No. 00-949

IN THE
Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT ALBERT GORE, JR.

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QUESTIONS PRESENTED

I. Whether the Florida Supreme Court's decision interpreting and applying the provisions governing contest proceedings in Florida's Election Code according to established canons of statutory construction violates Article II, § 1, cl. 2.

II. Whether the Florida Supreme Court's decision is inconsistent with 3 U.S.C. § 5.

III. Whether the Florida Supreme Court's decision, enforcing Florida's contest provisions by ordering the manual review of ballots not counted by machines under the legal standard for determining their validity specified in Fla. Stat. § 101.5614, violates either the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below: Governor George W. Bush, as nominee of the Republican Party for President of the United States; Richard Cheney, as nominee of the Republican Party for Vice President of the United States; Vice President Al Gore, as nominee of the Democratic Party for President of the United States; Joe Lieberman, as nominee of the Democratic Party for Vice President of the United States; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, individually and as members of the Florida Elections Canvassing Commission; the Miami-Dade County Canvassing Board; Lawrence C. King, Myriam Lehr, and David C. Leahy, as members of the Miami-Dade County Canvassing Board, and David Leahy, individually and as Supervisor of Elections; the Nassau County Canvassing Board; Robert E. Williams, Shirley N. King, and David Howard (or, in the alternative, Marianne P. Marshall), as members of the Nassau County Canvassing Board, and Shirley N. King, individually and as Supervisor of Elections; the Palm Beach County Canvassing Board; Theresa LePore, Charles E. Burton, and Carol Roberts, as members of the Palm Beach County Canvassing Board, and Theresa LePore, individually and as Supervisor of Elections; and Stephen Cruce, Teresa Cruce, Terry Kelly, Jeanette K. Seymour, Matt Butler, John E. Thrasher, Glenda Carr, Lonnette Harrell, Terry Richardson, Gary H. Shuler, Keith Temple, and Mark A. Thomas, as Intervenors.

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INTRODUCTION

This case raises the most fundamental questions about the legitimacy of political power in our democracy. In this case, the Court will decide whether the Electors for President of the United States, and thus the President of the United States himself, will be chosen by ascertaining the actual outcome of the popular vote in Florida in the election of November 7, 2000, or whether the President will instead be chosen without counting all the ballots lawfully cast in that state. The Florida Supreme Court has determined, in a way that would be unremarkable but for the stakes in this election, that in order to determine whether lawfully cast ballots have been wrongfully excluded from the certified vote tally in this election, they must be examined. This is basic, essential, to our democracy, and to all that gives it legitimacy.

The central question posed by this case is whether any provision of federal law legitimately forecloses the Florida Supreme Court from interpreting, applying, and enforcing the statutes enacted by the Florida Legislature to determine all election contests and ascertain the actual outcome of the popular vote in any such election. See Fla. Stat. § 102.168; see also Florida Election Code, Fla. Stat. §§ 97.011-106.37. This process – which operates by popular vote and employs administrative and judicial processes when needed to ascertain which candidate has prevailed – is the only provision by which the Florida Legislature has established the manner of appointing Florida's Presidential electors in the 2000 general election. They are common provisions that have been adopted and utilized for decades in the vast majority of the States. See *infra*. These statutes expressly provide for "judicial determination" of any contest to determine the rightful winner of an election, as called for by 3 U.S.C. § 5. Those statutes having been faithfully applied by the Florida Supreme Court in this case, the question is whether this Court may properly override Florida's own state-law process for determining the rightful winner of its electoral votes in this Presidential election.

Such intervention would run an impermissible risk of tainting

the result of the election in Florida – and thereby the nation. For this Court has long championed the fundamental right of all who are qualified to cast their votes "and to have their votes counted." *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964). Petitioners' request that this Court intervene in a state electoral process to ensure that votes are *not* counted turns *Sims* on its head. In the end, notwithstanding fears as to how "counting of [the] votes" may "cast[] a cloud upon what [Governor Bush] claims to be the legitimacy of his election," *Bush v. Gore*, No. 00-949 (A-504), Slip op. at 2 (Dec. 9, 2000) (Scalia, J., concurring), there can be little doubt that a count of the still uncounted votes, as the Florida Supreme Court ordered in this case, will eventually occur. The only question is whether these votes will be counted before the Electoral College meets to select the next President, or whether this Court will instead relegate them to be counted only by scholars and researchers under Florida's sunshine laws, after the next President is elected. Nothing in federal law, the United States Constitution, or the opinions of this Court compel it to choose the second course over the first.

OPINIONS BELOW

The opinion of the Florida Supreme Court in the contest proceeding is unreported and is set forth in Exhibit A to the application for stay. The order of the Leon County Circuit Court in that proceeding is unreported and is set forth in Exhibits B and C to the stay application. The opinion of this Court in a distinct but related case involving many of the same parties, see *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836, Slip op. (U.S. Dec. 4, 2000) (per curiam) (hereinafter *Palm Beach County*), is reported at 2000 WL 1769093 and is set forth in Exhibit D to the stay application.

JURISDICTION

The Florida Supreme Court entered judgment on December 8, 2000. An application for stay was filed on the same day. On December 9, 2000, the stay was granted; the application was

treated as a petition for certiorari that also was granted. This Court has jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Florida Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions at issue are reproduced in the appendix to this brief. See S. Ct. R. 24.1(f).

STATEMENT OF THE CASE

This case arises from a contest proceeding under the Florida Election Code to ascertain which Presidential candidate is the rightful winner of Florida's electoral votes in the 2000 general election. See Fla. Stat. § 102.168. Florida's election law establishes two distinct phases for the resolution of disputes regarding the outcome of an election. The first phase – the "protest" action – runs from election day through the certification of the election's results. It involves the reports of county canvassing boards to the Secretary of State and Elections Canvassing Commission, and the resolution by the county canvassing boards of any protests filed pursuant to Fla. Stat. § 102.166. This aspect of Florida's election law was before this Court in *Palm Beach County Canvassing*, *supra*, which sets out in more detail the factual background to this case. See *id.*, Slip op. at 1-4.

The second, post-certification phase for resolution of election disputes is the "election contest action" created by the Legislature in Fla. Stat. § 102.168. That law provides that "the certification of election * * * of any person to office * * * may be contested in the circuit court by any unsuccessful candidate for such office * * * or by any elector qualified to vote in the election related to such candidacy." One of the legislatively specified grounds for contesting any election is the "rejection of a number of legal votes sufficient to change or place in doubt the result of election." *Id.* § 102.168(3)(c). The Legislature expressly provided the state's courts with broad authority both to investigate claims in contest

actions and to fashion "any relief appropriate under such circumstances." *Id.* § 102.168(8).

Indeed, throughout the litigation over the certification results, petitioners themselves identified the contest procedure as the proper manner in which respondent Gore could seek a remedy for the problem of uncounted votes in Florida. See, *e.g.*, Answer Brief of George W. Bush before the Florida Supreme Court in *Palm Beach County Canvassing Bd.* v. *Harris*, Nos. SC00-2346, SC00-2348, & SC00-2349, at 18 (filed Nov. 19, 2000) (accusing respondent Gore of "substitut[ing] the certification process of Section 102.111 and Section 102.112 for the contested election process of Section 102.168 as the means for determining the accuracy of vote tallies"). As the Florida Supreme Court recounted in its opinion below:

> Bush's counsel, Michael Carvin, in the prior Oral Argument in *Palm Beach Canvassing Board* v. *Harris*, in arguing against allowing manual recounts to continue in the protest phase, stated that he did not
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> > think there would be any problem in producing...that kind of evidence in an election contest procedure...instead of having every court in Florida resolving on an ad hoc basis the kinds of ballots that are valid and not valid, you would be centralizing the factual inquiry in one court in Leon County. *So you would bring some orderliness to the process, and they would be able to resolve that evidentiary question*.

Slip Op. 6 n.7 (emphasis added and omitted).

Accordingly, on November 27, 2000, following the certification of Governor Bush as the winner of the Presidential election in Florida, Vice President Gore followed petitioners' recommended course of action and commenced this election contest action under Section 102.168 in Leon County Circuit Court. The complaint raised five claims:

(1) it challenged the rejection of 215 net legal votes for respondent Gore identified by the Palm Beach County Canvassing Board that had been excluded from the certified vote totals, Complaint ¶¶ 3(a), 60;

(2) it challenged the rejection of 168 net legal votes for Vice President Gore identified by the Miami-Dade County Canvassing Board also excluded from the certified vote totals, *id.* at ¶¶ 3(a), 37;

(3) it challenged the inclusion in the certified totals of the election night returns from Nassau County in place of the machine recount tabulation required by Fla. Stat. § 102.141 to be used to determine the certified totals, *id.* at ¶¶ 3(b), 41;

(4) it argued that the court should review approximately 9000 Miami-Dade County ballots that were not counted by the machines,[1] because – among other reasons – review of approximately 2000 similar ballots by the county canvassing board yielded nearly 400 legal votes, *id.* at ¶ 3(d); and

(5) it challenged the rejection of 3300 legal votes in Palm Beach County during the county canvassing board's manual recount. *Id.* at ¶ 3(c).

Following a two-day trial, the circuit court entered judgment for petitioners and the other defendants on all claims. Final Judgment Order, Sauls, J. (Dec. 4, 2000). Three of the circuit court's determinations were relevant to its refusal even to examine the 9000 Miami-Dade County ballots that were introduced into evidence during the trial. First, the court held that the ballots

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[1]These ballots are often called "undervotes." Tr. Contest Trial at 180 (Dec. 2, 2000). They are ballots which have not been counted as votes for President, notwithstanding that on visual inspection they may evidence a voter's intent to cast a vote for President.

should not be reviewed because the Miami-Dade County Canvassing Board did not abuse its discretion in terminating its manual recount pursuant to Section 102.166. Tr. of Ruling, Sauls, J. (Dec. 3, 2000), at 10. Second, the court held that respondent Gore was required to establish a "reasonable probability that the results of the election would have been changed" before the court could review the ballots and that respondent Gore had failed to carry that burden. *Id*. at 9. And third, the court held that, in an election contest action, the court may not review only the contested ballots but rather must review all ballots cast or no ballots at all. *Id*. at 12.

