No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

Brief on the Merits of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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INTRODUCTION

Respondents the Florida Secretary of State and the Florida Elections Canvassing Commission are charged with administering Florida's election laws. This brief focuses primarily on explaining the legal and practical effects of the Supreme Court of Florida's November 21, 2000 decision in *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000) on Florida's election law and its application to the November 7, 2000, general election of Presidential and Vice-Presidential Electors. We respectfully submit that the Supreme Court of Florida's decision, while establishing the future rights and procedures under Florida law, deviated from the law of the state as it existed on the day the Presidential Electors were to be elected by the people of Florida, November 7, 2000, in at least five important respects. We also address the question posed by this Court to the parties: "What are the consequences of this Court finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?"

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Florida changed Florida law in several important respects. *First*, the decision significantly rewrote the deadlines for county canvassing boards to certify election returns to the state. While the Florida legislature created a strict deadline, the court supplanted this with a loose standard that merely requires certification to allow sufficient time for an election contest to be completed by the federal deadline for appointment of Presidential Electors. In applying this new standard, the court also created a specific deadline of November 26 that applies solely in this election. *Second*, the decision allows county canvassing boards to amend timely-filed returns after the statutory deadline for certification of election results has passed, despite absence of statutory authority for such an amendment. *Third*, in light of the elimination of the deadline for county certifications and the new plenary amendment rights, the decision precludes the Florida Elections Canvassing Commission from performing its statutory duty to certify election results within the statutory time frame. Instead, the Commission must now wait for any protracted recounts to be completed and amendments to be filed before performing this function.

Fourth, the decision significantly broadened the power of county canvassing boards to conduct manual recounts. Under prior interpretations of Florida law, such recounts were used only to remedy a failure in the system of automated vote tabulation. Now, they may be used at any time, for any purpose, at the unfettered discretion of local officials. *Finally*, in conjunction with this new recount power, the decision below grants county canvassing boards newfound powers to set standards for evaluating ambiguous ballots. Because manual recounts were never meant to be used as broadly as is now allowed, the Florida Legislature, unlike those of other states that have enacted broad manual recount rights, never created standards by which to judge ambiguous, improperly executed machine tabulation ballots. The broad recount rights created by the court leave this gap to be filled by local officials on an *ad hoc* basis.

STATEMENT OF THE CASE

I. THE DUTIES OF FLORIDA OFFICIALS AND AGENCIES WITH REGARD TO ELECTIONS

The Florida state officers and executive agencies before the Court are the Secretary of State ("Secretary"), the Division of Elections ("Division"), the Florida Elections Canvassing Commission ("Commission"), and the Attorney General (the "Attorney General"). The powers and duties of each officer are summarized below.

A. The Secretary

The Secretary is an independently elected constitutional officer and a member of Florida's executive cabinet. Fla. Const. art. IV, § 4. The Florida Constitution provides that each cabinet member "shall exercise such powers and perform such duties as may be prescribed by law." *Id.* The Secretary is the state's chief elections officer. Fla. Stat. §§ 15.13 and 97.012 (2000). As such, the legislature has vested the Secretary with the authority to administer and oversee all elections in the state, and requires the Secretary to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." *Id.* § 97.012(1) (2000).

B. The Commission

The Commission is a special purpose state agency composed of the Governor, the Secretary, and the Director of the Division of Elections.[1] Fla. Stat. § 102.111 (2000).

The Commission's purpose under the Florida Election Code is to canvass election returns, certify the results of the election, and declare a winner for each office based on that certification. *Id.* The Commission is under a strict duty to certify as soon as all county returns are received, and, in any case, no later than seven days following a general election. If any county returns "are not received by the Department of State by 5 p.m. of the seventh day following an election, [they] shall be ignored, and the results shown by the returns on the file shall be certified."[2] *Id.* § 102.111(1).

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[1] In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

[2] Florida law contemplated that the election results would be certified no later than the seventh day following the election. Fla. Stat. § 102.111 (2000). For federal offices, however, a winner may not be declared until three days later. That is, however, not a matter of state law; it results from a consent decree between the state of Florida and the United States which requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following a federal election. Bush Petition App. at 27a, n. 46l.

