No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF FOR PETITIONER

MICHAEL A. CARVIN
COOPER, CARVIN & ROSENTHAL, P.L.L.C.
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891

THEODORE B. OLSON
Counsel of Record
TERENCE P. ROSS
DOUGLAS R. COX
THOMAS G. HUNGAR
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

[Additional counsel listed on inside front cover]

Counsel for Petitioner

GEORGE J. TERWILLIGER III
TIMOTHY E. FLANIGAN
MARCOS D. JIMÉNEZ
WHITE & CASE LLP
First Union Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700

JOHN F. MANNING
435 W. 116th Street
New York, N.Y. 10027

WILLIAM K. KELLEY
Notre Dame Law School
Notre Dame, Indiana 46556

BRADFORD R. CLARK
2000 H Street, N.W.
Washington, D.C. 20052

QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as candidate for President; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, as members of the Florida Elections Canvassing Commission; Matt Butler; Palm Beach County Canvassing Board; Broward County Canvassing Board; Broward County Supervisor of Elections; Robert A. Butterworth, as Attorney General, State of Florida; Florida Democratic Party; and Vice President Albert Gore, Jr., as candidate for President.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

Constitution & Statutes

Other Authorities

BRIEF FOR PETITIONER

On November 7, 2000, the Nation's quadrennial presidential election was conducted throughout the United States. The apparent results of the State-by-State returns indicate that the candidate who receives the Electoral College votes of Florida will, on December 18, 2000, receive a majority of the votes of the electors appointed by the various States and will thereafter become the next President of the United States.

On November 21, 2000, the Supreme Court of Florida issued an equitable decree altering Florida's methods and timetables for the determination of controversies regarding the appointment of presidential electors. That decree has interjected unwarranted but serious questions concerning the selection of Florida's presidential electors that threaten to undermine and cloud the outcome of the election in that State. Because that equitable decree is inconsistent with federal law and the Constitution of the United States, petitioner respectfully prays that this Court vacate the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-38a) is not yet reported. The orders of the Circuit Court for the County of Leon, Florida (Pet. App. 42a-43a & 44a-50a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The petition for a writ of certiorari was filed on November 22, 2000 and granted on November 24, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The judgment below amounts to the entry of a permanent injunction against state election officials and is therefore "final" for purposes of this Court's certiorari

jurisdiction. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). Petitioner expressly raised below the federal questions on which the Court has granted certiorari. *See* Pet. 9-10. The Florida Supreme Court's failure to address petitioner's federal claims, and its assertion that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws" (Pet. App. 10a n.10), are therefore no barrier to review by this Court. *Street v. New York*, 394 U.S. 576, 583 (1969); *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). State courts cannot evade this Court's review by failing to discuss federal questions. *Chapman v. Goodnow's Adm'r*, 123 U.S. 540, 548 (1887).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to this Court's Rule 24.1(f), the pertinent constitutional and statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for President and Vice President of the United States. The official initial count of the ballots cast in Florida showed that the Republican Party candidates, Governor George W. Bush and Secretary Dick Cheney, received more votes than their principal opponents in the election, Democratic Party candidates Vice President Albert Gore and Senator Joseph Lieberman, subject to the counting of overseas absentee ballots. Because the margin of victory was less than one-half of one percent, however, a statewide recount commenced. *See* Fla. Stat. § 102.141(4). The statewide recount, and the tabulation of overseas absentee ballots on November 18, 2000, while reflecting slightly different tabulation totals, each confirmed that Governor Bush and Secretary Cheney received the most votes.

On November 8, 2000, the Florida Democratic Party sought additional recounts by hand in four heavily populated, predominantly Democratic counties. The Florida Supreme Court thereafter issued a decree extending by twelve days the seven day statutorily imposed deadline to submit certified vote tabulations including the results of these recounts. Pursuant to that extended deadline, on November 26, the totals were again tabulated, and Governor Bush and Secretary Cheney were again determined to have received the most votes. The Florida Elections Canvassing Commission proceeded on November 26, 2000, to certify them as the victorious candidates in the statewide presidential election. Those certified results include tabulations that reflect manual recounts that were conducted solely as a result of the Florida Supreme Court decision under review here.

Vice President Gore and Senator Lieberman have filed a lawsuit in Leon County Circuit Court to contest the certified election results. The Florida Supreme Court's decision, which conflicts with both federal statutes and the federal Constitution, will thus continue to affect, and has the theoretical potential to change, the outcome of the presidential election in Florida, and thus the Nation. Reversal by this Court would restore the legislatively crafted method for appointing electors in Florida to its status prior to November 7, would allow the completion of the proper selection of presidential electors in Florida according to the plan contemplated by the Constitution, and would aid in bringing legal finality to this election.

I. The 2000 Presidential Election

A. The Election Laws Of Florida As Of November 7, 2000

Prior to November 7, 2000, pursuant to the authority conferred on it by Article II of the Constitution and 3 U.S.C. § 5, the Florida legislature had enacted a comprehensive and carefully interwoven statutory plan and

set of procedures and timetables to govern the appointment of presidential electors, the conduct of elections, and the bringing and resolution of controversies and contests related thereto.

On the first Tuesday after the first Monday in November during a presidential election year, Florida holds an election in each of its sixty-seven counties for the purpose of selecting presidential electors. Following the election, each county's canvassing board is responsible for counting and certifying the returns and forwarding them to the Florida Department of State. *See* Fla. Stat. § 102.141. "[A]s soon as the official results are compiled from all counties," the statewide Elections Canvassing Commission—comprising the Governor, the Secretary of State, and the Director of the Division of Elections—is required to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

Florida statutes specify a clear deadline by which counties must certify their returns to the Department of State. As the Florida Supreme Court itself put it in this case, "the deadline set forth in section 102.111(1), Florida Statutes (2000), requir[es] that all county returns be certified by 5 p.m. on the seventh day after an election." Pet. App. 4a. Section 102.111 underscores the firmness and importance of this deadline by providing that "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties *shall* be ignored, and the results shown by the returns on file *shall* be certified." Fla. Stat. § 102.111(1) (emphasis added). Another provision of the election code, Fla. Stat. § 102.112, reiterates the requirement that county "[r]eturns *must* be filed by 5 p.m. on the 7th day following the . . . general election." Fla. Stat. § 102.112(1) (emphasis added). Using different terminology, § 102.112 states: "If the returns are not received by the department [of State] by the time specified, such returns *may* be ignored and the results on file

at that time may be certified by department." Fla. Stat. § 102.112(1) (emphasis added).

Prior to the seven-day certification deadline, Florida law provides for recount of the votes in close races when the margin of victory is less than one-half of one percent. *See* Fla. Stat. § 102.141(4). In addition to this provision, the legislature has provided that disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. § 102.166(1)-(2), and/or a request for a manual recount, *see* Fla. Stat. § 102.166(4)-(10).[1] A protest must be lodged prior to the time the county canvassing board certifies the results or within five days after midnight of the date of the election, whichever occurs later. A request for a manual recount must be filed prior to the time the county canvassing board certifies the results or within 72 hours of midnight of the date of the election, whichever occurs later.

As of November 7, 2000, no provision of Florida law exempted the manual recount process from the seven-day certification deadline imposed by §§ 102.111 and 102.112. Thus, under the statutory scheme in effect on the date of the election, protest and recount procedures had to be completed before the seven-day deadline in order to be reflected in the county canvassing board's election returns, and the statutes expressly declared that county returns not received by the Secretary of State

---

[1] County canvassing boards are authorized, but not required, to grant requests for a manual recount. *See* Fla. Stat. § 102.166(4)(a)-(c). If the canvassing board chooses to embark on a manual recount, the board "shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots," Fla. Stat. § 102.166(7)(a), and "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent," *id.* at (7)(b).

prior to the deadline (5:00 p.m. on November 14 in this case) "may be ignored." Fla. Stat. §§ 102.112.

After certification, candidates and voters may contest the certification of an election by filing a complaint in Leon County Circuit Court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2). The contest process involves extensive judicial proceedings, including formal pleadings, discovery, trial, and appeals. *See* Fla. Stat. § 102.168(3)-(8); *Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984).

