
No. 00-15981
In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____?_____

NED L. SIEGEL,
GEORGETTE SOSA DOUGLAS, et al.,
Plaintiffs-Appellants,

v.

THERESA LEPORE,
CHARLES E. BURTON, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
(D.C. Docket No. 00-9009-CIV-DM)

_____?_____

BRIEF FOR THE STATE OF ALABAMA, THE ATTORNEY GENERAL
OF ALABAMA, AND THE SECRETARY OF STATE OF ALABAMA,
AS *AMICI CURIAE*, SUPPORTING REVERSAL

_____?_____

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1, the State of Alabama, the Attorney General of Alabama Bill Pryor, and the Secretary of State of Alabama Jim Bennett, as *amici curiae*, submit this Certificate of Interested Persons and Corporate Disclosure Statement. The following persons have an interest in the outcome of this appeal:

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STATEMENT OF THE ISSUE

In this brief, *amici curiae* will address the following issue:

Did the district court err in failing to follow this Court's decisions in *Roe v. Alabama* and in failing to assess the impact of Defendants' arbitrary manual recount procedures on voters' freedom of speech when it denied Plaintiffs' motion for temporary restraining order or preliminary injunction?

_____?

INTEREST OF AMICI CURIAE

The State of Alabama, the Attorney General of Alabama Bill Pryor, and the Secretary of State of Alabama Jim Bennett respectfully submit this brief as *amici curiae* pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. *Amici* submit this brief because of the similarities between this case and an Alabama case decided by this Court five years ago, *Roe v. Alabama*, involving the counting of unwitnessed and unnotarized absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of three decisions from this Court regarding the fundamental unfairness of changing ballot-counting procedures after an election has occurred. *See Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) ("*Roe I*") (certifying question to Supreme Court of Alabama), *remanded to district court for evidentiary hearing after receiving answer to certified*

question, 52 F.3d 300 (11th Cir. 1995) (“*Roe II*”), *appeal after remand*, 68 F.3d 404 (11th Cir. 1995) (“*Roe III*”). The State of Alabama, by and through its Attorneys General at the time, and the Secretary of State of Alabama were defendants in *Roe v. Alabama*. See *Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama personally represented the State and the Secretary of State in that litigation. See *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404.

Relying on the decisions of this Court in *Roe v. Alabama*, the State of Alabama reformed its laws to ensure that Alabama courts will not count absentee ballots that have not been properly witnessed or notarized. See Ala. Code § 17-10-10 (Supp. 2000) (“No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter’s affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths)”). The Attorney General and Secretary of State have relied on *Roe v. Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. See, e.g., Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <<http://www.ago.state.al.us/pdfopinions/2000-180.pdf>>

("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <<http://www.ago.state.al.us/pdfopinions/99-00227.pdf>> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

It is difficult to see how the order of the district court in this case can be affirmed without overruling or fundamentally altering *Roe v. Alabama*. Having now relied on the decisions in *Roe v. Alabama* for several years, *amici* have a profound interest in seeing those decisions upheld and consistently applied. Accordingly, *amici curiae* file this brief to address the application of the decisions in *Roe v. Alabama* to this case. In so doing, *amici* argue that the order of the district court denying Plaintiffs' motion for temporary restraining order and preliminary injunction must be reversed because the district court failed to follow *Roe v. Alabama*. *Amici* take no position, however, on whom Florida should certify as the winners in its election for President and Vice President. *Amici* simply wish to see that the decisions in *Roe v. Alabama*, and thus the requirement of

fundamentally fair election procedures, are applied and continue to be the law of this Circuit.

—————?—————

SUMMARY OF ARGUMENT

In its 1995 decisions in *Roe v. Alabama*, this Court upheld the basic constitutional principle that state election processes must be fundamentally fair. In so doing, the Court held that a state court order changing the rules for counting absentee ballots after the election occurred was fundamentally unfair. Because this case is strikingly similar to *Roe v. Alabama*, the outcome of this case turns on the proper application of *Roe I, II, and III* to the facts of this case. Because the district court failed to follow *Roe I, II, and III*, however, its order denying Plaintiffs' motion for preliminary injunction should be reversed.

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on whether the procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots once the election is over. Fundamental fairness also requires ballots that are in a similar condition to be similarly counted. Counting partially punched ballots without clear standards, however, unconstitutionally attributes political speech to voters against their will.

