No. 00-942

IN THE

Supreme Court of the United States

Robert C. Touchston *et al.*,
Petitioners,

v.

Michael C. McDermott *et al.*,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT FLORIDA DEMOCRATIC PARTY

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Only on exceedingly rare occasions has this Court reviewed a court of appeals order affirming the denial of a preliminary injunction. It should not do so here. The question presented in the Eleventh Circuit was painfully narrow in the first instance: whether the district court abused its discretion in denying a preliminary injunction on the abbreviated and untested record before it. But that question now has narrowed to the point of irrelevance in light of the Florida Supreme Court's decision in *Gore* v. *Harris*, No. SC00-2431, Slip op. (Dec. 8, 2000). Moreover, review of this federal court judgment would be particularly inappropriate in light of principles of comity and federalism, including specifically the *Rooker-Feldman* doctrine.

Pursuant to the "contest" provisions of the Florida elections code, see Fla. Stat. § 102.168, the Florida Supreme Court in that case ordered, *inter alia*, that manual counts of undervotes be conducted in any Florida counties that have not previously conducted such counts. The result is that the manual recounts challenged here and conducted under Fla. Stat. § 102.166 (the "protest" provisions), even if they had been halted as requested by Petitioners, now would be conducted pursuant to court order under the directives of *Gore* v. *Harris*. In any event, the en banc court of appeals properly followed settled law in holding that the district court had not abused its discretion in denying the preliminary injunction. Moreover, because Petitioners were not denied the right to vote or to have their votes counted, they were not irreparably harmed when their bid to deprive other voters of the right to have their votes counted fell short. Petitioners also have failed to meet the other elements required for preliminary injunctive relief. The petition should be denied.

STATEMENT OF THE CASE

1. Background. On November 7, 2000, Florida citizens cast over 5,820,000 ballots in the general election for the President of the United States. Under Florida's election law, the outcome of this election would determine what slate of electors would cast Florida's twenty-five electoral votes for the President of the United States. Based on initial returns transmitted to it by the county canvassing boards of Florida's sixty-seven counties, on Wednesday, November 8, 2000, the Florida Division of Elections ("Division") reported that Governor George W. Bush had received 2,909,135 votes for President and that Vice-President Al Gore had received 2,907,351 votes.

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, Florida law required an automatic recount of the ballots. Fla. Stat. § 102.141(4). At the end of this initial automatic recount, the margin between candidates Gore and Bush was reduced from the initially stated 1784 votes to 300 votes.

To recheck the results, Florida law provides that counties may conduct a further manual recount to address "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Any candidate "may file a written request with the county canvassing board for a manual recount" "prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." *Id.*

§ 102.166(4)(a), (b). If the county canvassing board grants the request, an initial manual recount is conducted of ballots from three precincts and at least one percent of the total county vote. If the results of the initial manual recount indicate a disparity with the machine count that could affect the outcome of the election, the canvassing board "shall" undertake one of three further steps, including a manual recount covering all precincts in the county. *Id.* § 102.166(5).

In this case, the Florida Democratic Party requested a manual recount in Broward, Miami-Dade, Palm Beach, and Volusia Counties. At the conclusion of the initial recounts, each of the four counties determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount all of the ballots.

2. Procedural History of This Litigation. On November 13, 2000, Petitioners in this case filed a Complaint in the United States District Court for the Middle District of Florida seeking a declaration that Fla. Stat. § 102.166(4) is unconstitutional and an injunction against the manual recounting of ballots for Florida's electors for President in Palm Beach, Miami-Dade, Volusia, and Broward Counties. Alternatively, Petitioners sought an injunction against the use of any such recounted totals in any certified returns. Petitioners also filed a Motion for a Temporary Restraining Order or Preliminary Injunction ("Motion for Preliminary Injunction").

Petitioners are three registered voters residing in Brevard County. Brevard County does not use a punch card voting system; rather, it employs a much more accurate optical scanner system. The named defendants are members of the county canvassing boards of Palm Beach, Miami-Dade, Broward, and Volusia Counties, respectively, along with the Secretary of State and the two other State Election Canvassing Commission

members.

On November 14, 2000, after a hearing on Petitioners' Motion for Preliminary Injunction, the district court issued an order denying Petitioners' motion on the grounds that Petitioners had not established any of the requisite elements for entry of a preliminary injunction. *Touchston* v. *McDermott*, No. 6:00CV1510ORL28C, 2000 WL 1713943, at ** 3-4 (M.D. Fla. Nov. 14, 2000). The district court concluded, *inter alia*, that Petitioners were not likely to succeed on the merits and had failed to demonstrate they would be irreparably harmed if an injunction was not granted. *Id*. The district court adopted the reasoning of the order issued by the Southern District of Florida the previous day in *Siegel* v. *LePore*, No. 00-9009-CIV, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), denying a similar request for injunction from other voter parties and Governor Bush and Secretary Cheney. Pursuant to Federal Rule of Appellate Procedure 8(a)(1), Petitioners moved for an injunction pending appeal before the district court. The district court denied that motion.

On November 15, 2000, Petitioners filed a Notice of Appeal from the district court's Order and an Emergency Motion for Injunction Pending Appeal and to Expedite. The Florida Democratic Party moved to intervene and opposed the emergency motion, as did other appellees. On November 17, 2000, after sua sponte setting the case for hearing en banc, the court of appeals denied the motion for injunction pending appeal.

