

No.

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**

PETITION FOR A WRIT OF CERTIORARI

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

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

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

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

[Additional counsel listed on inside front cover]

Counsel for Petitioner

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

QUESTIONS PRESENTED

The Supreme Court of Florida has held that the Secretary of State cannot certify election results in accordance with preexisting Florida law and must instead wait for the statutorily untimely results of manual recounts conducted in three Florida counties before certifying the results of the November 7, 2000 presidential election. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under “laws enacted prior to” election day.
2. Whether the state court’s decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State “in such Manner as the Legislature thereof may direct.”
3. Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment.

PARTIES TO THE PROCEEDING

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

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

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	4
I. The Underlying Litigation.....	4
A. The Recount Authority Litigation.....	5
B. The Recount Certification Litigation.....	7
II. Proceedings In The Florida Supreme Court	8
A. The State Court’s Decision.....	8
B. The Federal Issues Were Raised And Ruled On Below.....	9
REASONS FOR GRANTING THE PETITION	10
I. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law Governing Disputes Over The Appointment Of Electors.....	12
II. Review Is Warranted Because The Court Below Disregarded Constitutional Limitations On The Appointment Of Electors.....	18
III. Review Is Warranted Because The Supreme Court Of Florida’s Decision Conflicts With This Court’s And	

TABLE OF AUTHORITIES—Continued

Page(s)

Eleventh Circuit Precedent And The
Recount Procedures Sanctioned By The
Court Below Do Not Pass Constitutional
Muster20

A. Equal Protection21

B. Due Process.....23

C. First Amendment26

CONCLUSION27

PETITION FOR A WRIT OF CERTIORARI

Petitioner George W. Bush, the candidate of the Republican Party for the office of President of the United States, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida in this case. In plain contravention of the requirements of the Constitution of the United States and federal law, the state supreme court has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears designed to thwart the will of the electorate as well as the considered judgments of Florida's executive and legislative branches. Because the selection of presidential electors is governed directly by the Constitution and congressional enactments, as well as by state law, the court's decision involves issues of the utmost *federal* importance.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-39a) is not yet reported. The orders of the Circuit Court of the Second Judicial District for the County of Leon, Florida (App., *infra*, 43a-44a & 45a-51a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The decision below compels the Florida Secretary of State and Elections Canvassing Commission to accept, and include in the State's certification of election returns, untimely election results derived from selective manual recounts being conducted in certain Florida counties. App., *infra*, 42a. The judgment below is therefore "final" for purposes of this Court's jurisdiction under § 1257; indeed, it amounts to the entry of a per-

manent injunction against the responsible state officials. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945) (entry of injunction is “an effective determination of the litigation and not of merely interlocutory or intermediate steps therein”).

As demonstrated *infra*, petitioner expressly raised below the federal questions presented in this petition. Accordingly, the Florida Supreme Court’s failure to address petitioner’s federal claims, and its assertion that “[n]either party has raised as an issue on appeal the constitutionality of Florida’s election laws” (App., *infra*, 11a, n.10), is no barrier to review by this Court. “The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts.” *Street v. New York*, 394 U.S. 576, 583 (1969). *See also Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) (this Court has a “duty to . . . determine for ourselves precisely the ground on which the judgment rests”). Accordingly, a state court cannot evade this Court’s review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow’s Adm’r.*, 123 U.S. 540, 548 (1887) (“If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.”).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 3, Section 5 of the United States Code provides: “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.” 3 U.S.C. § 5.

Article II, Section 1, Clause 2 of the Constitution provides: “Each 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

Pursuant to this Court’s Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 52a-61a.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for the President and Vice President of the United States. An initial count of the ballots cast in Florida showed that Governor George W. Bush and Dick Cheney received the most votes in the election, subject to the counting of absentee ballots. Because the margin of victory was less than .5 percent, however, an automatic statewide recount commenced. *See* Fla. Stat. § 102.141(4). The automatic statewide recount confirmed that Gov. Bush and Secretary Cheney received the most votes. The absentee ballots have now been counted, and Gov. Bush and Secretary Cheney again have received the most votes. Nonetheless, the outcome of the Florida election has not been certified, and the American people are still uncertain as to who their next President will be. Petitioners have no choice but to seek this Court's intervention.