C. The Division of Elections

The Division is a sub-agency within the Department of State and is subordinate to the Secretary and to the Commission. It functions as the support and advisory staff to the Commission. *Id.* § 102.111(2) (2000). The Florida Legislature has also specifically empowered the Division to provide advisory opinions interpreting the Florida Election Code, Chapters 97 to 106, Florida Statutes (the "Election Code") and regarding other elections matters:

> *The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws* with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. *The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.*

Id. § 106.23(2) (emphasis added). The Division is thus given primary responsibility for interpreting the Election Code, and its interpretation "until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought." *Id.*

D. The Attorney General

Florida's Attorney General, like the Secretary, is an independently elected, co-equal cabinet officer. The Attorney General is the chief legal officer of the state and may generally issue advisory legal opinions. Fla. Stat. § 16.01(9) (2000). Opinions of the Attorney General, unlike those of the Division, are not binding on the party seeking the opinion. *See State v. Family Bank of Hallandale,* 623 So. 2d 474, 478 (Fla. 1993); *Goodman v. County Court*, 711 So. 2d 587, 589 (Fla. Dist. Ct. App. 1998).

The Attorney General does not issue opinions on election matters. *See* Op. Att'y Gen. Fla. 86-55 (1986) ("it is the policy of this office to refer all questions concerning the Elections Code, . . . to the Division [of Elections] for its response"); Op. Att'y Gen. Fla. 87-17 (1984) ("any question relating to the applicability or possible violation of Ch. 106 or other provisions in the Florida election laws should be submitted to the Division of Elections"). Indeed, in a recent

response to a request for an opinion, the Attorney General's office stated that it lacked jurisdiction to issue an opinion on an election matter:

> After reviewing your correspondence, I regret to inform you that the Attorney General's Office *does not have jurisdiction in this matter*. I have taken the liberty, however, of forwarding your letter to the Department of State, Division of Elections, which appears to be the appropriate authority to review your concerns.

Letter from Paula Wood to Frank Cuomo, dated May 30, 2000 (emphasis added).

II. THE ELECTION CODE

A. Compiling Election Results and Certifying a Winner

Chapter 102 of the Florida Statutes provides the statutory framework for certification of election results. Elections are administered by local officials in each county. Each of Florida's 67 counties has its own election canvassing board, whose function is to compile the results from the various precincts in the county and transmit a return to the Commission. Fla. Stat. § 102.141 (2000). These returns must be filed immediately upon the certification of the county's election results by the county canvassing board and, in any event, "by 5 p.m. on the 7th day following the . . . general election."[3] *Id.* § 102.112(1).

The Commission is charged with the duty of certifying the results of statewide elections and declaring a winner based on the returns filed by the county canvassing boards. *Id.* § 102.111. It is required to perform this function and to declare the winner of the election immediately upon receipt of returns from all counties. *Id.* § 102.111(1). If any county fails to file its return within seven days of a general election, the Commission is directed to ignore that county's returns and certify the results of the election and to declare a winner based solely on the returns that were timely filed. *Id.*

In performing its certification function, the Commission is not allowed to go look beyond the face of the return or question the veracity of the return submitted by the counties. It is, however, allowed to reject a return that appears "irregular or false" such that the Commission is unable to determine the true vote for any office. *Id.* § 102.131.

B. Pre-Certification Election Protests and Manual Recounts

Any candidate or voter has the right to file an election protest with the county canvassing board. *Id.* § 102.166(1). The protest procedure is typically resolved informally by the board and does not involve the Florida courts. The protest may be filed by the *latter* of five days after the

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[3] As discussed in note 1, *supra*, certification occurs on the 10th day following a federal election.

election or the date the results of the election are certified to the state. *Id.* § 102.166(2). Protests are typically used to address only the computation of election results.

As part of the protest procedure, any candidate or political party (but not a voter) may request a manual recount within 72 hours of the date of the election. *Id.*§ 102.166(4). In response, the county canvassing board may conduct a partial recount involving at least one percent of the votes cast for the protesting candidate. *Id.* 102.166(4)(d). If this sampling shows an "error in vote tabulation," there are several steps to be followed. Specifically, the county canvassing board must:

(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). The Election Code provides procedures for assigning the officials responsible for the recount and defines their functions but does not contain any criteria by which ballots are to be evaluated. *Id.* § 102.166(6).

C. Post-Certification Election Contests

Following certification of the results of the election by all counties, any voter, taxpayer or unsuccessful candidate may contest the results of an election. *Id.* § 102.168. A contest must be initiated within 10 days after the last county canvassing board certifies its returns to the state or a shorter time if a protest was filed. *Id.*§ 102.168(2).

