In the Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

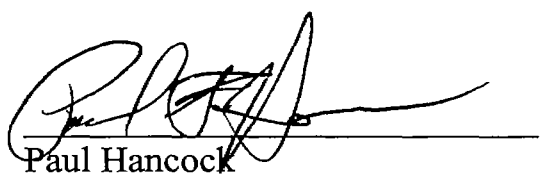
v.

PALM BEACH COUNTY CANVASSING BOARD, et al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 28th day of November, 2000, I caused one copy of Respondent Butterworth's initial brief to be served by facsimile, and three copies to be served by United States mail, postage prepaid, on counsel identified below. All parties required to be served have been served.



Paul Hancock

Norman Ostrau, Esq.
Deputy County Attorney
Broward County Attorney's Office.
Counsel for Jane Carroll,
Suzanne Gunzberger and Robert Lee
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
Tel: (954)357-7600
Fax: (954)357-7641

Andrew McMahon, Esq.
Leonard Berger, Esq.
Leon St. John, Esq

Palm Beach County Attorney's Office
Counsel for Defendants Charles E. Burton,
Carol Roberts and Palm Beach County
Canvassing Board
301 North Olive Avenue, Suite 601
West Palm Beach, Florida 33401
Tel: (561)355-6021
Fax: (561)355-4234

Bruce Rogow, Esq.
Beverly A. Pohl, Esq.
Bruce S. Rogow, P.A.
Counsel for Theresa laPore

Broward Financial Centre, Suite 1930
Fort Lauderdale, Florida 33394
Tel: (954)767-8909
Fax: (954)764-1530

Daniel Eckert, Esq.
L. Roland Blossom, Esq.
Frank B. Gummey, Esq.
Volusia County Attorney
Counsel fo rMichael McDermott,
Ann McFall and Pat Northy
123 West Indiana Avenue
Deland, Florida 32720
Tel: (904)736-5950
Fax: (904)736-5990

Robert Ginsberg, Esq.
County Attorney
Metro Dade Center
Counsel for David Leahy,
Lawrence King, Jr. and Miriam Lehr
111 NW 1st Street, Suite 2810
Miami, Florida 33128
Tel: (305)375-5151
Fax: (305)375-9611

Kendall B. Coffey, Esq.
Coffey, Diaz & O'Naghten
Counsel for Vice President Al Gore
2665 South Bayshore Drive, Suite 200
Miami, Florida 33133
Tel: (305)285-0800
Fax: (305)385-0257

Mitchell W. Berger, Esq.
Leonard K. Samuels, Esq.
Berger Davis & Singerman
Counsel for Florida Democratic Party
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Tel: (954)525-9900
Fax: (954)523-2872

Samuel S. Goren, Esq.
Michael D. Cirullo, Jr., Esq.
Josias, Goren, Cherof, Doody & Ezrol, P.A.

Counsel for Jane Carroll
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308
Tel: (954)771-4500
Fax: (954)771-4923

Henry Latimer, Esq.
Eckert Seamans Cherin & Mellott, LC
Counsel for Florida Democratic Party
450 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
Tel: (954)523-0400
Fax: (954)523-7002

Robert F. Bauer, Esq.
Counsel for Florida Democratic Party
607 14th Street, N.W., Suite 800
Washington, D.C. 20008
Tel: (202)628-6600
Fax: (202)434-1690

Lyn Utrecht, Esq.
Ryan, Phillips, Utrecht and MacKinnon
Counsel for Florida Democratic Party
1133 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
Tel: (202)778-4007
Fax: (202)293-3411

Professor Alan M. Dershowitz
Harvard Law School
1575 Massachusetts Avenue
Cambridge, MA 02138
Tel: (617)495-4617
Fax: (617)495-7855

Mark A. Cullen, Esq.
The Szymoniak Firm, P.A.
Counsel for Petitioner
2101 Corporate Boulevard, Suite 415
Boca Raton, Florida 33431
Tel: (561)989-9669
Fax: (561)989-9660

Joel S. Perwin, Esq.

