

No. _____

In the Supreme Court of the United States

Robert C. Touchston, Deborah Shepperd, and
Diana L. Touchston,

Petitioners,

v.

Michael McDermott, et al.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

BRIEF OF RESPONDENT STATE OF FLORIDA

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QUESTION PRESENTED

(Restated)

1. Whether change in the margin of votes that a candidate wins an election by does not create irreparable harm?
2. Whether Manual Recount provisions of the election protest statute need not be enjoined from enforcement due to allegations that they are unconstitutional due to vote dilution?
3. Whether Manual Recount provisions of the election protest statute need not be enjoined from enforcement due to allegations that they lack sufficient standards to be constitutionally applied?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Robert C. Touchston, Deborah Shepperd, Diana L. Touchston; Plaintiffs-Appellants; George W. Bush, Intervenor-Appellee; Michael McDermott, Ann McFall, Pat Northy, Theresa LePore, Charles E. Burton, Carol Roberts Jane Carroll, Suzanne Gunsburger, Robert Lee, David Lehy, Lawrence King, Jr. and Miriam Lehr, in their official capacities as members of the County Canvassing Boards of Volusia, Palm Beach, Broward and Miami-Dade Counties, respectively; Katherine Harris, in her official capacities as Secretary of the Department of State and as a member of the Elections Canvassing Commission; Clay Roberts and Bob Crawford, in their official capacity as members of the Elections Canvassing Commission, Defendants-Appellees; The Florida Democratic Party; Intervenor-Appellee; and Attorney General Robert A. Butterworth, Intervenor-Appellee (motion to intervene granted December 1, 2000).

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STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. s. 1254. The decision under review from the United States Court of Appeals for the Eleventh Circuit is an order rendered before rendition of judgment which was published on December 6, 2000.

STATEMENT OF THE CASE

Respondent State of Florida became a party to these proceedings on December 1, 2000, when the Eleventh Circuit Court of Appeals granted a motion to intervene filed by the State of Florida ex rel Attorney General Robert A. Butterworth on December 1, 2000.

Respondent Butterworth adopts the statement of the case and facts contained in the Eleventh Circuit's opinion in *Siegel v. Lepore*, Case No. 00-15981, Slip Op. at pp. 2-10 (11th Cir. Dec. 6, 2000), the reasoning of which was adopted in *Touchston v. McDermott*, Case No. 00-15985, Slip Op. at pp. 2 (11th Cir. Dec. 6, 2000).at Florida Supreme Court's opinion. Slip Op. pp. 2-8.

SUMMARY OF THE ARGUMENT

Voters supporting the candidacy of Governor Bush and Secretary Cheney have not been irreparably harmed because the margin by which they were declared winners of the election allegedly may have been distorted due to recounts undertaken pursuant to the statute being attacked.

Additionally, the attack on the manual recount provision of the protest statute has been rendered moot by the fact that the election process has moved beyond the protest stage and recounts are currently being conducted pursuant to the contest sections of the Florida election code. The equal protection

challenge has also been mooted by the fact that undervotes have been ordered to be recounted in all Florida counties.

REASONS FOR AFFIRMING THE DECISION BELOW

The manual recounts resulting through the application of § 102.166 (4) have been completed or terminated and the winners of the election certified. Although recounts are continuing, they have not been ordered pursuant to the statute concerned herein, but under the contest provision of the Florida Election Code. Therefore, the Petitioners are requesting this court to grant Certiorari in a case of purely academic interest because it could change the margin by which the electors for Governor Bush and Secretary Cheney were certified.

No irreparable harm results to voters simply because ballots of other voters were counted which did not change the outcome of the election.

Additionally, Petitioner's equal protection argument, based on allegations that recounts should take place statewide, is moot, where precisely that is taking place, albeit in accord with another portion of the statute.

I. THERE IS NO IRREPARABLE HARM.

The position of the Petitioners is that any voter should be able to turn the federal courts, including the United States Supreme Court, into tribunals for responding to questions of purely academic interest by filing a Petition for injunction alleging that one or more votes were recounted which shouldn't have been.

Here, the election process in Florida has moved far beyond any application of the manual recount provisions of the election protest statute. At the end of the protest period, Governor Bush and Secretary Cheney were certified as having prevailed in the Florida election, as of that time. Any subsequent activity which has any potential effect was the result of statutes other than the one under attack for alleged unconstitutionality in this case.