A post-certification election contest differs from a pre-certification election protest in several respects:

- The contest is a full evidentiary proceeding, *Id.* § 102.168(2), while the protest is an informal administrative proceeding with no formal fact-finding or trial-type procedures. *Id.* § 102.166.

- The contest is conducted in a central location, the circuit court for the county of the state capital. *Id.* § 102.168(2). The protest, on the other hand, is administered by the county canvassing board in the county in which it is brought, and numerous separate protests may be raised in various counties. *Id.* § 102.166.

- The contest takes into account the impact of any perceived irregularities in the election as a whole. *See Nelson v. Robinson*, 301 So. 2d 508 (Fla. Dist. Ct. App. 1974); *Smith v.*

Tynes, 412 So. 2d 925 (Fla. Dist. Ct. App. 1982). A protest, in contrast, is limited to the county in which it is brought. Fla. Stat. § 102.166(1) (2000).

- A contest requires an affirmative evidentiary showing by the petitioner that (i) there has been misconduct, fraud or corruption, (ii) the winning candidate is ineligible for office, (iii) legal votes were rejected, and that those votes would change the outcome of the election, or (iv) another circumstance proving that the outcome of the election was incorrect. *Id.* § 102.168(3). Conversely, no specific evidentiary showing is required for a protest. *Id.* § 102.166(3).

Unlike a protest, there is no specific time limitation on an elections contest. Indeed, there have been times in Florida when a contest resulted in the removal and substitution of an officer well into his term. By federal law, though, a contest for any presidential election must be completed six days before the meeting of the state electors, which in this case is December 18, 2000. 3 U.S.C. § 5 (1997).

ARGUMENT

I. FLORIDA LAW AS APPLIED PRIOR TO THE DECISION BELOW.

Before the Supreme Court of Florida issued the decision below on November 21, Florida elections were administered according to long-standing procedures set forth by the state legislature. These procedures required results to be reported and certified by specified deadlines, provided mechanisms for dealing with errors in vote tabulation, permitted manual recounts in certain limited circumstances involving a failure in the vote tabulation system, and allowed affected voters and candidates to contest an election after certification.

A. Election Protests and Certification Deadlines

Under the Election Code, any affected voter, political party or candidate may protest election returns before the canvassing board certifies the results of the office being protested, or within five days, whichever is later. Fla. Stat. § 102.166(1) (2000). In the event of a protest, the county canvassing board is required to follow specific procedures to verify the accuracy of the returns according to statutory procedures that vary depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. *Id.*. § 102.166(3). In each case, the remedies are designed to ensure that the vote counting system functioned as intended. *Id.*

As part of section 102.166, only a candidate or political party is permitted to file a written request with the county canvassing board for a manual recount. *Id.* § 102.166(4)(a). Provided the request is timely, the county canvassing board is given discretion to decide whether to allow a statutorily-defined sample manual recount to determine whether there was a mechanical or software problem in the vote tabulation. *Id.* § 102.166(4)(c).

In any case, however, the protest period and any recount had to be completed and the election results certified to the Florida Department of State within seven days of the election. *Id.* § 102.111(1). Immediately upon certification by the county canvassing boards, the Commission was required to certify the elections results and declare a winner. *Id.* If any county failed to certify by the deadline, the Election Code required that its returns be ignored and the certification proceed notwithstanding the omissions.

B. Post-Certification Election Contests

The conclusion of the seven-day protest and certification process triggers the right of any affected voter, taxpayer or unsuccessful candidate to file an election contest. *Id.* § 102.168(1). Unlike pre-certification protests, which are reviewed by local officials on a county by county basis, a contest takes into account all facts and circumstances regarding the election on an evidentiary record to determine whether the ultimate result was affected by the alleged irregularities. *See Nelson v. Robinson*, 301 So. 2d 508 (Fla. Dist. Ct. App. 1974); *Smith v. Tynes*, 412 So. 2d 925 (Fla. Dist. Ct. App. 1982). Because contests focus on the results of the entire election, they cannot be strategically limited to increasing the vote count in selected strongholds of one party or candidate.