The Florida Supreme Court affirmed in part and reversed in part. The court affirmed the judgment regarding both the ballots from Nassau County and the rejection, after review, of 3300 ballots by the Palm Beach County Canvassing Board. Slip op. at 33, 35. The court reversed, however, as to the exclusion of ballots which the Palm Beach and Miami-Dade Canvassing Boards had determined to represent valid votes, holding that valid ballots may not be disregarded in an election contest simply because they were not identified prior to the close of the county certification process. *Id.* at 35. Most significant for present purposes, the court held that respondent is "entitled to a manual count of the Miami-Dade County undervote," but also that the Florida Election Code authorized as an appropriate remedy "a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." Slip op. at 2; see *id*. at 28-32, 38-40.

Mindful of the impending deadline for resolution of the contest action contained in the safe harbor provision of 3 U.S.C. § 5, the court reversed with instructions to the circuit court to "commence * * * tabulation of the * * * ballots immediately." Slip. op. at 39. On remand, after the Florida Supreme Court's decision, the state circuit court conducted a hearing – the very same evening – to establish practical guidelines and judicial supervision of the process to ensure the fairness of the recount. In election contest

actions, the Florida Legislature has specifically conferred this judicial authority to "fashion such orders as [the court] deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8). The circuit court exercised that authority here to establish orderly procedures for a statewide manual count of undervotes throughout Florida. Tr. of Hearing Before the Hon. Terry Lewis (Dec. 8, 2000); Order on Remand (Dec. 9, 2000).

As to the roughly 9000 undervotes (ballots for which the machine did not record a vote) in Miami-Dade County, the circuit court established the following procedures: (1) beginning at 8:00 a.m. Saturday, the Miami-Dade County undervote ballots would be reviewed in the Leon County Public Library by the Supervisor of Elections of Dade County, in consultation with the Supervisor of Elections in Miami-Dade County; (2) the Supervisor would be permitted to rely on the Clerk of the Court and his staff; (3) two judges from the Second Judicial Circuit would oversee the counting teams; (4) those two judges would be directed to resolve any dispute about ballots; (5) if those judges could not resolve the dispute, Judge Lewis would resolve the dispute; (6) one person for the Democratic Party and one person for the Republican Party would be permitted to observe the count; (7) oral objections would not be permitted, but would be required to be reduced to writing and submitted to the state circuit court; (8) the counting room would be open to the public and the press; and (9) the circuit court would aim to complete the count by 2:00 p.m on Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 1-2.

As for the other counties, the circuit court established the following guidelines: (1) only "undervotes" would be reviewed; (2) the Canvassing Boards would be directed to implement procedures for manually counting the votes, just as they have traditionally done under existing Florida law; (3) judges from throughout the State could be requested to help resolve disputes

that might arise during the recounts; (4) by 12:00 p.m. Saturday, December 9, 2000, the County Canvassing Boards would be requested to fax their plans, protocols, and estimated time schedules to the Leon County Court administrator for the court's review; and (5) the Boards would aim to complete their work by 2:00 p.m. Sunday. Lewis Hrg. Tr. 1-8; Order on Remand 2-3.

The circuit court applied the Florida Supreme Court's holding that the counting teams were to follow the traditional legal standard under Florida law, as set forth by the Supreme Court, for determining whether a valid vote has been cast. In short, the circuit court's guidelines set forth a conventional, uniform process for implementing the court-ordered counting of votes in accord with the Florida Legislature's designated manner of conducting elections. The procedures put in place promise to produce a full, fair, and accurate state-wide count of the undervote in accordance with the Florida Supreme Court's ruling that faithfully implemented the applicable provisions of Florida's Election Code, which unambiguously provides for judicial determination of election contests. See Fla. Stat. § 102.168.

By Order of December 9, 2000, this Court granted a stay halting the ongoing counts. The Court also treated the Stay Application as a Petition for Certiorari, which it granted.

SUMMARY OF ARGUMENT

This Court should immediately vacate its stay and affirm the Florida Supreme Court's judgment.

I. The Florida Supreme Court's decision is fully consistent with Article II, § 1, cl. 2. Petitioners' primary argument to this Court – which is flatly contrary to petitioners' position in the Florida courts – is that the mere assertion of appellate jurisdiction by the Florida Supreme Court violated Article II, § 1, cl. 2. This argument lacks merit because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches;

judicial review and interpretation of Florida's election statutes is a necessary legislative assumption. In any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as an ordinary Florida statute granting courts jurisdiction, thus was accomplished by the Legislature. Further, petitioners' newfound argument is also foreclosed by this Court's longstanding precedents. See, *e.g., Smiley* v. *Holm*, 285 U.S. 355 (1932); *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916); *McPherson* v. *Blacker*, 146 U.S. 1 (1892).

In addition, petitioners' pejorative characterizations of the Florida Supreme Court's decision are unfounded and highly irregular. In its ruling, the Florida court did not "make law" or establish any new legal standards that conflict with legislative enactments. Rather, the court engaged in a routine exercise of statutory interpretation that construed the Florida Election Code according to the Legislature's designated "manner" for choosing electors in a statewide election. See Fla. Sta. § 103.111.

II. Petitioners' argument under 3 U.S.C. § 5 is insubstantial. It is not at all apparent how petitioners' current incarnation of this argument even raises a federal question: it is clear – and not now contested by petitioners – that 3 U.S.C. § 5 simply establishes a safe harbor for States that wish to make use of it. There is no dispute here about the meaning of 3 U.S.C. § 5. And there can be no doubt that the Florida Supreme Court was attentive to the terms of the statute and took into account the relevance of 3 U.S.C. § 5 in determining the intent of the Florida Legislature. In any event, nothing in the decision below even remotely creates "new law" in a manner that runs afoul of the terms of 3 U.S.C. § 5, or that affects Florida's entitlement to that provision's safe harbor. The court engaged in a perfectly ordinary exercise of statutory construction, and it surely cannot be the case that the law "changes" when a jurisdiction's highest court settles the meaning

of state law. In fact, because the circuit court's decision departed from the plain language of the Florida Election Code, under petitioners' theory reversal of the judgment below will deprive Florida's electors of the safe harbor of Title 3.

III. Finally, the Florida Supreme Court's judgment is fully consistent with equal protection and due process. Until now, petitioners have steadfastly taken the position before the Florida courts that, consistent with settled Florida law, a contest action is the proper means by which respondent should challenge the vote count in this election. It is inconsistent for them now to object to the very contest procedure they previously endorsed.

Moreover, contest actions under Florida law relate only to the ballots which one side or the other contests – virtually every Florida election contest case involves a small fraction of the votes cast in the contested election.

In any event, the Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law. The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is also consistent with state law. Nor does the "voter intent" standard set by Florida law violate the Equal Protection Clause.

The Florida Supreme Court has ordered not the "selective" recount of which petitioners have complained but a *statewide* recount of all uncounted ballots in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a statewide recount; petitioners are in no position to complain about a point on which they prevailed.

Petitioners' allegations about the manner in which they say the manual counts have been conducted have no support in the record and are based on unsubstantiated rumors, untested "evidence," and biased ex parte submissions. In fact, the recounts have been conducted in full public view by counting teams made up of

representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. The circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy. If there are anecdotal instances of isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. In the end, petitioners' argument amounts to a charge that the system of manual recounts, expressly authorized by Florida statute and previously used in innumerable instances over the years by Florida (and States throughout the country) is unconstitutional on its face. Such an ambitious and far-reaching claim has no legal support whatsoever.

The judgment should be affirmed. Because of the pressing need to complete the counting of votes, we ask that the stay be lifted immediately.

ARGUMENT

I. Article II Provides No Basis to Override the Florida Supreme Court's Decision.

Petitioners contend that the Florida Supreme Court's decision "established new standards * * * that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution." Stay App. at 2 (Question Presented 1).

Six days ago, in *Bush* v. *Palm Beach County*, No. 00-836, 531 U.S. __ (U.S. Dec. 4, 2000) (per curiam), this Court addressed a claim put forward by petitioner Bush that the decision of the Supreme Court of Florida in *Harris* v. *Palm Beach County* under the Florida Election Code's protest provision (Fla. Stat. § 102.166) ran afoul of this same constitutional provision. Petitioner there argued that "Article II precludes judicial lawmaking." See Bush Br. in *Palm Beach County* at 46. In particular, petitioner Bush relied upon *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892), for the proposition that, in interpreting state statutes relating to the

appointment of electors, the Florida court had run afoul of the provision of the U.S. Constitution giving the state legislature the power to determine the manner of appointment of electors. Petitioner Bush argued that the infirmity in the *Harris* decision was that the Florida court's construction of the provisions concerning certification of election results did not rest on "any statute." Bush Br. in *Palm Beach County* at 47. Petitioner Bush did not suggest that the Florida Supreme Court was disabled from exercising appellate review in that case – even though the protest provision of Section 102.166 (unlike the contest provision of Section 102.168) makes *no reference at all* to judicial review by any Florida court. Nonetheless, petitioner Bush freely acknowledged that the Florida Court could issue "directive[s] founded in pre-existing law." Bush Br. at 48. "Petitioner has never contended that state courts * * * are precluded by Article II from construing laws relating to elections." Bush Reply Br. in *Palm Beach County* at 9 n.6.

This much was common ground about Article II underlying this Court's per curiam opinion in *Palm Beach County.* This Court, of course, "decline[d] * * * to review the federal questions asserted" by petitioner Bush "to be present." Slip op. at 6. It did so because there was "ambiguity" about "the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the Legislature's authority under Art. II, § 1, cl. 2." *Id.* at 7. Specifically, this Court could not determine whether the Florida court intended that its conclusions rest solely upon traditional canons of statutory interpretation, or depended upon the state constitution as an independent and overriding source of law.[2]

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[2] See *id.* at 5 ("There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.' The opinion states, for example, that 'to the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage'

Indeed, this Court *exercised* jurisdiction by vacating the judgment below. See *id.*

1. Recognizing that they have no good claim under the Article II theory presented to this Court just six days ago, petitioners now put forward a radical new proposition in the name of Article II: that the highest appellate court of the state may not exercise its ordinary appellate jurisdiction over decisions of lower state courts where its *jurisdiction* is granted by the state constitution rather than in legislation dealing specifically with presidential elections.

