No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,

Petitioners,

vs.

ALBERT GORE, JR., ***et al.***,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF AMICI CURIAE SUPPORTING PETITIONER OF WILLIAM H. HAYNES, CONNIE MENDEZ, MARNEE BENZ, BERT CARRIER, et al.

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*. This brief is filed with the consent of the parties. Counsel for the parties have filed blanket letters of consent with the Office of the Clerk.

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STATEMENT OF INTEREST OF AMICI[1]

William H. Haynes, *et al.*, are Florida residents and voters. They cast ballots in the election to decide Florida's electors in the upcoming vote of the electoral college.[2] Amici have a constitutional right under Art. II, § 1, cl. 2, to have Florida's electors appointed in the manner directed by the Florida Legislature. Amici possess a federal statutory right to have Florida appoint its electors pursuant to the statutes enacted before the date on which they cast their ballots. Amici have such a clear interest in ensuring that elections in Florida comply with the letter of the law that Florida election law gives each of them, as qualified voters and taxpayers, a right to file an election contest.

The decision below ignored the import of this Court's decision in *Bush v. Palm Beach County Convassing Board*, No. 00-836 (Dec. 4, 2000) and deprived amici of their federal constitutional and statutory rights. In this brief, amici express their views on important federal issues that affect them directly as Florida voters. Given the important national issues raised here, and the time constraints necessarily imposed on the parties, amici respectfully submit that this brief will aid the Court in its consideration of this case.

SUMMARY OF ARGUMENT

The Florida Supreme Court came within one vote of allowing the statutory scheme enacted by the Florida Legislature before election day to decide the outcome of the presidential election. Had it done so, no major constitutional

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1. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

2. The other participating *amici* are set out in the addendum to the brief at A1.

confrontations or inter branch disputes would have resulted. Instead, a bare majority issued a decision that created new law never envisioned by the Florida Legislature. That decision necessitated a sprint to this Court and substantially increased the likelihood of legislative intervention at the state and federal levels. The decision below squarely conflicts with this Court previous ruling, Art. II, § 1, cl. 2, and 3 U.S.C. § 5. This Court should reverse this decision so that Florida may return to the course mapped out by the Florida Legislature.

As this Court recognized in *Bush*, the Constitution expressly delegates plenary authority to state legislatures to determine the manner for the appointment of electors. *See* Art. II, § 1, cl. 2. The text, history and judicial interpretation of Art. II, § 1, cl. 2 all demonstrate the plenary authority of state legislatures over the appointment of electors. State-court decisions that ignore or override statutory provisions governing the appointment of electors raise issues of constitutional magnitude.

The decision below features precisely the kind of judicial overreaching Article II forbids. *See* Argument IV, *infra* at 20-30. Having rewritten the statutory deadlines in its first decision, and having failed as yet to comply with this Court's remand order in *Bush*, the court below promulgated a judge-made amendment to its judge-made deadline. It then usurped the remedial authority that the statute gives solely to the trial court and devised a remedy inconsistent with the statutory recount provisions and totally at odds with the statutory respect for the decisions of local canvassing boards.

To makes matters worse, the court below applied this new legislative scheme of its own design retroactively in contravention of 3 U.S.C. § 5. Article II grants state

legislatures the preeminent role in the appointment of electors, and 3 U.S.C. § 5 imposes a limitation on retroactive lawmaking. The Florida Supreme Court's judicial lawmaking violated both these provisions simultaneously.

The decision below also reads as if this Court never issued its *Bush* opinion. This Court noted particularly the plenary authority of the Florida Legislature under Article II and Florida's legitimate interest in having its electoral votes qualify for the safe harbor created by 3 U.S.C. § 5. Nonetheless, the Florida Supreme Court rewrote Florida election law. Despite this Court's admonition that the state constitution could not trump the federal Constitution's delegation of plenary authority to the Florida Legislature, the court below once again allowed non-statutory factors to color its statutory interpretation.

