IN THE

Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, *et al.*,

Respondent.

Ned L. Siegel, *et al.*,

Petitioner,

v.

Theresa LePore, *et al.*,

Respondent.

On Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit and for a Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's interpretation of Florida law presents a substantial federal question for this Court to review or instead a determination reserved to the States?

2. Whether the State of Florida's statutorily mandated manual recount process, indistinguishable from the laws of other states and reflective of a process that has been applied throughout this country for centuries, violates the U.S. Constitution?

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In two companion petitions for writs of certiorari, Governor George W. Bush, together with related parties, asks this Court to interfere with ongoing manual recounts of the ballots cast in the State of Florida for the President of the United States as provided under Florida law. One petition, which seeks review of the judgment of the Florida Supreme Court interpreting provisions of the Florida Election Code governing manual recounts, rests on intemperate and insupportable mischaracterizations of that court's decision as usurping the role of the state legislature. In fact, the Florida Supreme Court played a familiar and quintessentially *judicial* role: it interpreted Florida law "us[ing] traditional rules of statutory construction to resolve [statutory] ambiguities." Slip op. at 39. Indeed, the court expressly "decline[d] to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it – the Legislature." *Id.* Thus, the questions purportedly framed in the petition are not in fact presented by this case.

The other petition seeks certiorari before judgment in a case in which the U.S. District Court for the Southern District of Florida has merely denied a preliminary motion to restrain the recounts and the U.S. Court of Appeals for the Eleventh Circuit has denied an injunction pending appeal and has nearly completed expedited briefing. That petition necessarily would bring only an extremely narrow question for the Court's consideration. In addition, that petition is riddled with non-record, *ex parte*, partisan accusations regarding the manner in which the Florida recount is proceeding. These accusations are false and have not been tested in court through cross-examination, verification, or judicial fact-finding. Indeed, Petitioners have deliberately avoided proceeding in the appropriate fora where their factual claims could be considered and resolved. All of this underscores the undeveloped nature of this case, the absence of adequate foundation in the courts

below, and the inappropriateness of the extraordinary step of certiorari before judgment.

Moreover, the substance of Petitioners' federal claims does not warrant review by this Court. Petitioners ask this Article III Court to interfere with a task that has been expressly delegated to the State of Florida by the U.S. Constitution's command in Article II that "[e]ach *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2 (emphasis added). This is not merely a question of a power "reserved" to the States by the Constitution, cf. U.S. Const. amend. X, but of an express constitutional delegation of exclusive authority. The Constitution explicitly confers upon the States plenary and exclusive power to establish the manner in which their presidential electors are chosen. *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968); *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892); *Ray* v. *Blair*, 343 U.S. 214, 224-25 (1952). At bottom, Petitioners seek to have this Court intervene in the process by which the organs of the Florida state government are effecting the procedure by which the State legislature has determined to appoint that State's presidential electors.

Beyond the obvious reasons that certiorari should be denied in this case – the patent insubstantiality of the federal claims presented, the absence of any conflict in authority, the utterly factbound and undeveloped nature of Petitioners' arguments – there are profound reasons of institutional legitimacy that counsel against a grant of certiorari. To begin with, principles of federalism that this Court has repeatedly reaffirmed against vigorous challenge counsel strongly against interference by this, or any, federal court in the process articulated by Florida state law, as set out by statute and interpreted by the courts of that State. Only on the most compelling showing of a constitutional violation should a federal court interfere with this task, uniquely delegated by the Constitution to the State government.

Petitioners' federal claims, even if properly presented,[1] are insubstantial and do not come close to meeting the high threshold that would require this Court to interfere with a State's process for appointing its electors for President of the United States.

Finally, this Court's involvement here will not add "legitimacy" to the outcome of the election. *Contra* Pet. for Certiorari, *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 22, 2000) [hereinafter *Bush* Pet.] at 12. The cases below involve only questions of Florida state law, questions that even Petitioners ultimately agree are within the power of the Supreme Court of Florida to resolve. *Id.* at 10 ("Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law."). This Court's interference with the normal processes by which questions of state law are resolved, and indeed, with the ongoing processes by which the President and Vice-President of the United States are chosen, would only diminish the legitimacy of the outcome of the election. That is particularly true given that it is difficult to imagine how this Court could intervene in the still-ongoing state proceedings so rapidly and clearly as not to deflect and derail the election process in untoward and unprecedented directions.

Thus, even if it were true that the outcome of the case may raise for the public "questions of similar magnitude" to those presented in cases such as *United States* v. *Nixon*, 418 U.S. 683 (1974), see Pet. for Certiorari, *Siegel* v. *LePore*, No. 00-837 (Nov. 22, 2000) [hereinafter *Siegel* Pet.] at 15, it presents no federal constitutional *questions* of similar magnitude – indeed,

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[1] There is the greatest doubt that Petitioners' federal claims in the state court action are fairly presented here, given that Petitioners consciously decided to avoid discussing federal law in the Florida trial court and raised the question before the state Supreme Court only in a few pages at the end of a brief there. See Slip op. at 10 n.10.

no constitutional questions of any real substance at all. Thus, the petitions for certiorari in both *Bush* v. *Palm Beach County Canvassing Board* and *Siegel* v. *LePore* should be denied.

