SUPREME COURT OF FLORIDA

PALM BEACH COUNTY CANVASSING BOARD, et al. vs. KATHERINE HARRIS, etc., et al.

Case No. SC00-2346

***

VOLUSIA COUNTY CANVASSING BOARD, et al. vs. KATHERINE HARRIS, etc., et al.

Case No. SC00-2348
DCA Case Nos. 1D00-4467/1D00-4501
Circuit Court Case Nos. 00-2700/00-2717

***

FLORIDA DEMOCRATIC PARTY vs. KATHERINE HARRIS, etc., et al.

Case No. SC00-2349
DCA Case No. 1D00-4506
Circuit Court Case No. 00-2700/00-2717

Petitioners/Appellants Respondents/Appellees

SUPPLEMENTAL BRIEF OF GEORGE W. BUSH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, Codes

STATEMENT OF THE CASE AND FACTS

On December 4, 2000, a unanimous decision of the Supreme Court of the United States (the "Supreme Court") vacated this Court's November 21 judgment in this case and remanded it for reconsideration by this Court in light of the Supreme Court's opinion. Following that ruling, this Court requested supplemental briefs addressing "the implementation of the Mandate to this Court from the Supreme Court of the United States." Intervenor/Respondent Governor George W. Bush respectfully submits that, in light of the Supreme Court's opinion, this Court should affirm the judgment of the Circuit Court of Leon County from which this appeal was originally taken.

This Court also has before it another appeal from the Leon County Circuit Court, dismissing on multiple grounds the contest action filed by Vice President Gore. Respondent respectfully suggests that sensible resolution of these two separate cases can proceed as follows:

If this Court chooses to address the contest appeal on the merits rather than either dismissing the appeal or summarily affirming the Circuit Court's decision in the contest action, the Court must *first* resolve important issues of federal law raised on this remand. The resolution of issues to be decided upon remand from the Supreme Court is necessary to adjudicating claims in the contest action, and any possible relief that this Court might order after its review of the contest appeal depends upon those antecedent

legal questions. To do otherwise reverses both the logic and the reality of the present procedural posture of these matters. The contest appeal necessarily involves important Federal constitutional and legal issues, as well as questions of Florida statutory law, and the issue of whether the trial court's findings of fact are clearly erroneous. In order to reach these numerous difficult issues, appropriate deference to the Supreme Court and the efficient use of scarce judicial resources both require resolving the remand case first.

In particular, this Court would be forced to consider issues including, but not limited to, whether, in light of Article II, Section 1 of the U.S. Constitution and 3 U.S.C. § 5:

- the deadline for certification of county returns – which served as the predicate for the contest proceeding – could be "equitably" extended to November 26;
- a new standard of counting "dimpled" ballots – despite a written preexisting policy in Palm Beach explicitly prohibiting counting such ballots as votes and a lack of any other Florida precedent for doing so – would be permissible;
- a new procedure for limited recounts in selected counties – despite the complete absence of precedents for such recounts – can be applied in the context of a statewide election for presidential electors; and
- the established discretion accorded county canvassing boards under Florida election law could be supplanted.

Respondent respectfully submits that any affirmative answer to the aforelisted questions would necessarily come into irreconcilable conflict with 3 U.S.C. § 5 and Article II, Section 1 of the U.S. Constitution, and could ultimately jeopardize the ability of Florida's electors to participate conclusively in the 2000 presidential election.

On the other hand, if this Court declines to hear that contest hearing appeal, or if it affirms that decision on the merits, then this remanded case may well become moot. Yesterday, after extensive hearings, expert testimony, presentation of evidence, and legal argument, the Circuit Court for Leon County rejected Vice President Gore's contest of the 2000 presidential election. In so doing, the Circuit Court carefully reviewed each of Vice President Gore's claims and concluded, *inter alia*, that the evidence was insufficient to meet the legal burden, that Vice President Gore's witnesses were not credible, and that the county canvassing boards did not abuse their sound and duly conferred discretion in resolving the issues in this election.