B. The Presidential Election In Florida And The Tabulation Of Votes

On November 8, 2000, the Florida Secretary of State announced that Governor Bush and Secretary Cheney had received the most popular votes in the previous day's election by a narrow margin. Those results were not certified, however, because the slim margin of victory triggered the recount provision of Florida law, and because of the need to receive and count overseas absentee ballots.[2]

On November 14, the results of the recount were announced: Governor Bush and Secretary Cheney had received the most popular votes for President and Vice President in the Florida election. The Florida Secretary of State announced her intention to proceed with certification of the results of the election upon receipt and tabulation of the overseas ballots.[3] On November 17,

---

[2] Under a federal consent decree, Florida must allow ten days from the date of the election for overseas absentee ballots to be received. *See United States v. Florida*, Civ. No. TCA-80-1055 (N.D. Fla. Apr. 2, 1982).

[3] The Florida legislature has assigned the task of certifying the results of presidential elections to the Department of State. *See* Fla. Stat. § 103.011. County canvassing boards

2000, however, before the overseas ballots could be tabulated and the election results certified, the Florida Supreme Court *sua sponte* issued a stay order enjoining the Secretary of State and the Elections Canvassing Commission from proceeding with certification. Pet. App. 39a-40a.

In the interim, respondent Florida Democratic Party had filed protests in four counties: Broward, Miami-Dade, Palm Beach, and Volusia. Respondent requested that the ballots cast in those selected counties—each heavily Democratic—be recounted by hand under the manual recount provisions of the protest section of the Florida Election Code set forth in Fla. Stat. § 102.166(4)-(10).

The Florida statute governing manual recounts contains no standards describing how manual recounts will be conducted or guidelines concerning the means by which a voter's intent will be ascertained. The four counties thus embarked upon various paths in attempting to divine the "voter's intent." Fla. Stat. § 102.166(7)(b). Counties adopted conflicting guidelines for reviewing ballots, and changed their own guidelines and standards repeatedly throughout the recounting process. The confusion, bordering on chaos, that developed during these selectively focused manual recounts has been well-publicized. The manual recounts followed two mechanical counts of punch-card ballots in three of the counties and considerable hand examination of the physical ballots. Review of punch-card ballots proceeded from analysis of the degree to which punch-card

---

initially certify their local election results and forward them to the Department of State. The Elections Canvassing Commission, of which the Secretary of State is a member, is then charged with certifying the overall returns of the election and declaring who has been elected to office. *See* Fla. Stat. § 102.111.

ballots had been perforated to examination for voter intent of indentations ("dimples") on the ballots.

II. The Litigation At Issue

After the Secretary of State announced her decision to certify the election results on November 14, 2000 without including the results of manual recounts submitted after the statutory deadline, Volusia County sued the Secretary and the Elections Canvassing Commission seeking to extend the November 14 limit on the time within which to submit county returns. Palm Beach County, the Florida Democratic Party, and Vice President Gore intervened as plaintiffs; Governor Bush and others intervened as defendants.

A. The Trial Court's Decisions

On November 14, 2000, the Circuit Court for Leon County held that the Secretary had discretion to ignore returns received after the statutory deadline. The court held that "the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of any pending manual recount, and may thereafter file supplemental or corrective returns," and also held that "[t]he Secretary of State may ignore such late filed returns . . . by the proper exercise of discretion after consideration of all appropriate facts and circumstances." Pet. App. 45a. The court reasoned that, under the language of Fla. Stat. § 102.112, "[t]hat the Secretary *may* ignore late filed returns necessarily means that the Secretary *does not have to* ignore such returns. It is, as the Secretary acknowledges, within her discretion." *Id.* at 48a.

After the trial court's order was announced, the Secretary of State asked counties interested in submitting returns after the deadline to provide her with written explanations of their reasons for doing so by 2:00 p.m. on Wednesday, November 15. J.A. 39. After receiving

submissions from four counties, the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. J.A. 21-38.

Vice President Gore and others then asked the trial court to issue an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. (The Volusia County manual recount was completed and the results submitted prior to the deadline.)

On November 17, 2000, the Circuit Court for Leon County issued its second decision, rejecting Vice President Gore's request to waive the statutory deadline. Pet. App. 42a-43a. The court held that the Secretary of State had not violated its November 14 order and explained that "the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Pet. App. 43a.

B. Proceedings In The Florida Supreme Court

Vice President Gore and Broward and Palm Beach counties appealed from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in declining to include in the statewide tabulation results from manual recounts filed after the 5:00 p.m. November 14 deadline. On Friday, November 17, 2000, without the benefit of briefing or argument, the Florida Supreme Court *sua sponte* enjoined the Secretary of State and the Elections Canvassing Commission from certifying the November 7 presidential election results for the State of Florida until further order of the court. Pet. App. 39a-40a.

The following day, November 18, 2000, the results of the absentee balloting were announced. Governor Bush and Secretary Cheney were once again found to have received more votes than their opponents.

On the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the trial court. Pet. App. 1a-38a.[4] The Florida Supreme Court held that the trial court had "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." Pet. App. 34a. The court determined that the language of Fla. Stat. §§ 102.111 and 102.112, which provide that county canvassing boards "must . . . file[]" their returns by 5:00 p.m. on the seventh day following the election and that late-filed returns "may be ignored" or "shall be ignored" by the Elections Canvassing Commission did not control. The Florida Supreme Court concluded that the question before it was "whether the Commission *must accept* a return after the seven-day deadline set forth in sections 102.111 and 102.112," Pet. App. 14a (emphasis added), and answered this question in the affirmative.

The Florida Supreme Court rejected "hypertechnical reliance upon statutory provisions" in resolving the controversy. Pet. App. 8a; *id.* at 31a ("Technical statutory requirements must not be exalted over the substance of [the] right [of suffrage]."); *id.* at 36a ("the will of the electors supersedes any technical statutory requirements"). The court concluded that while it har-

---

[4] The supreme court consolidated the appeal with an original action in which the court was asked to resolve the conflict between two executive branch opinions concerning the Palm Beach County Canvassing Board's authority to conduct a manual recount. The court ultimately dismissed the original petition, but expressly stated in its opinion that the Palm Beach board had authority to conduct the county-wide manual recount. Pet. App. 2a n.1, 13a.

bored "reluctance to rewrite the Florida Electon Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here." *Id.* at 37a-38a. On this basis, the court then announced that the Secretary's discretion to ignore untimely election returns under Fla. Stat. §§ 102.111 and 102.112, could only be exercised "if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Pet. App. 35a.

The Florida court thus announced that the November 14 deadline for accepting county election returns was inoperative in this election and directed the Secretary of State and the Elections Canvassing Commission to accept manual recount returns through 5:00 p.m. on Sunday, November 26, 2000. Pet. App. 37a-38a. Moreover, the court maintained its injunction preventing the Elections Canvassing Commission from certifying any election results until that date, and directed the Commission to include in its certified election results all manual recount returns received by that date. *Id.* at 38a.

III. Events Since The Petition Was Filed

As noted above, the Florida Supreme Court's decision announced a new deadline of 5:00 p.m. on November 26, 2000, for all counties to submit amended returns, including the results of any manual recounts. Thereafter, the Miami-Dade County Canvassing Board voted unanimously not to proceed with a manual recount. The manual recount was completed in Broward County. Palm Beach County did not complete its manual recount before Florida Supreme Court's November 26, 2000 5:00 p.m. deadline.

On the evening of November 26, 2000, as directed by the court below, all counties with outstanding results submitted election returns to the Secretary of State.

Governor Bush and Secretary Cheney once again were determined to have received the most votes. That same evening, the Elections Canvassing Commission certified the results and formally declared Governor Bush the winner of Florida's 25 Electoral College votes. Upon announcing the certified results, the Secretary of State explained why certification had been delayed:

> It was and it remains my opinion that the appropriate deadlines for filing certified returns in this election are those mandated by the Legislature. And it remains my opinion that the proper returns in this election are the returns that were certified by those deadlines. The Florida Supreme Court, however, disagrees. The court created a new schedule for filing certifications and conducting election contests rather than implementing the schedule enacted by the Legislature. . . .

Counting the Vote; Statements on the Certification of Florida's Votes, N.Y. TIMES, Nov. 27, 2000, at A13.

Vice President Gore has declared his intention to contest the election in circuit court by challenging the results certified by at least three Florida counties (Miami-Dade, Nassau, and Palm Beach). That contest was filed on November 27, 2000. In that litigation, the Vice President seeks a further round of manual recounting, this time conducted by judges, and seeks to have the results of those recounts included in the statewide returns.

