No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,
Petitioner,
v.
Palm Beach County Canvassing Board, *et al*.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

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

(Additional Counsel Listed In Signature Block)

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138

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STATEMENT OF THE CASE

This case involves a decision of the Florida Supreme Court interpreting Florida's Election Code in accord with the laws and constitution of the State of Florida. Petitioner attempts to convert the state law issues decided by the Florida court into questions of federal law under 3 U.S.C. § 5, Article II, § 1, cl. 2 of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment. But in fact the Florida court applied garden variety principles of statutory interpretation to resolve ambiguities and reconcile conflicting provisions within the Florida Election Code. Even if federal law had something to say about the scope of state judicial authority to construe state legislation, which it does not, the decision below effected no "change" in Florida law "which cannot be reconciled with state statutes enacted before the election." See Pet. i (Question Presented 2).

In any event, petitioner flatly misreads the provisions of federal law on which he relies. Section 5 of Title 3 does not "require[]" the States to do anything, contrary to the phrasing of the first Question Presented, but merely offers to the states a safe harbor with respect to controversies regarding electors that might arise before Congress when the electoral votes are counted. As to the additional question framed by this Court, there can be no judicial remedy for failure to "comply" with Section 5.

Moreover, Article II, § 1, cl. 2 does not cut into the authority of state courts to review and construe state election statutes under state law and thus would not be offended in this case even if the Florida Supreme Court had made "new" law. Nothing in the Constitution's several delegations of power to the "legislatures" of the States has ever been held to limit the role of the other branches of state government in the lawmaking process, including the authority of the state courts to act as final expositors of the meaning of the statutes enacted pursuant to those delegated powers. Nor would the decision below rise to the level of a due process violation, even if its construction of Florida law were wrong. Consequently, the judgment

below should be affirmed.

1. Background. On November 7, 2000, Florida citizens cast almost 6,000,000 ballots in the general election for President of the United States. Under Florida's election law, this election's outcome would determine which slate of electors would cast Florida's twenty-five electoral votes for President. Fla. Stat. § 103.

The State Elections Canvassing Commission, which ordinarily is composed of the Governor, the Secretary of State, and the Director of the Division of Elections, is charged with certifying the results of statewide elections based on the "total number of votes cast for persons for said office." Fla. Stat. §§ 102.111(1), 102.121 (2000).[1] The State Commission bases its certification on certifications submitted by the individual election canvassing boards of Florida's sixty-seven counties.

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

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, the provisions of Florida's election law relating to recounts and certification of election results required an automatic recount of the ballots. Fla. Stat. § 102.141(4). The Election Code does not mandate any specific process for conducting this recount. Most counties simply repeated whatever process, usually a machine count, they had used to tabulate the ballots initially. Others, however, conducted manual recounts. At the end of this initial automatic recount, the margin between candidates Gore and Bush was reduced

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[1] On November 8, 2000, Florida Governor Jeb Bush removed himself from the commission. See Pet. App. at 14a n.17.

from the initially stated 1,784 votes to 300 votes.

To recheck the results, Florida law provides that counties may conduct a further manual recount to address any "error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Any candidate "may file a written request with the county canvassing board for a manual recount" "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." *Id.* § 102.166(4)(a), (b). The request must "contain a statement of the reason the manual recount is being requested." *Id.* § 102.166(4)(a).

If a county canvassing board grants a request for a manual recount, it need not initially order such a manual recount county-wide. Rather, an initial manual recount need only "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." Fla. Stat. § 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.

Id. § 102.166(5) (emphasis added).

These procedures for conducting manual recounts require that the

county canvassing board appoint counting teams of at least two electors who are members of different political parties. Fla. Stat. § 102.166(7). 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." *Id.* § 102.166(7)(a)-(b).

After the automatic statewide recount reduced the margin between Governor Bush and Vice-President Gore to 300 votes, petitioner declined to request a manual recount in any county. The Florida Democratic Party requested a manual recount in four Florida counties: Palm Beach, Volusia, Broward, and Miami-Dade. Two of those counties, Palm Beach and Broward, are parties to the instant litigation. Pursuant to those requests and the requirements of Section 102.166(4)(d), the county canvassing boards of those counties conducted a sample manual recount of one 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 a stylus into the hole next to their candidate of choice. The aim of the voting machine design is that the stylus 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 generally 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 is old or has become clogged with chads from previous voters, the ballot may only be indented, or "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 10,750 ballots.

At the conclusion of those initial recounts, each of the four county canvassing boards 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.

Concerned that it would not be able to complete the full county recount in time, the Palm Beach County Canvassing Board, pursuant to Section 106.23, sought an advisory opinion from the Division of Elections of the Florida Department of State. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that all county returns had to be received by November 14. Secretary of State Katherine Harris then issued a statement on Monday, November 13, announcing that she would not accept any county vote certifications received after 5:00 p.m. on November 14. On that date, she issued two further opinions. In one, she stated that manual recounts were authorized under Florida law only when there existed a software defect or mechanical error in the vote tabulation equipment. In the other, she asserted that undertaking statutorily authorized manual recounts would not excuse a failure to comply with the 5:00 p.m. deadline for transmitting results. Later that day, the Attorney General of Florida issued an opinion squarely disagreeing with the Secretary of State's conclusion that a recount could be authorized only on the basis of a "voting tabulation error" caused by a defect in the machine itself.

2. Procedural History of This Litigation. On November 13, 2000, Volusia County, joined later by Palm Beach County, filed an action in the Circuit Court of the Second Judicial Circuit in Leon County, seeking a declaratory judgment that the county was not bound by the November 14, 2000, deadline set by the Secretary of State for submitting certified vote totals and requesting an injunction

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Absent a manual recount, the votes reflected on these ballots would not be counted in the election.

prohibiting the Secretary from ignoring election returns resulting from manual recounts authorized by Florida law but submitted after that date. Candidates Gore and Bush both intervened. On November 14, the Leon County Circuit Court held that, although the county canvassing boards were required in the first instance to comply with the statutory deadline, they could file supplemental returns reflecting the outcome of hand recounts. Pet. App. at 44a-50a. The court enjoined the Secretary against preemptive rejection of supplemental certificates, admonishing her that she could not "decide ahead of time what late returns should or should not be ignored," but was instead required "to exercise her discretion" and "consider[] all attendant facts and circumstances" before deciding whether to accept revised or amended returns. Pet. App. at 48a-50a. The counties appealed this first order to the First District Court of Appeals.

In response to the Leon County Circuit Court's order, Secretary Harris issued a directive requiring that all counties intending to submit late returns inform her of that fact and of the reasons for the late returns by 2:00 p.m. on Wednesday, November 15. Four counties did so. The Secretary again rejected the amended returns and announced that she would rely on the earlier certified totals for the four counties. 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, the Leon County court ruled that the Secretary's actions had not violated the court's injunction. Pet. App. at 42a-43a. The Florida Democratic Party and Vice-President Gore appealed this second order, and the First District Court of Appeals certified both appeals for immediate review by the Florida Supreme Court.

3. The Florida Supreme Court. On Tuesday, November 21, 2000, after full briefing and oral argument, the Florida Supreme Court issued a unanimous opinion interpreting the Florida Election Code and pointedly noting that "[n]either party has raised as an issue

on appeal the constitutionality of Florida's election laws." Pet. App. at 10a n.10. The court interpreted the Florida Election Code to require county canvassing boards to submit their returns to the Secretary of State by 5:00 p.m. of the seventh day following the election, pursuant to Section 102.111. *Id.* But the court eliminated the resulting incoherence in the statutory scheme by further holding that the county boards may also submit subsequent amended returns to reflect statutorily authorized recounts under Section 102.166, which the Secretary may reject only if they come so late as to preclude a candidate, elector, or taxpayer from contesting the certification of an election pursuant to Section 102.168, or to prevent Florida voters from participating fully in the federal electoral process pursuant to 3 U.S.C. §§ 1-10. Pet. App. at 33a n.55.

The court reached this result by applying familiar principles of statutory construction to resolve the textual ambiguities and gaps in the Florida Election Code, guided by an appreciation of the importance of the right to vote under Florida's constitution and laws. The court began by explaining that, "[w]here 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." Pet. App. at 23a. "[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.* at 24a.

The ambiguity identified by the state supreme court arose from two Florida statutes that 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 5:00 p.m. of the seventh day following the election and that any missing counties "*shall* be ignored." (Emphasis added). By contrast, Section

102.112(1), which the Florida legislature enacted subsequently, provides that any county returns not received by 5:00 p.m. on the seventh day "*may* be ignored." (Emphasis added).

Further, Section 102.166 (the "protest" provision) grants a candidate the statutory right to request a manual recount at any point prior to certification by a canvassing board, and such action can lead to a full recount of all votes in the county. The Florida Supreme Court observed that "logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days." Pet. App. at 21a. The court held that the protest provision thus conflicted with any reading of Section 102.111 that imposed an unalterable deadline. "For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by * * * 5:00 p.m. of the seventh day following the election." Pet. App. at 21a.

The Florida Supreme Court applied four traditional canons of construction to resolve the ambiguity of the Election Code: "First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general." Pet. App. at 24a n.42 (citing *State ex rel. Johnson* v. *Vizzini*, 227 So. 2d 205 (Fla. 1969)). The court found that Section 102.111 (the "shall" provision) addresses the general makeup and duties of the Elections Canvassing Commission, and "*only tangentially* addresses the penalty for returns filed after the statutory date." *Id.* at 25a. Section 102.112 (the "may" provision), by contrast, "constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter * * * ." *Id.* (Emphasis added).

"Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute."