Even apart from the absurd theory that *McPherson* requires everything relevant to a state's process for choosing electors to be packed into a specialized presidential electoral code, the very premise of petitioner's argument is fatally flawed because the Florida Legislature re-enacted the contest statute in 1999 against the settled background rule that decisions of circuit courts in contest actions are subject to appellate review. See, *e.g.*, *Beckstrom* v. *Volusia County Canvassing Bd.,* 707 So. 2d 720 (Fla. 1998); *Harden* v. *Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden* v. *Otter*, 452 So. 2d 564 (Fla. 1984); *McPherson* v. *Flynn*, 397 So. 2d 665 (Fla. 1981). "It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero* v. *Shadywood Villa Homeowners Ass'n*, 657 So. 2d 1193, 1195-96 (Fla. Dist Ct. App. 1995). Under Florida law, therefore, in referring to the "circuit court" in Section 102.168, the Legislature necessarily intended to encompass the ordinary accouterments of appellate review of circuit court decisions. Cf. *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the

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guaranteed by the state constitution. App. to Pet. for Cert. 30a. The opinion also states that 'because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . .' *Ibid.*").

law is."). Under Florida law, legislative provisions granting jurisdiction to the Circuit Court, without any express limitations, are always taken to include appellate review. See, *e.g.*, *State* v. *Sullivan*, 116 So. 255 (Fla. 1928); *Cote* v. *State*, 760 So. 2d 162 (Fla. Dist. Ct. App. 2000), *rh'g denied* (May 8, 2000). It accordingly is no surprise that the Legislature filed an *amicus* brief in this Court in the *Palm Beach County* matter that expressly recognizes the jurisdiction of the state's Supreme Court. Br. of Florida Senate & House of Representatives, No. 00-836, *Bush* v. *Palm Beach County Canvassing Board*, at 9 ("Florida has in place an election code for the resolution of disputes and a court system, *including a Supreme Court*, with the usual judicial powers of such courts." (emphasis added)). Thus, the statute itself supplies the necessary authority for review here.

Even petitioners do not try to explain why the Legislature would have wanted to endow a single circuit judge with final authority to decide these cases. Instead, all indications are that the Legislature intended this statute to be governed by the settled principle of Florida law that the state supreme court has appellate jurisdiction over all matters determined in the lower courts unless the Legislature expressly precludes such review. See, *e.g.*, *Leanard* v. *State*, 760 So. 2d 114, 118 (Fla. 2000) (Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts"). That, of course, is a principle with which the Florida Legislature is quite familiar.

2. In any event, it is plain that Article II would not have been implicated at all had the court below premised its jurisdiction on the Florida Constitution, because Article II, § 1, cl. 2 presupposes the existence of authority in each state to structure the internal processes and organization of each of its governmental branches; and because, in any event, the Florida Legislature *itself* drafted, proposed, and approved through bicameral passage the very provisions of its constitution that provide for appellate jurisdiction. The grant of jurisdiction contained in those provisions, as much as

an ordinary Florida statute granting courts jurisdiction, thus was accomplished by an act of the Legislature, and nothing in Article II, § 1, cl. 2, requires that all the provisions bearing on the selection of presidential electors be located exclusively in a separate statute devoted solely to that end – even assuming that a legislature, exercising its power under Article II, could by express provision eliminate judicial review for any contests arising out of the choice of Presidential electors, or confine that review to the final determination of trial judges. The issue here is whether the Florida legislature has done that. It has not.

Under Florida law, an amendment or revision to the state constitution may be undertaken "by joint resolution agreed to by three-fifths of the membership of each house of the legislature." Fla. Const. art. 11, § 1. Pursuant to that method, the Legislature drafted, proposed, and approved the constitutional provision that confers jurisdiction on the state supreme court. See Fla. Const. Art. 5, § 3(b). That provision originated as a Senate Joint Resolution and was approved by concurrent votes of both houses of the state legislature in 1971. See S.J.R. No. 52-D (1971). It was ratified by Florida's voters in 1972. See West's Fla. Stat. Ann., Fla. Const., art. V. The relevant jurisdictional provisions of the constitution were further revised, again at the proposal and on the vote of both houses of the Florida Legislature, in 1980. See S.J.R. No. 20-C (1980); West's Fla. Stat. Ann., Fl. Const., art. V (historical notes).

This process plainly satisfies any Article II requirement that contests regarding presidential electors proceed under rules devised by the state legislature. That it was contained in a measure not dedicated to the presidency and the Electoral College as such is without constitutional significance. Petitioners could not respond to this seemingly self-evident point by arguing that nothing but state "legislation," and perhaps state "electoral college legislation," is contemplated by Article II. That provision's plain terms mandate only that a State's electors be appointed "in such Manner as the Legislature" thereof may direct; it does not require

that the legislature must act by enacting a bill into law, as opposed to other means of direction. Indeed, this Court has so held. See *McPherson* v. *Blacker*, 146 U.S. 1, 29 (1892).[3]

Nor is this conclusion undermined by the fact that state constitutional provisions in Florida, after proposal and passage by the Legislature, are ultimately ratified or adopted by the voters. Indeed, this Court has squarely held that the analogous constitutional provision in Article I, § 4, which vests state legislatures with the power to prescribe the manner for selecting representatives to Congress, is consistent with a legislative exercise of authority made subject to popular referenda. *See State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). By the same token, state legislation – which petitioners insist *must* govern presidential election disputes – is passed by the Legislature but takes effect only when approved by the *governor*. It is beyond peradventure that the presence of this part of the state lawmaking scheme does not violate a constitutional delegation to the state "Legislature," even when the executive power is used to *veto* legislation adopted by the Legislature. See *Smiley* v. *Holm*, 285 U.S. 355 (1932) (delegation to each State's "Legislature" in Art. 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, does not preclude the State's governor from vetoing a state congressional reapportionment law). The point therefore seems inarguable: in exercising jurisdiction in this case, the Florida Supreme Court acted in precisely the "[m]anner" directed by the Legislature.[4]

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[3] Of course, it is common ground that the means chosen by the legislature are subject to constraints imposed by other provisions of the federal Constitution, for example, Article II, § 1, cl. 4, and the Fourteenth Amendment.

[4] Although it is not directly relevant here, we note that the same principles govern application of Art. 1, § 1 of the Florida Constitution, which was at issue in *Palm Beach County*. That provision also was approved by the Legislature and presented to the voters as part of a significant constitutional

Petitioners appear to argue that, under *McPherson*, the jurisdiction of the state supreme court may not be premised on the Florida Constitution because the U.S. Constitution "does not permit state constitutions to override a state legislature's selection of the manner of choosing electors." Stay App. at 25. But at most this case involves *interpreting* a state legislature's mode of selection, not *overriding* it. Moreover, in *McPherson*; the Court in that case noted, without question, that the Colorado Constitution of 1876 "prescribed" the selection of electors by the legislature of the newly admitted State. 146 U.S. at 33. Further, an 1874 Senate report quoted in *McPherson* referred to the appointment of electors as provided in a state constitution. See *id.* at 35 ("Whatever provisions may be made by statute, *or by the state constitution*, to choose electors by the people, there is no doubt of the right of the legislature * * * ." (emphasis added)).

Even under the most aggressive reading of *McPherson*, however, petitioners' argument is insubstantial.[5] As the Court indicated in *Palm Beach County*, *McPherson* might be read to suggest that it is impermissible for a state constitution to

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revision and re-enactment in 1968. See *Florida Soc'y of Opthalmology* v. *Florida Optometric Ass'n*, 489 So. 2d 1118, 1122 n.2 (1986) (Ehrlich, J., specially concurring); Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475, 476 n.8 (2000). At the time of that action, the Legislature surely was aware that the provision had long been understood to emphasize the importance of the right to vote. See, *e.g.*, *State* v. *Bird*, 163 So. 248, 252 (Fla. 1935).

[5] And, indeed, were it the proper reading, this Court would not have remanded in *Palm Beach County*. In that case, the Florida Supreme Court expressly relied on Article V of the Florida Constitution as the basis for its jurisdiction. See Slip op. at 5. This Court did not express any concern about the Florida court's exercise of its appellate jurisdiction in that case. Rather, it said that it could not precisely determine the "grounds for the decision" below. See *Palm Beach County Canvassing Board*, Slip op. at 6 (internal quotation marks and citation omitted). If this Court had thought that the mere exercise of jurisdiction under a state constitution was improper, it would not have had to remand the case for clarification.

"circumscribe the legislative power" regarding the process for selecting electors. 146 U.S. at 25. Whatever might be the rule where a state constitution was not passed by the state legislature, here, far from "circumscrib[ing] the legislative power," the Legislature *itself*, as noted above, proposed and passed the state constitutional provision that petitioners insist governed this action. And it surely cannot be the case that Article II of the U.S. Constitution *precludes* state legislatures from using state constitutional mechanisms to resolve controversies concerning electors, if that is the "[m]anner" of appointment that the legislature "direct[s]." Indeed, any such rule of preclusion necessarily would run afoul of petitioners' *own* reading of Article II, under which legislatures have *carte blanche* in determining the manner of appointment. Article II cannot be read to swallow itself.

Nor is this even a case where a constitutional provision initially promulgated by the Legislature was later asserted to *prevent* enforcement of a state statute, which was the issue raised by this Court's *Palm Beach County* opinion. Nothing of the sort is going on here. To the contrary, Article V of the Florida Constitution and Fla. Stat. § 102.168 are entirely consistent with one another – and there is every reason to believe that the Legislature intended and expected that participants in election contests would make use of the appeals process as a means of clarifying, interpreting, and enforcing the laws. Under petitioners' own approach, then, Article II of the U.S. Constitution *requires* that the right to appeal put in place by the Florida Legislature must govern here.