The Florida Legislature imposed no specific time limitations on a judicial election contest, but imposed strict time limits on protests and recounts that precede certification, which is the prerequisite to a contest. This difference reflects a legislative policy in favor of resolving all election disputes, other than errors in the vote tabulation system, through a full evidentiary proceeding before a single trial court.[4]

C. Use of Pre-Certification Manual Recounting

Before the decision of the Florida Supreme Court, the Division had interpreted the Election Code to allow for a manual recount *only* where there was some failure in the vote tabulation system. This interpretation was based on the language of section 102.166(5), Florida Statutes, which requires an "error in vote tabulation" for a full recount to be called and the legislative history of that provision, which indicated that manual recounts were to be used to

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[4] Florida law provides that the exclusive venue for an election contest involving a statewide race is in Leon County, Florida, the seat of state government. Fla. Stat. § 102.1685 (2000). Exclusive venue in Leon County provides a single, centralized, judicial proceeding and avoids a multiplicity of lawsuits tried before various courts throughout the state regarding the same election. The Legislature's preference for election contests thus furthers the goals of judicial and administrative economy and finality of the result.

correct defects in the tabulation system rather than to remedy voter error in failing to properly execute ballots.[5]

The Florida Legislature has charged the Division with the responsibility of answering questions from the county canvassing boards concerning the conduct of elections formal advisory opinions. Fla. Stat. § 106.23(2) (2000). Consistent with the statutory scheme for manual recounts, legislative history and prior interpretation of the statute, the Division issued a formal advisory opinion, stating that:[6]

> [a]n "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting system to read an improperly marked marksense or improperly punched punchcard ballot is not an error in the vote tabulation. *Unless the discrepancy*

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[5] To minimize the possibility of voter error, general election voting instructions in conspicuous print were placed prominently in each polling place. Fla. Stat. § 101.46 (2000). In those counties using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

(emphasis in original). When voters followed the instructions, including the removal of any loose chips (chads) attached to their ballots, the automatic tabulation system accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, could be affected by the manual recount at issue. Florida law, as it existed before November 21, in no way required the results of an election to be altered based on such errors. *See, e.g., Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. Dist. Ct. App. 1984) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study [by the voters] will sort it out.").

[6] This opinion was issued at the request of Palm Beach County, pursuant to the Division's duties under Florida law. Unbeknownst to the Secretary, Palm Beach posed an identical question to the Florida Attorney General, who issued a response contrary to that of the Division. JA 40-46, 63. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the county canvassing boards that request the opinion. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawfor*d, 645 So. 2d 513, 521 (Fla. Dist. Ct. App. 1994); *see also Krivanek v. Take Back Tampa Political Committe*e, 625 So. 2d 840, 844 (Fla. 1993). In contrast, no canvassing board is bound by an Attorney General's opinion. In fact, it is questionable whether the Attorney General has authority to issue an opinion on an election issue, given the specific allocation of this function to the Division in section 106.23(2), Florida Statutes.

> *between the number of votes determined by the tabulation system and by the manual recount of the sample precincts is caused by incorrect election parameters or software errors, a county canvassing board is not authorized to manually recount ballots for the entire county, nor perform any action specified in Section 102.166(5)(a) and (b), of the Florida Statutes.*

JA 57 (emphasis added). According to the Division's binding opinion, the failure of certain voters to properly execute their ballots was not a basis for conducting a pre-certification manual recount. In this regard, there is no basis in Florida law for a manual recount in selected counties in a statewide election.

The Division's interpretation was the statement of Florida law as it existed prior to the election. In section 102.166(5), Florida Statutes, the Florida Legislature used the term "vote tabulation" to mean, in the context of counties using automated tabulation, the result derived through the electronic or electromechanical equipment. The Division, having extensive experience with the application of the statute, recognized the term "tabulation" as a term of art that had consistently been used within the context of electronic or electromechanical equipment. When the votes are counted by the vote tabulation equipment, the legislature uses the terms "tabulate" or "tabulation," and when votes are counted manually, the Legislature uses the term "recount" rather than "retabulate." *See, e.g.*, Fla. Stat. §§ 101.5603(1), 101.5603(3), 101.5607(1)(b) and 101.5612.

Additionally, the Division interpreted the statutes as a coherent whole. When a sample manual recount indicates a problem with the vote tabulation system, the county canvassing board is first to attempt to correct the error and recount the remaining precincts with the system under section 102.166(5)(a), Florida Statutes. If the error cannot be corrected, the board should request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system cannot be made to operate properly, then, as a last resort, the board may manually recount all the ballots under subsection (5)(c). Section 102.166(4) was enacted to provide a set of remedies when a vote tabulation system failed to read properly marked ballots, with a manual recount being the last and most drastic. The statute was not intended to allow individual county canvassing boards to use any method of counting votes they might choose *after* an election, nor was it intended to allocate votes from improperly executed ballots that could not be read by properly functioning tabulation equipment.