Pet. App. at 25a (citing *McKendry* v. *State*, 641 So. 2d 45 (Fla. 1994)). Section 102.112 ("may") was enacted in 1989; Section 102.111 ("shall") was enacted almost four decades earlier, in 1951. *Id.*

"Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." Pet. App. at 26a. Section 102.112 contains a detailed provision authorizing the assessment of fines against the members of a dilatory county canvassing board. "If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless." *Id.* "For example, if a Board simply completed its count late and the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines." *Id.* at 24a-25a.

"Fourth, related statutory provisions must be read as a cohesive whole." Pet. App. at 25a (citing *Sun Ins. Office, Ltd.* v. *Clay*, 133 So. 2d 735 (Fla. 1961)). The court held that reading Section 102.111 as an iron-clad deadline would conflict with the protest right provided in Section 102.166, because in many cases a full manual recount obviously could not be completed by 5:00 p.m. on the seventh day after the election. *Id.* at 26a. In addition, overseas ballots cannot be counted until after the seven-day deadline has expired. *Id.* at 27a.

Based on these principles, the court held that the permissive language of Section 110.112 necessarily superseded the apparently mandatory language of Section 102.111. See Pet. App. at 2a n.1. The court explained that "we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline 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.* at 37a (emphasis added).

Having determined that the Secretary was permitted to accept returns filed after the deadline, and in light of the importance of the right to vote under the Florida Constitution, Pet. App. at 29a, the court also determined the scope of the Secretary's discretion to "ignore" returns submitted after the seven-day period for initial certification.[3] The court concluded that, under the statutory scheme, the manual recounts should be "allowed to proceed in an expeditious manner." *Id.* at 32a. It noted that – as all must concede – "[i]gnoring the county's returns is a drastic measure," *id.*, and it held that the Secretary's discretion to reject "amended returns that would be the result of ongoing manual recounts" provided for by state law, *id.* at 34a, was limited to "returns * * * submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal election process." *Id.* at 35a.

The court invoked its standard equitable powers to ensure the counting of all lawfully cast votes while allowing adequate time to satisfy Florida's contest provisions and federal electoral college deadlines. Pet. App. at 37a-38a. 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 had

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[3] In fact, the Secretary admits both that she has discretion not to reject untimely certifications and that she does not apply that deadline to overseas absentee ballots. Although the Secretary contends that she is required to accept such ballots for ten days after the election because of federal law, both Florida law and federal law require that absentee ballots be received by the date of the election. See Fla. Stat. § 101.67; 42 U.S.C. §§ 1973aa-1, 1973ff-2. See note 22, *infra*.

requested such an opportunity, *id.* at 38a n.56, the court set deadlines designed to protect the interests of candidates in contesting certification, and the interests of Florida's voters in being able to participate in the electoral college process. Specifically, the court ruled that the Secretary should accept amended certificates reflecting manual recounts if they were filed by 5:00 p.m. on Sunday, November 26.

On November 22, the Miami-Dade County Canvassing Board announced that it would not conduct a manual recount because it could not comply with the November 26 deadline. On November 26, the Secretary of State denied a request by the Palm Beach County Canvassing Board for an extension until the morning of November 27 to complete its manual recount. Palm Beach County then submitted the results of its partially completed manual recount, which the Secretary refused to accept. At approximately 7:30 p.m. on November 26, 2000, the Secretary of State certified that George W. Bush had received 2,912,790 votes in Florida and Al Gore, Jr., 2,912,253 – a difference of 537 votes.

SUMMARY OF ARGUMENT

This dispute over the Florida Supreme Court's interpretation of the Florida Election Code is a state-law case that, despite its undoubted importance, does not belong in federal court. The process legislatively adopted by Florida for resolving disputes regarding the appointment of electors includes state judicial review. Principles of federalism counsel strongly against interference by this Court, or any federal court, in that process. The federal claims purportedly presented by petitioner are insubstantial.

I. The entire petition rests on intemperate and insupportable mischaracterizations of the Florida Supreme Court's decision as usurping the role of the state legislature. In fact, the Florida court played a familiar and quintessentially judicial role: it interpreted Florida law "us[ing] traditional rules of statutory construction to

resolve [statutory] ambiguities." Pet. App. at 37a. Hence, this case does not in fact present the first two questions framed by petitioner.

II. Even if the Florida Supreme Court's decision could be said to have "enact[ed]" new law (first Question Presented) or to be irreconcilable "with state statutes enacted before the election was held" (second Question Presented), the court's decision did not violate 3 U.S.C. § 5 for the simple reason that Section 5 does not impose any mandate or requirement on the States – nor could it do so consistent with Article II, § 1 or settled principles of federalism. Properly understood, Section 5 merely offers the States a safe harbor with respect to a hypothetical controversy that has not yet arisen – a dispute over electors that might arise before Congress when the electoral votes are counted. Accordingly, apropos the additional question framed by this Court, there can be no judicial remedy for failure to comply with Section 5.

III. In any event, the Florida Supreme Court's decision complies with 3 U.S.C. § 5. Section 5 offers a safe harbor to determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. Florida meets this test because it has long provided, under laws enacted prior to November 7, 2000, for judicial resolution of disputes regarding questions of state law, including those relating to the appointment of presidential electors.

IV. The Florida Supreme Court's decision also is entirely consistent with Article II, § 1, cl. 2 of the United States Constitution, which provides that "Each State shall appoint" electors "in such Manner as the Legislature thereof may direct." This provision neither displaces the state judiciary nor forbids it from undertaking statutory interpretation pursuant to state law. Thus, where a state legislature has enacted an election code (as Florida has), nothing in Article II, § 1, cl. 2 prevents the state courts from playing whatever interpretive

role state law grants to them.

V. Finally, nothing in the Florida Supreme Court's decision raises due process concerns of "retroactive" changes in state law. To the contrary, due process is furthered by ensuring, as the Florida Supreme Court has attempted to do, that as many votes as possible are fairly and accurately counted.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S DECISION DID NOT ABROGATE EXISTING FLORIDA STATU-TORY LAW.

Petitioner's claims – under 3 U.S.C. § 5, Article II, and the Due Process Clause – are all premised on his thesis that the Florida Supreme Court retroactively altered the Florida legislature's scheme for counting ballots cast in the presidential election. As we will demonstrate below, these provisions of federal law are not bases for invalidating a construction of state law by the state courts with which petitioner, or even this Court, disagrees. Petitioner's repeated attempts to persuade this Court that the Florida Supreme Court misapplied state law, *e.g.*, Reply Br. On Pet. for Certiorari [hereinafter "Pet. Rep."] at 6 (state court decision "deviate[d]" from state law), accordingly, cannot state the basis for a federal claim. But before exploring the weakness of petitioner's specific claims, we address the assumption that underlies all of petitioner's Questions Presented – namely, that the decision of the Florida Supreme Court somehow created a "new legal rule" that amended Florida law in "retroactive" fashion. That is simply not so. The decision by the Florida Supreme Court was an ordinary exercise in statutory interpretation, admittedly dealing with an important and hotly contested issue, but one governed by state laws that long antedate this election. The decision therefore could not be the sort of "new legal rule" that could possibly offend the Due Process Clause or

Article II, § 1, cl. 2, or take Florida out of the safe harbor of 3 U.S.C. § 5.

Whether one agrees or disagrees with the decision as a matter of Florida law, it cannot be denied that the court applied ordinary principles of judicial interpretation to a complex statutory scheme. The state supreme court addressed the seven-day deadline for filing certified results set out in Sections 102.111 and 102.112, seeking to resolve a patent conflict between one provision saying that returns filed after seven days "shall" be ignored and another saying that those returns "may" be ignored. Reading Section 102.111 to create an absolute, inflexible deadline, the court held, would do violence to Section 102.112, which is the later-enacted, more specific provision addressing both the deadline for filing returns and the penalties for filing returns thereafter.[4] It would be incorrect as a matter of statutory interpretation to override Section 102.112 with the earlier, more general provision of Section 102.111, which is directly concerned not with the deadline for filing returns but rather with establishing the general makeup and duties of the Elections Canvassing Commission. Further, reading Section 102.111 as an absolute, exceptionless deadline would render meaningless, said the court, the detailed provision in Section 102.112 authorizing the assessment of fines against the members of a dilatory county canvassing board. Such a reading would also conflict with the statutory protest right provided in Section 102.166, because in many cases a full manual recount simply cannot be completed by 5:00 p.m. on the seventh day following the election. And it would conflict with the Secretary of State's discretion to accept late-filed returns. The court accordingly gave credence to the more specific, more recently

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[4] Petitioner's view that Section 102.112 is restricted to the circumstances of *State ex rel. Chappell* v. *Martinez*, 536 So. 2d 1007 (Fla. 1988) (see Pet. at 14 n.3), is belied by the very text of Section 102.112, which is obviously not so limited. In any event, the Florida Supreme Court's decision finding this state-law argument unpersuasive is hardly extraordinary.

enacted provision, utilizing canons of construction certainly familiar to and routinely relied on by this Court. See Pet. App. at 24a-25a.

The court relied upon the plain text of the statute, and in particular its statement that the "official return of the election" must include "write-in, absentee and manually counted results." Pet. App. at 27a-28a. Accordingly, the court concluded that, although the county canvassing boards *are* required to submit their returns by 5:00 p.m. on the seventh day following the election, the Secretary was *not* required to ignore supplemental certifications after that date. Rather, the court held, under Section 102.112, she was merely *permitted* to ignore supplemental certifications filed after that date. *Id.* at 28a.

