No. _____

In The

Supreme Court of the United States

ROBERT C. TOUCHSTON, DEBORAH SHEPPERD, and DIANA L. TOUCHSTON, *Petitioners*,

v.

MICHAEL MCDERMOTT, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

Certified Florida election results for Presidential Electors contain votes reconstructed pursuant to Fla. Stat. § 102.166 ("the Manual Recount Statute"). The Supreme Court of Florida may imminently order the Florida Secretary of State to certify more votes reconstructed under this statute. The U.S. Court of Appeals for the Eleventh Circuit refused preliminary and permanent injunctive relief to voters claiming vote dilution, which raises three substantial federal questions warranting immediate review by this Court:

1. Whether the dilution of a voter's vote without more constitutes irreparable harm.

2. Whether the manual recount provisions of the Manual Recount Statute create an unconstitutional two-tiered system for counting votes by allowing a candidate to seek, and willing county canvassing boards in their absolute discretion to grant, manual recounts of votes in only selective vote-rich counties to the partisan advantage of one candidate, thus diluting and debasing the vote of those who voted in counties where no manual recount would be conducted.

3. Whether the Manual Recount Statute is unconstitutional because it: (a) lacks standards circumscribing a county's power to grant or deny a manual recount; (b) lacks standards to determine a valid vote during a manual recount, resulting in the use of vague, subjective, arbitrary and capricious standards, developed ad hoc and ex post facto, to count votes cast contrary to instructions given voters in the voting booth and contrary to the standards used to count votes in past elections; and (c) fails to provide fundamental fairness and due process to the non-requesting candidate and voters.

PARTIES TO THE PROCEEDING

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

Robert C. Touchston, Deborah Shepperd, Diana L. Touchston; *Plaintiffs-Appellants*;

George W. Bush, as candidate for president; *Intervenor-Appellee* (did not file notice of appeal so as to be listed as appellant);

Michael McDermott, Ann McFall, Pat Northy, Theresa LePore, Charles E. Burton, Carol Roberts, Jane Carroll, Suzanne Gunzburger, Robert Lee, David Leahy, Lawrence King, Jr., and Miriam Lehr, in their official capacities as members of the County Canvassing Boards of Volusia, Palm Beach, Broward and Miami-Dade Counties, respectively ("County Defendants"); Katherine Harris, in her official capacities as Secretary of the Department of State and as a member of the Elections Canvassing Commission; Clay Roberts and Bob Crawford, in their official capacity as members of the Elections Canvassing Commission ("State Defendants"); *Defendants-Appellees*;

The Florida Democratic Party; *Intervenor-Appellee*; and

Attorney Gen. Robert Butterworth (filed ungranted motion to intervene).

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ("Voters") respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Because their votes have been diluted by manual recounts under Florida Statute § 102.166, which creates an unconstitutional two-tiered system for standardless "reconstruction" of votes in selective counties, Voters are irreparably harmed. Votes "reconstructed" pursuant to this unconstitutional scheme are already in the totals certified for Presidential electors, and there is imminent threat that more fruit of this poisonous tree will be added to certified totals. Both the legitimacy of the Presidential election – and perhaps the choice of the President – are jeopardized by this unconstitutional statute.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-61a) is reported at 2000 U.S. App. LEXIS 30781 (Dec. 6, 2000). The opinion of the district court (App. 162a-174a) is not yet reported.

JURISDICTION

The judgment of the United State Court of Appeals for the Eleventh Circuit was entered on December 6, 2000. App. 1-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2.

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 3, Section 5 of the United States Code provides: " If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5 (2000).

Title 3, Section 7 of the United States Code provides: "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7 (2000).

Title 42, Section 1983 of the United States Code provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (2000).

Pursuant to this Court's Rule 14.1(f), the remaining pertinent provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.141, 102.155, 102.166(1)-(7), 102.168, and 103.011, are set forth at App. 199a-211a.

STATEMENT OF THE CASE

Petitioners, three voters who cast their vote for Governor George W. Bush in the 2000 general election and who reside in Brevard County, Florida, sought a preliminary injunction in the U.S. District Court for the Middle District of Florida, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343(a). The injunction would prohibit Florida's Secretary of State, members of Florida's Election Canvassing Commission, and certain county canvassing boards from certifying the results of the November 7th general election for President, using the results of any manual recount of votes pursuant to the Manual Recount Statute. The district court has denied the preliminary injunction, and the U.S. Court of Appeals for the Eleventh Circuit has affirmed the district court's denial of the preliminary injunction.

I. The Election and the Results.

On Tuesday, November 7, 2000, Voters went to the polls with other citizens of Florida and the United States to cast their votes for Presidential Electors. The initial tally of the ballots cast in Florida, excluding absentee ballots, resulted in the Republican candidate for President, Governor Bush, receiving 2,909,135 votes. The Democratic candidate for President, Vice President Albert Gore, Jr., received 2,907,351 votes, producing a difference of 0.0299 percent in the number of votes received by the two

candidates. App. 5a. Because Vice President Gore was defeated by less than 0.5 percent, Florida law required an automatic statewide recount of the votes. *See* Fla. Stat. § 102.141(4). Upon completion and certification of the automatic statewide recount on November 14, 2000, Governor Bush retained the lead, although the margin had diminished considerably to 300 votes, with 2,910,492 for Governor Bush and 2,910,192 for Vice President Gore. App. 5a . On November 18, 2000, the counties completed and certified the overseas absentee ballot count to Florida's Department of State, resulting in a lead for Governor Bush of 930 votes: 2,911,872 for Governor Bush and 2,910,942 for Vice President Gore. App. 6a n.4 .