The Division's reading of the election law also harmonized section 102.166(5) with the other provisions in the Election Code. The reference to "vote tabulation" must be read in conjunction with various other provisions of the Election Code wherein the term "tabulation" is used in the context of the equipment itself. *See, id.* §§101.5603(1)(definition of "automatic tabulating equipment); 101.5606(3) ("automatic tabulating equipment will be set to reject all votes" under certain circumstances); 101.5607(1)(b) ("within 24 hours after the completion of any logic and accuracy test conducted pursuant to s.101.561(1), the supervisor of elections shall send by certified mail to the Department of State a copy of the tabulation program which was used in

the logic and accuracy testing"); and 101.5612 ("the supervisor of elections shall have the automatic tabulating equipment tested to ascertain that the equipment will correctly count the votes").

Finally, the legislative history confirmed that the Division's interpretation correctly implemented the will of the Legislature. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15, Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The Legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act (the identical Senate bill to the House bill that was passed) noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported in the media, but in testimony before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic and accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process, would enhance the public's confidence in our voting system.

Harris Response to Petition App. at 2.

As this legislative history indicates, the statute was intended to provide software verification and an alternate recounting procedure in connection with a protest, to be used in situations in which mechanical or computer problems caused the tabulation system to function improperly. The Division never interpreted the legislation to provide for manual recounts to evaluate ambiguous ballots that *voters* failed to properly execute.

Neither the language of the statute nor the legislative history indicate any intention to grant county canvassing boards plenary power to permit manual recounts for virtually any reason. The policy of Florida has been that state and county elections are conducted in a uniform manner throughout the state. To this end, the Legislature has placed the responsibility to "obtain and

maintain uniformity in the application, operation, and interpretation of the election laws" with the Secretary. Fla. Stat. § 97.012 (2000). The ability of each county canvassing board to establish its own standards for determining whether to conduct a recount and then establish its own standards for interpreting the intention of voters for various types of ballots (1) runs afoul of the purpose of establishing a uniform code and assigning an executive officer the responsibility of maintaining uniformity and (2) constitutes the unlawful judicial delegation of legislative authority by vesting the boards with unbridled discretion.

II. THE DECISION OF THE SUPREME COURT OF FLORIDA

The Supreme Court of Florida's decision brought about a significant shift in the way the Election Code is implemented and applied. In so doing, the court recognized that the new rules it propounded were at variance with the statutory scheme. It denounced "hyper-technical reliance upon statutory provisions," and noted that "there is no magic in the statutory requirements," obviously recognizing that the new rules it espoused deviated from the literal terms of the legislative scheme. Bush Petition App. at 9a, 36a. Similarly, while purporting to resolve "ambiguity" in state law and disclaiming any intent to rewrite the Election Code, the court's opinion makes it abundantly clear that it created new law not premised on the statutory language, but rather on newly created and generally defined equitable and state constitutional principles:[7]

> Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, *we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.*
>
> *Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof.* If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on November 17, 2000, by this Court shall remain in

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[7] The court found an ambiguity between sections 102.111 and 102.112 (which state that late filed results shall (or may) be ignored) and section 102.166(5), which allows for manual recounts. However, this statutory conflict results from the court's use of section 102.166(5) to create broad rights to pre-certification manual recounts that did not previously exist. By expanding the rights created by the legislature in this manner, the court created the very conflict it sought to resolve -- the fact that manual recounts cannot always be completed in seven days.

> effect until the expiration of the time for accepting amended certifications set forth in this opinion. *The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.*

Bush Petition, App. at 37a-38a.

