No. 00-949

IN THE

# Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
*Petitioners*,

v.

ALBERT GORE, JR., *et al*.,
*Respondents.*

**On Writ Of Certiorari**
**To The Supreme Court Of Florida**

## BRIEF FOR PETITIONERS


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## QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election, judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. §5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election, judicially created selective and capricious recount procedures that vary both across counties and within counties in the State of Florida, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

## PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Governor George W. Bush, as Nominee of the Republican Party of the United States for President of the United States; Richard Cheney, as Nominee of the Republican Party of the United States for Vice President of the United States; Albert Gore, Jr., as Nominee of the Democratic Party of the United States for President of the United States; Joseph I. Lieberman, as Nominee of the Democratic Party of the United States for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence D. King, Myriam Lehr and David C. Leahy as members of the Miami-Dade Canvassing Board; David Leahy individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King and David Howard (or, in the alternative Marianne P. Marshall), as members of the Nassau County Canvassing Board; Shirley N. King individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton and Carol Roberts, as members of the Palm Beach Canvassing Board; Theresa LePore individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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## BRIEF FOR PETITIONERS

On December 4, 2000, this Court unanimously vacated the Florida Supreme Court's November 21 judicial revision of Florida's election laws. *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (U.S. Dec. 4, 2000). The Court remanded for further proceedings not inconsistent with its concerns regarding the Florida court's awareness of and compliance with federal constitutional and statutory constraints on the authority of the Florida judiciary to revise the Florida Legislature's method for appointing presidential electors. *Id.*

Just four days later, *without a single reference to this Court's December 4 decision*, the majority of the Florida Supreme Court announced sweeping and novel procedures for recounting selected Florida ballots to determine anew the winner of the November 7 presidential election in Florida. This latest manual recount regime would be conducted according to varying—and unspecified—standards, by officials unspecified in Florida's election law, and according to an ambiguous and apparently unknowable timetable. The Florida court's wholesale revision of Florida statutory law, adopted in part to address the problems flowing from its earlier abandonment of the system crafted by the Florida Legislature, ignores the obviously intertwined nature of the protest and contest provisions and overrides numerous legislative choices embodied in the Florida Election Code.

The decision below acknowledges, but fails to adhere to, Article II, § 1, cl. 2 of the federal Constitution, which vests plenary and exclusive authority in the Florida Legislature to determine the manner of selecting Florida's electors. And, while the Florida court stated that it was "cognizant" of 3 U.S.C. § 5, which creates a "safe harbor" allowing a State to afford conclusive effect to its choice of presidential electors, it completely rewrote the Florida Legislature's pre-election laws designed to take advantage of that provision. The court's

newly devised scheme for re-tabulating votes is plainly arbitrary, capricious, unequal, and standardless.

The court below not only failed to acknowledge that its earlier decision had been vacated, it openly relied on manual recounts that had occurred *only* because of that opinion as a predicate for changing the Secretary of State's certification of the election and as the foundation for its state-wide recount plan. It compounded that manifest overreaching by overriding its own "equitable" deadlines, created two weeks ago, as well as the legislature's carefully wrought timetable.

The Florida court's decision imposes its decree on counties that were never part of the proceedings below, overrides statutory authority explicitly vested in the state's chief election officer and local canvassing boards, designates new officials to supervise in place of the officials specified in Florida's election code to discharge that function, establishes a standard for the instigation of recounts not recognizable under Florida law, requires manual recounts of "under-voted" but not "over-voted" ballots, and mandates inconsistent recounts within certain counties, in violation of fundamental principles of equal protection and due process.

The unconstitutional flaws in the Florida Supreme Court's judgment immediately bore further unconstitutional fruit when the trial court attempted to implement the supreme court's decision, which effectively mandated the creation of an entirely new set of arbitrary and unreviewable *ad hoc* procedures that are flatly incompatible with the legislature's judgments regarding the conduct and timing of manual recounts and its delegation of authority to the Secretary of State to ensure uniformity in election procedures. *See* Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000). The trial court explicitly acknowledged it was creating a two-tier system, one for Dade County and one for "the rest of the counties in the state." Hearing Tr. at 5 (attached to Petition-

ers' Supplemental Mem.). In the interest of making the recounts "go as smoothly as possible," the trial court precluded parties from objecting to the interpretation or allocation of individual ballots in the course of the recounts. *Id.* at 8. The trial court called for county canvassing boards throughout the state to create new "protocols" for the recounts. *Id.* And the trial court explicitly acknowledged that there were to be no specific, uniform standards to guide the recounts. *Id.* at 10.

This case is the quintessential illustration of what will inevitably occur in a close election where the rules for tabulating ballots and resolving controversies are thrown aside after the election and replaced with judicially created *ad hoc* and *post hoc* remedies without regard for uniformity, objectivity, or finality. The Florida Supreme Court has not only violated the Constitution and federal law, it has created a regime virtually guaranteed to incite controversy, suspicion, and lack of confidence not only in the process but in the result that such a process would produce.

## OPINIONS BELOW

The opinion of the Supreme Court of Florida below (Pet. App. 1a-56a) is not yet reported. The order of the Circuit Court for the County of Leon, Florida (Pet. App. 57a) is not reported. The November 21, 2000 opinion of the Supreme Court of Florida in *Palm Beach County Canvassing Board v. Harris* (Pet. App. 66a-100a), is reported at __ So. 2d __, 2000 WL 1725434 (Fla. Nov. 21, 2000).

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on December 8, 2000. The jurisdiction of this Court rests upon 28 U.S.C. §1257(a). *See* Applic. for Stay, No. 00A504, at 16-19. Petitioners seek reversal of the Supreme Court of Florida's decision, which, as ex-

plained below, violates Article II of the United States Constitution, 3 U.S.C. §5, and the Fourteenth Amendment to the Constitution, and irreconcilably conflicts with this Court's decision in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth at Pet. App. 127a-145a.

## STATEMENT OF THE CASE

According to the initial count and statutory recounts of the Florida election results, Governor Bush received more votes for President than did Vice President Gore. Nevertheless, more than a month after the November 7 presidential election, the outcome of that election remains shrouded in uncertainty, confusion, and intense controversy. The thirty-three days since the election have been characterized by widespread turmoil resulting from selective, arbitrary, changing, and standardless manual recounts of ballots in four Florida counties pursuant to requests made on behalf of Democratic presidential candidate Vice President Gore. The tide of litigation flowing from that fatally flawed process has resulted in decisions of the Florida Supreme Court that rewrite substantial portions of Florida's Election Code in a dramatic and unconstitutional departure from the scheme enacted by the legislature—a departure that threatens Florida's ability to obtain the finality and certainty that the Florida Legislature intended to achieve and that compliance with 3 U.S.C. § 5 provides.

### A. Florida's Election Laws As Of November 7

Prior to November 7, 2000, pursuant to the authority conferred on it by Article II of the United States Constitution and 3 U.S.C. §5, the Florida Legislature had en-

acted a comprehensive and carefully interwoven statutory plan and set of procedures and timetables to govern the appointment of presidential electors, the conduct of elections, and the timely resolution of disputes and controversies related thereto.

Shortly after a presidential election, each Florida county's canvassing board is responsible for counting and certifying the election returns and forwarding them to the Florida Department of State. Fla. Stat. § 102.141. Florida's Secretary of State "is the chief election officer of the State" with responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. §97.012(1). "[A]s soon as the official results are compiled from all counties," the statewide Elections Canvassing Commission—comprising the Governor, the Secretary of State, and the Director of the Division of Elections—is required to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

The legislative scheme contains two provisions mandating that local county canvassing boards must certify their election returns to the Department of State no later than 5:00 p.m. on the seventh day following the election. Fla. Stat. §§ 102.111, 102.112. Section 102.112 further provides that returns filed after that deadline "may" be ignored by the Secretary of State.

Florida law provides that, prior to the seven-day certification deadline, disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. §102.166(1)-(2), and/or a request for a manual recount, *id.* § 102.166(4)-(10). The county canvassing boards have the discretion to reject or accept the request for a recount. *Id.* § 102.166(4)(c). If the canvassing board decides to perform a manual recount, it may first conduct a sample manual recount. *Id.* § 102.166(4)(d). If the sample manual recount indicates "an error in the vote tabulation which could affect the

outcome," the county canvassing board may correct the error and recount remaining precincts with the vote tabulation system, request verification of the tabulation software, or "[m]anually recount all ballots." *Id.* § 102.166(5).

If the canvassing board chooses to embark on a manual recount, the board "shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots," Fla. Stat. § 102.166(7)(a), and "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent," *id.* at (7)(b).

