IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC00-2431

On Appeal from the Second Judicial Circuit

CASE NO. 1D00-4745

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*

Appellees,

CASE NO.

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Petitioners,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE
STATE OF FLORIDA, and SECRETARY OF AGRICULTURE
BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS
AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF
ELECTIONS,
individually and as members of and as THE FLORIDA ELECTIONS
CANVASSING COMMISSION,

Respondents.

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PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' PETITION FOR STAY OF THIS COURT'S ORDER

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Plaintiffs respectfully submit this response in opposition to the Petition of George W. Bush and Richard Cheney for Stay of This Court's Order Pending Review of Petition for Writ of Certiorari in the United States Supreme Court.

Petitioners have, within hours of a ruling by this Court ordering "immediate" relief, asked this Court to stay that relief. Because such an Order would entirely defeat the purpose of this Court's decision, it should be denied. As this Court is well aware, earlier today it reversed and remanded this matter to the Circuit Court of Leon County, for further proceedings pursuant to its opinion. Though that decision had several elements to it, petitioners seek especially a stay of this Court's order that: (1) "undervotes" from Miami-Dade County be tabulated immediately; and (2) a statewide manual count of the undervotes be commenced under this court's direction. See Gore v. Harris, No. SC00-2431 (December 8, 2000), at 17-18.

This request should be denied for two reasons: (1) Irreparable harm from any delay in this matter will befall respondents, not petitioners – and the balance of equities favors respondents, not petitioners; (2) Petitioners have not established a substantial likelihood that the Supreme Court will grant review of their constitutional claims, and even if so, there is little chance that the Supreme Court will reverse this Court's ruling.

ARGUMENT

The factors governing the issuance of a stay pending review by the U.S. Supreme Court are well-settled: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Likelihood of success on the merits in context of an application for stay pending review by the U.S. Supreme Court concerns whether there is a *reasonable probability* that four Justices will vote to grant certiorari and a *significant possibility* that a majority of the Court will reverse on the merits. See, e.g., Curry v. Baker, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying application for stay in elections matter).

None of these factors, particularly that relating to irreparable injury, weighs in favor of petitioner here. Indeed, the balance of the equities weighs overwhelmingly against issuance of the stay sought by petitioner

I. Irreparable Harm will be Suffered By Respondents if a Stay is Granted; By Contrast, no Irreparable Injury will Befall Petitioners if a Stay is Denied

A. Any Injury Petitioner Might Suffer Is Sharply Outweighed By The Irreparable Injury To Respondent Gore From Issuance Of A Stay By This Court

Most importantly, any possible injury to defendants of allowing a counting of ballots is strongly outweighed by the indisputable fact that the granting of a stay would irrevocably prejudice plaintiffs. Indeed, issuance of a stay by this Court would not simply cause irreparably injury to plaintiffs; a stay would as a practical matter effect reversal of this Court's decision by denying any prospect that it could ever be implemented.

This Court has shown that it recognizes the importance of concluding the contest proceeding currently underway under state law, and any vote counts within that proceeding, as soon as possible. The extreme difficulty of accomplishing this task would be made insurmountable by even another day's delay as a result of a stay from this Court. This result would turn the purpose of a stay application on its head: rather than "temporarily suspend[ing] judicial alteration of the status quo" to permit the U.S. Supreme Court to exercise jurisdiction over proper federal claims, see *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers), the grant of a stay here would effectively nullify this Court's decision and enter final judgment for defendants, while at the same time defeating the U.S. Supreme Court's ability to consider and resolve the issues raised on the merits.

B. Petitioners' Are Not Entitled to a Stay For Reasons Attributable to the

Operation of 3 U.S.C. §5

Petitioners argue that a stay is necessary because they will suffer irreparable injury as a result of the December 12 deadline set forth in 3 U.S.C. § 5. That argument makes no sense.

Defendants assert that the present action cannot finally determine the contest over the Presidential election within the meaning of 3 U.S.C. § 5 "because it is irreparably tainted by this Court's unauthorized and unlawful rewrite of the legislative structure to select Florida's electors." Motion at 6-7. They similarly claim that "[h]aving failed to resolve the controversy at issue in accordance with Section 5, this Court's decision is deprived of the 'conclusive' effect that Congress would otherwise accord to it in similar circumstances." Motion at 7.

If those assertions were true – and we wholeheartedly disagree with them – a stay would not help defendants. A stay would not eliminate this Court's judgment; it would only suspend enforcement of that judgment by the circuit court. The judgment would remain in effect and – in fact – under Governor Bush's argument, would itself preclude the "final" determination required under 3 U.S.C. § 5.

Indeed, under the construction of Section 5 put forward by defendants, "[r]eversal of this Court's decision to correct the clear constitutional errors" is the only way to obtain conclusive effect under Section 5. But a stay is not necessary for that; defendants must obtain review on the merits in the U.S. Supreme Court and there is no need for a stay in order to obtain such review.

If, on the other hand, the counting is allowed to proceed, both parties will have an equal opportunity to obtain protection under Section 5, with the winner depending upon both the outcome of the counting and the outcome of any further proceedings in the courts, including the U.S. Supreme Court. Such a decision does not impose any irreparable injury whatsoever on defendants and it fairly balances the equities among the parties.

C. **The Public Interest Weighs Strongly Against A Stay**

Third, the rights of third parties and the public interest both weigh strongly against petitioner at this juncture. The counting of uncounted ballots, which this application seeks to halt, has been commenced to ascertain the numbers of ballots actually cast by Florida citizens in the Presidential election, as provided in the Florida Elections Code. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554 (1963) (citizens have constitutionally protected right to have their votes counted). The public also has a definite interest in the ability of this Court to implement its rulings by ensuring that all legal procedures in place under Florida law to determine the rightful winner of Florida's electoral votes in the Presidential election are properly followed.