SUMMARY OF ARGUMENT

1. The Florida Supreme Court's decision, which announced a new framework and timetable for resolving controversies over the presidential election results in that State, should be vacated because it does not comply with 3 U.S.C. § 5.

a. Responding to a presidential election crisis much like that unfolding in Florida during the past three

weeks, Congress enacted a statutory scheme to implement the constitutional mechanism of the Electoral College. 3 U.S.C. §§ 1-15. One of those statutes, § 5, provides that state-court resolutions of controversies regarding the appointment of presidential electors shall be conclusive only if they are made pursuant to "laws enacted prior to" election day.

b. The court below rejected Florida statutes and deadlines for the appointment of electors and the resolution of presidential election disputes as "hypertechnical." Instead, it resorted to its "equitable powers" to prescribe new standards and deadlines, suspend mandatory enforcement mechanisms, and curtail the discretion conferred on the state executive by the legislature. The decision below constitutes a clear departure from the legal requirements established before election day, and announces new rules governing the resolution of election disputes. The Florida Supreme Court thus consciously and boldly overrode Florida's "laws enacted prior to" election day and replaced them two weeks later with laws of its own invention.

c. Title 3 U.S.C. §5 is designed to ensure that disputes relating to the appointment of presidential electors will be decided under laws made prior to the exigency under which they arose. It was enacted by Congress to discourage precisely what has happened in Florida this month, where the candidate who did not receive the most votes in the official tabulation is attempting to change the result by changing the rules. But the plain language of the statute provides that state courts must adhere to preexisting law if their resolution of election controversies is to be given binding effect. The court below failed to do so.

d. The Florida Supreme Court's decision should be vacated as a result of its failure to comply with 3 U.S.C. § 5. The resulting consequences are two-fold. First, the executive officials in Florida would be able to discharge all of their duties, including their duties imposed by fed-

eral law, under the rules in place on election day. Second, Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission regarding the appointment of Florida's electors made pursuant to the carefully crafted scheme put in place before the election to apply equally to all voters and candidates. Vacating the decision below would thus allow the Electoral College process to reach a lawful, final, and conclusive resolution of the presidential election.

2. The Florida Supreme Court, by arrogating to itself the authority to make new rules applicable to this election contest, also violated Article II of the Constitution, which invests the authority to regulate the manner of appointing presidential electors in state legislatures.

a. The Constitution provides that "[e]ach State shall appoint [electors] in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 1. History and precedent establish that this power granted to state legislatures is both plenary and exclusive.

b. Article II establishes a federally mandated separation of powers between the state legislature and other branches of state government in the context of choosing presidential electors. The Framers deliberately chose to invest the power to determine the manner of choosing electors in this particular branch of state government, thereby excluding the exercise of such power by the other branches. Any delegation of this constitutional authority must be both clear and express.

c. The Florida legislature has not granted to the state supreme court the authority to determine the manner of choosing electors. On the contrary, the legislature has established a complex and detailed framework for presidential elections, and has granted the executive branch the authority to exercise limited discretion and to certify the results of such elections in accordance with statutorily imposed deadlines. The state court reached

out and prohibited the executive branch officials from performing their duties, and announced new deadlines to supplant those enacted by the legislature. The court thus arrogated to itself the power to determine the manner in which Florida's electors are appointed, authority that the Constitution reposes only in the state legislature.

d. The proper remedy for the Florida Supreme Court's violation of Article II is nullification of its attempt to interfere in the manner in which the State's electors are appointed. The court below had no authority under the federal Constitution to announce new rules for this presidential election. Its attempt at judicial legislation was unconstitutional, and its actions patently *ultra vires*, and the court's decision is thus void. As a result, the state executive branch officials should be freed by this Court to carry out their duties without the unconstitutional interference of the state supreme court.

ARGUMENT

Presidential electors "exercise federal functions under," and discharge duties pursuant to, "authority conferred by" the Constitution. *Burroughs v. United States*, 290 U.S. 534, 545 (1934). The Constitution reposes in Congress authority to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. CONST. art. II, § 1, cl. 4. Congressional authority over electors is, however, much broader. The President exercises the whole of the Nation's executive power. U.S. CONST. art. II, § 1. "The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs*, 290 U.S. at 545. Among the powers vested in Congress is the power to "protect the election of the President and Vice President from corruption." *Id.* at 547. *A fortiori*, Congress also possesses ample authority to prevent chaos, turmoil, and violations of due process in presidential elections.

The Constitution allocates to each of the States the authority to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," U.S. CONST. art. II, § 1, cl. 2, and the electors are, in turn, empowered to meet and to vote by ballot for the election of the President. U.S. CONST. amend. XII. Article II, § 1 does not, however, shield state election laws from other constitutional requirements. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions."). Indeed, state-imposed restraints on or impediments to the ability to cast an effective ballot in a presidential election "implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983).

Ballot requirements, "*including filing deadlines*, [have] an impact beyond . . . [the] borders" of a particular state. *Id.* at 795 (emphasis added). "Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Id.* There is a "'pervasive national interest'" in presidential elections that is "'greater than any interest of an individual State.'" *Id.* (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)).

I. The Judgment Of The Florida Supreme Court Should Be Vacated Because It Does Not Comply With 3 U.S.C. § 5

A. State Court Determinations Regarding Controversies Over The Appointment Of Presidential Electors Lack Conclusive Effect Unless They Implement Legal Rules Enacted Before The Election

In keeping with the "broad congressional power to legislate in connection with the elections of the President and Vice President," *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976), Congress has enacted statutes to implement the constitutional framework governing the Electoral College. *See, e.g.*, 3 U.S.C. §§ 1-15. Of particular relevance here, 3 U.S.C. § 5 sets forth the circumstances under which state court determinations relating to "any controversy or contest concerning the appointment of all or any of the electors" of the State will be given authoritative effect. Under §5, such determinations shall be given "conclusive" effect and will "govern in the counting of the electoral votes," but *only* if the controversy is resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. §5 (emphasis added); *see also id.* (providing that the determination of such "controvers[ies]" must be "made pursuant to" the prior enacted law). Thus, any judicial determination of a controversy regarding electors based on a new, post-election rule of state law would fail to satisfy the requirements of § 5 and would not receive the benefit Congress intended to confer on election results and the resolution of controversies concerning elections determined according to rules established and in place before an election.

Section 5 was enacted in 1887 as a reaction to the contested Hayes-Tilden election of 1876, a contest marked by naked partisanship, post-election maneuvering and accusations of corruption. In adopting the statutory scheme that emphasizes certainty and clear, pre-set

rules to govern disputes, Congress was evidently determined to avoid a similar episode. *See* 18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876" in which a "cabal . . . had determined . . . to debauch[] the Electoral College"). The manifest purpose of this federal law is to ensure that attempts by state courts or other tribunals to influence or affect the determination of the State's electors will not be effective when reached pursuant to rules, standards or criteria adopted after the voters have gone to the polls. As Representative William Craig Cooper of Ohio explained in the congressional debate on this statute (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose").

Against this backdrop, any contention that the Florida Legislature satisfied 3 U.S.C. § 5 merely by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable. First and foremost, nothing in Florida's election statutes authorizes the state supreme court to set aside carefully developed rules and thoughtfully balanced timetables for the conduct of election protests, recounts and contests. Even the supreme court expressed its "reluctance to rewrite the Florida Election Code." Pet. App. 37a. And given the detailed and carefully wrought statutory deadlines and the authority assigned to Florida's election officials, there is no basis for inferring that the legislature intended courts to exercise equitable powers to change the rules in the midst of the State's efforts to ascertain and pronounce election results.

Moreover, such an interpretation of the Judiciary's authority would render §5 a virtual nullity, and would offer none of the protections that Congress sought to achieve in enacting the statute. If state legislatures could simply convey authority to a chosen tribunal to create new post-election rules to govern disputes over the appointment of electors, States could easily avoid the limitations imposed by 3 U.S.C. §5. Section 5 plainly does not admit of such an interpretation, because it provides that the judicial or other determination at issue must have been made "pursuant to" preexisting law, not merely by a preexisting tribunal. As Representative Cooper cogently observed, "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 CONG. REC. 47 (Dec. 8, 1886).

B. The Decision Below Announces New Rules Of Law And Timetables To Govern Controversies And Contests Concerning Florida's Appointment Of Presidential Electors

A judicial decision that has the effect of adopting a new rule of law to govern election disputes cannot, consistent with §5, be applied retroactively to affect the appointment of presidential electors at an already-conducted election. Rather than confining its analysis and its remedy to the requirements set forth in Florida election statutes, the Florida Supreme Court invoked its inherent "equitable powers" to prescribe new deadlines, suspend mandatory fines, and eviscerate the Secretary's statutory discretion, all in favor of its own conception of what would constitute "a fair and expeditious resolution of the questions presented here." Pet. App. 37a-38a. Under 3 U.S.C. § 5, however, this Court has an independent obligation to ensure that Florida resolves any controversies over the appointment of electors by reference to the rules enacted by the legislature prior to the

election, not *post hoc* standards announced for the first time by courts some two weeks after the election.