The court then addressed the scope of the Secretary's discretion to ignore such supplemental certifications. It concluded, in light of the state constitution[5] and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was limited. Pet. App. at 28a-34a. It

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[5] The Florida Constitution has long been interpreted as guaranteeing vigorous protection of the right to vote. See, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So.2d 720, 725 (Fla. 1998) (recognizing that the "will of the voters" is paramount); *State ex rel. Chappell* v. *Martinez*, 536 So.2d 1007 (Fla. 1988) (because right to vote is guaranteed by constitution, mere technical noncompliance cannot justify a refusal to count validly cast votes); *Boardman* v. *Esteva*, 323 So. 2d 259, 263 (Fla. 1975) ("[t]he right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard"); *Barancik* v. *Gates*, 134 So. 2d 497, 499-500 (Fla. 1961) (right to vote is the "keystone in the arch of liberty."); *Special Tax Sch. Dist.* v. *Florida*, 123 So. 2d 316, 323 (Fla. 1960) (election statutes must be construed in favor of the voter); *State ex rel. Titus* v. *Peacock*, 170 So. 309 (Fla. 1936) (ballots cast by qualified voters not to be thrown out if capable of being given proper effect); *State* v. *Gibbs*, 13 Fla. 55, 7 Am. Rep. 233 (1869) (when legal returns are received by state board of canvassers at any time before canvass is complete, which could have been counted if received on the day appointed by law, those votes must be counted).

found that she lacked discretion to ignore supplemental certifications of returns that are submitted late solely "because the Board is acting in conformity with other provisions of the Code," see *id.* at 36a, unless the returns are submitted too late for Florida to make the federal December 12 deadline.

The act of interpreting and reconciling ambiguous or apparently conflicting statutory provisions is an exercise with which this Court is thoroughly familiar and has never been regarded as the "making" of law exceeding the bounds of the judicial role.[6] See, *e.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 534 (1998) (examining "how Congress would want the conflicting statutory provisions to be harmonized"); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944) (confronting the conflicting provisions of a District of Columbia statute and deferring to the conclusion of the United States Court of Appeals for the District of Columbia); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543 (1940) (observing that the Court often "has followed th[e] purpose, rather than the literal words" of legislation (footnote omitted)); *J.C. Penney Co.* v. *Commissioner*, 312 F.2d 65, 66 (CA2 1962) (Friendly, J.) ("[I]t is as clear as anything ever can be that Congress did not mean what in strict letter it said").[7]

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[6] "Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947). Thus, Judge Learned Hand was able to reject administrative interpretation and subsequent legislative action in construing a disputed portion of the Selective Training and Service Act of 1940, ch. 720, § 8(b), 54 Stat. 885, 890 (expired 1947), because "upon the courts rests the ultimate responsibility of declaring what a statute means." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (CA2), *aff'd*, 328 U.S. 275 (1946).

[7] The Florida Supreme Court's interpretation of Florida's election law is no different from this Court's interpretation of many federal statutes, interpretations that have often become the target of the rejected criticism that the Court is "making" law. See, *e.g.*, *Green* v. *Bock Laundry Mach. Co.*, 490

The text-oriented canons of construction on which the Florida Supreme Court relied are garden variety interpretive rules "designed as short-cuts to the discovery of the legislature's 'true' intent."[8] They are "commonsensical"[9] linguistic and syntactic guides for finding meaning in statutory text as illuminated by "principles that involve predictions as to what the legislature must have meant, or probably

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U.S. 504, 510 (1989); *id.* at 527-28 (Scalia, J., concurring); *id*, at 531-32 (Blackmun, J., dissenting); *FDA* v. *Brown & Williamson Co.*, 120 S. Ct. 1291, 1306 (2000) ("Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction."); *id*. at 1316-25 (Breyer, J., dissenting); *West Virginia Univ. Hosps.* v. *Casey*, 499 U.S. 83, 93-97 (1987); *id*. at 115 (Stevens, J., dissenting); *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1661 (2000) (interpreting statute in context of overall statutory scheme and finding Secretary's interpretation unreasonable); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546-48 (1994); *id.* at 549-57 (Souter, J., dissenting); *Chisom* v. *Roemer*, 501 U.S. 380, 395-400 (1991); *id.*, at 404-09 (Scalia, J., dissenting); *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 698-704 (1995); *id.* at 709-11 (O'Connor, J., concurring); *id*. at 715-21 (Scalia, J., dissenting); *McNally* v. *United States*, 483 U.S. 350, 355-60 (1987); *id*. at 361 (Stevens, J., dissenting).

[8] Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 743 (1992). See generally William N. Eskridge, Jr., and Phillip P. Frickey, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634-716 (2d ed. 1995); William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION (1994); Otto J. Hetzel et al., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 389-91, 622-702 (2d ed. 1993); Cass R. Sunstein, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 150-57 (1990).

[9] Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26 (1997). See also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 ("[T]he 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences * * * . [O]ne of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce * * * results less compatible with the reason or purpose of the statute.").

meant, by employing particular statutory language."[10] Such canons effectuate the legislation's purpose; they do not create new law. Hence, this Court has recognized that employing these canons does not constitute forbidden judicial lawmaking, for they are merely "part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dept of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (per Scalia, J.); *United States Dept of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (noting assumed legislative familiarity with canons); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) ("canons of construction are no more than rules of thumb that help courts determine the meaning of legislation").

Nor, of course, were these canons of construction newly minted by the Florida Supreme Court. Long before the instant election, that court was established as the supreme expositor of Florida law. See, *e.g.*, *Dade County Classroom Teachers Ass'n* v. *Legislature of the State of Fla.*, 269 So. 2d 684, 686 (Fla. 1972) ("The doctrine of judicial authority and responsibility was early established in the historic case of *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)."). Accordingly, the Florida Supreme Court has been the entity charged by the people of Florida with the task of interpreting ambiguous or conflicting provisions of the Florida Election Code. For example, in *State ex rel. Drew* v. *McLin*, 16 Fla. 17 (1876), the Florida Supreme Court construed, in the context of a post-election contest, the power of the Florida Board of State Canvassers under an 1868 statute and issued a writ of mandamus compelling the state board to meet and include votes of certain counties. Similarly, in *State ex rel. Knott* v. *Haskell*, 72 So. 651 (Fla. 1916), the state supreme court granted a writ of mandamus to require county election

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[10] Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

commissioners to perform a recount in the primary election for the Democratic gubernatorial nominee.[11] In *State ex rel. Peacock* v. *Latham*, 170 So. 475, 478 (Fla. 1936), the court held that a statute setting a twenty-day deadline for the submission of names of nominated candidates did not apply when election officials had failed to properly count and return the ballots cast in the primary election.[12]

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[11] The court rejected a statutory construction under which a recount would have been precluded once the ballots had been delivered in a sealed ballot box to the Supervisor of Registration. 72 So. at 659. The court considered several provisions of the Election Code and concluded that "[t]he general election law contains no evidence whatever of a legislative purpose to make the first determination of a board of inspectors to be forever final, notwithstanding such determination may have been induced by fraud or reached by disregarding the requirements of the statute or arrived at by the grossest and most flagrant errors, mistakes and misconception of duty, and, in the absence of such legislative purpose, we think that it would be the duty of the court in a proper case by writ of mandamus to order the inspectors to make their returns and certificates speak the truth if by any possibility it could be accomplished." *Id.* at 660.

[12] "The statute involved here must be considered in paria materia with other statutes governing the holding of Primary Elections * * * . A deviation from the proper performance of the duties of the election officials, as in this case, may so frustrate the contemplated orderly procedure as to make inapplicable provisions of this statute which would otherwise be held to be mandatory." 170 So. at 478. "The duties of a State Canvassing Board of Primary Elections are * * * ministerial. Under the Primary Election Law of this State the vote actually cast determines the rights of the candidates. If the vote actually cast is through error or fraud, by accident or design incorrectly returned so that a candidate may be deprived of his rights it is difficult to understand how it can reasonably be urged that no power exists to correct the error." *Id.* at 479. See also *Beckstrom* v. *Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that election code prohibited county practice of re-marking ballots for optical scanner, "even though the process was widely used, recommended by the manufacturer's representative, and approved by the state Division of Elections"); *State ex rel. Chappell* v. *Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that seven-day deadline of Section 102.111 was satisfied when county transmitted election results telephonically to Secretary of State within seven days after the election, even though vote counts were

In *State ex rel. Andrews* v. *Gray*, 125 Fla. 1 (1936), the court held that the state judiciary retains the power to reconcile apparently conflicting election statutes by "supplement[ing] the intendments of the positive words, fill[ing] in the vacant spaces, and * * * correct[ing] uncertainties and harmoniz[ing] results with justice through a method of judicial decision." *Id.* at 18. The court observed, "You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it." *Id.* at 19-20. See also *Advisory Opinion to Governor*, 157 Fla. 885, 889, 27 So. 2d 409 (1946) (judicial interpretation of laws governing replacement of Senator who died in office necessary where statutes produced only "hopeless confusion"); cf. *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) ("I am not so naive (nor do I think our forebearers were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it – discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.")

Indeed, the Florida legislature has itself plainly acquiesced in state judicial resolution of election disputes in presidential elections. In Section 102.171, it provided that the legislature, not the courts, should resolve disputes involving elections of state legislators. By contrast, it assigned to the courts the duty of resolving all other election disputes, including those arising in presidential elections. See Fla. Stat. § 102.168(1).

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not received in writing prior to deadline); *State ex rel. Fair* v. *Adams*, 139 So. 2d 879, 883-84 (Fla. 1962) (interpreting state statutes to determine that a ballot containing the name of the same individual as a candidate for several offices was illegal, while conceding that "neither our constitutional prohibition nor statutory oath requirement expressly precludes a candidate from seeking numerous offices"); *McConihe* v. *State ex rel. McMurray*, 17 Fla. 238 (1879) (ordering an election to be held after the time prescribed by statute for the holding of the election had passed).