Respondent believes that this well-reasoned and careful determination by the Circuit Court was correct, and that this Court should either deny the appeal or affirm the result summarily. In that instance, the disputes over whether the appropriate date for certification was November 18 or November 26 and whether Florida statutes in effect on November 7, 2000 permit "dimples" to be counted as votes become academic: either way, the same electors are certified with the exact same result.

Thus, if the contest appeal is affirmed, judicial economy will be served and this Court will avoid the complex federal and constitutional issues implicated in this remanded case. And, of course, the period of uncertainty and instability regarding Florida's participation in the presidential election will be brought to an end and final resolution will be achieved for the 2000 presidential election.

SUMMARY OF ARGUMENT

The opinion of the Supreme Court of the United States directs this Court on remand to specify the extent to which this Court's November 21 opinion in this case relied on Florida Constitution and the extent to which its opinion considered the effects of its ruling under 3 U.S.C. § 5. The November 21 opinion was based ultimately on considerations arising under the Florida Constitution. Moreover, the effects of the November 21 decision under 3 U.S.C. § 5 are not addressed in the Court decision. Finally, without the overlay of the Florida Constitution, this Court must construe the plain language of sections 102.111 and 102.112 to require county canvassing boards to submit returns by the seventh day following the election and to permit the Secretary of State discretion to ignore any late filed returns.

ARGUMENT

I. The Mandate Of The Supreme Court of The United States.

The December 4, 2000 order of the Supreme Court vacated this Court's November 21, 2000 judgment and remanded for further proceedings

with respect to two distinct questions of federal law: (1) whether this Court's November 21 ruling changed Florida election law in violation of Article II of the United States Constitution, and (2) whether this Court understood that such a change would frustrate the "legislative wish" of the Florida Legislature embodied in the Florida Election Code, in light of 3 U.S.C. § 5 and Article II. U.S. Slip Op. at 6-7.

The Supreme Court recognized that this Court's opinion "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution in concluding that late manual recounts could be rejected only under limited circumstances." *Id*. at 4. As the Supreme Court noted, although as a general rule it "defers to a state court's interpretation of a state statute," this case is outside that rule because it concerns a law governing the selection of Presidential electors. ~~Slip Op. at 4.~~*Id.* Here, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Id*. Invoking its decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court made explicit that Article II authorizes states to appoint electors only "in such Manner as the Legislature thereof may direct" and thus the federal constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25). In particular, as the Supreme Court also made clear in *McPherson*, "[t]his power is conferred upon the legislatures of the

States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions . . . ." 146 U.S. at 34 (quoting Senate Rep. 1st Sess., 43 Cong. No. 395)).

Having indicated that this Court has no ability to "circumscribe" the legislative power with respect to the appointment of electors on the basis of any provision of the Florida Constitution, the Supreme Court identified several passages in this Court's November 21 opinion that demonstrate that this Court relied on the Florida Constitution to "circumscribe" the legislature's power in extending the statutory deadline for a return of ballot counts. *See* U.S. Slip Op. at 5.

The Supreme Court also addressed 3 U.S.C. § 5, explaining that under this provision, "[i]f the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to [the] time of meeting of the electors." U.S. Slip Op. at 6. As the Court explained, § 5 "contains a principle of federal law that would assure finality of the State's determination," but only "if made pursuant to a state law in effect before the election." *Id.* Given this important provision – which not only provides a "safe harbor" but also implements Article II – the Supreme Court directed this Court to construe the state Election Code with § 5 in mind, and, significantly, cautioned against overriding the "wish" of the Florida legislature to secure for Floridians the benefits of that federal statute. U.S. Slip Op. at 6 ("a legislative wish to take advantage of the 'safe

harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law").