In cases arising under the Ex Post Facto Clause, which similarly forbids certain types of retroactive state rulemaking, this Court has held that the question whether state law has changed in a manner that violates the Clause is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."); *see Carmell v. Texas*, 120 S. Ct. 1620, 1639 n.31 (2000) ("Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause, however, is a federal question we determine for ourselves."). By the same token, the question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appointment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. §5, is ultimately a question of federal law.

This Court has not previously had occasion to set forth the appropriate test for determining whether a state court has adopted a new rule of law within the meaning of § 5. The Court has, however, frequently addressed virtually the same question in determining whether to give retroactive effect to newly decided cases in the habeas corpus context. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court explained that "[i]n general . . . a case announces a new rule when it breaks new ground .. . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time . . . ." *Id.* at 301 (opinion of O'Connor, J.). In determining whether a rule of law announced by a court is in fact

new, this Court will "determine whether a … court … would have felt compelled by existing precedent to conclude that the rule" was required. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (internal quotation marks and citations omitted).[5]

While *Teague* uses prior judicial precedents as its point of reference for determining whether a judicial decision establishes a "new rule," the appropriate question under 3 U.S.C. § 5 is, of course, whether the Florida Supreme Court adopted a "new rule" as measured against the existing statutory provisions "enacted" by the legislature to govern presidential elections. Under this understanding, it is clear that the decision below announces a new rule for purposes of 3 U.S.C. § 5. Plainly, the decision below "breaks new ground" and announces a result that was not "dictated by" statutes in effect at the time of the November 7 election. As even the Gore respondents acknowledge, the state supreme court failed to resolve the dispute at issue here according to laws "enacted prior to" election day. Instead, "[i]n light of the unique circumstances of the case, the court *invoked its equitable powers to fashion a remedy* . . . ." Gore Opp. 12 (emphasis added); *see* Pet. App. 37a. The invocation of a court's equitable powers to fashion novel remedies, new rules, and *ad hoc* timetables plainly fails

---

[5] The *Teague* line of cases provides a useful metric for determining whether a court has announced a new rule, and *Teague*'s underlying concerns for finality and the enforcement of settled expectations parallel the interests served by 3 U.S.C. § 5. Under *any* permissible definition, however, the Florida Supreme Court's decision in this case imposed new rules. There is simply *no* law enacted prior to Election Day that set forth the deadline of November 26 announced in the decision below or the virtually non-existent range of discretion within which the Secretary of State was allowed to operate. A legislative pronouncement that required (or authorized) late returns to be ignored was inverted into a requirement that late returns be accepted.

to comply with the congressional directive that disputes concerning the appointment of presidential electors must be resolved "pursuant to" the "laws enacted prior to" election day in order to be given effect. 3 U.S.C. § 5.

Undeterred by—and seemingly indifferent to—the express federal statutory disapproval of the *post hoc* creation of new legal rules that could change the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a 180-degree departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the presidential election. Section 102.112 of the Florida Statutes unequivocally required that election returns by county canvassing boards "must be filed by 5:00 p.m. on the 7th day following the . . . general election . . . ." The new rule of law announced by the decision below changes the effective deadline for submission of election returns from November 14 until November 26 (Pet. App. 38a), nearly tripling the statutory seven-day protest period and certification deadline mandated by the Florida Legislature.

Further, § 102.111 of the Florida Statutes provides that the Elections Canvassing Commission "shall . . . ignore[]" county returns filed after 5:00 p.m. on the seventh day following the election, and "shall . . . certif[y]" the election based on the results returned before the deadline. Section 102.112(1) confirms that late-filed returns "may be ignored" by the Elections Canvassing Commission. *See* Fla. Stat. §102.112.[6] In the face of

---

[6] This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida's decision in *Chappell v. Martinez*, 536 So. 2d 1007, 1008-09 (Fla. 1988), in which the court affirmed the Secretary of State's exercise of discretion to accept late returns from a county that

this clear and preexisting legislative directive, the Supreme Court of Florida has concluded retroactively that the Elections Canvassing Commission shall *not* and may *not* ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, and *shall* include late returns based on selective manual recounts in individual counties. Pet. App. 38a.

Even if the Secretary of State *might* have been authorized to excuse a county board's insubstantial noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. §102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting requirement in Florida law that she accept returns filed 12 days after the statutory deadline, thus tripling the legislature's protest period and concomitantly shortening the contest period. Indeed, without any support in Florida election statutes, the court below simply announced that "[t]he Secretary may ignore [late] returns only if 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 election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process." Pet. App. 37a. These explicit but sharply limited, judicially crafted criteria wholly supplant the explicit provisions of §§ 102.111 and 102.112, which (at most) leave the power to excuse compliance with the certification deadlines to the Secretary's discretion.

---

had substantially complied with the statutory deadline. In passing § 102.112, however, the state legislature did not amend or in any way alter § 102.111. In fact, the Florida House *rejected* an amendment that would have replaced "shall" in § 102.111 with "may." 1989 Fla. Sen. J. 819. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court's novel ruling directed.

The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue. Florida election law not only authorizes machine and manual recounts, but sets explicit limits and short timeframes for the period during which they may be conducted. In passing §§ 102.111 and 102.112 the legislature plainly determined that expedition and finality were paramount considerations, and elevated those goals over the need for manual recounts that might threaten to drag on interminably. If requested, manual recounts are neither required nor are they conducted on a statewide basis. The statutory deadline, by contrast, is expressed in unambiguously mandatory terms and applies uniformly throughout the state. No meaningful conflict can be discerned between the carefully confined time limits for the protest phase, including the manual recount provisions, and the statutory deadline provisions: manual recounts, under the law as it existed on November 7, must be completed within the deadline.

The new, judicially established statutory deadline written in place of the one contained in §§ 102.111 and 102.112 also creates a new rule of law in that it effectively modifies the legislative provisions providing for contests to election results. *See* Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. A contestant has ten days from the time the last county canvassing board certifies its returns to file his or her complaint. The defendant then has ten days to file an answer. By issuing a judicial decree that pushes back the deadline for certification from November 14 to November 26, the Florida Supreme Court has modified the preexisting rule of law discernible on the face of the legislature's contest provisions. Indeed, because any judicial or other proceedings regarding challenges to the appointment of electors must be finally re-

solved by December 12,[7] contestants, and particularly defendants, will not have the statutorily provided time in which to file their pleadings, conduct discovery, and participate in a trial and appeal as contemplated by the legislature. Plainly, the Florida Supreme Court created a new rule, one that had not been in existence before election day 2000, for resolving disputes concerning the appointment of electors.[8]

Because no preexisting rule of law required the Secretary of State to waive the time limit on the facts presented, the Florida Supreme Court's attempt to enforce its newly announced rule retroactively plainly fails to satisfy 3 U.S.C. § 5. That is particularly true in this case, given the court's acknowledgement that it was not interpreting Florida law, but was relying on principles of "equit[y]" to justify its decision. *E.g.*, Pet. App. 37a. Significantly, the requirements of 3 U.S.C. § 5 are satisfied only if the state court determination at issue is made pursuant to laws that were "*enacted*" prior to election day. In imposing this requirement, Congress faithfully adhered to the constitutional mandate that state *legislatures* are to direct the manner in which presidential electors are appointed. U.S. CONST. art. II, § 1, cl. 2.

---

[7] Section 5 of Title 3 provides that any controversy or contest concerning the appointment of presidential electors shall be resolved "at least six days prior to" the day fixed for the meeting of electors. 3 U.S.C. § 5. The day fixed for the meeting of presidential electors this year is December 18, 2000. *See* 3 U.S.C. § 7.

[8] Similarly, the constantly changing and county-to-county variations in the recount protocols and standards, including consideration by some counties during the manual recount of simple indentations known as "dimples" as legally cast votes, clearly marks a departure from prior practice as of November 7, and thus reflects another post-election change in procedures that is inconsistent with § 5.