STATEMENT OF THE CASE

A. The Election

On November 7, 2000, Florida citizens cast over 5,820,000 ballots in the general election for the President of the United States. Under Florida's election law, the outcome of this election would determine what slate of electors would cast Florida's twenty-five electoral votes for the President of the United States.

Based on initial returns transmitted to it by the county canvassing boards of Florida's sixty-seven counties, on Wednesday, November 8, 2000, the Florida Division of Elections ("Division") reported that Governor George W. Bush had received 2,909,135 votes for President and that Vice-President Al Gore had received 2,907,351 votes.

B. Florida's Recount Provisions

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, Florida law required an automatic recount of the ballots. Fla. Stat. § 102.141(4). No specific process is required under Florida law for this recount. Most counties conducted this recount by simply repeating whatever process, usually machine, they had used to count the ballots initially. A few counties, however, conducted hand recounts. At the end of this initial automatic recount, the margin between the two leading candidates for President of the United States was reduced from the initially stated 1,784 votes to 300 votes.

Florida law provides that its counties may conduct a further manual recount to address "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). In any county, any candidate "may file a written request with the county canvassing board for a manual recount."

Id. § 102.166(4)(a). The statute requires that the request "contain a statement of the reason the manual recount is being requested." *Id.* Any such request "must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." Fla. Stat. § 102.166(4)(b).

The purpose of the manual recount is to determine whether there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). If a county canvassing board decides to grant a request for a manual recount, it need not initially order a county-wide recount. Rather, an initial recount only "must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue * * * . The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts. *Id.* § 102.166(4)(d). The statute further provides that:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

Fla. Stat. § 102.166(5) (emphasis added).

Manual recounts must be conducted in accordance with the procedures set forth in Section 102.166(7). Those procedures require that the county canvassing board appoint counting teams of at least two electors who are members of different political parties to manually recount the ballots. If a counting team is unable to determine a voter's intent in casting a ballot, the ballot

must be "presented to the county canvassing board for it to determine the voter's intent." Fla. Stat. § 102.166(7)(a)-(b).

C. The Manual Recounts, Petitioners' Attempted Federal Action, and the Scope of the *Siegel* Petition

After the automatic statewide recount reduced the margin between Governor Bush and Vice-President Gore to 300 votes, the Florida Democratic Party requested a manual recount in four Florida counties: Palm Beach, Volusia, Broward, and Miami-Dade. Pursuant to those requests and the requirements of Florida Statutes Section 102.166(4)(d), the county canvassing boards of those counties conducted a sample manual recount of 1 percent of the total votes cast in their respective counties.[2]

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[2] Both Palm Beach County and Broward County employ a punch card balloting system. Voters in the counties are given a rectangular card ballot covered with perforated squares. Although the squares are numbered, the candidates' names do not appear on the ballot. Voters are instructed to slide the card into a machine, which holds a book listing the candidates for office next to a series of holes. Voters are told to insert the stylus provided into the hole next to their candidate of choice. The goal of the voting machine set up is that the stylus will be inserted in such a way that a "chad," one of the perforated squares, is completely separated from the ballot. If this happens a machine reader will later be able to count the votes reflected on the ballot. Unfortunately, a chad does not always fully separate from a ballot when punched by a stylus. The chad may only partially detach from the card, or, if the voting machine becomes clogged with chad from previous voters, the ballot may only be "dimpled." The machine reader will not be able to read the ballot. Such uncounted ballots are called "undervotes."

Because of the high percentage of undervotes created by punch card voting systems, the vast majority of counties in Florida do not use them. In Broward County, the undervote in the November 7, 2000, election for President was over 6,000 ballots. In Palm Beach County it was an incredible 10,750 ballots. Absent a manual recount, the votes reflected on these ballots would not be counted in the election.

The dislodging of chad from punch card ballots is a consequence of the fact that partially dislodged chads remain attached to the cards. See Decl. of Rebecca Mercuri, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11) tab 16, ¶ 9. Contrary to the suggestion of Petitioners' filing, it is virtually impossible to dislodge chads that have not already been partially dislodged. See Lee Gomes, *Chads - How Tough Are*

At the conclusion of those initial recounts, each of the four counties ultimately determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount *all* of the ballots cast in their respective counties in accordance with Florida Statutes Section 102.166(5)(c).

Petitioner Bush did not request a manual recount in any Florida county. (Neither did he then or at any time since object to including hundreds of ballots in his favor that were counted by hand initially and in the initial recount.) Instead, on November 11, 2000, a day when he could himself still have sought countywide recounts in most Florida counties, he filed the *Siegel* case (in which Petitioners now seek certiorari before judgment) in the U.S. District Court for the Southern District of Florida seeking to have the federal courts enjoin the ongoing Florida process for counting ballots in its election. In the complaint, and despite the fact that they had neither requested nor been denied manual recounts anywhere in Florida, Petitioners alleged that the manual recounts in four counties, which had not yet begun, would violate Equal Protection, Due Process, and the First Amendment.