Finally, the Supreme Court stated that in light of the "considerable uncertainty" surrounding this Court's November 21 decision, it was unable "at this time" to review the arguments that Intervenor/Respondent Bush urged under Article II and 3 U.S.C. § 5. U.S. Slip Op. at 6. The Supreme Court accordingly directed this Court to reconsider its decision in light of those provisions of federal law. In this way, "ambiguous or obscure adjudications by state courts [will] not stand as barriers to a determination *by this Court* of the validity under the federal constitution of state action." U.S. Slip Op. at 6 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940)) (emphasis added).

II. This Court's Initial Interpretation Of Florida Election Laws In This Case Was Based On the Florida Constitution Rather Than On the Statutory Scheme Created By The Florida Pursuant To Its "Direct Grant" Of Authority Under Article II, Section 1 of the Federal Constitution.

It is clear that this Court's original ruling was based not on a simple construction of Florida's election law statute, but rather, on its view of the right to vote, and the rights emanating therefrom, contained in Florida's Constitution and other law external to the election code.

This Court's reliance upon the constitutional right to vote was evident at the very outset of its opinion. Thus, under the section title "Guiding Principles," the Court disparaged "hyper-technical reliance upon *statutory* provisions." Fla. Slip Op. at 10 (emphasis added). Instead, the Court

emphasized that " '*The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.*' " *Id.* at 11 (quoting *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975) (emphasis in the original). It explained that it had "consistently . . . adhered to the principle that the will of the people is the paramount consideration" and that its "goal today remains the same as it was a quarter of a century ago, *i.e.,* to reach the result that reflect the will of the voters, whatever that might be." *Id.* at 11. The Court, moreover, made clear that this "principle" was in addition to and separate from Florida's election law statutes: "This fundamental principle, *and* our traditional rules of statutory construction, guide our decision today." *Id.* (emphasis added). And in identifying "The Applicable Law" to resolving the question before it, the first thing that this Court referenced, which it described as "[t]he abiding principle governing all election law in Florida," was Article I, Section 1, of the Florida Constitution. *See* Fla. Slip Op. at 16.

Indeed, after noting the clarity of Florida's statutes, this Court could not have been clearer that resolution of the question before it "required" it to examine the "interplay" of those statutes with "constitutional law." Fla. Slip Op. at 31. This Court plainly acknowledged that "[u]nder this statutory scheme, the County Canvassing Boards are *required* to submit their returns to the Department by 5 p.m. of the seventh day following the election"; that "[t]he statutes *make no provision for exceptions* following a manual recount"; and that "[i]f a Board fails to meet the deadline, the Secretary is

not required to ignore the county's returns but rather is *permitted to ignore the returns."* *Id.* at 31 (emphasis added). It then explicitly stated that in order "[t]o determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, *it is necessary to examine the interplay between our statutory and constitutional law . . . .*" *Id.* (emphasis added).

The Court then immediately turned, in Part VIII of its opinion, to "THE RIGHT TO VOTE." *Id.* (emphasis in the original). It then proceeded to analyze Florida constitutional law regarding this right. It thus began with "[t]he text of [the] Florida Constitution" and, in particular, the "Declaration of Rights." *Id.* It proceeded to cite a series of constitutional law decisions. *See, e.g.,* Fla. Slip Op. at 32 (quoting *State v. City of Stuart,* 120 So. 335, 347 (Fla. 1929)); *id.* at 33 (quoting *Treiman v. Malmquist,* 342 So.2d 972, 975 (Fla. 1977)); *id.* at 33, n. 50 (citing *Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975)). It referenced the "framers" of the constitution and, in particular, their "declaration [in the Constitution] that all political power inheres in the people." *Id.* at 32. Perhaps most specifically, the opinion held that "[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are *valid* only if they impose no 'unreasonable or unnecessary' restraints *on the right of suffrage.*" *Id.* at 33 (emphasis added). Quoting *Treiman,* 342 So.2d at 975, the Court stated that "*[u]nreasonable or unnecessary* restraints on the elective process are prohibited." *Id.* (emphasis in original). As the Court explained, "[t]echnical

statutory requirements must not be exalted over the substance of this right." *Id.* at 34 (emphasis added). Needless to say, "statutory requirements" are "exalted" over everything except the requirements of higher ~~law;~~law, *i.e.*, the Florida Constitution.