However, on November 21st, the Florida Supreme Court ordered that all manual recount totals that had been completed and submitted to the Elections Canvassing Commission by 5:00 p.m., November 26th must be accepted by the Secretary of State and added to the final votes. App. 6a. On the evening of November 26th, the Election Canvassing Commission certified that Governor Bush had received 2,912,790 votes and that Vice President Gore had received 2,912,253 votes, making Governor Bush the recipient of Florida's 25 electoral votes by a margin of 537 votes. App. 6a.

II. Manual Recounts and Challenges to the Election.

Although the State Defendants have certified Governor Bush as the recipient of Florida's 25 electoral votes, whether he continues to be entitled to those electoral votes remains in doubt because of several manual recounts and legal contests to the certified results brought by Vice President Gore, the Florida Democratic Party, and/or voters and taxpayers who supported the Vice President.

A. *Florida's Manual Recount Statute.*

The manual recounts arise from provisions in Fla. Stat. § 102.166, which allows a candidate in a statewide election, but not a voter, to request a manual recount of ballots cast in counties selected by that candidate or the candidate's political party. The candidate requesting the manual recount must choose three precincts to be recounted, and "[i]f the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots." Fla. Stat. § 102.166(5). However, no county canvassing board is required to grant the request for a manual recount. Indeed, "the canvassing board has unrestricted discretion to grant or deny a sample manual recount of three precincts." App. 8a. If a manual recount is granted, counting teams and county canvassing boards are to conduct the manual recount in such a manner as to "determine a voter's intent in casting a ballot." Fla. Stat. § 102.166(7)(b). No Florida statute contains instructions or standards to guide the counting teams or the canvassing boards as they attempt to determine the voter's intent.

B. *Challenges By Way of Manual Recount Requests.*

Governor Bush has requested no manual recounts. However, pursuant to the Manual Recount Statute, the Florida Democratic Party requested manual recounts for certain precincts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, all containing a heavy concentration of Democratic voters. App. 9. The requests were granted, and the four counties began manually recounting the votes to "determine a voter's intent in casting a ballot." Fla. Stat. § 102.166(7)(b). Since there are no instructions or standards to guide this determination, each county evaluated the ballots

under different, sometimes shifting, standards that allow vague, subjective, arbitrary, and capricious determinations of voter intent in these counties. This changing approach differs from the objective and unequivocal standard applied by these counties before the manual recounts there and contrary to the instructions for voting that the voter received in the voting booth – namely, that voter was to cast her vote by punching through the ballot card in the hole designated for the voter's chosen candidate.

III. The Proceedings Below.

On November 13, 2000, Voters filed their complaint and motion for a preliminary injunction, requesting "a judicial declaration that Fla. Stat. § 102.166(4) is unconstitutional (both on its face and as applied) because it debases their votes and the votes of those similarly situated and thereby denies them rights guaranteed by the Fourteenth Amendment." App. 11a. They also requested the court to enjoin the certification, by either the County or State Defendants, of any vote totals that included results from any manual recount in Volusia, Palm Beach, Broward, or Miami-Dade Counties. The district court denied Voters' requests, holding that no "valid basis for intervention by federal courts" had been presented and that the "requisite elements for the entry of a preliminary injunction" had not been established. App. 171a-172a . Particularly, the district court found no likelihood of success on the merits and no irreparable harm. App. 173a.

The Court of Appeals affirmed the district court's denial on the same grounds that it affirmed the denial of a preliminary injunction in *Siegel v. LePore*, a companion case brought by Governor Bush and several Florida voters decided the same day, holding that there had not been a showing of abuse of the district court's discretion in finding no irreparable harm to Plaintiffs. App. 76a-87a.

REASONS FOR GRANTING THE PETITION

I. This Case Involves Matters of Great Importance, Including the Right Not to Have One's Vote Diluted and Who Shall Be President of the United States of America.

The constitutional rights claimed by Voters are guaranteed by the Fourteenth Amendment to the U.S. Constitution, and "the Civil Rights Act of 1871 throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Mitchum, DBA Book Mart v. Foster*, 407 U.S. 225, 240 (1972) (citation omitted). The Civil Rights Act, 42 U.S.C. § 1983, "was intended to enforce the provisions of the Fourteenth Amendment 'against State action . . . whether that action be executive, legislative, or judicial.'" *Id*. (*quoting Ex parte Virginia,* 100 U.S. 339, 346 (1879)) (emphasis omitted). Furthermore, this Court has specifically agreed that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in overturning of a state policy." *Zablocki, Milwaukee County Clerk v. Redhail*, 434 U.S. 374, 380 (1978).

