No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The arguments advanced to this Court by respondents depend upon minimizing into insignificance the meaning of Article II, §1, cl. 2 of the Constitution, 3 U.S.C. § 5, and the effect of the post-election revision of Florida election law by the Florida Supreme Court. If respondents are correct, the constitutional delegation to state legislatures of the power to determine the manner in which presidential electors are appointed, and Congress's effort to provide a means by which a State's selection of electors will be determined in a timely and conclusive manner according to rules and procedures adopted before the election, may easily be circumvented. The predictable consequence will be post-election chaos, turmoil, litigation and uncertainty whenever a state court changes the law for ascertaining the results of an election in the midst of that post-election process. Every close presidential election will be transformed into a litigation circus, the outcome of which will be determined in substantial part by state court changes in election laws "passed for the occasion." 1 Dec. 1803, Annals 13:129 (reprinted in 5 FOUNDERS' CONST. at 453).

I. Respondents' Efforts To Recharacterize The Decision Below Cannot Withstand Scrutiny

Respondents' lengthy and tortured efforts to recharacterize the decision below as a modest, hardly noticeable, garden-variety act of ordinary statutory interpretation fail to withstand the mildest scrutiny.[1]

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[1] Respondents contend that the Florida Supreme Court's revision of Florida election law is impervious to any review by this Court. Gore Br. 1; Butterworth Br. 8-9. Where, however, the resolution of a federal question turns on whether a state tribunal adopted a new rule of law to the detriment of the federal petitioner, this Court has not hesitated to examine the decision in light of preexisting state law. *See*

First, the Florida Supreme Court plainly rewrote the election laws in a number of significant respects. *See* Harris Br. 11-20. Its decision was as far removed as it could be from a "garden variety" statutory interpretation. Gore Br. 1. In fact, while the court seasoned its opinion with discussions of canons of statutory construction, even the court acknowledged that it was changing, not construing, the law. Throughout its opinion, the court repeatedly stressed that it would not be bound by "technical statutory requirements" (Pet. App. 36a), but would use its "equitable powers," *id*. at 37a, to be guided by "the will of the people," *id*. at 8a, "to reach the result that reflects the will of the voters," *id*. at 10a, and to ascertain not the meaning of a statute but the "will of the electors," *id*. at 36a. The court plainly understood that its decision changed the meaning of clear statutory provisions in a manner that could affect the outcome of the election (and will, presumably, apply to future elections).

Respondents' efforts to rationalize what the court below actually did are most transparent in their argument that the court was doing nothing other than resolving a purported "conflict between one provision [§ 102.111] saying that counties filing returns after seven days 'shall' be ignored and another [§ 102.112] saying that returns filed past the deadline 'may' be ignored." Gore Br. 14. Petitioner has already demon-

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Pet. Br. 20; *General Motors Corp. v. Romein*, 503 U.S. 181, 187-88 (1992); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958). Indeed, in *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), this Court exercised independent judgment to determine whether a state supreme court's "construction unexpectedly broaden[ed] a [criminal] statute which on its face had been definite and precise." Such an "unforeseeable state-court construction," the Court held, violated the defendant's due process right to fair notice by retroactively changing the law. *Id.* at 354-355.

strated the fallacy of that contention. Pet. Br. 22-25 & n.6, 45-46; *see also* Harris Br. 16-18 & n.13. Whatever "reconciliation" may be appropriate between the mandatory and permissive non-inclusion of returns submitted after the deadline, no conceivable manipulation of those provisions could have led to the conclusion that the Secretary "shall accept" such returns.

Respondents' assertion that the mandatory statutory deadline of 5 p.m. on the 7th day after the election, which is contained in equally forceful language in both § 102.111 and § 102.112, conflicts with the counties' discretionary power to grant requests for manual recounts (§ 102.166) "because in many cases a full manual recount simply cannot be completed by 5:00 p.m. on the seventh day following the election," is equally indefensible. Gore Br. 14. The Florida legislature was undoubtedly aware of this potential conflict, since it adopted the recount provision at the same time it reiterated the requirement that counties "must" file their returns within seven days of the election. *See* Fla. Laws 1989, c. 89-338 § 30, c. 89-348 § 15. Moreover, any perceived conflict is wholly illusory, since the decision to initiate a manual recount is wholly discretionary. *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. App. 1992). If a county board believes it cannot make the legislative time limit for submitting its returns, it need not conduct the recount. And, if a county board chooses to conduct a recount, the legislature has directed that "[t]he county canvassing board *shall appoint as many counting teams* of at least two electors *as is necessary* to manually recount the ballots" (Fla. Stat. § 102.166(7)(a) (emphases added))—presumably to enable the county to meet the deadline. If it fails to complete the recount by the deadline, § 102.112 provides that the Secretary "may … ignore[]" untimely returns. *See* Pet. Br. 22 & n.6.

