No. 00-837

IN THE

Supreme Court of the United States

NED L. SIEGEL, *ET AL.*,

Petitioners,

v.

THERESA LEPORE, *ET AL.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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

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

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

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

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

Petitioners seek to preserve the right to vote for President of the United States against unconstitutional actions by election officials. This Court's immediate review is necessary in order to protect petitioners' constitutional rights in this case of imperative public importance.

Respondent Florida Democratic Party ("FDP") belittles the clear federal interest in protecting the right to vote by arguing that all of petitioners' federal claims are "insubstantial." *E.g.*, Opp. 2, 4, 18. The FDP is mistaken: Petitioners present important, substantive claims that are governed by the Constitution and that federal courts historically have addressed.

The FDP also claims that the petition involves "only questions of Florida state law" and that the petition is merely "a bald attempt to federalize a state law dispute" over manual recounts. Opp. 3, 29. But state election officials remain subject to *federal* Constitutional guarantees, and it is precisely those guarantees that are being fatally undermined by the Florida recounts.

I. This Case Plainly Presents Questions Of Imperative Public Importance, Warranting This Court's Immediate Review

Notably, the FDP does not dispute that the questions presented by this case are of imperative public importance—nor could it plausibly do so, given the significance of the right to vote and the unique role assigned to the President under the Constitution. U.S. CONST., Art. II, § 1. Indeed, the district court itself acknowledged the "serious" nature of petitioners' claims, and the Florida Supreme Court, in its ruling in a closely related case, emphasized the "extraordinary importance" of the litigation. Pet. App. 3a; 00-836 Pet. App. 37a.

In an effort to minimize the obvious importance of this case, the FDP argues that the record is too "undeveloped" for this Court's review to be appropriate. *E.g.*, Opp. 1, 2, 27. As set forth in the petition, however, and unrebutted by the FDP, the key facts supporting petitioners' case—far from being "undeveloped"—are *undisputed*. These undisputed facts include: (1) manual recounts are proceeding only in selected Florida counties; (2) the recounts are being conducted under Florida statutes that do not provide uniform standards for the recounts; (3) canvassing boards have changed standards within counties during the course of the recounts, and the counties have been involved in post-election litigation to set standards or to change standards; (4) the selective recounts inevitably count purported "votes" in some counties that would not be counted in others; (5) ballots are subject to physical degradation through repeated handling; and (6) local officials are acting under intense political pressure and with knowledge of the potential impact of their decisions on the national election. *See* Pet. 5-14. The Court is fully cognizant of these facts, and they amply support petitioners' constitutional claims.

To be sure, given the rapid development of this case and the very short time limitations imposed by the Constitution and statutes, petitioners and the FDP have *both* sought to supplement the factual record in the lower courts. *See* FDP Motion For Leave To File Appendix, No. 00-15981 (Nov. 16, 2000); Attachments To FDP Brief, No. 00-15981 (Nov. 17, 2000). Indeed, the Eleventh Circuit has *twice* instructed the parties to provide factual updates. Order, No. 00-15981 (Nov. 16, 2000); Order No. 00-15981 (Nov. 22, 2000). And even before this Court, the FDP seeks to rely on press reports and other assertions that "have not been tested in court through cross-examination, verification, or judicial fact finding." *Compare* Opp. 1 with *id.* 6-7 n.2. These *supplemental* efforts, however, are in no way inconsistent

with the self-evident truth that the key facts are already before the Court.[1]

The FDP also suggests that this case lacks public importance, by arguing that the petition is addressed only to a "preliminary motion to restrain the recounts" and thus presents "an extremely narrow question for the Court's consideration." Opp. 1. That argument is mistaken. Petitioners seek injunctive relief not only to halt the selective and standardless recounts, but also to prohibit certification of returns that include the results procured through the flawed recounts. If the Court grants the petition, the Court will be able to address fully petitioners' constitutional claims.

Under these unique and compelling circumstances, the petition satisfies the requirements of this Court's Rule 11, and certiorari review before judgment is warranted. Pet. 15-16.

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[1] The FDP's attack (Opp. 27-28 n.12) on petitioners for attempting to supplement the record before the court of appeals is unjustified. As noted, both the FDP and petitioners have sought to supplement the record to reflect recent developments before the court of appeals. It is, of course, well within the court of appeals' discretion to accept such supplemental material. *First Alabama Bank v. Parsons Steel, Inc.*, 825 F.2d 1475, 1487 (11th Cir. 1987) ("This Court has the discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below").