I. The Underlying Litigation

Once election results had been tabulated in most of the other states in the union, it became apparent that the victor in the State of Florida would almost certainly be the next President of the United States. Dissatisfied with the results of the initial count and the automatic recount, officials of the Democratic Party filed requests for manual recounts in four selected Florida counties: Broward, Miami-Dade, Palm Beach, and Volusia Counties. In each of these counties, Vice President Gore had received a substantial majority of the votes cast in the election.

As this Court is undoubtedly aware, the chaos that erupted in the wake of these selectively focused requests for manual recounts has been striking. Unrestrained by statutory guidance, the counties have embarked upon various paths in attempting to divine the "intent of the voters." Counties have adopted conflicting guidelines

for achieving this goal, and have repeatedly changed guidelines and standards in the midst of the recounting process. The widely varying and inconsistent policies (or lack of policies) underscores the absurdity of the purported objective of a manual recount conducted under these conditions. A manual recount in selected limited counties without consistent standards according to guidelines that are constantly changing and where subjective judgments are being exercised by persons who know that their decisions may alter the results of the presidential election will not yield a more accurate tabulation than the original statewide machine count, it will simply undermine the credibility and integrity of any final result.

The manual recount process has also undermined the physical integrity of the voters' ballots. Ballots have been damaged throughout the manual recount process by being twisted, rumped, creased, and dropped; some have been stained with ink, poked with pens, and crushed. This aggressive, careless treatment of the ballots has apparently changed their original character in that chads, still attached after voters cast the ballots, have been dislodged in bunches, littering the floor of the recount rooms. It has become impossible to determine the actual condition of the ballots as they appeared when they were cast in the November 7 election in the specified counties.

The chaos and confusion over the manual recount process has triggered numerous legal actions. Two of those legal actions reached the Florida Supreme Court and are the subject of this petition.

A. The Recount Authority Litigation

One lawsuit at issue involves the authority of the selected counties to conduct a manual recount of the votes cast on November 7. This proceeding centers on a request by the Palm Beach County Canvassing Board, which asked whether an "error in the vote tabulation"

under Florida election law (Fla. Stat. § 102.166(5)), which was the statutory condition precedent for the exercise of the authority to initiate manual recount proceedings, referred to errors in the tabulation system itself or, more broadly, included discrepancies between the number of votes determined by the tabulation system and a sample manual recount. Exhibits A and B, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to the Palm Beach request, the state Division of Elections, the State office charged by the legislature with responsibility for interpreting Florida election law, Fla. Stat. § 106.23, issued an opinion that manual recounts are not authorized unless the County Canvassing Board concludes that "the vote tabulation system fails to count . . . properly punched punchcard ballots." Exhibit C, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346. The opinion continued that "unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county. . . ." *Id.* The following day Florida's Attorney General issued an advisory opinion on the same issue that contradicted the Division of Elections's advisory opinion. Exhibit D, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to these conflicting opinions from the Florida executive branch, the Palm Beach County Canvassing Board filed a pleading with the Florida Supreme Court in which it asked the court to resolve the conflict.

B. The Recount Certification Litigation

The second legal proceeding relevant to this petition arose out of the Florida statutory deadline for certifying election results, which by law is set for 5:00 p.m. on the seventh day after the election, *i.e.*, Tuesday, November 14. Fla. Stat. § 102.111(1).¹ After a Florida Circuit Court enjoined the Secretary of State from declaring that all manual recounts had to be completed by the statutory deadline and directed her to exercise her discretion to determine whether to include untimely election returns in her certification of the election results, the Secretary asked counties interested in submitting explanations for extending the deadline to do so by 2:00 p.m. on Wednesday, November 15. FDEC App. 5, Ex. E.² After receiving submissions from four counties (FDEC App. 5, Ex. O), the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. FDEC App. 5, Ex. H.

Vice President Gore and others sued for an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. FDEC App. 12. On November 17, after a hearing the previous afternoon, the Circuit Court for Leon County issued its decision denying the motion. FDEC App. 13. The court held that the Secretary of State had not violated its November 14 Order and explained that

¹ Volusia County submitted its manual recount results before the 5:00 p.m., November 14 deadline and, therefore, is in a different category than the other three counties.