Podhurst Orseck Josefsberg Eaton
Meadow Olin & Perwin, P.A.
Counsel for Florida Democratic Party
City National Bank Building, Ste. 800
23 West Flagler Street
Miami, Florida 33130-1780
Tel: (305)358-2800
Fax: (305)358-2382

Benedict P. Kuehne, Esq.
Sale & Kuehne, P.A.
Counsel for Florida Democratic Party
Bank of America Tower, Suite 3550
100 S.E. Second Street
Miami, Florida 33131-2154
Tel: (305)789-5989
Fax: (305)789-5987

Peggy Fisher, Esq.
Joseph S. Geller, Esq.
Counsel for Florida Democratic Party
2411 Hollywood Boulevard
Hollywood, Florida 33020
Tel: (954)920-2300
Fax: (954)920-6885

Jeanne Baker, Esq.
2937 Southwest 27th Avenue, Suite 202
Miami, Florida 33133-3703
Tel: (305)443-1600
Fax: (305)445-9666

Michael A. Carvin, Esq.
Counsel for Petitioner
Cooper, Carvin & Rosenthal, P.L.L.C.
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
Tel: (202)220-9600
Fax: (202)229-9601

Barry Richard, Esq.
Counsel for Petitioner
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
Tel: (850)222-6891
Fax: (850)681-0207

George J. Terwilliger, III, Esq.
Timothy E. Flanigan, Esq.
Marcos D. Jimenez, Esq.
Counsel for Pettioner
White & Case LLP
First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Tel: (305)371-2700
Fax: (305)358-5744

Theodore B. Olson, Esq.
Counsel of Record
Douglas R. Cox, Esq.
Thomas G. Hungar, Esq.
Mark A. Perry, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel: (202)955-8500
Fax: (202)467-0539

Benjamin L. Ginsberg, Esq.
Counsel for Petitioner
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
Tel: (202)457-6000
Fax: (202)457-6315

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 PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT BUTTERWORTH

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PAUL F. HANCOCK
Deputy Attorney General
Fla. Bar no. 0140619
Counsel of Record

JASON VAIL
Assistant Attorney General
Fla. Bar no. 298824

KIMBERLY J. TUCKER
Assistant Attorney General
Fla. Bar no. 0516937

Office of the Attorney General
PL-01
The Capitol
Tallahassee, FL 32399
850 487-1963

QUESTION PRESENTED
(Restated)

1. Whether post-election judicial interpretation of a state's elections laws during a presidential election violates 3 U.S.C. s. 5, which requires that a State resolve controversies in relation to the appointment of electors under "laws enacted prior to" election day, or the Due Process clause.

2. Whether the Florida Supreme Court's interpretation of Florida's elections laws 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. s. 5?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. s. 1257. The decision under review from the Florida Supreme Court is a judgment rendered by Florida's highest court. The Florida Supreme Court published the decision under review on November 21, 2000.

STATEMENT OF THE CASE

Respondent Butterworth became a party to these proceedings when the Palm Beach County Canvassing Board sued him and others for a declaratory judgment, raising questions about the interpretation of Florida's election laws. *Palm Beach County Canvassing Board v. Harris*, SC00-2346. The Florida Supreme Court realigned the parties so that Respondent Butterworth became a petitioner in that court.

Respondent Butterworth adopts the statement of facts contained in the Florida Supreme Court's opinion. Slip Op. pp. 2-8.

The issue in this case is the propriety of a Florida Supreme Court order interpreting Florida general elections law. The stakes are the delicate balance between the power and authority of the states and the federal government that form the foundation for our federal system. Our constitutional structure is based upon dual sovereignty. When questions of state law arise, the *state* judiciary is the proper, final arbiter of the meaning of state law.

This case concerns a claim that the Florida Supreme Court retroactively changed Florida's election law after the November 7, 2000, election in derogation of 3 U.S.C. s. 5, the due process clause of the Fourteenth Amendment and U.S. Const. Art. II, sec. 1, cl. 2. But the Florida Supreme Court's opinion was an exercise in statutory interpretation — a function of the judicial

branch under Florida law and the state Constitution. Art. II, s. 3, Florida Constitution; section 20.02(1) Florida Statutes. The Florida Supreme Court applied traditional methods of statutory interpretation to determine legislative intent. In doing so, it did not make new law; and it did not alter the statutory scheme in place on election day. There was no substantive due process deprivation.

The constitutional grant of authority to the state legislature to direct the manner of choosing presidential electors is effectuated in the context of the legislature's power under its state constitution. Here, the Florida Supreme Court's decision interpreting the state's election laws did not violate Article II, section 1, cl. 2 of the U.S. Constitution because the Florida Legislature granted Florida citizens the right to vote for presidential electors by general law and, in accordance with the Florida Constitution, the Florida judiciary plays an important role in determining the meaning of all election laws when disputes arise.