### B. State Court Proceedings Leading To Extension Of The Certification Deadline

Although both the initial results of the November 7 election and a statewide machine recount of the ballots showed that Governor Bush and Secretary Cheney had received the most votes in the presidential election in Florida, a manual recount in four selected counties was requested on behalf of Vice President Gore and Senator Lieberman (the "Gore respondents"). On November 13, 2000, respondent Gore and others brought suit in state court, seeking to compel the Secretary of State to waive the November 14 deadline established by Florida statutes for certifying Florida's presidential election results. That suit sought to require the inclusion in certified totals of the results of manual recounts then contemplated or ongoing in Broward, Miami-Dade, and Palm Beach Counties. The circuit court denied that relief on November 17, concluding that the Secretary of State had exercised "reasoned judgment" in declining to accept late returns.

On November 21, the Florida Supreme Court reversed the circuit court and declared for the first time in Florida law that "the Secretary may reject a Board's amended returns only if the returns are submitted so late

that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Pet. App. 97a. The Florida Supreme Court accordingly directed the Secretary of State to accept untimely manual recount returns through 5:00 p.m. on November 26, 2000—twelve days after the statutory deadline—and directed the Secretary to include in her certifications all manual recount returns received by that date. *Id.* at 99a.

Manual recounts thus occurred after November 14 to varying degrees in Broward, Palm Beach, and Miami-Dade counties, and results from Broward County's manual recount were submitted to the Secretary of State on November 25. Pet. App. 116a. On November 22, the Miami-Dade County Canvassing Board unanimously decided to halt its manual recount, after counting only 136 of the 635 precincts in the county. *Id.* at 59a. The Palm Beach Canvassing Board began a manual recount, but did not complete its work by the 5:00 p.m. November 26 deadline set by the Florida Supreme Court. The Board instead submitted partial returns at that time and later supplemented them. *Id.* at 60a.

As of 5:00 p.m. on November 26, the tabulated results showed *for the third time* that Governor Bush had received the most votes for President. Accordingly, the Secretary of State certified those returns and the Election Canvassing Commission declared Governor Bush the winner of Florida's presidential election.

### C. This Court's Prior Decision

On November 22, Governor Bush filed a petition for certiorari seeking review in this Court of the Florida Supreme Court's November 21 decision. On December 4, 2000, this Court issued a unanimous *per curiam* opinion, vacating that decision and remanding the case "for further proceedings not inconsistent with this [Court's] opinion." *Bush*, slip op. at 6. This Court decided "to decline *at this time* to review the federal questions"

raised by petitioners because of uncertainty as to the grounds for the decision below. *Id.* (emphasis added). But this Court cautioned the court below against overriding the Florida Legislature's "wish" to secure for Floridians the benefits of the "safe harbor" accorded by 3 U.S.C. § 5, *see Bush*, slip op. at 6, and expressly directed the court below to explain "the extent to which [it] saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2" and "the consideration [it] accorded to 3 U.S.C. §5." *Id.* at 7. The Florida Supreme Court has not yet issued an opinion in that case on remand.

### D. The Election Contest

Candidates and voters are permitted by Florida law to "contest" the certification of an election by filing a complaint in circuit court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2), and involve judicial proceedings, including formal pleadings, discovery, and trial. Fla. Stat. § 102.168(3)-(8).

On November 27, 2000, the day after Governor Bush was certified as the winner of the November 7 presidential election in Florida, the Gore respondents filed a complaint in the Circuit Court for Leon County to contest that certification. Like the earlier protest actions, the complaint sought relief primarily with respect to a handful of heavily Democratic counties. The complaint alleged that the results certified by the Secretary of State improperly (1) failed to include a partial manual recount of ballots in Miami-Dade County; (2) failed to include untimely results of a manual recount in Palm Beach County; and (3) included the results from Nassau County's original machine count of ballots. The Gore respondents further asked the court to evaluate ballots in Palm Beach County and Miami-Dade County that the Gore respondents contended were not properly counted. In response, Governor Bush and Secretary Cheney ar-

gued *inter alia* that the relief sought by the Gore respondents would violate federal statutes and the United States Constitution. *See, e.g.*, Pet. App. 110a-117a, 120a-121a, 125a-126a.

On December 4, 2000, following a two-day trial, the circuit court rejected the Gore respondents' claims. The court found that there was no credible evidence establishing a reasonable probability that the Florida election results would be different if the requested relief were granted to the Gore respondents; that the Miami-Dade County Canvassing Board did not abuse its discretion in deciding not to perform a complete manual recount; and that the Palm Beach County Canvassing Board did not abuse its discretion in determining that the 3,300 ballots the Gore respondents sought to have reviewed again by the circuit court were non-votes. Pet. App. 61a-62a. The circuit court also found that the Palm Beach County "process and standards [for evaluating ballots] were changed from the prior 1990 standards," and noted that these changes were "perhaps contrary to Title III, Section (5) of the United States Code." *Id.* at 62a-63a.[1]

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[1] That factual finding was supported by substantial evidence presented during the trial below. For example, Judge Burton, Chairman of the Palm Beach County Canvassing Board, admitted that when the first ballots were subject to a sample manual recount on November 11, the canvassing board used its existing 1990 guidelines mandating that if a "chad . . . is fully attached, bearing only an indentation, [it] should not be counted." Trial Transcript, *Gore v. Harris*, No. 00-2808, at 238, 239, 240 (Fla. Cir. Ct. Dec. 2-3, 2000) ("Trial Tr."). Judge Burton testified that during the sample recount, the canvassing board changed to the "Sunshine Rule," *id.* at 240 (defining "Sunshine Rule" as "any light that was coming through any indentation on a ballot"), and then back again to the 1990 standard. *Id.* at 242. According to Judge Burton, the Board eventually abandoned *any* semblance of a *per se* rule. *Id.* at 245. Ultimately, a court or-

The circuit court expressed its concern that implementing a different standard for evaluating ballots during the contest proceeding would create a two-tier system not only within certain counties, but also with respect to other counties. Citing an opinion letter from Florida's Attorney General, the circuit court explained that such a system "would have the effect of treating voters differently depending upon what county they voted in .... [thereby raising] legal jeopardy under both the United States and state constitutions." Pet. App. 63a (citation omitted).

The evidence before the trial court revealed that the lack of any specific guidance for determining whether a particular ballot reflected a vote, *see* Fla. Stat. § 101.5614(5), led to wide discrepancies across and within Florida counties regarding the evaluation of ballots in a manual recount. Indeed, standards often varied even from one canvassing board member to another in the same county.[2]

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dered the canvassing board to consider "dimpled" chads even though the pre-existing 1990 policy precluded treating mere indentations as valid votes, *see Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL 00-11078-AB, 2000 WL 1728721 (Fla. Cir. Ct. Nov. 22, 2000), and even though a sample ballot provided in each voting booth instructed voters to: "check your ballot card to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[2] For example, according to a monitor in Miami-Dade County, there were four different standards applied by three different canvassing board members. Judge King determined that every "dimpled or pregnant chad . . . was a vote," Trial Tr. 497, whereas Judge Lehr looked for any indication of chad separation. *Id.* at 497, 499. Supervisor Leahy switched from looking for a "two point" hanging chad during the sam-

The evidence before the trial court also revealed the substantial degradation of ballots caused by manual handling. Ballot fragility was most plainly evident in Miami-Dade, which attempted to undertake a selective recount during the judicially-extended protest period. Miami-Dade used machines in the first instance to segregate "no vote" ballots. Trial Tr. 479. That process demanded the constant stopping and starting of the ballot-counting machines, and frequent manual treatment of ballots was necessary to retrieve non-votes, clear jams, and process the ballots. *Id.* at 484, 485. The rough handling led to approximately *1,000 chads per day* being dislodged from ballots. *Id.* at 506.

### E. The Florida Supreme Court's Decision

On December 8, 2000, a 4-3 majority of the Florida Supreme Court reversed the circuit court and announced the creation of a complex, non-uniform, and novel system for further manual recounts. The majority held that canvassing board decisions were not "to be accorded the highly deferential 'abuse of discretion' standard" after the protest period. Pet. App. 13a. Despite that ruling, and without review of the ballots, the majority directly *ordered* the inclusion of (1) 176 or 215 net votes for the Gore respondents as "identified" by the Palm Beach Canvassing Board,[3] and (2) 168 net votes for the Gore respondents "identified in the partial recount" by the Miami-Dade Canvassing Board but not submitted for certification. Pet. App. 3a-4a. All of these ballots were

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ple recount, *id.* at 499, to the "Sunshine Rule" described above. *Id.* at 497. These standards also differed from the standards used in Palm Beach County.

