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 FLORIDA SUPREME COURT

THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE AMERICAN CIVIL RIGHTS UNION

The American Civil Rights Union respectfully moves the Court pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support whereof, it states:

1. The American Civil Rights Union was established in 1998 as a § 501(c)(3) as an educational and legal charity dedicated to basic constitutional issues. Its purpose is as stated on its Internet webpage is "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

2. The Policy Board of the ACRU consists of The Hon, Robert Bork, The Hon. Robert B. Carleson, The Hon. Linda Chavez, The Hon. Edwin Meese, III, Mr. Joseph Perkins, The Hon. William Bradford Reynolds, The Hon. Kenneth W. Tomlinson, Professor James Q. Wilson, Ambassador Curtin Winsor, Jr., all of whom in one capacity or another have been active throughout their careers in constitutional issues.

3. The interest of the ACRU in this case is the Court's first impression consideration of the authority of the Florida legislature (and any other state legislature in any future election) under the Constitution, Article II, Section 1, paragraph 2, to adopt and control the process of choosing its Electors for President and Vice President.

4. Counsel for the Amicus has contacted the counsel for the Parties in this case and understands, that while this is being typeset, all Parties are entering into a Consent Order for the acceptance of all Amici briefs, making this Motion unnecessary.

Respectfully submitted,

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INTEREST OF AMICUS[1]

The interest of the Amicus, American Civil Rights Union, in the central issues of this case is as described in paragraphs 1-3 of the Motion for Leave to File Amicus Curiae Brief, *supra*. These statements are incorporated here by reference.

SUMMARY OF ARGUMENT

This case concerns a decision of the Supreme Court of Florida that changed substantive provisions of the Florida election law concerning the presidential election. The precise questions posed by this Court both address whether the actions of the Florida Supreme Court are in accord with the federal election statutes codified in Title 3, beginning in 1877 in response to the contentious Hayes-Tilden Election of 1876.

These statutes have a specific constitutional basis in Article II, Section 1. Respect for that basis, that the state election laws are committed to the "legislature," not to the courts, nor to referenda, not to any other entity than the elected representatives within each state. The Congressional statutes depend on that authority.

Based on both the theory of American government and a prior decision of this Court on the meaning of the word "legislature," the ACRU believes that the Florida Supreme Court has not only violated those statutes, but has also violated the plain language of the Constitution itself.

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1. This *amicus curiae* brief filed in support of the Petitioner was funded solely by the ACRU and authored entirely by counsel for the ACRU.

This is a highly volatile election, and there could be either a resolution of the outcome or even a concession by one of the candidates. But, even in that case, the Amicus believes that this Court should resolve the issue for the purpose of proper conduct of presidential elections, as it has in the past.

As this brief is written, the Certification of Election has just been signed in Florida, awarding the 25 Electoral College votes in that state to George Bush. The Amicus understands that Electoral College results in two other states' results are undergoing an automatic recount under state laws, but would not affect the national result, regardless of their outcomes. Litigation on several Florida issues will apparently will be filed Monday morning, so the ultimate outcome is unknown.

ARGUMENT

I. According to a Prior Decision of this Court, the Word "Legislature" as Used in the Constitution Means the State Legislature, and No Other Entity

While the question of the constitutional basis of the state part of federal presidential elections has never been before this Court, the question of what the Constitution means by the word "legislature" has been decided by this Court.

Hawke v. Smith, 253 U.S. 221 (1920), presented the Court with the question whether the State of Ohio could conduct a binding referendum, under its own Constitution and laws, concerning the ratification by that state of the Eighteenth Amendment which created Prohibition. The legislature of Ohio had already acted to ratify that Amendment, but that action was petitioned to referendum, which would have reversed that ratification if it passed.

The decision of this Court was that the Framers of the Constitution well understood the leaning of the word "legislature" in Article V. As this Court then said in *Hawke, supra*, at 227,

> The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

Later in the opinion, this Court was even more clear in the meaning of the word "legislature." It said,

> What did the framers of the Constitution mean in requiring ratification by "legislatures"? That 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, at 227.

The Court concluded, therefore, that the only action directed and permitted by any state in ratifying a constitutional amendment was the action of the state legislature itself, and no other action including any referendum by the people.

In the instant case, Article II, Section 1, commits to the "legislature" of each state the writing of the laws for the choosing of the Electoral College. The freedom of the legislatures to act within that grant of power from the United States Constitution is demonstrated by the fact that Maine and Nebraska have chosen to have their two Electors who match their Representatives elected by congressional district, rather than statewide, winner-take-all contests. (If all states had selected district election of Electors, odds are the 2000 Election would have been over, early on the morning of 8 November, and all the uncertainty and litigation that has occurred would have been eliminated. But that is a consideration for the future, not for this case.)