On November 13, 2000, following briefing by the parties, a district court properly denied Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction through an extensive Order (the "Order"), *Siegel* v. *LePore*, No. 00-9009-civ, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), on the grounds that: (a) federal court intervention would inappropriately interfere with Florida's selection of its presidential electors; (b) the Florida statute providing for the manual recounting of election results, Fla. Stat. § 102.166, is reasonable and non-discriminatory and does not violate the First or Fourteenth Amendments or result in a constitutional

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They?, WALL ST. J., Nov. 22, 2000, at B1.

deprivation of any kind; (c) Petitioners' alleged injuries are speculative and far from irreparable; and (d) Petitioners failed to present evidence that they lack an adequate state law remedy. Petitioners' claims, the court held, did not demonstrate "the clear deprivation of a constitutional injury or a fundamental unfairness in Florida's manual recount provision." Order at 24. Moreover, the court noted, Petitioners' allegations that manual ballot recounts are unreliable were similar to the garden-variety election disputes that federal courts routinely decline to consider. Finally, the court noted that it was not in the public interest to prevent the revelation of the results of a recount, truth being an essential element of a democracy. It is in the appeal of that Order denying a preliminary injunction – and only that order – that the *Siegel* Petitioners seek certiorari before judgment in the Eleventh Circuit.[3]

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[3] Governor Bush appealed the denial of the preliminary injunction to the United States Court of Appeals for the Eleventh Circuit and sought an injunction pending appeal from that court. After directing that the cause would be heard *en banc* and ordering briefing, the court of appeals denied the emergency motion for an injunction pending appeal. Like the district court, the court of appeals found that states had the primary authority to determine the manner of appointing presidential electors and to resolve controversies concerning that process. Because the State of Florida had in place procedures by which Governor Bush could assert his constitutional claims in the courts of that State, the court of appeals held that he had not demonstrated a substantial threat of irreparable injury sufficient to warrant extraordinary relief. The court of appeals granted, however, Governor Bush's motion for an expedited briefing schedule and later issued a scheduling order. Under the present order, Governor Bush is directed to file a supplemental brief no later than Monday, November 27, 2000, at 12 noon, describing the impact of the Florida Supreme Court's opinion on the claims pending before the Eleventh Circuit. Appellees must file briefs by Tuesday, November 28th at 12 noon and Governor Bush's reply brief is due on Tuesday, November 28th at 10 p.m. If oral argument is deemed necessary, it will be held on Wednesday, November 29th at 1:30 p.m.

D. The Florida Supreme Court Decision at Issue in the *Bush* Petition

Once a county canvassing board certifies an election, it transmits the results to the Florida Secretary of State, who then transmits them to the Elections Canvassing Commission so that it can declare the winner for each office. Two Florida statutes purport to define the obligation of the county canvassing boards to transmit their certifications to the Secretary of State. Section 102.111 provides that county returns must be transmitted to the Secretary of State no later than 5 p.m. of the seventh day following the election and that any missing counties "***shall** be ignored*." By contrast, the later-enacted Section 102.112(1) provides that any county returns not received by 5 p.m. on the seventh day "***may** be ignored.*" Section 102.112(2) imposes a fine of $200 for each county canvassing board member for each day that county's returns are late. The Florida Supreme Court decision of which the *Bush* Petitioners seek review involves only the interpretation of these provisions of State law.

The lawsuit that forms the basis for the *Bush* Petition was filed in the Circuit Court of the Second Judicial Circuit in Leon County on November 13, 2000. Originally brought by Volusia County, but subsequently joined by Palm Beach County, it sought a declaratory judgment that the county was not bound by the November 14, 2000, deadline set by the Secretary of State (Petitioner Bush's state campaign co-chair) for submitting certified vote totals and an injunction prohibiting the Secretary from ignoring election returns resulting from manual recounts authorized by Florida law but submitted after that date. On November 14, 2000, the Leon County court held that although counties did have to comply with the statutory deadline, they could file supplemental returns reflecting the outcome of hand recounts. The Court admonished the Secretary that she could not decide in advance whether to exercise her discretion to accept late-filed returns, but had instead to consider the reasons offered for the late filing before deciding whether it would be accepted or not. The counties appealed to the First District Court of

Appeals.

In response to the Leon County order, Secretary Harris issued a directive requiring that all counties intending to submit late returns inform her of that fact and the reasons for the late returns by 2:00 p.m. on Wednesday, November 15. Four counties did so. After the Secretary concluded that the reasons supplied by the counties for submitting manual recounts were insufficient to justify the acceptance of late returns and again announced that she would not include the results of any manual recounts completed after November 14 at 5:00 p.m., the Florida Democratic Party and Vice-President Gore filed a motion in the Leon County Circuit Court seeking to enforce that court's prior injunction against the Secretary. On Friday, November 17, 2000, the Leon County court announced its opinion that the Secretary's actions had not violated the court's injunction. The Florida Democratic Party and Vice-President Gore appealed, and the First District Court of Appeals certified both appeals for immediate review by the Florida Supreme Court. On Tuesday, November 21, 2000, after full briefing and oral argument, that court issued the decision below.

The Florida Supreme Court found that the questions before it included the following issues of Florida law:

> "Under what circumstances may [a County Canvassing] Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary [of State]" and "[State Election] Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?"

Slip op. at 10. The Court noted pointedly that "Neither party has raised as an issue on appeal the constitutionality of Florida's election laws." *Id.* at n.10.

The Court stated that it would resolve the issues according to familiar principles of statutory interpretation, guided by an appreciation of the importance of the right to vote under Florida

law. "Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code." *Id*. at 24. "[H]owever, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary." *Id.* "In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent." *Id.*

The Florida Supreme Court applied four traditional canons of construction: "First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general." *Id.* at 24. "Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute." *Id.* at 25. "Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Id.* at 26. "Fourth, related statutory provisions must be read as a cohesive whole." *Id.*

Based on these unexceptional principles of statutory construction, the unanimous Court, per curiam, determined that consistent with the permissive language of Section 110.112, the Secretary was not required by the Election Code to ignore the results of manual recounts, even when the recount could not be completed by the seven-day deadline specified in those sections. *Id.* at 18-29.

