No. 00-949

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH AND RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., ET AL.,

Respondents.

On Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF
A MEMBER OF THE BAR OF THIS COURT
IN SUPPORT OF NEITHER PARTY

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Motion for Leave to File Brief *Amicus Curiae*

Amicus anticipates that the parties will file letters granting general consent to briefs *amicus curiae* in this case. In the event such letters are not forthcoming, *amicus* moves for leave on the following grounds:

The brief proposed to be filed is limited to two matters not raised by the parties: (1) the availability of an action in the nature of *quo warranto* as a proper means to resolve this controversy and (2) the definition of "legal vote" implicitly proposed by Petitioners. These points are made concisely in the space of two pages. It is hoped for those reasons that the brief will not be a burden and may be of assistance to the Court. *See* Rule 37.1.

Therefore, should consent to filing of briefs *amicus curiae* be withheld by the parties, *amicus* respectfully requests the Court grant leave to file this brief.

Interest of *Amicus*[1]

As a member of the bar of this Court, *amicus* is interested in the Court being fully informed of matters relevant to the decision of this case. *See* Rule 37.1.

Summary of Argument

Quo warranto brought by the United States is the only appropriate means for this Court to adjudicate the dispute underlying this case. Concerning the merits, the definition of "legal vote" implicitly advanced by Petitioners is less valid than that expounded by the Supreme Court of Florida.

Argument

1. This is a dispute regarding which individuals shall exercise the office of presidential elector representing the State of Florida. The traditional means for judicially determining disputes regarding title to office is a proceeding in *quo warranto*.[2] Therefore, *amicus* suggests that this Court should adjudicate this dispute, if at all, only in an action brought in the name and by the authority of the United States against the persons claiming title to the office of presidential elector by virtue of appointment by the State of Florida.[3] If the State were impleaded in such an action, as would seem appropriate,[4] then

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[1]Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person other than amicus made a monetary contribution to the preparation or submission of this brief.

[2]*See, e.g.*, *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 502 (1933); *Smith v. Dearborn Financial Services, Inc.*, 982 F.2d 976, 981 (6th Cir. 1993) (quoting *United States ex rel. State of Wisconsin v. First Fed. Sav. & Loan Ass'n*, 248 F.2d 804, 808 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958)); *United States v. Billheimer*, 2000 WL 1566325, at *2, 86 A.F.T.R.2d 2000-6328, 2000-2 USTC ¶ 50,761 (S.D. Ohio Sept. 5, 2000) (discussing nature of *quo warranto*).

[3]*See, e.g.*, *Wallace v. Anderson*, 18 U.S. (5 Wheat.) 291, 292 (1820) (holding that in the absence of a contrary statute, "no writ of quo warranto can be maintained, but at the instance of the Government"); *cf. Bush v. Palm Beach Canvassing Bd.*, 531 U.S. ____, slip op. at 4 (Dec. 4, 2000) ("In the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature [acts] by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution."); *Nebraska Territory v. Lockwood*, 70 U.S. (3 Wall.) 236 (1865) (holding that Territory could not bring *quo warranto* to question right of judge of territorial court: "A State court cannot issue a writ of mandamus to an officer of

the original jurisdiction of this Court could be invoked. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251(b)(2).

2. At the core of Petitioners' challenge to the judgment of the Supreme Court of Florida is the vagueness of the definition of a "legal vote" that the court expounded: a ballot showing a "clear indication of the intent of the voter as determined by the canvassing board." *Gore v. Harris*, No. SC00-2431, slip op. at 23, 2000 WL 1800752 (Fla. Dec. 8, 2000) (quoting Fla. Stat. § 101.5614(5) (2000)), *cert. granted*, 531 U.S. ___ (Dec. 9, 2000). However, that standard is more definite and certain – and more firmly grounded in law enacted by the Florida Legislature – than the one that Petitioners implicitly propose, to wit: unyielding reliance upon the results obtained from machines of various designs and degrees of accuracy through which have been passed ballots punched or marked by persons of varying abilities, knowledge and habits, using devices in various states of repair and prone to various types of malfunction. Petitioners have not explained how *disregarding* those differences among the counties and citizens of Florida advances their professed goal of uniformity and fairness or is consistent with law enacted by the Florida Legislature. Further, reliance on the judgment of the county canvassing boards is reasonable because they (not their machines) are likely to be most familiar with the circumstances of voting in their respective jurisdictions.

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the United States. 'His conduct can only be controlled by the power that created him.") (quoting *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821)).

[4] *See* Rule 17.2; Rules 81(b) & 19(a)(2)(i), Fed. R. Civ. Proc.; *cf. People ex rel. Boyington v. Northfield Twp. High School Dist. No. 225*, 402 Ill. 435, 439, 84 N.E.2d 553, 556 (1949) (rejecting argument that because interested private parties were powerless to commence *quo warranto* action, they therefore could not be intervenors).

Conclusion

The writ should be dismissed as improvidently granted.

Respectfully submitted,

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