By choosing the term "enacted," Congress made clear that the laws to be followed in resolving disputes are state *legislative* acts, not the post-election equitable decrees fashioned by state courts to promulgate new rules. This understanding comports with accepted legal usage of the term "enacted" and with decisions from this Court. *See* BLACK'S LAW DICTIONARY 890, 1606 (7th ed. 1999) (s.v. "law") (defining "enacted law" as "[l]aw that has its source in legislation; WRITTEN LAW"; defining "written law" as "[s]tatutory law, together with constitutions and treaties, *as opposed to judge-made law*") (emphasis added); *United States v. Brown*, 381 U.S. 437, 443 (1965) (distinguishing "legislative enactment" from "judicial application" and "executive implementation"); *United States v. Harris*, 106 U.S. 629, 639 (1883) (referring to "the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments"). The decision below, by rejecting the "technical" requirements actually "enacted" by the Florida Legislature in favor of the court's own notions of "equity," clearly fails to satisfy § 5's requirement that election law disputes be resolved pursuant to preexisting "enact[ments]."

Thus, the decision below was not dictated by preexisting law and, in fact, the statutory provisions applicable to resolving disputes over the appointment of electors were expressly overridden. Although the state supreme court's decision *discusses* Florida laws that existed prior to election day, it does not identify any source of preexisting law that set forth the substance of the rules set forth in the judgment below. The Florida Supreme Court itself fully acknowledged throughout its opinion that it was not following the legislature's express directives. Indeed, it dismissed such provisions as inconvenient "[t]echnical statutory requirements." Pet. App. 31a. The Florida Supreme Court's decision thus consciously and unapologetically fails to adhere to the "laws enacted prior to" election day. Nothing in Florida law prior to November 7 revealed that the seven-day pe-

riod for certification of election results was in reality a nineteen-day period, or that the Secretary of State's broad power to enforce the statutory deadline and reject untimely election returns was wholly displaced by extra-statutory criteria. Far from being compelled by preexisting legislative enactments, the state supreme court's decision clearly changed Florida election law and announced a "new rule."

Tellingly, even the Gore respondents do not dispute that a change in the law took place. They simply claim that the Florida Supreme Court's decision does not "'change the rules' *in any way that implicates federal law*." Gore Opp. 17 (emphasis added). Under 3 U.S.C. § 5, however, *any* post-election change in the rules governing the appointment of presidential electors (much less the extensive revisions introduced by the Florida Supreme Court in this case) not only implicates federal law, it squarely ignores and overrides the federal requirements and standards enunciated in § 5.

C. The Florida Supreme Court's Decision Also Upsets The Policy Choice Made By Congress In 3 U.S.C. § 5

As noted above, the legislative history and purpose of 3 U.S.C. §5 confirm that the new rule announced by the Florida Supreme Court is inconsistent with the requirements of §5. The intent of §5 is to ensure that disputes relating to the appointment of presidential electors will be "decided under and by virtue of laws made prior to the exigency under which they arose." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper). In other words, the rule of law means the application of rules properly enacted and generally understood *before* the contest—not rules made up afterwards to suit the needs of one or the other of the protagonists.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by discouraging precisely what is happening in Florida

today, where the candidate who did not receive the most votes and his subordinates seek to overturn the results of the presidential election by appealing for the enactment of new rules after the election has been held. That was done repeatedly during the recounts, ending with the effort to force adoption of the "dimpled" ballot concept, and it was done when the time limit for conducting manual recounts was changed from seven to nineteen days. Section 5's rejection of such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, or that recount standards would be changed from day to day according to the whims of the officials in charge of the process in each county, "campaign strategies would have taken this into account . . . ." *Id.* at 582. Indeed, the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold and that local officials could adopt recount rules that favored their preferred candidates. Considerations of due process and fundamental fairness plainly preclude such retroactive rulemaking here.

* * * * *

The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candi-

date has previously resisted so strenuously and resourcefully the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the state courts, in order to satisfy §5, must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so if their decisions are to be given binding effect, and it is equally plain that the Florida Supreme Court failed to do so here.

D. Because The Judgment Below Does Not Comply With 3 U.S.C. § 5, It Is Not Binding On Congress Or The Elections Canvassing Commission

The additional question posed by this Court asks "What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?"

The appropriate remedy to follow from such a finding seems obvious: This Court should vacate the Florida Supreme Court's judgment, thereby reinstating the Elections Canvassing Commission's statutory authority to act in accordance with the clear and specific deadlines prescribed by Florida election law as of November 7, 2000. The same relief would flow, of course, from this Court's determination that the decision below violates Article II.

Such a result would permit Florida's executive officials to perform their duties under the law as it existed on November 7, 2000. As explained above, Title 3 sets forth a carefully crafted *federal* scheme, in which the States play a crucial role. Florida, in particular, has through its legislature designated certain state executive branch officials, including the Secretary of State and the Elections Canvassing Commission, as the state officials responsible for performing Florida's obligations under the federal scheme and exercising appropriate discretion.

Title 3 U.S.C. § 15, which directly implements Congress's authority under the Twelfth Amendment to count electoral votes, sets forth, *inter alia*, the procedures by which Members of Congress may object to the votes cast by certain electors, and how Congress will resolve those objections. It provides that "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected . . . ." 3 U.S.C. § 15. Section 6, in turn, states that "if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the Seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made." 3 U.S.C. § 6. Thus, this Court's determination that the judgment below does not comply with § 5 would also ensure that Congress, in performing its functions under 3 U.S.C. § 15, would be bound to give "conclusive" effect to the official certification of the Elections Canvassing Commission concerning the appointment of Florida's electors made according to the unmodified Florida election law. 3 U.S.C. § 5.

Congress has enacted a statutory framework that is dependent to a significant degree on certifications and other actions by state executive officials, which Congress has deemed necessary to fulfill its constitutional responsibilities related to counting the votes of the electoral college. It would frustrate Congress's carefully orchestrated procedures for carrying out these important constitutional duties if state courts, acting in a manner manifestly inconsistent with 3 U.S.C. §5, could nonetheless issue injunctions and other binding orders to state executive officials that prevent them from perform-

ing their duties in accordance with pre-existing Florida statutes and, thus, with 3 U.S.C. § 5.[9]

This conflict is heightened by the fact that in certain circumstances, where the provisions of 3 U.S.C. § 5 have not been complied with, federal law gives conclusive effect to the determinations of the responsible state executive officials. Under 3 U.S.C. § 15, for example, if Congress receives multiple electoral vote returns from a State, none of which complies with 3 U.S.C. § 5, and the two Houses of Congress are unable to agree on which return to count, "then, and in that case, the votes of the electors whose appointments shall have been certified by the executive of the State, under the seal thereof, shall be counted." 3 U.S.C. § 15. Plainly, because a clear goal of § 5 is to *avoid* any possibility that Congress would be bound by state determinations that do not comply with § 5, it cannot be the case that a state court determination that is inconsistent with § 5 can compel state executive officials to certify election results in such a way as to bind Congress.

The Florida Supreme Court's decision thus stands as an obstacle to state executive officials' performance of their federal statutory duties. A finding by this Court that the Florida decision was inconsistent with the requirements of 3 U.S.C. § 5 would accordingly require a declaration that the judgment below—as a matter of *federal* law—is a nullity, to the extent it purports to bind state executive officials with federally assigned responsibilities relating to the November 7 election and the

---

[9] Petitioner emphasizes that he is *not* asking this Court to declare the "correct" rule of Florida law. Rather, petitioner is simply seeking to ensure that Florida officials are able to perform their *federal* duties with respect to this election without being restrained by the newly fashioned equitable decree, standards and timetable announced by the Florida Supreme Court to supplant the rules for this election.

choice of presidential electors.[10] As a result, the Elections Canvassing Commission would be free to recertify petitioner, once again, as the winner of the election context in Florida, with a corrected vote total reflecting the vote tabulated in compliance with the statutory deadline of November 14.[11]

While it is true that petitioner was also certified the winner under the judicially-created deadline of November 26, the votes certified under that judicially-imposed procedure are substantially different from those that would have been certified as of the statutory deadline of November 14. Those differences may have significant consequences for the election contest challenge currently being mounted by Vice President Gore.

Under Florida law, there is a "presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). Specifically, certified election returns are "regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld." *Id.* at 268-69 n.5 (quotation omitted). Con-

---

[10] There is nothing surprising about that principle of law. For example, in the context of the Extradition Clause, U.S. CONST. art. IV, §2, cl. 2, and the federal statute that implements it, 18 U.S.C. § 3182, this Court has overturned state court decisions that interfere with state executive officials' attempts to perform their duties imposed by federal law. *New Mexico ex rel. Ortiz v. Read*, 524 U.S. 151, 154-55 (1998); *California v. Superior Court*, 482 U.S. 400 (1987).