Finally, petitioner's argument is directly refuted by *State ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), in which this Court held that Article I, § 4, allowing States to prescribe the manner in which representatives to Congress are elected, does not preclude the state supreme court from exercising jurisdiction over such matters even though that jurisdiction is premised squarely on the state constitution. *Id.* at 568-70. This precedent completely

undercuts petitioners' argument that the Florida Supreme Court, by invoking its jurisdiction under Article V of the Florida Constitution, is completely disabled from playing its ordinary role as the highest court of the state when questions arise concerning the laws that relate to the appointment of electors. Indeed, *McPherson* itself was an original mandamus action in the Michigan Supreme Court. See 52 N.W. 469, 470, aff'd, 146 U.S. 1. This Court affirmed on the merits.[6]

3. Even if the Florida Supreme Court's authority were thought to stem only from the Florida Constitution, not the statute, and even if that constitution had not been enacted by the Legislature, exercise of that authority still would not violate Article II.

a. To begin with, the theories put forward by petitioner Bush

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[6] In any event, this argument was not properly raised below. At oral argument, petitioners' counsel conceded in response to direct questioning that the Florida Supreme Court had jurisdiction in this case, despite Article II. After argument, petitioners filed an untimely "clarification of argument" that was not accepted by the Court below. Even in that filing, petitioners did not argue, as they do here, that Article II disabled the Florida Supreme Court from exercising appellate jurisdiction. To the contrary, they said only that the "relief" sought by respondent was barred by Article II. See Bush Clarification at 2-3.

This is an appeal from a state court judgment, under 28 U.S.C. § 1257. 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, 438-39 (1969). Before a claim may 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)). This rule is mandated by principles of federalism that require respect for state courts which have acted in complete good faith in reaching decisions that may involve questions of federal law. In this case, petitioners were asked at oral argument, directly and repeatedly, whether Article II disabled the court below from adjudicating the appeal and they insisted that it did not. They *never departed from that position* before the Florida Supreme Court, even in their untimely post-argument submission.

in *Palm Beach County* and here are based on misreadings of Article II and of this Court's precedents. Should the Court in this case reach the issue reserved in *Palm Beach County*, it should conclude that a state court need not avoid use of the state constitution in construing legislation.

The state courts would be strange places indeed if Article II disabled them, in construing statutes enacted pursuant to constitutional grants of power to the "Legislature," from placing any reliance on state constitutions. The only authority cited by petitioners for that proposition, *McPherson* v. *Blacker*, actually supports the opposite conclusion: that the state courts, in interpreting state statutes enacted pursuant to the delegation of authority in Article II, *may* rely on all the sources of law they ordinarily bring to the task of interpreting state laws.

McPherson does state in dictum that the delegation to the legislature in Article II "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." 146 U.S. at 25. And undoubtedly it is true that, except by action of the legislature, the State could not purport to vest the power to direct the manner of the appointment of electors in any other body or individual.

But *McPherson* makes equally clear that, once a state legislature has enacted laws in exercise of its power to direct the manner of appointment of electors, the state courts may interpret those laws precisely as they would any other state legislative enactment. The Court's opinion explains that state statutes and the state constitution may be used by state courts in determining the precise scope of the right to vote for electors when such a right is conferred by state legislation. "Whenever presidential electors are appointed by popular election * * * [t]he right to vote [granted thereby] * * * refers to the right to vote as established by the laws *and constitution* of the State." 146 U.S. at 39 (emphasis added). 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 petitioners' basic Article II claim: the state courts are not disabled from applying their state constitutions when they interpret legislation enacted pursuant to Article II.

Nor does Article II create a "state-constitution-free" zone in a state's law – even assuming it would be possible to pull the thread of state constitutional law out of the fabric of a state's law when administering or adjudicating questions bearing on elections for President and Vice President. State constitutions provide the necessary framework for a wide range of practices necessary to the conduct of elections held for the purpose of appointing electors, including a variety of actions by the executive and judicial branches of state government. Indeed, state constitutions determine the very nature and composition of the state legislature that is given the power to determine the method for the appointment of electors under Article II. Compare Fla. Const. art. III, § 1 (creating a bicameral legislature) with Neb. Const. art. III, § 1 (creating a unicameral one). They impose quorum requirements, qualifications of members, voting standards, and other rules necessary to enable the legislature to function. See, *e.g.*, Fla. Const. art. III, § 2 (members); *id.* § 3 (sessions); *id.* § 4 (quorum and procedures); *id.* § 7 (passage of bills); *id.* § 15 (qualifications). In a very real sense, the state legislature is a creature of the constitution that creates it, and any attempt to isolate one from the other would give rise to a host of unforeseen practical and legal problems.[7]

b. The threshold inquiry under Article II is whether the state

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[7] The absurdity of petitioners' view can be illustrated another way: if a state legislature's "plenary" power over the appointment of Presidential electors cannot be circumscribed by any outside authority (including the state constitution), then it would seem to follow that this Court might well lack jurisdiction to entertain this very case, for Congress would have no authority to confer jurisdiction to review these matters under 28 U.S.C. § 1257.

constitution "circumscrib[ed] the legislature's authority," and here the application of the Florida Constitution is fully consistent with Article II because there is every indication that the Legislature intended to provide appellate review in contest actions, not eliminate it.

For example, suppose that the Legislature had enacted a provision stating: "To promote expeditious resolution of election disputes, there shall be no appellate review of the decisions of circuit courts in contest actions." If the Florida Supreme Court had held that provision invalid under the Florida Constitution, an issue would then arise under Article II regarding the validity of the provision for contests of Presidential elections. Here, where the constitutional provision for appellate review merely supplements the Legislature's scheme – much like judicial rules of procedure or evidence or principles of statutory construction – and does not invalidate a choice made by the Legislature, the principle set forth in *McPherson* is not implicated at all. See 146 U.S. at 39-40; see also *id.* at 24-26; *Leanard*, 760 So. 2d at 118 (Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts").[8]

4. Petitioners also raise a claim that the Florida Supreme Court's decision violates Article II because the Court below "over[rode]" the state legislature in its construction of state law. App. for Stay at 25-27.

a. To begin with, there is no warrant in Article II, in *McPherson*, or in *Palm Beach County*, for the contention that some statutorily-based decisions of state law -- those with no "precedent," Stay App. 25 -- violate Article II because they are

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[8] More generally, Article I of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States." Petitioners' argument would seem to mean that this express grant of authority to the Legislature precludes judicial review. That, of course, has never been this Court's view. See, *e.g.*, *United States* v. *Morrison*, 120 S. Ct. 1740 (2000).

"legislative" and not "judicial" in character. Here petitioners essentially resurrect -- now in Article II guise -- the extraordinary *Teague* argument that they made in *Palm Beach County*. Cf. *Teague* v. *Lane*, 489 U.S. 288 (1989). They argue, with absolutely no authority, that "newly announced judicial extensions" of prior precedent in this context, Stay App. 25, violate the federal constitution.

But even *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation that amounts to a "newly announced judicial extension[]" of prior law. Petitioners' attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.[9]

In any event, there are no judicial "extensions" involved in the

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[9] The kind of federal superintendence over state court decisions petitioners would have this Court implement would also turn decisions like *Teague* on their head. *Teague* is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioner would instead use a limitation on "new" judicial interpretations as a sword by which the federal judiciary, in challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioner would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the standard proposed by petitioners would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context.

decision below. The Florida Supreme Court employed the substantive standards expressly set out in the Florida contest provision, and the other Florida statutes on which it relied. Indeed, under petitioners' own theory, a reversal of the judgment below and a reinstatement of the circuit court opinion – which declined to use the standards contained in the plain text of the recently-enacted amendments to the contest provision – would violate Article II.

A discussion of the particular state law issues cited by petitioners confirms that the decision below is a routine example of statutory construction that is entirely consistent with Article II, and that petitioners' claims are nothing more than an impermissible attempt to persuade this Court to redetermine these state-law issues. Significantly, despite the division on the court below with respect to the relief granted, there was significant consensus with respect to the questions of statutory interpretation: six of the seven justices agreed on the issues of statutory interpretation. Slip op. at 13-20; see also *id.* at 61-63 (Harding and Shaw, JJ., dissenting). Petitioners' contentions before this Court ultimately reduce to empty assertions with little in the way of support.

First, petitioners claim that the Section 102.168 contest action does not apply to Presidential elections. However, as the Florida Supreme Court explained, Slip op. at 6 n. 7, petitioner Bush, the Florida Legislature, and the Florida Secretary of State all took the position before that court that the contest action was available. Indeed, petitioner Bush himself filed a third-party complaint in the circuit court in this case, invoking Section 102.168 with respect to the Presidential election.[10]

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[10] The single case cited by petitioners– *Fladell* v. *Florida Elections Canvassing Comm'n* – was an intermediate appellate decision later vacated by the Florida Supreme Court, which expressly held that "the Court's rulings thereon are a nullity." See *Fladell* v. *Florida Elections Canvassing Comm'n*, Nos. 00-2372 & 00-2376, Slip op. at 4 (Fla. Dec. 1, 2000).

In an abrupt about-face, petitioner now suggests that, when a state legislature exercises its "plenary authority" under Article II, it must write specific rules to govern only that unique exercise of authority. This suggestion is both unjustified and unrealistic. If a legislature decides to hold an election to select Presidential electors, it typically assumes that all of the laws, rules, and regulations contained in the state election code will be applicable. And, indeed, all of the States rely on generally applicable provisions of their election laws in carrying out their periodic responsibility of selecting electors for President and Vice President.