[3] The court directed the trial court to determine whether 176 or 215 was the correct number. Pet. App. 4a n.6.

counted *after* the November 14 deadline.[4] Furthermore, the majority ordered the *trial court* "to immediately tabulate by hand the approximately 9,000 Miami-Dade ballots," *id.* at 33a, yet ordered the *supervisors of elections and canvassing boards* "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith," *id.*[5]

The majority opinion did not acknowledge or respond to this Court's December 4 opinion vacating the November 21 decision, nor did it explain how its newly fashioned directives complied with 3 U.S.C. § 5's time limit. The majority conceded, however, that the "need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law," Pet. App. 31a, and that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, *the Florida election law scheme must yield in the event of a con-*

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[4] These votes were thus untimely under the statutory deadline, and were included only by virtue of the supreme court's improper reliance on its vacated November 21 opinion.

[5] The majority's decision thus has the effect of subjecting Miami-Dade County to an arbitrary double standard. The results from a *full* manual recount of all ballots from 20 percent of its precincts (the most heavily Democratic, in which Vice President Gore received about 75% of the vote) were ordered included in the totals, but the ballots from the remaining 80 percent of the county's precincts (many of which are more heavily Republican) would have only "undervotes" manually counted. Chief Justice Wells, in his dissent, expressed concern about this effect, because "not to count all of the ballots if any were to be recounted would plainly be changing the rules after the election and would be unfairly discriminatory against votes in the precincts in which there was no manual recount." Pet. App. 44a.

*flict*." *Id.* at 16a n.11 (emphasis added). The court nonetheless created and imposed a novel recount plan that could not be completed in a timely and orderly manner and that would, by definition, conflict with 3 U.S.C. § 5. *See* Pet. App. 32a n.21 ("we agree that practical difficulties may well end up controlling the outcome of the election"); *id.* at 56a (Harding, J., dissenting) (majority "provid[ed] a remedy which is impossible to achieve and which will ultimately lead to chaos").

Nor did the majority explain how its judgment could be reconciled with the constitutional and federal law claims raised by petitioners below. *See, e.g.*, Pet. App. 109a-110a (equal protection and due process); Pet. App. 110a (Article II and 3 U.S.C. § 5). As Chief Justice Wells wrote in dissent, Florida's "[c]ontinuation of [a] system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns . . . ." Pet. App. 43a-44a. He also concluded that directing the trial court to conduct a manual recount of the Miami-Dade County ballots violates Article II of the federal Constitution, in that "neither th[e Florida Supreme] Court nor the circuit court has the authority to create the standards by which it will count the undervoted ballots." *Id.* at 45a. Chief Justice Wells also expressed concern that "in a presidential election, the Legislature has not authorized the courts of Florida to order partial recounts, either in a limited number of counties or statewide," *id.* at 46a, and that "there is uncertainty as to whether the Florida Legislature has even given the courts of Florida any power to resolve contests or controversies in respect to presidential elections." *Id.* at 49a. In addition, Chief Justice Wells cautioned that "manual recounts by the canvassing board[s] are constitutionally suspect." *Id.* at 43a n.28.[6]

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[6] Chief Justice Wells further noted that "[a] continuing problem with these manual recounts is their reliability. It only stands to reason that many times a reading of a ballot by

Although the majority announced that "every citizen's vote be counted whenever possible," Pet. App. 17a, and that it was the Florida Supreme Court's duty to "see that every citizen's vote be counted," *id*. at 17a n.12, the majority held that "a final decision as to the result of the statewide election should only be determined upon consideration of the legal votes contained within the undervote or 'no registered vote' ballots of all Florida counties, as well as the legal votes already tabulated." *Id*. at 18a. As Chief Justice Wells pointed out in his dissent, the majority ignored the fact that "overvotes" as well as "undervotes" result in a vote not being counted. *Id*. at 38a-39a n.26 (Wells, C.J., dissenting) ("It seems patently erroneous to me to assume that the vote-counting machines can err when reading undervotes but not err when reading over-votes.").[7]

The majority directed the trial court "to enter such orders as are necessary to add any legal votes to the statewide certifications," Pet. App. 33a, and instructed

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a human will be subjective [and] [t]his subjective counting is only compounded where no standards exist or, as in this statewide contest, where there are no statewide standards for determining voter intent by the various canvassing boards, individual judges, or multiple unknown counters who will eventually count these ballots." Pet. App. 47a-48a.

[7] The majority's reasoning about "undervotes," appears to be that any mark on a ballot—such as a dimpled indentation—reflects an intent to vote, even if it is not counted by a machine. If that premise is accepted, then all of the machine-counted votes would also have to be examined manually so that ballots that include two "votes" for President can be excluded from the totals. The majority failed to address this logical extension of its reasoning, which, as the evidence before the trial court demonstrated, actually occurred. Trial Tr. 512-13 (witnessing instances where machine-counted vote included in totals also contained a "dimple vote" for another candidate).

that during the recounts, the standard to be applied in determining whether a vote is "legal" is whether there is a "clear indication of the intent of the voter." *Id.* at 34a (citing Fla. Stat. § 101.5614(5)). The majority provided no further guidance to the trial court, refusing to make provision for, among other things, "the qualifications of those who count," "whether a person may object to a counter," "what standards are used in the count," "the effect of differing intra-county standards," or "how one objects to the count." *See id.* at 48a (Wells, C.J., dissenting). Chief Justice Wells expressed his concern that the majority's prolongation of "this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis." *Id.* at 35a.[8]

In the wake of the majority's decision, the trial court implemented the supreme court's mandate by issuing orders near midnight on December 8 regarding how the recount would proceed. It ordered that by 8:00 a.m. December 9, 64 county canvassing boards were to begin segregating their "undervotes" with a goal of completing a recount by 2:00 p.m. on Sunday, December 10. Hearing Tr. 5, 7, 9 (attached to Petitioners' Supplemental Mem. In Support Of Emergency Application, No. 00A-504 (filed Dec. 9, 2000)). The trial court did not establish any uniform, statewide method for identifying and segregating undervotes, nor did it provide any instruction to avoid double counting previously counted ballots. Instead, it merely ordered each canvassing board to develop "some indication of the protocol purported or proposed" to segregate undervotes by noon on Saturday,

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[8] Both dissents also pointed out that the majority's decision departs from the law as it existed on November 7. *See* Pet. App. 35a (Wells, C.J., dissenting) (majority's decision "has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at 55a (Harding, J., dissenting) ("the majority has established standards for manual recounts—a step that this Court refused to take in an earlier case").

December 9, 2000. *Id.* at 8. The trial judge instructed that the recount was to be conducted by some combination of judges, canvassing board employees, and "such other public officials" as the various counties deemed necessary in light of the schedule. *Id.* at 8-9. The trial court called upon judges in other counties to assist in the recount in order "to give *some* objectivity and partiality [sic] to the process itself, to reduce, to the extent possible any objections to the manner in which [the recount] was conducted." *Id.* at 9 (emphasis added). The trial court, however, expressly forbade objections to the vote recounts as they occurred, although observers could take notes and (in theory only) submit written objections later. *Id.* at 8-9.

The events that occurred in the wake of the majority's decision thus closely mirrored Justice Harding's warning: "Even if such a recount were possible, speed would come at the expense of accuracy, and it would be difficult to put any faith or credibility in a vote total achieved under such chaotic conditions." Pet. App. 55a (dissenting opinion).

## SUMMARY OF ARGUMENT

I. The new standards, procedures, and timetables established by the Florida Supreme Court for the selection of Florida's presidential electors are in conflict with the Florida Legislature's detailed plan for the resolution of election disputes. The court's new framework thus violates Article II, § 1, cl. 2 of the United States Constitution, which vests in state legislatures the *exclusive* authority to regulate the appointment of presidential electors. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

A. The multiple ways in which the Florida Supreme Court's decision has cast aside provisions of the statutory scheme governing elections also constitute violations of Article II, § 1 because they usurp the legislature's exclusive authority. These judicial departures include: the elimination of the Secretary of State's author-

ity to maintain uniformity in application of the election laws; disregard for the statutory provisions that require manual recounts to include "all" ballots; the substitution of courts for canvassing boards in determining ballot validity; and the imposition of *de novo* judicial review by courts of canvassing boards' certified judgments.

B. Because state constitutions cannot alter Article II's direct and exclusive grant of authority to legislatures, and because the Florida Legislature did not delegate to it the power to do so, the Florida Supreme Court did not have jurisdiction or authority to decide this case. The Florida Legislature has granted jurisdiction over election contests only to Florida circuit courts.

C. The Florida Supreme Court's decision repeatedly relies on its November 21 decision, which this Court had already vacated, and the consequences of that decision. This magnifies the Article II violations that the November 21 decision produced.

II. The Florida Supreme Court's revision of Florida's statutory system for resolving election disputes also violates 3 U.S.C. § 5, which gives conclusive effect to determinations of controversies or contests concerning the appointment of electors only if those determinations are made "pursuant to" "laws enacted prior to" election day and within the federally mandated December 12 deadline.

Section 5 is intended to "assure" States of "finality" in the determination of their presidential electors, and this Court has already cautioned the Florida Supreme Court "against any construction of [state law] that Congress might deem to be a change in the law." *Bush v. Palm Beach County Canvassing Board*, No. 00-836, slip op. at 6.