On the same date, the court of appeals denied a motion for injunction pending appeal in the *Siegel* case. Plaintiffs in *Siegel* filed a petition for certiorari before judgment, arguing that the manual recounts violated the Equal Protection and Due Process Clauses and the First Amendment. This Court denied that petition.

After several exhaustive rounds of briefing, including on the impact of the Florida Supreme Court's decision in *Bush* v. *Palm Beach County*, oral argument was conducted before an en banc panel of all twelve judges of the Eleventh Circuit on December 5, 2000. On December 6, 2000, the court of appeals issued its opinions in Petitioners' case, and in *Siegel* v. *LePore*. In *Touchston*, the court affirmed the district court's denial of a preliminary injunction for the reasons set forth in the *Siegel* opinion. Both cases involved the same fundamental issues. The court held that the denial of the preliminary injunctions must be affirmed because "Plaintiffs still have not shown irreparable injury, let alone that the district court clearly abused its discretion in finding no irreparable injury on the record then before it * * * ." *Siegel,* 2000 WL 1781946 at *8. The court pointedly noted that the factual record before the district court consisted of untested affidavits and media reports. Observing that "many highly material allegations of fact [were] vigorously contested," the court held that it could not appropriately consider the merits, *Id.* at n.4, and held that the district court had not abused its discretion. *Id.* at *7.

The court of appeals in *Siegel* held that the *Rooker-Feldman* doctrine, which precludes a lower federal court from reviewing a final state court decision,[1] did not apply to the plaintiffs' challenge to the Florida Supreme Court's decision in *Bush* v. *Palm Beach County Canvassing Bd.*, 2000 WL 1725434 (Fla. 2000), because that decision had been vacated by this Court, see *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836 (Dec. 4, 2000). See *Siegel*, 2000 WL 1781946 at *4.

On December 8, 2000, Petitioners sought a writ of certiorari from this Court.

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[1] See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

3. The Decisions of the Supreme Court of Florida. After Volusia County and Palm Beach County brought an action against Florida Secretary of State Harris to enjoin her from requiring that manual handcount results be submitted by 5:00 p.m. on November 14, 2000, the Florida Supreme Court issued an order requiring the Florida Secretary of State to accept amended certificates from county canvassing boards reflecting manual recounts if filed by 5:00 p.m. on November 26, 2000 (or by 9:00 a.m. on November 27, at the Secretary's option). *Palm Beach County Canvassing Bd.* v. *Harris*, 2000 WL 1725434 (Nov. 21, 2000). Broward County completed its county-wide manual recount and submitted results to the Secretary of State by that deadline. (Volusia County had submitted its manual recounts in time to meet the initial deadline of 5:00 p.m. on November 14, 2000.) On the evening of November 26, 2000, the Elections Canvassing Commission of Florida certified the vote total of Florida in the presidential race. That certification stated that Governor Bush received 537 more votes than Vice-President Gore. Palm Beach County completed its manual recount, showing a net gain of 215 votes for Vice-President Gore, but these totals were not included in the final certification because they were submitted approximately two hours after the 5:00 p.m. deadline, and the Secretary of State refused to accept them on that basis. Miami-Dade County, after completing a partial manual recount, reversed itself and discontinued its manual count, based upon a determination that it could not complete the count by the deadline.

After granting a petition for certiorari filed by Governor Bush, this Court on December 4, 2000 vacated the Florida Supreme Court's decision and remanded the case for clarification of the basis for the Florida Supreme Court's opinion. This Court expressly declined to rule on the federal questions asserted to be present by Petitioner Bush.

On December 8, 2000, the Supreme Court of Florida issued its opinion in *Gore* v. *Harris*, Case No. SC00-2431 (December 8, 2000). The underlying case was an action filed by Vice-President Gore contesting the certified election results of November 26, 2000 pursuant to Fla. Stat. § 102.168. That case was filed on November 27, 2000, in the Leon County Circuit Court, contesting the certification results on the grounds that they included "a number of illegal votes" and failed to include "a number of legal votes sufficient to change or place in doubt the result of the election." See Fla. Stat. § 102.168(3)(c).

This separate and distinct "contest" proceeding raised five instances in which the official certified results either rejected legal votes or received illegal votes. These were:

(1) The rejection of the 215 net votes for Vice-President Gore identified in the manual count conducted by the Palm Beach County Canvassing Board;

(2) The rejection of 168 net votes for Vice-President Gore, identified in the partial recount by the Miami-Dade County Canvassing Board;

(3) The certification of election night returns from Nassau County, instead of the results of the statutorily mandated automatic recount, resulting in a net gain of 51 votes for Governor Bush;

(4) The rejection of an additional 3300 votes in Palm Beach County, most of which were identified by Democratic observers as votes for Gore, but which were not included in the certified results; and

(5) The refusal to review approximately 9000 ballots from Miami-Dade County, which the counting machine registered as non-votes and which had never been manually reviewed.

Gore v. *Harris*, Slip op. at 4. The Leon County Circuit Court rejected Vice-President Gore's contest action with regard to all relief sought. Vice-President Gore appealed to the First District Court of Appeal, which certified the judgment to the Florida Supreme Court.