Second, petitioners assert that the court below "essentially overruled" two subsections of Section 102.166 by ordering a recount of less than all of the ballots cast. However, as the Florida Supreme Court explained, the Section 102.166 protest remedy is entirely separate from the Section 102.168 contest remedy. Slip op. at 13; see also *id.* at 61 (Harding and Shaw, JJ., dissenting) (agreeing that the two remedies are separate). And whatever the restrictions on the county canvassing boards' authority under Section 102.166, the Legislature expressly granted the courts extraordinarily broad remedial authority in contest actions (see Section 102.168(8)), and it is that authority which is the basis for the determination below.

Third, contrary to petitioners' contention, Stay App. at 26, the court below did not rely on the prior opinion that this Court vacated in *Palm Beach County*. It merely pointed out that a canvassing board's failure to complete the recount by the date specified in the court's opinion (which governed protest remedies) did not forever bar any legal votes identified in that recount from being included in the ultimate vote totals (as a possible contest remedy). Slip op. at 34-35. Petitioners' reference to the Broward County votes, Stay App. at 26, is mystifying because the counting of those votes was not an issue in the court below.

Fourth – and somewhat inconsistently – petitioners attack the Florida Supreme Court for refusing to go beyond the statutory

standard for a legal vote – the clear intent of the voter, Fla. Stat. § 101.5614(5) – and hold that indented ballots may never constitute legal votes. Stay App. at 27. Here, the court's opinion simply recognizes and faithfully adheres to the statutory test; it is difficult to understand how this fidelity to the legislative enactments of the State could possibly violate Article II. If the court had gone beyond the express statutory provision to provide further guidance, petitioners would presumably have argued that such guidance impermissibly made new law.

b. It must be noted that the federal claim asserted in *Palm Beach County* is completely absent here. There is no indication whatsoever in the lower court's opinion that it "saw the Florida Constitution as circumscribing the Legislature's authority" under the federal Constitution. Indeed, the Florida Supreme Court clearly recognized the limitations imposed by Article II – it expressly acknowledged them at the outset of its opinion. Slip op. at 5 ("These statutes established by the legislature govern our decision today.") Accordingly, no federal question (and hence no basis for reversal) is even presented in this case under *Palm Beach County* or Article II.

Petitioners nonetheless impugn the Florida Supreme Court in general terms, arguing that it violated Article II when it "substituted its judgment for that of the legislature" and "rewr[ote] th[e] statutory scheme" governing the appointment of presidential electors in various respects. Stay App. at 23.

But here, unlike in *Palm Beach County*, the Florida Supreme Court's opinion makes clear that it did *not* rely upon the Florida Constitution even in *construing* the election law. The court based its interpretation on entirely conventional tools of statutory construction, including statutory text, traditional canons, and relevant precedents; in other words, it engaged in altogether routine statutory interpretation.

Petitioners' argument here thus is either that the Florida Supreme Court deliberately misrepresented the basis for its

decision by saying it was interpreting Florida statutory law when it was actually doing something else entirely – or that Florida's highest court seriously erred in interpreting Florida law. Either contention contradicts the "general rule" that "this Court defers to a state court's interpretation of state law." *Palm Beach County*, Slip op. at 4. And, were this Court to adopt petitioners' view of Article II, it would be required to second-guess every state law ruling by a state court bearing in any way on a presidential election to determine whether the lower court was attempting to disguise some other and improper basis for decision or had just gotten the state law wrong.

Nor is petitioners' argument consistent with this Court's decision in *Palm Beach County* in which the Court remanded the case for the Florida Supreme Court's clarification of the basis of that Court's decision.

Finally, as this Court is well aware, the process of statutory construction is the process of determining how to resolve issues that are not conclusively determined by the language of the statute. Unavoidably, petitioners take the position that Article II bars a court from engaging in this routine and obviously essential process: if an issue is not explicitly and unambiguously addressed in the language of the statute or in a prior decision that is precisely on point, then the court has usurped the Legislature's constitutionally delegated power. Nothing in Article II so limits the courts' authority. Indeed, the fact that the provisions for election contests in Section 102.168 apply broadly to *all* elections confirms the Legislature's intent that the courts are to exercise their usual role as neutral umpires who interpret the law to resolve disputes.

II. The Florida Supreme Court's Decision Is Consistent With 3 U.S.C. § 5.

The Court is by now familiar with petitioners' ever-shifting reading of 3 U.S.C. § 5. First, petitioners maintained that Section 5 was a flat federal prohibition on the determination of election

controversies through laws enacted after election day. Pet. for. Cert., No. 00-836, at 4-8. In their merits brief, they subsequently acknowledged that Section 5 on its face constituted only a safe harbor, but urged this Court to infer a broader prohibition as supposedly necessary to effectuate Congress' intent. Br. for Petr. Bush at 17-19, 27-29. Now, they attempt without explanation to convert this Court's direction in the *Palm Beach County* case that state courts should be aware of the safe harbor provided by Section 5 in determining legislative intent, see Stay App. at 29 (quoting *Palm Beach County*, Slip op. at 6), into a jurisdictional basis for this Court to invalidate the Florida Supreme Court's decision, *id.* at 30. Petitioners' argument fails both because Section 5 constitutes only a safe harbor from a challenge in Congress to a state's slate of electors and because the decision below did not constitute a change in Florida law.

1. ***The Florida Supreme Court Was Fully Attentive To The Impact Of Its Decision On The Safe Harbor Of 3 U.S.C. § 5.*** From the outset, the Florida Supreme Court was attentive to Section 5's requirements, consistent with this Court's directive that "a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law." *Palm Beach County*, Slip op. at 6. Thus, the court acted fully "cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5," which statute the court quoted in full. Slip op. at 5-6. And the court made clear that its decision rests on the contest process set out in Section 102.168, "which laws were enacted by the Legislature prior to the 2000 election." Slip op. at 6.

2. ***The Text And Legislative History Establish 3 U.S.C. § 5 Exclusively As A Safe Harbor***. Petitioners' attempt to derive a judicial remedy from 3 U.S.C. § 5 conflicts with Congress' avowedly narrow purpose in enacting the statute. As respondent developed at length in his opening brief in the *Palm Beach County* case, see Resp. Br. at 21-30, and as we recount more summarily

here, 3 U.S.C. § 5 serves *no purpose* other than to insulate a state's slate of electors from challenge in Congress. Section 5 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, Florida's own Legislature, appearing as an *amicus* before this Court in the *Palm Beach County* case, rejected petitioners' broader 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 are 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 legislative history of 3 U.S.C. § 5 confirms the understanding that it is focused exclusively on Congress and provides only an option. That history establishes conclusively that the statute's only purpose and effect is to provide each State with a way to guarantee that its electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant

to the Twelfth Amendment.[11] Indeed, supporters of the bill took great care to address and refute without contradiction precisely the construction of Section 5 that petitioners now erroneously press 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. *E.g.*, 15 CONG. REC. 5547 (June 24, 1884) (statement of Rep. Herbert). 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. * * * *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).

Petitioners cannot successfully convert their argument under 3 U.S.C. § 5 into a claim under Article II of the Constitution by maintaining that the Florida Supreme Court overrode the will of the Legislature by taking the state outside the safe harbor of Section 5. The wish to avoid challenge to its electors represents an important indication of a State Legislature's intent, but that wish is not the only one to be taken into account. There is no question, for example, that a state legislature *can* intend to take a State out of the safe harbor to achieve some other objective and a state court's overriding obligation remains to interpret the terms of the statute as the State Legislature enacted it. 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. 633, 635 (1888) (emphasis added); see also Paul L. Haworth, THE HAYES-TILDEN DISPUTED

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[11] As detailed in respondent's opening brief in the *Palm Beach County* case, at 23 & n.14, Sections 5 and 15 were a direct reaction to the Hayes-Tilden matter.

PRESIDENTIAL ELECTION OF 1876, at 305-06 (1906) (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. *E.g.*, 18 CONG. REC. 30 (Dec. 7, 1886) (report by Select Committee on the Election of President and Vice President, accompanying Senate Bill 9).[12]

3. ***The Decision Below Does Not Change Florida Law And Therefore Does Not Affect Florida's Entitlement To The Safe Harbor Of 3 U.S.C. § 5***. Petitioners err in asserting that the Florida Supreme Court's decision "makes new law" in numerous respects.[13] First and foremost, the decision below is in all respects entirely with longstanding Florida election law. *E.g.*, *Beckstrom*

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[12] If there remains any ambiguity about the appropriate reading of Section 5, it should nonetheless be interpreted as only a safe-harbor provision in order to avoid constitutional questions under Article II and 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).

[13] Given the nature of the briefing in this proceeding, in which respondent apparently will have no opportunity to address issues raised for the first time in petitioners' brief, it is of course essential that petitioners' arguments on the merits be constrained to those raised in their application for a stay.

v. *Volusia Cty. Canvassing Board*, 707 So. 2d 720 (Fla. 1998); *Boardman* v. *Esteva*, 323 So. 2d 259 (Fla. 1975); *State ex rel. Peacock v. Latham*, 170 So. 819 (1940), 170 So. 309 (1936), 170 So. 472 (1936); *State ex rel. Nuccio v. Williams*, 97 Fla. 159, 120 So. 310 (1929); *Darby* v. *State*, 73 Fla. 922, 75 So. 411 (1917)

Second, petitioners assert that the decision below conflicts with a 1992 Florida appellate decision describing the discretion of a canvassing board to hold a manual recount in a protest proceeding. Stay App. at 30 (citing *Broward County Canvassing Bd.* v. *Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992)). The cited decision is inapposite. First, the case now before this Court involves a *contest* rather than a protest; the two election schemes (Fla. Stats. §§ 102.166 &.102.168) are distinct. Second, in the present case Miami-Dade County made the decision to commence a manual recount, and the same court that decided *Hogan* held that completing the recount was "mandatory." Even if that single decision were in point, the decision of the Florida Supreme Court – a superior tribunal – on an issue of statutory interpretation could hardly be deemed a sufficient change in the law that Congress would have intended the state's electors to lose their presumed validity. Indeed, the contrary view would conflict with settled principles of judicial hierarchy by binding the Florida Supreme Court to follow the decisions of the inferior courts in such matters.