Although the court below acknowledged to the "stringent calendar controlled by federal law," Pet. App. 16a n.11, it ignored federal law altogether by imposing multiple changes on the statutory system for resolving

election disputes. Among other things, the Florida Supreme Court provided an extraordinary remedy that has no statutory basis, and its novel exposition of the contest provision essentially reads out other more specific provisions in Florida's Election Code.

III. The new set of manual recount procedures concocted by the Florida Supreme Court is arbitrary, standardless, and subjective, and will necessarily vary in application, both across different counties and within individual counties, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

A. The Equal Protection Clause forbids the state from treating similarly situated voters differently based merely on where they live. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Yet the various manual recounts ordered by the Florida Supreme Court will *necessarily* result in such differential treatment in violation of the Equal Protection Clause. The lack of uniform standards for counting "votes" means that voters who cast identical ballots in different counties will likely have their ballots counted differently. This is also true of the completed manual recounts that the Florida Supreme Court has compelled, or attempted to compel, the Secretary of State to include in the certified election results.

The new multi-tier recount scheme ordered by the court imposes several inherently different standards that also violate equal protection guarantees. It includes all newly identified "votes" from about one-fifth of the precincts in Miami-Dade County, but only orders the recount of a fraction of ballots identified as "under-votes" from the other 80 percent of the county. And, while solicitous of under-votes, the decision does nothing to account for "over-votes" in the machine count (which are also recorded as non-votes). Furthermore, by adopting varying levels of deference to the conclusions of different county canvassing boards, the court introduces even greater disparities in treatment.

B. Due process requires the application of clear and consistent guidelines based on prospective rules. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Yet the Florida Supreme Court's new election procedures are retroactive and anything but clear and consistent. In fact, they substantially deviate from practices established before election day. Changing the legal status of ballots after the election on the basis of selective, subjective, standardless, and shifting methods of manual recounting is fundamentally unfair. *See Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995). Under the particular circumstances imposed by the court for the manual recounts, due process is further compromised because ballots are inevitably degraded during repeated machine inspection of ballots to segregate under-votes and by the manual recounts themselves. Moreover, the prescribed procedures adopted to implement the Florida Supreme Court's judgment deny parties any meaningful opportunity to object to subjective ballot determinations or to receive judicial review of those determinations. Finally, the Florida Supreme Court has also fundamentally changed the meaning and legal consequences of vote certification.

## ARGUMENT

### I. The Decision Of The Florida Supreme Court Violates Article II Of The Constitution

The Constitution expressly grants the legislatures of the several States plenary power over the appointment of electors, directing that electors shall be chosen "in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, §1, cl. 2. As this 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, 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." *Bush*, slip op. at 4-5 (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*, slip op. at 4. By rewriting that statutory scheme—thus arrogating to itself the power to decide the manner in which Florida's electors are chosen—the Florida Supreme Court substituted its judgment for that of the legislature in violation of Article II. Such a usurpation of constitutionally delegated power defies the Framers' plan. The Florida Legislature never authorized judicial revision of the legislative structure it so meticulously conceived. Indeed, notwithstanding the rote incantation by a majority of the court below of the paramount role of the state legislature in this field, the court's key conclusions were simply pronounced without even the pretense of any statutory support.

This Court has recognized that the legislature's Article II power of appointment is exclusive. *See McPherson*, 146 U.S. at 34-35 ("'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.'") (quoting with approval S. Rep., 1st Sess., 43d Cong., No. 395). Indeed, the Constitution contains provisions that vest responsibility in the States *qua* States, *e.g.*, U.S. CONST. art. I, § 8, cl. 16, as well as provisions that, as here, single out the particular branch of state government charged with exercising certain duties integral to the functioning of the federal government, *e.g.*, U.S. CONST. art. I, § 2, cl. 4. In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Framers' decision to vest specific authority in state legislatures

must be understood to be exclusive of state executive or judicial power to prescribe the "manner" of appointing electors. Thus, in the absence of a clear and express delegation of the appointment power by the legislature to a coordinate branch of government, the Constitution bars the exercise of that power by any other branch.

### A. The Decision Below Overrides Numerous Provisions Of Florida Election Law

The decision below overrides numerous provisions of the detailed and specific statutory scheme enacted by the Florida Legislature. The resulting, judicially promulgated election scheme not only flies in the face of the specific language of the contest statute but also renders all but irrelevant the detailed statutory provisions addressing when and how canvassing boards may conduct manual or other recounts—including the requirement that any such recount must include "all ballots"—and the Secretary of State's duty and authority to ensure *uniformity* in the operation of the election laws by issuing opinions that are binding on the canvassing boards, the only bodies statutorily authorized to "count" votes. That new, judicially promulgated system is a plain violation of Article II.

First, assuming *arguendo* that the contest statute even applies to presidential elections, the court below simply disregarded the plain language of that statute.[9]

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[9] The § 102.168 remedy by its terms does not extend to presidential elections, and it certainly does not authorize a contest action by a candidate for President (rather than by an unsuccessful candidate for presidential elector). Florida law instead establishes separate procedures for certifying the election of presidential electors and for replacing electors when appropriate, but makes no provision for a "contest" of the presidential election. *See* Fla. Stat. §§ 103.011, 103.021(5). The court's arbitrary extension of § 102.168 to a

As is clear from the face of the contest statute, what is "contested" is "the *certification*." Fla. Stat. § 102.168(1) (emphasis added). The deadline for filing a contest action runs from "the date the last county canvassing board . . . certifies the results of the election being contested," *id.* at § 102.168(2); in any such action "the proper party defendant" "shall be" the canvassing board. *Id.* at 102.168(4). It would be hard to find language that more clearly indicates the legislature's intent to provide for judicial *review* of the certification decision, as opposed to a *de novo* examination of each purportedly disputed ballot without regard to the certified judgment of the body whose statutory duty is to count the votes. Not surprisingly, until the decision below, Florida law had long recognized that there is a "presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). Specifically, certified election returns are "regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld." *Id.* at 268-69 n.5 (quotation omitted). Indeed, to overcome that strong presumption, an election challenger must show, as a threshold matter, that there has been "substantial noncompliance with the election statutes." *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

By contrast, the decision below treats a contest as a *de novo* proceeding in which courts may treat the judgments of the canvassing boards and of the Secretary of State—including certification—as purely hortatory pro-

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presidential "contest" is therefore itself a violation of Article II.

nouncements.[10] Those judgments thus become legally meaningless, since the circuit court *must* adjudicate the dispute without regard to any reasons, however compelling, that the canvassing boards or the executive may have had for certifying results as they did. Plaintiffs in the position of the Gore respondents thus need not "contest" the "*certification*," for the court will—indeed must—simply *ignore* it. In fact, under the ruling below, *certified* election returns are treated with *less* dignity than returns that have not been certified by either the county canvassing boards or the state election commission. While the *certified* election results from *all* other counties (except Broward and Volusia, where manual recounts produced over 700 additional Gore votes) are presumed *incorrect* and will be subject to *de novo* judicial review, the decision below requires that the *uncertified* results of manual recounts in Palm Beach County (adding 176 or 215 Gore votes) and Miami-Dade County (with 168 additional Gore votes based solely on partial results) be certified without *any* judicial review of their correctness (or any review of whether the certified results from these counties, in fact, "rejected legal votes").

The consequence of the court's ruling is nothing less than the evisceration of the internal coherence of the legislature's design. The legislature provided for canvassing boards, not courts, to count votes. Indeed, even the

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[10] The court attempted to justify its decision to ignore the certification, and its imposition of "de novo" review, with the observation that, because "a protest is not a prerequisite for a contest," "[n]o appellate relationship exists between a 'protest' and a 'contest.'" Pet. App. 12a-13a. Certification, however, quite clearly *is* a prerequisite for a contest, and the statute provides no basis for ignoring certification merely because no "protest" need ever have been lodged before the election results were certified.

statute from which the court below claimed to derive its purportedly uniform "intent of the voter" standard—a statute that by its plain terms applies only to the initial canvass of votes when a ballot is *spoiled* or *damaged*, *see* Fla. Stat. § 101.5614(5)—expressly provides that whether a ballot reflects a "clear indication of the intent of the voter" is a determination to be made *"by the canvassing board*." *Id.* (emphasis added). *See also* Fla. Stat. §102.166(7)(b) ("If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented *to the county canvassing board* for it to determine the voter's intent.") (emphasis added). By revoking the canvassing board's legislatively conferred authority and ordering the *circuit court* to "commence the tabulation of the Miami-Dade ballots" and conduct its own *de novo* examination of which ballots are valid, Pet. App. 34a, the court below overrode the will of the legislature to repose responsibility for examining ballots in election officials with presumed expertise in this field (subject to the ultimate interpretive authority of the Secretary of State), and thereby violated Article II, § 1. *See* Pet. App. 45a (Wells, C.J., dissenting) ("Directing the trial court to conduct a manual recount of the ballots violates article II, section 1, clause 2 of the United States Constitution, in that neither this Court nor the circuit court has the authority to create the standards by which it will count the under-voted ballots").