The primary consequence of a finding that the Florida Supreme Court's opinion does not comply with 3 U.S.C. s. 5 is that any slate of presidential electors ultimately chosen will not be entitled to immunity from challenge by Congress under 3 U.S.C. s. 15.

REASONS FOR AFFIRMING THE DECISION BELOW

In this case, this Court confronts the frontier of federalism. The decision below, construing Florida's election laws, is a matter of fundamental state interest.[1] The conduct of local elections dictates the composition of state and local government, as well as it provides a mechanism for choosing federal representatives. As an interpretation of Florida general elections law, the court's decision applies to races other than the one at issue here. If this Court addresses the correctness of that decision, it risks impairing the balance between state and federal government that is unique and important in our system of government. As Justice Kennedy said in his concurrence in *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 838 (1995):

> Federalism is our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system, unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

---

[1] *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

I. THE FLORIDA SUPREME COURT'S DECISION OF NOVEMBER 21, 2000, DOES NOT VIOLATE 3 U.S.C. S. 5.

The authority to review legislative acts and to say what the law is is a core judicial power. *Marbury v. Madison*, 1 Cranch 137 (1803). As this court said in *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312 (1994), "It is this Court's responsibility to say what a statute means . . ." The Florida courts, like the federal courts, have this same power. This authority is recognized in the Florida Constitution, Art. V, sec. 1, and in statute, section 20.02(1), Florida Statutes ("The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."). See also, *Commission on Ethics v. Sullivan*, 489 So. 2d 10, 13 (Fla. 1986).

As a matter of law, the judicial act of interpreting a statute does not constitute a change in the law. The court merely determines what the law says, and that decision applies before the date of the decision. *Rivers v. Roadway Express Inc.*, 511 U.S. at 312-313 ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). The objective of statutory interpretation is to discern legislative intent and to give effect to it. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) ("'Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'"); *Miller v. French*, 120 S.Ct. 2246, 2253 (2000) ("where Congress has made its intent clear, 'we must give effect to that intent.'"); *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 500 (Fla. 1999)

("The essential purpose of statutory construction is to determine legislative intent.").

In this case, the Florida Supreme Court confronted a classic problem in statutory interpretation. The Division of Elections and the Attorney General had issued contrary opinions about the operation of Florida's election laws. The county canvassing boards, which had to act in short order pursuant to those laws in responding to the Mr. Gore's election protests and requests for statutorily authorized manual recounts, under were in doubt about how to proceed. In short, the question posed by all the parties was: what does the law say and what should people do to comply with its intent?

The Florida Supreme Court began its analysis by observing that when interpreting the state's election laws, its decision affected a fundamental right in Florida, the right to vote. Slip Op. pp. 14-15, 29-32. "Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right." *Id.*, p. 32.[2] The court was justified in keeping this objective in mind. While the U.S. Constitution does not confer a right on the people to vote for president,[3]

---

[2] These principles are old ones in Florida. *See e.g., Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) ("the primary consideration in an election contest is whether the will of the people has been effected.").

[3] Article II, section 1, U.S. Constitution; *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (the Constitution does not confer the right to vote on anyone); *McPherson v. Blacker*, 146 U.S. 1 (1892) ("The constitution does not provide that the appointment of electors shall be by popular vote . . .").

when a state legislature confers such a right to vote, that right is delineated and defined by other constitutional provisions.[4] voters not only have a constitutionally based right to vote, but they have a right to have that vote counted.[5]

With this concern in mind, the court acted to resolve an apparent conflict in the state election laws and to interpret the legislative design of the statutory structure. The court relied upon four time-honored principles of statutory construction — principles that this Court has applied itself in case after case:

1. When "two statutory provisions are in conflict, the specific statute controls the general statute." *Id.*, p. 24-25; *Gozlon-Peretz v. U.S.*, 498 U.S. 395 (1991) ("A specific provision controls over one of more general application.").

2. When "two statutes are in conflict, the more recently enacted statute controls the older statute." Slip Op. p. 25; *Morton v. Mancari*, 417 U.S. 535 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

3. A "statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." Slip Op. p. 26; *U.S. Department of Treasury v. Fabe*, 508 U.S. 491, 505 n. 6 (1993) (give effect to each word in a statute); *Washington Market*

---

[4] *Williams v. Rhodes*, 393 U.S. 32 (1968).