Immediately after this discussion, this Court set forth its explicit holding. "*Based on the foregoing,*" explained the Court, "we conclude that the authority of the Florida Secretary of State to ignore amended returns . . . may be lawfully exercised under limited circumstances." *Id.* at 34 (emphasis added). The Court then prescribed those circumstances, which are not found in the statute itself:

> Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by law. To disenfranchise electors in an effort to deter Board members, as the Secretary in this case proposes, violates longstanding law.

Id. at 35. Thus, after emphasizing that "unreasonable or unnecessary" statutory requirements for elections violate the Florida Constitution, the Court struck down the Secretary's adherence to the statutory deadline because it was such an "unreasonable and unnecessary" restriction, under the "longstanding" precedent interpreting the Constitution. *See also id.* at 40 ("[t]his drastic penalty [of ignoring late-filed manual recounts] must be both reasonable and necessary."). This Court's reliance on *Roudebush v.*

Hartke, 405 U.S. 15, 25 (1972) and *Pullen v. Mulligan*, 138 Ill.2d 21 (1990),[1] neither of which are based on Florida law, further confirms that this Court's decision rested on principles external to the election law statute itself. *See id.* at 35-36.

That this Court relied on principles outside the statute itself to extend the statutory deadline is evident by a comparison to the other statutory analyses in the opinion. The Court, for example, in the course of interpreting the phrase "error in vote tabulation" in section 103.166(5), engaged in a detailed statutory analysis, reconciling the various terms in the

---

[1] In its initial opinion, the Court relied in part on Petitioner's representations concerning the Illinois Supreme Court case of *Pullen v. Mulligan.* The Court quoted *Pullen* for the proposition that, where the intention of the voter can be ascertained with reasonable certainty from the ballot, that intention should be given effect. This case does not stand for the proposition as the petitioner has suggested, however, that all dimpled ballots should be counted as votes. The Supreme Court of Illinois found that the procedures adopted by the trial court were proper and that 19 out of the 27 votes in question were **disregarded** entirely because the intent of the voter could not reasonably ascertained. These 19 votes had dimpled or other marks. The 8 votes that were counted were **perforated, not dimpled** ballots, or ballots that contained dimples consistently throughout the ballot. *Pullen* does not stand for the proposition that "rogue dimples" or other dimples can be counted, unless the voter cast dimple ballots consistently throughout the punchcard and no other chads were successfully punched.

We also note that Michael Lavelle, the attorney representing Penny Pullen in this case, provided an affidavit to the Circuit Court in Palm Beach County on November 22, 2000 that falsely stated that dimpled ballots were counted in the *Pullen* case. Mr. Lavelle later corrected his false affidavit. In the transcript of the deposition of Mr. Lavelle on December 1, 2000 in *Gore v. Katherine Harris*, before the Leon County Circuit Court, No. 00-2808, Mr. Lavelle stated that when he had pages of the transcript from the trial court read to him, and was advised that no dimples or dents were counted, he said, "my God, I can't believe it."

statute's text to produce a cohesive whole. *See* Fla. Slip Op. at 14-16. Likewise, in interpreting the "shall ignore" provision in section 102.111 and the "may ignore" provision of section 102.112, the Court resorted to the traditional canons that "[t]he specific statute controls the non-specific statute," "the more recently enacted statute controls the older statute," and that a statutory provision "will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Id.* at 26-27.