Given the political sensitivity and national attention this case is subject to, when considered in conjunction with the fundamental constitutional rights at stake and the local passions and prejudices engendered by the issues raised, the federal courts are the best forum in which to hear Voters' claims. As the U.S. Supreme Court pointed out in *Mitchum*, in cases such as the current election controversy, "the United States courts are further above mere local influence than the [state] courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of vicinage . . . they will be able to rise above prejudices or bad passions or terror more easily." *Mitchum*, 407 U.S. at 241

(*quoting* comments of Rep. Coburn re Civil Rights Act of 1871, from *Cong. Globe*, 42d Cong., 1st Sess., 460 (1871)).

Thus, because the vitally important right to vote is at stake here, and because the resolution of this case may determine the next President of the United States, this case involves matters of great importance, and this Court should grant this writ.

II. The Courts Below Erred in Denying Injunctive Relief, Disregarding the Irreparable Harm of Vote Dilution.

The Court of Appeals denied Voters' request for a preliminary and permanent injunction on the sole ground that Voters had failed to demonstrate that they were "suffering serious harm or facing imminent injury." App. 79a. The court majority stated that voters had not claimed that they were "prevented from registering to vote, . . . from voting or . . . from voting for the candidate of his choice. . . . [n]or . . . that [a] vote was rejected or not counted." App. 79a-80a. Thus, the court below based its holding, *sub silenco*, on its apparent belief that the Plaintiffs' claim of vote dilution, alone without more, is just not enough. In addition, the court below held that, "[e]ven assuming Plaintiffs can assert some kind of injury, they have not shown the kind of serious and immediate injury that demands the extraordinary relief of a preliminary injunction." App. 80a (emphasis in original). Apparently, the majority was referring to their holding that, "[a]t the moment, the candidate Plaintiffs [in *Siegel v. LePore*] (Governor Bush and Secretary Cheney) are suffering no serious harm . . . because they have been certified as the winners of Florida's electoral votes." App. 79a. On these grounds, the Court of Appeals found no irreparable injury.

A. *Voters Suffer Irreparable Injury.*

As shown below, the ruling of the court below that Voters have suffered no irreparable injury is erroneous.

1. Vote Dilution Itself Is an Irreparable Injury.

In holding that vote dilution, alone without more, is not an irreparable injury, the Court of Appeals stated that "[t]he only areas of our constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." App. 81a.

The Court of Appeal's holding, however, is contrary to the decisions of this Court in *Moore v. Ogilvie*, 394 U.S. 814 (1969) (requirement that independent candidates for President and Vice President submit petitions with signatures from each of 50 of 102 counties unconstitutionally discriminates against voters in more populous counties by diluting their votes), and *Dept. of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (census plan that would result in loss of House seat constitutes an Article III injury in fact to citizen of affected state by dilution of vote). Both cases held that voter dilution is in itself a constitutionally cognizable injury warranting injunctive relief. The dilution of votes by manual recounts in selected counties at issue here is no less constitutionally offensive than the potentially discriminatory petition requirements at issue in *Moore v. Ogilvie* or proposed census sampling at issue in *Dept. of Commerce v. U.S. House of Representatives* regardless of the outcome of election, petition drive, or census sampling.

Second, vote dilution should be deemed an irreparable harm based on other existing precedents. State action that denies or chills the exercise of First Amendment rights is in itself deemed an irreparable harm. *Elrod v. Burns*, 427 U.S. 347 (1980). The Eleventh Circuit majority concedes this much. App. 81a. Plainly, the right to vote also implicates the exercise of First Amendment rights. Indeed, it is difficult to imagine a clearer example of

political expression than voting. As Circuit Judge Tjoflat noted, "First Amendment concerns are raised when political speech in the form of a vote is attributed to a person who intended to refrain from voting, as would occur, for example when a dimpled ballot is counted for a particular candidate in a selective manual recount." App. 33a n. 44 (*quoting Pacific Gas & Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986)).

Selective manual recounting diminishes the value of votes in a manner similar to state actions that limit, but do not altogether prohibit, the exercise of First Amendment rights. It is true that the exercise of First Amendment rights might be limited by reasonable "time, place, or manner" restrictions, but no legitimate or reasonable state interest is served by the dilution of votes that occurs under selective manual recounts conducted in a fundamentally unfair way. Moreover, depriving the Plaintiffs here a preliminary injunction when the very real and imminent harm of vote dilution threatens them, due to resumed selective manual recounts, is closely analogous to a rule that would demand that no injunction issue against a threatened deprivation of First Amendment rights until a penalty against their exercise is actually imposed, rather than merely threatened. Such a rule would be directly contrary to First Amendment doctrine that permits injunctive relief against conduct that "chills" the exercise of First Amendment rights. *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988). For the same reasons that any cognizable threatened injury to the exercise of First Amendment rights is deemed irreparable, therefore, vote dilution should likewise be regarded as an irreparable harm in itself, thus warranting preliminary injunctive relief.

It is not "wholly speculative as to whether the results of those recounts may eventually place Vice President Gore ahead," as the Court of Appeals asserts. App. 79a. The intended objective of the selective manual recounts is obviously to assure, to the

extent possible, that Vice President Gore will thereby triumph, as Circuit Judge Carnes aptly demonstrates. *See* App. 75a-99a.