Respondents—like the court below—close their eyes to the fact that the setting of deadlines constitutes a

balancing of numerous factors and is an inherently legislative task. Here, for example, the Florida legislature had to strike a balance between potentially lengthy recount proceedings, an appropriate period for protests, a suitable period for judicially conducted contests with potential appeals, and the need for finality in the context of the deadlines that apply to a presidential election. It balanced those factors and decided on a seven-day window after the election for protests and limited recounts and twenty-eight days or so for any potential contests. To be sure, such deadlines are "inherently arbitrary," but fixed dates "are often essential to accomplish necessary results." *United States v. Boyle*, 469 U.S. 241, 249 (1985). That is particularly true in the context of presidential elections, where federal law fixes precise deadlines for the appointment of electors because the need for finality has significance for the entire nation. *See* 3 U.S.C. §§ 5, 7. The simple truth is that the Florida legislature established clear, unambiguous and sensible statutory deadlines enforceable by the Secretary of State. The Florida Supreme Court revoked those deadlines and essentially terminated the Secretary's statutorily granted authority.

Second, the Florida Supreme Court also decided to create, out of whole cloth, a new deadline for a selective, standardless, changing and unequal manual recount process for this particular election—an "equitable" decree completely untethered to any legislative judgment. *See* Pet. App. 37a. Having determined to abandon the statutory November 14 deadline, the court was forced to devise another date to ensure some semblance of finality. At oral argument in the court below, one of the justices asked, "Are we just going to reach up [for] some inspiration and put it down in paper?" Unofficial Tr. of Oral Arg. 14. Since respondents' counsel could offer no alternative date, the court apparently did reach somewhere for inspiration and settled on 5:00 p.m. on Sunday, November 26. Pet. App. 38a. Respondents make no effort to contend that the deadline devised by the

court below is not a new rule adopted for purposes of this election.

The court's equitable decree divining a new deadline to fulfill its vision of the will of the electorate did not just substitute one arbitrary deadline for another. The court's ruling also had the effect of substantially shortening the legislatively decreed time for post-certification contests to the election results (assuming *arguendo* that such contests are even permissible in this context). Once the results were finally certified on November 26, respondent Gore filed a contest to the election. Under Florida law, the defendant(s) must respond, Fla. Stat. § 102.168(6), and defend the certified outcome in full judicial proceedings, including discovery, trial, and appeals. *See*, *e.g.*, *Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984). In light of the federal deadline for the appointment of electors, the court's extension of the certification deadline has dramatically compressed the time for efforts to contest the election and, most significantly, for defending against such efforts.

The partisan struggle in Florida today is precisely the kind of chaotic situation that would have been avoided by adherence to the statutory deadline. The Florida Supreme Court's willingness to fashion new rules of law for this election has cast the election into turmoil and prolonged a dispute that should have been avoided. The court's revision of Florida election law, which is inconsistent with Article II and incompatible with Florida's implementation of 3 U.S.C. § 5, should be set aside so that the presidential election can achieve lawful finality.

II. The Decision Below Cannot Be Reconciled With Article II

As previously explained (Pet. Br. 36-50), the Florida Supreme Court's equitable reworking of Florida's statutory electoral scheme cannot be reconciled with Article II, § 1, cl. 2 of the Constitution, which provides that

electors shall be appointed "in such Manner as the [state] Legislature . . . may direct." Respondents have failed to justify the post-election judicial revision of the Legislature's direction as to how Florida's electors are to be appointed.[2]

The Gore respondents contend that "Article II's command is directed to the States *qua* States." Gore Br. 34-35. That assertion is incorrect. Article II does vest the authority to *appoint* electors in "Each State." However, the Constitution vests the authority to "direct" the "Manner" of appointing electors in each State in "the Legislature thereof." As petitioner has already established (Pet. Br. 41-43), this distinction is of constitutional significance. Where the Framers intended to vest authority in the States as such, they said so. But where they wanted to specify an organ of state government to perform a function (or carry out a responsibility), they *also* said so. Where the Constitution spells out the agency of the State that is assigned a particular function, fulfillment of the constitutional design requires that such a designation be afforded legal meaning.