The resulting decision cannot stand. The Florida Supreme Court failed to respect the will of the people, and the decisions of the Florida Legislature, the Framers, and this Court. They fell just short of resolving this election dispute in a manner that comported with the pre-existing law of Florida and therefore would have enjoyed widespread, bipartisan respect. This Court can and should correct this momentous error.

ARGUMENT

Exercising its plenary authority, the Florida Legislature enacted a thorough and straightforward legislative scheme governing the appointment of electors. The Florida Supreme Court did not merely interpret this statutory scheme, it rewrote both statutory law and even its own judge-made law. The Florida Supreme Court set forth its own legislation, disregarding the judgments of both the Florida Legislature and this Court and substituting its own.

If this statutory scheme addressed a matter of only local concern, such judicial lawmaking could not justify this Court's intervention. But this case involves a matter of surpassing national importance. Art. II, § 1, cl. 2 prevents this judicial arrogation of the Florida Legislature's preeminent authority over the appointment of electors. Article II reserves the manner of selecting electors to the legislatures of the several states. This Court made that point clear in *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892), and the Court foreclosed any suggestion that *McPherson* has lost any of its vitality in the last 100 years by expressly reaffirming it in *Bush.*

The Framers squarely and wisely rejected any role for the state judiciaries in determining the appointment of electors. *See infra.* Here, however, the Florida Supreme Court continues to develop new "legislation" out of thin air. As with its earlier effort, this post hoc judicial lawmaking solved nothing, but instead lengthened the window for political instability and unrest. This Court should vindicate the wisdom of the framers and reaffirm the plenary authority of the Florida Legislature.

I. THIS COURT HAS JURISDICTION TO VINDICATE PETITIONER'S AND AMICI'S FEDERAL RIGHTS TO HAVE FLORIDA'S ELECTORS APPOINTED PURSUANT TO THE RULES ESTABLISHED BY THE FLORIDA LEGISLATURE

This Court has jurisdiction over this case because the Florida Supreme Court rejected a "right, privilege, or immunity . . . claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257. Petitioner argued below that the Florida Supreme Court could not reject the rules imposed by the Florida Legislature and substitute its own

deadlines without violating, *inter alia*, Art. II, § 1, cl. 2, 3 U.S.C. § 5, and this Court's mandate in *Bush*. The Florida Supreme Court implicitly rejected those arguments and infringed Petitioner's federal rights.

The Florida Supreme Court likewise denied Amici's rights under Art. II, § 1, cl. 2, and 3 U.S.C. § 5 to have the electors from their State appointed "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. As explained *infra*, Art. II, § 1, cl. 2, grants both Petitioner and Amici a federal constitutional right to have Florida electors in the electoral college appointed in accordance with the laws enacted by the Florida Legislature. By misinterpreting the relevant Florida statutes, ignoring deadlines clearly imposed by the Florida Legislature, and creating new deadlines out of whole cloth, the decision below deprives Petitioner and Amici of federal rights. 28 U.S.C. § 1257 vests this Court with jurisdiction to correct that denial of federally-protected rights.

Respondents' insistence that the Constitution leaves election matters to the States cannot defeat this Court's jurisdiction. This Court has emphasized that all federal elections, especially presidential elections, implicate important federal interests.[3] The more fundamental problem with Respondents' suggestion is that Art. II, § 1, cl. 2, grants

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3. *See, e.g.*, *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (acknowledging "clear" federal interest in "protect[ing] the election of [the] President and Vice President from corruption"); *Ex parte Yarbrough*, 110 U.S. 651, 666, 662 (1884) (noting federal government's "essential" interest in ensuring "that the votes by which its members of congress and its president are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice").

authority over the appointment of electors not to the State as an undifferentiated sovereign, but specifically to "the Legislature thereof." Indeed, the gist of Petitioner's complaint is that the decision below deprived Petitioner of his federal right to have electors appointed as directed by the Florida Legislature, as opposed to the Florida Supreme Court.