Moreover, the legislature clearly anticipated that some elections might be close, and clearly provided rules on how to deal with that situation. In particular, the legislature has never prescribed manual recounts as the exclusive, or even preferred, methodology for discerning the intent of voters or for distinguishing "legal" from "illegal" votes. Instead, when an initial count of the election results demonstrates that the margin of victory for a candidate is less than one-half of one percent, an *automatic* recount must take place, unless the losing candidate does not desire such a recount. *See* Fla. Stat. § 102.141(4). A manual recount *may* be ordered at the

protest stage, subject to detailed requirements—including the requirement that "all ballots" must be counted when such a recount is ordered. *See* Fla. Stat. § 102.166. Under the scheme devised by the court below, however, there literally is no point in the safeguards provided for such recounts at the protest stage. Indeed, there is no point in any candidate or canvassing board *ever* going through the protest process or in conducting a manual recount. To achieve the result reached by the court below, the legislature might as well have dispensed with the bulk of the election code and simply provided for the shipment of all ballots to the circuit court immediately following the certification of the election results. Indeed, if Florida law could plausibly be read in the manner announced by the court below, the court's own earlier efforts—merely two weeks ago—to extend the certification deadline so as to permit additional manual recounts are completely inexplicable.

The Florida Supreme Court also approved the inclusion in the statewide election results of ballots (such as those from Broward County) that were counted as valid votes on the basis of mere "dimples" or indentations on the ballot. The Florida legislature has *never* provided that dimpled ballots should be counted as valid votes. To the contrary, counting "dimpled" ballots as valid votes violates the very statute relied on by the court below, Fla. Stat. § 101.5614(5), which requires "a *clear indication* of the intent of the voter as determined by the canvassing board" (emphasis added). Although the election code contemplates a certain level of discretion in how canvassing boards may elect to count votes, it also provides expressly for the means for cabining that discretion and binding those boards to a *uniform* counting standard: The Secretary of State is the "chief election officer of the state" and her duty is to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Florida Supreme Court's crazy-quilt ruling, by contrast, orders selective and partial recounts

conducted pursuant to varied and ever-shifting standards, thus expressly *mandating* a lack of consistency—in direct contravention of the legislature's unequivocal directive to achieve uniformity in the operation of Florida's election laws.[11]

Before the decision below, no statute in Florida had ever been interpreted as establishing the principle that "it is absolutely essential" to conduct a manual recount of all "undervotes" to determine whether a voter's intent can be divined from them. *Id*. at 15a. In every statewide election there are tens or hundreds of thousands of ballots that do not register votes and yet are not manually recounted. But if that recount principle were in fact an established fixture of Florida law, it would be hard to escape the conclusion that *all* ballots must be counted in the same manner in order to determine *each* voter's true "intent." For example, once the court believed, however erroneously, that the outcome of the election was "in doubt," it was irrational to require manually counting "undervotes" but not "overvotes"—the court's ruling would require courts to ignore the vote of anyone who clearly marked his ballot for a candidate and also wrote in the same candidate, resulting in his vote being disqualified as an "overvote" even though his intent is unmistakable. The legislative safeguards of § 102.166 (5)(c)—which provides that if a county canvassing board elects to conduct a manual recount, it "shall" "[m]anually recount *all* ballots" (emphasis added)—are plainly designed to avoid the dangers of selective, arbi-

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[11] Because the Florida legislature has empowered the canvassing boards to determine what constitutes a "clear indication" of voter intent, the decision below also substitutes judicially mandated standards for standards that the canvassing boards had issued pursuant to legislatively delegated authority. *See* Stay App., Exh. J (Palm Beach County Guidelines providing that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote").

trary and incomplete results inherent in a partial manual recount. Indeed, because the legislature imposed "'a mandatory obligation to recount all the ballots in the county'" *before* certification in those cases in which a manual recount is appropriate, Pet. App. 26a), it is inconceivable that the legislature intended a partial recount to suffice for *overturning* those certified results.[12]

It is no answer to say that § 102.166's requirement that a manual recount must include *all* ballots has no applicability in a contest action under § 102.168. As Chief Justice Wells recognized, "it is only in section 102.166 that there are any procedures for manual recounts which address the logistics of a recount," and thus the two sections must be read consistently with one another—particularly where, as here, there was an initial protest filed in a county pursuant to § 102.166 and a subsequent contest of that county's return pursuant to §102.168. *See* Pet. App. 42a-43a (Wells, C.J., dissenting).

The decision below therefore ushers in a regime that cannot possibly be supported by any reasonable reading of the contest statute or any other provision of the Florida Election Code. The authority to count votes, entrusted by the Legislature to county officials subject to limited judicial review, has now been seized by the state judiciary, which *alone* now has authority to count votes and declare the election winner. A two-step process—administrative action followed by deferential judicial review—has been transformed by fiat into a unitary ju-

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[12] Under the new legislative scheme adopted by the court below, an unrepresentative 20 percent of the ballots in Miami-Dade County will have been manually recounted and included in the certified total, whereas the remaining 80 percent (with the exception of the purported "undervotes") will not have been manually recounted at all. (As discussed below, this also constitutes a patent violation of the Equal Protection Clause.)

dicial examination of the ballots—one in which the circuit court may simply commandeer any county resources it might need to conduct its own counts. Indeed, because those counts have been untethered from the minimal statutory moorings that the legislature prescribed for vote-counting—such as bipartisan membership in counting boards—subjective concepts of equity jurisprudence are the only safeguard on which petitioners could rely to expect a fair evaluation of the disputed ballots. Especially given that there is no objective statutory standard—or, even now, any judicially created standard—for determining which partially perforated or "dimpled" ballots evince clear voter intent and are therefore "legal votes," there is no basis for believing that that necessarily *ad hoc* process would produce a result more reliable than that produced by the certified election results.

### B. Article II Precludes The Florida Supreme Court's Exercise Of Jurisdiction

The Supreme Court of Florida lacked jurisdiction, as a matter of federal law, to enter the judgment below. Under Florida law, assuming *arguendo* that the legislature has authorized contest actions in presidential elections, only the circuit court possessed legislatively conferred jurisdiction to resolve the Gore respondents' claims. *See* Fla. Stat. § 102.168(1) (permitting election certifications to be "contested in the circuit court"); *id.* § 102.168(8) (authorizing "[t]he circuit judge to whom the contest is presented" to resolve contests).[13]

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[13] Although petitioners' counsel responded to an oral argument inquiry in a manner expressing acceptance of that court's jurisdiction, petitioners promptly clarified their position in their post-argument brief in the court below. That brief noted that Article II confers sole authority on state legislatures to determine the manner of appointing electors, and that the legislature's authority "'cannot be taken from them

By contrast, the Florida Legislature granted *no* such jurisdiction to the Florida Supreme Court—a point seemingly recognized by the court below, which rationalized its authority to overturn the circuit court's judgment on the sole basis of the Florida Constitution. Pet. App. 1a (citing FLA. CONST. art. V, § 3(b)(5)); *see also Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000) ("appellate jurisdiction of the courts of Florida is derived entirely from Article V of the Florida Constitution"). Article II, § 1 of the United States Constitution, however, does not permit state constitutions to circumscribe in any way a state legislature's selection of the manner of choosing presidential electors. *See McPherson*, 146 U.S. at 35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, *and cannot be taken from them or modified by their state constitutions*.") (emphasis added) (quoting with approval Senate Rep., 1st Sess., 43d Cong., No. 395). Thus, because the Florida *Legislature* has conferred no role in reviewing contests over the results of a presidential election on the Florida Supreme Court, the

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or modified by their State constitutions . . . .'" Pet. App. 102a n.1 (citations omitted). As petitioners explained, "equitable relief cannot lie because . . . 'the original and appellate jurisdiction of the Courts of Florida is derived entirely from article V of the Florida Constitution, *not* [from] the Florida legislature.'" *Id.* at 104a-105a (citation omitted). For that reason, the court below had no substantial basis for asserting that all parties "agree[d]" to that court's jurisdiction. *Id.* at 1a n.1. Indeed, even if petitioners had agreed to—rather than expressly challenged—the court's jurisdiction, that would not provide an adequate state ground for the court's exercise of jurisdiction in this case, because under Florida law, "'the parties cannot stipulate to jurisdiction over the subject matter where none exists.'" *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (quoting *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994)).

court below lacked authority to enter its judgment, and the judgment below must accordingly be reversed.