The Florida Supreme Court reversed the judgment of the circuit court, holding that "the trial court erred as a matter of law in not including (1) the 215 net votes for Gore identified by the Palm Beach County Canvassing Board (footnote omitted) and (2) in not including the 168 net votes for Gore identified in a partial recount by the Miami-Dade County Canvassing Board." *Id.* The Florida Supreme Court found no error in the trial court's findings regarding the Nassau County votes and the additional 3300 votes in Palm Beach County. *Id.* Finally, the court held that the trial court erred by refusing to examine the additional 9000 ballots from Miami-Dade. *Id.* at 5.

The Florida Supreme Court based its analysis on Florida statutory law, noting that the case was "controlled by the language set forth by the Legislature in section 102.168, Florida Statutes (2000) [the contest statute]." *Id.* at 6. That law provides that one of the grounds for a contest action is "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. § 102.168(3)(c). Instead of applying this statutory standard, however, the trial court erroneously required proof of "a reasonable probability that the results of the election would have been changed." See Slip op. at 21-22.

Applying the correct statutory standard to the particular allegations in the case, the Florida Supreme Court first noted that the trial court failed to examine the 9000 Miami-Dade ballots that had never been manually reviewed, presenting Vice-President Gore with "the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine

such evidence." *Id.* at 31. The court held that "[o]nly by examining the contested ballots, which are evidence in the election contest, can a meaningful and final determination in this election contest be made." *Id.* at 37. With regard to the 215 net votes in Palm Beach County and the 168 net votes in Miami-Dade County, the court held that these partial recount results should be included because the county canvassing boards had identified them as legal votes under Florida law. *Id.* at 34-35. The court declined to disturb the trial court's holdings with regard to the Nassau County vote and the 3300 additional disputed ballots in Palm Beach County.

Addressing the concern that other votes may have gone uncounted in other parts of Florida, the Florida Supreme Court stated that "the ultimate relief would require a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." *Id.* at 2. The court further noted that the circuit court can, under Florida statutory law, order all necessary public officials, "in all counties that have not conducted a manual recount or tabulation of the undervotes in this election to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.* at 38-39. The court held that any such necessary statewide relief be ordered upon remand. *Id.* at 40.

Finally, the court addressed the standard for tabulating ballots and determining what is a legal vote. Here again, the court relied on the Florida legislature and Fla. Stat. § 101.5614(5), which states that a vote shall be counted as a "legal" vote if there is a "clear indication of the intent of the voter." See *id.*

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE THE UNDERLYING ACTION IS RENDERED IRRELEVANT BY THE FLORIDA SUPREME COURT'S DECISION IN *GORE* v. *HARRIS*, AND THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING INTERIM INJUNCTIVE RELIEF.

I. THE RELIEF SOUGHT IN THE PRESENT CASE HAS BEEN SUPERSEDED BY THE FLORIDA SUPREME COURT'S DECISION IN *GORE* v. *HARRIS*.

The Florida Supreme Court's decision in *Gore* v. *Harris* supersedes Petitioners' request for a preliminary injunction and the underlying action. Petitioners' action was brought to challenge recounts conducted under the "protest" provisions of the Florida election code. See Fla. Stat. § 102.166. *Gore* v. *Harris*, on the other hand, was brought under the "contest" provisions of the Florida election code, see Fla. Stat. § 102.168. The relief granted by the Florida Supreme Court completely supersedes any possible relief that could have been or could be granted in the present case. The Florida Supreme Court ordered that a manual count or tabulation of undervotes be conducted in all counties that have not previously conducted such a manual count or tabulation. Slip op. at 38-39. Thus, the relief Petitioners sought – a halt to manual recounts conducted by the county canvassing boards under Fla. Stat. § 102.166 or, alternatively, an injunction that such recounts not be included in certified vote totals – is no longer relevant. Even if such recounts had been stopped or found to be unconstitutional under Section 102.166, recounts would now be conducted pursuant to the Florida Supreme Court's decision in *Gore* v. *Harris*, under

a completely different statutory provision that is not at issue in this case. Further, Petitioners' professed concern about "selective" recounts has now been fully addressed by the *statewide* relief ordered by the Florida Supreme Court.

While Petitioners no doubt will take issue with *Gore* v. *Harris*, that is a very different case, one that involves different parties, different issues and different provisions of Florida's election code, as the court below recognized. *See Siegel*, Slip Op. at 23 n.10 ("[T]his case involves discretionary recounts ordered by county canvassing boards. A recount ordered by a state court under state law in a contest proceeding might be a substantially different case, raising different legal issues.") In any event, any challenge to *Gore* v. *Harris* lies by means of a petition for writ of certiorari directly to the Florida Supreme Court. A motion to stay the Florida court's judgment pending the filing of a petition for certiorari has already been filed by Governor Bush and Secretary Cheney. If this Court is inclined to review *Gore* v. *Harris*, it obviously will have the opportunity to do so directly.

Finally, principles of comity and federalism counsel strongly against granting certiorari as a way of indirectly challenging the Florida Supreme Court's judgment in *Gore* v. *Harris*. E.g., *Powell* v. *Powell*, 80 F.3d 464, 467 (CA11 1996) (*Rooker-Feldman* doctrine based on "reasons that go to the heart of our system of federalism -- the dual dignity of state and federal court decisions interpreting federal law."); see also *International Eateries of Am.* v. *Board of County Comm'rs of Broward County*, 838 F. Supp. 580, 586 (S.D. Fla. 1993) (principles of abstention and federalism require that courts decline to entertain claims that would disrupt important state administrative and judicial processes); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Publ. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951); *Younger* v. *Harris*, 401 U.S. 37 (1971).