[5] *United States v. Classic*, 313 U.S. 299, 315 (1941) (constitutional right to have one's vote counted in congressional election).

Co. v. Hoffman, 101 U.S. 112 (1879) (give effect to the whole statute, each word, render nothing superfluous).

4. "[R]elated statutory provisions must be read as a cohesive whole." Slip Op. p. 26; *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1300 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' . . . A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme.'").

The application of these principles led to the result. This result, on a matter of fundamental local interest, is beyond reproach in this forum and is entitled to respect and deference. The issues before this Court do not include the question of whether the Florida Supreme Court was correct or incorrect in its interpretation of Florida law. As this court has repeatedly observed, "We are, of course, bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976).

The court examined whether the Secretary of State had the discretion to ignore manual recount totals submitted after the seven-day deadline, in light of the fundamental constitutional right to vote and to have that vote counted. For instance, the court observed that "the Legislature may enact laws regulating the electoral process, [but] those laws are valid only if they impose no 'unreasonable and unnecessary' restraints on the right of suffrage." Slip Op. p. 31. Such laws must be liberally construed "in favor of the citizens' right to vote." *Id.*, p. 32.

Based on this analysis, the court concluded that ignoring "the county's returns is a drastic measure." *Id.*, p. 33. The court said to disenfranchise electors under these circumstances is

unreasonable and violates longstanding law. *Id.* pp. 33-34. The court then turned to precedent from this Court for guidance, *Roudebush v. Hartke*, 405 U.S. 15 (1972) ("A recount is an integral part of the Indiana electoral process."). The Florida Supreme Court concluded that recounts are also an integral part of Florida's election scheme and allowing recounts concluded beyond the seven-day deadline was consistent with that scheme.

The court also concluded that the Secretary's discretion to disregard manual recount votes submitted after the seventh day was narrow. The court defined the scope of that discretion under the statutory framework as "only appropriate if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process." *Id.*, p. 33. The court concluded that the Secretary's refusal to accept manual recount totals in any other situation in effect disenfranchises voters, a result that is "unreasonable, unnecessary, and violates longstanding law." *Id.*, pp. 33-34.

Thus, while one may wish to quarrel with the result, one cannot quarrel with the court's process or objective. As of the great jurists of this Court, Justice Marshall, has pointed out, only the state courts are the proper and final arbiters of questions of *state* law:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ

> for construing the legislative acts of that government. . . We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. . . [T]he construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in confict with the Constitution, laws, or treaties of the United States.

Elmendorf v. Taylor, 23 U.S. 152, 159-160 (1825).

The Florida Supreme Court's objective, consistent with its constitutional role, was to determine what the law is and to give it effect. Statutes conflict. One may supercede another without so stating. One may be contrary to the requirements of the Florida Constitution and therefore be unconstitutional. These issues have to be resolved by someone. The Florida system is a very traditional one. Courts resolve those conflicts and determine constitutionality, and therefore, fit the conflicts between statutes or between a statute and the constitution in a neat box. There is nothing improper about this. Were it otherwise, Congress or the state legislature might be able to act in an unconstitutional manner. In reaching its conclusion, the Florida Supreme Court applied longstanding rules and principles of statutory construction and longstanding Florida precedent. The issue, the proper construction of state election law, is a matter of fundamental state interest, and this Court should not disturb the *interpretation* of those laws.

The Florida Supreme Court's process and objective do not run afoul of 3 U.S.C. s. 5, which states:

> If any State shall have provided, **by laws enacted prior to the day fixed for the**

> **appointment of the electors**, for its final determination of any **controversy** or **contest** concerning the appointment of all or any of the electors of such State, by **judicial** or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Emphasis added.

The issue for this Court, then, is, does the Florida Supreme Court's interpretation of Florida's election laws constitute a change in the law as it existed on the day for appointing the electors, which was election day? See 3 U.S.C. s. 1.

The answer must be that such an interpretation does *not* constitute a change in the law as contemplated by 3 U.S.C. s. 5, because an interpretation of a statute or a statutory scheme merely determines what the law is, and has always been. *Rivers v. Roadway Express Inc.*, 511 U.S. at 312-313.

