IN THE SUPREME COURT OF FLORIDA

MATT BUTLER,

Appellant, CASE NO.: SC00-2403

vs.

HONORABLE KATHERINE HARRIS.
as Secretary of State, State of Florida, and
HONORABLE ROBERT A. BUTTERWORTH,
as Attorney General, State of Florida,

Appellees.
_____/

BRIEF ON JURISDICTION AND ON THE MERITS OF ATTORNEY GENERAL ROBERT A. BUTTERWORTH

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STATEMENT OF TYPE SIZE AND FONT

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STATEMENT OF THE CASE AND FACTS

This is an appeal certified from the First District Court of Appeal as arising out of the election of November 7, 2000 for President and Vice President of the United States. Appellant (hereafter referred to as Butler) brought a petition for declaratory judgment in Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, on or about November 17, 2000, alleging that subsections (4) and (5) of §102.166, Fla. Stat., pertaining to manual recounts in connection with election protests, deprive Butler of equal protection and therefore are unconstitutional.

Butler is a resident and voter in Collier County, Florida who voted in the November 7 general election.

A hearing was held on November 17, 2000, following which the trial judge granted declaratory judgment entitlement, but held that the provisions did not deprive Butler of any equal protection right.

Butler appealed to the First District Court of Appeal, which certified the appeal to this Court.

SUMMARY OF ARGUMENT

There is no dispute that Butler voted for the candidate of his choice in the November 7, 2000 general election and had his vote counted. There is also no dispute that Butler did not file an election protest, the period for election protests is over, and that the results of that election have been certified by the Florida Elections Canvassing Board. Accordingly, Butler lacks standing to press his claim, and the case is moot. As a result, there is no issue of great public importance that requires this Court's attention.

Moreover, on the merits, the trial court's order, and equal protection jurisprudence, demonstrate that there is no principled basis for Butler's equal protection argument.

ARGUMENT

APPELLANT LACKS STANDING, THE CASE IS MOOT, AND, AS THE CIRCUIT COURT SO FOUND, THERE IS NO MERIT TO BUTLER'S EQUAL PROTECTION CLAIM

For jurisdictional purposes, the question is whether there is an issue of great public importance that now requires this Court's attention. Both the facts of this case, and the law, demonstrate that no such issue exists.

Butler represents that he voted in the November 7, 2000 general election and makes no claim that his vote was not counted. Butler offers no evidence that he initiated an election protest under §102.166(1), Fla. Stat. Undaunted, however, he now claims that, since he, as an elector, is authorized to file an election protest under §102.166(1), Fla. Stat., he therefore has a constitutional right to request a preliminary manual recount under §102.166(4) and a countywide manual recount under §102.166(5), Fla. Stat., should the local canvassing board so decide.

I. Butler Lacks Standing.

It is well-settled that in order to establish a legally cognizable claim, a party must have standing. Butler, by not initiating an election protest, by voting and having that

vote counted, and by the election having been certified by the Florida Elections Canvassing Commission, cannot meet the requirements for standing.

A party who challenges the constitutionality of a statute must show that it affects him or her personally. State v. Sullivan, 43 So. 2d 338 (Fla. 1949). In Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952), this Court further established that

not only must a person be adversely affected by a statute in order to challenge its validity, but he or she must also be adversely affected by the part of the statute that is attacked. In this light, it is noted that subsection (4) vests discretion in the county canvassing board to conduct a preliminary, targeted recount, and subsection (5) authorizes a full manual recount only if the board finds "an error in vote tabulation which could affect the outcome of the election" and chooses this from among three options. It can hardly be seriously contended that Butler is injured in any way by the broad discretion vested in county canvassing boards under these provisions. In sum, there is no constitutional right to ask the board to exercise its discretion.

As the court in State v. Flowers, 643 So. 2d 644, 645 (Fla. 1st DCA 1994), points out, "(a) party seeking an adjudication as to the constitutionality of a statute must show that he or she has been charged with violating the statute, is threatened (with) prosecution for violation of the statute, or that the adjudication requested will otherwise affect his or her rights."

To have standing, a person must not engage in speculation, conjecture, hypothetical situations, or make claims in the abstract. Los Angeles v. Lyon, 461 U. S. 95, 101-02, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Stated succinctly, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U. S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).

Against this backdrop, Butler's claim that, as a voter, he is not able to seek a manual recount, fails the conditions precedent for standing set out above because he never filed an election protest. Succinctly stated, there must be a protest to the returns of an election pursuant to §102.166(1), Fla. Stat., before there can be a request for a manual recount pursuant to §102.166(4). No such request was made in Collier County, and no such request for an election protest was made by Butler. Only one who does so brings oneself under the statute which he unsuccessfully challenged before the trial court and now challenges here. Butler has failed to do so and therefore lacks standing to press his claim; that is, he fails to make the necessary showing of real or threatened harm or injury for which judicial relief can be redress. In sum, Butler has not alleged, and cannot allege, "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon

which the court so largely depends for illumination of difficult constitutional issues." Baker v. Carr, 369 U. S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

Butler lacks standing to press his claim, as he has no special injury as compared to all voters, whereas candidates and their parties do have special injury should the accumulated vote totals not initially reflect the will of the people, thereby invoking the canvassing board's discretion to direct a manual recount.

II. The Case is Moot.

The November 7, 2000 general election is now history. No election protest currently exists with regard to Collier County. Accordingly, Butler can make no viable claim with regard to an election protest, or any recount that may flow from such a protest. In short, Butler cannot now assert a case or controversy, or cause of action.

Moreover, his claim is not saved by the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception applies when the challenged action is of too short a duration to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subjected to the same action again, review will be allowed. See Tribune Co. v. Cannella, 438 So. 2d 516, 519 (Fla. 2d DCA 1983), quoting Weinstein v. Bradford, 423 U.S. 147, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975).