In contrast, with respect to reconciling the Secretary's authority to ignore late-filed returns in sections 102.111 and 102.112 with the manual recount provisions of 102.166, the Court did not rest its decision on the statute itself. Rather, it relied on principles external to the statute itself. *See* Fla. Slip Op. at 23. That is, to fill in these perceived statutory ambiguities, the Court did not defer to the judgment of the Secretary, as is required under ordinary principles of administrative laws. *See Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 7, 3 (Fla. 1973). Rather, it resolved the ambiguity by looking to the principle of Florida constitutional law that the will of the people must prevail. The Court thus found it necessary to "invoke the *equitable* powers . . . to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here." *Id.* at 41 (emphasis added).[2]

---

[2] To be sure, the Court's opinion does state that it has "used . . . traditional rules of statutory construction" to resolve statutory ambiguities. Fla. Slip Op. at 40. Presumably, the "traditional rule" referenced is that an ambiguous statute should be interpreted to avoid raising constitutional doubt. That rule itself, however, references principles external to the

Finally, Part X of this Court's opinion made explicit the centrality of the Florida Constitution to its analysis: "Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited." Fla. Slip Op. at 38. Thus, as the Supreme Court noted, this Court decided that Florida's constitutional right to vote trumped the careful balance struck by the Florida Legislature in favor of prompt finality, as expressed in Florida law. This Court set aside the statutory certification procedures in favor of new rules that it regarded as more faithful to the state constitution. The conclusion that this Court elevated the supremacy of the Florida Constitution over the legislature's plain statutory directive is inescapable. Indeed, as discussed in Part III below, this Court could have reached its decision *only* by this *constitutional* graft on the statutory scheme.

This Court's reliance upon the Florida Constitution, however, violates Article II.[3] As the Supreme Court made clear in *McPherson v. Blacker*, Article II, § 1, cl. 2 of the United States Constitution entrusts state legislatures with "plenary power" over the manner in which to appoint presidential electors. The *McPherson* Court quoted at length with approval

---

statute.

[3]Because 3 U.S.C. § 5, among other things, implements Article II, this Court's reliance upon the Florida Constitution would also fail to meet the requirements of § 5.

from an 1874 Senate Report that reflected an understanding of state legislatures' power to provide for the manner of appointing presidential electors without constraint from state constitutions. "This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their *state constitutions* . . . ." *McPherson*, 146 U.S. at 35 (quoting Sen. Rep. 1st Sess. 43d Cong. No. 395).

The Supreme Court's decision, with its emphasis on *McPherson*, must be read as an express caution to this Court. Quite simply, invocation of state constitutional provisions in order to "circumscribe" legislative directives concerning the manner in which to appoint presidential electors is constitutionally impermissible. *See* U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25). Thus, this Court must interpret the Florida election laws at issue in this case, in the context of a presidential election, consistent with Article II (*i.e.*, without reliance on the Florida Constitution).

This Court, in order to implement the Supreme Court's mandate faithfully, must revisit its decision and interpret the legislature's statutory scheme without reference to the Florida Constitution. As discussed in Part III, below, without reference to the Florida Constitution, the statutory scheme plainly granted the Secretary of State the discretion to refuse to certify returns that were not submitted before 5 p.m. on the seventh day after the election. Accordingly, the appropriate course of action for this Court on remand is to affirm the judgment of the Leon County Circuit Court.

III. Absent the State Constitutional Concerns Relied On By This Court In Its Original Ruling, The Statute Must Be Read To Permit The Secretary of State To Reject Late Filed Returns.

Without the overlay of the Florida Constitution, the Court's prior interpretation of the statute must be replaced with a reading that upholds the Secretary of State's actions in this case. The Florida election code expressly states, in the plainest possible language, that county canvassing boards' election returns "must be filed by 5:00 p.m. on the seventh day following the . . . general election . . ." and that the Secretary "shall" or "may" ignore any returns filed in violation of this mandatory state law obligation. Fla. Stat. §§ 102.111-102.112.

This Court's original opinion construed these provisions to require that election returns from a manual recount may be filed at any time that would not "preclude a candidate from contesting the certification" and that the Secretary may not ignore returns filed after the statutory deadline, but within this new judicially-created "deadline." Slip Op. at 38, 40. In other words, the Court read the requirements that the returns "shall" be submitted by the statutory deadline and that the Secretary of State "shall" or "may" ignore any late-filed returns to mean that the returns "could" be filed late and that the Secretary of State "must accept" such returns.