Third, petitioners make the related argument that the Florida Supreme Court's decision "effectively announc[es] a new standard that manual recounts are *required* in cases of claimed voter error." But petitioners do not even attempt to offer a page reference for this gross misreading of the decision below, which carefully explains that the statute requires one contesting an election to make a threshold showing that a sufficient number of legal votes have been rejected to place in doubt the outcome of the election. Slip op. at 22-23. Indeed, under petitioners' theory of 3 U.S.C. § 5, reversal of the Florida Supreme Court's judgment and reinstatement of the decision of the circuit court would deprive

Florida of the safe harbor. As six of the Florida Justices agreed, the circuit court failed to use the standards included in the statute on Nov. 7, 2000. And petitioners' challenge to the Florida Supreme Court's order directing manual recounts in each county – without regard to the counties' discretion – is entirely disingenuous: it was *petitioners* who argued that a statewide recount would be required in the event that respondents' contest of the 9000 uncounted Miami-Dade ballots was sustained. See Amended Brief of Appellees Bush and Cheney, in *Gore* v. *Harris*, Fla. S. Ct. No. SC00-2431, at 43 ("In a contest of a statewide election, a statewide recount is required by the Equal Protection Clause of the U.S. Constitution and Florida Statute Section 102.168.").

Fourth, Petitioners allege that the Florida Supreme Court changed the law by adopting a statewide standard requiring that "dimpled" ballots be counted in recount proceedings. Stay App. at 31. Of course, petitioners neglect to reconcile that contention with their due process and equal protection theories that the court's decision is unconstitutional because it supposedly *fails* to adopt standards for determining voter intent. We address the standard set forth by the Legislature and applied by the courts in this case *infra*, but it is enough to note here that petitioners do not even claim that the Florida Supreme Court's decision conflicts with any prior court decision or, more to the point, with any legislative enactment in this respect.

Petitioners' examples are most useful, we think, in demonstrating how their theory would require constant federal judicial superintendence over state procedures and state court rulings in Presidential elections. Federal judges would be called on to examine supposed inconsistencies between different rulings in a never-ending search for what law really is "new" and what law is "old." Indeed, petitioners' argument that courts faced with an election controversy may not provide an "answer * * * created after Election Day," Stay App. at 32, would seriously distort the normal application of state election laws, given the necessarily

retroactive nature of judicial decisionmaking. See *Harper* v. *Virginia Dept. of Taxation*, 504 U.S. 86 (1993). And federal courts would apparently scour the text of state court decisions for clues that state judges had applied state election laws to new circumstances – which until this case had long been regarded as a principal responsibility and virtue of state judiciaries, not a federal constitutional vice. Nor would the federal inquiry be limited to the state courts, for petitioners maintain that the safe harbor of 3 U.S.C. § 5 evaporates upon a mere change in ballot procedures by a *single county canvassing board*. See Stay App. at 32 (asserting violation of Section 5 based on supposed change in Palm Beach County's treatment of "dimpled" ballots: "This change in policy by the organ of government granted the authority to conduct manual recounts fails to satisfy 3 U.S.C. § 5's express requirement that controversies be resolved pursuant to law as it exists prior to election day."). Yet some such adjustments must occur repeatedly in every state in every election. It is simply not credible to suggest that this everyday state of affairs regularly operates to eliminate the protections of safe-harbor provisions.[14]

Petitioners' argument is thus inconsistent with the longstanding practice of state courts, as well as attorneys general, to interpret and construe state election statutes as necessary to resolve post-election disputes.[15] Florida courts have routinely engaged in post-election statutory interpretation. See, *e.g.*, *State ex rel. Peacock* v. *Latham*, 170 So. 475, 478 (Fla. 1936); *State ex*

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[14] Indeed, every time a court interprets a state election statute for the first time in the context of a Presidential election, it presumably makes "new" law in petitioners' view, thereby stripping the state of the safe harbor afforded by Section 5.

[15] 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, 1999 WL 1333481 (Dec. 22, 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).

rel. Knott v. *Haskell*, 72 So. 651 (Fla. 1916); *State ex rel. Drew* v. *McLin*, 16 Fla. 17 (1876). The range of settled practices that would be drawn into question by petitioners' argument, or that would draw the availability of the 3 U.S.C. § 5 in question, is little short of staggering.

III. The Fourteenth Amendment Affords No Basis for This Court to Set Aside Florida's Established Statutory Proceedings for Determining the Proper Outcome of the Election.

A. There Is No Violation of the Equal Protection Clause.

Petitioners have pointed to two supposed equal protection problems arising from the remedy ordered by the Florida Supreme Court. First, petitioners contend that the Florida Supreme Court erred by ordering a statewide manual count of undervotes, thereby supposedly discriminating against those whose votes were counted by automated means. Second, petitioners contend that the inclusion for a manual recount of approximately 9000 undervotes from Miami-Dade County caused some votes to be counted twice and others to be counted using standards different from those applied to other Miami-Dade County votes. Supp. Mem. at 2 n.1. Neither allegation has merit.

To begin with, neither of petitioners' claims was raised properly below. It is important to appreciate the narrowness of the Fourteenth Amendment claim raised by petitioners before the Florida Supreme Court: Petitioners argued (in only one throwaway line, no less) that "the application of counting standards in different counties as well as the occurrence of manual recounts in only selected counties or selective portions of counties violates the equal protection and due process clauses of the U.S. Constitution." Amended Brief of Appellees George W. Bush and Dick Cheney at 45 (Exh. H to Stay Application). No other Fourteenth Amendment claim was framed.[16]

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[16] Petitioners' post-argument submission to the Florida Supreme Court,

Petitioners' Fourteenth Amendment arguments rest principally on the assertion that, if the manual count proceeds, similar ballots will be treated dissimilarly in different parts of the State. We note that, insofar as this argument is directed at pre-contest tabulations, it is out of place here; petitioners should have raised such claims in an election contest of their own. But more fundamentally, petitioners' contention simply finds no support in the law, and has sweeping implications for the conduct of elections. The court below was quite insistent that the counting of ballots must be governed by a *single* uniform standard: the intent of the voter must control. Of course, so long as the count is conducted by humans, it undeniably will be possible to allege some degree of inconsistency in the treatment of individual ballots – as is the case whenever the application of any legal standard (*e.g.*, negligence, public forum) is at issue. That will be true in *every* one of the many jurisdictions that provide for manual recounts; it is true whenever States provide for variation in the methods of voting from county to county (*e.g.*, optical scanners as opposed to less reliable punch card ballots), which is now the case in *every* State; and it was true *everywhere* prior to the introduction of mechanical voting machines, when all ballots were counted by hand. Petitioners' theory would mean that all of these practices violate the Fourteenth Amendment. Moreover, if petitioners mean to say that all votes must be tabulated under a fixed and mechanical standard (*e.g.*, the "two-corner chad rule"), their approach would render unconstitutional the laws of States that hinge the meaning of the ballot on the intent of the voter – and also would mean that the Constitution requires the disenfranchisement of many voters whose intent is clearly discernible. This argument, in our view, is wholly insubstantial. Similar arguments regarding the conduct of elections uniformly have been rejected by the courts.

In any event, if the standard set out by the Florida Court is not

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"Clarification of Argument for Appellees George W. Bush and Dick Cheney" (Exhibit M to Stay Application), was not accepted for filing.

applied consistently, applicants will have recourse to the Leon County Circuit Court and, on appeal, to the Florida Supreme Court, either of which will be able to eliminate any inconsistency by determining itself which ballots meet the statutory standard.[17]

1. *The Florida Supreme Court's order to review the ballots from Miami-Dade County is consistent with established state law.*

The Florida Supreme Court's order to "remand this cause for the circuit court to immediately tabulate by hand the approximately 9,000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed," Slip op. 38, was consistent with established state law for handling contest actions. As such, it raises no substantial federal questions.

This holding was a rather straightforward application of the Legislature's injunction, in Section 102.168(3), against the exclusion of "a number of legal votes sufficient to change or place in doubt the outcome of the election," coupled with its command to the judiciary in the contest proceeding to "ensure that any allegation in the complaint is investigated, examined … to prevent or correct any alleged wrong." Sec. 102.168(8). Moreover, the Court's decision was premised on the trial court's finding of "less than total accuracy, in regard to punchcard voting devices utilized in Miami-Dade" County, *Gore* v. *Harris*, No. 00-2808 (Fla. 2d Judicial Cir. Dec. 4, 2000), and a holding of an Florida appellate court that the Miami-Dade Canvassing Board's decision to abandon its count was an abdication of its "mandatory obligation"

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[17] And, indeed, Florida statutory law provides that opportunity with regard to any ballots that a candidate believes should not have been counted during a manual recount pursuant to Fla. Stat. 102.166, see App. 36 (complaining about standards used during previous manual recounts). See Fla. Stat. 102.168 (3)(c) (permitting a candidate to contest the inclusion of "illegal votes" in the certified election results).

under Florida law. *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Board*, 25 Fla. L. Weekly D2723 (Fla. 3d DCA Nov. 22, 2000). This remedy is well established under Florida law in election contest cases. See *Broward Cty. Canvassing Bd.* v. *Hogan*, 607 So.2d 508 (4th Dist. App. 1992); *Morse* v. *Dade County Canvassing Bd.*, 456 So. 2d 1314 (3rd Dist. App. 1984); *McQuagge* v. *Conrad*, 65 So.2d 1851 (Fla. 1953); *State ex rel. Carpenter* v. *Barber*, 198 So. 49 (1940); *State ex rel. Peacock* v. *Latham*, 170 So. 475 (1936); *State ex rel. Titus* v. *Peacock*, 170 So. 309 (1936); *Ex parte Beattie*, 245 So. 591 (1936); *Nuccio* v. *Williams*, 120 So. 310 (1929); *Ex parte Smith*, 118 So. 306 (1928); *Florida* v. *Knott*, 72 So. 651 (1916); *State ex. rel. Law* v. *Saxon*, 5 So. 801 (1889).