ARGUMENT

I. THE RIGHT TO VOTE IS A FUNDAMENTAL RIGHT, AND STATE ELECTION PROCEDURES MUST BE FUNDAMENTALLY FAIR.

In *Roe I*, this Court noted that the Supreme Court of the United States has long held that “[t]he right of suffrage is ‘a fundamental political right, because preservative of all rights.’ ” *Id.* at 580 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). In *Reynolds v. Sims*, the Supreme Court held that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. 533, 554 (1964), *quoted in Roe I*, 43 F.3d at 580. This Court observed in *Roe I* that “federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.” *Roe I*, 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986)). The case presently before the Court is not a “garden variety” election dispute. It is, on the contrary, a case that raises serious questions concerning the fundamental fairness of Defendants’ election procedures, where (as in *Roe v. Alabama*) election officials appear to have changed the rules after the election.

In denying Plaintiffs' motion for a temporary injunction or preliminary injunction, the district court failed to follow *Roe I, II, and III*. In fact, the district court's *only* reference to *Roe v. Alabama* was to quote the dissent in *Roe I*, not the opinion of the Court. *See Siegel v. LePore*, No. 00-9009-CIV, 2000 WL 1687185, at *7 (S.D. Fla. Nov. 13, 2000). This failure to follow circuit precedent was clearly erroneous given the similarities between the situation in *Roe I* and the facts of this case.

Before the election that culminated in the *Roe* litigation, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I*, 43 F.3d at 578; *Roe III*, 68 F.3d at 406–07 (stating that the district court's findings, which were “supported overwhelmingly by the evidence,” showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). That notwithstanding, a state circuit court ordered such ballots to be counted.¹ Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the race for Chief Justice in a precarious posture. *Roe I*,

¹ The Alabama Supreme Court, in answering a state-law question certified by this Court in the then-ongoing *Roe* litigation, essentially echoed the circuit court's order, holding that absentee ballots in “substantial compliance” with state law should be counted. *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–22 (Ala. 1995).

43 F.3d at 578. As this Court is no doubt aware, the 200 to 300 vote spread in *Roe* was even smaller than the narrow margin now separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of improperly notarized and witnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama to disregard improperly executed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of disregarding improperly executed absentee ballots violated the Fourteenth Amendment. *Roe I*, 43 F.3d at 579.

On appeal to this Court, the *Roe* plaintiffs argued that enforcement of the state court order

would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer" that "would result in fundamental unfairness and would violate plaintiffs' right to due process of law" in violation of the Fourteenth Amendment, and that this violation of "the plaintiffs' rights to vote and . . . have their votes properly and honestly counted" constitutes a violation of the First and Fourteenth Amendments.

Id. at 580. The *Roe* plaintiffs further argued “that the [state] circuit court’s order requiring the state’s election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively ‘stuff the ballot box,’ implicating fundamental fairness issues.” *Id.* at 581 (footnotes omitted). This Court agreed with the *Roe* plaintiffs and determined that departing from Alabama’s longstanding policy of disregarding improperly executed absentee ballots would indeed violate provisions of the United States Constitution.

In deciding *Roe I*, this Court held that departing from Alabama’s previous practice of disregarding improperly executed absentee ballots “would have two effects that implicate fundamental fairness.” *Id.* “First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements].” *Id.* In addition, this Court explicitly rejected the assertion that *Roe I* presented an issue of enfranchisement rather than one of disenfranchisement and plainly distinguished the First Circuit’s decision in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). In doing so, the Court took judicial notice that reducing

the requirements for voting absentee would increase the number of absentee ballots. *Id.* at 582 n.15. This Court also stated that “had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee.” *Id.* On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *ex post facto* would upset the legitimate expectations of the voters and candidates — this Court ruled that complying with the state court’s order would violate the Fourteenth Amendment.

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II. FUNDAMENTAL FAIRNESS REQUIRES THAT ELECTION OFFICIALS NOT CHANGE THE RULES FOR COUNTING BALLOTS AFTER THE ELECTION.

The first question the district court should have addressed in this case was whether the Defendants had changed their rules for manually counting partially punched ballots after the November 7, 2000, election. If Defendants changed the rules, either formally or in practice, so as to count votes that previously would not have been counted, *Roe I, II, and III* require that the change be enjoined.

A. Changing Manual Recount Procedures After the Election Is Fundamentally Unfair Under *Roe I*.

Under the holding in *Roe I*, changing the rules for counting partially punched ballots in four Florida counties would be fundamentally unfair. In *Roe I*, this Court held that changing state ballot counting procedures to require the counting of absentee ballots that were not properly witnessed or notarized would dilute the votes of persons who complied with the witness/notarization requirements of state law and disenfranchise those who would have voted but for the statutory requirements. *Roe I*, 43 F.3d at 581. A post-election change in manual recount procedures in a county in Florida would effect a similar dilution of the votes of voters who submitted partially punched ballots in counties that did not conduct manual recounts.