While the county canvassing boards are expressly required to submit all election returns within seven days, there is no statutory requirement that the boards conduct manual recounts and no implicit or explicit exception to the seven-day deadline for manual recounts, even though all agree that the

Florida legislature expressly contemplated manual recounts and knew they would be time consuming. To the contrary, the time for requesting a recount is left to the discretion of the losing candidate and the decision whether to conduct a recount is left to the discretion of the county canvassing board. Thus, under the *statute*, far from being a mandatory or essential means of tallying votes in close elections, manual recounts are simply a *conditional option* left to the discretion of canvassing boards – they may conduct them if, and only if, they do so within the unambiguous mandatory deadline. If it is difficult for a large county to do so because it has many votes to count, it must either forego the manual recount or "*shall* appoint as many counting teams . . . as is necessary" to get the job done within seven days. Section 102.166(7)(a). (After all, large counties with more voters also have more resources, personnel and money to do the counting.) Alternatively, if, as this Court's original opinion hypothesized, a manual recount is not even requested by the losing candidate until the eve of the deadline, this unreasonably dilatory request would, standing alone, be a compelling reason for the Board to deny the manual recount request. *See* Slip Op. at 23. Thus, the fact that a "candidate *can* request a manual recount at any point prior to certification by the board and such action *can* lead to a full recount" in no way alters or relaxes the requirement that they "must" do so within seven days. Slip Op. at 23 (emphasis added).

This is particularly true because the Florida Legislature expressly contemplated the possibility of potentially time-consuming manual recounts

when it re-enacted, and reinforced, the mandatory seven-day deadline. In 1989, when it *first* authorized manual recounts, the legislature knew that this would be the only method for recounting votes that might push up against the statutory deadline. It nonetheless subjected this novel methodology to the same deadline as all other methods of recounting votes and provided explicit directions for resolving the potential time crunch caused by manual recounts – appointing enough counting teams. Indeed, Section 112 and the revision of Section 166 were signed into law on the *same day* in 1989. Ch. 89-338, 89-348, Laws of Fla. We therefore know to a certainty that the legislature intended that manual recounts, like all other means of resolving election protests, be subject to the uniform, unambiguous deadline. Even if the Secretary has authority to "ignore" late-filed returns in circumstances other than where there has been substantial compliance with the deadline, it certainly cannot be in the manual recount circumstance expressly contemplated, and not excused, by the Florida legislature.

Moreover, the fact that the Florida Legislature expressly contemplated manual recounts conclusively demonstrates that the legislature did not believe manual recounts were the best or only means of accurately counting votes, or believed that any improved accuracy was less important than the finality and uniformity created by the mandatory deadline. If the Legislature thought that manual recounts were the best means of achieving an accurate vote tally, it would not have made that

methodology wholly optional by each county board and thereby created a system where such returns would necessarily be performed only in *part* of the state. If a legislature believes a particular methodology is the best means for assessing the number of legal votes, and is seeking to achieve statewide accuracy, it obviously would make that method mandatory and statewide – as the Florida legislature did for the automatic statewide *machine* recount. *See* Fla. Stat. § 102.166. Even if vote tallys are perfect in the counties where the Vice President seeks manual recounts, we still will not know which candidate received the most legally cast votes because the other counties in Florida did not engage in these sorts of recounts. The Florida legislature's knowledge of this arithmetic reality demonstrates that it did not take a position as to whether machine or manual recounts were more accurate and was perfectly content to have certified statewide returns based exclusively on the machine recounts, or a combination of machine and manual recounts. Moreover, if the Florida legislature thought the manual recounts were the only permissible means of devising accurate election returns, and also thought it would be sometimes impossible to do so within seven days, it would not personally *fine* county board members who were simply seeking to vindicate this fundamental "right to vote."[4]

---

[4]In its initial brief in this case, the Florida Democratic Party suggested that there is somehow a conflict between the requirement that the official results compiled by the county canvassing boards for submission to the Secretary include "write-in, absentee and manually recounted results" and the requirement that the board submit manual recount results within seven days. *See* Section 101.5614(a). This assertion is facially incorrect. It is quite true that "manually recounted results," like "write-in" votes, are a