As developed *infra*, Petitioner and Amici possess a federal right to have Florida's electors appointed pursuant to the process established by the Florida Legislature. Although federal electors and voters in federal elections are not federal officers, they do perform a federal function. *See, e.g., Ray v. Blair*, 343 U.S. 214, 224 (1952); *Burroughs*, 290 U.S. at 545; *Yarbrough*, 110 U.S. at 662. If state laws allegedly interfere with the right to perform that federal function as permitted under federal law, this Court has jurisdiction to vindicate the federal right. In *Ray*, for example, a potential presidential elector asserted a federal right not to be bound by a state law requirement that electors pledge to support the candidate nominated by the party's national convention. Although the Court ultimately rejected the asserted federal right, it asserted jurisdiction "based on this federal right specifically claimed by respondent." *Ray*, 343 U.S. at 216 (citing 28 U.S.C. § 1257(3)). Here, Petitioner and Amici claim the federal right to have the Florida electors appointed according to the process established by the Legislature. That claimed federal right vests this Court with jurisdiction.

Respondents suggest that this Court lacks jurisdiction to review what is essentially an issue of state law. In a variety of contexts, however, this Court will wade into state-law disputes when necessary to vindicate federal rights. For example, on numerous occasions, this Court has intervened to vindicate a

litigant's federal right to have state courts give a prior state or federal-court judgment full faith and credit.[4] In such cases, this Court reviews the asserted deprivation of a federal right, even though it generally requires the Court to undertake an extensive analysis of the state law of judgments.

This Court also exercises jurisdiction to ensure that a state-law interpretation of a state tax provision does not deny a federal entity's immunity from state taxation. In *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268 (1976) (per curiam), this Court held a national bank immune from state and local sales taxes, despite the state supreme court's state-law determination that the incidence of the tax fell on a non-federal party. As the dissent acknowledged, "[s]ince the case involves a federal claim of immunity from state taxation, we are not bound by the California court's determination." *Id.* at 269 (Stevens, J., dissenting).

This Court has not hesitated to intervene when States set the rules for federal elections in a manner that allegedly violated federal law.[5] *See, e.g., Williams v. Rhodes*, 393 U.S.

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4. *See, e.g., West Side Belt R.R. Co. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99 (1911); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900); *Crescent City Live-Stock Landing & Slaughter-House v. Butchers' Union Slaughter House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887); *Dupasseur v. Rochereau*, 88 U.S. 130, 134-35 (1874).

5. Indeed, at least one court has gone so far as to treat laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, as federal laws. *See Case of Electoral College*, 8 F. Cas. 427, 432-34 (C.C.D.S.C. 1876) (partially unpaginated). That view of the laws in dispute would remove any doubt as to this Court's authority to engage in plenary review to ensure that the decision below correctly interpreted the provisions adopted by the Florida Legislature to

23, 28 (1968); *McPherson*, 146 U.S. at 23-24. In *Williams*, for example, the Court emphasized that although the States enjoyed "extensive power . . . to pass laws regulating the selection of electors," such "powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S. at 29.

In short, there is nothing objectionable or anomalous about this Court reviewing a state-law determination to ensure that the court below did not interpret state law in a manner that infringed on rights, privileges, or immunities claimed under the Constitution or statutes of the United States. 28 U.S.C. § 1257 grants this Court jurisdiction over such cases, and this Court has exercised that jurisdiction in cases raising issues of far less importance to the federal government and federal Constitution.

II. THE COURT BELOW DEPRIVED PETITIONER AND AMICI OF THEIR FEDERAL RIGHT TO HAVE FLORIDA'S ELECTORS APPOINTED ACCORDING TO THE RULES ESTABLISHED BY FLORIDA'S LEGISLATURE

A. The Constitutional Text, History, and Subsequent Judicial Decisions All Give the Florida Legislature, not the Florida Courts, Authority over the Appointment of Electors.

