

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the
United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, *et al.*,

Appellees.

PETITION OF GEORGE W. BUSH AND RICHARD CHENEY FOR STAY OF
THIS COURT'S ORDER PENDING REVIEW OF PETITION FOR WRIT OF
CERTIORARI IN THE UNITED STATES SUPREME COURT

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
Washington, D.C.

GEORGE J. TERWILLIGER, III
TIMOTHY FLANIGAN
WHITE & CASE LLP
Washington, D.C.

KIRK VAN TINE
BAKER BOTTS, LLP
Washington, D.C.

BARRY RICHARD
Florida Bar No. 0105599
GREENBERG TRAURIG, P.A.
Post Office Drawer 1838
Tallahassee, FL 32302
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

Counsel for Appellees George W. Bush
and Dick Cheney

Pursuant to Rule 9.310 of the Florida Rules of Appellate Procedure, 28 U.S.C. 2101(f), and this Court's authority to control the issuance of its own mandates, Petitioners George W. Bush and Richard Cheney request that this Court stay its decision to begin a partial manual recount of selected votes in Miami-Dade County, as well as the remaining counties of the State, pending resolution of a petition for a writ of *certiorari* to be filed with the United States Supreme Court. *See State ex rel. Gibbs v. Couch*, 139 Fla. 709, 710 (Fla. 1939) (“[I]f the case was one that would likely be reviewed by the Federal Court on *certiorari* or one in which the balance of convenience requires a suspension of this Court's decree and a withholding of its mandate, the stay order should be granted.”). For the reasons explained below, this Court's recent ruling violates the United States Constitution and federal law. The United States Supreme Court is therefore likely to grant a petition for a writ of *certiorari* to review this case.

I. There Is A Reasonable Probability That At Least Four Members Of The United States Supreme Court Will Conclude That This Case Warrants Plenary Consideration.

For the reasons discussed below, there is a likelihood that the United States Supreme Court will grant *certiorari* to hear this case.

This Court already granted *certiorari* to review a highly similar case arising out of the same election dispute in Florida. 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.

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 the United States Supreme Court authoritatively to decide.

II. The Supreme Court Is Likely To Reverse This Court’s Decision As Violative Of The United States Constitution And Federal Law.

There is at least a strong possibility that Petitioners will prevail on the merits in this case.

1. This 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 the United States Supreme 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, as the United States Supreme Court recently held, 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.” Slip Op. at 5 (Dec. 4, 2000) (quoting *McPherson*, 146 U.S. at 25).

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, this Court substituted its judgment for that of the legislature and violated Article II.

**2. This 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 arises, the dispute is to be resolved “pursuant to” those “laws enacted *prior to*” election day. 3 U.S.C. § 5. If this “principle of federal law” is complied with, 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. Slip Op. 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. By changing the Election laws in various ways detailed in our previous filing with the Court, this Court violated these commands.

3. This 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 constitutionally 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) (citations omitted). By

ordering that votes in different counties should be counted differently, this standard has been violated.

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.

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

Applicants will suffer irreparable injury unless a stay issues in this case. This Court's decision imperils Governor Bush's proper receipt of Florida's twenty-five electoral votes. This 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

Applicant's ability to seek meaningful review by the United States Supreme Court.¹

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 Applicant's injury will be irreparable. Reversal of this 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 this Court's

¹ 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 determination to be given conclusive effect and to govern in Congress's counting of the electoral votes.

unauthorized and unlawful rewrite of the legislative structure to select Florida's electors.

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

CONCLUSION

For the foregoing reasons, this Court should stay its mandate pending the United States Supreme Court's review of Petitioners' petition for a writ of *certiorari*.

Barry Richard
Florida Bar No. 0105599
GREENBERG TRAUIG, P.A.
Post Office Drawer 1838
Tallahassee, Florida 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been furnished to the following on this 8th day of December, 2000.

Bruce Rogow,
Beverly A. Pohl
BRUCE A. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Ste. 1930
Ft. Lauderdale, FL 33394

Denise D. Dytrych
PALM BEACH COUNTY
ATTORNEY
James C. Mize, Jr.
Andrew J. McMahon
Gordon Selfridge
ASSISTANT PALM BEACH
COUNTY ATTORNEYS
301 North Olive Avenue, Ste. 601
West Palm Beach, FL 33401

John D.C. Newton, II
BERGER, DAVIS & SINGERMAN
215 South Monroe Street, Ste. 705
Tallahassee, FL 32301
Telefacsimile: (850) 561-3013

Mitchell W. Berger
BERGER, DAVIS & SINGERMAN
350 East Las Olas Boulevard, Ste. 100
Ft. Lauderdale, FL 33301
Telefacsimile: (954) 523-2872

David Boies
BOIES, SCHILLER & FLEXNER, LLP
80 Business Park Drive, Ste. 110
Armonk, New York 10504
Telefacsimile: (914) 273-9810

W. Dexter Douglass
DOUGLASS LAW FIRM
211 East Call Street
Tallahassee, FL 32302
Telefacsimile: (850) 224-3644

Robert A. Butterworth, Attorney
General
The Capitol, PL-01
Tallahassee, FL 32399-1050
Telefacsimile: (850) 410-2672

Katherine Harris, Secretary of State
Deborah Kearney, General Counsel
FLORIDA DEPARTMENT OF STATE
The Capitol, PL-02
Tallahassee, FL 32399-0250
Telefacsimile: (850) 487-2214

Joseph P. Klock, Jr.
Donna E. Blanton
STEEL, HECTOR & DAVIS
215 South Monroe Street, Ste. 601
Tallahassee, FL 32301

BARRY RICHARD