Another group of voters who would see their votes diluted would be those whose partially punched ballots were left uncounted in their county's manual recount because their county adhered to its pre-election rules. A final group that would see its votes diluted would be those who followed voting instructions, like those in Palm Beach County, that direct voters "to be sure your voting selections are clearly and cleanly punched and there are no chips left hanging on the back of

the card.” Mot. for Injunction Pending Appeal, Attach. 3, *Touchston v. McDermott*, No. 00-15985 (11th Cir.).

Voters and candidates generally would likewise suffer from a post-election change in vote-counting procedure. As the Court observed in *Roe I*, “[w]e believe that, had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and supporters of Hooper and Martin who did not vote would have voted absentee.” *Roe I*, 43 F.3d at 582. In this case, had the presidential campaigns in Florida known the rules for manually counting partially punched ballots could be changed after the election, they could have demanded recounts in other Florida counties.

B. The District Court Should Have Examined What Practices or Procedures Were Being Used By Defendants Prior to November 2000 in Determining How to Count Partially Punched Ballots.

Florida law provides no uniform standards for determining whether or how to manually count punch-card ballots like those used in Palm Beach, Miami-Dade, Broward, and Volusia Counties. In conducting a manual recount, the law simply instructs the recounting teams and the canvassing board “to determine a voter’s intent in casting a ballot.” Fla. Stat. Ann. § 102.166(7)(b) (West Supp. 2000). Unlike other states that provide objective standards for determining how to count a

partially punched ballot, *see, e.g.*, Ind. Code Ann. § 3-12-1-9.5 (West 1997), Florida’s recount statute provides no standards, procedures, or guidance on how “to determine a voter’s intent” when manually recounting punch-card ballots.

The result of this lack of clear statewide standards appears to be a conflicting patch-work of procedures for deciding how to count partially punched ballots. For example, it appears that, prior to the November 2000 election, Palm Beach County had a procedure outlining how to count partially punched ballots with so-called “hanging chad” or “dimpled chad.” It is unclear from the district court’s decision whether Miami-Dade, Broward, and Volusia Counties had any established practice or procedures for counting partially punched ballots prior to the November election.

The question of whether Defendants had any practices and procedures for determining how to manually count punch-card ballots before the November 2000 election is critical to following this Court’s decisions in *Roe v. Alabama*. Indeed, in *Roe II*, the Court remanded the case to the district court for the express purpose of determining what prior Alabama practice had been. *Roe II*, 52 F.3d at 302. The district court erred in failing to address this question.

C. The District Court Should Have Examined Whether Defendants Changed Their Manual Recounting Practices or Procedures After They Began Counting Ballots on November 7, 2000.

Under *Roe*, the district court's next inquiry should have been whether Defendants had changed their prior manual recount practices or procedures after the counting of ballots began on November 7, 2000. As outlined in Appellants' Opening Brief, there is strong evidence to suggest that election officials in Palm Beach County changed their policy on how to count partially punched ballots after the manual recount had begun. It appears that Palm Beach County officials began the recount using their previous procedures, changed to the so-called "light test" midstream, and later returned to the previous procedures, but confusion continued regarding what the procedures actually meant. *See* Docket Entry 23, Ex. B (CNN Transcript: "Manual Vote Count Procedure Varies in Palm Beach County," Nov. 11, 2000); Opening Brief for Appellants at 6–7.

Events after the district court denied Plaintiffs' motion for a temporary restraining order or preliminary injunction indicate further changes in Palm Beach County recount procedures. On Wednesday, November 15, 2000, a Palm Beach circuit judge ruled that—contrary to its pre-election procedures—the county canvassing board should not automatically reject "dimpled" ballots. *See* Daniel de Vise et al., *Review Expected to Take 6 Days*, Miami Herald, Nov. 17, 2000, at 21A.

This is exactly the kind of *ex post facto* change ordered by the state court in *Roe v. Alabama* when it directed Alabama officials to begin counting unwitnessed, unnotarized absentee ballots after the election had occurred. This is precisely the type of post-election vote-counting change this Court found unconstitutional in *Roe v. Alabama*. See *Roe I*, 43 F.3d at 581–82; *Roe III*, 68 F.3d at 408.

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III. FUNDAMENTAL FAIRNESS REQUIRES BALLOTS IN LIKE CONDITION TO BE COUNTED ALIKE.