There is no reason to believe that the Framers were any less aware that the word "legislature" was "plain, and admits of no doubt in its interpretation" when they wrote the Electoral College provisions, than when they wrote Article V. Until and unless Article II, Section 1, of the Constitution is amended in such manner as the people, through Congress and their state legislatures shall decide, any action of any entity, in the courts or in the executive in any state which rewrites provisions of the provisions of its presidential election process, should not stand.

Other parties to this case will fully discuss the statutes Congress has passed pursuant to Article II, Section 1. This Amicus will not address those statutes except to say that the grant of power to Congress to adopt them, and the mandate of this Court to apply them, both rest on the express language of Article II, Section 1.

A. The Only Action the Florida Supreme Court Could Have Taken under Article II, Section 1, of the Constitution Would Have Been an Advisory Opinion.

A decision made by then-Justice Rehnquist, sitting as a Circuit Justice, leads to this conclusion. In *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), the question presented was whether an advisory referendum could be conducted in Nevada concerning the legislature's possible ratification of the Equal Rights Amendment to the United States Constitution.

The appellants in *Swackhamer* relied on *Hawke, supra*, for the conclusion that a referendum could play no part in the ratification process, and therefore they were entitled to emergency relief to prevent that referendum from taking place. Relief on that basis was denied in the lower courts, and the request for emergency relief came before then-Justice Rehnquist as Circuit Justice.

Because the referendum was "non-binding," and the Nevada legislature was free to carry out its sole and constitutional duty of ratifying the proposed amendment, this Court concluded that the referendum did not violate the Article V definition of "legislature."

The conclusion was,

> Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature, as provided by Congress and by Art. V. I would be most disinclined to read either Hawke, supra, or Leser, supra, or Art. V as ruling out communication between the members of the

> legislature and their constituents. If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort,

Swackhamer, 1377, 1378.

There are statutes which allow courts to issue advisory opinions under specialized circumstances. Given the importance and urgency of this particular matter, the Florida Supreme Court might even have used its general equity powers to issue an advisory opinion to the parties in this matter. By analogy to the present case, *Swackhamer* suggests to this Court that an advisory opinion by the Florida Supreme Court would have been entirely appropriate.

What made that Court's action inappropriate was not its opinions about the operation of Florida law, which could have been considered by both Secretary Harris and the Florida legislature, but the binding nature of its orders, which struck down statutory requirements established by that legislature and binding on that public official, under Article II, Section 1.

A word must be said about deadlines. All deadlines are "arbitrary" to some extent, whether they are set by legislatures, courts, or anyone else. Even the calendar by which all deadlines are measured is itself arbitrary, if one goes back to Pope Gregory in 1582 when he established it by papal fiat and removed ten days from the year. Neither this election, nor modern life in general, would be possible if the standard was "do things whenever you get around to it"

The question is not whether the deadline for certification by Secretary Harris was "arbitrary." The question is who has the responsibility for setting that deadline. The constitutional answer is, that power belongs solely to the "legislature."

B. American Political Theory also Supports the Decisions of the Framers to Give Control of the Election of Presidents to Elected Officials, Both State and Federal.

In the view of the American Civil Rights Union, the text of the Constitution resolves the questions presented in this case. However, there are philosophical reasons well grounded in American political theory why the process of electing Presidents of the United States should be in the hands initially of the legislatures that write the election laws, and in the hands of Congress thereafter.

Thomas Jefferson wrote to a friend about the essential difference between courts and legislators as deciders of public policy. The Amicus hopes that the Court will consider Jefferson's words without offense.

> Contrary to all correct example, [the Federal judiciary] are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power. They are then in fact the corps of sappers and miners, steadily working to undermine the independent rights of the States and to consolidate all power in the hands of that government in which they have so important a freehold estate.

Thomas Jefferson: Autobiography, 1821. ME 1:121.

Of legislators, however, Jefferson wrote, "It is not from [the Legislative] branch of government we have most to fear. Taxes and short elections will keep them right." — Thomas Jefferson to Thomas Ritchie, 1820. ME 15:297

Jefferson, of course, understood as well as anyone the need for independence of judges in order to make judicial decisions free of political interference. However, the opposite conclusion also follows, that political decisions must be made by political bodies. This is what the Framers did in crafting Article II, Section 1, at issue in this case.