This Court confronted a similar question in *Leser v. Garnett*, 258 U.S. 130 (1922), where it rejected a claim that several state legislatures, owing to provisions in their respective state constitutions, lacked the power to ratify the Nineteenth Amendment. The Court held that the state constitutions did not limit the legislatures' constitutionally delegated power, explaining that "the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id*. at 137. *See also Hawke v. Smith*, 253 U.S. 221, 227 (1920) (rejecting state constitutional limits on legislature's ratification power and concluding "[i]t is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed"). The Florida legislature's Article II power thus transcends any limitations sought to be imposed by the Florida Constitution.

Contrary to the Gore respondents' assertion, the supreme court's reliance on the state constitution as a purported basis for jurisdiction cannot be justified on the grounds that the courts must "assume that the Legislature passed [the contest statute] with knowledge of the prior existing laws." Stay Opp. Br. 12 (citation omitted). That principle of interpretation was not invoked by the court below, and in any event cannot be tortured into the proposition that the contest *statute* incorporates "the ordinary accouterments of appellate review of circuit court decisions." *Id*. That canon of construction, whatever it may mean in other circumstances, cannot mean that the legislature can simply be deemed to have granted to the state supreme court authority to review contest proceedings in cases where Article II must be observed. Because the legislature's power in this area is

"exclusive[]," *McPherson*, 146 U.S. at 27, there is no reason to suspect the legislature intended its statutory scheme to be "supplemented" with appellate review provisions it chose *not* to include in the statute itself. It would amount to a significant erosion of Article II if that grant of plenary authority to state legislatures could be deemed to have been delegated *sub silentio*.

In sum, the court below plainly altered the "manner" of appointing electors. The court was constrained by Article I, § 2 to follow the statutory scheme established by the legislature, but failed to do so, choosing instead to substitute a scheme of its own devise. Such an unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it routine "judicial review" of a contest proceeding.

### C. The Florida Supreme Court's Decision Is Improperly Predicated On Its Now-Vacated Opinion Of November 21, Perpetuating Its Article II Errors

Although this Court vacated the Florida Supreme Court's November 21 decision in part based on reservations concerning that opinion's compliance with, and consideration of, Art. II, § 1, cl. 2 of the United States Constitution, *Bush*, slip op. at 7, the decision below expressly rests—without explanation—on that earlier flawed decision. Such reliance on a prior vacated decision defies this Court's mandate, and extends the error of the November 21 decision, which was expressly predicated on the erroneous assumption that state constitutional provisions override legislatively mandated procedures for appointing presidential electors. The court's December 8 opinion thus represents an *ongoing* violation of *McPherson* and its requirement that the legislature *alone* may define the method of appointing electors.

Most prominently, the court below mandated that additional votes reflected in Palm Beach County's un-

timely returns be added to Vice President Gore's certified totals explicitly on the sole ground that the November 21 opinion "held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election." Pet. App. 29a-30a. Tellingly, the court below failed to explain how its vacated decision is still even binding let alone how it squares with this Court's December 4 vacatur and remand with instructions to consider and follow federal law. *Bush*, slip op. at 7. In relying on its prior vacated decision without justification and without reconsideration, the Florida Supreme Court has flouted the mandate of this Court.

For example, because the Florida Supreme Court's November 21 decision has been vacated, the Secretary's alternate certification of a 930-vote lead for Governor Bush should be in effect before any contest recounts begin, but that is clearly not contemplated by the court below. On several separate occasions, the court below explicitly articulates a much smaller margin between the candidates, and assumes votes counted by the county canvassing boards after the statutory deadline had passed as valid votes for Vice President Gore. Indeed, two of the "errors" committed by the circuit court were in failing to count as valid votes "(1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board." Pet. App. 3a-4a. These votes could only *possibly* count if the court's November 21, 2000 holding were still binding.[14] Moreover, the

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[14] To be clear, the court below did not hold that the circuit court erred in merely failing to examine the Palm Beach and Miami-Dade County ballots and determine whether they were legal votes or not—such a judgment would not necessarily conflict with this Court's prior mandate—but in failing

court below also implicitly countenances the inclusion of the returns from Broward County's manual recount conducted after the Florida statutory deadline but before the judicially-created November 26 deadline. Pet. App. 30a.

## II. The Florida Supreme Court's Decision Conflicts With 3 U.S.C. § 5

Congress has provided in 3 U.S.C. § 5 that "any controversy or contest concerning the appointment" of a State's electors should be resolved "pursuant to" "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). Two significant benefits follow from State compliance with the terms of §5. First, "it creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Bush*, slip op. at 6. This alone advances the "'pervasive national interest'" in presidential elections by providing certainty and finality. *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)). It embodies the congressional judgment that rules applicable to election disputes cannot fairly be changed once the voters have gone to the polls. *See* 18

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to *automatically* include those votes as legal votes in the vote totals. Pet. App. 25a, 29a. Such conclusive deference is due a canvassing board determination—under the decision of the court below—only at the protest and not the contest stage of the proceeding. Pet. App. 13a. At the contest stage, the ballots—like the additional 9,000 Miami-Dade ballots—must be manually examined to discern voter intent, Pet. App. 32a, and any canvassing board determinations in this regard are mere "*evidence* that a ballot does or does not qualify as a legal vote." Pet. App. 28a (emphasis added). Thus, the Florida Supreme Court held that the Miami-Dade and Palm Beach County votes were properly counted at the protest stage of the recount process despite the fact that they were counted after the statutory deadline governing that process.

CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id*. ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?").

Section 5 thus creates a compact between States and Congress. By enacting laws prior to election day that seek to resolve potential controversies or contests concerning presidential electors, in accordance with its exclusive authority vested by Article II, the Florida Legislature sought to obtain for the State of Florida and its voters the protections that § 5 affords.

A second, and no-less-important, benefit of State compliance with the terms of § 5 is that it alleviates the need for Congress to intervene actively in a presidential election. Indeed, Congress enacted § 5 precisely to avoid a repetition of the near-cataclysmic result of its effort to resolve the presidential election of 1876. *See*, *e.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876"). Or, in the words respondents used in a prior brief to this Court: "Congress recognized that . . . it was essential to take 'this question out of the political cauldron.'" Gore Br., No. 00-836, at 24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (remarks of Rep. Browne)). There is a strong federal interest in preventing questionable applications of state law that could force Congress to arbitrate divisive electoral disputes. The very purpose of § 5 was to avoid the chaos and confusion sown in the national polity by a protracted and unresolved dispute about the results of a presidential election—even in an individual State.

If this "principle of federal law" is complied with, *Bush*, slip op. at 6, the determination of an electoral dispute is entitled to "conclusive" effect and "shall govern

in the counting of the electoral votes," 3 U.S.C. § 5. As the language and history of the statute make clear, Congress has asserted its federal role in the context of presidential elections to "assure finality" to States' determinations of disputes as long as they comply with § 5's requirements. *Bush*, slip op. at 6.

Despite this Court's recent suggestion to the Florida Supreme Court that it is not free to disregard the Florida Legislature's decision to secure for the citizens of Florida the benefits of § 5,[15] and despite the Florida court's recognition that "because the selection and participation of Florida's electors in the presidential election process is subject to a stringent calendar controlled by federal law, the Florida election law scheme must yield in the event of a conflict," Pet. App. 16a n.11, the court below has again ordered relief that fails to adhere to § 5's requirements—this time only four days before the December 12 deadline imposed by § 5. As Chief Justice Wells explained in his dissenting opinion:

> My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion.

Pet. App. 35a (Wells, C.J., dissenting). Reversal of the decision below is essential to preserve the protections that Congress sought to confer upon the States through § 5, to secure the certainty and finality of Florida's electoral process, and to ensure that Florida's electoral votes are accorded proper consideration in Congress.

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[15] In *Bush*, this Court cautioned that "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." *Bush*, slip op. at 6.

As discussed in Part I above, the Florida Supreme Court's decision announces a substantial, judicially mandated change in Florida law and thus fails to determine the election dispute "pursuant to" the laws enacted prior to November 7, 2000. The changes in Florida law announced in the court's decision are numerous.

First, and most fundamentally, the extraordinary remedy provided by the Florida Supreme Court has no statutory support. Nothing in the Florida Election Code provides for the procedure and results mandated by the Florida Supreme Court, and there is no indication that such a remedy was ever contemplated by the legislature.

Second, as noted more fully above, *see* Part I.A, *supra*, the Florida Supreme Court's novel exposition of the contest statute effectively renders superfluous the more specific provisions regarding recounts. *See*, *e.g.*, Fla. Stat. §§ 102.141(4), 102.166.[16]

Third, by ordering that the results of a partial recount in Miami-Dade County be included in the certified results, the court effectively rewrote the statutory provisions in Fla. Stat. §§ 102.166(4)(d) and 102.166(5)(c) that require that "all" ballots be counted in a manual recount.