Nor is it relevant that the Florida Supreme Court was not asked to resolve the particular ambiguities and conflicts within the Florida Election Code at issue here until after November 7. It is quite typical for interpretations of state electoral law to be made after the election has been held. See, *e.g.*, *State ex rel. Peacock* v. *Latham*, 170 So. 2d 475, 478 (Fla. 1936); *State ex rel. Knott* v. *Haskell*, 72 So. 651 (Fla. 1916); *State ex. rel. Drew* v. *McLin*, 16 Fla. 17 (1876). Indeed, most disputes about the meaning of a law arise only after an event takes place whose significance under that law is contested. State courts as well as attorneys general are routinely called upon to interpret and construe state election laws to resolve post-election disputes.[13] Permitting state courts to interpret their laws – in ways that will, by definition, disappoint one or another litigant – does not violate either 3 U.S.C. § 5, even under petitioner's strained reading, or the federal Constitution. At bottom, petitioner's contention is that the Florida Supreme Court committed an error in interpeting state law. This argument does not describe post-election judicial legislation.

Although petitioner's attack on the supposed usurpation of lawmaking authority by the Florida Supreme Court is, to be sure, hitched to the wagon of Article II and Title 3, its basic thrust reaches well beyond those sources of law. Not to rebuff that attack decisively would cast a shadow of illegitimacy over much of the indispensable and wholly lawful work of this Court and of state and federal courts throughout the nation.

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[13] See, *e.g.*, *State ex rel. Stephens* v. *Marsh*, 221 N.W. 708 (Neb. 1928); *State ex rel. Dahlman* v. *Piper*, 69 N.W. 378 (Neb. 1896); *Woods* v. *Sheldon*, 69 N.W. 602 (S.D. 1896); Miss. Op. Att'y Gen. No. 1999-0697 (Dec. 22) 1999 WL 1333481 (1999); Tex. Op. Att'y Gen. No. JC-0293, 2000 WL 1515422 (Oct. 11, 2000); Ark. Op. Att'y Gen. No. 94-366, 1994 WL 702001(Nov. 21, 1994).

II. TITLE 3, SECTION 5 PROVIDES ONLY A RULE FOR DETERMINING WHETHER A STATE'S ELECTORS SHALL BE SUBJECT TO CHALLENGE BEFORE CONGRESS; IT DOES NOT PROHIBIT ANY ACTION OR DECISION BY A STATE.

Petitioner argues that the decision of the Supreme Court of Florida "violates" the "federal mandate" contained in 3 U.S.C. § 5, which, he has represented to this Court, "requires States to resolve any disputes over the appointment of electors by exclusive reference to state laws 'enacted prior to' election day." Pet. Rep. at 2 (quoting 3 U.S.C. § 5). This Court has accordingly directed the parties to brief and argue the question of what the "consequences [would be] of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5." See *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 24, 2000) (Order granting certiorari).

A. SECTION 5 IS A SAFE HARBOR OPTION, NOT A MANDATE.

As its plain language reveals, 3 U.S.C. § 5 does not contain any "mandate" or legal prohibition; it does not "require" anyone to do anything. Instead, it purports to set out a rule by which the Houses of Congress shall determine which electors for President of the United States from a particular State will be entitled to have their votes counted if more than one return purporting to contain the electoral votes of that State is received by the President of the Senate. Tellingly, the State's own legislature, appearing as an *amicus* before this Court, has rejected petitioner's reading of Section 5.

The statute provides that "if" certain rules are followed by a State in making its "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State * * * such determination * * * 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. The regulation "hereinafter" to which the statute refers is 3 U.S.C. § 15, which announces a rule by which the Houses of Congress will decide which electors' votes to count when the President of the Senate receives "more than one return or paper purporting to be a return from a State." 3 U.S.C. § 15. In such a case, Section 15 provides that "those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made." *Id.*

The language of 3 U.S.C. § 5 thus provides a safe harbor for the State's "final determination" of who its electors are, protecting them from subsequent challenge before the Houses of Congress if that final determination is made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5. It does not *require* the States to follow any procedure with respect to determining who its electors are, nor does it prohibit any such procedure. But it does contemplate the exact course of events followed here – a law set before election day, and the resolution of those disputes occurring after election day through "judicial" "methods" under that law.

The legislative history of 3 U.S.C. § 5 confirms this understanding. That history establishes conclusively that the statute's only purpose and effect is to provide the States with a way to guarantee that a State's electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment.

Both Sections 5 and 15 of Title 3 were a direct reaction to the Hayes-Tilden debacle of 1877 in which multiple sets of presidential

electors from Florida, Louisiana, and South Carolina claimed legitimacy and sought to have Congress count their votes. Given that the electoral college tally was exceedingly close (Samuel Tilden needed only a single electoral vote to prevail), the choice would determine the outcome of the election. But federal law at that time did not specify how such conflicting claims should be resolved, a circumstance that raised the realistic prospect of renewed civil war. The matter was referred to a commission that included five Justices of this Court and was ultimately resolved through a compromise in which Democrats acquiesced in the counting of votes in favor of Hayes in exchange for a promise that federal troops supporting Republican governments in South Carolina and Louisiana would be withdrawn, allowing Democratic governments to be seated, and effectively ending Reconstruction.[14]

Congress debated for more than a decade how to avoid a reprise of the Hayes-Tilden incident. The solution adopted, as contemporary commentators recognized, was to permit the States themselves to adopt procedures that would ensure that their electors were properly identified. Thus, under Section 5 as enacted, "Congress does *not* command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but *simply holds out an inducement for them so to act*." John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q.

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[14] Congress recognized that, because a similar conflict over electors could "affect peace or war, the existence of the United States, the election of a President," 17 CONG. REC. 1023 (Feb. 1, 1886) (statement of Sen. Sherman), it was essential to take "this question out of the political cauldron." 15 CONG. REC. 5079 (June 12, 1884) (statement of Rep. Browne). See generally Paul L. Haworth, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906); Keith I. Polakoff, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973); C. Vann Woodward, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

633, 635 (1888) (emphasis added); see also Haworth, *supra*, at 305-06 (law "provides that a state may finally determine every contest connected with the choice of electors, but that such determination must be made in accordance with a law passed before the electors are chosen and that the decision must have been made at least six days before the meeting of the electors. Where such a determination has been made, it must be accepted * * * ."). The legislative history specifically reflects a recognition that a State was free not to take advantage of Section 5's safe harbor, with the only implication being that the State's electors would be subject to challenge in the Congress. According to the Senate Report on the bill published in the Congressional Record:

> In those States where a tribunal has been established, under the laws thereof, for the determination of contests concerning the appointment of electors therein, and such tribunal has decided what electors were duly appointed, the determination of the State tribunal shall be conclusive. * * * Congress having provided by this bill that the State tribunals may determine what votes are legal coming from that State, and that the two Houses shall be bound by this determination, *it will be that State's own fault if the matter is left in doubt.*

18 CONG. REC. 30 (Dec. 7, 1886) (emphasis added) (report by Select Committee on the Election of President and Vice-President, accompanying Senate Bill 9).[15]

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[15] See also, *e.g.*, 17 CONG. REC. 867 (Jan. 25, 1886) (statement of Sen. Morgan) ("If the States will not dutifully exercise their own powers, so that their rights can not be abridged, they can not justly complain if the two Houses, [having] met to count their votes, are unable to agree as which of two sets of electors are the rightful representatives of the electoral powers of such States. If the vote is lost in such cases, the fault is wholly with the State."); *id.* at 1023 (Feb. 1, 1886) (statement of Sen. Hoar) ("The bill says, therefore, that in case the State declines to appoint any other tribunal and chooses to

Indeed, supporters of the bill took great care to address and refute without contradiction precisely the construction of Section 5 that petitioner now erroneously presses 110 years later. These supporters explained that the statute could not result in the invalidation of a State's votes but provided only a safe harbor against a challenge in Congress to the State's slate of electors. As Representative Herbert explained:

> [T]he Senate bill does not undertake to interfere in any manner whatever * * * with the right of a State absolutely to choose its electors * * * . The Senate bill does not interfere with the election at all nor with the right of election. It simply undertakes to lay down a mode in which it shall be ascertained who has been chosen. That is all. It undertakes simply to legislate with reference to *the rules of evidence by which it shall be ascertained what the State has done, what electors the State has appointed*. * * * [T]he power of the voters is absolute to choose whom they please, but this absolute power of election is not at all inconsistent with the right resting here to decide who has been chosen. *You must separate between the right to choose and the right to decide who has been chosen*.

15 CONG. REC. 5547 (June 24, 1884) (emphasis added). And Representative Eden made virtually the identical point:

> The States are entirely free under the Constitution to adopt the mode of appointment of electors that the legislatures thereof may prescribe. This bill only provides that if the States shall have settled all controversies relative to the appointment of electors, within a given time before the meeting of the electors and by a tribunal of its own selection, the votes of the electors thus

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leave it on the governor's certificate, we will leave it where the State has left it.").

> appointed and regularly given shall be counted. If any State neglects to use the means within its power to identify who are its legally appointed electors, the two Houses of Congress, when in joint meeting to count the electoral vote, are to resort to other provisions of the bill to determine who are the legally appointed electors of the State. *The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State*.

18 CONG. REC. 75 (Dec. 9, 1886) (emphasis added).[16] There is no question that Congress fully understood and embraced this understanding of Section 5. Burgess, *supra*, at 637 ("The majority of the House was however finally made to comprehend that this provision was no interference by Congress with the right of the states to appoint their electors in such manner as they might determine, but was only a notice to the states as to what evidence Congress would accept from a state as *conclusive* in case a contest should arise in that body concerning the counting of the electoral vote of a state." (emphasis in original)).[17]

Petitioner's contrary rendition of the legislative history, see Pet. at 12-13 and Pet. Rep. at 2, rests on a total misreading of a statement by one member of the House. In the remarks quoted by petitioner, Representative Cooper merely addressed opponents'

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[16] See also, *e.g.*, 17 CONG. REC. 1060-61 (Feb. 2, 1886) (statement of Sen. Teller) ("But there may be, and possibly will be, times when it may be necessary to determine what the State has settled, or rather, to put it more properly, to determine which is the State, whether it is the people who come here represented by one man as governor or another, when there is a dual State government. It is then, and then only, * * * that there can be any inquiry at all * * * .").