II. THE COURT OF APPEALS FOLLOWED SETTLED RULES OF FEDERAL PROCEDURE IN AFFIRMING THE DENIAL OF A PRELIMINARY INJUNCTION.

Appellate review of a lower court's decision to grant or deny a preliminary injunction is extremely narrow in scope. A district court's denial of a preliminary injunction may be reversed only if the court clearly abused its discretion. 2000 WL 178416, at *8; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (grant or denial of preliminary injunction reviewed under abuse of discretion standard). The reason for affording deference to the lower court stems in part from the nature of a preliminary injunction proceeding:

> "This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district court."

2000 WL 1781946, at *11 (quoting *Gray Line Motor Tours, Inc.* v. *City of New Orleans*, 498 F.2d 293, 296 (CA5 1974) (citations omitted)).

The court of appeals found that deference was especially appropriate in this case because of the undeveloped record: "[O]nly limited affidavits and a few documents were introduced into the record before the district court. No formal discovery has been undertaken, and, as yet, no evidentiary hearing has been held in this case. Many highly material allegations of facts are vigorously contested." *Id.* at *7. Deliberately eschewing a return to the district court to develop the record, Petitioners

instead have clung to "scant evidence" that is "largely incomplete," "vigorously disputed" and untested "by the adversarial process of cross-examination." *Id.* n.7. Petitioners continue to rely on disputed "evidence" in their petition, referring, for example, to voting instructions (allegedly posted on two counties' websites) that were never admitted into evidence. Pet. for Certiorari, *Touchston* v. *McDermott* (Dec. 8, 2000) [hereinafter *Touchston* Pet.] at 22-23. The court of appeals properly affirmed the district court, noting that "an undeveloped record * * * cautions against an appellate court setting aside the district court's exercise of its discretion." *Id.* at *7.

Contrary to Petitioners' assertion, *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), does not support a grant of certiorari to review the merits. *Touchston* Pet. at 25. In affirming the appellate court's decision to review the merits, rather than simply the exercise of discretion by the district court in denying a preliminary injunction, this Court in *Thornburgh* found that the factual record was unusually complete, 476 U.S. at 757, and that the unconstitutionality of the challenged state action was clear, *id*. at 756. The Court noted that a different situation would be presented where "the probability of success on the merits depends on facts that are likely to emerge at trial." *Id*. at 757 n.8. As the court below determined: "This case clearly falls within the latter category * * * . The answer to the constitutional questions is anything but clear. And, in stark contrast to *Thornburgh*, we have before us a factual record that is largely incomplete and vigorously disputed * * * [consisting of] limited affidavits and the submission of a few documents, including news media reports. * * * These evidentiary infirmities are especially problematic given that Plaintiffs' major claims are as-applied challenges to the Florida statutes, arguments the validity of which depends upon the development of a complete evidentiary record." 2000

WL 1781946, at n.4. *Thornburgh* does not permit review of the merits in this case. See also 476 U.S. at 821 (O'Connor, J., joined by Rehnquist, J., dissenting) (on limited record before it, court of appeals should not have invalidated statutory provisions in reviewing denial of preliminary injunction).

While Petitioners express disagreement with the lower court decisions, they make no attempt to demonstrate that the district court abused its discretion in denying the preliminary injunction, The court of appeals properly followed the principle of law that permits reversal of a district court's denial of a preliminary injunction only for abuse of discretion. Even if Petitioners could demonstrate that the court of appeals misapplied this rule, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a rule of law." S. Ct. R. 10. No reason has been provided by Petitioners to depart from this principle.

III. PETITIONERS WERE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. Petitioners Failed to Establish Irreparable Injury.

The court of appeals properly affirmed the district court's denial of preliminary injunctive relief because Petitioners had failed to show on the existing record a substantial likelihood that they would suffer irreparable injury if the injunctive relief were denied. 2000 WL 1781946, at *8. The court's conclusion was based upon settled and well-established principles applicable to the grant or denial of preliminary injunctive relief and was the product of sound analysis. For example, the court of appeals stated: "No voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or

prevented from voting for the candidate of his choice. Nor does any voter claim that his vote was rejected or not counted." *Id.* at *9. In short, Petitioners simply failed to prove the existence of *any* injury affecting their rights to vote. The court of appeals was thus manifestly correct in holding that the type of injury which might otherwise demand the extraordinary relief of a preliminary injunction was absent in this case. *Id.*

Not only did Petitioners fail to establish on the record the substantial likelihood of irreparable harm, but they also did not even allege any concrete and immediate legally cognizable injury. As the court of appeals properly concluded, "we reject the contention that merely counting ballots gives rise to cognizable injury." *Id.* at *10. Petitioners had their votes counted and the fact that the Florida electoral process provides a means whereby the ballots of other voters may also be counted (as opposed to being ignored, which Petitioners have persistently asked the courts to do) cannot produce any injury to them. A preference by Petitioners for machine ballot counting over manual counts likewise does not rise to the level of a recognizable constitutional or other injury. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982).