The district court also should have addressed whether the lack of uniform standards for manually counting partially punched ballots would allow two ballots in substantially identical condition to be counted differently based upon the county where they were cast. For example, the recount in this case centers on ballots with so-called “hanging chad” and “dimpled chad.” It would be fundamentally unfair to allow one county to count ballots with merely “dimpled chad” while another county required “hanging chad” to be counted.

Clear uniform standards for manually counting partially punched ballots are essential for a fair and accurate vote count. For example, Indiana Code Section 3-12-1-9.5 provides clear standards for election officials to follow when chad irregularities exist on the election ballots. The Indiana statute states that a chad that has been pierced, but has not been entirely punched out, will be counted as a

vote for the indicated candidate. Ind. Code § 3-12-1-9.5(c). A chad that has merely been dented or dimpled, but has not been separated in any way, will not be counted, however. Ind. Code § 3-12-1-9.5(d). Florida law provides no such uniform standards.

Florida's lack of such standards makes skewed election results virtually inevitable due to the likelihood of different counties having different standards to determine whether a vote has been cast. Furthermore, the absence of uniform standards may also result in election officials consciously or unconsciously interjecting their own political bias in the tally of ballots. The lack of uniform standards results in a fundamentally unfair, inaccurate tally by giving election officials unbridled, subjective discretion.

The district court's failure to address the absence of uniform standards was erroneous. By not determining whether the lack of uniform standards for manually counting partially punched ballots would allow two ballots in substantially identical condition to be counted differently based upon the varying standards of the counties where they were cast, the district court failed to address a serious question that goes to the fundamental fairness of Defendants' manual recount procedures.

_____?

IV. COUNTING PARTIALLY PUNCHED BALLOTS WITHOUT CLEAR STANDARDS ATTRIBUTES POLITICAL SPEECH TO VOTERS WITHOUT THEIR CONSENT.

Depending on the location, election officials in Florida are currently divining the will of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. The district court did not address the impact of this standardless procedure on individual voters' First Amendment right to freedom of expression.

It is well established that “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined.” *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment protects the right of our nation’s citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”) When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials, left to their individual discretion, will inevitably place political speech in the mouths of those voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a “dimpled chad.” If election officials count those indentations as votes, they are putting words into the voters’ mouths. The government cannot compel voters to speak when they have chosen to remain silent. *West Virginia v. Barnette*, 319 U.S. 624, 631–41 (1943).

In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so, they had demonstrated their ability to do so. There was no option on these ballots for “NONE OF THE ABOVE.” By correctly selecting candidates in other races and leaving only a “dimpled chad” or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the

presidential race. *See Barnette*, 319 U.S. at 641 (“We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”)

In the absence of a clear standard, the divination of these votes says more about the intent of the election officials than the intent of the voters. To affirm the trial court’s failure to address this issue below, this Court would be “required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.” *Id.* at 634.

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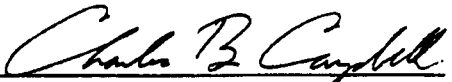
CONCLUSION

This Court should uphold its decisions in *Roe v. Alabama*. Because the district court failed to follow *Roe v. Alabama*, its order denying Plaintiffs’ emergency motion for a temporary restraining order and preliminary injunction should be reversed.

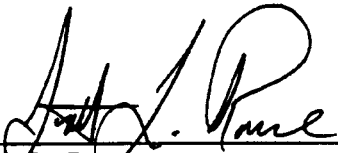
Respectfully submitted this the 20th day of November, 2000.

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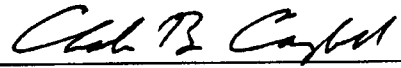
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Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that this “Brief for the State of Alabama, the Attorney General of Alabama, and the Secretary of State of Alabama, as *Amici Curiae*, Supporting Reversal” has been prepared using a TrueType Times New Roman 14-point font. This brief complies with the type-volume limitation of 7,000 words in Rule 29(d). According to the word count of the word-processing system used to prepare this brief, this brief contains 3,992 words.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this “Brief for the State of Alabama, the Attorney General of Alabama, and the Secretary of State of Alabama, as *Amici Curiae*, Supporting Reversal” has been served upon the following counsel on this the 18th day of November, 2000, by United States Mail, first-class postage prepaid and addressed as follows:

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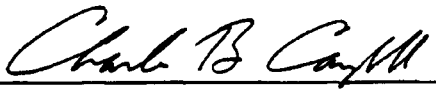
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