² “FDEC App.” refers to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee in the court below.

“the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision.” App., *infra*, 44a.

II. Proceedings In The Florida Supreme Court

The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court’s decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00 p.m. November 14 deadline in the statewide tabulation.

A. The State Court’s Decision

On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court “erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts.” App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary’s discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that “the Secretary may reject a Board’s amended returns only if the returns are submit-

ted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Id.* at 37a. Based on this newly fashioned, hitherto unrecognized rule of law, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through Sunday, November 26, 2000. *Id.* at 38a-39a. Moreover, the court maintained its injunction preventing the Secretary from certifying any election results by that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.* at 39a.

B. The Federal Issues Were Raised And Ruled On Below

Each of the issues presented by this petition was expressly raised in the court below. *First*, petitioners argued that a *post hoc* judicial decision on the appointment of electors would violate 3 U.S.C. §5, which requires that any such disputes be resolved in accordance with laws enacted prior to election day. Bush Answer Br. 42-43; App., *infra*, 62a. *Second*, petitioners contended that any decision overriding the Florida legislature's procedures for appointing electors (including the November 14 deadline for certifying votes) would violate Article II, which vests sole authority over such matters in the legislatures of the several States. Bush Answer Br. 43 n.15; App., *infra*, 62a-63a, n.15. And *third*, petitioners argued that the manual recount being sought by the Gore faction would "violat[e] the United States Constitution," by diluting votes in violation of the Due Process and Equal Protection Clauses, by allowing standardless decision-making in the voting arena in violation of the Due Process Clause, and by impairing the right of association through voting in violation of the First Amendment. Bush Answer Br. 43-44; App., *infra*, 63a-64a.

As noted above, the Supreme Court of Florida did not expressly rule on petitioner's federal claims. Be-

cause the judgment below necessarily rejects those federal claims on the merits, however, those federal questions are squarely presented here.

REASONS FOR GRANTING THE PETITION

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses a clear and present danger to that right, and should be corrected forthwith to ensure that our Nation continues to be governed by the rule of law.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95. 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. Counties in Florida, however, have undergone a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the vot-

ers. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision preventing the Secretary of State of Florida from exercising her legislatively conferred authority to perform the act of certification that would complete the electoral process in Florida has added to that angst and has strayed from established federal constitutional and statutory law.

Governor George W. Bush and Dick Cheney received the most votes cast in Florida, as initially counted, as recounted, and as retabulated again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of an arbitrary, standardless and selective manual recount of ballots cast in three heavily populated, predominantly Democratic counties in Florida.

This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal statutory and constitutional restraints on the ability of States to impose *post hoc* requirements on the appointment of presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court and the court of appeals regarding the scope of the First and Fourteenth Amendment protections for the funda-

mental right to vote. Moreover, these important questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court to decide. Indeed, absent a decision by this Court, the election results from Florida could lack finality and legitimacy. The consequence may be the ascension of a President of questionable legitimacy, or a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

I. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law Governing Disputes Over The Appointment Of Electors

Although election procedures are often governed exclusively by state law, that is not the case in elections for the members of the Electoral College, who choose the President and Vice President of the United States. While some of the details of appointing presidential electors are left to the several States, the basic framework is established by the Constitution itself, in Section 1 of Article II and the Twelfth Amendment. Moreover, Congress has enacted legislation to implement the constitutional framework, and those federal laws, of course, reign supreme over state laws in this area. U.S. CONST., art. VI, cl. 2.

In particular, Congress has provided that when "any controversy or contest concerning the appointment of all or any of the electors" from a State arises, the dispute must be resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. §5 (emphasis added). The evident purpose of this federal law is to ensure that the applicable rules cannot be changed once the voters have gone to the polls. As Representative Wil-

liam Craig Cooper of Ohio explained in the congressional debate on this provision (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), “these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided.” 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* (“these contests should be decided under and by virtue of laws made prior to the exigency under which they arose”); *id.* (“How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?”). Representative Cooper’s concerns, although expressed more than a century ago, seem remarkably prescient when read against the backdrop of events of the past fifteen days in Florida. As he asked rhetorically, in opposing the views of congressional Democrats who wished to permit the use of retroactive rulemaking to resolve electoral disputes: “To what anarchy, to what confusion, to what riot, if you please, Mr. Speaker, might such a course of procedure lead!” *Id.*