Petitioners' attempt to create irreparable harm by equating the manual recount process with state action that "chills" the exercise of First Amendment rights has no merit. In the first place, Petitioners clearly has no viable "vote dilution" claim arising from application of the Florida recount statute. No vote can be "diluted" in the constitutional sense – and consequently no voter can be injured – by a procedure that simply seeks to count the legally cast votes of those whose votes may not have been recognized by an initial machine count. A recount does not result in "dilution." See *Bennett* v. *Yoshina*, 140 F.3d 1218,

1226 (CA9 1998); *Partido Nuevo Progresista* v. *Perez*, 639 F.2d 825, 828 (CA1 1980).[2]

The court of appeals decision also does not conflict with the decision of this Court in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). The vote dilution in *Moore* proceeded from a state nominating petition statute that improperly granted greater voting strength to less populous counties than to more populous areas and thus obviously discriminated against one voting group in favor of another in violation of the Fourteenth Amendment Equal Protection Clause. Nothing of the sort exists here with respect to the Florida manual recount statute, which is applicable to all counties on a non-discriminatory basis, does not provide for any geographically imbalanced weighing of votes, and seeks only to ensure that a more complete and accurate vote count is obtained. The Florida statute clearly does not offend this Court's "one person – one vote" jurisprudence and thus cannot be said to

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[2] Petitioners largely based their vote dilution arguments on what they alleged to be the "selective" nature of the Florida recount statute because only a few counties were involved in the process. The Florida statute, however, allows a manual recount in *any* county where it is properly requested. See Fla. Stat. § 102.166(4). Thus, any appearance of selectivity is only a product of the fact that Petitioners' chosen candidates elected *not* to seek recounts in other counties. In any event, the recent action by the Florida Supreme Court in *Gore* v. *Harris*, taken in connection with a different statute (the election contest provisions of Fla. Stat. § 102.168), has virtually eliminated the basis for Petitioners' argument by extending a manual recount of "undervotes" to *all* Florida counties where no previous request for a recount had been made.

produce any injury to Petitioners, irreparable or otherwise.[3]

Similarly, the court of appeals' opinion is not at odds with *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316 (1999), which involved a challenge to census sampling techniques. Indeed, the Court in *Department of Commerce* never reached the constitutional issues, so the question of irreparable injury did not arise in that context. Indeed, *Department of Commerce* undermines Petitioners' argument. There, and in *Wisconsin* v. *New York*, 517 U.S. 1 (1996), this Court rejected any suggestion that the Constitution was offended by manual counts and recounts of the census, even though evidence showed that such methods were certain to produce inaccuracies.

Furthermore, there has in fact been no "chilling" of Petitioners' First Amendment rights by reason of the Florida recount statute. As the court of appeals correctly noted, there are no claims here that Petitioners were prevented from voting or registering to vote or that their votes were rejected or not counted. 2000 WL 1781946, at *9. There is likewise no allegation or evidence that Petitioners were restricted in any way by the Florida statute from expressing support for the candidate of their choice or from their right to associate with others of like political persuasion. Petitioners have failed to establish that

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[3] Petitioners reliance on *Baker* v. *Carr*, 369 U.S. 385 (1961), *Wesbury* v. *Sanders*, 376 U.S.1 (1964), and *Gray* v. *Sanders*, 372 U.S. 368 (1968) is equally misplaced. In all of the statutes in question in those cases, representatives to the same statewide body were elected from political jurisdictions with widely disparate populations. That issue is not presented here in the case of an at-large election where, although the elections are conducted by individual counties, the winner is determined based on the statewide popular vote.

there is even an incidental impact on any First Amendment right they have which is associated with the voting process. Petitioners' effort to create harm where none exists is wholly unpersuasive.

Petitioners' claim of injury arising from the effects of election contest proceedings conducted under Fla. Stat. § 102.168 is misplaced. Petitioners' constitutional challenges are addressed to the manual recount statute – Fla. Stat. § 102.166 – and those recounts have now been concluded. No issue concerning Section 102.168 – constitutional or otherwise – was raised before the court of appeals and no such issue is properly presented to this Court by the petition. As the court of appeals so aptly observed, a recount ordered by a state court in a contest proceeding would present a far different case with different legal issues. 2000 WL 1781946 n.10. Thus, if Petitioners wish to contend that they are being constitutionally harmed by the election contest statute or by the interaction of that statute and proceedings thereunder with the manual recount statute, then they must properly present such claims to the district court by way of an amended or supplemental complaint. The fact that the Florida Supreme Court has now addressed and resolved issues in the election contest proceeding adds no element of irreparable injury to this case even if these issues were properly before the Court.

B. There Is No Conflict With Other Circuit Court Decisions.

The court of appeals also properly recognized that not every alleged constitutional violation presumptively produces irreparable injury and that controlling jurisprudence follows a more narrow focus in applying this principle. Specifically, the court of appeals recognized that the presumption of irreparable injury did not extend to alleged violations of the Fourteenth

Amendment, but was instead limited to right of privacy claims and certain First Amendment claims involving an imminent danger that free speech would be directly chilled or prevented. 2000 WL 1781946, at *10. The court of appeals correctly held that Petitioners' allegations did not make out such a case and thus did not create any presumption of irreparable injury. *Id.*

Contrary to Petitioners' assertions, the court of appeals' decision in this regard does not conflict with the decisions of either the Ninth or Second Circuits cited in the petition, none of which involved voting rights issues. In *Goldie's Bookstore, Inc.* v. *Superior Court of California*, 739 F. 2d 466, 472 (CA9 1984), the Ninth Circuit actually *reversed* the grant of a preliminary injunction because the likelihood of success on plaintiffs' equal protection constitutional claim was "very slight" and because the balance of hardships (*i.e.*, irreparable harm) did not favor plaintiffs. This case thus undermines Petitioners' position. The language quoted by Petitioners is simply dicta unsupported by reference to any other Ninth Circuit authority.[4] If anything, the decision in *Goldie's* is entirely consistent with the result in the court of appeals because the Ninth Circuit expressly recognized that the existence of harm is directly related to the strength or weakness of the constitutional claim.[5] Here, Respondents

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[4] The court in *Goldie's* recognized that the issue of whether an alleged constitutional violation could alone give rise to irreparable harm was not before it because the district court in fact did *not* rely on that proposition. The court went on to state, however, that it could not affirm on the basis of that concept anyway because the constitutional claim was "too tenuous." 739 F.2d at 472.