II. Petitioner Cannot Establish A Likelihood that Certiorari Will be Granted, and Certainly Not that they will Prevail in the U.S. Supreme Court

A. Petitioners Have Not Established A Reasonable Probability that Certiorari Will be Granted

Petitoners make much of the fact that the Supreme Court granted review of

what they call a "highly similar" case arising out of the same election dispute. Petition at 1. The Supreme Court recently declined to review one of the very same questions that petitioners intend to present to that Court.

While it is true that the Court recently granted review in, and decided, another case arising from this election dispute, see *Bush v. Palm Beach County Canvassing Board*, No 00-836 (December 4, 2000), it is worth noting that in that case, the Court declined to review the of the very questions that petitioners apparently will present to that Court in this matter: whether manual recounts violate a variety of constitutional provisions. In that case, the Court declined review on the question: "Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment." See *Bush*, *supra*, Petn. For Certiorari, at i. The Supreme Court declined to grant review on that question. *Bush, supra*, at 1.

B. Petitioners Have Not Established A Likelihood that the Will Prevail on the Merits in the U.S. Supreme Court

Because petitioner can establish neither irreparable harm nor a convincing case on the balance of harms, nor even a substantial prospect that the U.S Supreme Court will grant review of this matter, it is not necessary at this time for the Court to address the likelihood of success on the merits of petitioner's claims. In any event, however, the federal claims he raises are insubstantial and would not warrant relief in any event.

Petitioner argues that the proceeding to contest the election now moving forward under Florida law somehow violates Article II of the U.S. Constitution or Title 3 of the U.S. Code. Both claims are wrong. The Florida Legislature provided, by laws in place at the time of the election, that its electors were to be determined by popular vote, subject to judicial contest proceedings to determine the actual outcome of the election. The contest proceeding is thus a fixed feature of Florida law for purposes of this election and the fulfillment of the Florida statutes governing such proceedings does not violate either Article II or Title 3. Indeed, Title 3 explicitly contemplates such proceedings, stating with approval that each State may provide "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." 3 U.S.C. § 5.

Defendants impugn this Court's integrity by claiming that it "substituted its judgment for that of the Legislature and violated Article II." Slip op. at 4. Later, Defendants claim that, "[b]y changing the Election laws in various ways . . . this Court violated" Congress' commands. Slip op. at 5. No basis or citation is ever provided for these wild charges, which therefore fail on their face.

In fact, each element of this Court's decision in this action under the contest statute is clearly authorized by the Florida Legislature and entirely consistent with the precedents interpreting that statute:

- Defendants expressly conceded in oral argument before the Florida Supreme Court that the Section 102.168 contest action may be

invoked with respect to the Presidential election.

- Defendants expressly conceded in that same oral argument that the Florida Supreme Court may exercise appellate review of the circuit court's ruling in this case.
- Judicial review of contested ballots is a long-recognized remedy under Section 102.168. See, e.g., *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998); State v. Peacock, 125 Fla. 810 (1936); *Farmer v. Carson*, 110 Fla. 245 (Fla. 1933); *State v. Smith*, 107 Fla. 134 (1932); *State v. Williams*, 97 Fla. 159 (1929). In this posture, any ruling or order that such counts cannot proceed would itself be an impermissible change in the law that would raise serious questions under both Article II of the United States Constitution and 3 U.S.C. § 5.

As for defendants' further claim that manual counting of votes under Florida law violates the Equal Protection Clause, they have shown no likelihood of success on the merits here either. The decision of this Court does not present either of the problems that defendants have argued would raise concerns under the Equal Protection Clause.

To begin with, in their brief, defendants argued that "In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause." See Amended Brief of Petitioner Bush in *Gore v. Harris*, Fl. S. Ct. No. SC00-2431 at 44. The decision of this Court, of course, orders a statewide manual

count of undervotes, see slip op. at 16-20, so this equal protection claim is not presented.

Defendants also argued that "the application of counting standards in different counties" would violate, inter alia, the Equal Protection Clause. See id. at 45. In their stay application, defendants repeat this argument. They state that "[b]y ordering that votes in different counties should be counted differently," this Court has violated equal protection.

The premise of this argument is simply not present here, because this Court has ordered that a uniform, statewide standard, that required by the legislature, be used in counting the undervotes. See slip op. at 23-25 (explaining that, under longstanding interpretations of statutory law, ballots containing a "clear indication of the intent of the voter" constitute "legal votes" that must be counted). Because all the undervotes that will be manually counted will be counted under this same standard, there is nothing to petitioner's equal protection claim.

There is also no basis for a claim of inconsistent application of this standard, since the manual count will be conducted under the supervision of the Circuit Court. Inconsistency in application would not, in any event, create an equal protection problem: If it did, every manual recount statute in the nation would violate equal protection, and, indeed, the use by different localities of voting machines and procedures with varying degrees of sensitivity in "reading" votes would violate equal protection as well. If this is the basis of petitioner's complaint, under his view, there would be no way to count the ballots except

perhaps to have them all counted by a single person. The need for an orderly process of counting these votes, however, is sufficient to sustain from Equal Protection challenge the reasonable procedure set out in this Court's opinion. 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").

In any event, if the standard set out by this Court is not applied consistently, defendants will have recourse to the Leon County Circuit Court and, on appeal, to this Court, either of which can make a determination of which ballots meet the statutory standard. Since there has been no failure on the part of the court to ensure that the standard is applied consistently, the very inequality of treatment of which defendants complain is not present here.

CONCLUSION

The motion for stay should be denied.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF DECEMBER 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, hand delivery or facsimile transmission this 8th day of December, 2000 to the following:

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