Despite the express federal statutory prohibition against the *post hoc* creation of new legal rules to affect the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the Presidential election. Under § 102.111 of the Florida Statutes, for example, election returns by county canvassing boards “must be filed by 5:00 p.m. on the 7th day following the . . . general election . . .” By contrast, under the new rule of law announced by the decision below, the effective deadline for submission of election returns has been extended from November 14

until November 26 (App., *infra*, 37a), nearly tripling the statutory seven-day time period mandated by the Florida Legislature.

In addition, §102.112 of the Florida Statutes provides that the Elections Canvassing Commission “shall . . . ignore[]” county returns filed after 5:00 p.m. on the seventh day following the election, and “shall . . . certif[y]” the election based on the results returned before the deadline. Section 102.111(1) confirms that late-filed returns “may be ignored” by the Elections Canvassing Commission.³ See Fla. Stat. §102.112. Notwithstanding this clear, and preexisting, legislative directive, the Supreme Court of Florida has now concluded retroactively that the Elections Canvassing Commission could

³ Section 102.112(1) of the Florida statutes provides that if election returns are not received by the Department of State by 5:00 p.m. on the seventh day following the election, the returns “may be ignored.” This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida’s decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). In *Chappell*, one of the six counties in the Fourth Congressional District failed to submit its original certificate until two days after the statutory deadline in § 102.111. The county had, however, informed the Department of State by telephone of its results prior to the deadline. The supreme court ruled that the county had substantially complied with § 102.111 and thus allowed the county’s votes to count. See *Chappell*, 536 So. 2d at 1008-09. In passing § 102.112, however, the State Legislature did not repeal § 102.111. Nor does this case involve a situation like that at issue in *Chappell*, in which a county conducting a recount informed the Department of State of its results prior to the deadline, but simply failed to submit its official results in writing by the deadline. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court has now directed.

not ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, pending the completion of selective manual recounts in individual counties. App., *infra*, 34a-37a.

In addition, the judicially established waiver of the statutory deadline contained in § 102.112, is contrary to the legislative provisions contained in § 102.168 providing for contests to election results. See Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. Pushing back the deadline for certification by judicial fiat thus runs headlong into the Florida Legislature's intent to allow a period of time for court challenges.

The Supreme Court of Florida's decision also deviated from its prior decisions making clear that the "judgments" of officials such as the Secretary of State in fulfilling their specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975)); see also *Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute."). This arbitrary judicial departure from the well-established law of Florida—as it plainly stood prior to November 7, 2000—is in flagrant violation of Congress's federally imposed requirement that controversy over the appointment of electors be resolved solely un-

der legal standards “enacted prior to” the date of the election. 3 U.S.C. § 5.⁴

Even if the Secretary of State *might* be authorized to excuse county board noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. §102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting rule of Florida law that mandated that result in the circumstances presented here. The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue here. Indeed, the State’s legislative body required that when the margin of victory in an election is less than .5 percent, an automatic statewide recount is to be held. *See* Fla. Stat. § 102.141(4). The Florida Legislature also contemplated that manual recounts might be requested by candidates or parties (but not by voters) in some circumstances, but established no standards to guide the discretion of county canvassing boards in determining whether to conduct such manual recounts. *See* Fla. Stat.

⁴ The Supreme Court of Florida purported to follow prior Florida case law in reaching its decision but that claim is manifestly without foundation. Under 3 U.S.C. § 5, of course, this Court has an independent obligation to ensure that Florida resolves any controversies over appointment of electors by reference to the rules of law enacted prior to the election, not *post hoc* standards announced for the first time some two weeks after the election. Moreover, this Court has repeatedly recognized that when a state court rests its decision on a nonfederal ground that “is so plainly unfounded that it may be regarded as essentially arbitrary,” such action does not remove consideration of the federal question from this Court’s jurisdiction. *See McCoy v. Shaw*, 277 U.S. 302, 303 (1928); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-55 (1958).