[5] *Monterey Mechanical Co.* v. *Wilson*, 125 F.3d 702 (CA 9 1997), also cited by Petitioners, is to the same effect and likewise does not conflict with the Eleventh Circuit's opinion. There, the court made it clear that any finding

submit that the factual record is woefully insufficient to support Petitioners' constitutional allegations, providing yet another basis upon which to conclude that Petitioners have shown no irreparable injury.

The Second Circuit decisions cited by Petitioners are similarly not in conflict with the Eleventh Circuit's holding. Both *Brewer* v. *West Irondequoit Central School District*, 212 F.3d 738 (CA2 2000), and *Jolly* v. *Coughlin*, 76 F.3d 468 (CA2 1996), discussed the issue of irreparable harm in the context of the plaintiff having clearly made the requisite showing of a substantial likelihood of success on the merits of the constitutional claims.[6] Thus, these Second Circuit decisions stand for the unremarkable proposition that in cases not involving the right to privacy or direct infringements on First Amendment rights, the presumption of harm will arise when the complaining party has made the requisite showing with respect to the merits of the constitutional claim. The Eleventh Circuit

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of irreparable harm in the context of a constitutional challenge seeking injunctive relief would be dependent upon a proven constitutional infringement. In *Monterey*, the Ninth Circuit held the challenged statute unconstitutional on the basis of the factual record, and its comments about irreparable harm arising from constitutional infringement were only made in that context. Even then, the Ninth Circuit simply remanded the case to the district court to reconsider preliminary equitable relief in light of the determination of unconstitutionality. Nothing in *Monterey* suggests that irreparable harm in the Ninth Circuit will be presumed from an unproven constitutional violation.

[6] *Covino* v. *Patrissi*, 967 F.2d 73 (CA2 1992) (cited by *Brewer*), and *Statharos* v. *New York Taxi and Limousine Commission*, 198 F.3d 317 (CA2 1999), are both privacy cases and are clearly consonant with the Eleventh Circuit's conclusion regarding the presumption of irreparable harm in constitutional cases.

decision rests on the same principle. In the present case, the lack of record support effectively precludes Petitioners from establishing a substantial likelihood of success on the merits, and there is no occasion for the presumption to arise, just as would be the outcome under the Ninth and Second Circuit decisions relied upon by Petitioners.

C. Petitioners Have Not Demonstrated A Substantial Likelihood Of Success On The Merits Of Their Constitutional Claims.

The district court denied the preliminary injunction not only because Petitioners failed to demonstrate irreparable injury from the denial of an injunction, but also because they failed to demonstrate a substantial likelihood of success on the merits of their equal protection, due process and First Amendment claims. Although the court of appeals found it unnecessary to reach these claims, the district court was correct in so holding and certiorari should be denied on this independent ground as well.

1. Equal Protection. The district court correctly found that Petitioners have not met the burden of showing a likelihood of success on the merits of their equal protection claims. The availability of the manual recount as a standard post-election, precertification procedure is a long-standing feature of Florida law, and of the law of other States,[7] and has been repeatedly

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[7] See Cal. Elec. Code § 15627; Colo. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. Ann. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code Ann. § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. Ann. § 19:53A-14; 25 Pa. Code § 30. At least 20 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. S.D. Admin. R. 5:02:09:05(5); Tex. Elec.

used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted. The district court correctly found that Florida process is available equally and provides candidates for office and political parties within each county with equal rights to seek a recount. "Florida's manual recount provision is a 'generally-applicable and evenhanded' electoral scheme." 2000 WL 1694376, at *6 (S.D. Fla., Antoon) (citing *Anderson* v. *Celebrezze*, 460 U.S. at 788 n.9). No requests for manual recounts have been denied in this election. As the court of appeals recognized, the precertification process pursuant to Fla. Stat. § 102.166 is based on the correct conclusion that Florida's designation of political candidates and parties to request manual recounts is a "reasonable choice" because "they are the ones most likely to be alert to problems with a machine tally." 2000 WL 1781946, at *16 (Anderson, J., concurring). The Chief Judge of the court of appeals went on to note that permitting political candidates to protect voter interests as part of the checks and balances of a state electoral structure is common among the states. *Id.* at *17 n.9. And, this Court has previously recognized that manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4.").

Petitioners argue that the Florida statute should be invalidated because it "allows a candidate in a statewide election to selectively cause the votes in some counties to be counted,

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Code § 212.005(d); Vt. Stat. § 2601; Va. Code Ann. § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

while ignoring valid votes in other counties." *Touchston* Pet. at 19. This argument demonstrates a clear lack of understanding of the Florida process. Fla. Stat. § 102.166 allows any candidate or political party to request a manual recount in any county.[8] More importantly, in the context of a contest under Fla. Stat. § 102.168, the Florida Supreme Court has ordered that validly cast ballots for which machines did not record a vote be examined in order to determine if there is a clear indication of the intent of the voters casting such ballots. Slip op. at 40.

