IN THE SUPREME COURT OF FLORIDA

MATT BUTLER,

Appellant, CASE NO.: SC00-2403

vs.

HONORABLE KATHERINE HARRIS.
as Secretary of State, State of Florida, and
HONORABLE ROBERT A. BUTTERWORTH,
as Attorney General, State of Florida,

Appellees.
_____/

BUTTERWORTH'S REPLY IN SUPPORT OF DISMISSAL OF THIS CAUSE AS MOOT OR, ALTERNATIVELY, DISMISSAL FOR LACK OF STANDING

Appellee, ROBERT A. BUTTERWORTH, as Attorney General of Florida, by and through undersigned counsel, hereby replies to Butler's Response To Order to Show Cause, averring that the cause is moot in that Butler has failed to demonstrate that his constitutional attack on §102.166 (4) and (5), Fla. Stat., survives. Alternatively, dismissal remains in order for lack of standing.

Butler's Response is wholly devoid of any legal citations supportive of his contention that his constitutional claims are not moot. Rather than cite to legal authorities for his argument that this Court should now strike two statutory provisions, Butler cavalierly–an erroneously--contends that his "exact position has (already) been

vindicated in the companion case . . .recently decided by the United States Supreme Court." Bush v. Gore, 531 U. S. ___ (December 12, 2000). Even assuming this to be so, the obvious flaw in Butler's argument is that the United States Supreme Court did not invalidate any statute in reaching its conclusion. Indeed, no court throughout the entire presidential litigation process has invalidated any Florida statute; all decisions were made without having to strike any organic or statutory law.

As a result, Butler fails to demonstrate why it is now necessary, after virtually all of the presidential election litigation has been concluded, for this Court to strike two statutes. In this regard, Butler now presses for an advisory opinion, a decision that can no longer have any bearing on the outcome of the presidential election, or afford any further relief to any party.

Butler thus utterly fails to demonstrate the conditions precedent to overcoming the "capable of repetition, yet evading review" exception as argued in the brief Attorney General Butterworth submitted to this Court. The argument and citations of authority presented on pages 6 and 7 of that brief remain unchallenged, save for Butler's bare conclusory notion.

In fact, Butler's own admission that "the controversy giving rise to . . . Butler's question has been decided(,)" (page 3 of Response) amply demonstrates that there is no longer any viable cause of action or case or controversy that requires resolution by

this Court.

Butler's argument that the United States Supreme Court's majority decision in Bush v. Gore, is supportive of his position is a gross misreading of that decision. This Court is well aware that the majority decision is based on a concern regarding the susceptibility of differing standards used by the several county canvassing boards in conducting manual recounts of punch-card ballots in order to discern the voters' intent. The validity of the statutes Butler challenges here was not an issue before the United States Supreme Court.

Moreover, this Court is also well aware of the history of the use of manual recounts. Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998). In Roudebush v. Harkte, 504 U. S. 15, 92 S. Ct. 804, 31 L. Ed. 2d 1 (1972), the Court recognized that recounts are an integral part of a state's electoral system, 92 S. Ct. at 811, and that Indiana's recount provision includes manual recounts ("If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially rejected.") (Emphasis added.) 92 S. Ct. at 810.

Against this backdrop, Butler's claim would require a re-write of the United

States Supreme Court's recent decision in Bush v. Gore, and the scuttling of the manual recount precedent set out above. Butler would have this Court so rule based on the notion that every voter is entitled to request a county canvassing board to conduct a manual recount–even if no protest is filed in the requesting voter's home county! Because Butler filed no protest, and no one else in Collier County filed a protest, this case comes before this Court upon the incredible proposition that the equal protection clause mandates that every voter is entitled to make this request regardless of the initiation of a protest which is a condition precedent to requesting a manual recount!

The bare facts that the First District Court of Appeal certified this case to this Court, and that this Court accepted the case, only shows that this case was accorded the same treatment as all others that involved the presidential election. It is self-evident that such a scenario does not dictate or drive the outcome of a case. Similarly, an agency head's disagreement with a statute that official is charged with administering also does not dictate or compel a specific outcome of a case.

This case is moot, and nothing Butler says in his Response alters this conclusion in any manner.

As an alternative grounds for dismissal, Butler fails to show how he meets the legal threshold for standing. The Attorney General's argument on this point (set out on pages 3 to 6 of his brief) also remains unchallenged. It must be born in mind that

Butler never initiated an election protest, never questioned whether his vote counted, and resides and votes in a county that did not have an election protest filed.

What Butler overlooks is that the salient purpose behind the recount provisions he challenges is, for the purpose of this case, to assure that votes cast in other counties were properly counted. Stated another way, the purpose of the manual recounts in counties other than Collier was to assure that citizens and voters in those counties had their votes count as much as Butler's did in his home county. In short, Butler can have no quarrel with a system that assures that others' votes counted as much as his did.

In sum, Butler cannot seriously contend that somehow he sustained a legally cognizable injury precisely because some voters in other counties where protests were filed had their votes count as much as his did in Collier County where no protest was filed. Such a claim sets equal protection voting rights jurisprudence on its ear.

Finally, Butler's claims fail on the merits as he cannot overcome the equal protection jurisprudence set out on pages 7 to 11 of the Attorney General's brief.

It is axiomatic that courts will not rule on constitutional questions if a case can be decided on other grounds. The penultimate decision on the 2000 presidential election is now part of our jurisprudence, as are the numerous cases carefully and fully decided by this Court under the most pressing of time constraints. The litigation, in addition to the presidential election, is now over.

Even though the Attorney General avers that Butler cannot prevail on the merits of his equal protection claim, nothing further need be done to complete the final chapter of this unprecedented litigation, except to dismiss this action as moot or, alternatively, for lack of standing. The Attorney General so requests that this Court close the book on this matter and thereby assign it forever as a significant part of our nation's history.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Terrell C. Madigan, Esq., and Harold R. Mardenborough, Jr., Esq., McFarlain, Wiley, 215 S. Monroe Street, Suite 600, Tallahassee, Florida 32301; and Deborah Kearney, General Counsel, Department of State, The Capitol,

Tallahassee, Florida 32399, this 2nd day of January, 2001.

George Waas