The Voters are thus threatened with further imminent injury: Should the Florida Supreme Court order resumption of manual recounts, their votes will be progressively diluted in precisely the manner that the requested selective manual recounts contemplate. This in itself constitutes a cognizable injury regardless of what the outcome of the election might be.

The Court of Appeals also asserts that immediate injunctive relief should be available to a voter only when the voter is "prevented from registering, . . . prevented from voting or prevented from voting for the candidate of his choice," or claims "that his vote was rejected or not counted." App. 80a. Arbitrarily restricting immediate injunctive relief in such a manner, however, is contrary to the decisions of this Court since *Reynolds v. Sims*, 377 U.S. 533, 535 (1964) ("the right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

The appellate court claims further that, even if voter dilution represents an injury warranting injunctive relief, it does not warrant a preliminary injunction because whatever harm suffered by the Voters "unrelated to the outcome of the election . . . can be adequately remedied later." App. 80a. It is true, of course, that a permanent injunction, issued by the District Court later, will prevent irreparable harm *in future elections*. However, this is to no avail regarding this election, which is what the preliminary injunction is all about. Any hope that a permanent injunction would remedy any injury caused the Voters by this election has already vanished, if it ever existed.

In any case, awaiting a remedy "later" for this election would very possibly involve serious disruption of the political and public order. It would also severely prejudice against the Voters the outcome of any evidentiary hearing, because of the disruption that

might result in a finding favorable to the Voters. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1975) (new election ordered after state supreme court ordered exclusion of absentee and shut-in ballots in violation of U.S. Constitution). Such projected scenarios prompt the conclusion that a constitutionally cognizable claim of voter dilution should properly be regarded as an *irreparable* injury warranting preliminary injunctive relief in order to remove the offending votes from the certified totals before the election is final.

A cognizable claim of vote dilution should be regarded as threatened irreparable harm for the additional reason that it cannot be later remedied through the award of money damages. The harm to Voters cannot reasonably be repaired by providing them money damages. The vote dilution that Voters are currently suffering from and are threatened with, as further explained below, should be sufficient for irreparable injury. Thus, the court below erred, and this Court should decide this important issue.

2. Voters Currently Suffer Irreparable Harm and the Imminent Threat of Further Irreparable Harm.

Voters here, in fact, now suffer irreparable harm and imminent threat of further irreparable harm by dilution of their votes for President due to constitutional defects in Florida's Manual Recount Statute. The results of Volusia's and Broward's manual recounts are currently included in the statewide certified totals, App. 13a, and Vice President Gore is currently petitioning the Florida Supreme Court to include additional results of manual recounts, both past and future, in the certified totals. App. 212a. Vice President Gore claims that if the results of these manual recounts were included in the statewide totals, he would be certified the winner of Florida's electoral votes. App. 222a, 226a.

This harm arising from the dilution of the Voters' votes is irreparable because of the deadlines imposed by the scheduled

certification of Presidential Electors on December 12, 2000, and the ensuing vote of the Electoral College on December 18, 2000. Because the dilution of Voters' votes is occurring in the context of a Presidential election, any remedy must be swift in order to be adequate. While most elected offices carry ongoing powers which are exercised over a period of several years, the singular power of a Presidential Elector to cast Florida's votes in the Electoral College must be performed on December 18, or be forever lost. As such, any vote dilution which is allowed to continue through December 18 will become permanent and irreparable.

Furthermore, the certified results provide the baseline for any contest proceeding, such as that currently lodged in the Florida Supreme Court. App. 212a-233a. Since the certified totals already include the results of manual recounts from Broward and Volusia Counties, Governor Bush's lead is reduced by 635 votes. His present lead of 537 would be 1,172 absent the manual recounts. The certification of such results causes very real harm because, according to Florida election contest law, "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). As a result, in a contest proceeding, the certified totals place the burden "clearly on the contestor [Governor Bush] to establish that the ballots [manually recounted] have been irregularly cast." *Id.* This presumption is sufficiently strong that "ballots cannot be used to impeach an official return made by election managers unless the integrity of the ballots is first clearly established by the person who seeks to use the ballots for the purpose." *Burke v. Beasley*, 75 So. 2d 7, 9 (Fla. 1954). This presumption of accuracy is also reflected in Florida statutes, which declare that a "certificate of election which is issued to any person shall be prima facie evidence of the election of such person." Fla. Stat. § 102.155.

As a result, the effect of including the results of manual recounts in the totals certified is to shift the burden of proof as to the validity of these votes from Vice President Gore to Governor

Bush during the contest proceedings. Since who bears the burden of proof often determines the outcome, this shift in burden could be outcome determinative. Therefore, it also creates an ongoing constitutional injury to the Voters.