The basis of Florida's manual recount statute is reasonable. The use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county. But this

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[8] Petitioners conveniently lose sight of the fact that a candidate or party can only request, not mandate, a manual recount. Fla. Stat. § 102.166(4). Moreover, as Chief Judge Anderson explained, the statutory procedures governing manual recounts provide safeguards against the type of partisan abuses suggested by Petitioners:

> [T]he decision [to grant a manual recount] is made by a county canvassing board composed of three statutorily designated officials, including a county court judge, none of whom are active participants in the candidacy of any candidate. *See* Fla. Stat. § 102.141. The canvassing board's discretion is not standardless, but rather is guided by a statutory purpose of determining the intention of voters and correcting "an error in the vote tabulation which could affect the outcome of the election." *Id.* § 102.166(5). Florida law further provides that canvassing board meetings must be open to the public. *See id.* § 286.0105(1). Finally, a canvassing board's decision to grant or deny a manual recount is subject to judicial review. * * * The combination of the composition of the canvassing boards, the statutory standards guiding their discretion, and the availability of judicial review provides meaningful checks on the exercise of discretion by canvassing boards, and reduces the risk of partisan influences tainting the process.
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> Slip op. at 40-41.

will be true "[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions * * * .)." *Siegel*, 2000 WL 1687185, at *7. "No court has held that the mere use of different methods of counting ballots constitutes an equal protection violation." 2000 WL 1781946, at *14 (concurring opinion). Indeed, the fact that counties have different ballot marking and counting systems demonstrates the value in having statutory checks and balances such as a manual recount process.[9]

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[9] For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.4% undervote rate (4 in 1000 ballots). (See Decl. of Jon Ausman, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11), Tab 13, ¶ 8.) In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade counties experienced a 3.2% undervote rate (32 in 1000 ballots) in the presidential race. (Decl. of Jon Ausman, App. Tab 13, ¶ 9.) The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause, but it also enhances the equality of the voting process. Petitioners' equal protection claims are tantamount to contending that unless each county's marking and counting systems are identical in every way there is violation of constitutional rights. Even if Petitioners had standing to allege a denial of equal protection in the failure to conduct a recount in the counties in which it was not requested, their equal protection claim would be unsupportable in light of the entirely reasonable basis for the distinction in treatment between the ballots of the various counties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"); see also Slip op. at 42 ("[T]he state has sufficiently strong interests to justify the manual recounting of votes within the established statutory framework.") (Anderson, J., concurring). The basis for determining where recounts are conducted was not arbitrary. Where there

2. <u>Due Process.</u> Petitioners due process arguments are meritless. As provided by the plain language of the statute, the manual recount provisions are designed to remedy errors in the vote tabulation "which could affect the outcome of the election and to arrive at the true voters' intent." Slip op. at 42. Petitioners' mantra that the Florida manual recount statute does not incorporate "any standard" and "gives absolute discretion" to county canvassing boards ignores the plain language of the statute. Citing *Broward County Canvassing Board* v. *Hogan*, 607 So. 2d 508 (Fla. App. 1992), Petitioners attack the Florida statutes by arguing that the discretion delegated by the Florida Legislature to the county canvassing boards in Fla. Stat. § 102.144(4)(c) violates the Due Process Clause. *Touchston* Pet. at 21. Specifically, Petitioners anticipate a harm, contending that canvassing boards will discriminate against candidates based on political affiliations. But, no evidence of such behavior exists in this case, nor is there any evidence of such behavior ever occurring. Indeed, in this case, there has not been any request for a manual recount that was not granted by a county canvassing board. Moreover, in *Palm Beach County Canvassing Board* v. *Harris*, No. 00-836, the Florida Supreme Court inquired of counsel for Governor Bush (the candidate supported by Petitioners) whether he wanted to request manual recount in any additional counties. Governor Bush declined the offer. (Florida Supreme Court Order, Nov. 21, 2000, *Palm Beach* v. *Harris*, at n.56). *Touchston* Pet. at 21. Fla. Stat. § 102.166 provides that a full manual recount should only go forward if the canvassing board determines that, after a sample

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was a request for a manual recount, it was granted. Where there was no request, it was not. Nothing could be more reasonable, or less discriminatory.

manual evaluation of ballots, the results of the manual recount "could affect the outcome of the election."

Petitioners also argue that there are no standards covering the canvassing boards' examination of ballots subject to a manual recount. *Touchston* Pet. at 21. Again, a simple reading of the statute belies Petitioners' claim. Fla. Stat. § 102.166(7) sets forth the procedure for manual examination of a ballot and requires that the ballots be examined to ascertain the "intent of the voter." This clear standard is consistent with that which was emphasized by the Florida Supreme Court in *Gore* v. *Harris* in the context of the remedy ordered in the contest proceeding conducted pursuant to Fla. Stat. § 102.168: "In tabulating the ballots and in making a determination of what is a 'legal' vote, the standard to be employed is that established by the Legislature in our [Florida's] Election Code is that the vote shall be counted as a 'legal' vote if there is a 'clear indication of the intent of the voter.'" Slip op. at 40 (citing Fla. Stat. § 101.5614(5)).