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[2] The Gore respondents suggest that "this claim may not be properly before the Court." Gore Br. 33. That suggestion, tentative though it is, is unwarranted. Petitioner argued below that Article II of the Constitution "provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen," and that it would "violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature*'s judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors." Pet. App. 62a-63a n.15. This was sufficient to put the Florida Supreme Court on notice of precisely the claim presented in this Court: That the court would (and, ultimately, did) exceed its constitutional authority if it were to supplant the legislature's directives regarding the manner of appointing electors with its own. *See, e.g., Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935).

Relying primarily on *Smiley v. Holm*, 285 U.S. 355 (1932), respondents assert that state statutes governing the appointment of electors "have always been subject to state law processes including state judicial review and gubernatorial veto." Gore Br. 36; *see also* Butterworth Br. 14-15. *Smiley* held that a state governor could participate through the veto power in the enactment of electoral legislation; it did not address, nor has this Court *ever* addressed, the authority of a state *court* to revise laws relating to presidential elections enacted under Article II. The distinction is significant, because the Framers anticipated participation by the executive branch (through the veto power) in the legislative process, but specifically *rejected* any involvement of the judiciary in that process. *Compare* U.S. CONST. art. I, §7, cl. 2, *with* 1 *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., 1966), 2 Farrand 75 (Framers rejected proposal for "council of revision," comprised partly of judges, with power to nullify legislation). As explained earlier, the Framers contemplated various means by which electors might be selected in their lengthy consideration of this subject; the one alternative that was roundly rejected was that the selection be lodged with the state judiciary. Pet. Br. 38.

Smiley actually supports petitioner, not respondents. This Court in *Smiley* made clear that the constitutional delegation to state legislatures to regulate the "manner" of congressional elections (under Art. I, §4) involves "lawmaking." 285 U.S. at 366. Because, under the state constitution there involved, the governor had a role in the "lawmaking" function (*i.e.*, the veto power), his exercise of that role was constitutional. *Id.* at 368; *see also State ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (sustaining use of referendum in respect of congressional election because state constitution allowed "lawmaking" through referendum). In Florida, however, the judiciary does *not* have a role in the "lawmaking" process. FLA. CONST. art. II, §3; Fla. Stat. §20.02; *see Burdick v. State*, 594 So. 2d 267, 270 n.8 (Fla. 1992)

("Clearly this Court's role is to interpret, not to legislate. Accordingly, we can do no more than point out what appears to us to be a serious inconsistency between the two statutory . . . schemes"). Thus, the state supreme court's revision of Florida's duly enacted legislation, in contravention of the restrictions imposed on it under the state constitution, is the opposite of the situation presented in *Smiley*.[3]

In short, the problem with respondents' approach to Article II is the applicability of the general principle they discuss to the circumstances of this case. Despite their effort to clothe the decision below in benign coloration, that court materially revised the manner of appointing Florida's electors. This was not the formal and authorized participation in the process considered in *Smiley*, but the usurpation of power, however well intended, by the judiciary from the legislature—the specific branch of state government entrusted by the Constitution to perform this function.[4]

The Gore respondents concede (as, indeed, they must) that "[i]f the state supreme court or Governor decided to pick electors on its own, in disregard of state law, that would violate the Constitution." Gore Br. 37

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[3] Moreover, *Smiley* involved redistricting rather than a direct regulation of elections. The apportionment of legislative districts is committed to the States *qua* States by Article I, Section 2. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). For this reason, the Gore respondents' attempted reliance on *Growe*'s approval of state-court involvement in this area (*see* Gore Br. 38) is also misplaced.