In light of the "preeminent status the right of suffrage has been consistently accorded in Florida law," *id.* at 30, the Court concluded that "the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances * * * ." *Id.* at 32. In this case, ignoring the returns would be appropriate under Florida law only 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 pursuant to 3 U.S.C. §§ 1-10. *Id.* at 33.

In light of the unique circumstances of the case, the court invoked its equitable powers to fashion a remedy that would allow a fair and expeditious resolution of the questions presented. *Id.* at 39. After noting that the court at oral argument had inquired whether the presidential candidates were interested in the court's consideration of reopening the opportunity for recounts in additional counties, and that neither candidate requested such an opportunity, *id.* at 40 n.56, the court set deadlines designed to address the state law contest and federal electoral college deadline points noted above. Specifically, the court ruled that the Secretary should accept amended certificates reflecting manual recounts if they are filed by 5:00 p.m. on Sunday, November 26, 2000 (or Monday morning, at the Secretary's option).

E. The Petitions for Certiorari

Pursuant to the Florida Supreme Court's ruling, manual recounts continue in Broward and Palm Beach counties. In their petitions, Petitioners seek to bolster their unusually weak federal claims with wild, irresponsible and utterly unsupported allegations concerning the conduct of those recounts. This Court should be particularly aware that this material, which is untested and which we believe to be utterly false, has never been presented to any court before now and is not a part of the record in either of the cases of which Petitioners seek review. In any event, the conduct of the recounts is of course subject to state court oversight, and Petitioners have available to them ample means under state law to challenge the conduct of any manual recount, including challenges to the inclusion in the final tally of any ballot that they believe should not have been counted, or to the exclusion of any ballot that they believe should have been

counted. See Fla. Stat. § 102.168(3)(c). The state forum provided by statute would be the appropriate place to bring in the first instance any complaints about the conduct of the ongoing manual recounts, rather than raising such complaints before this Court in petitions seeking review of decisions having nothing to do with that question, and in which those complaints were neither raised nor decided below.

In any event, the Court should also rest assured that what is actually happening in Broward and Palm Beach counties is nothing like Petitioners describe. As recently as last night, Petitioners asked the court of appeals to supplement the record with numerous affidavits and news reports detailing "ballot abuse." Taken collectively, the affidavits allege that "unaccounted for chad" is being dislodged from the ballots as they are counted, that a few ballots were temporarily placed on the wrong pile, that two ballots were folded and a few others twisted, and that one vote counter "smelled rum" from a source he could not identify while in the counting room. Not only are these allegations far too trivial even to approach the standard necessary to assert a constitutional violation or to outweigh the countervailing interest in counting the tens of thousands of ballots not counted by the machines, they are contradicted by facts that are in the record. Moreover, reliable evidence contradicts Petitioners' contention that the counting rooms themselves are circus-like or that the counters are deliberately seeking to alter the ballots. Palm County Canvassing Board Chair Judge Charles Burton testified about the recount process underway in that county before the Palm County Circuit Court on November 22, 2000. In that testimony he confirmed that the atmosphere in the counting rooms was appropriate, that the vote counting was proceeding in an orderly way, and that ballots were not being degraded by the recount process.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS RAISE NO SUBSTANTIAL FEDERAL CLAIM AND THIS COURT'S INTERVENTION WOULD DISSERVE THE NATIONAL INTEREST.

I. PRINCIPLES OF FEDERALISM COUNSEL STRONGLY AGAINST ACCEPTING PETITIONERS' INVITATION TO INTERFERE WITH FLORIDA'S ELECTORAL PROCESS

The authority of the States to establish principles and procedures for selecting their electors is fundamental to state sovereignty. By expressly providing for state discretion, the Framers constitutionalized each state's right to organize and administer elections in the manner that best reflected the will of its respective citizenry, thereby reinforcing the decentralized nature of American Government. Petitioners ask this Court to intervene in this fundamental state matter and to interfere with the extensive, constitutionally authorized statutory process provided by Florida for selecting presidential electors. There is no basis for that request.

The Florida legislature exercised its constitutional authority by deciding that presidential electors are to be selected by popular vote in accordance with that state's election laws. See Fla. Stat. § 103.011. Moreover, as described above, it enacted a specific set of procedures to be followed for recounting (including manual counting) and confirmation of ballots cast for the purpose of designating presidential electors. See generally Fla. Stats. §§ 102.061, 102.111, 102.112, 102.141, 102.166, 97.021, 101.5603. The manual recount now underway was triggered under state law by anomalies in initial automated counts and was the object of a timely and proper request. Florida has embarked upon an orderly and structured process pursuant to its comprehensive statutory system to enfranchise

voters by attempting to count accurately the votes cast. That process appropriately includes a combination of manual and automated ballot counts. Petitioners ask this Court effectively to substitute its judgment for that of Florida, which enacted detailed election procedures through the lawful exercise of its authority over the appointment of electors. To do so would violate Article II, Section 1, Clause 2, of the U.S. Constitution, ignore 3 U.S.C. § 5, and implicate significant Tenth Amendment concerns.[4]

This lawsuit thus is a patent attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. The manual recount not only is fully authorized under Florida law, it has now been expressly approved by a unanimous Florida Supreme Court based on its longstanding adherence to the principle of Florida law that the will of the people is paramount. Slip op. at 9. The Florida Supreme Court has carefully preserved the right of Petitioners or others to contest the certification of an election pursuant to Florida law. Intervention by this Court in this ongoing process could cause irreparable delay at a critical moment and would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States.