Furthermore, by its plain language, section 5 contemplates judicial resolution of challenges and contests to the selection of electors. In acknowledging the role of the judiciary in presidential elections, Congress, knowing courts' role to say what the law is, must have contemplated that election laws would be judicially interpreted during such contests. Therefore, Congress contemplated that election laws would be constructed

during such contests. Thus, such judicial interpretations — anticipated by Congress — cannot run afoul of section 5.

For these reasons, the Florida Supreme Court's opinion does not violate 3 U.S.C. s. 5.

Finally, the Florida Supreme Court's opinion does not violate substantive due process rights to a fundamentally fair election, to the extent such a right exists. See petition p. 17, citing *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The Florida Supreme Court's opinion was not a post-election change in law or procedure, and it *enfranchised* voters rather than disenfranchised them.

II. THE FLORIDA SUPREME COURT'S INTERPRETATION OF FLORIDA ELECTION LAW IS NOT AT ODDS WITH ARTICLE II, SECTION 1 OF THE CONSTITUTION.

When a state acts pursuant to its grant of authority under U.S. Const. Art. II, sec. 1, cl. 2 to direct the manner of choosing state presidential electors, its acts are effectuated in the context of the state's constitution. In Florida, when the Legislature enacts general laws, the state constitution provides that those laws are subject to judicial review. Therefore, because the Legislature enacted its presidential election scheme by general law, it contemplated that those laws would be subject to judicial review. Such a constitutional expectation means that judicial review is part of the manner directed by the Legislature for the choosing of presidential electors.

Article II, section 1, clause 2, of the federal Constitution gives a state legislature plenary power to determine the manner of appointing presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *Fitzgerald v. Green*, 134 U.S. 377 (1890); *Cohens v. State of Virginia*, 19 U.S. 264, 311 (1821) ("Upon

the State legislatures it depends to appoint the Senators and Presidential electors, or to provide for their election.").[6]

But a state's power to establish the manner of selecting electors is not absolute. For example, once a state confers a right to vote for presidential electors, that right cannot be abridged in a manner that violates the federal constitutional or statutory provisions. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11 (1982).

Furthermore, when a state establishes by general law a scheme to select presidential electors, it does so within the constraints imposed by the state's constitution and laws. In Florida, general laws regarding elections, including laws related to the manner for appointment of electors, are subject to judicial review and interpretation, just like any other laws. Elections are governed by the provisions of Chapter 101 and 102 of the Florida elections code. These are general laws – enacted by the Legislature and, pursuant to Florida law, approved by the Governor and subject to judicial review and interpretation. The Legislature enacted these statutes knowing that under Florida's Constitutional and statutory scheme, such general laws are subject to judicial review; the Florida Legislature placed no limitations upon such judicial review and interpretation of general laws concerning the appointment of presidential

---

[6] Thus, for instance, the state legislature does not have to provide for the popular election of electors; and in fact, in the Republic's early years, many state legislatures chose electors, and once one state, Maryland, appointed a three-person panel to select its electors. *McPherson v. Blacker*, 146 U.S. at 28-33. Like this year's election, relying on state legislatures to select electors was not without hazard. In fact, during the first presidential election, New York's legislature deadlocked on selecting electors and consequently the state cast no electoral votes for president that year. *Id.*, at 30.

electors. See Article V, section 1, Florida Constitution; section 20.02, Florida Statutes.[7] *See also, Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) (Supreme Court assumes "that Congress is aware of existing law when it passes legislation."); *accord Holmes County School Board v. Duffell*, 651 So. 2d 1176, 1179 (Fla. 1995) ("The legislature is presumed to know existing law when it enacts a statute.").

The petitioner challenges the Florida Supreme Court's decision at issue here based upon an erroneous interpretation of U.S. Const. art. II, sec. 1, cl. 2, asserting that ". . . the Framers did not see fit to leave the mechanics of electoral appointment to either the judicial or executive branch of the several States, but instead entrusted the legislative arm . . . with authority to articulate the standards by which electors would be chosen." Petition, p. 19. However, prior precedents of this Court make clear that the federal Constitution neither requires nor excludes participation of *either* the executive or judicial branches of state governments from the lawmaking process associated with the state legislatures' directions regarding the appointment of electors. Such laws are subject to veto, where provided in the state's constitution, and are subject to judicial review and interpretation, where likewise provided by state law.

---

[7] Section 20.02(1) provides in relevant part as follows: "Declaration of policy. — The State Constitution contemplates the separation of powers within the state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. . . . The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."