[17] See also, *e.g.*, 17 CONG. REC. 1020 (Feb. 1, 1886) (statement of Sen. Hoar) ("As far as possible this bill remands everything to the State, and simply gives a decisive weight and power to certain official action of the State itself * * * .").

"object[ion] * * * to the phrase 'enacted prior to the day,'" asserting that it was essential that the state "legislature [not] be permitted to meet concurrently with the contesting electors and provide a method of deciding the contest at the time the contest is proceeding." 18 CONG. REC. 47 (Dec. 8, 1886**)**. But Representative Cooper never suggested that the statute would, as petitioner supposes, invalidate the selection of electors made under law enacted after the date of the election, or permit this Court to strike down whatever state action had allegedly taken the state outside the statute's safe harbor. To the contrary, he explained that the bill merely addressed Congress's determination of a State's electors and, indeed, flatly *rejected* the claim that Section 5 could result in the invalidation of a State's votes:

> [N]obody claims that the Senate and the House have the right to say that the vote of any State shall be rejected. But they have a right, and as I understand the matter, it is their duty, to ascertain whether a State has voted or not, and ascertain whether the vote that has been deposited under the forms of law, with the proper officer, is in fact the lawful vote of a State. It is, as has been already said, a question of identity, and these two assembled bodies, the Senate and the House of Representatives, have the right, and have the duty imposed upon them, to see to it that the votes counted are in fact the votes of the States.

Id. at 48.[18]

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[18] As those who adopted it recognized, if 3 U.S.C. § 5 *did* purport to bind the States as petitioner suggests, it would run afoul of Article II, which vests the States, and not the federal government, with exclusive authority to determine the "Manner" in which the Electors of a State shall be appointed. U.S. Const. art. II, § 1, cl. 2. Properly construed, Section 5 does not abridge that provision because its framers took care to ensure that, although it might create an incentive for a State to adopt a particular system for deciding who its lawful electors were to be, the provision does not impose *any* requirements upon the States.

B. ANY READING OF SECTION 5 AS A MANDATE TO THE STATES WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS UNDER ARTICLE II AND SETTLED PRINCIPLES OF FEDERALISM THAT ARE PROPERLY AVOIDED BY READING IT AS A SAFE HARBOR.

If there remains any ambiguity about the appropriate reading of Section 5, it should nonetheless be interpreted as only a safe harbor in order to avoid the serious constitutional questions that would be raised by reading it as a mandate to the States as petitioner urges. First, such a reading would raise serious constitutional questions under Article II. Article II delegates to the state legislatures the determination of the "manner" by which the State shall appoint presidential electors. Article II reserves no power to the Congress to override the States' determination of the manner of appointment of electors, providing only for its determination of the time on which they are chosen and a uniform day on which they shall vote. This stands in pointed contrast to Article I, Section 4, which delegates authority in the first instance to the state legislatures to determine the time, place and manner of congressional elections, but expressly reserves to Congress the power to "make or alter" such regulations.

Even if Congress has, by virtue of Article II and the Necessary and Proper Clause of Article I, Section 8, cl.18, the power to prescribe rules for its own determination of how to "count" the votes of the electors, and such power encompasses the power to enact 3 U.S.C. § 5, Congress would arguably exceed its powers if it were to make any law respecting any State's own determination of the manner of selecting its own electors. The framers' express omission from Article II of any congressional override power comparable to that provided for in Article I plainly suggests, by negative implication, that Congress lacks any such power. Where the framers wished Congress to have the power to override the States as to election methods in federal elections, they explicitly provided it. Omission of

such a power from Article II suggests none was intended. Reading Section 5 of Title 3 as a safe harbor rather than a mandate avoids the serious question of whether that section exceeds Congress's delegated authority.

Second, petitioner's reading of Section 5 as preempting a State's own choice of procedures for selecting electors raises serious constitutional questions under settled principles of federalism. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). A congressional attempt to rearrange the constitutional structure of state government – for example, by purporting to preclude judicial involvement in state election disputes that the state has sought through its own constitution and laws to provide – is one of the few sorts of intrusion upon state sovereignty that might well be unconstitutional even after this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See *id.* at 556 (citing *Coyle* v. *Oklahoma*, 221 U.S. 559 (1911)) (invalidating a congressional attempt to relocate a state capital).

Construing Section 5 to permit but not require States to avail themselves of its safe harbor avoids any such intrusion upon the State's own internal allocation of power and hence upon its fundamental attributes of sovereignty. At a minimum, this Court has required congressional intent to be quite clear before it may upset the usual constitutional balance of federal and state powers. See *id.*; *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984). Section 5 does not set forth a mandate with such clarity and accordingly should be construed in the manner most favorable to the preservation of Florida's right to structure its own internal separation of powers as it sees fit – namely, as a safe harbor that allows but does not require any state to conform to the procedures set forth in Section 5.

C. A DETERMINATION BY THIS COURT THAT THE DECISION BELOW DID NOT "COMPLY" WITH THE PROVISIONS OF SECTION 5 THUS CANNOT LEAD TO A JUDGMENT OF REVERSAL.

A determination by this Court that the decision of the Florida Supreme Court did not "comply" with 3 U.S.C. § 5 would not support a reversal of the judgment below. Because the statute does not require the States to do anything, a failure to meet the standard set out in the statute is not a ground for reversal. At most, the consequence of such a determination by this Court would be to render the safe-harbor provision inapplicable, so that Florida's selection of electors might not be "conclusive" in the event of a dispute before Congress about its Electors pursuant to 3 U.S.C. § 15.[19]

III. THE FLORIDA SUPREME COURT DECISION SATISFIES THE CONDITIONS OF THE "SAFE HARBOR" PROVISION OF SECTION 5.

In any event, the Florida Supreme Court decision was fully consistent with the safe harbor provision set out in 3 U.S.C. § 5. The statute 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." Petitioner argues that the decision of the Florida Supreme Court contravened this requirement by creating a "new legal rule[]" that would apply

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[19] Even a determination now by this Court that the Florida Supreme Court decision was not in compliance with Section 5 would not necessarily take Florida out of the safe harbor since subsequent developments such as the contest actions now pending in Leon County could result in changes to ultimate vote totals regardless of the Florida Supreme Court's decision.

"retroactively." Pet. at 13-17.

To begin with, petitioner's argument is based on a flat misstatement of the requirements of the statute's safe harbor provision. Petitioner reads the statute as if its text provided that all the substantive rules of decision by which a State makes its "final determination of any controversy or contest" must be set out in "laws enacted prior to the day fixed for the appointment of the electors." But no such language appears in the statute. Rather, the statute specifies that a safe harbor shall be given determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5.

Florida has complied with this standard. The institutional mechanism of judicial review to decide disputes about electors was in place in Florida long before the day fixed for the appointment of 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). If the text of the statute left any doubt, it is clear from the legislative history, beyond any second-guessing, that the Florida system comports with congressional intent:

> It means precisely this: The State may by statute enacted before the day of election fix any tribunal that within its judgment it may be deemed necessary to decide any controversy concerning the appointment of the electors, or any one of them; and when that tribunal, whatever it may be, shall have settled that question within a certain period before the meeting of the electors, that result is final and conclusive upon Congress, and the electors decided by that tribunal to be legally appointed must be counted by the House and the Senate. That is what it means.

15 CONG. REC. 5461 (June 21, 1884) (statement of Rep. Springer).

"Tribunals are established in the States for trying such cases, and the only effect of this is that their decision is binding upon Congress." *Id.* (statement of Rep. Hiscock). "The bill provides that where the State has created a tribunal for the determination of these questions the proceedings of that tribunal shall be conclusive * * * ." 17 CONG. REC. 1020 (Feb. 1, 1886) (statement of Sen. Hoar).

The legislative history nowhere suggests that, if States vested the judiciary with jurisdiction over election contests (which Congress believed would be the most likely course), the safe harbor would apply only if the courts issued decisions unambiguously on all fours with pre-election precedent. To the contrary, it was understood that election contests would "be decided according to the laws of each State by judicial interpretation." 17 CONG. REC. 816 (Jan. 21, 1886) (statement of Sen. Sherman). So long as the State has "submitted the controversy to its judicial tribunals, and they have determined it, that is the act of the State, and it ought to bind the Congress * * * ." 15 CONG. REC. 5078 (June 12, 1884) (statement of Rep. Browne). No more was expected than that the matter would be resolved "by the judicial tribunals appointed to try judicial contests in a judicial way." 17 CONG. REC. 1064 (Feb. 2, 1886) (statement of Sen. Edmunds); see also 15 CONG. REC. 5462 (June 21, 1884) (statement of Rep. Springer) (explaining that, under Section 5, "this tribunal must have been in existence before[]" the election).

Even if 3 U.S.C. § 5 had anything to say about the substantive rules under which ballots in Florida are counted – which, by its terms, it does not – it is clear that, after the Florida Supreme Court's decision under review, as before, those ballots are being counted under "laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. That decision was a routine state court adjudication interpreting state law. And, of course, the wildly creative "construction" of 3 U.S.C. § 5 that petitioner urges on this Court as a means of reversing the decision below dwarfs any "judicial departure from the well-established law of Florida" by the state

supreme court below. Contra Pet. at 15.

IV. NEITHER FLORIDA'S SYSTEM FOR APPOINTING ELECTORS, NOR THE FLORIDA SUPREME COURT DECISION CONSTRUING THAT SYSTEM, VIOLATES ARTICLE II.