Fashioning such a remedy in no way violates the U.S. Constitution in general, or its Equal Protection Clause specifically. Targeting the vote count to those ballots that had not registered on machines that were found not be accurate by the trial court was a narrowly tailored remedy authorized under state law, that certainly does not discriminate against any group of voters on its face. Indeed, it is the exclusion of these ballots, not their inclusion, that would raise questions of unequal treatment. The Florida Supreme Court's order does nothing more than place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated. In the end, all voters are treated equally: ballots that reflect their intent are counted. It is of no constitutional import whether that intent is captured by a machine tabulation or one performed by election officials.[18]

[18] There has been some suggestion that further manual counting of ballots may produce a "degradation of the ballots," *see Bush, supra,* at 2 (Scalia, J., concurring). Yet this suggestion has scant support in the record, and there is ample evidence to the contrary. *See, e.g., Tr. 11-22-00, Morning Session, at 7, 13-14) (Remarks of Supervisor Leahy)*. More importantly, clearly the question of to what extent recounts of the ballots increase accuracy is a question for the state courts and state election official under state law, not for this Court to resolve.

2. *The Florida Supreme Court's order of a manual tabulation of ballots that were recorded as "no votes" is consistent with state law.*

The gravamen of petitioners' complaint concerning the manual recount has been its selectivity. Yet, in this case, the Florida Supreme Court ordered not a "selective" recount but a *statewide* recount of undervotes in every Florida county that had not already completed a manual recount. Indeed, the Florida Supreme Court expressly *granted* petitioners the relief they sought with respect to a state-wide recount, "agree[ing] with the appellees" that Florida statutes "require a counting of the legal votes contained within the undervotes in *all counties* where the undervote has not been subjected to a manual tabulation." Slip op. at 2 (emphasis added). Petitioners cannot complain of a ruling in their favor.

In any event, the availability of the manual recount as a standard post-election procedure is a long-standing feature of Florida law, and of the law of other States,[19] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[20] As

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[19] At least 21 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. Cal. Elec. Code § 15627; Col. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 2601l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[20] The uncontradicted evidence by both respondents' and petitioners' witnesses at trial was that a manual count of punch card ballots was necessary in close elections. Petitioners' expert witness, John Ahmann, testified that a manual count was advisable "in very close elections" (12/3/00 Tr. 442) and detailed ways in which machine deficiencies could result in intended votes not registering in a machine count (*id.* at 425, 430, 440-41, 443-45). Respondents' expert witness also so testified. (12/2/00 Tr. 78-87; see also *id.* 51-54, 63.) Petitioners' witness, Judge Burton, testified that it was possible to discern the clear intent of the voter in hundreds of ballots the

this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, §4."). Where some ballots apparently have not been counted, and there is reason to believe that evidence of a voter's intent may exist on the face of those ballots, it is an entirely reasonable remedy to direct a manual examination of those ballots to determine whether voter intent can be clearly ascertained. In that regard, the remedy of the Florida Supreme Court was to

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machines did not register as a vote. (12/2/00 Tr. 278; see also *id*. 260-61, 271.) The trial court expressly found that "voter error and/or less than total accuracy in regard to the punchcard voting devices utilized in Dade and Palm Beach counties." (12/4/00 Tr. at 10.)

Many studies support the conclusion of the Florida Legislature, the trial court, and witnesses from all sides that machine counts produce inaccuracies. See, *e.g.*, Roy G. Saltman, *Accuracy, Integrity, and Security in Computerized Vote-Tallying,* U.S. Dep't of Commerce, National Bureau of Standards (1988); National Bureau of Standards Report, *Effective Use of Computing Technology in Vote-Tallying* (1978); Ford Fessenden, *Counting the Vote*, N.Y. TIMES, Nov. 17, 2000, at A1 (citing many voting machine manufacturers who say that machine inaccuracy ranged wildly in Florida on November 7, and quoting industry officials who state "the most precise way to count ballots is by hand"); David Beiler, *A Short in the Electronic Ballot Box*, Campaigns & Elections, July/Aug. 1989, at 39; Tony Winton, *Experts: Machine Counts Inaccurate*, AP ONLINE, Nov. 11, 2000 (noting that "officials in England and Germany consider manual counts to be more accurate than automated ones" and quoting computer scientists for the proposition that "problems with automated vote-counting equipment, especially the computer card punch type used in south Florida, have been well documented" and that error rates of two percent to five percent are routine); Marlon Manuel, *Recounts: Democratic Official Defends Method That Bush Opposes*, ATLANTA J. & CONST., Nov. 17, 2000, at A11 (quoting president of company that "sells ballot software to 12 Florida counties, including . . . Palm Beach, Miami-Dade and Broward" for the proposition that "[i]f they're trying to determine a voter's intent, they're not going to get it off our machine or any machine").

adhere strictly to the directive of the Florida Legislature that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(5).

It is important to note that petitioners do not claim that the Florida Supreme Court's order is discriminatory in any invidious manner; they do not claim that any citizens of Florida were improperly denied their right to vote; and there is no claim of any fraudulent interference with the right of anyone to vote. Petitioners make none of these claims, which in certain circumstances have provided the basis for federal intervention in state election procedures and/or findings of invalidity of such procedures. Instead, petitioners' contention here seems to be that there is some constitutional defect in a state procedure that permits manual recounts to occur for some votes which may have been missed (undervotes), but not all votes (*i.e.*, votes that were effectively counted by automated processes). The Florida process, however, provides citizens of each county, and candidates for office within each county, with equal rights: No votes can be "diluted" in the constitutional sense by a process that seeks simply to count the legally cast votes of citizens participating in an election whose votes may not have been recognized by an initial machine count.[21] All undervotes are treated the same way under the Florida Supreme Court's order. The Equal Protection Clause does not require that the Florida Supreme Court ignore the most

[21] The "dilution" cases petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person, one-vote principle under which voters from different districts cannot be given votes of unequal weight. That issue is not even presented where, although the election is conducted by individual counties, the winner is determined based on his statewide popular vote. Petitioners' heavy reliance on *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), is equally misplaced. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The Florida Supreme Court's order does not work any such irrational discrimination. Rather, the remedy fashioned is applied generally and equally to all undervotes in the state.

accurately counted vote totals while seeking to ensure that all votes are counted.[22]

The use of different vote tabulating systems undoubtedly will generate tabulation differences from county to county.[23] But this will be true "[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions * * * .)." *Siegel* v. *LePore*, 2000 WL 1687185, at *7 (S.D. Fla. Nov. 13, 2000). As Chief Judge Anderson noted in the *Siegel* appeal: "No court has held that the mere use of different methods of counting ballots

[22] Many states expressly allow for county-by-county or precinct-by-precinct recounts. See, e.g., Cal. Elec. Code § 15621 (voter may request recount and specify counties in which recount is sought and order of precincts to be counted; voter must fund recount); Ind. Code § 13-12-11-1 (candidate entitled to recount, which may be conducted in one or more precincts); Iowa Code § 50.48(4) (any statewide candidate, upon posting bond, is entitled to a recount in "one or more specified election precincts" within counties); Kan. Stat. § 25-3107(b) (candidate (or voter) may request a recount of "the ballots cast in all or in only specified voting areas for the office for which such person is a candidate," with the recount method being at the discretion of requesting party; bond must be posted); Mont. Code §§ 13-16-211, 13-16-305 (any unsuccessful candidate can petition for a recount in specified counties upon posting bond; candidates can also petition a state court for a recount in one or more counties and in one or more precincts within each county, and court "shall order a recount in only the counties or precincts for which sufficient grounds are stated and shown."); N.J. Stat. § 19:28-1 (any candidate (or group of 10 voters) who believes that an error may have occurred can apply to state court for a recount of votes cast in any district or districts."); Tex. Elec. Code § 212.001(5) (campaigns or voters may request a recount, specifying the election precincts, grouped by county or otherwise, for which the recount is desired); Wis. Stat. § 9.01 (any candidate or voter may request a recount on ground of mistake or fraud; requesting party must post bond and identify specific locations where recounts are desired).

[23] Florida's 67 counties use four different voting systems: one county counts all votes by hand; one uses mechanical lever voting machines (votes recorded on counter wheel when voters pull lever); 24 use punch card voting systems; and 41 use marksense voting systems (optical scanners detect marks made on ballot). See Pet. App., Exh. A, submitted with petition in *Touchston* v. *McDermott* (Dec. 8, 2000); *Touchston* v. *McDermott*, No. 00-15985, 2000 WL 1781942, at n.16 (CA 11 Dec. 6, 2000).

constitutes an equal protection violation." *Siegel* v. *LePore*, 2000 WL 1781946, at *14 (CA11 Dec. 6, 2000) (concurring opinion). Indeed, the fact that counties have different ballot marking and counting systems demonstrates the value in having statutory checks and balances such as a manual recount process.[24] County-to-county variations of this nature do not violate the constitution. See, *e.g.*, *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1158 (CA5 1981) (legislative deviation from equality is permissible for purposes of administrative convenience, adherence to historical or geographic boundaries and recognition of separate political units).[25]

3. *The "voter intent" standard set by Florida law does not violate the Equal Protection Clause.*

The Florida statutory standard used in conducting manual

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[24] For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.3% undervote rate (4 in 1000 ballots). In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade Counties experienced a 1.5% undervote rate (15 in 1000 ballots) in the presidential race. The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause; it also enhances the equality of the voting process.