[4] Respondent Butterworth actually insists (Br. 17-18) that the state judiciary wields power over elections, including the adjustment of deadlines, that is "wholly independent" of the legislature. While the exercise of such authority might be permissible under state law in elections for state officers, it is clearly not authorized by Article II in presidential elections. The court below apparently overlooked this point

n.24. But *that* is very close to the reality of what happened in this case. The Florida Supreme Court, by unilaterally altering the statutory deadlines for certifying election returns, authorizing extended manual recounts in selected counties, and changing the circumstances under which recounts can be considered, altered the "manner" of appointing electors. The state supreme court here arrogated to itself a power—the power to "direct" the "manner" in which electors will be selected—reserved by our Constitution exclusively to the legislature. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).[5] That unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it "judicial review."[6]

Finally, the Gore respondents refute an argument not made by petitioner, asserting that the separation of powers is generally not mandatory on the States. Gore Br. 42. As a general proposition, that is unexceptionable. In this context, however, the Constitution specifically assigns the power to determine the manner of appointing presidential electors to the state legislature, not to the State. The Constitution thus, in this instance, does select a specific agency of state government in which to repose this authority. Moreover, petitioner has not argued that the Florida legislature cannot constitutionally

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[5] Petitioner notes that a citation to *McPherson* in the opening brief (at 47) inadvertently omitted the fact that the Court was quoting, with approval, from an 1874 Senate Report on the subject of the Electoral College.

[6] For this reason, the Gore respondents' lengthy recitations of judicial and administrative interpretations of state election laws (Gore Br. 39-41 & nn.28-30), as well as their observation that state courts can adjudicate violations of election laws (*id.* at 43-44), are completely irrelevant. Petitioner has never contended that state courts, or executive officers, are precluded by Article II from construing laws relating to elections.

grant authority to the judiciary where it has explicitly chosen to do so. *See* Pet. Br. 43. Petitioner's point is that the Florida legislature *has not* done so; and in the absence of an express grant of the authority reserved to the legislature by the Constitution, the state supreme court was constitutionally prohibited from exercising that authority of its own volition.

III. The Judgment Below Should Be Vacated Because It Does Not Comply With 3 U.S.C. § 5

A. The Decision Below Fails To Comply With § 5

Section 5 is much more simple, straightforward and functional than respondents have described. It provides an opportunity for States, if they enact pre-election laws providing for the determination of controversies concerning the appointment of electors, and if they resolve such controversies pursuant to such laws in a timely manner, to ensure that the State's determination "shall be conclusive, and shall govern in the counting of the electoral votes." Florida did enact such laws and was in the midst of ascertaining the results of its election pursuant to those laws when the Florida Supreme Court, exercising its equitable powers, rewrote Florida's laws for determining election controversies, enjoined the state executive from complying with those laws, and changed various deadlines and dispute resolution procedures. That intervention violated Article II and jeopardized the State's (and petitioner's) right to the conclusive effect accorded by §5. The judgment below is, therefore, a nullity.

Respondents' characterization of petitioner's argument concerning the effect of §5 and respondents' rendition of §5's legislative history are wide of the mark. It is true that States are not required to adopt election laws as contemplated by §5. But if they do not do so, they run the risk of the uncertainty and confusion regarding the appointment of their electors that is occur-

garding the appointment of their electors that is occurring in Florida today.

Florida *did*, however, adopt laws designed to ensure that the State, its voters, and its electors would receive the due process, finality and conclusiveness that § 5 promises. And Florida was in the process of resolving disputes and certifying its electors in accordance with § 5 when the Florida Supreme Court *sua sponte* issued an injunction to stop that process dead in its tracks ten days after the election and, four days later, rewrote the law that embodied Florida's attempt to comply with and gain the benefits of § 5. If that intervention is sustained, Florida and its voters face a risk that they will not obtain the benefits of § 5. If it is a nullity, as petitioner contends, this Court can restore the order to Florida's election that its legislature endeavored to give it pursuant to Article II and § 5.

There is no dispute that one purpose of § 5 is to ensure that determinations of controversies over electors will govern in the counting of electoral votes. Where respondents err is in asserting that the legislative history reveals "that the statute's *only* purpose and effect is to provide the States with a way to guarantee that a State's electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment." Gore Br. 23 (emphasis added). Both the text and the legislative history of § 5 make plain that any state court decision resolving a controversy over the appointment of electors on the basis of a new rule of law that had not been enacted prior to the election does not receive the binding and conclusive effect accorded when § 5 is complied with.

Section 5 expressly provides that determinations by state tribunals regarding disputes over presidential electors will have two consequences if they comply with the requirements of § 5: First, such determinations "shall be conclusive," and second, they "shall govern in the counting of electoral votes." 3 U.S.C. §5. Respon-

dents' interpretation of § 5 effectively reads the first of these consequences out of the statute. In respondents' view, the *sole* and *exclusive* effect of compliance with § 5 is that the state tribunal's determination "shall govern in the counting of electoral votes"; the separate allowance of "conclusive" effect is wholly superfluous. Respondents' interpretation is thus irreconcilable with "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992).