[11] Nothing in the foregoing analysis, of course, affects the validity of the Elections Canvassing Commission's November 26 certification that petitioner received the most votes in Florida's presidential election. The same presidential electors would have been elected under a standard that complied with the statutory deadline, because petitioner and Secretary Cheney received the most votes each time the votes were tabulated.

sequently, to overcome this strong presumption, an election challenger must show, as a threshold matter, that there has been "substantial noncompliance with the election statutes." *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

The proper application of this strong presumption to the results that would have been certified by the Elections Canvassing Commission but for the Florida Supreme Court's *sua sponte* November 17 order and November 21 opinion and order would be significant to petitioner. First, the vote margin for petitioner is significantly smaller under the November 26 certification than it would have been under the certification required by the statute. Perhaps more importantly, the *content* of the votes certified on November 26—and thus entitled to the presumption of correctness—is significantly different than it would have been under the statutory deadline. For example, the November 26 certification includes "dimpled" ballots manually recounted in Broward County, a process that produced 567 additional votes for the Vice President. If this Court finds that the Florida Supreme Court's amendment of the statutory deadline to November 26 is inconsistent with § 5, those 567 votes will not be clothed with the presumption of correctness afforded certified election returns. Instead, the vote tally produced by the normal, machine assisted, recount and submitted by Broward County on November 14 will be entitled to that presumption. Which votes are viewed as the properly certified election results could have significant consequences for the election contest.[12]

---

[12] Moreover, if this Court rules that election standards—including the standards for assessing valid ballots—promulgated after November 7 are not "conclusive" under § 5, the Florida courts in the election challenge will not accept Vice President Gore's newly developed "dimpled" ballot standard as a permissible basis for determining proper certification of presidential electors.

Vice President Gore also claims in his election contest that the Elections Canvassing Commission should have included the tabulation of ballot changes manually recounted in Palm Beach County by 5:00 p.m. on November 26 (or, alternatively, should have extended the deadline still further). Similarly, the Vice President argues that Miami-Dade County Canvassing Board abused its discretion by not conducting a partial recount of votes for the November 26 deadline. Both these claims will be rendered invalid if the state election officials are free to enforce, as the proper deadline under federal law, the statutory deadline previously established by the Florida legislature.

Perhaps the most significant consequence of the Court's ruling for petitioner would be to clarify the governing federal law standards and thereby forestall an impending constitutional crisis. As it currently stands, an election contest is proceeding, and the matter is before the Florida courts. If this Court holds, under 3 U.S.C. § 5, that an exercise of "equitable powers" to alter existing statutory standards is an impermissible change in the law, and that judicial amendment of statutory standards enacted by the legislature is contrary to Article II, § 1's grant of plenary authority to state legislatures, the prospect of subsequent judicial amendment—and of dualing slates of electors mandated by dualing branches of Florida's government—is substantially diminished.

Nor does the fact that Congress and the Florida Legislature have other means of remedying state judicial violations of U.S. Const. art. II, § 1, cl. 2, and 3 U.S.C. § 5 preclude this Court from prescribing the proper remedy.[13] To be sure, what the Florida Supreme Court did

---

[13] Under 3 U.S.C. § 2, the Florida Legislature has the authority to direct the "manner" of appointing electors when the State "has failed to make a choice on the day prescribed by law." When there is a controversy over the appointment of electors and the State fails to make a "final determination" of

in this case was to usurp the prerogatives of the Florida legislature, and the legislature is constitutionally and statutorily empowered to respond by appointing electors or otherwise legislating with regard to the manner of appointment. U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 2. By acting now to reject the Florida Supreme Court's unwarranted intrusion into the regulation of the manner of appointing electors, this Court will eliminate the potential for a constitutional crisis arising out of an unseemly conflict among Florida's legislative and judicial branches regarding the appointment of electors.

In *McPherson v. Blacker*, 146 U.S. 1 (1892), moreover, the Court entertained a challenge to a Michigan statute authorizing the appointment of electors through district, rather than statewide, elections. Michigan's Secretary of State argued that given the role of Congress, as well as certain state executive officers, in determining election results, disputes regarding the appointment of electors were not subject to judicial review and remedies. *Id*. at 23. The Court squarely rejected that argument, concluding that the validity of Michi-

---

its electors pursuant to 3 U.S.C. § 5, the legislature plainly possesses the authority to resolve that dilemma under § 2. Thus, § 2 and § 5 are complementary parts of Title 3's framework for regulating the appointment of electors. Section 5 gives the State an opportunity to resolve any "controversy" or "contest" over electors if it does so in accordance with statutes enacted prior to the election, provided that a final determination pursuant to such statutes is reached "at least six days before the time fixed for the meeting of the electors." 3 U.S.C. § 5. In contrast, § 2 contemplates that, if necessary, the legislature will prescribe the "manner" of appointing electors following the election. Accordingly, § 2 recognizes the state legislature's power to protect its constitutional prerogatives over the appointment of electors in the event that, *inter alia*, its pre-election statutory scheme is subverted or otherwise fails to produce a conclusive choice under § 5.

gan's method of appointment raised "a judicial question," subject to judicial orders. *Id*. at 24.

Similarly, in *Foster v. Love*, 522 U.S. 67 (1997), the Court enforced a private right of action against Louisiana's primary election system under 2 U.S.C. § 7, which prescribes a uniform day for the election of Senators and Representatives. Although the question apparently was not raised in that case, it is important to note that Article I, Section 5 provides that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1. Thus, if Louisiana's election scheme violated federal requirements for the election of Senators and Representatives, each House presumably could have enforced that requirement in the context of judging "the Elections" of its members. That fact, however, did not prevent this Court from fashioning an appropriate judicial remedy.

Congress enacted 3 U.S.C. § 5 to protect the strong national interest in having disputes over electors resolved through pre-established rules, thereby ensuring finality and fairness to the resolution of such inherently political contests and to avoid the kind of contentious, chaotic and standardless process that has characterized the Florida situation during the three weeks since November 7. That Congress retains the right to count the returns of the electoral college to resolve such disputes where necessary does not protect the same important federal rights and interests that Congress sought to protect through § 5. *Cf. Clinton v. City of New York*, 524 U.S. 417, 430 (1998).

II. The Florida Supreme Court's Decision Violates Article II Of The Constitution Of The United States

In addition to being irreconcilable with the requirements of 3 U.S.C. §5, the Florida Supreme Court's decision violates Article II of the Constitution, which expressly invests state *legislatures* with the power to de-

termine the manner in which presidential electors are appointed. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object" of appointing electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). In the absence of clear and express delegation of that power by the state legislature to a coordinate branch of state government, the Constitution forbids the exercise of such power by any branch other than the legislature. In Florida, the legislature manifestly did *not* grant the authority to adjust deadlines for election returns to organs of the Florida judiciary. Rather, it set forth a precise statutory scheme to govern the appointment of presidential electors. The Florida Supreme Court's extensive and unauthorized revision of that scheme was unconstitutional.

A. The Framers Vested The Authority To Determine The Manner For The Appointment Of Presidential Electors In The State Legislatures

In constructing the new national government, the Framers were confronted with the problem of how its officials would be chosen. They settled on three separate schemes. The Members of the House of Representatives would be elected "by the People of the several States." U.S. CONST. art. I, §2, cl. 1. The Senators would be "chosen by the Legislature" of each State. U.S. CONST. art. I, §3, cl. 1.[14] As for the President and Vice President, the Framers devised a new system of indirect election that has become known as the Electoral College. *See* U.S. CONST. art. II, § 1 & amend. XII.

The Electoral College was the product of considerable debate and compromise at the Convention. The

---

[14] This mode of selection was later changed to provide for direct popular election of Senators. U.S. CONST. amend. XVII.

Framers ultimately settled on a system of electors, who would be appointed from each State and who, in turn, would vote for the President and Vice President. *See The Federalist* No. 68 (Hamilton). This approach was adopted to minimize "the danger of intrigue & faction." 2 *The Records of the Federal Convention of 1787* 500 (Max Farrand, ed. 1966) ("Farrand") (floor remarks of Gouverneur Morris).

The most significant issue to be resolved was how the electors themselves would be chosen. Some of the delegates argued for popular election, while others sought to vest the authority to appoint electors in either the executive or the legislative branches of the several States. In light of the length and passion of the debates over the mode of selecting the President, it is notable that *not a single delegate* to the Convention suggested that the power to determine the manner of appointing electors be vested in the state courts. As James Madison said on the floor, "[t]he State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment." 2 Farrand 110.