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[4] An injunction prohibiting a manual recount would do more than *forbid* the State from engaging in a challenged practice. Given the State's obligation under Article II of the Constitution to compose a slate of electors, such an injunction would affirmatively *force* the State to conduct its vote count and verification according to a particular federal vision of how that count and verification should proceed. Cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). Indeed, the very suggestion that federal courts might reach into state governmental machinery to tell the states how to make and interpret their own laws would fly in the face of basic principles of federalism. See *New York* v. *United States*, 505 U.S. 144, 178 (1992) (Congress may not command states to legislate).

II. NOTHING IN FEDERAL LAW PROHIBITS THE FLORIDA SUPREME COURT'S ROUTINE INTERPRETATION OF FLORIDA'S ELECTION LAW

Petitioners make the stunning argument that federal law somehow disables the Florida courts from playing their ordinary role in this case of interpreting Florida law, and that federal law overrides the Florida court's determination that the seven-day deadline contained in Fla. Stats. §§ 102.111 and 102.112 does not stop the manual recounting of ballots or the inclusion of those recounts in the final tally. See *Bush* Pet. at 12-18. The flimsiness of this argument is self-evident.

1. Title 3. The federal statute principally invoked by Petitioners, 3 U.S.C. § 5, provides that each state's procedures for settling "any controversy or contest concerning the appointment of all or any of the electors" shall be conclusive with respect to the choice of that state's electors if the state procedures were "provided[] by laws enacted prior to the day fixed for the appointment of the electors." Petitioners argue that the decision of the Florida Supreme Court somehow violated this statute by creating a "new legal rule[]" that would apply "retroactively." *Bush* Pet. at 13-17.

To begin with, Petitioners' argument is based on a flat misstatement of the requirements of the statute, which in fact provides that disputes must be resolved "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. There thus is literally nothing to Petitioners' argument. The laws of Florida, of course, established the state judiciary as the mechanism for deciding "controvers[ies] and contest[s]" about all questions of Florida law, and not just those concerning appointment of presidential electors. See Fla. Const. art. V, § 1 ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."); *id.* art. V, § 20(c)(3) (granting circuit courts original

jurisdiction "in all cases in equity" and reaffirming the Supreme Court's pre-existing jurisdiction).

In any event, the decision by the Supreme Court of Florida amounts to an ordinary act of statutory interpretation of a law enacted prior to the election, not to a new "enactment." This is clear from even a cursory review of the opinion of the Florida Supreme Court below. The court dealt with the conflict between the provision of Florida law that said that returns filed after seven days "shall" be ignored, and the parallel provision saying that they "may" be ignored, by giving credence to the more specific, and the more recent, provision, a canon of construction certainly familiar to this Court as well. See Slip op. at 24-25. The court also recognized that the provision for fines for late submission of returns implied that they could, indeed, be accepted late. *Id.* at 27. It concluded, in light of the state constitution and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was strictly limited. *Id.* at 30-35. We respectfully submit that the decision below is persuasive, but whether one agrees or disagrees with it, it cannot be denied that it is an ordinary interpretation of a complex statutory scheme.

Thus, the questions purportedly framed in the petition are not in fact presented by this case. The Florida Supreme Court's routine interpretation of its statutory scheme does not "change the rules" in any way that implicates federal law. Petitioners seek to transform their disappointment with the Florida Supreme Court's authoritative interpretation of Florida law into a "constitutional" claim by arguing that it amounted to a change in the rules after the fact. If they were correct that they thereby stated a constitutional claim, every disappointed state court litigant would be able to bring a similar challenge in federal court. Permitting our state courts to interpret their laws – in ways that will, by definition, disappoint one or another litigant – of course does not violate the federal Constitution. At bottom, Petitioners' contention is that the Florida Supreme Court

committed an error of state law. This argument does not describe post-election judicial legislation, so as to implicate 3 U.S.C. § 5 or Article II, § 1, nor does the argument state a due process claim. A "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). [5]

2. Article II. Petitioners' argument that the delegation of authority to the state "Legislature" in Article II eliminates the state courts' power to interpret state law amounts to much the same thing: a request that this federal court alter the state Supreme Court's interpretation of state law. See *Bush* Pet. at 19 (repeating Petitioners' unavailing argument before the state Supreme Court about what the "manner" of appointed electors is under state law). The delegation, like other delegations of authority to the States, see U.S. Const. art. I, § 4, means that the procedure for appointing electors is a matter of state law, the ultimate meaning of which must be determined by state, not Federal, courts.