In *Bush v. Palm Beach County Canvassing Board*, this Court confirmed the plenary authority of Florida's Legislature to determine the manner of appointing electors. *Bush*, slip op. at 4-5. That decision comports with the text of Art. II, § 1, cl. 2, the history of that provision's framing, and the prior decisions of this Court and other state and federal courts.

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govern the appointment of electors.

When a state Legislature enacts laws to govern the appointment of electors, it exercises authority under Art. II, § 1, cl. 2. *See, e.g., id.*; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995). A state court that fails to respect the Legislature's enactments and rewrites them in the service of its own view of the proper method for appointing electors reverses the allocation of authority expressly provided by Art. II, § 1, cl. 2. Such judicial legislation concerning the appointment of electors is not merely an unfortunate instance of judicial activism – it violates the federal Constitution.

Art. II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." This provision lodges authority not simply in the States but uniquely in the state legislatures. The Constitution does not leave the States free to decide how to allocate authority over appointment of electors among their various branches of government. By resolving this question for each State, the Constitution pre-empts any state-law separation of powers debate. Whatever may be the division and balance of power among a State's branches of government on other matters, Art. II, § 1, cl. 2 guarantees that the appointment of electors remains under the control of the state legislature. *Cf. Hawke v. Smith*, 253 U.S. 221 (1920) (rejecting Ohio's efforts to transfer the constitutional role of the state legislature in the amendment ratification process to the people in a referendum).

The history of the framing of Art. II, § 1, cl. 2 confirms what its text makes clear. Although the Framers disagreed as to the optimal method for selecting electors, they all agreed that the selection of electors was not a proper business for the

state courts. The record of the framing and subsequent judicial decisions all confirm that the state legislature enjoys the primary authority over the appointment of electors, and in a dispute between the state legislature and the state courts, the legislature must prevail.

The Framers' express delegation to the state legislatures represented a deliberate and thoughtful accommodation of the views of those who favored direct popular election, those who favored election by the state legislatures, and those who preferred election by Congress. *See McPherson*, 146 U.S. at 28. The delegation also avoided subsidiary disagreements over whether States should apportion electoral votes by district or on a winner-take-all basis. *See id.* As this Court summarized in *McPherson*: "The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id*. While the Framers disagreed about the best method for choosing a President, they were of one mind that lodging such authority in the judiciary "was out of the question." Madison, July 25, 1787 (*reprinted in* 5 Elliot's Debates on the Federal Constitution 563). The impropriety of a judicial role was so clear to the Framers that it did not merit serious discussion. "The state judiciaries had not been, and he presumed would not be, proposed as a proper source of appointment." *Id.* at 564.

The early history of the Republic confirmed the preeminent role of the state legislatures in the appointment of electors. Although the electoral college did not function as the Framers envisioned in all its particulars, the state legislatures did

exercise plenary authority over the appointment of electors in accord with the original design. From the beginning, "various modes of choosing the electors were pursued," and "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *McPherson*, 146 U.S. at 29. Indeed, appointment by the legislature itself, with no popular vote at all, was a common practice in the Nation's early history. *See id.* at 29-32; *see also, e.g.*, J. Story, Commentaries on the Constitution § 1466 (1833). The Florida Legislature, for example, directly appointed electors as late as 1868. *See McPherson*, 146 U.S. at 33. Despite this diversity of appointment methods, no record appears of any attempt by a state court to impose its view concerning the manner for the appointment of electors upon the legislature. *See id.* at 35 (noting that "our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action").

McPherson and *Bush* leave no doubt that the plenary and exclusive power concerning the appointment of electors resides in each State's legislature, and not any other branch of state government. In *McPherson*, the Court recognized that "the sovereignty of the people is exercised through their representatives in the legislature." 146 U.S. at 25. As a result, the Court reasoned that the state legislatures logically would possess authority over the appointment of electors even if Art. II, § 1, cl. 2, allocated that power to the States generally without specifying its delegation to the state legislatures. *See id.*[6] Accordingly, Art. II, § 1, cl. 2 expressly prevents a state

6. This reasoning, however, does not render the specific delegation to the state legislatures a nullity. As the Court explained, "the insertion of those words [specifying that such power resides in each

court from overriding the state legislature's procedures and deadlines for appointing electors or otherwise "attempt[ing] to circumscribe the legislative power."