In addition to these existing injuries, a serious threat of further harm continues to loom in the form of the election contest proceedings being pressed by Vice President Gore. The complaint filed in that case claims that a net gain of approximately 1,800 votes should be certified, all but 51 of which are based upon manual recounts conducted or requested under the manual recount statute. App. 214-15a. His contest complaint claims that the difference between his certified vote total and that of Governor Bush was "entirely the result of" four errors in the tabulation and certification process. *Id.* This contest complaint claims that Vice President Gore was denied a net gain of 375 votes from "rejecting the results of the complete manual count in Palm Beach County . . . and the results of a manual count of approximately 20 percent of the precincts in Miami-Dade County," App. 215a; more than 800 votes from "not counting approximately 4,000 ballots in Palm Beach County . . . that the Palm Beach County Canvassing Board reviewed but did not count as a vote (in the manual recount)," App. 215a; and approximately 600 votes from "not counting approximately 9,000 ballots in Miami-Dade County . . . which were never counted manually because the Miami-Dade County Canvassing Board prematurely ceased its manual count." *Id.*. The complaint later explains that the failure to conduct and/or certify each of these manual counts "results in the unlawful rejection of legal votes," App. 222a, 229a, 232a. The complaint also claims that the challenged actions "violated section 102.166(5)(c)," App. 229a; and that this statute "required" that officials count ballots which they did not. App. 221a.

In contrast to the 1,775 votes claimed based upon the dictates of the Manual Recount Statute, the complaint claims only a net of approximately 50 votes not attributable to manual recounts. As

such, the fact that this Nation does not at this moment have a clear "President-Elect" is entirely due to the prospect that additional votes will be certified as a result of Florida's manual recount statute. The only way that Vice President Gore claims he can become President is with the aid of selective manual recounts authorized by this statute.

The Manual Recount Statute is also working irreparable harm through its discriminatory impact on the ability to mount an election contest. Where Vice President Gore has been able to mount an effective contest to the election, this has been possible only because of his ability to rely on vote information gathered through the manual recounts that he requested during the protest stage. As discussed above, nearly all of the ballots which he seeks to count and certify were identified during manual recounts launched at his request. In contrast, the Voters would have been forced to start from scratch by conducting manual counts of entire counties in any counties they sought to contest – a nearly impossible task given the time constraints, especially considering the 12 day delay in certification ordered by the Florida Supreme Court in *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434 at 16, *vacated, Bush v. Palm Beach County Canvassing Bd.*, 2000 WL 1769093 (Dec. 4, 2000). App. 135a.

In addition to identifying select sets of ballots for Vice President Gore's contest, the manual recount proceedings also allowed him to challenge the certified results on the basis that the failure to manually count or certify the results thereof violated the manual recount statute and constituted official misconduct. App. 221a-223a, 229a, 232a. Had Voters attempted to counter this dilution of their votes by seeking similar recounts through a contest proceeding, they would have been unable to point to any comparable violations to justify their efforts.

Of course, Voters' ability to rectify this situation through a contest proceeding is also rendered virtually nil by other statutory

factors. In order to bring a contest to show that legal votes were excluded or that illegal votes were included, Fla. Stat. § 102.168(3)(c) requires a showing that the questioned action was sufficient to "change or place in doubt the result of the election." As Circuit Judge Tjoflat observed in his dissent, this remedy "is no remedy at all for voters who have suffered constitutional injury while attempting to vote for the winning candidate." App. 49a.

This same obstacle also blocks efforts to seek contest recounts of counties with smaller vote margins than those selected by Vice President Gore. As explained at length by Circuit Judge Carnes, manual recounts in Miami-Dade, Broward, and Palm Beach Counties could be expected to possibly change the outcome of the election because of their large size and the high percentage of ballots cast for Vice President Gore. App. 133a. Similar manual recounts in individual counties with smaller populations or vote margins would not meet this standard for either the manual recount or contest proceedings.

Thus, Voters here, in fact, are currently suffering and imminently face further irreparable harm.

3. The Court of Appeal's Decision Creates a Split in the Circuits.

Furthermore, the Eleventh Circuit's decision has created a split in the circuits by its refusal to recognize irreparable harm from the deprivation of a constitutional right, outside of a limited range of First Amendment and right of privacy situations. App. 82a-83a. This holding conflicts with that of other circuits which recognize that the deprivation of equal protection or other constitutional rights *ipso facto* constitutes irreparable harm. The Ninth Circuit has long maintained that "an alleged constitutional infringement will often alone constitute irreparable harm" and that

a district court "could have relied on . . . alleged deprivation of equal protection in its balance of hardships analysis." *Goldie's Bookstore, Inc. v. The Superior Court of the State of California*, 739 F.2d 466, 472 (9th Cir. 1984). More recently, it has found irreparable harm in a claim of "unconstitutional discrimination," noting that money damages could not remedy such an injury. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

The Second Circuit has also found irreparable harm in equal protection violations, noting that it had also done so with regard to violations of Fourth and Eighth Amendment rights. *Brewer v. The West Irondequoit Central School District*, 212 F.3d 738, 744 (2nd Cir. 2000) (*citing Covino v. Patrissi*, 967 F.2d 73, 77 (2nd Cir. 1992)); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996). As the Second Circuit has explained, where "plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary." *Statharos v. New York Taxi and Limousine Commission*, 198 F.3d 317, 322 (2nd Cir. 1999) (right of privacy regarding financial information).

As a result, there is a split in the circuits on this important question that this Court should resolve.

B. *Voters Have Substantial Likelihood of Success on the Merits.*

Voters also have a substantial likelihood of success on the merits, an issue not reached by the Court of Appeals below.