III. THE FLORIDA RECOUNT PROVISIONS ARE UNEXCEPTIONAL; PETITIONERS' SUBSTANTIVE CONSTITUTIONAL CHALLENGE TO THEM IS INSUBSTANTIAL

Petitioners next allege that the manual recounts now being conducted in accordance with Florida law are "selective, arbitrary, and standardless," and thus violate the federal Constitution. See *Siegel* Pet. at 15. The Florida provisions for

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[5] "[T]he concept of the separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). Indeed, "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states." *Id.* at 256 (Frankfurter, J., joined by Harlan, J., concurring in the judgment).

manual recounts are, however, utterly unexceptional. To permit the government of each county to conduct the election within that county has a long and uninterrupted history in this Nation, going back to the founding. The availability of the manual recount as a standard post-election procedure is a longstanding feature of Florida law, and of the law of other States,[6] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[7] The Florida scheme provides citizens of each county, and candidates for office within each county, with equal rights. The manual recount procedure violates neither Equal Protection, nor Due Process, nor the First Amendment.

1. <u>Equal Protection</u>. The weakness of Petitioners'

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[6] At least 20 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. See Cal. Elec. Code § 15627; Colo. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 2601l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[7] Indeed, the fact that counties have different ballot marking and counting systems justifies the need for statutory checks and balances such as a manual recount process. For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.4% undervote rate (4 in 1000 ballots). (See Decl. of Jon M. Ausman, App. Brief of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11), tab 13, ¶ 8.) In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade counties experienced a 3.2% undervote rate (32 in 1000 ballots) in the presidential race. (Decl. of Jon Ausman, App. tab 13, ¶ 9.) The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause, but it also enhances the equality of the voting process.

constitutional claim is reflected in the imprecision with which they identify the source of the alleged rights at issue. In *Siegel*, their first argument is that the recounts violate "Equal Protection," ostensibly because the recounts that are underway will "dilute" the votes of certain voters "based on the counties in which they live." *Siegel* Pet. at 17.

There is no principle of Equal Protection that is violated by the Florida procedure. The "dilution" cases Petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person one-vote principle under which voters from different districts cannot be given votes of unequal "weight." This issue is not even presented in an at-large election like the instant one where, although the elections are conducted by individual counties, the winner is determined based on his or her statewide vote. When the state undertakes procedures to ensure that qualified voters' votes are counted, the previously counted votes are not, of course, "diluted" at all. And, as this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.").[8]

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[8] Petitioners' assertion of a conflict with *Roe* v. *Alabama*, 43 F.3d 574 (CA11 1995) ("*Roe I*"), and *Roe* v. *Alabama*, 68 F.3d 404 (CA11 1995) ("*Roe III*"), also is misplaced. In these cases, an Alabama state court ordered the counting of contested absentee ballots that were neither certified nor notarized as required by Alabama's absentee ballot law and, under standard Alabama practice, would have been excluded. The unlawful vote dilution in the *Roe* cases is quite different from this case. The availability of the manual recount as a standard post-election procedure is a longstanding feature of Florida law, and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all *lawfully* cast ballots are counted. Petitioners make no allegation that unlawful ballots are now being counted in violation of any statute or general practice of the State of Florida.

Unlike *Roe I*, 43 F.3d at 581, there is absolutely no "post-election

Petitioners also argue that it is constitutionally impermissible for the manual recounts to proceed "selective[ly]" in only certain Florida counties. See *Siegel* Pet. at 18. If Petitioners mean to say that every county must count its voters' votes in precisely the same manner as every other county, they are obviously wrong. As they do in Florida, different counties within states routinely use different equipment and different ballots for the conduct of their elections. This obviously does not systematically "dilute" the votes of particular counties in any way that violates the Equal Protection Clause.

Petitioners also argue that Florida cannot permit recounts limited to certain counties only. But the only relevant case they cite, *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), involved incarcerated prisoners who were denied the right to vote altogether based solely on their county of residence. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The manual recount provisions of Florida law do not work any such type of irrational discrimination: Florida law does not specify that recounts should occur only in certain counties. Nor were the counties now conducting the manual recounts chosen arbitrarily or on any discriminatory basis. Florida law provides a right to request a manual recount in *any* county in which a candidate has a reason for believing that such a recount might reveal "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Each candidate and each county was treated

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departure from previous practice" in Florida, and Petitioners cannot show that a manual recount to ensure accuracy will cause any vote dilution. The fact that different components of the verification process may be activated in different counties does nothing to cause votes in other counties to go uncounted. The Equal Protection Clause does not require that all votes be counted by machines or registered in a certain manner. Petitioners' Equal Protection claims are tantamount to contending that unless each county's marking and counting systems are identical in every way there is violation of constitutional rights.

identically. Each candidate was empowered by statute to request manual recounts in any county.

Democrats requested manual recounts in several counties in which the initial machine recount indicated a problem with the machines reading the ballots serious enough that it might affect the outcome of the election. Governor Bush made the conscious, political choice not to request manual recounts in any county, a choice that manifestly does not create a constitutional violation conveniently inuring to his benefit. Indeed, as the Florida Supreme Court pointedly noted, Governor Bush declined the suggestion that the State reopen an opportunity for seeking a manual recount in additional counties. See Slip op. at 40 n.56.