II. Petitioners' Constitutional Claims Are Serious And Substantial And Require This Court's Immediate Review

A. Manual Recounts Are Not Immune From Constitutional Scrutiny

The FDP fails to rebut petitioners' showing that Florida's arbitrary, standardless, and selective manual recounts violate the Equal Protection Clause, the Due Process Clause and the First Amendment. Rather, the FDP attempts to shield Florida's recounts from constitutional scrutiny by alleging the use of analogous procedures in other States, and by appealing to the "long and uninterrupted history in this Nation" of manual recounting. Opp. 19 & n.6. Neither argument, however, has merit here.

First, the petition does not challenge the constitutionality of manual recounts generally, but only of Florida's standardless, arbitrary and selective manual recounts. Second, the FDP is simply incorrect to assert that many States conduct manual recounts in the arbitrary and subjective manner that characterizes Florida's ongoing manual recount.[2] Third, even if Florida could

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[2] To the contrary, some of the States cited by the FDP do not allow for a manual recount where the original count, as here, was conducted by some type of electronic or electromechanical device. *See, e.g.*, IOWA CODE § 50.48; *see also* IDAHO CODE § 34-2305; N.M. STAT. ANN. § 1-14-14; OKLA. STAT. Title 26 § 7-134.1. Of the state codes that permit manual recounts, many contain provisions mandating that if a manual recount is conducted *it must be conducted throughout the entire state. See, e.g.*, OR. REV. STAT. Title 23 § 258.171 (1); WYO. STAT. Title 22 § 22-16-109(b),(c). Many states also provide reasonable and uniform standards for conducting the recount and for determining what constitutes a "valid" vote. *See, e.g.*, ALASKA STAT. §§ 15.20.480,

[Footnote continued on next page]

establish some historical pedigree for its discriminatory manual recounts, this Court has never held that repeated constitutional violations effect, over time, an immunity protecting such conduct from subsequent judicial review. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 161, 168 (1972) (Jacksonville ordinance and Florida statute, "derived from early English law," unconstitutionally vested "unfettered discretion" in government officials).

The FDP argues that none of the petitioners has been denied "the right to vote." Opp. 21. If the FDP means that no one turned petitioners away at the polls, that is true but irrelevant; indeed, the same was true of the voters in *Reynolds v. Sims*, 377 U.S. 533 (1964). The voter petitioners in this case were and are suffering an impermissible infringement of "their right to vote," in the constitutionally crucial sense that some Florida counties are proceeding with an *ad hoc* process that dilutes and devalues their votes. "[T]he right of suffrage can be 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." *Id.* at 555. It is unconstitutional for Florida to discriminate against voters based upon their political group or their particular viewpoint.

Moreover, the FDP cannot dispute the uniquely federal interest in election laws affecting the President of

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[Footnote continued from previous page]
15.20.730, 1.15.360; COLO. REV. STAT. T1 Elections § 1-7-309. The FDP's politically-driven invocation of Texas's election laws is also factually misplaced. For example, unlike Florida, Texas law requires that the same recount method be used consistently across all the recounted jurisdictions. See TEX. ELEC. CODE § 214.042(b).

the United States. As this Court stated in *Anderson v. Celebrezze*:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

460 U.S. 780, 794-95 (1983) (citations omitted).

Florida's arbitrary and standardless manual recount violates the Constitution just as plainly as did the state laws at issue in *Anderson* and *Reynolds*.

B. The Manual Recount Violates the Equal Protection Clause

Florida's recount scheme, as applied in this case, violates the Equal Protection Clause because it subjects citizens to fundamentally unfair and discriminatory treatment based upon place of residence, and consequently gives votes in the selected counties greater weight than votes cast by identically situated voters in other Florida counties. *See, e.g.*, *Reynolds*, 377 U.S. at 567 ("[T]he weight of a citizen's vote cannot be made to depend on where he lives."); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-54 (1964).

Implicitly conceding the force of this analysis, the FDP asserts that because "a candidate" can request a manual recount in any county, no Equal Protection violation occurs when recounts proceed in only some counties but not others. Opp. 21. But most of the petitioners are *voters*, who had *no* right under Florida law to request a recount, and the FDP does not argue otherwise.