Petitioner next argues that the procedure Florida is now employing to appoint its electors "contraven[es]" Article II of the Constitution because of the role played in that procedure by the Florida Supreme Court. See Pet. Rep. at 7; Pet. at 18-20. At the outset, we note that this claim may not be properly before the Court because it was neither pressed nor passed upon below. See *Yee* v. *Escondido*, 503 U.S. 519, 533 (1993). This is an appeal from a state court judgment, under 28 U.S.C. § 1257. See Pet. 1. That statutory authority prevents this Court from deciding federal constitutional claims that are raised for the first time before it in appeals from state court decisions. See *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (per curiam); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-439 (1969). Before a claim will be considered here on appeal, it must "'be brought to the attention of the state court with fair precision and in due time.'" *Street* v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).[20] That standard was not met here.[21]

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[20] There does appear to be an exception to the "pressed or passed on" rule when the constitutional question which petitioner seeks to present first "arose from [the state court's] unanticipated act in giving to the statute a new construction which threatened rights under the Constitution," at least when the constitutional question is subsequently presented to the state court in a petition for rehearing or reargument. See *Herndon* v. *Georgia*, 295 U.S. 441, 443-44 (1935). Even if the requirement of filing a petition for reargument or rehearing in the state court could be waived, petitioner cannot invoke this exception since the ruling of the state court could not have been "unanticipated." The Florida Supreme Court ruled essentially as petitioner asked them to. (Indeed, the court below gave respondents somewhat less

In any event, Article II's command is directed to the States *qua* States and cannot become a warrant for federal court intrusions into state election disputes, much less for federal judicial supervision of state court decisions regarding those disputes. Here, it is clear that the requirements of Article II, § 1, cl. 2 have been satisfied, for the Florida legislature did "direct" (in the Florida Election Code) a "Manner" for the appointment of electors. Under Florida law, this "Manner" of appointment happens to be subject to review by the state's highest court. And the Florida Supreme Court acted well within its statutory jurisdiction in this case. Article II, § 1, cl. 2 neither displaces the state judiciary nor forbids it from performing its traditional function under state law of construing statutes to fill gaps, clarify ambiguities and harmonize inconsistencies. Indeed, 3 U.S.C. § 5 provides strong evidence that Congress itself recognized the propriety of state judicial review regarding the appointment of electors. For Section 5 offers a safe harbor to states that use "*judicial* or other methods or procedures" to resolve controversies concerning electors.

Petitioner concedes that, under Article II, § 1, cl. 2, "[h]ad

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than they asked for by setting a rigid November 26 deadline for completion of the manual recounts.) And petitioner *did* anticipate the ruling, arguing that it would violate 3 U.S.C. § 5. What he failed to do was to raise a claim under Article II, and it is for that reason that he is now foreclosed from raising any such claim before this Court.

[21] An examination of the brief filed by petitioner below reveals that no Article II claim was adequately made before the Florida Supreme Court. The only reference to Article II in the portion of petitioner's brief in that Court on which he relies was in a description in a footnote of the source of state authority to prescribe the manner by which electors are chosen. See Brief of George W. Bush in *Palm Beach County* v. *Katherine Harris*, at 43 n.15; Pet. App. at 62a-63a. The only argument made in that footnote was that "under the relevant federal statutes and the Supremacy Clause" the state procedures for choosing electors are "incorporate[d] by reference" into federal law. See *id*.

the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so." Pet. at 20. But if the state judiciary could have been delegated the task of selecting the electors by name, then surely it may engage in the much less intrusive, and more familiar, role of garden variety statutory interpretation. In the end, petitioner seems ultimately to agree that state courts should play some interpretive role. See Pet. Rep. at 7 (conceding a role for the state judiciary in the interpretation of laws for the appointment of presidential electors).

Although petitioner insists that "[w]here a State's judiciary * * * eviscerat[es] a state statutory rule applicable to electoral disputes, federal court review is plainly appropriate," *id.*, the decision below did not "eviscerate" the state statutes it construed. It interpreted and harmonized them, making sense of the entire statutory scheme. More fundamentally, as this Court has repeatedly held, a grant of lawmaking power to the "legislature" of a State imposes no requirement that only the legislature itself make the law. Such a grant does not impose any restriction on the lawmaking machinery employed by the States. State statutes governing the appointment of electors, like those enacted pursuant to other constitutional delegations of lawmaking power to the "legislatures" of the States, have always been subject to state law processes including state judicial review and gubernatorial veto.[22]

Thus, in *Smiley* v. *Holm*, 285 U.S. 355 (1932), this Court held that the delegation to each State's "Legislature" in Article I, § 4 of the authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4,

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[22] Petitioner's reading of Article II would also call into question the Secretary's current practice of giving a ten-day extension for overseas absentee ballots, a practice that rests only on an administrative role. See Fla. Div. of Elections Rule 1S2.013. See note 3, *supra*.

did not preclude the state executive, the Minnesota Governor, from vetoing a state congressional reapportionment law. Obviously such action – which completely overturned the action of the state legislature – would run afoul of petitioner's "evisceration" principle. This Court held, however, that § 4 does not exclude other branches of the state from participating as they ordinarily do in the lawmaking process of prescribing the manner of elections. It rejected the argument put forward by petitioner that, in passing laws pursuant to the constitutional grant of authority in Art. I, § 4, the legislature is "not acting strictly in the exercise of a lawmaking power but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required." *Smiley*, 285 U.S. at 335.

This Court found in the constitutional language no "attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the state has provided that laws shall be enacted. Whether the Governor of the State, through the veto power, shall have a part in the making of state laws is a matter of state policy. Article I, Section 4, of the Federal Constitution, neither requires nor excludes such participation." *Id.* at 368.[23] Nothing in the Article I delegation of lawmaking power to the States "precludes a State from providing that legislative action in

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[23] Similarly, in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), this Court considered whether citizens could reject via popular referendum a law enacted by the state legislature to regulate elections. The Ohio constitution granted the people the right to overturn any legislation in a referendum; the people exercised that power to overturn a congressional apportionment scheme. The Court ruled that Article I, § 4 did not preclude this referendum. The Court held that, in order to show that this clause was violated, the petitioners would have to demonstrate that the Republican Guarantee Clause was also violated, that is, that the inclusion of a referendum as a check on the legislature's authority would "introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form." *Id.* at 569. In *Davis*, as here, no such argument could be made.

districting the State for congressional elections shall be subject to the veto power of the Governor." *Id.* at 372. Similarly, nothing in Article II prevents the State from having its judiciary play its ordinary role in the lawmaking process, that of interpreting the laws enacted by the legislature.[24]

Only this principle can explain this Court's recent decision in *Growe* v. *Emison*, 507 U.S. 25, 34 (1993), in which, despite the reference to "Legislature[s]" in Article I, § 4, cl. 1, this Court unanimously held that state courts as well as state legislatures could redraw congressional districts. This Court criticized the district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts," thus "ignoring the possibility and legitimacy of state judicial redistricting." *Id.* at 34.[25] This Court reaffirmed *Scott* v. *Germano*, 381 U.S. 407,

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[24] Petitioner has cited a single sentence in *McPherson* v. *Blacker*, 146 U.S. 1, 25 (1892), which states that the words of Article II operate "as a limitation upon the state in respect of any attempt to circumscribe the legislative power." We do not disagree. If the state supreme court or Governor decided to pick electors on its own, in disregard of state law, that would violate the Constitution. But where, as here, the state supreme court is simply interpreting existing law, such action is clearly constitutional. See *id.* at 23 ("We are not authorized to revise the conclusions of the state court on these matters"); *id.*, at 35 (quoting Senate Report permitting state supreme court to appoint electors if legislature so wishes). Indeed, in *McPherson* itself, the state supreme court below had measured the statute providing for the appointment of electors for conformity with "the state constitution and laws," and this Court concluded that it was "not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23. This very conclusion is enough to dispose of petitioner's Article II claim.

[25] The source of state court redistricting authority is the "Manner" clause of Article I, § 4, cl. 1, which refers to state "Legislature[s]." See Brief of Appellants Joan Growe, Secretary of the State of Minnesota, et al., in *Growe* v. *Emison*, No. 91-1420, 1991 U.S. Lexis Briefs 1420, at n.15 ("The United States Constitution gives responsibility for drawing congressional district boundaries to state legislatures. U.S. Const. art. I, § 4. When a state legislature fails to adopt a congressional redistricting plan, state courts are

409 (1965) (per curiam) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").[26]

Smiley and related cases construing constitutional language identical in relevant part to that relied upon by petitioner here foreclose his argument under Article II. Indeed, the case for subjecting election laws to judicial interpretation at the state level is markedly stronger than the case for subjecting them to a state law executive veto mechanism. *Smiley* observed that, although the veto mechanism existed in "only two states" at the time of the Founding, it was nonetheless sufficiently "well known" to have informed the drafting of the constitutional provisions empowering state legislatures to enact laws on the election of federal officials. 285 U.S. at 368. In contrast to the veto mechanism, judicial power to interpret statutes was routine in all of the original states. As Alexander Hamilton explained in the Federalist Papers – and Chief Justice Marshall repeated in *Marbury* v. *Madison* – "interpretation of laws is the proper and peculiar province of the courts."[27]

Thus, state judicial power to interpret state election laws has been an established practice in the centuries since the Founding.[28]

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urged, under the doctrine established in *Scott v. Germano*, to adopt a plan. Numerous state courts have met this responsibility * * * .").

[26] Although the Florida legislature might have reserved to itself the power to select electors, it decided to treat Presidential elections as part of its general framework for all other elections. This framework implicates judicial review, executive decisionmaking, and conformity to Florida's constitutional principle of voter sovereignty.

[27] THE FEDERALIST NO. 78 (Alexander Hamilton); see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 12 (1983).