Even if Petitioners had standing to allege a denial of equal protection in the failure to conduct a recount in the counties in which it was not requested, their equal protection claim would be unsupportable in light of the entirely reasonable basis for the distinction in treatment between the ballots of the various counties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"). This is not a circumstance where "the votes of similarly situated voters [are given] different effect based on the happenstance of the county or district in which those voters live." *Siegel* Pet. at 17. The basis for determining where recounts are conducted was not arbitrary. Where there was a request for a manual recount, it was granted. Where there was no request, it was not. Nothing could be more reasonable, or less discriminatory.[9]

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[9] Petitioners also allege that the use of different standards in different counties for determining which ballots to count also amounts to unconstitutional discrimination. *Siegel* Pet. at 18. Despite repeated conclusory allegations to the contrary, all counties are using the *same* standard, the intent of the voter. See Fla. Stat. § 102.166(7). Even if this standard were interpreted slightly differently in different counties, Petitioners would have no more valid an Equal Protection challenge than they would

2. <u>Due Process.</u> Petitioners' due process claim is equally insubstantial. They argue that the manual recount statute prescribes "no meaningful standards" for "determining whether and how" to conduct a manual recount, and that the statute thus invades a "liberty or property interest * * * in an arbitrary and capricious manner." *Siegel* Pet. at 19-20. The premise of this argument, that there are no meaningful standards for officials conducting recounts, is wrong as a matter of Florida law.[10]

Petitioners assert that the county canvassing board's discretion to order a manual recount is absolutely "standardless," and that this violates due process. Petitioners do not, however, allege either that the decisions to recount were made on any arbitrary or improper basis, or that they were denied recounts elsewhere on any such basis. Their complaint instead is that the mere grant of discretion to the county canvassing commissions contained in the statute itself violates the Constitution. See *Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 315 (1994) (addressing such a claim).

To prevail on such a facial challenge, Petitioners would have to establish that there are *no* constitutionally valid applications of Florida's statutory process for manual recounting. See *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11 (1988). Petitioners have made no effort to meet this burden, and they could not do so if they tried. For example, it could not be

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against different counties' use of different balloting equipment. In any event, because this standard is included in state law, its meaning – and any conflicts about it – may ultimately be resolved by the Florida Supreme Court.

[10] It must be remembered that Petitioners are not making a delegation doctrine challenge to the statute, alleging that there is no "intelligible principle" to cabin the administrative agency's discretion. See *Loving* v. *United States*, 517 U.S. 748, 771 (1996) (quoting *Hampton* v. *United States*, 276 U.S. 394, 409 (1928)). Nor could they make one here, since the federal Constitution does not constrain the state governments with federal separation of powers principles as such. See *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957) (plurality op.); *id.* at 235 (concurring opinion).

seriously contended that the Florida statute would be unconstitutional were a county canvassing board to direct a manual recount upon its written, verified conclusion that the county's vote-counting devices had malfunctioned (a circumstance that came to pass in Volusia County). See *Siegel*, 2000 WL 1687185, at *3. Petitioners' facial challenge is entirely groundless.

Furthermore, the statute contains standards sufficient to defeat any due process challenge. The statute makes clear that the purpose for the manual recount is to determine if there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). This standard provides the requisite guidance for the county officials' exercise of their discretion whether or not to order a manual recount. As the statute makes clear, the county officials' discretion is not unbounded; rather, they must consider requests for manual recounts in light of this standard: The statute explicitly provides that any request for a manual recount must "contain a statement of the reason the manual recount is being requested." *Id.* § 102.166(4)(a). And, if a manual recount *is* conducted, the county canvassing board is required to take action if, but only if, "the manual recount indicates an error in the vote tabulation which could affect the outcome of the election." *Id.* § 102.166(5).

In light of these provisions, a decision to grant a manual recount on some basis other than an allegation related to the possibility that there might be an error in the vote tabulation would be an abuse of discretion. By the same token, if a candidate provided substantial support for such an allegation, but the county canvassing board denied his or her request for a manual recount, this, too, would amount to an abuse of discretion. And, in either case, an aggrieved party might properly seek relief in state court. This suffices to demolish any claim that the grant of discretion in the statute violates due process. See *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (due process offended, even in context of control of primary

conduct, only by statutes that provide "no standard" for the exercise of official discretion).

Nor do county officials have standardless discretion in determining how to count individual ballots during the manual recount. The touchstone under Florida law is the voter's intent. Indeed, Florida statutory law provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(2)(a). The manual recount provision expressly provides that "[i]f a 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." Fla. Stat. § 102.166(7). This is a familiar standard used throughout the United States for determining whether and how to count ballots. See, *e.g.*, *Delahunt* v. *Johnson*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981).

Like all issues of compliance with voting laws, the meaning of that standard is "ultimately a judicial question." *State ex rel. Nuccio* v. *Williams*, 120 So. 310, 314 (Fla. 1929). Thus, there is no unacceptable risk that county officials will apply this test subjectively, arbitrarily, or inconsistently. And, in any event, any objection to the way in which a particular ballot has been counted in the application of the intent of the voter standard can be brought in state court, and any question about the meaning of the standard can ultimately be resolved before the State Supreme Court, whose decision will of course have uniform application throughout the State.

3. <u>First Amendment.</u> Nor, for the same reasons, is there any substance to Petitioners' claim of "unconstrained" or "standardless" discretion over the implementation of laws that touch upon First Amendment rights. *Siegel* Pet. at 23. As *Anderson* makes clear, regulations of elections are not judged by

the same standards as regulations that abridge First Amendment rights of Free Speech. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 460 U.S. at 788 (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); see also *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). Petitioners' citation to *City of Lakewood* v. *Plain Dealer*, 486 U.S. 750, 763 (1988), see *Siegel* Pet. at 23, is therefore completely inapposite even if *City of Lakewood*'s demand for constraints on discretion in the licensing of primary conduct protected by the First Amendment could be extrapolated to the completely different context of decisionmaking internal to the government in the search for accuracy in processing ballots – an extrapolation this Court's precedents do not support. Cf. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.").