Contrary to Petitioners' assertion, *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), is inapplicable here. *Touchston* Pet. at 21. In *Morales*, this Court affirmed the state court's decision that struck down an anti-gang criminal ordinance as vague because it did not articulate a standard for illegal loitering. The ordinance provided inadequate notice regarding whether behavior would be illegal and thus created the risk of criminal conviction without any criminal standard. Here, the Florida Legislature established a clear voter-intent standard delegating authority to local election officials to apply the standard to the facts presented to the local officials, such as the type of vote marking equipment used in their county. Petitioners have not been harmed in remotely the same way that the plaintiffs in *Morales* were. They make no claim that their primary conduct

was subject to the whim of an official. Nor do they claim that their votes were not counted because of a vague voter-intent standard.

Petitioners' reliance on *United States* v. *Mosely*, 238 U.S. 383 (1915), *United States* v. *Classic*, 313 U.S. 299 (1941), and *Lane* v. *Wilson*, 307 U.S. 268 (1939), in support of their due process claims miss the mark. All three cases examine facts in which voters are deliberately and insidiously disenfranchised. *Mosely* and *Classic* were criminal cases that involved conspiracies to preclude votes in certain precincts from being counted and to count votes for a candidate as votes for his opponent. *Lane* is a challenge to a state statutory scheme that permanently disenfranchised a class of voters who failed to register to vote during a certain ten-day period. Unlike the cases cited by Petitioners, the Florida statutory process seeks to enfranchise voters where machine marking and recording equipment may have worked a disenfranchisement of voters who cast legal ballots.

Petitioners' reliance on *Bennett* v. *Yoshina*, 140 F.3d 1218 (CA9 1998), is ironic. *Bennett* clearly stands for the proposition that when voters relied on an election procedure and were disenfranchised for doing so, the procedure violates due process. There is no evidence in this case that voters relied on any standard for counting ballots other than the voter-intent standard contained in the state statutes. Moreover, the statutes do not disenfranchise any voters, but rather, offer a comprehensive system of checks and balances all designed to facilitate enfranchisement. Notwithstanding any alleged surprise voters might have when learning of the manner in which election officials discern voter intent, the system would still withstand constitutional scrutiny because counting more votes than had previously been counted does not disenfranchise anyone. See

Partido Nuevo Progresista v. *Perez*, 639 F.2d 825 (CA1 1980).

D. The Balance of Harm Does Not Favor Petitioners.

Petitioners' argument that the balance of harm "weighs heavily" in their favor is based entirely on the proposition that, if an injunction is not issued, their votes will somehow 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, "resulting in a denial of equal protection." *Touchston* Pet. at 25. This argument has now been completely negated by the December 8, 2000 decision of the Florida Supreme Court in which, among other things, the manual recount of undervotes has now been extended to *all* Florida counties in which such recounts have not yet taken place. Thus, the very basis upon which Petitioners were attacking the recount statute – candidate-selected sets of undervotes – should no longer be considered an issue in this case. Not only does the balance of harm not favor Petitioners, but they cannot claim to be suffering any harm at all given the action by the Florida Supreme Court. On the other hand, even by Petitioners' own admission, an injunction at this point would visit substantial harm upon the state and county election and judicial officials who are now charged with the responsibility of ensuring that all undervotes throughout the state are accurately counted. It would also visit substantial harm upon Vice-President Gore and the Florida voters who selected him, as well as upon the public interest as the contest proceedings move towards a speedy resolution.

E. Petitioners' Public Interest Argument Is Baseless.

Petitioners' contention that the public interest would be served by the extraordinary injunctive relief they seek is based on two wholly unsupported claims. First, Petitioners claim the public interest is harmed because candidates may selectively pick the counties in which manual recounts will be conducted. Of course, *Gore* v. *Harris*, which requires that all undervotes be manually counted, regardless of the county, demolishes this argument. And, even if the Florida Supreme Court had not ordered such a remedy under Fla. Stat. § 102.168, the protest provisions of Fla. Stat. § 102.166 are generally and equally applicable – as has been fully discussed above. Second, without even a scintilla of evidence, Petitioners boldly argue that Florida's manual recount process results in an "erosion of the public trust in our electoral system." *Touchston* Pet. at 28. Indeed, Petitioners even go so far as to suggest that Florida's long-standing manual recount process creates "[a]n appearance of corruption." *Id.* at 28. There is absolutely no evidence of corruption, or even the appearance of corruption, in this case. Indeed, the very opposite is true. Florida's manual recount process acts as an important check on the ballot counting process that *promotes*, not erodes, public trust in the electoral system. Manual recounts occur when a candidate or political party states a valid reason for a recount and in the judgment of local officials the results of a manual recount could affect the outcome of an election. The manual recounts that were conducted pursuant to Fla. Stat. § 102.106 were conducted in full public view by counting teams made up of representatives from different political parties with the supervision of a three-member canvassing board that include a sitting county judge and review by the Florida judiciary.

CONCLUSION

The underlying action has been rendered irrelevant by the Florida Supreme Court's decision in *Gore v. Harris.* No reason would support what amounts to a collateral attack on that decision in the context of this petition. The court of appeals followed settled principles of law in affirming the district court's denial of a preliminary injunction. Petitioners have demonstrated no abuse of discretion in that decision. The petition therefore should be denied.

Respectfully submitted.

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