When Florida's Legislature enacted the statutes governing the appointment of electors, it exercised its plenary authority derived from Art. II, § 1, cl. 2's specific command. Under that clause, neither the Florida Supreme Court nor any other instrumentality of the Florida government has any right to determine the manner in which Florida's electors are appointed.[7] Whatever may be the division and balance of power under the constitution or laws of Florida in other contexts, Article II makes the Florida Legislature supreme over the Florida courts in the matter at hand. By rewriting the Legislature's enactments below in the service of its own view of the proper method for appointing electors, the Florida Supreme Court reversed the allocation of authority expressly provided by Art. II, § 1, cl. 2. As explained *supra*, such state-court judicial legislation concerning the appointment of electors does not merely raise issues of state law – that practice violates the federal Constitution.

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legislature], operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power." 146 U.S. at 25.

7. To be sure, the Florida legislature can assign a role to the Florida Supreme Court. When, as here, the parties dispute whether the Florida Supreme Court has exercised an implicitly delegated statutory interpretation function or arrogated authority that the Florida Legislature never intended to delegate, the Florida Supreme Court cannot have the last word as to whether the Florida Supreme Court acted *ultra vires*. If Petitioner is correct that the Florida Supreme Court exercised an authority never delegated to it, then the decision below represents a deprivation of federal constitutional rights that cannot be left unremedied.

In striking contrast to the Florida Supreme Court's arrogation of authority to decide the manner in which Florida's electors should be appointed, other States' supreme courts have confirmed the primacy of the state legislature in such disputes. *See*, *e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286 (Neb. 1948) (rejecting claim that legislature's chosen method of selecting electors violated state constitution and holding that legislature's power under Article II was, in any event, plenary); *In re Opinions of Justices*, 45 N.H. 595, 1864 WL 1585, at *5 (N.H. July 19, 1864) ("[t]he whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature"); *In re Opinion of the Justices*, 113 A. 293, 298 (N.H. 1921) (reaffirming the court's 1864 opinion and holding that "[a]s the manner of making the appointment is left to the Legislature of each state, there can be no constitutional objection to the scheme now proposed").[8]

The limited federal case law confirms the plenary authority of the state legislature. The decision in *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876) (partially unpaginated), an extraordinary habeas corpus case arising out of the disputed presidential election of 1876, demonstrates that a state court's interference in a dispute concerning the appointment of electors clearly abridges the state legislature's preeminent authority under Art. II, § 1, c1. 2. South Carolina law vested state election officials with the authority not only

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8. *See also* 10 Annals of Cong. 131-146 (1800) 130 (Sen. Pinckney: "if it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it").

to collect and tabulate votes, but also to decide "all cases under protest and contest that may arise," and to certify their determination of the election to the secretary of state by a certain date. *See* 8 F. Cas. at 431. The resolution of such protests and issues as arose evidently displeased some elements within the South Carolina government, because the state supreme court ordered the officials simply to aggregate the local returns and to report the total, without looking beyond the face of the returns or considering any protests or contests. After the officials had certified their determination of the election in accordance with their independent performance of their statutory duties, the state supreme court ordered them to certify a contrary determination. When the officials refused on the ground that having adjourned *sine die*, they no longer constituted a canvassing board and had no authority to do as the court ordered, the court held them in contempt and imprisoned them.

The federal court granted the writ of habeas corpus. The federal court first held that the officials' actions were "in pursuance of a law of the United States," *id*. at 434, because the officials' powers and duties under the statutes of South Carolina were "derived directly" from Art. II, § 1, cl. 2, *id*. at 432. The South Carolina legislature, "in obedience to that provision, ha[d] by law directed the manner of appointment of the electors," and "that law ha[d] its authority solely from the constitution of the United States." *Id*. at 433. The corollary of the court's holding that the officials' actions were authorized by Article II was that "the whole matter was beyond the jurisdiction of the supreme court" and the officials "were in no wise subject to the control . . . of the judicial department." *Id*. at 433-34. The state supreme court's attempts to interfere with

the officials' performance of their statutory duties therefore were void, and the officials were entitled to release.