§ 102.166(4)(c). In passing §§ 102.111 and 102.112, however, the legislature plainly determined that finality had an important place in the certification process as well.

The Florida Legislature thus consciously weighed the interests of finality against competing interests supporting manual recounts. It is clear from the legislative enactments that the court struck the balance between finality and manual recounts in such a way that ongoing manual recounts do not warrant abandoning the statutorily imposed deadline found in §§ 102.111 and 102.112, unless, in the most permissive reading of the statutes, the Secretary of State decides in her lawfully granted discretion that such late-filed returns should be included in the final election results. Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by prohibiting precisely what is happening in Florida today, where the candidate who did not receive the most votes and his supporters are attempting to overturn the results of the Presidential election by changing the rules after the election has been held. Section 5's prohibition against such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively

extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, “campaign strategies would have taken this into account” *Id.* at 582. Indeed, the candidates’ decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold.

The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candidate has previously resisted so strenuously and resourcefully, the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the States must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so, and it is also plain that the Florida Supreme Court failed to do so. Given the importance of the issue to the Nation, this is not a question that can await further development in the lower courts. The Court should decide—now—whether or not Congress meant what it said when it directed that controversies concerning the appointment of electors be decided only “by laws enacted prior to” election day. 3 U.S.C. §5; *see* Sup. Ct. R. 10(c) (including among the considerations supporting review in this Court, state court decisions that decide “an important question of federal law that has not been, but should be, settled by this Court”). If Congress did, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Below Disregarded Constitutional Limitations On The Appointment Of Electors

The congressional directive that States decide controversies concerning electors according to “laws enacted prior to” election day (3 U.S.C. §5) is derived from the constitutional command that each State appoint

electors “in such Manner as the Legislature thereof may direct.” U.S. Const. art. II, § 1, cl. 2. Significantly, 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—the one, as in the federal government, most representative of the popular will—with authority to articulate the standards by which electors would be chosen.

In Florida, the “manner” in which the legislature has directed that electors be appointed is quite clear. The citizens vote for them on Election Day (which is established by federal law), and the various counties must certify the results of the election to the state Division of Elections by 5:00 p.m. the following Tuesday. Fla. Stat. § 102.112. As soon as practicable thereafter, the legislature has commanded that the results of the election “shall” (or at least “may”) be certified, while the results from any counties not reporting before the statutory deadline “shall” (or, again, at least “may”) be ignored. Fla. Stat. §§ 102.111, 102.112. Notably, the creation of this timetable intentionally leaves time for election contests, as the legislature clearly provided for in § 102.168. Under this legislative directive, the results in Florida—as all acknowledge—are clear: The electors for the Republican candidates garnered more votes before the statutory deadline, and that outcome did not change when the results of absentee balloting (which, under federal law, must be counted notwithstanding the state deadline) were considered.

The Florida Supreme Court has seen fit to revise the “manner” in which Florida’s electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts, notwithstanding the fact that the statutory deadline has long since passed and no waiver of that deadline has been granted by the State agency authorized by the legislature to grant such relief: the Elections Canvassing

Commission. The Constitution admits of no such *post hoc* alterations to the scheme of electoral appointments. Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so; but the simple fact is that it did *not* do so.

It is no accident that Article II reserves the manner of selecting electors to the *legislatures* of the several States. As this Court has explained, “[t]hat was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people.” *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And then, as now, a legislature was *not* a state court, sitting after the fact to decide what rules should be adopted and applied. Rather, by requiring the legislative branch to set forth the manner in which electors would be chosen, the Framers undoubtedly wanted to ensure that the rules would be specified in advance in order that there could be no doubt that their application in particular circumstances was reflective of the will of the people. The events in Florida have only confirmed the wisdom of the constitutional design, faithful adherence to which requires that this Court review the Florida Supreme Court’s usurpation of legislative power in defiance of the Constitution’s plan.

III. Review Is Warranted Because The Supreme Court Of Florida’s Decision Conflicts With This Court’s And Eleventh Circuit Precedent And The Recount Procedures Sanctioned By The Court Below Do Not Pass Constitutional Muster

The Florida Supreme Court’s decision opens the door to an electoral catastrophe. The court below has essentially given the green light to a standardless exercise in which vote-counters in a few, carefully selected counties will divine the “intent of the electorate” without

any legislative guidance or uniform standards. The process therefore varies from county to county, and criteria for counting ballots as votes has changed repeatedly in each recount county. Voters in counties not selected for recount will have ballots tabulated pursuant to wholly different, less permissive standards. The results of such lawlessness cannot be squared with fundamental principles of our constitutional structure.