Fourth, the court's decision flatly disregarded the Florida Election Code by authorizing courts, rather than county canvassing boards, to determine the validity of a ballot. *See* Fla. Stat. § 101.5614(5).

Fifth, the court departed from the statutory language providing county canvassing boards with discretion to determine whether to conduct manual recounts in the first place, Fla. Stat. §§ 102.166(4)(c) and (5)(a)-(c), and

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[16] The legislatively enacted statutory scheme must be read as a whole, which includes giving effect to the detailed provisions specifically governing recounts. *See* Pet. App. 39a, 42a-43a (Wells, C.J., dissenting).

instead directly ordered that manual recounts be conducted.

Sixth, the Florida Supreme Court created a new standard for determining whether a ballot should be deemed a legal vote, and included "dimpled" ballots as valid votes. Prior to the court's decision there was no such standard in Florida.[17]

Seventh, the court established a new multi-tiered standard of review in which some ballots will be reviewed by the trial court under a *de novo* standard and others will not be reviewed at all.

Eighth, the court's decision ordered that votes from Palm Beach and Miami-Dade Counties that were not submitted before either the seven-day statutory deadline (Fla. Stat. §§ 102.111 and 102.112) or the judicially fashioned November 26 deadline, must nevertheless be included in the statewide certification. The court's determination to include these votes in the final tally constitutes a further change in the law.

Finally, the Palm Beach County Canvassing Board's decision to count "dimpled" or indented chads as votes was a plain deviation from the County's prior, established written policy. The Palm Beach County guidelines on counting ballots, issued in November 1990, make clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote . . .

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[17] The judgment below is also at odds with the previous policy that the counties undertook manual recounts only because of evidence of machine error and not solely because of the alleged failure of certain voters to fully punch through their ballot cards. During oral argument before this Court in *Bush*, the Florida Attorney General's office *could not name a single instance, prior to this year's presidential election, in which manual recounts were undertaken for mere voter error*. *See* No. 00-836, Or. Arg. Trans. 39-40 (Dec. 1, 2000).

an indentation is not evidence of intent to cast a valid vote." *See* Exh. J attached to Applic. for Stay, No. 00-A504; *see also* Trial Tr. 238-39 (testimony discussing 1990 standards).[18] Despite that previously announced standard, the Board changed its approach after the November 7 election and decided to count some ballots that would not have complied with its prior policy.[19] This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day. By giving effect to that change in policy, the decision below compounds the noncompliance.

In each of these ways, the Florida Supreme Court's decision conflicts with § 5's requirements.[20] By an-

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[18] That standard of what constitutes a vote was clearly reflected in the instructions given to Palm Beach voters on election day, which stated: "After voting, check your ballot card to be sure your voting sections are clearly and cleanly punched and there are no chips left hanging on the back of the card." *Touchston v. McDermott*, No. 00-15985, 2000 WL 1781942, at *6 n.19 (11th Cir. Dec. 6, 2000) (Tjoflat, J., dissenting).

[19] The Board's decision was triggered by a judicial ruling (itself a change in the law) that the Board could not have a per se rule against counting such ballots. *See Florida Democratic Party v. Palm Beach County Canvassing Bd.*, No. CL00-11078-AB, Trial Tr. 244-47 (Fla. 15th Jud. Cir. Nov. 15, 2000).

[20] Although the Florida court's decision purports to apply state law, the court was clearly cognizant of 3 U.S.C. § 5; yet its decision ultimately misinterprets that federal law and fails to heed this Court's admonition to avoid construing the Florida statute in this context to create newly announced changes in law. When the resolution of a federal question turns on whether state law has changed or a state court has adopted a

nouncing new, post-election changes in the law, the Florida Supreme Court's decision ensures that any change in the certified election results will not be "conclusive" under §5. The decision thus lacks binding effect on the parties and on the state election officials it seeks to command, and it places Florida's 25 electors at risk, thereby frustrating the Florida Legislature's choices in establishing a statutory scheme consistent with 3 U.S.C. §5.[21] These actions also frustrate one of the ob-

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new rule of law in violation of federal constitutional norms, this Court will examine the state court's decision. *See, e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (This Court's "jurisdiction is not defeated if the non-federal ground relied on by the state court is without any fair or substantial support"; "in order that constitutional guaranties may appropriately be enforced, [this Court must ascertain] whether the asserted non-federal ground independently and adequately supports the judgment." (internal quotations and citations omitted)); *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself." (citation omitted)); *see also Michigan v. Long*, 463 U.S. 1032, 1039 n.4 (1983) ("[W]here the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."); *Terre Haute and Indianapolis R.R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 589 (1904) (to decline jurisdiction because state court relied on "untenable construction" of unconstitutional state law "would open an easy method of avoiding the jurisdiction of this Court").

[21] The court below acknowledged that "[t]he need for prompt resolution and finality is especially critical in presi-

vious objectives of both Article II and Title 3—confidence in presidential election results, which follows from assurances that elections are determined under rules in effect when the votes are cast. This Court's reversal of the Florida Supreme Court's decision is necessary to preserve these fundamental attributes of the federal and state compact embodied in § 5, a compact entered into by the Florida Legislature pursuant to its exclusive constitutional power to determine the manner of appointing Florida's electors.

## III. The Florida Supreme Court's Decision Violates Equal Protection And Due Process Guarantees

The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This unfair, new process cannot be squared with the Constitution.

### 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 con-

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dential elections where there is an outside deadline established by federal law," Pet. App. 31a, but conceded that, in light of its decision, "practical difficulties may well end up controlling the outcome of the election," *id.* at 32a n.21. The court made no effort to explain how the arbitrary and haphazard recount process it had invented could properly be conducted within the time limits established by federal law. Nor did it offer any justification for its decision to effectively override the legislature's decision to secure the benefits of § 5 for the State of Florida. Justice Harding explained the reality of the situation in his dissent by noting that the majority's remedy "is impossible to achieve and . . . will ultimately lead to chaos." *Id.* at 56a.

ception of political equality . . . can mean only one thing—one person, one vote . . . .”—“[t]he 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).

The Equal Protection Clause prohibits government officials from implementing an electoral system that gives 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, 707-12 (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”).

The new electoral system created by the Florida Supreme Court is not facially neutral, but even if it were, the disparate treatment of voters based on the counties or geographic regions in which they live would nonetheless violate the Constitution. 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.

Respondents attempts to distinguish *O’Brien*, arguing that it “stands only for the unremarkable proposition

that voters cannot be denied the right to vote solely because of their county of residence," and Florida voters, unlike the inmates in *O'Brien*, have not been "denied the right to vote altogether" on that basis. Stay Opp. at 19-20. That argument, however, ignores settled equal protection precedent, and does a significant disservice to the fundamental right to vote. As this Court has long recognized, 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.[22]

As in *O'Brien* and *Reynolds*, the necessarily disparate manual recounts ordered by the Florida Supreme Court arbitrarily treat voters differently based solely on where they happen to reside. For example, where there is a partial punch or stray mark on a ballot, that ballot may be counted as a "vote" in some counties but not others. The court's order also requires that ballots counted as part of the contest proceedings are evaluated under a different standard than ballots in other counties that have already completed manual recounts. Indeed, the "standards" used in those earlier manual recounts themselves constituted equal protection violations, since, to the extent "standards" existed at all, they varied widely from county to county, and even changed from day to day or hour to hour within a single Florida county. *See* 00-837, Pet. at 5, 11-13.

Respondents nonetheless assert that the Florida Supreme Court's so-called "standard" based on the "clear

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[22] Respondents are also mistaken in suggesting that there can be no unconstitutional vote dilution when *additional* "votes" are counted. Stay Opp. at 20-21. As the Eleventh Circuit explained in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), if some ballots are counted improperly, other citizens' votes will be unconstitutionally diluted, even though the total number of votes may increase. *Id.* at 581.

indication of the intent of the voter" represents "a uniform, statewide standard" for conducting manual recounts. Stay Opp. at 19, 22. Indeed, respondents even goes so far as to call that infinitely elastic phrase "a clear standard—one that has been in place in Florida . . . for years," and one that "[t]he Florida canvassing boards and courts have long implemented." *Id.* at 22-23. Respondents' present characterization is strikingly different from reality and the position respondents took before the state courts. The Gore respondents conceded to the Florida Supreme Court in the earlier case involving the certification deadline that "different canvassing boards have used different standards." Gore Answer Br., Nos. SC 00-2346, -2348 and -2349, at vi <http://news.findlaw.com/cnn/docs/election2000/fsc1119gorerply.pdf>.