B. The Decision Below Violated Article II, Section 1, Clause 2 By Usurping the Florida Legislature's Authority.

Pursuant to its plenary authority, the Florida Legislature has enacted a comprehensive statutory scheme governing the manner in which Florida's electors shall be appointed. As detailed above, Art. II, § 1, cl. 2, obligated the Florida Supreme Court to respect the Legislature's exercise of its plenary power. Nonetheless, the Florida Supreme Court disregarded that obligation and created yet another set of entirely new rules of law to govern the appointment of Florida's electors.

The Florida Supreme Court's exercise of power is incompatible with the Florida Legislature's plenary authority and Art. II, § 1, cl. 2 of the Constitution. The decision below does not reflect a customary exercise in statutory interpretation. To the contrary, the court below rewrote the relevant statutes in a manner that clearly usurped the Florida Legislature's authority under Art. II, § 1, cl. 2.

Of course, even a blatant exercise of judicial lawmaking by a state court under the guise of the interpretation of a state statute would not justify this Court's intervention, absent a violation of a federal right. But as explained above, Art. II, § 1, cl. 2's delegation of plenary authority over the appointment of federal electors to the state legislature converts an otherwise merely regrettable exercise in judicial lawmaking into a constitutional violation. In the context of a federal election for

the appointment of electors,[9] this Court possesses jurisdiction to correct the Florida Supreme Court's misinterpretation and to vindicate Petitioner's and Amici's rights to have electors appointed pursuant to the laws enacted by the Florida Legislature. To do so avoids a constitutional violation and vindicates rights claimed under the federal Constitution.[10]

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9. By vindicating the federal constitutional right to have the appointment of presidential electors determined as directed by the state legislature, this Court would not necessarily disturb the Florida Supreme Court's misinterpretation of § 102.111 when it comes to state elections. This Court possesses jurisdiction only to vindicate federal constitutional rights, which in the unique context of Art. II, § 1, cl. 2, requires state courts to interpret state law concerning the appointment of electors correctly.

10. The blatant nature of the Florida Supreme Court's error obviates the need to decide whether a state court's interpretation of a state law concerning the appointment of electors need be grievously wrong or merely erroneous to justify this Court's intervention. Amici submit, however, that this Court possesses jurisdiction to vindicate any error in the interpretation of such laws for at least two reasons. First, Art. II, § 1, cl. 2 gives Petitioner and Amici a right to have electors appointed as directed by the state legislature. Close does not count. Second, laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, are properly construed as federal law, rather than state law. *See Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876). Accordingly, deference or a demand for a particularly egregious violation play no role. Of course, even though this Court possesses jurisdiction to correct all errors, it can limit its exercise of that jurisdiction to cases, like this one, that involve egregious misinterpretations of state law (and, therefore, clear violations of federal rights).

III. SECTION FIVE OF TITLE THREE PREVENTS THE FLORIDA SUPREME COURT FROM REWRITING THE LAWS GOVERNING THE APPOINTMENT OF ELECTORS AFTER ELECTION DAY

The Constitution specifically grants state legislatures the plenary and exclusive authority to appoint electors. U.S. Const., Art. II, § 1, cl. 2. In accordance with this constitutional command, Congress has vested state legislatures with the authority to prescribe the procedures for appointing electors. *See* 3 U.S.C. §§ 2, 5, 7. Federal law – both constitutional and statutory – therefore clearly vests state legislatures, not state courts, with the sole authority to set the procedures governing the appointment of electors.