Article II, section 1, of the United States Constitution charges the state legislatures with establishing the manner of appointing Electors for the Office of President and Vice President of the United States. In Florida, while candidates for these offices run statewide, the Manual Recount Statute allows a candidate to request manual recounts in only selected counties. Fla. Stat. § 102.166(4)(a). Thus, the candidate may select for manual recounts

only those counties where the candidate *stands to gain a partisan political advantage*.

The Manual Recount Statute, therefore, creates a two-tiered system of counting votes that will be inherently biased in the requesting candidate's favor and that dilutes the votes cast for the requesting candidate's opponents. As the Attorney General for the State of Florida has explained:

> A two-tiered system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual recount was conducted would benefit from *having a better chance of having his or her vote actually counted* than a voter in a county where a hand count was halted.

App. 140a (emphasis added) Butterworth Letter. This effect is exacerbated when the selected counties use a vague, subjective, arbitrary, and capricious standard - developed ad hoc and ex post facto - to count votes contrary to the instructions given to voters in the voting booth and contrary to the standards used to count votes in previous elections.

1. The Two-Tier Manual Recount System Dilutes the Votes of Florida Voters and, Thereby, Denies Them Equal Protection of the Laws.

There are two lines of vote dilution cases, one based on geography, *Reynolds v. Sims*, 377 U.S. 533 (1964), and the other based on "stuffing of the ballot box." *Ex Parte Siebold*, 100 U.S. 371, 379 (1879). Both lines are implicated here.

Moore v. Ogilvie, 394 U.S. 814 (1969), involved geographic vote dilution in the selection process for Illinois' Presidential Electors. This Court held that the process violated equal protec-

tion because it weighted nominating signatures from some counties more heavily than other counties. *Id.* at 816. This created a two-tiered system depending on county residence. "When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy exists." *Id.* "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* at 819; *see also Baker v. Carr*, 369 U.S. 186 (1962); *Wesbury v. Sanders*, 376 U.S. 1(1964); *Reynolds v. Sims*, 377 U.S. 533 (1954); *Gray v. Sanders*, 372 U.S. 368, 379 (1968).

Furthermore, the Equal Protection Clause safeguards the rights of voters to have their valid votes counted along with the valid votes of other voters. *United States v. Saylor*, 322 U.S. 385, 388-89 (1944); *United States v. Mosely*, 238 U.S. 383 (1880). However, the Manual Recount Statute allows a candidate in a statewide election to selectively cause the votes in some counties to be counted, while ignoring valid votes in other counties, based on partisan political advantage. Thus, valid votes not counted by the machine will still not be counted in those counties where no manual recount has been requested, while the votes of similarly situated voters in other counties will be counted. Thus, voters in one county are favored over others with a partisan result.[1]

The Manual Recount Statute does not permit the Voters to seek manual recounts in the rest of the state to offset this heavily biased reconstruction of undervotes in the counties selected by one candidate. As a result of the statute's structural flaw, the Voters' votes, and those of hundreds of thousands of other voters

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[1]Similarly, in the census sampling cases, this Court held that residents of counties which have fewer undercounts "have a strong claim that they will be injured . . . because their votes will be diluted vis-a-vis residents of counties with larger 'undercount' rates." *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 344 (1999).

throughout Florida, will be irretrievably diluted in violation of the Equal Protection Clause.[2]

Furthermore, the Manual Recount Statute allows candidates to "stuff the ballot box." Not only does the Manual Recount Statute permit discriminatory selection of counties by the candidate, it compounds the constitutional problem by: (1) failing to provide *any* standards to guide county canvassing boards in deciding whether to grant requests for manual recounts, (2) failing to provide uniform rules for how votes are to be counted if a request is granted, and (3) failing to require notice to opposing candidates and opportunity for them to be heard. Such opportunity for selectivity and failure to incorporate any standards result in a gross lack of fundamental fairness.

Statutes that fail to establish standards that are sufficient to guard against arbitrary and capricious deprivations of liberty interests, partisan decisions, unfairness, and favoritism violate due process. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The lack of due process that results from the failure of the Manual Recount Statute to incorporate any standard circumscribing county canvassing boards' discretion leads inevitably to the dilution of Voters' vote.

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[2]Voters do not challenge *per se* the validity of manual recounts. *See Roudebush v. Hartke*, 405 U.S. 15 (1972). Other States have adopted procedures to ensure fundamental fairness in selecting which counties to manually recount. Indiana, for example, provides that, once a candidate requests a recount of particular counties or precincts, his opponent may file a cross-petition requesting a recount in other counties or precincts. Ind. Code §§ 3-12-6-4 and 6. Both recounts must be granted. *See also* 10 Ill. Comp. Stat. Ann. 5/23-23. In Maryland, if an election outcome is changed by a recount, an opposing candidate may demand his own recount of votes in precincts not specified by the petitioner. Md. Code Ann., Elections § 12-102 (1999); *see also* 21-A Me. Rev. Stat. Ann. tit. 21-A § 737-A (1999); N.J. Stat. Ann. § 19:28-4 (2000).