When it became apparent that some Florida officials were bent on paving the road to chaos that the state supreme court has now endorsed, Governor Bush and Secretary Cheney, and various Florida voters, sought an injunction in federal court. Both the district court and the court of appeals denied their request for an interlocutory injunction, although the appellate court did not foreclose the possibility of appropriate relief if necessary. Petitioner Bush, among others, has petitioned this Court for review of the federal case (*Siegel v. LePore*, No. 00-____, filed contemporaneously herewith), which raises the same fundamental due process and equal protection constitutional questions as does the Florida Supreme Court's decision. Since those questions are addressed more fully in that petition, which is being submitted to the Court concurrently with this one, Petitioner will only summarize the constitutional problems here.

A. Equal Protection

The dilution of the weight of a citizen's vote constitutes a denial of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). As a result, the Equal Protection Clause demands that the votes of similarly situated voters be given similar effect. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974); *Roman v. Sincock*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). Florida's selective manual recount procedures, as approved by the court below, arbitrarily treat voters differently simply because they happen to live in different parts of the State, and accordingly conflict with prece-

dent of this Court cited above. A partially punched ballot, for example, may not be counted at all in most counties, might be counted as a vote in other counties, and in some counties it might be counted as a vote or not—depending on which set of ever-changing rules the election officials happen to be applying at the time it is reviewed. This has the effect not only of arbitrarily denying the right to vote to some persons, but of diluting the votes of the majority of Floridians who correctly cast their ballots. Either way, the present regime cannot withstand equal protection analysis.

The Supreme Court of Florida's decision cannot be reconciled with this Court's opinion in *O'Brien*, in which it struck down a New York law that allowed an inmate incarcerated outside of his home county to cast an absentee ballot, while not allowing a similarly situated inmate to cast a ballot when incarcerated within his home county. See *O'Brien*, 414 U.S. at 528-30. The manual recount scheme condoned by the Supreme Court of Florida suffers from failings similar to those contained in the New York law struck down in *O'Brien*. The right of a citizen to vote, and to have that vote counted equally to the votes of others similarly situated, cannot be infringed on the sole basis of the county in which the citizen resides, anymore than on the basis of the county in which a prisoner is incarcerated. Because the Supreme Court of Florida's decision "conflicts with [a] relevant decision[] of this Court," review is warranted. Sup. Ct. R. 10(c).

The decision below also directly conflicts with the Eleventh Circuit's decision in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The court below held that conducting manual recounts in selected Democratic counties in the State long past the seven-day deadline imposed by state law and in a manner flatly inconsistent with the authoritative interpretation of the law by the state official charged with enforcing it does not violate the federal Constitution. In *Roe*, by contrast, as dis-

cussed above, the Eleventh Circuit held that to change the voting rules after election day and thus count some votes that should not be counted would unconstitutionally dilute the votes of those who complied with the established voting requirements. *Id.* at 581-82. In this case, conducting a manual recount in selected counties with no established standards in place to determine whether to conduct such manual recounts and, if so, what procedures to follow, subjects identically situated voters to different treatment solely on account of the county in which they reside. To include ballots in the final statewide tally that were counted solely because they were subjected to the different scrutiny attendant to a manual recount, would be as improper in this case as counting the noncompliant ballots at issue in *Roe*. As in *Roe*, the counting of ballots that should not be counted will unconstitutionally dilute the votes of those who properly cast their ballots on election day and those who do not live in the counties selected for a manual recount. In addition to being erroneous as a general matter, therefore, the Supreme Court of Florida's decision also fails to comport with the Eleventh Circuit's holding in *Roe*. This conflict further supports review in this Court. Sup. Ct. R. 10(b).