The FDP claims that conducting a manual recount in four selected, predominantly Democratic, counties will increase the number of votes counted. Opp. 20. A manual recount, whether conducted accurately or not, may well increase the number of "votes" recorded in those selected counties (and, not incidentally, result in more Democratic "votes"). But the votes of numerous Florida citizens whose ballots are *not* being scrutinized for some slight indication of "intent" will go uncounted, and as a result, their votes will have less *weight* in choosing the next President than those cast by identically situated citizens in other Florida counties. This fundamentally unequal treatment of ballots cast by identically situated voters is patently unconstitutional.

The FDP is mistaken in suggesting that there can be no unconstitutional vote dilution when additional "votes" are counted. As the Eleventh Circuit explained in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) ("*Roe I*"), if some votes are counted improperly, other citizens' votes will be unconstitutionally "diluted," even though the results of the challenged ballot-counting mechanism may be to increase the total number of votes counted. *Id.* at 581.

The FDP asserts that the one-person-one-vote rule of the Fourteenth Amendment has no application to "at-large" elections based on a "statewide vote." Opp. 20. 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 I*, 43 F.3d at 577, 581

(invalidating state ballot scheme in statewide elections). Not surprisingly, the FDP cites no authority for this novel construction of the Fourteenth Amendment.

The FDP's key assertion that "there is absolutely no 'post-election departure from previous practice' in Florida" is demonstrably incorrect. Opp. 20 n.8. The entire manual recount process in Florida has been characterized by "post-election departure from previous practice," including the abandonment of longstanding practices (for example, Palm Beach County's abandonment of a 1990 policy prohibiting the counting of merely "dimpled" ballots), and dramatic lurches from one newly articulated "standard" to another. As the *Roe I* court held, such "post-election departures" deny voters equal protection. 43 F.3d at 581.

C. The Manual Recount Violates Due Process

Florida's failure to provide clear guidelines that can be consistently and objectively applied to govern the manual recounts constitutes a violation of the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Roe I*, 43 F.3d at 580; *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982); *Griffin v. Burns*, 570 F.2d 1065, 1077-79 (1st Cir. 1978).

Although the FDP asserts that the statutory scheme does provide standards, the *only* "standard" it identifies is the extremely basic and general one of "the intent of the voter." Opp. 22 n.9. As the general confusion, changes in approach, and litigation emerging from the recount process conclusively demonstrate, that generalized statement of purpose is plainly inadequate to serve as a meaningful guide to *how* to divine the voter's intent. The canvassing boards are each applying different "standards" to the evaluation process, and those standards have changed repeatedly and they continue to change, in a setting of intense political pressure. In

short, the rules are changing as the "game" is being played and the contest is being determined by "rules" that were not in place when the votes were cast—all in violation of the Due Process Clause. *E.g.*, *Logan*, 455 U.S. at 432-33; *Griffin*, 570 F.2d at 1077-79; *Roe I*, 43 F.3d at 580-81.[3]

D. The Manual Recount Violates The First Amendment

Voting is protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The FDP nonetheless seeks to preserve the standardless, selective recounts from challenge under the First Amendment by arguing that Florida officials do not have "unconstrained discretion." Opp. 26. As set forth above, however, Florida statutes do not provide any meaningful constraint on or guidance for the local canvassing boards; and, in any event, it is plain—from the changing standards—that Florida law, as applied and in practice, *does* permit officials to act with insufficiently constrained discretion. Thus, under controlling law, the Florida recounts as currently conducted violate the First Amendment. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (an "impermissible risk of suppression of ideas" exists where "an ordinance … delegates overly broad discretion to the decisionmaker").

The FDP also asserts that Florida's arbitrary and unequal manual recount constitutes mere "decisionmaking internal to the government" and therefore that First Amendment principles do not apply. Opp. 26. This Court has made clear, however, that the States' power in

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[3] The FDP also does not dispute that the crucial initial decision by the canvassing boards to begin the manual recount process is governed by no standard at all, not even the intent "standard." *See* Pet. 20 n.5.

federal elections remains subject to the First Amendment. *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986).

CONCLUSION

This is a unique case of undeniable, imperative public importance to the Nation and the Constitution. For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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

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

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

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

Counsel for Petitioners

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