By declaring that only those state court determinations complying with §5 would be "conclusive," Congress made clear that § 5 is not aimed solely at determining which electoral votes "shall govern in the counting." Instead, §5 also addresses the broader question of the types of state court determinations that will receive "conclusive" effect in the process of certifying electoral votes from a State. In order to avoid any incentive for the type of *post hoc* judicial legislation at issue in this case, Congress decided that a state tribunal's resolution of controversies or contests concerning the appointment of electors would not bind the parties and state officials involved, unless such determinations were made "pursuant to" the law as enacted prior to election day. Only this reading of § 5 gives independent meaning to the two distinct phrases contained in the statute—"shall be conclusive" and "shall govern in the counting."

The error in the Gore respondents' interpretation of § 5 is confirmed by the structural relationship between § 5 and 3 U.S.C. § 15. Section 15 sets forth procedures for Congress to follow in determining whether to count a given set of electors from a State. As previously explained (Pet. Br. 31), in some circumstances §15 requires Congress to count disputed electoral votes in accordance with the certification of the state executive. *See* 3 U.S.C. § 15 (if the Senate and House disagree over multiple electoral vote returns from a State, "the votes of

the electors whose appointment shall have been certified by the executive of the State, under seal thereof, shall be counted"). If state courts were permitted to fashion new rules of law and apply them retroactively to change the results of a presidential election, and were further permitted to compel state executive branch officials to certify election results in compliance with that act of *post hoc* judicial legislation, such state court decisions could govern in the counting of electoral votes despite Congress's express determination in § 5 that judicial determinations of that nature must *not* be given binding effect. Only petitioner's reading of § 5 avoids this irreconcilable conflict between the provisions of § 5 and § 15 by making clear that judicial decisions in violation of the requirements of § 5 are not "conclusive" and thus do not bind state executive officials in the performance of their legislatively conferred responsibilities.

The Gore respondents also contend (Gore Br. 31-33) that because the state supreme court itself was in existence prior to election day and empowered to settle election controversies, § 5 was satisfied. That contention is would make § 5 a virtual nullity. Section 5 requires that the tribunal's determination be made "pursuant to" the "laws enacted prior to" election day. This statutory requirement refutes any implication that courts can comply with § 5 while invoking their equitable powers to decree new election rules in contravention of plain statutory text. *See* Pet. Br. 26. By overriding the clear legislative directives imposing a November 14 deadline on the submission of county election returns and by crafting a new twelve-day extension through its *equitable* powers, the Florida Supreme Court failed to satisfy § 5.

This post-election departure plainly contravenes the purpose of §5's requirement that disputes be resolved pursuant to laws enacted prior to the election, not under post-election rules of procedure and dispute resolution crafted with full knowledge of their potential effect on the outcome of a disputed presidential election. The leg-

islative history clearly reveals Congress's concern with ensuring that the rules governing election contests would be enacted prior to the election:

> In my judgment it would be wise if it could be provided that these contests should be decided under and by virtue of laws made prior to the exigency under which they arose, made prior to the existence of the particular contest to be decided. . . . *I think that it would be wise if the contest should be made in the face of existing law rather than that the law should be made in the face of the existing contest*.

18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) (emphasis added).[7]

Representative Herbert echoed this same sentiment and presciently explained the danger in invoking new legal rules to resolve a dispute over presidential electors:

> The country never will be satisfied in any political case with a temporary expedient or device under a law passed at the moment, after parties had taken sides on the question. The party losing under such circumstances will naturally believe it has been cheated. The people of this country are law-loving and law-abiding, but they want laws passed before cases arise, and not with reference to any special case that may have arisen.

18 CONG. REC. 75 (Dec. 9, 1886).[8]

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[7] Representative Cooper's comments were made in response to a minority objection to the inclusion of the provision that disputes between contending electors should be settled pursuant to the "laws enacted prior to" election day. 18 CONG. REC. 47. Notably, the Gore respondents' many citations to the legislative history behind 3 U.S.C. §5 do not involve this crucial aspect of the statute, let alone undermine this clear evidence of Congress's intent.