Pursuant to the Supreme Court of Florida's decision, and in contrast to the legislative scheme, Florida law now provides that:

1. County canvassing boards have the authority to amend returns filed within the statutory deadline for up to 12 days *after* the deadline for certification of the election results to accommodate pre-certification manual recounting;

2. The Commission must accept amended election returns filed after the statutory deadline so long as the filing does not violate the judicially created alternative deadline of November 26 that was designed to accommodate pre-certification manual recounting in this election[8] (*but see* Fla. Stat. §§ 102.111, 102.112);

3. The Commission is to ignore its statutory duty to certify election results based solely on the returns filed within the seven-day deadline set by the Legislature, so that late-filed amendments to timely filed election returns may be submitted to reflect pre-certification manual recounts that extend beyond the deadline (*but see*, Fla. Stat. § 102.111));

4. County canvassing boards enjoy broad discretion to order manual recounts in selected counties for a statewide election, even where the "error in vote tabulation" (i.e., the failure of the tabulation system) previously required under

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[8] November 26 is an absolute deadline developed specifically for this Presidential election. For future elections, late results that reflect manual recounts must be accepted unless they are "so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process." Bush Petition App. at 32a. Like the November 26 deadline, this rule adds to the legislative enactments. Moreover, as the limitation on late filings applies only to electoral college proceedings, which must comply with the strict deadlines in Title 3 of the United States Code, there appears to be no basis to *ever* reject a late filing or late amendment of election results for any offices other than Presidential and Vice Presidential Electors. Thus, for most offices, the court has completely eliminated that finality and expedient certification required by the Election Code. Such is vastly different from the previously understood and applied the intent of sections 102.111 and 102.112. Further, it runs squarely into the requirement of the Florida Constitution that the Legislature convene in organizational session 14 days after the general election. Fla. Const. art. III, § 3(a). If the state certification must be permitted to remain open fourteen days after the election, the constitutional direction cannot be met.

statute has not occurred and even if the recount will extend beyond the statutory deadline for filing election returns (*but see.*, Fla. Stat. § 102.166(5)); and

5. When a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual canvassing boards in selected areas of the state.

As discussed below, the Florida Supreme Court's decision represents a significant departure from the pre-existing Florida elections law. The rules articulated by the Court are not based on the statutory language, and were not a foreseeable judicial interpretation of the Election Code.

III. THE DECISION BELOW ALTERED THE MANNER IN WHICH ELECTIONS ARE ADMINISTERED IN FLORIDA AND EFFECTIVELY REWROTE PORTIONS OF THE ELECTION CODE.

A. Prior to November 21, the Election Code Required Certification of Election Results Within Seven Days.

The requirement that certification be completed within seven days was expunged by the court below. In its place there is a new, judicially-created time limitation that allows filing up to 19 days after the election. Bush Petition App. at 38a. County canvassing board members are now under no duty to comply with the strict time limitations that previously existed; they can no longer be fined or have their returns ignored for failing to file certified returns when they conduct the pre-certification recounts, despite clear statutory language to the contrary. *Id.* In essence the requirement in section 102.111 that the Commission "shall ignore" late returns (or in section 102.112 the Secretary "may ignore" late returns) has been rewritten to read that the Commission "shall *not*" ignore late returns filed up to twelve days after the seven-day deadline has passed. Likewise, the statutory requirement that local boards "must" certify within this time frame has been eliminated.

Moreover, the Commission is now precluded from certifying election results on the seventh day following the election (or in federal elections the tenth day), as previously required under sections 102.111, 102.121 and 102.131, Florida Statutes. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least 19 days to certify the final results of the election, all so that pre-certification manual recounts may be completed.

Finally, the time frame for an election contest, the only procedure available to individual voters to challenge the outcome of the election, has been drastically shortened by the court. Under the prior law, the period for filing a contest would have begun with the final certification of results and the contest proceeding could have extended until December 12, the federal deadline for appointment of Presidential Electors. Now, any contest cannot begin until the recounts are completed and the results certified. This did not occur until November 26, cutting the contest

period almost in half from what was already an extremely short period in which to plead a case, conduct discovery, have a trial and pursue any subsequent appeals.

B. Prior to November 21, the Election Code did not Allow for Certified Election Results to be Amended by County Canvassing Boards.

Despite the total absence of supporting statutory language, county canvassing boards may now file amended returns after the statutory deadline has passed even if they had properly filed returns before the deadline. Bush Petition App. at 37a. Additionally, the Secretary has been divested of any discretion to reject an amendment, unless it is so late that it *will* (not may or could) preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint Presidential Electors within the time limitations of federal law. *Id.* For purposes of this election, the court below determined that a deadline of November 26 met this newly articulated rule. Bush Petition App. at 38a.