A number of provisions of federal law reflect the preeminent role of state legislatures. For example, 3 U.S.C. § 2 recognizes the state legislature's authority, in a case when the State fails to make a valid choice on election day, to appoint electors "*in such a manner as the legislature of such State may direct*." (emphasis added); *see also* 3 U.S.C. § 7 (granting state legislatures authority regarding the meeting and voting of electors). Congress has recognized that the Constitution vests state legislatures, not state courts, with the authority to frame such election procedures.

Congress not only recognizes the preeminence of state legislatures, it also reinforces the value of setting election rules before election day. *See* 3 U.S.C. § 5. That section states in pertinent part: "If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors* [this year, November 7th] for its final determination of any controversy or contest concerning the appointment of all

or any of the electors of such State . . . such determination made pursuant to such law so existing on said day. . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution." (emphasis added).

This section ensures that if a State has a procedure in place before election day, a determination made in any controversy pursuant to that procedure "shall be conclusive, and shall govern in the counting of electoral votes." 3 U.S.C. § 5. Here, the Florida Supreme Court has usurped the Florida Legislature's authority by "enacting" new law after the election to replace the governing law that was duly enacted by the Florida Legislature prior to election day. These actions by the Florida Supreme Court violate not only Article II, § 1, cl. 2 of the United States Constitution but also 3 U.S.C. § 5.

A. The Florida Supreme Court Impermissibly Rewrote the Law Governing the Appointment of Electors After Election Day.

The Florida Legislature enacted a procedure long *before* election day to govern the appointment of the electors. The decision below rewrote those procedures long *after* the votes were cast. That post-hoc judicial lawmaking violated Art. II, § 1, cl. 2 and 3 U.S.C. § 5, as well as the broader maxim that "[e]lections belong to the political branch of the government and . . . are beyond the control of judicial power." *Roe v. Alabama*, 43 F.3d 574, 577 (11th Cir. 1995).

The Florida Legislature has enacted detailed provisions governing elections. Those statutes provide for the "final determination of any controversy or contest concerning the appointment of any or all electors. . . ." *See* 3 U.S.C. § 5. The decision below ignored this procedure in favor of a system of the court's own devising that was not promulgated until after

the statutory deadline had passed. This post-election rewriting of the rules by the Florida Supreme Court has created disarray by changing the rules after the game was over.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). A key element to any system of fair elections is that the governing authority – here, the Florida Legislature pursuant to Art. II, § 1, cl. 2 – must set the rules in advance. Senator Samuel Smith colorfully described the obvious and special dangers of such a post-election "law to be passed for the occasion" almost two centuries ago in the context of the disputed election of 1800. 1 Dec. 1803, Annals 13:129 (reprinted in 5 Founders' Const. at 453). Senator Smith warned that if it had been attempted to "elect[ ] a President by a law to be passed for the occasion, . . . the person, whoever he might have been, would have met the fate of an usurper, and his head would not have remained on his shoulders twenty-four hours." *Id.* The Florida Supreme Court disregarded both the substantial regulations enacted by the Florida Legislature and Senator Smith's admonitions about the substantial dangers of such retroactive lawmaking.

Art. II, § 1, cl. 2, delegates policy judgments regarding the selection of electors to the Florida Legislature and 3 U.S.C. § 5 requires those policy judgments to be made before election day. By revisiting those policy judgments, the court below reconsidered the Florida Legislature's judgments and violated

both of these provisions of federal law.

B. In Light of Art. II, § 1, cl. 2 and 3 U.S.C. § 5, It Makes No Sense to Allow the Florida Supreme Court To Rewrite the Law Governing the Appointment of Electors After Election Day.

As explained above, Art. II, § 1, cl. 2 prevents the Florida Supreme Court from usurping the Florida Legislature's authority to direct the appointment of electors, and 3 U.S.C. § 5 imposes an additional federal obstacle to judicial lawmaking after election day. Together these provisions clearly belie the proposition necessarily advanced by Respondents: that the Florida Supreme Court possesses the exclusive authority to dictate the content of the law governing the appointment of electors after election day. This suggestion turns federal law on its head.