First, the Manual Recount Statute gives absolute discretion to the county canvassing boards on whether to grant such requests. Fla. Stat. § 102.166(4)(c); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508 (Fla. App. 1992). Thus, Democrat boards are under no statutory compulsion to deny Democrat candidates' requests for manual recounts when such candidates received the most votes in that county, even when such requests are not predicated on a failure of the voting tabulation system to accurately count votes, but are simply transparent attempts to mine for votes.

Second, there are no standards in the statute on how to manually count the votes. Inherent in the right to vote is having the vote counted in a manner consistent with the voter's intent. *See United States v. Mosely*, 238 U.S. 383, 385 (1915); *United States v. Classic*, 313 U.S. 299, 315 (1941). The Constitution protects these rights and nullifies any state law that denies these rights to its citizens. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

The only statutory guidance in conducting the visual inspection of the ballot to determine the vote is provided in Fla. Stat. § 102.166(7)(b): "[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." Thus, the Manual Recount Statute permits county canvassing boards to use different rules, over time or even within the same county, resulting in fundamental unfairness. Moreover, counties are free to adopt vague, subjective, arbitrary, and capricious test and change them after the election, if they choose. This lacks due process and dilutes Voters' votes.

In this case, the canvassing boards in Broward and Palm Beach Counties had pre-existing procedures for counting punch-card ballots that required that at least one corner of the chad be dislodged. In Palm Beach County, the canvassing board had a ten-

year-old official written policy that was in place on November 7th to this effect:

> The guidelines assume that these directions [to voters on voting machines] have been understood and followed. Therefore, a chad that is hanging or partially punched may be counted as a vote, since it is possible to punch through the card and still not totally dislodge the chad. But a chad that is fully attached, *bearing only an indentation, should not be counted as a vote*. An indentation may result from a voter placing the stylus in the position but not punching through. Thus, an indentation is not evidence of intent to cast a vote.

Florida Democratic Party Appendix, Tab 8, Exhibit A (emphasis added). This was based on the instructions given the voter in the voting booth. When manual recounting of the votes was initiated, it was done in accord with the standard adopted in 1990. However, the Florida Democratic Party obtained a court order requiring that dimpled chads be counted as votes. Appellants' Request to Take Judicial Notice, Attachment A and C.

In Broward County, voters were similarly instructed and had a previous policy to only count ballots that were perforated. However, two local judges ordered that dimpled ballots be counted. Appellants' Supplemental Request To Take Judicial Notice, Attachment H, pages 9-10.

Fundamental unfairness results from counting reconstructed ballots cast contrary to voting instructions. These county-issued voting instructions are relied on by voters to ensure that votes will be correctly counted for the candidate the voter intended to select. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998); *cf. Hendon v. North Carolina State Board of Elections*, 710 F.2d 177, 180 n. 4 (4th Cir. 1983). The voting instructions presented a clear way for voters to make their choice for President. Voters who did not choose to vote (an undervote) for a Presidential candidate could do so by not punching through the ballot. "It is beyond

belief to suggest that thousands of voters" who did not punch out the chip or chad "were secretly relying on the hope that their votes would[] be counted." *Bennett*, 140 F.3d at 1228.

Not only does the Manual Recount Statute not employ an objective standard, it does not delineate *any* standard for the manual counting of ballots, allowing counties to use any standard they choose. When ballots are ambiguous (ballots not completely punched through), county canvassing boards have attempted to subjectively divine the intent of the voter by employing various methods. This practice is subjective because there are two equally plausible explanations if ballots are not punched through: that the voter was too weak to punch through the ballot or that the voter made a mistake or changed her mind. It is arbitrary and capricious to pick one intent over another when faced with such ballots. Such an approach also fails to recognize those voters who deliberately choose not to vote for any Presidential candidate, while permitting canvassing boards to impute to such voters an intent to vote for a particular candidate.

Opposing candidates are statutorily prevented from protecting the integrity of the vote from manipulation by candidates and election officials conducting selective manual recounts of votes. Most importantly, the Manual Recount Statute requires that the candidate demonstrate that the results of the recount "could affect the outcome of the election." Fla. Stat. § 102.166(5). A winning candidate could not do this.

Furthermore, these requests must come "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of election day, whichever occurs later." Fla. Stat. § 102.166(4)(b). County canvassing boards also have complete discretion to select additional precincts to be manually recounted. Fla. Stat. § 102.166(4)(d). If the 72 hour time period has elapsed, a non-requesting candidate may not counter with requests for manual recounts in other precincts or

counties. Nor does a candidate possess any recourse if the county board decides to expand the manual recount to other precincts.

Thus, the Manual Recount Statute permits partisan county canvassing boards to decide to manually recount targeted precincts in order to increase the votes of candidates after the favorable results of the candidate-requested manual recount are known, while opposing candidates from contesting this manual recount or requesting recounts in other counties. The effect of all this is to unconstitutionally weight the votes of voters in some counties over those of others.

2. This Court Should Exercise Jurisdiction Because This Case Involves Systematic Denial of Equality In Voting.

The right of suffrage is "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885). Thus, voting in local and state elections is subject to constitutional protection, *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1969), specifically, the protection of the Equal Protection Clause. *See Reynolds*, 377 U.S. at 544. Thus, while the Constitution delegates to the States the primary power and responsibility to conduct and police their own elections, U.S. Const. art. I, § 4, cl. 1, where the state action is one "that systematically den[ies] equality in voting," rather than an "episodic event[]," a violation of the equal protection clause is found. *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980).