In short, Jefferson's observation deals with the remedies available if the decision-makers reach conclusions that the American people, in their ultimate sovereignty, conclude is wrong. Legislatures, both state and federal, face regular, partisan, contested elections. If in the judgment of the people of Florida, or the people of the United States, that such actions in the 2000 Election were wrong, those elected officials will be removed from their positions, The remedy for political mistakes will be political.

If, on the other hand, courts make such decisions, there is no remedy. State judges in Florida face "retention" elections every six years,. Federal justices and judges, by deliberate decision of the Constitution, face no elections whatsoever. This is immensely important for the independence of the judiciary from political pressures.

But, it is precisely this independence from the political process which supports Jefferson's conclusion that political questions should not be decided by judges. And the *uber*-political question in the United States is the election of its President.

To the same effect is the discussion of the "mode of appointment of the Chief Magistrate of the United States" in *The Federalist*, No. 68, written by Alexander Hamilton. The hopes of the authors of *The Federalist*, that the Electoral College "affords a moral certainty that the office of President will never fall to the lot of any man who is not in eminent degree endowed with the requisite qualifications," have fallen short of the mark in some instances. "Talents for low intrigue and the little arts of popularity" have led to some less than eminent administrations.

Still, the theory of the election of the President, there presented, still holds. Both the members of the Electoral College, and the Members of the House of Representatives who would act if the College failed to produce a majority, were subject to direct election by the people. The central decisions were all political, and to be made in the political process. This is in accord with Title 3. This is not in accord with the rewriting of the terms of this election in Florida by the Florida Supreme Court.

C. The Application of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to the Instant Case Does Not Support the Action of the Florida Supreme Court in this Matter, but Does Support This Court's Continuation to a Decision Even if the 2000 Election is Concluded before the Hearing on This Matter

On an accelerated schedule such as this case, it is impossible for any Amicus to see the legal positions of the parties outlined in detailed Petitions for Certiorari. However, on information and belief from following news accounts, including public interviews with leading counsel for all sides in this matter, the American Civil Rights Organization

believes that those who support the actions of the Florida Supreme Court will advance this Court's decision in *Anderson v. Celebrezze, supra*, as a basis for the Florida Supreme Court to act in this matter, and therefore for this Court to allow its decision to stand.

The author of this brief was the legal architect of both Eugene McCarthy's litigation in 1976 and John Anderson's in 1980, to obtain ballot access in the several states as independent candidates for President. The history of the McCarthy litigation, which struck down the election laws of 26 states, is in the *American Bar Association Journal*, August, 1977, at p. 1108. The history of the Anderson litigation, which struck down election laws in ten states, is reviewed in the *Anderson* case, itself.

All of these cases, in all years and at all levels, concerned only the right to compete, the chance to be on the ballot without First Amendment discrimination based on the political beliefs of the candidate. None of these cases had anything to do with Article II, Section 1. These cases would have been exactly the same if the Electoral College had been abolished before those elections, in favor of direct, popular election of the President.

None of the supporters of Eugene McCarthy in 1976, and few of the supporters of John Anderson in 1980, were under any delusion that either could win the Presidency. All of those supporters were firmly convinced, however, that these were responsible voices that should not be silenced under the First Amendment. Neither Article II, Section 1, nor the Electoral College was ever mentioned in any of those cases.

So, this entire line of cases fails to support a conclusion that the Florida Supreme Court was correct to act as it did in the instant case.

The present case, on the other hand, deals with who could, should, and would be elected President of the United States. It deals directly and unavoidably with specific grants of power by the Constitution to the legislatures of the several states and to the Congress, concerning the Electoral College.

The only application of the *Anderson* case to the present one, is this: This Court should exercise its jurisdiction in defense of the constitutional provisions — which it has begun by granting certiorari. Then, it should use that jurisdiction to eliminate the interference in that constitutional system by the Florida Supreme Court. And further, even if this election should be decided before this Court rules on this case, this Court should still decide the case. Just as the *Anderson* case was worthy of decision in 1983, three years after the election in question, the same consideration applies here.

CONCLUSION

Because of the "plain" language of the Constitution that "admits of no doubt in interpretation" in giving control of the presidential election laws in Florida to the Florida "legislature," the Amicus submits that this Court should rule that the Florida Supreme Court acted outside the bounds of the Constitution and strike down its revisions of Florida law. This conclusion is supported by prior decisions of this Court, and by the American philosophy of political responsibility for political decisions.

Then, having struck down the unconstitutional actions of the Florida Supreme Court, this Court should recognize that its own jurisdiction is then exhausted, and conclude the matter with no other action.

Respectfully submitted,

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