For these reasons, any conclusion that the "right to vote," or an accurate vote count, is somehow dependent on manual recounts (in selected counties) is necessarily premised on empirical and policy judgments that plainly cannot be derived from the Florida *election code*. Rather, as this Court's original opinion candidly acknowledged, the primacy given to manual recounts is derived from the Florida Constitution, as previously interpreted by this Court and Illinois Supreme Court "pronouncements" on "accurate vote counts [being] one of the essential foundations of our democracy." Slip Op. at 36.

---

proper part of the official results *if* they are done within the seven-day window – as Volusia County did. This simply reaffirms that the Florida legislature contemplated that manual recounts, along with other means of supplementing the returns provided by "the automatic tabulating equipment," be included in the canvassing boards' election returns. It in no way suggests that a board's desire to manually recount votes would somehow excuse noncompliance with the seven day deadline, any more than its desire to count "write-in votes" would excuse noncompliance. This is particularly obvious because Section 5614 is a directive to the *county canvassing boards* concerning what should be in their official returns and has nothing to do with the Secretary's duty to certify the returns when submitted. In Section 111, this certification, and declaration of a winner, must be done "as soon as" the Commission receives the county boards' certified returns. The statute does not contemplate two certifications and two declarations of which candidate won – one based on returns without manual recounts and another when supplemented by the manual recounts.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by facsimile or hand delivery on December 5, 2000:

Daniel D. Eckerd
Volusia County Attorney
Frank B. Gummey, III
Tura Schnebly
Assistant County Attorneys
123 West Indiana Avenue
DeLand, FL 32720-4613

Mark Herron
301 South Bronough Street, Suite 200
Tallahassee, FL 32301

Jonathan Sjostrom
215 South Monroe Street, Suite 601
Tallahassee, FL 32301

Karen Gievers
523 East College Avenue, Suite 2
Tallahassee, FL 32301

Deborah Kearney, General Counsel
Department of State, PL02
Tallahassee, FL 32301

W. Dexter Douglass
211 East Call Street
Tallahassee, FL 32301

Bill L. Bryant
Harry O. Thomas
Post Office Box 1877
Tallahassee, FL 32302-1877

Mitchell Berger
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301

Benedict P. Kuehne
Sale & Kuehne, PA
Bank of America Tower, Suite 3550
100 S.E. 2nd Street
Miami, FL 33131-2154

Michael D. Crotty
Crotty & Bartlett, PA
1800 West International Speedway Blvd.
Building 2, Suite 201
Daytona Beach, FL 32114

Douglas A. Daniels
523 North Halifax Avenue
Daytona Beach, FL 32118

Ronald G. Meyer
Meyer and Brooks, PA
Post Office Box 1547
Tallahassee, FL 32302

Barry Richard
Greenberg Traurig
101 East College Avenue
Tallahassee, FL 32301

John D.C. Newton, II
215 South Monroe Street, Suite 705
Tallahassee, FL 32301

Terrell C. Madigan
Harold R. Mardinborough, Jr.
Post Office Box 2174
Tallahassee, FL 32302

Craig Meyer
Florida Department of Agriculture and Consumer Services
515 Mayo Building
407 South Calhoun Street
Tallahassee, FL 32399-0800

Kendall Coffey
Coffey Diaz & O'Naghten, LLP
2665 South Bayshore Drive
Miami, FL 33133

Stephen Zack
Zack Koznitsky
Bank of America Tower
100 S.E. 2nd Street
Miami, FL 33131

Murray Greenberg
Miami-Dade County
111 N.W. 1st Street
Miami, FL 33130

Jason L. Unger
Florida Bar No. 991562
Counsel for George W. Bush
Gray, Harris & Robinson
301 South Bronough Street
Suite 600
Tallahassee, FL 32301
(850) 577-9090 telephone
(850) 577-3311 facsimile

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

_____
Jason L. Unger