Because this Court is asked to remedy through a "constitutional lens" a broad-gauged, systemic, fundamental unfairness that infects the results of a state election, rather than to examine the validity of individual ballots or supervise the administrative details of the election, it should properly exercise jurisdiction. Thus, this Court should accept this case for review and then reach the merits. *See Thornburg v. American College of Obstetricians & Gynecologists*, 467 U.S. 747 (1986).

C. *The Balance of Harms Favors Voters.*

The balance of harms weighs heavily in favor of the Voters and other similarly situated voters. If the injunction does not issue, Voters' votes for Electors will be diluted through the manual recount of a candidate-selected set of undervotes in four heavily populated, predominately Democratic counties while the undervotes in sixty-three counties will be completely uncounted, "depriv[ing] voters of their right to vote based on their county of residence and thereby den[ying] them equal protection of the laws." App. 38a. This scheme "allows candidates to play games with individual rights" and "contravenes the long-settled principle that '[q]ualified citizens not only have a constitutionally protected right to vote, but also the right to have their votes counted.'" App. 37a.

As this Court has noted:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he cast his ballot in favor of one of several competing candidates, underlies many [United States Supreme Court] decisions.

Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

In addition, by counting the candidate-selected set of undervotes, such a scheme "infringes upon the plaintiffs' right, and the right of all voters, to associate for the advancement of

their favored political candidate." App. 44a. The right of individuals to associate for the advancement of political beliefs . . . ranks among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). Voters' votes for Electors are diluted and their "right of political association is diminished when other votes for [the same Electors] are not counted." App. 45a.

On the other hand, election officials have no constitutionally legitimate interest in affording greater weight to candidate-selected votes than to the votes of similarly situated voters throughout the state. As state and county officials, their interests should be on the side of ensuring that all votes throughout the state are given equal weight. Because the dilution of Voters' votes may possibly affect the outcome of the election, the wrong candidate may take office. This factor is heavily in favor of Voters.

D. *The Public Interest Requires Injunctive Relief.*

The public interest favors the equal weighting of all of the ballots cast in a statewide race, and even more so in a Presidential race. "An executive like the President has broad discretion; he has the power to affect every voter, and thus every voter must be permitted to vote and have his ballot *both counted and equally weighed*." App. 56a n. 66 (emphasis added).

Furthermore, this Court in *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), specifically recognized that "in the context of a Presidential election, state imposed restrictions implicate a uniquely important national interest." As the *Anderson* Court pointed out:

> The president and the vice president of the United States are the only elected officials who represent *all* 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 largely be determined by voters beyond the State's boundaries.

Id. (emphasis added).

Under the Manual Recount Statute, manual recounts may be requested by partisan political candidates, not to ensure that every valid ballot throughout the state is counted along with all of the others, but to seek a partisan political advantage. "[T]he system encourages candidates to cherry-pick — to carefully select the counties in which to request that ballots be manually examined for [under]votes." App. 23a. "A candidate will want [under]votes counted in counties where he captured a greater proportion of the machine tabulated vote than did his opponent, because the candidate can expect that he will likely take a similar proportion of the [under]votes." *Id.* In the absence of the injunctive relief sought by Voters, a disproportionately high number of undervotes in four heavily populated, predominately Democratic counties will be added to the statewide vote total, while the valid undervotes throughout the rest of the state will not be counted at all.

This result is contrary to the one-person-one-vote principle and is, therefore, contrary to the national public interest in the equally weighed selection of the President. As this Court has explained, "the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Ogilvie*, 394 U.S. at 819.

Further, stopping selective and manipulable recounts serves the public interest by halting their continuing erosion of the public trust in our electoral system. The seemingly endless process of

multiple recounts has produced a strong appearance of corruption, in which public officials are widely viewed as acting out of their own partisan political interests rather than for the common good as their obligations of office demand. Reducing or preventing such an appearance of corruption is a critical public interest which would be well served by promptly enjoining these unconstitutional recounts and use of their fruit. As this Court has stated in addressing other aspects of the electoral process:

> Leave the perception of impropriety unanswered, and the cynical assumption . . . could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897, 908-09 (2000) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

So important is this public interest in avoiding the appearance of corruption by public officials that even limitations on a form of political expression – contributions to candidates – which were found to involve "'significant interference' with associational rights, could survive" where the state showed the limit to be drawn to stem an appearance of corruption. *Shrink Missouri PAC*, 120 S. Ct. at 904-05 (*quoting Buckley v. Valeo*, 424 U.S. 1, 28 (1976)).

An appearance of corruption presents a sufficiently powerful public interest to justify restraints that "operate in an area of the most fundamental First Amendment activities" and where the "First Amendment affords the broadest protection." *Buckley*, 424 U.S. at 14. If this interest is sufficient to impose restraints on our most precious First Amendment freedoms, then it certainly justifies an injunction to prevent the Manual Recount Statute from

violating fundamental rights to equal protection under the law. Therefore, the public interest is served by the issuance of an injunction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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