.

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. This risk of arbitrary and subjective decision making is especially acute in an extremely close election for the most important office in the nation. In effect, if the selective manual recount is allowed to proceed to the apparent end desired by its defenders, the

next President of the United States may be selected by the arbitrary and standardless decisions of a handful of potentially interested county officials about such matters as whether to count a vote because a ray of light shines through a hole or because only one, rather than two, corners of a chad remains attached to a ballot.

### C. The Manual Recount Violates The First Amendment

Because the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" overlaps with "the right of individuals to associate for the advancement of political beliefs," voting is protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). For the reasons discussed above, the selective manual recounts impinge upon and dilute First Amendment rights. Moreover, the manual recounts violate the First Amendment because, under Fla. Stat. § 102.166(4), the canvassing boards are vested with standardless discretion to initiate manual recounts. The Constitution prohibits state actors from exercising unconstrained discretion over the application of laws that implicate First Amendment rights. *See City of Lakewood v. Plain Dealer Publ'g*, 486 U.S. 750, 763 (1988) ("[The] danger [of a First Amendment violation] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (noting that the First Amendment "is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement," and that laws affecting First Amendment rights are invalid "if they are wholly lacking in terms of susceptible objective measurement") (internal quotation marks and citations omitted).

In addition, if Florida is permitted to count some votes differently from others – even in the mistaken be-

lief that the disparate treatment will increase accuracy – the government will effectively lift some voices above others. The First Amendment clearly forbids that result. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

GEORGE J. TERWILLIGER III
TIMOTHY E. FLANIGAN
MARCOS D. JIMÉNEZ
WHITE & CASE LLP
200 South Biscayne Blvd.
Suite 4900
Miami, Florida 33131
(305) 371-2700

THEODORE B. OLSON
*Counsel of Record*
DOUGLAS R. COX
THOMAS G. HUNGAR
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891

*Counsel for Petitioners*

November 22, 2000