[28] See, *e.g.*, *Opinion of the Justices*, 107 A. 705, 707-08 (Maine 1919)

(construing women's suffrage legislation in conjunction with state referenda and also stating "The clause, 'in such manner as the Legislature thereof may direct,' means, simply that the state shall give expression to its will, as it must, of necessity, through its lawmaking body, the Legislature.* * * . But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed. * * * . [Legislative acts under Section 4] must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith."); *State* v. *Marsh*, 34 N.W.2d 279, 282-83 (Neb. 1948) (resolving this question: "The question then is--what manner of appointment of electors has the Legislature of this state directed?" and deciding between conflicting state statutes about "political parties" by interpreting these various laws); *Markham* v. *Bennion*, 252 P.2d 539, 540-44 (Utah 1953) (interpreting phrase "public officers" in Utah election law governing presidential elections through canons of construction and judicial examination of the "intent of legislature" in enacting law); *State* v. *Myers*, 4 N.E.2d 397, 398-99 (Ohio 1936) (interpreting registration provisions of Ohio Election Code and stating that Code is "not unconstitutional" because "there is no provision in the Ohio Constitution limiting the exercise of that delegated power" under Article II to select the manner of appointing Electors); *McClendoon* v. *Slater*, 554 P.2d 774, 778-81 (Okla. 1976) (interpreting Oklahoma election law, such as provisions governing independent voters, recognition of parties, and party affiliation changes); *Commonwealth* v. *O'Connell*, 181 S.W.2d 691 (Ky. Ct. App. 1944) (construing state law governing absentee ballots in presidential election with state constitution's provisions); *McLavy* v. *Martin*, 167 So. 2d 215 (La. Ct. App. 1964) (interpreting Louisiana Presidential Elector Law and finding that it is not an unconstitutional delegation of power to a political party); *Opinion of the Justices*, 34 So. 2d 598 (Ala. 1948) (stating that law that binds electors violates the Constitution); *Opinion of the Justices*, 113 A. 293 (N.H. 1921) (interpreting proposed bill governing absentee voters, and finding that bill would be constitutional insofar as it is passed under Article II power); *Opinion of Justices*, 1864, 45 N.H. 595 (1864) (deciding that proposed bill governing absentee voting is constitutional); *Opinion of Justices*, 37 Vt. 665 (1865) (deciding similar issue); *Stanford* v. *Butler*, 181 S.W.2d 269, 271-73 (Tex. 1944) (interpreting phrase "state office" in Texas Election Code and holding that such laws could not apply to Presidential elections because such a reading

Petitioner's understanding of Article II would place federal courts in the business of selecting which, if any, of these state court decisions are permissible.[29]

Moreover, petitioner's claim that the Florida Supreme Court may not interpret state electoral statutes calls into question not only that court's indisputable power of judicial review, but also the important and established interpretation of such statutes by state Attorneys General nationwide.[30]

"was not intended by the Legislature" and stating that because the state legislature has not directed how a party should select its nominees, "the party is free to follow any method which it may choose in keeping with party usages and customs"); *State* v. *Osborne*, 125 P. 884, 885 (Ariz. 1912) (reviewing the constitutionality of an act providing for, among other things, election of presidential electors and stating that "[t]he constitutionality of an act of the Legislature, although it may determine the legality of holding an election and thereby have a political effect, is strictly a judicial question. For whether the act is within the limits of its delegated power or not is a strictly judicial question to be decided by the courts, and in no sense political" and that judicial review does not "interfere with the discretionary powers of the Legislature").

[29] As the Court explained in *Smiley*:

> General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states.

285 U.S. at 369.

[30] See 1989 Alaska Op. Atty. Gen. 85, 1989 WL 266932 (July 1, 1989) (interpreting Alaska Election Code regarding write-in votes and Twelfth Amendment after an election); Att'y Gen. Op. No. 81-134, 1981 WL 155208 (Feb. 4, 1981) (construing absentee voting statutes); Miss. Att'y Gen. Op., 1980 WL 28870 (Oct. 28, 1980) (construing Mississippi absentee ballot provisions and "vacation" exception); Miss. Att'y Gen. Op., 1980 WL 28885 (Oct. 27, 1980) (interpreting other provisions of absentee ballot law); 1979-80

Mass. Op. Att'y Gen. 98, 1979 WL 42140, Oct. 29, 1979) (interpreting Massachusetts absentee ballot law); Mich. Op. Att'y Gen., No. 6775, 1993 WL 494593 (Nov. 18, 1993) (deciding whether federal and state government employees can serve as Presidential electors under Michigan law); 20 Okl. Op. Att'y Gen. 156, No. 88-68, 1988 WL 424327, Oct. 4, 1988 (deciding same issue for Oklahoma Electors); Tenn. Op. Att'y Gen. No. 80-62, 1980 WL 103680 (Feb. 5, 1980) (deciding same issue in Tennessee); S.C. Op. Att'y Gen. 196, 1960 S.C. Op. Att'y Gen. No. 88, 1960 WL 9016, Sept. 21, 1960 (interpreting South Carolina statute to say that Presidential electors are nominated by Party officials, not through a primary); Tenn. Op. Att'y Gen. No. 79-525, 1979 WL 34133, Dec. 11, 1979 (interpreting Tennessee Presidential Elector statutes); Op. S.C. Att'y Gen., 1960 WL 12012, April 22, 1960 (interpreting South Carolina statute regarding names of Presidential electors on ballot); Op. S.C. Att'y Gen., 1981 WL 158040, Nov. 6, 1981 (interpreting South Carolina nomination law for Presidential Electors); Tex. Att'y Gen. Op. JM-998, 1988 WL 406325, Dec. 23, 1988 (interpreting Texas Election Code about straight-line party votes); 1980-81 Va. Op. Att'y Gen., WL 101405, Oct. 22, 1980 (interpreting Virginia Code as not requiring a special provision for write-in votes for president on a voting machine); Op. Mich. Att'y Gen., 1982 WL 183571, June 16, 1982 (interpreting Michigan election law governing political parties on ballots); 69 Md. Op. Att'y Gen. 133, 1984 WL 247042, Jan. 6, 1984 (interpreting similar law in Maryland); Mo. Op. Att'y Gen., Op. No. 179, 1980 WL 115003, Aug. 22, 1980 (interpreting similar law in Missouri); Kan. Op. Att'y Gen. 24, May 18, 1992 (deciding whether one Vice Presidential nomination can be substituted for another under Kansas Election Law); Op. Ky. Att'y Gen., No. 00-1, 2000 WL 121765, Jan. 11, 2000 (interpreting Kentucky election statutes to decide that Reform Party is not a "political party" entitled to use presidential primary); 42 Oreg. Op. Att'y Gen. 93, 1981 WL 152270, Sept. 25, 1981 (interpreting Oregon law governing nomination of Presidential electors); Op. Att'y Gen. Tenn., No. 81-460, 1981 WL 169408, Aug. 18, 1981 (similar issue under Tennessee law); 1988 Ariz. Op. Att'y Gen. 93, No. I88-069, 1988 WL 249646 (June 27, 1988) (stating that an Arizona statute that failed to allow a way for new political parties to place the names of their presidential electors on the ballot was unconstitutional); 1984 Ariz. Op. Att'y Gen. 51, No. I84-059, 1984 WL 61256 (April 20, 1984) (deciding that an Arizona statute did not entitle a particular party to representation as a political party). Petitioner's reading, which would permit the state courts to review all state election law with the sole exception of those governing Presidential elections, would create a baffling array of confusions in state law. State officials tend to examine general provisions of state election law in a uniform way. E.g., Del. Op. Att'y

The rule set out in *Smiley, Growe*, and the other cases described above, resonates with the fundamental principle that the federal Constitution takes the arrangement of state governmental branches as it finds them. "[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).[31]

Petitioner's argument that the delegation of authority to the state legislatures in Article II works a change in the ordinary process of making state law rests solely on a case construing not a delegation of lawmaking authority to the state legislatures, but the wholly different delegation to the state legislatures of power to ratify constitutional amendments under article V.[32] Petitioner relies on the Court's

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Gen. 00-IB11, 2000 WL 1092964, June 19, 2000 (interpreting Delaware's general statutory language restricting voting rights of "idiots or insane people").

[31] See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 480-81 (1981) (Stevens, J., dissenting) ("[T]he allocation of functions within the structure of a state government [is] a matter for the state to determine. I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts."); *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.) (rejecting argument that lawmaking authority of the legislature had been improperly assigned to another branch: "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject."); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (Harlan, J.) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate * * * is for the determination of the State.").

[32] Article V of the Constitution provides for a Constitutional Convention for amendments to be called "on the Application of the Legislatures of two thirds of the several States." It further provides that an amendment will be valid

statement in *Hawke* v. *Smith*, 253 U.S. 221 (1920), that the term "Legislature" in Article V means *only* the legislature (and not the people via a plebiscite). See Pet. at 20 (quoting *Hawke*, 253 U.S. at 227). Yet as *Smiley* explained, *Hawke* is inapposite precisely because it does not involve a delegation of "lawmaking" authority.[33] Indeed, *Hawke* itself makes clear that its holding is confined to those constitutional clauses that impose a non-lawmaking role on state legislatures under the Constitution. *Hawke*, 253 U.S. at 231 ("[L]egislative action [under Article I, § 4] is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution.").[34]

This Court itself has confirmed state court authority to interpret and enforce state election laws passed pursuant to Article II, § 1, cl. 2. More than a century ago, the Court held that "[a]lthough the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when

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"when ratified by the Legislatures of three fourths of the several states," if Congress chooses this "Mode of Ratification."

[33] *Smiley*, 285 U.S. at 365-66 ("The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. Hawke v. Smith, No. 1, supra; Id., No. 2, 253 U.S. 231; Leser v. Garnett, 258 U.S. 130, 137. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view.")