In addition, the decision below manifestly violates equal protection by mandating the inclusion of 168 votes based on a manual recount of 20 percent of the ballots in Miami-Dade County (from predominantly Democratic precincts), while ordering that only approximately 9,000 of the remaining 80 percent of the ballots be recounted —even though many of those ballots were cast by voters in predominantly Hispanic (and Republican-leaning) precincts. This patent violation is compounded by the fact that the judgment below disenfranchises numerous voters in Miami-Dade County and elsewhere whose ballots were rejected by the machine count as so-called "over-votes" but might upon manual inspection reflect a clear intent to vote for a particular candidate. *See* Pet. App. at 38a-39a n.26 (Wells, C.J., dissenting) (emphasizing disparate treatment of over-votes).[23]

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[23] This disparate treatment of predominantly Hispanic communities in Miami-Dade County also violates §2 of the Voting Rights Act. *See* Bush Amended Br., No. SC00-2431, at 35 (Dec. 6, 2000). This Court has recognized that facially neutral changes in governmental structure that effectively discriminate against protected classes violate the Equal Pro-

The manual recount in Miami-Dade and the rest of the counties in Florida presents yet another intractable equal protection problem. The undisputed evidence at trial established that the very process of segregating undervotes from the rest of the ballots inevitably will identify as undervotes ballots that were *already counted* in the first (or second) machine counts, but not in the third pass through the machine. Trial Tr. 549 (34 precincts in Miami-Dade had more undervotes after segregating undervotes than were reported after the first recount). Votes that have already been included in the count may be counted *again*, after examination, as undervotes. Such double-counting of votes is a plain dilution of the votes of the remaining voters in violation of the equal protection clause. That equal protection violation with respect to Miami-Dade has already occurred, and would be exacerbated if more ballots were counted. Moreover, the decision below orders the rest of the counties in Florida to engage in the same sort of selective manual recount. Some "undervotes" would be segregated in that process that have already been included in the certified count, with the result that some votes would be counted and included twice.

By requiring further inconsistent and standardless recounts, the court's order guarantees disparate treatment for similarly situated voters. The equal protection violations are compounded by the fact that the court adopted a standard of "selective deference" to the decisions of the county canvassing boards. This conscious discrimination among voters on the basis of their county, or even precinct, of residence, violates the fundamental principle of equal protection that voters cannot be sub-

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tection Clause, *see, e.g.*, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967), and no less is true for changes in government operations that dilute the fundamental right to vote.

jected 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.") (citations omitted).[24]

### B. Due Process

The Florida Supreme Court's radical departure from preexisting Florida law, and its failure to provide and apply clear and consistent guidelines to govern the manual recounts, also violates the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The facts here 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).

As explained above, the Florida Supreme Court has deviated substantially from the election law and practices in place prior to election day by ordering that the manual recount occur under circumstances and standards that have never before existed in Florida law, including fundamentally changing the meaning and legal consequences of certification of election results. *See*

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[24] Respondents incorrectly assert that the one-person-one-vote rule of the Fourteenth Amendment has no application to "at-large" elections based on a "statewide vote." Stay Opp. at 21. A voting scheme that places more weight on votes from a particular county, particularly where that county is dominated by one political party, violates equal protection principles regardless of whether the election involves a "statewide" vote. *Roe*, 43 F.3d at 577, 581 (invalidating state ballot scheme in statewide elections).

Part I, *supra*. The court has therefore changed the rules yet again, and as a result, the contest is being determined by "rules" that were not in place when the votes were cast—in plain violation of the Due Process Clause. *See Logan*, 455 U.S. at 432; *Duncan*, 657 F.2d at 703; *Griffin*, 570 F.2d at 1077-79; *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970).

In *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), for example, the court of appeals held that the State of Alabama violated a group of absentee voters' First and Fourteenth Amendment rights when it departed from the State's longstanding policy of not counting unwitnessed absentee ballots. The court stated that such a post-election change in the way absentee ballots are counted violates fundamental fairness because it "would dilute the votes of those who met the requirements" and because "the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [requirements]." *Id.* at 581. Here, as in *Roe*, ballots that would not have been counted as lawful votes on election day will necessarily have their legal status changed as a direct consequence of selective, subjective, standardless, and shifting methods of manual recounting.

It cannot be seriously argued that there have not been post-election changes to the "standards" used to count votes. Since 1990, for example, Palm Beach County has had a policy against counting mere indented or "dimpled" chad as valid votes. The Chairman of the Palm Beach County Canvassing Board testified that upon commencing the sample recount, the Board used these established standards declaring that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." Trial Tr. at 239; *see also* Exh. J., Applic. For Stay, No. 00A504 (1990 policy declaring that a mere indentation "is not evidence of intent to cast a valid vote"). That understanding of what constitutes a legal vote was clearly reflected in the instructions given

to voters on election day. *See* n.18, *supra*. The county canvassing board, however, changed that policy post-election after litigation brought by Vice President Gore and his allies to require a more discretionary standard. *See* Don van Natta Jr. with David Barstow, *Elections Officials Focus of Lobbying From Both Camps*, N.Y. TIMES, Nov. 18, 2000, at A1. The "standards" used by other manual recount counties have undergone similar changes, Trial Tr. at 245-46, 497, 499 (Miami-Dade Supervisor would not count nonconforming ballot unless "there was a hanging chad by two points" during the sample recount, but then examined light penetration for the full recount). The decision below only magnifies the due process problem by replicating such changes, on a selective and unfair basis, throughout the State. Those changes alone constitute a clear constitutional violation.[25]

Respondents attempt to distinguish the due process cases upon which petitioners rely on the ground that the voter plaintiffs in cases such as *Roe* and *Briscoe* relied to their detriment on the preexisting election laws in determining how to cast their ballots, whereas in this case, no voter could have relied upon the standards by which voter intent is determined in voting. Stay Opp. at 22. Respondents are mistaken. Just as in *Roe*, Florida voters in, for example, Palm Beach County relied upon the definition of a legally valid vote reflected in the voter instructions they were given. Pursuant to those standards, voters who made some minor mark on their ballot but ultimately determined not to vote for any presiden-

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[25] Respondents' reliance (Stay Opp. at 21) on *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), is misplaced. That case did not involve the fundamental right to vote. Moreover, the unstructured and chaotic procedures mandated by the Florida Supreme Court are "arbitrary and irrational," and therefore would plainly fail the due process standard articulated in that case. *Id.* at 548 (Kennedy, J., concurring).

tial candidate had no notice whatsoever that that minor mark could later be counted as a vote. If they had received such notice, they could have examined their ballots after voting, determined that some minor mark appeared on the ballot, and requested a new one or otherwise corrected the stray mark. *See* Trial Tr. at 456 (voter who may have dimpled his ballot by "plac[ing the stylus] over the name of one of the candidates," before deciding he did not want to cast a vote for President).

Moreover, the candidates were also forced to make decisions regarding, *inter alia*, whether or not to seek manual recounts in certain counties (or how to respond to such recounts requested by their opponents). These decisions, like the decision of the voters described above, turned in part on the candidates' assessment of the kinds of standards and processes in place prior to the election, including the procedures that had been used in prior recounts. Thus, respondents' assertion that no one could have meaningfully relied upon the standards for determining voter intent in place on election day is simply mistaken.

In addition, 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 decisionmaking of local election officials and as-yet unspecified other individuals who may have a keen personal interest in the outcome of an election. The court's failure to provide such guidelines constitutes a clear violation of the Due Process Clause.

With humans making subjective determinations about an absent voter's intent, without standards established by law, there is a very substantial risk that the method for determining how to count a vote will be influenced, consciously or unconsciously, by individual desire for a particular result. That risk is heightened significantly here because of the irreversible damage

done to the ballots during the recount processes and the clear errors that have occurred during the manual recounts.[26] Further manual recounts, by another varying and inconsistent set of arbitrary "standards," will not be accurate. They will simply compound the unfair and standardless methods that have been the hallmark of the Florida recount. As Chief Justice Wells warned in his dissenting opinion below: "The majority returns the case to the circuit court for this partial recount of undervotes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom are totally unknown. That is but a first glance at the imponderable problems the majority creates." Pet. App. 35a.

Finally, the chaotic and unfair procedures mandated by the Florida Supreme Court effectively deny the parties any meaningful opportunity to raise objections to ballot determinations made by nonjudicial counters during the manual recount, and preclude any chance for judicial review of those determinations. Under the decision below, the trial court delegates its judicial role under Fla. Stat. §102.168 to various county officials and other counters, and the trial court lacks the opportunity to review the ballots itself to form its own understanding of a particular voter's intent. Such sweeping denial of the opportunity to raise objections and obtain meaningful judicial review plainly violates the Due Process Clause. *See*, *e.g.*, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

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[26] For example, during the manual recount process, ballots were treated roughly and dropped, causing serious and material damage to the ballots, including dislodging and removing "chads" from ballots. Trial Tr. at484-85, 505-06. This type of degradation obviously limits the accuracy of each succeeding recount. *See* also 00-837, Pet. at 10-11.

## CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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