In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court held that the grant of authority to a state legislature in U.S. Const. art. 1, sec. 4[8] (a section much like the one at issue in this case) was conditioned by the authority given to the state legislature under its state constitution. Thus, the Court upheld a veto of a congressional reapportionment bill against a claim that the legislature enjoyed unchecked plenary power to determine the time, place and manner of the election of federal representatives. The Court considered whether the use of the term "Legislature" in Article I, sec. 4 invested the legislature of each state with a "particular authority, and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver, and thus renders inapplicable the conditions which attach to the making of state laws." *Smiley v. Holm*, 285 U.S. at 365 The Court rejected the notion that this constitutional provision insulated general laws enacted by state legislatures in the exercise of their authority under article 1, sec. 4 from gubernatorial veto, where such veto authority was provided by general laws in the state's constitution. The Court found that there was "no suggestion" in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.[9] Accordingly, the Court

---

[8] U.S. Const. art. I, sec. 4, provides in relevant part that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; . . .

(Emphasis supplied).

[9] The Court specifically held that:

> Whether the Governor of the state, through the veto power, shall have a part in the making of

determined that laws enacted by state legislatures, pursuant to U.S. Const. art. 1, sec. 4, are subject to the veto power of the governor as part of the legislative process, where the state constitution so provided. *Smiley v. Holm*, 285 U.S. at 368.

Likewise, the grant of authority to state legislatures to "direct" the manner for appointment of presidential electors is carried out through state policy which grants roles to other branches of state government. Pursuant to the Constitution and laws of the State of Florida, election laws apply to all elections and are subject to judicial review and interpretation as is any other general law.

The Florida judicial branch has routinely and consistently exercised its authority with regard to the conduct of elections in the State of Florida. In Florida, elections officials, including the

---

> state laws, is a matter of state polity. Article 1, sec. 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. . . .That the state Legislature might be subject to such a limitation, either then or thereafter imposed as the several states might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President, as provided in article 1, s. 7. The latter consequence was not expressed, but there is no question that it was necessarily implied, as the Congress was to act by law . . .

Smiley v. Holm, 285 U.S.. at 368-369.

state canvassing board, have a "clear, complete, unequivocal and continuing legal duty, non-discretionary in nature, to correctly certify the results of the voting . . . [in a] general election . . ." *State ex rel. Clendinen v. Dekle,* 173 So.2d 452, 455 (Fla. 1965). And it has long been recognized in Florida that the judicial branch has the inherent power "to cause to be corrected" an error on the part of election officers who by inadvertence and mistake, or by design and fraudulent intention, have made an untrue certificate or return as to the votes actually cast in any election precinct, and by such erroneous or false return defeat the will of the electors. *State ex rel Knott v. Haskell*, 72 So. 651 (Fla. 1916).

"Generally, the [Florida] courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disenfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . ." *State ex rel. Carpenter v. Barber*, 144 Fla. 159, 198 So. 49, 51 (Fla. 1940).

The ministerial duty imposed by law on election officials to make a correct count and return of votes as cast in Florida is a *continuing* one; and mistakes made by such officials in counting and returning the votes as cast may even be corrected in mandamus proceedings where such officials neglect or refuse to perform their duties under law to make such corrections. *Schneider v. Lang*, 66 Fla. 492, 63 So. 913 (Fla. 1913); *State ex rel Knott v. Haskell*, 72 So. at 651, 658-659. *See also, State ex rel. Nuccio v. Williams,* 97 Fla. 159, 120 So. 310, 314 (Fla. 1929) (Inspectors and clerks in election districts have duty of correctly counting, tabulating, and returning all votes and ballots; mandamus is appropriate remedy in case election ballots were not correctly and accurately counted, tabulated, or returned.); *State ex rel. Peacock v. Latham*, 125 Fla. 793, 170 So. 475 (Fla. 1936).