Nothing in the legislative history cited by the Gore respondents answers this primary point. Congress did not intend state courts to be free to change the rules after a presidential election and then impose those newly fashioned rules on the executive branch officials charged with certifying the election results. That is particularly true where, as here, such a state court decision threatens to nullify the legislature's decision (in the exercise of its exclusive authority under Article II) to claim for the State the benefits of compliance with § 5.

Respondents also err in suggesting (Gore Br. 28-30) that applying § 5 in accordance with its terms would raise serious constitutional questions. Respondents' Article II concerns are wholly misplaced. As discussed elsewhere (Pet. Br. 36-39; Part II, *supra*), Article II vests in the state *legislature*, not the state supreme court, the power to determine the manner of appointing electors. Applying § 5 to prevent state courts from adopting new retroactive rules that were not enacted by the legislature, and which undermine a State's ability to select its electors, hardly conflicts with Article II. To the contrary, § 5 advances the constitutional interests expressed in Article II by ensuring that the *legislature*, rather than state courts or other tribunals, determines the manner of appointing presidential electors.[9]

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[8] Ironically, Representative Herbert compared the people's interest in having disputes resolved under pre-set laws with the proper judicial role of interpreting the law as enacted: "Like the upright judge, when he is compelled to decide what his conscience does not approve, he says: 'This, indeed, is very hard, *but so the law is written.*' And therefore it is that an unjust law, an imperfect law, is better than no law at all. *Let the people know beforehand what the law is and what they are to expect*." 18 CONG. REC. 75 (emphases added).

[9] An interpretation of § 5 that purported to limit the *legislature*'s authority to enact post-election legislation regarding the appointment of electors might raise constitutional questions under Article II, but no such issue is presented in

Respondents' federalism argument is equally without merit, as it rests on an inaccurate caricature of petitioner's arguments. Petitioner nowhere contends that § 5 "preclude[s] judicial involvement in state election disputes." Gore Br. 29-30. Petitioner's point is simply that where, as here, a state supreme court has adopted a new rule and attempted to apply it retroactively to affect the results of a presidential election, the court's decision is not binding on either the Congress or state election officials.

B. This Court Should Vacate The Lower Court's Decision In Order To Vindicate The Federal Mechanism In 3 U.S.C. § 5

Respondents' mistaken reading of § 5 drives their inadequate response to the specific question posed by this Court: What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5? The Gore respondents brush aside that question in a single paragraph. Gore Br. 30-31.

According to the Gore respondents, this Court *cannot* vacate the judgment below, even if the Court concludes that the Florida Supreme Court's decision is inconsistent with the requirements of § 5. As shown above, that argument ignores the substance of § 5; moreover, it ignores the effects that the judgment below has had and may continue to have on state officials attempting to perform their role in presidential elections. *See* Pet. Br. 32-36.

Florida, through its legislature and consistent with Article II, has created a system whereby officers of Florida's executive branch are authorized to act to secure for Florida the advantages of § 5: That "*its* final determination" according to laws enacted before the election—not

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tions under Article II, but no such issue is presented in this case.

the determination of some other entity—shall be "conclusive" and shall "govern in the counting of the electoral votes." Actions by the responsible state officials to perform their duties under §5 cannot be overthrown by the state court, whether or not its ruling is correct as a matter of state law. *E.g.*, *California v. Superior Court*, 482 U.S. 400 (1987) (state supreme court reversed for attempting to prevent state executive from performing duties under federal statute). That the court below purported to base its decision on state law does not shield it from review (or reversal) by this Court when important federal interests are at stake. *See, e.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (reversing attempt by state supreme court to enforce state law on grounds that state law would impair substantial federal interest); *see also* Pet. Br. 31-32 & n.10.

Moreover, the Court has made clear that when a state court decision is predicated on an erroneous understanding of federal law, the normal course is to vacate that decision and remand for further consideration in light of a proper understanding of federal law. *Three Affiliated Tribes v. Wold Engineering, Inc.*, 467 U.S. 138, 152 (1984); *see also United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 632 (1973). Thus, even if the Gore respondents are correct that §5 merely provides a "safe harbor" where the election laws are not changed after election day, it is plain both that the Florida court was concerned that its actions comport with Title III and that it did not understand that its decision might jeopardize such a "safe harbor." *E.g.*, Pet. App. 32a & n.55. Whether or not there has been a change in law under §5 is a federal question, and, if the Florida court was incorrect in its understanding of federal law, in light of the impending time constraints, this Court should simply vacate the decision below to rectify that error.