In the end, the Convention resolved to instill the state *legislatures* with the power to determine the manner of appointing electors. As ratified, the Constitution provided that "[e]ach State shall appoint [electors] *in such Manner as the Legislature thereof may direct*." U.S. CONST. art. II, § 1, cl. 2 (emphasis added). As this Court has recognized, "[t]he final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *McPherson*, 146 U.S. at 28; *see also Ray v. Blair*, 343 U.S. 214, 224 n.11 (1952) ("Discussion in the Constitutional Convention as to the manner of election of the President resulted in the arrangement by which

presidential electors were chosen by the state as its legislature might direct").[15]

In the early days of the Republic, several state legislatures chose electors directly, without conducting a vote of the citizenry. The constitutionality of this practice was quickly settled:

> When a bill to regulate presidential elections was before the First Congress, Representative Giles argued that by prescribing that electors should be chosen "in such Manner as the Legislature … may direct" the Constitution implied that the legislatures were not permitted to make the choice themselves; electors were to be chosen by the people. Giles was immediately corrected from both ends of the political spectrum. The power was "left discretionary with the state Legislatures," said Jackson of Georgia—as Goodhue of Massachusetts added, "by the express words of the Constitution."

Currie, *The Constitution in Congress* 138 n.60 (citations omitted). "The states took advantage of the latitude thus afforded them to employ a wide variety of methods for choosing electors." *Ibid.*; *see generally McPherson*, 146 U.S. at 28-35 (cataloguing various methods by which States have chosen electors).[16]

---

[15] Alexander Hamilton explained that the Electoral College was designed "to afford as little opportunity as possible to tumult and disorder." THE FEDERALIST No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The goal was to ensure that the President be elected in the absence of "heats and ferments," "sinister bias," or "corruption." *Id.* at 412.

[16] The wide variety of procedures that have been employed by state legislatures over time demonstrates that the Article II structure is fully consistent with principles of federalism. At the same time, however, "the provisions governing elections

B. In The Absence Of Express Legislative Direction, The State Executive And Judicial Branches Are Constitutionally Prohibited From Engrafting Material Changes Onto The Manner Of Appointing Presidential Electors

The words "in such Manner as the Legislature ... may direct" in Article II establish a federally mandated separation of powers between the state legislature and other branches of state government in the context of choosing presidential electors. "[T]he insertion of those words," this Court has explained, "operate[d] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *McPherson*, 146 U.S. at 25. The Florida legislature has thus been granted, by the Constitution itself, plenary authority to regulate the manner of appointment of presidential electors: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States." *Id.* at 34-35 (quoting Senate Rep. 1st Sess. 43 Cong. No. 395 (Sen. Morton)); *see also State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 285 (Neb. 1948) ("Article II, section 1, of the Constitution of the United States ... leaves to the Legislature of the state the manner of determining how 'Each State' shall appoint its presidential electors. It is a matter within the control of the state Legislature."); *McClendon v. Slater*, 554 P.2d 774, 777 (Okla. 1976) ("the Legislature has the duty to direct the manner of choosing presidential electors").

---

reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). The States have been given a role in this most national of elections, but that role is not (as respondents have suggested) exclusive of any federal interest. To the contrary, as shown above, the federal interests in presidential elections are paramount and pervasive.

The reason that the Framers committed the manner of appointing electors to the legislatures of the several States was that the legislative branch of government, unlike the executive or the judicial, is representative of the will of the people. This Court has explained that legislature "was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Hawke v. Smith*, 253 U.S. 221, 227 (1920); *see also McPherson*, 146 U.S. at 27 (Article II "recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object"). The Framers expected that choices regarding the manner of appointing presidential electors would be made by such a representative body.

It is significant that the Framers specifically identified the state *legislatures* as the repositories of the power to determine the manner of appointing presidential electors. Several provisions of the Constitution assign federal authority or responsibility to the several States. Such authority is sometimes vested in the States *qua* States.[17] A number of other constitutional provisions identify with precision the state institution that is charged with exercising particular duties integral to the functioning of the federal government. For example, various constitutional provisions specify that the state

---

[17] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 16 ("reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); *id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").

executive is to perform duties.[18] Many single out state legislatures as the appropriate agents for exercising federal power, often subject to explicit qualifications or reservations of power in Congress.[19] At least one provision, the Supremacy Clause, singles out state judges for the assignment of federal responsibilities.[20] The Constitution's reliance on particular state institutions under such provisions is so carefully crafted that at least one provision, the Guarantee Clause, specifies that the United States can intervene to protect States "against domestic Violence" "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." U.S. CONST. art. IV, § 4.

In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Founders' decision to vest specific authority in state legislatures must be understood to be exclusive of state

---

[18] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* art. IV, § 2, cl. 2 (requiring States to extradite persons charged with treason "on Demand of the executive Authority of the State from which he fled").

[19] *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations . . . ."); *id.* art. V (amendment may be proposed "on the Application of the Legislatures of two thirds of the several States"); *id*. (constitutional amendments become effective when ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress").

[20] *See* U.S. CONST. art. VI, cl. 2 ("[T]he Judges in every State shall be bound [by the Constitution, laws and treaties of the United States], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

executive or judicial power to prescribe the "Manner" of appointing electors. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983); *McPherson*, 146 U.S. at 27. Thus, while the Constitution does not generally require States to observe the separation of powers principles that inhere in our federal constitutional structure, States *must* provide for the manner of appointment of electors through the legislative process rather than by resort to the executive or judicial branches of their respective governments. *Cf. Thornton*, 514 U.S. at 804 ("the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States").

The Florida legislature *could* have delegated to state courts some authority over the manner appointing electors. *See McPherson*, 146 U.S. at 34-35 ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors") (emphasis added). But any such delegation must be both clear and explicit. Because the power to determine the manner of appointing electors is vested by the Constitution itself in the state legislature—and only in the state legislature—it cannot be presumed to have been delegated *sub silentio*, nor can another branch arrogate it to itself without the legislature's express approval.

C. The Florida Supreme Court Has Not Been Granted Authority To Determine The Manner Of Appointing Presidential Electors

In Florida, the legislature has directed that the State's presidential electors be appointed in accordance with the results of a popular election. *See* Fla. Stat. § 103.011. The Florida legislature has expressly assigned the task of certifying the results of that election to the Department of State, *see id.*, and the duty to make and sign the certificates of election for presidential electors

to the Elections Canvassing Commission. *See* Fla. Stat. § 102.121. Moreover, Florida law makes clear that counties must certify election results by 5:00 p.m. on November 14. *See* Fla. Stat. §§ 102.111(1), 102.112(1). The members of the Elections Canvassing Commission—the executive branch entity the legislature has charged with the obligation (or discretion) to certify the results "as soon as the official results are compiled from all counties," § 102.111—have repeatedly expressed their intention to comply with the statutory deadline of November 14 and to appoint electors based on the election returns submitted by that date. That decision would be consistent with the "manner" the Florida legislature has directed for the appointment of electors.

The state supreme court, however, enjoined the Elections Canvassing Commission from certifying the results under the statutory schedule, and has invented an entirely new deadline that has no basis in any statute or other legislative enactment. Because the Constitution specifically assigns to state legislatures the power to direct the manner of appointing presidential electors, however, the court was constrained to follow the statutory scheme established by the Florida legislature. It manifestly failed to do so.[21]

The Florida Supreme Court made clear that it felt no obligation to adhere to the statutes applicable to the elec-

---

[21] These issues involve, to a certain extent, the examination of Florida state statutes. Because this inquiry is inextricably bound with the federal question of whether the Florida Supreme Court's order was unconstitutional under Article II, this Court may conduct an independent review of the state-law bases asserted in defense of the court's action. *See, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 357-58 (1816) (reversing state court's title determination under state law, where necessary to proper construction and application of treaty); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981).

tion of presidential electors. *See*, *e.g.*, Pet. App. 8a (rejecting "a hyper-technical reliance upon statutory provisions"); *id.* at 31a ("Technical statutory requirements must not be exalted over the substance of this right [of the citizens to vote]"); *id.* at 36a ("the will of the electors supersedes any technical statutory requirements"). Whether or not that approach was correct as a matter of Florida law, the importance of the court's dismissive attitude toward the pronouncements of the legislature is that it demonstrates the court's failure to appreciate the restrictions imposed by Article II and the exclusivity of legislative power in regard to the manner of appointing presidential electors.