The Florida Supreme Court has even required the state canvassing board to convene and recertify the results of elections, including statewide elections, where the tabulation of votes certified was inaccurate. *State ex rel Drew v. McLin*, 16 Fla. 17, 1876 WL 2501 (Fla. 1876) (Florida Supreme Court required, through issuance of mandamus, the Secretary of State, Attorney General, and Comptroller to "meet, canvass, and reassemble" as a board of state canvassers where their failure to "canvass and count and enumerate" the votes in four counties resulted in their certification of a candidate for Governor who had not received the highest number of votes for that office); *State ex rel. Collins v. Brooker*, 46 So. 2d 600 (Fla. 1950)(Florida Supreme Court held that the state canvassing board was a *nominal party* in a mandamus action challenging, among other irregularities, the correct tabulation of absentee ballots in Hillsborough County for a congressional election, "so that it may be required to recertify the election returns of the different candidates for Congress from the First Congressional District."); *State ex rel. Clendinen v. Dekle,* 173 So.2d 452, 455-456 (Fla. 1965) (Florida Supreme Court has jurisdiction to compel the State Canvassing Board to recertify vote tabulations of the statewide results on a proposed amendment to Article XVII of the State Constitution in the general election of 1964, even where the action was instituted more than 60 days after the general election.).

The Florida Supreme Court has long held that the courts' power in this regard is "wholly independent" of general election law statutes; rather, it is an elemental and fundamental principle. *State ex rel Knott v. Haskell*, 72 So. at 661.[6]

---

[6] In Haskell, the Florida Supreme Court noted that:

> The general election law contains no evidence whatever of a legislative purpose to make the first determination of a board of inspectors to be

Accordingly, corrections have been compelled in vote tabulations, even where such corrections required elections officials to act outside the time frames required by statute. *State ex rel. Peacock v. Latham*, 125 Fla. 793, 170 So. 475 (Fla. 1936).[7]

> forever final, notwithstanding such determination may have been induced by fraud or reached by disregarding the requirements of the statute or arrived at by the grossest and most flagrant errors, mistakes, and misconception of duty, and, in the absence of such legislative purpose, we think that it would be the duty of the court in a proper case by writ of mandamus to order the inspectors to make their returns and certificates speak the truth if by any possibility it could be accomplished.

State ex rel. Knott v. Haskell, 72 So. at 660.

[7] In *State ex rel. Peacock v. Latham*, the Florida Supreme Court held that mandamus lies to compel a board of county commissioners to reprint ballots and substitute as the Democratic nominee for county judge the candidate whom recount and recanvas showed was nominated in the Democratic primary, notwithstanding that the name of such nominee had not been certified and filed with the board within the time required by statute, where the proceedings for recount and recanvassing had been instituted prior to expiration of the time for filing certificates. Significantly, as in the case at bar, the Florida Supreme Court held that the statute requiring printing only the names of candidates put in nomination by primary election which have been certified by a canvassing board and filed with the board not more than 60 nor less than 20 days previous to the day of the election, must be construed *in pari materia* with other statutes governing holding of primary

Every two years, the Florida Legislature reenacts its entire set of statutes, renewing and readopting all Florida statutory law — including the state's election laws. Sections 11.2421 and 11.2422, Florida Statutes. The Legislature reenacts this statutory law knowing of the Florida courts' interpretation of it. Such periodic readoption indicates legislative acceptance of those interpretations.

Perhaps the Florida Legislature could have decided to choose presidential electors itself, rather than, by general law, submitting the question to the people. But the legislature did not do so. Nor has it ever attempted in the past to limit the courts' jurisdiction over elections matters, knowing the extensive history of the Florida courts' involvement in such matters. *State ex rel. Knott v. Haskell,* 72 So. at 660 (". . . [I]n some of the cases like the later New York cases construing the particular statute it was held that the Legislature had by the statute shown its intention to prevent the exercise of the power of the court, and the court interpreted this to be a declaration of a public policy that a *speedy declaration of the result* of a general election *was of greater importance to the public than the individual right to an office.* But it is perfectly obvious that this principle is not applicable to the selection of candidates by political parties at a primary election." (emphasis supplied).).

Therefore, the Florida Legislature made a considered choice to subject its manner of choosing electors to review by Florida courts in the same manner as all other general laws and to the same extent such courts have exercised their power to review and interpret all other election laws in this state. This considered choice is within the Florida Legislature's power under Article II, section 1, clause 2 of the U.S. Constitution and the Separation of Powers enunciated in Art. II, sec. 3 of the

---

elections, count, tally, and return of ballots, and canvas of results. *State ex rel. Peacock v. Latham*, 170 So. at 478.

Florida Constitution. Accordingly, the Florida Supreme Court's decision *interpreting* the state's election laws does not violate Article II, section 1, clause 2 of the U.S. Constitution.

III. IF THE COURT FINDS THE FLORIDA SUPREME COURT OPINION IN VIOLATION OF 3 U.S.C. S. 5, FLORIDA'S ELECTORS WILL NOT BE IMMUNE FROM CHALLENGE IN CONGRESS.