In the case at bar, however, the matter was fully adjudicated by the trial court,

and there is no reasonable expectation, as opposed to a mere possibility born of speculation, that there will be another presidential election like the one held this past November which would cause Butler to file an election protest and thereafter demand a preliminary and total manual recount. In short, the possibility that Butler will be subjected to the same action of which he complains here is far too remote and speculative to overcome the mooting of his action.

III. On the Merits, Butler Has No Viable Constitutional Equal Protection Claim.

The trial court's order succinctly and correctly disposes of Butler's claim. Furthermore, the prospect of all of Florida's registered voters–more than nine million–having the constitutional right to seek a manual recount, and the obvious glaring consequences to the orderly electoral process that Florida's Election Code, Ch. 97-106, Fla. Stat.,

seeks to assure, is the strongest reason for rejecting Butler's claim on the merits.

This Court, in Palm Beach County Canvassing Board v. Harris, Case Nos. SC00-2346, SC0-2348 & SC00-2349, opinion issued November 21, 2000, carefully examined the state's elaborate election system designed to assure that every vote that is cast is counted. The vitalization of Butler's claim, the effect of which is to allow the several million registered voters to seek a manual recount, would wreak havoc with that system.

Equal protection jurisprudence informs that the legislature is granted broad discretion in creating statutory classifications, North Ridge General Hospital v. City of Oakland Park, 374 So. 2d 461 (Fla. 1979), appeal dismissed, 444 U.S. 1062 (1980), and the party challenging the classification bears the burden to show that there is no conceivable factual predicate which would reasonably support the classification under attack. In re Estate of Gaines, 466 So. 2d 1055, 1059 (Fla. 1985). Moreover, where there is no suspect classification (or fundamental right), the legislative classification choice will be sustained if supported by a rational basis. Coy v. Florida Birth-Related Neurological Injury Plan, 595 So. 2d 943 (Fla. 1992). This is consistent with the well-established principle of statutory construction applicable to the facial constitutionality of a statute:

> [T]he vice of constitutional invalidity must inhere in the very terms of the title or body of the act. If this cannot be made to appear from argument deduced from its terms or from matters of which the court can take judicial knowledge, we will not go beyond the face of the act to seek grounds for holding it invalid.

Crandon v. Hazlett, 157 Fla. 574, 26 So.2d 638, 643 (1946), quoting State v. Armstrong, 127 Fla. 170, 172 So. 861, 862 (1937) (Terrell, J.).

In determining whether a state's action impinges on a voters' Fourteenth Amendment right to equal protection of the laws, the United States Supreme Court has

recognized that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L. Ed. 2d 714 (1974).

To this end, it is clear that the rational basis test applies. As the Supreme Court said in Burdick v. Takushi, 504 U. S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992):

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends." Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

The classification that must be justified based on a rational basis test is the classification between persons (candidates and their parties) who can request a recount, and persons (voters) who cannot. The rational basis is demonstrated by the singular fact that the individual citizen who casts his or her vote, and has that vote count, is in a different situation from the candidate and the candidate's party who are concerned

with, and have the most profound interest in, the accumulated vote total. It is therefore within the Legislature's sound discretion to provide for the candidate and the candidate's party the authority to seek a manual recount if the totality or accumulation of the votes raises the threshold provided by the statute. Conversely, the prospect of allowing all of the several million eligible voters to seek a manual recount, and the turmoil that such a prospect could bring to bear on Florida's orderly election system, are reasons enough for the Legislature to have determined to craft the statute as it has chosen to do so. Against this backdrop, when a court looks at a law to see if the facts support the law, "if any state of fact, known or to be assumed, justifies the law, the court's power of inquiry ends; questions as to the wisdom, need or appropriateness are for the legislature." Fulford v. Graham, 418 So. 2d 1204, 1205 (Fla. 1st DCA 1982), citing State v. Bales, 343 So.2d 9 (Fla. 1977).

Butler alleges that because a voter can file an election protest, he therefore has a corresponding constitutional right to request a manual recount. This claim defies both law and logic.

Nothing prevents any candidate or political party from requesting a recount in any jurisdiction. See § 102.166 (4)(a), Fla. Stat.. There is no allegation that requests for a manual recount from one candidate or political party made within the statutorily required time frame were treated any differently from requests for manual recounts

made by others. Thus, Butler's initial problem is that he is not similarly situated to others with regard to this matter. Although Butler contends that he should be able to request a manual recount, under Florida law, no individual voter has this authority, and the Legislature has determined that it would wreak havoc with what must be an already heavily regulated election system by permitting millions of people to make this request. While there is a fundamental right to vote, and a statutory right to file a protest, neither is implicated here. What Butler seeks is a constitutional right of all Florida voters to request a manual recount. No such right exists in our jurisprudence.

In sum, there is no equal protection right for a person, particularly one who has not filed an election protest, to request a manual recount. Butler fails to present any case authority for this proposition.

CONCLUSION

Butler, who has voted for the candidate of his choice and had that vote counted, and who did not file an election protest, lacks standing to press his claim. By intervening activities of the certification of the election and the demise of the election protests time frame, Butler's claim is moot. And by application of equal protection jurisprudence, Butler's claim is without merit. This Court should dismiss the cause as not within its jurisdiction as a question of great public importance because the claim is moot and Butler lacks standing. Alternatively, the Court should affirm the judgment of

the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Terrell C. Madigan, Esq., and Harold R. Mardenborough, Jr., Esq., McFarlain, Wiley, 215 S. Monroe Street, Suite 600, Tallahassee, Florida 32301; and Deborah Kearney, General Counsel, Department of State, The Capitol, Tallahassee, Florida 32399, this 4th day of December, 2000.

George Waas