In light of the court's manifest willingness to depart from and reorder the statutory scheme in order to fulfill its vision of "the will of the people" (Pet. App. 8a), it is unsurprising that the court's decision turns the governing statutes on their head. With respect to the deadline for certifying election returns, for example, Florida law unambiguously provides that county returns "must be filed by 5 p.m. on the 7th day following the . . . general election." Fla. Stat. § 102.112(1). Even the court below acknowledged that "the deadline set forth in section 102.111(1), Florida Statutes (2000), requir[es] that all county returns be certified by 5:00 p.m. on the seventh day after an election." Pet. App. 4a. The court concluded, however, that it would "[a]llo[w] the manual recounts to proceed in an expeditious manner, rather than impos[e] an *arbitrary* seven-day deadline." *Id.* at 32a (emphasis added). Of course, it was not the court that would have been "impos[ing]" the deadline; that deadline was established by preexisting statutory law as an integral part of a carefully balanced legislative program and timetable for counting ballots and resolving disputes. Regardless of the wisdom of the court's decision to rewrite the statutory deadline, it is plain that the court substituted its judgment for that of the legislature. Although the Constitution may permit state courts to take such action as applied to the elections of state officials,

Article II precludes such judicial lawmaking in the context of appointing presidential electors.

Lest there be any doubt as to the legislative nature of the decision below, the court also adopted an entirely new, and utterly arbitrary, deadline for the submission of election returns. The court acknowledged that it was not basing this decision on any statutory provision. Pet. App. 37a-38a ("we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here"). Eschewing the "arbitrary" November 14 deadline established in advance by the legislature, the court imposed its own deadline of November 26 for the submission of county returns—a date vastly more arbitrary than the statutory deadline because the legislature's deadline was part of a carefully crafted system and timetable for protests, recounts, contests and certification. The court plucked out one date and changed it without any apparent regard for the effect of its decision on the balance of the carefully wrought legislative plan. Whether such an order is within the equitable powers of a Florida court in the ordinary course has no bearing on this case. Rather, it is clear that the court below reached out to affect the "manner" of appointing presidential electors by changing the deadline for the submission of vote tallies, and thereby arrogated to itself a power that the Constitution has instilled only in the state legislature.

The deadline for certifying election results indisputably is encompassed within the "manner" of appointing electors vested by the Constitution in the state legislatures. *See Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *McClendon v. Slater*, 554 P.2d 774, 776-77 (Okla. 1976). Each State—and, often, the political subdivisions within the States—conduct elections in different ways. Regardless of the voting mechanism, however, the need for finality dictates that a deadline be set for certifying the returns. The Florida legislature has established precisely such a deadline: 5:00 p.m. on the 7th

day following the election. As noted above, that deadline is tied to other procedures and deadlines and ultimately to the certification and appointment of the electors.

The Florida Supreme Court did not even attempt to rest its exercise of judicial power over the manner of appointing electors on any statute or other delegation of such power to it by the legislature. Instead, the court repeatedly invoked the Florida constitution as "[t]he abiding principle governing all election law in Florida." Pet. App. 14a; *see also*, *e.g.*, *id.* at 30a. While that might well be an acceptable source of law for an election of a state official, it cannot suffice with respect to the appointment of presidential electors. As this Court has explained, "[t]his power [to determine the manner of appointing electors] 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 (emphasis added). The Florida Supreme Court's decision, which disregards this principle, cannot be reconciled with the framework imposed on the States by Article II.

The particular provisions of the state constitution on which the Florida Supreme Court relied highlight the federal constitutional error in its analysis. The court stressed that "[t]he right of suffrage is the preeminent right contained in the [state] Declaration of Rights," and asserted 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." Pet. App. 29a-30a. In light of this construction, the court held that the Elections Canvassing Commission could not reject untimely returns. *Id.* at 31a-32a. But, as the early practice demonstrates (and this Court's decision in *McPherson* confirms), there is *no* "right of suffrage" under the *federal* Constitution in the context of selecting presidential electors. The state legislatures may make such ap-

pointments themselves, without conducting any election whatsoever. Indeed, Florida itself did so in 1868.

It thus makes no difference to the constitutional analysis whether the Florida Supreme Court's decision to preclude the Secretary of State from certifying the election on November 14, or to establish a new certification deadline of November 26, was mandated or inspired by the state constitution. In the absence of an express delegation from the legislature, the court was precluded from issuing *any* directive not founded in preexisting law that could affect the manner of appointing presidential electors. The court's order in this case clearly had that effect. It is, therefore, unconstitutional.[22]

D. As A Result Of Its Unconstitutional Arrogation Of Power, The Florida Supreme Court's Decision Is A Nullity

This Court has never before confronted the situation in which a state court exerted authority expressly withheld from it by Article II of our Constitution, and thus has not had the opportunity to consider the correct remedy for such an act. Two related lines of precedent indicate, however, that the proper remedy for the Florida Supreme Court's violation of Article II is nullification of its attempt to interfere in the manner in which Florida's electors are appointed.

---

[22] Contrary to the Gore respondents' suggestion, enforcing Article II in this case would not lead to the "federalization" of all state-court decisions in the election context. *See* Gore Opp. 17. In some cases, there might be legitimate questions of state law arising from the implementation of a legislatively authorized scheme of appointing electors. This case, however, does not even present a close call. The court below strayed so far from the framework established by the Florida legislature that its unconstitutional exercise of authority over the electoral process is patent.

First, the Court has long held that "the Constitution and constitutional laws of the [United States are] the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation." *Ex Parte Siebold*, 100 U.S. 371, 399 (1879); *see also Milliken v. Bradley*, 418 U.S. 717, 744 (1974). A state law that conflicts with the Constitution is void. *E.g.*, *Gunn v. Barry*, 82 U.S. 610, 623-24 (1872). As discussed above, the Florida Supreme Court's decision to waive the statutory deadlines for certifying the election results, and to impose a deadline of its own invention, amounts to new rules of law. The court was without constitutional authority to announce such rules, however, because Article II vests exclusive authority over such matters in the Florida legislature. As a result, the Florida Supreme Court's efforts at judicial legislation are void. "An unconstitutional law is void, and is as no law." *Siebold*, 100 U.S. at 376; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759-60 (1995) (Scalia, J., concurring).

Second, it is well-established that an act by a state official in violation of duties or obligations imposed by the Constitution is *ultra vires* and, thus, void. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908). "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Siebold*, 100 U.S. at 392. Because the Constitution vests exclusive authority over the manner of appointing electors in the legislature, and because that authority has not been delegated by the Florida legislature to the judiciary, the state supreme court's intrusion into the electoral process was *ultra vires*. *Cf. Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*"). The supreme court's decision, therefore, should be vacated and given no force or effect.

See, e.g., California v. Superior Court, 482 U.S. 400, 412 (1987) (reversing without remand California Supreme Court decision in contravention of the Extradition Act, which implements the Extradition Clause of Article IV).

Vacatur of the decision below would confirm that the Secretary of State and the Elections Canvassing Commission have the authority—expressly delegated to them by the legislature—to certify the results of the election based on returns received by the statutory deadline of November 14. And, because the state supreme court's injunction precluding the responsible executive branch officials from doing so violated the Constitution and is, therefore, a legal nullity, those officers may exercise their discretion to certify the election *nunc pro tunc* to that date. If this Court vacates the judgment below and the Elections Canvassing Commission takes such action, some of the recently filed election challenges to the election results may be mooted.[23] In any event, enforcing the constitutional structure in this case will imbue this election with the finality that the carefully wrought federal system was meant to secure.

CONCLUSION

The judgment of the Supreme Court of Florida should be vacated.

Respectfully submitted.

---

[23] For example, the Vice President has complained that the Miami-Dade County Canvassing Board improperly stopped its manual recount after the state supreme court announced its November 26 certification deadline. But the Miami-Dade recount had not even *begun* until after the statutory deadline had expired on November 14, and the Supreme Court of Florida opened the door to such a recount on November 17.

MICHAEL A. CARVIN
COOPER, CARVIN & ROSENTHAL, P.L.L.C.
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

BARRY RICHARD
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891

GEORGE J. TERWILLIGER III
TIMOTHY E. FLANIGAN
MARCOS D. JIMÉNEZ
WHITE & CASE LLP
First Union Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700

THEODORE B. OLSON
Counsel of Record
TERENCE P. ROSS
DOUGLAS R. COX
THOMAS G. HUNGAR
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

BENJAMIN L. GINSBERG
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

JOHN F. MANNING
435 W. 116th Street
New York, N.Y. 10027

WILLIAM K. KELLEY
Notre Dame Law School
Notre Dame, Indiana 46556

BRADFORD R. CLARK
2000 H Street, N.W.
Washington, D.C. 20052

Counsel for Petitioner

November 28, 2000

70150759_16.DOC