Petitioners' position, that alleging violation of constitutional rights is, by itself, sufficient to establish irreparable harm and create a basis for an injunction is in violation with the law, relied upon by the Eleventh Circuit, that the burden is on the movant to establish each of the elements of a temporary injunction before the trial court. Here, the Petitioners failed to establish any of them, but especially irreparable harm.

II. THIS MATTER IS MOOT WHERE THERE ARE NO LONGER ANY RELEVANT ACTIONS TAKING PLACE UNDER THE STATUTE CONCERNED AND A STATEWIDE RECOUNT IS TAKING PLACE.

The Florida Supreme Court has ordered a statewide recount pursuant to the contest provisions of § 102.168, Florida Statutes (2000), which is taking place right now. Thus, whether or not

the provisions of the protest statute, § 102.166, Florida Statutes (2000), which permit manual recounts to take place are unconstitutional or not (which is hotly contested), the matter is moot. All the recounts which took place under the statute under attack have either been completed or terminated, and the results of the election certified. The candidates that the Petitioners contend they supported have, thus far, prevailed. Should they be determined not to have prevailed in the future, it will not be because of the statutes concerned herein, but because of other provisions of the election code.

Further, with regard to the equal protection issue, the Florida Supreme Court has now ordered a statewide recount of all “no votes”. Thus, to the extent that Petitioners complaint that some counties have been treated differently than others, that problem has been substantially, or even completely ameliorated.

This Court should not grant certiorari of a matter which is moot.

This case remains moot, even in the face of claims it is capable of repetition yet evading review. The underlying circumstances facing this Court are unique, and Petitioners have not presented any record basis for arguing that future courts could be faced with similar situations that would escape judicial review because the inevitable flow of events. The lower courts acted with admirable speed in reviewing the record and arguments the parties have presented, and the Petitioners’ case is still moot because of other rulings and election proceedings besides the present action. The Petitioners can forward only a highly speculative basis for having this Court review a case that is moot, and such hypothetical arguments are insufficient to support judicial intervention. See, City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (conjectural injuries do not provide a basis for standing to seek injunctive relief). Even engaging in such speculation, it is

extremely unlikely that this same set of circumstances – involving the same parties – will face this Court in the future.

CONCLUSION

The opinion of the United States Eleventh Circuit Court of Appeal properly rests on the grounds that the Petitioners failed to establish irreparable harm. Through the protest period, the candidates they supported prevailed. Therefore, the Petitioners are requesting the United States Supreme Court to answer questions of purely academic interest. Further, the matter is moot where the election process has moved far beyond the protest stage and the statute under attack herein is not the basis for the current situation.

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 U.S. mail and facsimile to James Bopp, Jr., Heidi K. Meyer, James R. Mason, III, Eric C. Bohnet, Justin David Bristol, Richard E. Coleson, and J. Aaron Kirkpatrick, 1 South 6th Street, Terre Haute, Indiana 47807; Matt Staver, Esq., 210 East Palmetto Avenue, Longwood, Florida 32750, and facsimile (407-875-0770), Laurence H. Tribe, Hauser Hall, Room 420, 1575 Massachusetts Avenue, Cambridge, MA 02138, Kendall Coffey, 2665 South Bayshore Drive, Miami, Florida 33133, Teresa Wynn Roseborough, 999 Peachtree Street, N.E., Atlanta, Georgia 30309-3996, and facsimile (404-853-8806); Bruce Rogow, Esq., Beverly A. Pohl, Esq., Broward Financial Centre, Suite 1930, 500 East Broward Blvd., Fort Lauderdale, Florida 33394, and facsimile (954-764-1530); Robert Ginsberg, Esq., County Attorney, Lee Kraftchick, Javier Soto, Office of Miami-Dade County Attorney, Metro Dade Center, 111 NW 1st Street, Suite 2810, Miami, Florida 33128 and facsimile (305-375-5634); Edward A. Dion, Michael Cirullo, Tamara Scrudgers, Broward County Attorney, 115 S. Andrews Avenue, Fort Lauderdale, Florida 33301 and facsimile (954-357-7641); Denise Dytrych, Palm Beach County Attorney, P.O. Box 1989, West Palm Beach, Florida, 33402-1989, and facsimile (561-355-4398); Samuel S. Goren, Michael D. Cirullo, Jr., 3099 East Commercial Blvd, Suite 200, Fort Lauderdale, Florida 33308 and facsimile (954-771-4923); and J. B. Murray, 1900 Phillips Point West, 777 S. Flagler Drive, West Palm Beach, Florida 33401-6198, and facsimile (561-655-1509),

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(904-736-5990) this 9th day of December, 2000.

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