Before the decision below, there was no provision in Florida law that expressly authorized returns to be amended, much less required an amendment after the statutory deadline to be accepted as a matter of right. There was no statutory provision that required the Secretary to accept late-filed returns or limited rejections of late filings specifically to situations where the federal time limitations jeopardized Florida's electoral votes. Both the ability to amend and the standards for the acceptance or rejection of an amendment have now been created judicially rather than legislatively.

Indeed, the existing Florida law required that "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[9] Fla. Stat. § 102.111(1) (2000). The Supreme Court's decision alters the statutory scheme, imposing upon the Secretary an absolute duty to accept all late filed returns even though the Legislature required her to do just the opposite. *Id.*

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[9] This statute governs the Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which speaks only to county canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received by the department by the time specified, such returns *may* be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1) (2000). Even if this provision, which applies only to county boards, were read to grant the Secretary some discretion in deciding whether to accept late returns, the construction by the Supreme Court of Florida requiring late filings and post-deadline amendments to be accepted without question is clearly a change in what might otherwise be understood from reading section 102.111, even in connection with section 102.112. There is no statutory support for reconciling a conflict between provisions that say the Secretary on the one hand "may ignore" and on the other "shall ignore" late returns by reading them to mean "shall not ignore" under any circumstances except those created by the court below.

C. Prior to November 21, Florida Law did not Allow Manual Recounting to be Used to Selectively Count Ballots that a Properly Functioning Automated Tabulation System Could not Count.

The decision below allows pre-certification manual recounts to be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software, or other similar failure in the automated vote tabulation system and was considered dehors the common law. The Supreme Court of Florida has now departed from these limitations and recognized that manual recounts are equitably required and grounded in Florida law. While a state supreme court may generally create new common law or equitable rights, it may not apply such principles retroactively to a federal election. *See Roe v. Alabama,* 43 F.3d 574 (CA11,1995).

Under section 102.166(5), Florida Statutes, a manual recount was the last-resort remedy to be used in areas with automated tabulation systems that did not function properly to tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, a county canvassing board would have had to attempt to correct the error and recount the remaining precincts with the tabulated system. If the error could not be corrected, a board was allowed to request the Department of State to verify the tabulation system. Finally, only if the first two techniques failed and the system still could not be made to work properly, then, as the final remedy, the board could manually recount the ballots.

There was never any indication that section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read properly marked ballots, not to provide county canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

The Florida Legislature has never developed standards for manual recounts of ballots that could not be machine read. Numerous other states have developed such standards, including California, Wisconsin, Indiana and Colorado, to borrow the examples cited by the Attorney General below. The fact that Florida has not demonstrates that the legislature never meant to allow the broad use manual recounts that these other states have.

In the proceedings below, the Supreme Court of Florida was asked to create the types of standards that the Legislature chose not to enact. The court declined that invitation and chose instead to allow broad use of manual recounting without any standards to guide the process.

IV. EFFECT OF FINDING THE DECISION BELOW TO BE CONTRARY TO FEDERAL LAW.

The Supreme Court of Florida is the final arbiter of Florida law. The decision below impacts voters' rights and election law in Florida now and in the future, not only in presidential races but in all others as well.

Respectfully, these Respondents do not believe that this Court need interfere with the development of Florida law by its supreme court. The issue is solely whether the supreme court created a body of law regarding the selection of Presidential Electors different from the law existing on November 7, 2000. The court's opinion suggests that it did.

If the Court decides that there was a change, and that the change violated federal law, the Court would determine that the Division properly issued its opinions in November 2000 in response to election officials' inquiries; that those opinions were binding on the requesting elections' officials; that no manual recount provision existed under Florida law to remedy voter errors; and that no right existed in a statewide contest to conduct a manual recount on a selected county basis. Finally, this Court should find that the Secretary properly exercised discretion in rejecting requests for post-certification submissions of additional vote counts other than those from overseas ballots received by the tenth day following the election.

Appropriate relief would be to modify the judgment of the Supreme Court of Florida to the extent that it applied its decisional holdings to the selection of Presidential Electors on November 7, 2000. Such relief also would effectively affirm the order of Judge Lewis finding that the Secretary's exercise of jurisdiction in refusing to permit the submission of manual recounts to cure voter error beyond the seven-day legislative deadline and the Commission's certification on November 15 were proper. As a result, the totals certified on November 15 and the overseas ballots received as of November 17 would constitute the complete certification for the presidential election. No returns from manual recounts after the November 14 certification will be permitted to be counted in the total of votes cast for Florida Presidential Electors.

Respectfully submitted,

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