[34] *Hawke* discussed seven different clauses in which state legislatures are given federal constitutional roles. 253 U.S. at 227-28. In all seven, the legislatures act in nonlawmaking roles. There were two, and only two, exceptions from this list – the Article I, Section 4 power to prescribe the "Manner" of congressional elections, and the Article II power to do the same for presidential elections.

acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress." *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890) (citations omitted); see *Walker* v. *United States*, 93 F.2d 383, 387-88 (CA8 1937) ("It is contended by defendants that presidential electors are officers of the state and not federal officers. We are of the view that this contention is sound and should be sustained.") (citing *Fitzgerald*). Moreover, because the selection of electors is a matter of *state* law, the Court has explained, state courts have jurisdiction over cases involving violations of state election laws enacted under Article II, § 1. See *Fitzgerald*, 134 U.S. at 378-79; see also *Walker*, 93 F.2d at 388-89 ("Manifestly, the right to vote for presidential electors depends directly and exclusively on state legislation. We conclude that count 1 of the various indictments does not state a federal offense."). The Court in *Fitzgerald* thus refused to reverse a state court judgment imprisoning a state resident for violating state election laws, explaining that the state "clearly has such power in regard to votes for presidential electors, unaffected by anything in the constitution and laws of the United States." *Fitzgerald*, 134 U.S. at 378-79. Accordingly, the state judiciary's traditional role in interpretation does not disappear under Article II, § 1, cl. 2.

V. NOTHING IN THE FLORIDA SUPREME COURT DECISION VIOLATES DUE PROCESS.

Nor, finally, is there any merit to petitioner Bush's glancing contention that the Florida Supreme Court's decision violates his federal right to "due process ." Pet. at 17. Again, this claim was not raised below. The only reference to due process in petitioner's brief in the Supreme Court of Florida came in his discussion (see Pet. App. at 63a) of the conduct of the manual recounts under the Florida scheme – leading to the question this Court declined to review in No. 00-837. Not having been raised below, the due process claim is not

properly before this Court.[35]

Because this claim was raised for the first time in the Petition for Certiorari, and in a single sentence at that, it is hard to determine what theory, if any, petitioner seeks to urge on this Court. The Question Presented emphasizes the "post-election" nature of the decision below, so it appears that petitioner seeks to allege that the Florida Supreme Court's interpretation of state law amounted to a retroactive change in the law so egregious that it violates "substantive due process." See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 556-557 (1998) (Breyer, J., dissenting) (noting that Due Process Clause might be thought to protect against unfairly retroactive laws because "courts have sometimes suggested [that] a law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary"); but compare *id*. at 537-538 (plurality opinion of O'Connor, J.) (expressly declining to measure purportedly unfairly retroactive legislation against the substantive due process test for "arbitrar[iness] and irrational[ity]"). The difficulty with this argument is that petitioner cannot establish any of the elements that would be essential to such a claim.

To establish the charge of a constitutionally impermissible retroactive change in the law, petitioner would have to demonstrate not simply that the Florida Supreme Court's decision constituted a retrospective change and that the change deprived him of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters*, 524 U.S. at 548 (Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J., dissenting) (same).

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[35] It may be revealing of the force of petitioner's due process theory that he discusses it in only a single paragraph of the petition for certiorari, Pet. at 17-18, and not at all in the briefing below or in the reply in support of certiorari.

First, the Florida Supreme Court's decision did *not* constitute a retroactive change in Florida law at all. For the reasons set forth above in Part I, the court's decision was an unremarkable construction of state statutes and state constitutional provisions. Even if that were not the case, it would take an exceptional showing of unfair retroactive effect to hold a court decision (as opposed to a legislative enactment) violative of due process: court judgments are normally retrospective in light of their application to the parties to the case, and the Fourteenth Amendment has never been suggested to require otherwise. Indeed, this Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings (again, in contrast to legislative enactments) must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring).

Second, the supposedly retroactive nature of the Florida Supreme Court's decision did not deprive petitioner of any cognizable interest protected by the Fourteenth Amendment. There can be no reliance interest in an administrative deadline that the Florida Supreme Court held to be inconsistent with Florida law and the need to count Florida votes in a fair and accurate manner. The most that petitioner has said on the point is that "the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known" of the court's decision in advance. Pet. at 18. That argument is both fanciful and disingenuous. Petitioner has never asserted that he failed to request recounts on the view that they could not be completed within the deadlines set by the Florida Secretary of State. To the contrary, he has repeatedly rejected the suggestion that he desired such recounts, and specifically did so in response to a direct inquiry from the Florida Supreme Court. See Pet. App. 38a n.56. Moreover, even assuming that petitioner has a protected constitutional interest in seeking recounts in other counties, Florida's

election protest provisions (which petitioner has invoked with respect to several Florida counties) are certainly sufficient to protect that interest. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).[36]

Petitioner also suggests that, if the candidates had known that the Florida Supreme Court would permit supplemental returns to be filed after the deadline, "campaign strategies would have taken this into account," Pet. at 18 (internal quotation marks and citation omitted), but that just demonstrates the extreme weakness of his due process claim. Petitioner obviously can point to no strategic or tactical decision made during the presidential campaign in reliance on

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[36] The only decision cited by petitioner in support of his supposed interest is inapposite. *Roe* v. *Alabama*, 43 F.3d 574 (per curiam), and 68 F.3d 404 (CA11 1995) (per curiam), involved the claim of Alabama *voters* that the effectiveness of their votes would be diluted by the retroactive abrogation of a uniform, long-standing prohibition on accepting certain write-in ballots. Not only does petitioner lack standing to raise such a claim, but the Eleventh Circuit's holding rested on the fact that the change in Alabama law resulted in the counting of selected ballots that previously had been regarded as *illegal* in circumstances where voters who were *not* given the benefit of the new rule of eligibility could plausibly allege that they would have decided to vote had the onerous requirements lifted for others been lifted for them as well. Petitioner asserts here the very different interest in precluding the counting of entirely *lawful* ballots that happen not to have been counted prior to the deadline set by the Secretary of State, an interest that cannot possibly have constitutional footing.

The only due process right even arguably implicated by this case is the right of voters to have their ballots counted, a consideration that only supports the state supreme court's decision. The state has no substantial interest in enforcing an arbitrary deadline that has the singular effect of precluding those votes from being counted. See *Zimmerman Brush*, 455 U.S. at 428. It is worth noting in this respect that petitioner Bush himself is aggressively arguing in the state courts that military absentee votes should be counted notwithstanding various clear requirements of Florida statutes to the contrary, based in substantial part on the rights of voters to have their ballots counted.

Florida's specific deadline for its counties' submission of their completed election returns, on the scope of the Secretary of State's discretion with respect to that deadline, or on what counts as evidence that a voter intended to poke a hole through a machine-readable ballot!

Finally, there is no serious argument that the Florida Supreme Court's decision, even if retroactive, was unconstitutionally "arbitrary or irrational." Unlike a case such as *Eastern Enterprises*, in which particular companies were isolated by Congress to bear retroactively an enormous and unexpected financial burden arguably beyond any reasonable expectation, the Florida Supreme Court's decision applies entirely evenhandedly to all counties and candidates.[37] Moreover, not even petitioner Bush challenges the principal undercurrents supporting the state supreme court's decision: the state constitutional right to have one's vote counted and the virtue of reconciling competing statutory provisions.

At bottom, all petitioner can really claim is that, in his view, the Florida Supreme Court got Florida law wrong. But a "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948) ("otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680 (1930) (Brandeis, J.) ("[T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court"). To hold that

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[37] Although only three counties were at the time seeking to conduct manual recounts, that was only because petitioner Bush elected not to exercise his right to request recounts in any of the sixty-four other Florida counties.

the decision below violates due process would do violence both to principles of federalism and to the independence of the judiciary throughout the United States. It would invite an onslaught of such claims by the losing parties in state courts alleging that the decisions in their cases constituted an unconstitutional departure from "preexisting * * * law." Pet i. It would effectively introduce a federal rule of separation of powers on the states, by holding that certain legal rules – those that would comprise such unlawful departures – may not be announced by courts, but only through legislation. And it would undermine the authority of the judiciary to decide the meaning of law, by holding that apparently routine judicial acts of statutory construction long thought to involve only questions of state law in fact amount to illegitimate and unconstitutional usurpations of the legislative role.

Undoubtedly the Due Process Clause imposes some limit on truly outrageous and arbitrary judicial action, "the most egregious of circumstances." *Eastern Enterprises*, 524 U.S. at 550 (Kennedy, J., concurring). But if the balance between state and federal power is to be held true, and if the judicial process of statutory interpretation is to be protected from promiscuous charges of usurpation, before a claimed error in a construction of state law can rise to the level of a due process violation it would have to be far graver than any that petitioner has erroneously attributed to the court below.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

Teresa Wynn Roseborough
David I. Adelman
James A. Orr
John H. Fleming
999 Peachtree St, NE
Atlanta, GA 30309

Ronald A. Klain
Andrew J. Pincus
c/o Gore/Lieberman Recount
430 S. Capitol St.
Washington, DC 20003

Kendall Coffey
Coffey Diaz & O'Naghten
2665 South Bayshore Dr.
Miami, FL 33133

Jonathan S. Massey
3920 Northampton St., NW
Washington, DC 20015

Peter J. Rubin
Neal K. Katyal
Georgetown Univ. Law Ctr.
600 New Jersey Ave., NW
Washington, DC 20001

Laurence H. Tribe
(Counsel of Record)
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138

David Boies
Boies, Schiller & Flexner
80 Business Park Dr., Ste. 110
Armonk, NY 10504

Kathleen M. Sullivan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Amy Howe
4607 Asbury Pl., NW
Washington, DC 20016