It would defeat §5's very purpose to hold, as respondents urge, that *only* Congress can enforce the statute. That argument would have the perverse effect of

largely rendering § 5 a nullity in precisely those cases—close, contested elections—in which Congress clearly intended § 5 to have the most force. As the Gore respondents acknowledge, the presidential election of 1876, in which Congress had to resolve the conflicting claims of multiple sets of electors, pushed the Nation toward the brink of a "renewed civil war." Gore Br. 23. In the wake of this grave threat to the country's political stability, "Congress recognized that … it was essential to take 'this question out of the political cauldron.'" Gore Br. 23-24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (statement of Rep. Browne)). Section 5 embodies the congressional mechanism for ensuring that in a close election, state tribunals are authorized to act to determine electors with fairness and finality and with reference to pre-existing rules, so that Congress will only rarely be compelled to exercise its ultimate authority to determine which electors are valid. Yet under the Gore respondents' minimalist interpretation, § 5 would simply return the question of contested electors to "the political cauldron" of Congress, even where a state legislature has complied with the statute to obtain for its constituents the benefits of § 5—as Florida's had done here, before the court below intervened. The statute should not be interpreted to require that self-defeating result.

The court below failed to comply with § 5; this Court should vacate the judgment below in order to preserve the federal statutory system and to provide the certainty and finality for presidential elections that Congress intended.

C. The Decision Below Violates Due Process

As 3 U.S.C. § 5 demonstrates, Congress has decided that in the election context *in particular*, retroactive new rules are fundamentally and unacceptably unfair—reinforcing the Due Process Clause's general concern for fundamental fairness and adequate notice. *See* U.S.

CONST. amend. XIV §§ 1, 5. The Gore respondents argue that the new election procedures announced by the court below are factually distinct from the new vote-counting rule found to be unconstitutional in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). Gore Br. 45. But here, as in *Roe*, ballots that would *not* have been counted as lawful votes under the rules in place on election day may have their legal status changed as a result of the new timetable, as a direct conseuence of selective, subjective, standardless and shifting methods of manual vote recounting and as a result of the Gore respondents' recent, tactical embrace of "dimpled" ballots. Pet. Br. 33 & n.12. Such post-election changes violate due process. *See* Alabama Br. 13-28.

IV. Petitioner's Claims Are Clearly Justiciable

Amici Florida Senate and House contend that compliance with 3 U.S.C. § 5 is a nonjusticiable political question properly resolved by the Florida legislature or Congress. *Amici* Br. 4. That claim is misplaced. This case presents precisely the sort of "judicial question" this Court decided in *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), and numerous other cases that happen to arise in a political context. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.'").

There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department," nor is there "a lack of judicially discoverable and manageable standards for resolving" the issues under either 3 U.S.C. § 5 or Article II, § 1. *Baker v. Carr*, 369 U.S. at 217. To the extent that a determination under either provision tangentially *relates* to a constitutional function that may be performed by Congress or the Florida legislature, such an attenuated connection does not preclude judicial review. *See, e.g., Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*,

395 U.S. 486 (1969); *Moore v. Oglivie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Perhaps the most significant result of a ruling for petitioner in this case would be to clarify the governing federal law standards and thereby avoid a potential constitutional crisis. By making clear in this case the unwarranted nature of the Florida Supreme Court's intrusion into the legislatively mandated process for appointing electors, this Court will eliminate the potential for an unseemly conflict between Florida's legislative and judicial branches regarding the appointment of electors.

Moreover, the fact that other governmental entities, such as the Florida legislature and Congress, may review the issue—and may have other means of remedying violations of Article II and §5—does not render these issues nonjusticiable. In *McPherson*, 146 U.S. at 23, this Court exercised jurisdiction over a challenge to Michigan's statutory scheme for appointing electors, even though (as the Michigan Secretary of State argued) state or federal actors might later have adjudicated the same questions in the exercise of their respective authorities. *See also Foster v. Love*, 522 U.S. 67 (1997) (congressional power to judge elections and qualifications of members did not foreclose Court's review of Louisiana election scheme). Consequently, the fact that the state legislature and the Congress might address issues involved in the appointment of Florida's electors in no way precludes this Court from exercising jurisdiction over the present controversy.

CONCLUSION

The judgment of the Supreme Court of Florida should be vacated.

Respectfully submitted.

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