[25] Many legal standards require a finder of fact to examine evidence and make a judgment regarding intent. *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) (intent is a question of fact for a jury). Will contests seek the intent of the decedent. Reliance on finders of fact to apply broad standards is ubiquitous. *Russell* v. *Gill*, 715 So. 2d 1114 (Fla. Dist. Ct. App. 1998) (where the terms of a contract are ambiguous, intention of the parties may be ascertained from all of the pertinent facts and circumstances); *Holland* v. *United States*, 348 U.S. 121 (1954) (evidence must be sufficient to convince criminal jury of the guilt of the accused beyond a reasonable doubt). Indeed, the law is full of standards that require judgment to ascertain intent. Federal juries in criminal fraud cases are instructed to consider the facts in evidence and that "[t]o act with intent to defraud means to act knowingly and with the intention or the purpose to deceive or cheat." O'Mally et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.07 (5th ed.).

recounts – ascertainment of the voter's intent, see Fla. Stat. § 102.166(7) – does not violate equal protection requirements. It is incorrect to assert, as petitioners do, that the standard for determining whether a ballot should be counted varies from county to county. The "voter intent" standard is the same throughout Florida, and the circuit court issued detailed guidelines to ensure that the manual counts proceeded in a uniform fashion. Each ballot must be reviewed ballot-by-ballot to determine the voter's intent in the context of the entire ballot. Arbitrary exclusions would violate the Florida statutory scheme. The Florida Supreme Court's instructions in *Harris* were given to prevent this result.

In its decision, the Florida Supreme Court reaffirmed the governing standard by which the recounts were to proceed – one that has been in place in Florida and countless other states for years: "the standard to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" Slip op. at 40 (citing Fla. Stat. § 101.5614(5)). The state circuit court issued detailed guidance based on this standard immediately after the Florida Supreme Court's decision. The Florida canvassing boards and courts have long implemented that standard, and vote totals certified in this and many previous elections reflect countless ballots manually recounted under this same standard. See, *e.g.*, *Darby* v. *State*, 75 So. 411, 413 (Fla. 1917). Indeed, the Secretary of State's November 14 certification included numerous manually counted votes for petitioners, including vote totals from heavily Republican counties.

Hence, the contention that the "intent of the voter" standard violates equal protection (or due process) is nothing more than an argument that the contest and recount procedures of Florida's election code, which mirror those that have long existed in one form or another in numerous States, are on their face unconstitutional. Manual counting and recounting of ballots under the intent of the voter standard has been the *rule*, not the exception, in this country for generations – indeed, for most of the

period since its founding. See *Bush* v. *Gore*, No. 00-949 (00A504) (U.S. Dec. 9, 2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) ("intent of the voter" standard followed by Florida Supreme Court is "consistent with the prevailing view in other States"); see also *Delahunt* v. *Johnston*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981); *Democratic Party of the Virgin Islands* v. *Board of Elections*, 649 F. Supp. 1549, 1552 (D.V.I. 1986) ("There can be no question then, that the intention of the elector must be paramount. Neither a regulation of the Board of Elections, nor a decision of the supervisor of elections, can supercede the requirement that where the elector's intent can be divined, it should be given effect.") (citation omitted)); cf. *NLRB* v. *Americold Logistics, Inc.*, 214 F.3d 935, 939 (CA7 2000) ("The Board's policy – and the rule in this circuit – is to count ballots when the voters' intent is clear, despite irregularities in the manner in which the ballots have been marked") (citations omitted); *TCI West, Inc.* v. *NLRB*, 145 F.3d 1113, 1115 (CA9 1998) ("The general rule in this Circuit and most other circuits, as well as the policy admitted by the Board is that a ballot should be counted where a voter's intent is clear, despite irregularities in the voter's mark.") (citations omitted); *NLRB* v. *Duriron Co.,* 978 F.2d 254, 257 (CA6 1992) ("A ballot should normally be counted if there is a clear expression of preference regardless of an irregularity in the voter's mark."); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871, 875 (CA2 1982) ("The general rule is that a ballot should be counted if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.") (internal quotations omitted); *Wackenhut Corp.* v. *NLRB*, 666 F.2d 464, 467 (CA11 1982) ("We seek to determine whether the Board's action here is consistent with the admitted Board policy of attempting to give effect to the voters' intent whenever possible") (internal quotations

omitted) (citing *NLRB* v. *Manhattan Corp.*, 620 F.2d 53 (CA5 1980); *NLRB* v. *Tiche-Goettinger Co.*, 433 F.2d 1045 (CA5 1970).

Moreover, with respect to the counting of punch card ballots, most States do not attempt specifically to define what particular appearance of the ballot is required before a vote is to be counted. Even those States that do have such standards usually have a "catch-all" provision permitting the counting of any ballot that "otherwise reflects the intent of the voter." *E.g.*, Tex. Election Code Ann. § 127.130(d)(4), (e) (2000) (vote to be counted if "indentation" on chad or other mark indicates clearly ascertainable intent of voter); Ind. Code Ann. § 3-12-1-1. At least 22 states have enacted statutes allowing – or even as in Texas encouraging – the use of manual recounts to back up punch-card tabulation systems. See *supra*.

Even in states that have adopted statutory guidelines to assist in ascertaining voter intent, the ultimate goal is to determine how a voter intended to vote. For example, the election code of Texas provides as follows:

> (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
>
> (1) at least two corners of the chad are detached:
>
> (2) light is visible through the hole;
>
> (3) an indentation on the chad from the stylus or other object is present and indicates a clearly *ascertainable intent of the voter* to vote; or
>
> (4) the chad reflects by other means a clearly *ascertainable intent of the voter* to vote.
>
> (e) Subsection (d) does not supersede any clearly *ascertainable intent of the voter*.

Tex. Elec. Code § 127.130 (emphasis added). The Texas statute, while providing guidelines for manually counting punch card ballots, thus establishes the intent of the voter as the paramount and overriding standard. Indeed, the guidelines set forth in subsection (d) are made expressly subject to this overarching standard. If the Florida standard is struck as unconstitutional, it is difficult to see how statutes such as the Texas election code could survive.

If petitioners have complaints about the treatment of particular ballots, or the treatment of ballots in particular locations, the Florida procedure now in place provides a perfectly suitable mechanism for addressing them: such complaints may be presented to the circuit court and tested on appeal. But rather than invoke that traditional remedy, petitioners would have the Court abruptly end the counting altogether and *toss out lawfully cast ballots that have been, and are now being, counted.* That is an absurd and unprecedented response to an asserted flaw in the process for tabulating votes, and one that surely is not required by the U.S. Constitution. In fact, if there is anything to petitioners' equal protection claim, the remedy is not to end the counting of votes; it is, instead, to articulate the proper standard and – as required by state law – to have the counting go forward under that standard.

B. There Is No Violation of the Due Process Clause.

Petitioners' claim under the Due Process Clause has no merit. First, any suggestion that the application of different counting standards by different counties raise due process concerns here is fatally flawed because petitioners have utterly failed to develop any record evidence to support their accusations in this regard and can offer only unconfirmed rumors and untested accusations. As described *supra*, recounts have in fact proceeded in an orderly and uniform fashion. Florida's manual recount system acts as an important check on the ballot counting process that promotes, not erodes, public trust in the electoral system. The manual recounts here, for example, were conducted in full public view by counting

teams made up of representatives from different political parties, with the supervision of a three-member canvassing board that includes a sitting county judge and review by the Florida judiciary. And the circuit court developed lengthy and detailed guidelines to ensure uniformity and accuracy.

Petitioners' allegations about the recount process are thus without any factual basis. Moreover, they are not even legally cognizable. Petitioners have failed to adduce proper evidence to support their claim. In any event, if there are isolated mistakes or inaccuracies during recounts, petitioners have ample remedies available to them under Florida law and Florida procedure to secure full redress. There is no warrant for holding the entire recount procedure unconstitutional on its face.

Petitioners' argument would have the unthinkable consequences of (i) overturning the settled "intent of the voter" standard; (ii) invalidating the entire election in Florida, in which many ballots already have been included in the certified totals as a result of manual counting, and (iii) calling into question numerous other results nationwide in a host of local, state, and national elections. Not surprisingly, petitioners' argument also flatly contradicts their representation of counsel before the Florida courts in the *Bush* v. *Palm Beach County Canvassing Board* litigation (quoted above), in which they urged that manual recounts should be conducted pursuant to a *contest* in order to minimize concerns regarding the standards for counting.

To the extent that petitioners' due process argument rests on the claim that the Florida Supreme Court imposed standards for counting the votes that were not in place when the votes were cast, that argument must fail for reasons already discussed above: the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it. In fact, this argument is particularly flawed in the due process context. To establish the charge of a constitutionally impermissible retroactive change in the law, petitioners would have to demonstrate not simply that the Florida Supreme Court's decision constituted a

retrospective change and that the change deprived them of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (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). Petitioners cannot possibly meet this standard,[26] and the authorities on which they rely are wholly inapposite.[27]

The only due process right even arguably implicated by this case is the right of voters to have their ballots counted, a

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[26] This Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings 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).

[27] *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 do petitioners 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. Petitioners assert here the very different interest in precluding the counting of entirely *lawful* ballots, an interest that cannot possibly have constitutional footing.

Any reliance on *United States* v. *Mosley*, 238 U.S. 383 (1915), *United States* v. *Classic*, 313 U.S. 299 (1941), and *Lane* v. *Wilson*, 307 U.S. 268 (1939), would also be misplaced. All three decisions involve cases in which voters were deliberately and insidiously disenfranchised. *Mosley* and *Classic* were criminal cases that involved conspiracies to preclude votes in certain precincts from being counted and to count votes for a candidate as votes for his opponent. *Lane* was a challenge to a state statutory scheme that permanently disenfranchised a class of voters who failed to register to vote during a certain ten-day period. Unlike the cases cited by petitioners, the Florida statutory process seeks to enfranchise voters where machine marking and recording equipment may have worked a disenfranchisement of voters who cast legal ballots.

consideration that strongly supports the state supreme court's decision. It is worth noting in this respect that petitioners themselves have taken the view that military absentee votes should be counted even if the ballots in question did not comply with various clear requirements of Florida statutory law. We agree that voters have important rights to have their ballots counted, and the magnitude of those rights dwarfs any due process claim petitioners assert here.[28]

At bottom, all petitioners can really claim is that, in their 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 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." 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.

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[28] Even if this Court disagreed, the appropriate remedy for either an Equal Protection Clause or Due Process Clause violation would not be to cancel all recounts, but rather to order that the recounts be undertaken under a uniform standard. Counting *none* of the votes would be vote dilution with a vengeance.

CONCLUSION

The stay granted by this Court should be immediately dissolved, and the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted.

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