A decision from this Court finding the Florida Supreme Court's opinion in violation of 3 U.S.C. s. 5 has two practical consequences. First, Florida's slate of electors will not be immune from a challenge in Congress under 3 U.S.C. s. 15.

Title 3, section 5 immunizes a state's slate of electors from any subsequent challenge if that slate is determined by a process in place on the date of the election. Section 5 works in conjunction with 3 U.S.C. s. 15, in which Congress has authorized itself to lodge objections to electoral votes when they are counted on January 6. Section 15 also prescribes a process for resolving objections. From the section 15's plain language it appears that section 5 immunity is only relevant when a state chooses two competing slates of electors. Since it is unlikely that Florida will select two sets of presidential electors, the practical consequences of finding the Florida Supreme Court's opinion at odds with section 5 are slight.

The Court's decision as to the application of 3 U.S.C. s. 5 will not alter the fact that votes tabulated as a result of manual recounts will continue to count in Florida.

Finally, if this Court finds that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. s. 5, it will have no effect on the final vote tabulation in the State of Florida; it will not result in the vote tabulation returning to that

which it was when certified by the State Canvassing Board on November 14, 2000.

Petitioners proceed under the misapprehension that the vote tabulation and certification become "final" - immune from modification or correction – after passage of the statutory deadline in Section 102.111, Florida Statutes. Petitioners allege that the Florida Supreme Court "changed" state law by extending the date for submission of corrected vote tabulations – thus, *altering* the vote totals from the November 14, 2000 level. Petitioners seek a return to the November 14 certified vote tabulation through an attack on the Florida Supreme Court's power to issue that order.

However, Florida case law, in existence long prior to this election, requires the State Canvassing Board to convene and recanvass to correct erroneous vote tabulations to reflect the will of the people – regardless of statutory deadlines for certification. The courts through their mandamus power – a power enumerated to the courts in the Florida Constitution[8] – may direct election officials, including the State Convassing Board, to convene and reassemble to recount, recanvas, tally, and correct inaccurate vote tabulations.[9]/[10]

---

[8] Art. V, sec 3(b)(8); Art. V, sec. 4(b)(3); Art. V, sec. 5(b).

[9] In Florida, mandamus has been issued to direct a recount, recanvass and vote tabulation correction **even after the State Canvassing Board had adjourned *sine die*.** *State ex rel. Drew*, 16 FL 17, 1876 WL 2501 (Fla. 1876).

[10] *See also, State ex rel. Bloxham v. Gibbs,* 13 Fla. 55, 1869 WL 1536 (Fla. 1869)(Mandamus will lie to direct the board of state canvassers to reassemble and complete a recanvass of the returns of votes cast at a state election, where they have neglected to make a complete canvass of the returns in their

Accordingly, a finding by this Court of a violation of 3 U.S.C. s. 5 will have no effect on the obligation of the State Canvassing Board to amend the vote tabulation to correct inaccuracies; no impact on the Florida courts' power, under the Constitution of the State of Florida, to order such corrections and recertification of results by mandamus; and, ultimately, cannot result in a return to the November 14 vote level *if that vote tabulation is inaccurate* as a matter of fact and law.

CONCLUSION

The opinion of the Florida Supreme Court is an interpretation of the law by the state's highest court. For these reasons, Respondent Butterworth asks the Court to find the Florida Supreme Court's opinion to be consistent with 3 U.S.C. s. 5 and to affirm the decision against the claim it violates Article II, section 1, clause 2 of the U.S. Constitution and the substantive due process clause of the Fourteenth Amendment.

RESPECTFULLY SUBMITTED,

Robert A. Butterworth
Attorney General

Paul F. Hancock
Deputy Attorney General
Fla. Bar no. 0140619
Counsel of Record

---

possession. Mandamus action dismissed only after the Legislature repealed the law creating the Board of Canvassers, without saving proceedings or duties required by law to be performed by them and uncompleted, pending completion of the Supreme Court of Florida against the Board.

Jason Vail
Assistant Attorney General
Fla. Bar no. 298824

Kimberly J. Tucker
Assistant Attorney General
Fla. Bar no. 0516937

Office of the Attorney
General
PL-01
The Capitol
Tallahassee, FL 32399
850-487-1963

Dated: November 28, 2000