B. Due Process

The manual recount underway in certain Florida counties is unconstitutional because it is being conducted in the absence of meaningful objective standards. The officials responsible for overseeing the turmoil and constantly changing process that the nation has been watching for the past two weeks have failed to articulate rules for when a recount will be ordered, how long it will take, how it will be conducted, what votes will (and will not) be counted, and so on. This uncertainty derives from the fact that Florida law provides no meaningful guidance to help local canvassing boards determine whether to conduct a manual recount and, if so, the process to follow in determining whether to count any

given ballot. The only “standard” conceivably contained in the Florida statutes is the extremely general one that canvassing board’s are to attempt “to determine the voter’s intent.” Fla. Stat. § 102.166(7). This vague statement of generalized purpose absolutely fails to provide any meaningful guide for local canvassing boards to follow in determining *how* to divine the voter’s intent.

This total lack of guidance has, not surprisingly, led counties to apply different “standards” to the evaluation process, and, moreover, to the extent such standards have been announced, they have been renounced or changed within minutes or hours. Two counties that voted not to proceed with county-wide manual recounts reversed those decisions within days. The result is a chaotic, and entirely standardless and arbitrary, regime in which a question of national importance is being decided by government actors wholly unconstrained by limits or standards. It does not comport with the minimum standards of due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Moreover, counties have even departed from their past practices in conducting manual recounts. For example, the Broward County Canvassing Board has previously rejected the *need* for a manual recount in a situation strikingly similar to this one. In 1991, after an initial machine recount of the votes cast in a local city council race changed the margin of victory from five votes to three, the Board declined to conduct a manual recount. The Board concluded that the change in numbers was simply the result of “hanging paper chads” that fell away in the second count, causing two ballots initially counted for the victor to become overvotes (and thus no vote) because holes were actually punched for two candidates. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992). The Board determined that such “voter errors . . . are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot

cards,” and did not warrant a manual recount. *See id.*⁵ Despite this prior practice of not conducting manual recounts in cases where a discrepancy between the initial count and a machine recount was due to this kind of “voter error,” Broward County opted to change course and conduct a manual recount in this case.

Similarly, Palm Beach County is reportedly considering reversing course from its prior guidelines to count so-called “dimpled” chads. *See* Dan Balz, *Bush Spurs Gore Recount Plan; Fla. Official Rejects New Tallies*, WASH. POST, Nov. 16, 2000, at A1; Don Van Natta, Jr., *Dimpled Votes Are New Hope For Democrats*, N.Y. TIMES, Nov. 22, 2000, at A1, available at <http://www.nytimes.com/2000/11/22/politics/22DISP.html?pagewanted=2>. In the Palm Beach County guidelines on counting ballots issued in November 1990, however, the County Canvassing Board made clear that “a chad that is fully attached, bearing only an indentation, should not be counted as a vote.” *See* Guidelines on Ballots With Chads Not Completely Removed, Adopted by the November 6, 1990 Canvassing Board.

The Eleventh Circuit made clear in *Roe* that changing the rules after an election to count ballots that historically had not been counted violates the Due Process Clause. *See Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). Nonetheless, this is precisely what Broward County and Palm Beach County are doing: They are engaged in a “post-election departure from [their] previous practice[s].” *Id.* at 581. This change in approach in determining whether to conduct a manual recount and, if so, how to count ballots, stands in direct conflict with

⁵ The Fourth District Court of Appeals for Florida upheld the Board’s decision not to conduct a manual recount in the *Hogan* case. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992).

the Eleventh Circuit's holding in *Roe*. Furthermore, these changes underscore the utter lack of standards in the Florida statute to guide local canvassing boards and the unconstitutional nature of the manual recounts that the Supreme of Court of Florida has approved.

C. First Amendment

Voting is expressive and associational activity protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). The arbitrary and standardless recounting regime approved by the Florida Supreme Court, however, violates the First Amendment rights of those Floridians who voted. It raises some citizens' voices above others, and drowns out still others. It distorts, and dilutes, the expression of political will that the people of Florida made on November 7—and which has been confirmed in subsequent recounts. It threatens to subvert the views of the many to those of the few, whose votes—after being reviewed according to no discernible, much less articulable, standards—are deemed by interested local officials to have more value than those cast in the rest of the State. The First Amendment cannot withstand such governmental overreaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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

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

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

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

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

Counsel for Petitioner

November 22, 2000