Whatever the standard, Florida's manual recount provisions survive it, because they do not provide Florida officials with unconstrained discretion and give such officials *no* power whatever to deny any candidate or voter access to the ballot or the franchise. The statutory standards, enforceable by Florida courts, are sufficient to defeat Petitioners' purported First Amendment challenge.

4. Additional Claims In The *Siegel* Action. Finally, the question that Petitioners purport to present in the *Siegel* matter simply cannot be resolved at this stage given the procedural posture of the case, which the petition notably fails to address. The only issue before the Eleventh Circuit – and therefore the only question that could be presented in this Court *via* the

Petition for Certiorari Before Judgment – is whether the district court properly denied Petitioners' motion for a preliminary injunction on the then-existing record. See *SunAmerica Corp.* v. *Sun Life Assur. Co.*, 77 F.3d 1325, 1333 (CA11) (standard governing such an appeal), *cert. denied*, 519 U.S. 822 (1996); see also *FTC* v. *Affordable Media, LLC*, 179 F.3d 1228, 1235 (CA9 1999) (same). Any purely legal claims asserted by Petitioners that could even arguably be the basis for injunctive relief are meritless for the reasons described above, but Petitioners' fact-based claims regarding the course of the manual recounts, on which the petition principally rests, are not even properly presented. Just as important is the fact that Petitioners nowhere contest the conclusion, supported by the district court's extensive analysis and citation to precedent and the court of appeals' subsequent order denying an injunction, that Petitioners are free to pursue their claims in state, not federal, court.

And, as an entirely separate matter, the *Siegel* Petitioners' fact-bound claims necessarily depend on non-record assertions.[11] Contrary to the Rules of Civil and Appellate Procedure, as well as the clear intent of the Rules of the Supreme Court, Petitioners apparently attempted (but thus far have failed) to file in the court of appeals for use in this Court a barrage of heavily contested affidavits untested in the district court or any other forum, that assertedly establish their federal law claims.[12] If this Court were

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[11] That the case is factbound alone of course counsels against certiorari, particularly given that the question relates to "fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals." *Kungys* v. *United States*, 485 U.S. 759, 773 n.6 (1988); see also *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994); *Hayes* v. *Florida*, 470 U.S. 811, 814 n.1 (1985); *Packwood* v. *Senate Select Comm. Ethics*, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers).

[12] Petitioners' attempt to purportedly "supplement the record" is impermissible under either FRAP 10(e), *Hoover* v. *Blue Cross & Blue Shield*, 855 F.2d 1538, 1543 n.5 (CA11 1988), or the court of appeals' inherent authority to supplement the record, *Dickerson* v. *Alabama*, 667 F.2d 1364, 1367 (CA11 1982) (limited supplementation permitted only because

to review those claims, the parties apparently would conduct a preliminary injunction hearing as an original matter in this Court (battling affidavit-by-affidavit and expert report-by-expert report), contrary not only to sound principles of judicial administration and settled jurisdictional prerequisites, but also to simple common sense. The district court directed Petitioners to file their claims in Florida's state courts and develop a record there; Petitioners refused. Alternatively, Petitioners could have developed a record in federal district court to support a request for a permanent injunction; they refused, abandoned proceedings in that forum, and rushed to the Eleventh Circuit instead. The only reasonable conclusions from this course of conduct are (i) that Petitioners have thus far delayed resolution of their claims by consciously avoiding development of their factual claims in the appropriate trial courts, all of which have demonstrated a near-Herculean willingness to consider and dispose of such claims expeditiously, and (ii) that if they wish to pursue such allegations, they should do so by returning to those fora and pursuing appropriate, expeditious appeals.

All of the foregoing, of course, also demonstrates that this is not one of those very rare cases in which it would be appropriate for this Court to grant certiorari prior to the court of appeals rendering judgment (particularly given the highly expedited briefing schedule already set by that court, see *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958)).

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substantive issues were not in serious dispute, remand would serve no purpose, and parties were clearly on notice of the evidence at trial).

Moreover, contrary to the impression left by the petition, Petitioners first filed the petition in this Court and only *later* sought (unsuccessfully so far as we are aware) to file in the Eleventh Circuit their principal "Motion to Supplement" the record. This is nothing more than an effort (i) to mask the reality that Petitioners are seeking to introduce a mountain of heavily contested factual material in this case for the first time *in this Court*, and (ii) to avoid the "clearly erroneous" standard that properly would be applied to factual findings by the trial court in this context, *SunAmerica Corp.*, 77 F.3d at 1333. (Well after being served with the petition, Respondents' counsel *still* had not been served with contents of putative record material.)

CONCLUSION

It is precisely in a case such as this, where the Constitution specifically delegates authority to the States – and where the attention of the Nation is focused on the proceedings – that this Court's obligation is at its peak to preserve the principles of federalism that it has articulated and enforced. These petitions represent a bald attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. Intervention by this Court in this ongoing process would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States. Because there is nothing even approaching a clear showing of a constitutional violation requiring redress by this Court, the petitions for writs of certiorari should be promptly denied.

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