Art. II, § 1, cl. 2 clearly gives state legislatures a preeminent role in determining the appointment of electors. Section 5 then imposes a sensible non-retroactivity principle. Courts generally interpret statutes in a manner that sets their meaning retroactively. That, however, does not permit state courts to escape the limitations imposed by the Constitution and federal law. Respondents' implicit theory is that when a state court errs in interpreting statutory provisions for appointing electors it neither usurps legislative authority nor creates new law. In fact, such an erroneous decision does both, in clear violation of Art. II, § 1, cl. 2, and 3 U.S.C. § 5.

Respondents' view ignores constitutional text and history. It takes the one branch of state government the Framers thought wholly unsuited for direct participation in the appointment of electors and not only gives it pride of place, but insulates its errors from review. Respondents' view makes

hash out of a straightforward delegation of plenary authority over the appointment of electors to state legislatures. The Constitution authorizes this Court to review and correct erroneous judicial constructions of statutes governing the appointment of electors. This Court should exercise that authority and correct the Florida Supreme Court's erroneous decision or defer to the authority of the Florida Legislature to vindicate the meaning of its election laws as they were written.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BUSH*, ARTICLE II, AND 3 U.S.C. § 5

The decision below conflicts not only with the established limits that Art. II, § 1, cl. 2, and 3 U.S.C. § 5 place on state courts, but also, more remarkably, with this Court's decision in *Bush*. *Bush* emphasized three principles that should have guided the Florida Supreme Court in this case. First, this Court reaffirmed that Art. II, § 1, cl. 2 gives the state legislatures plenary and exclusive authority over the process for the appointment of electors and "'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.'" *Bush*, slip op. at 5 (quoting *McPherson*, 146 U.S. at 25). Second, this Court explained that the Constitution's direct grant of plenary authority to the state legislatures means that the state constitutions cannot override state election laws as applied to a presidential election. As a result, Florida courts must interpret the Florida election laws without allowing "the Florida Constitution [to] circumscrib[e] the legislature's authority under Art. II, § 1, cl. 2." *Id*. at 7. Third, this Court observed that 3 U.S.C. § 5 disfavors retroactive changes in electoral laws and 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." *Id.* at 6. The decision below violates each of these three principles.

First, the court below overstepped its permissible role by rewriting the Florida election code. While the Constitution clearly vests the Florida Legislature with the authority to enact contest procedures and impose deadlines, the Florida Supreme Court revised the statutory deadlines, rewrote the contest procedures, and devised entirely new procedures without any mooring in statutory text.

In its prior vacated decision, the Florida Supreme Court rewrote the statutory deadline for county canvassing boards to certify their election results. Section 102.112 imposes a mandatory deadline for the Secretary of State to certify election results received by November 14th. The Florida Supreme Court's first opinion extended the Legislature's November 14th deadline to November 26th. This Court, of course, vacated that decision. In the decision below, the Florida Supreme Court did its vacated decision one better. Not only does the court continue to ignore the Legislature's November 14th deadline, but it has now amended its original deadline and ordered the courts to include recounted ballots submitted to the Secretary of State after the deadline. "The [November 26, 2000] deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots." *Gore v. Harris*, slip op. at 34-35. The court then ordered 215 votes from Palm Beach County that were counted after the court-imposed deadline to be included retroactively in the

certified totals. *Id.* at 34, 39.

The Florida election code not only provides deadlines for the completion of recounts and the submission and certification of results, it also prevents the inclusion of partial recounts in certified results. In the event of a recount, Fla. Stat. §§ 102.166(4)(d) & 102.166(5)(c) impose a mandatory obligation on country canavassing boards to "manually recount *all* ballots." This provision no doubt reflects a legislative concern that partial manual recounts raise concerns about unequal treatment. Despite this clear text, the court below ordered the trial court to include the results of a partial recount in Miami-Dade County. That result may or may not reflect wise policy, but it does not reflect the policy choices of the Florida Legislature. *See* Slip Op. at 36 (court below conducted its own balancing of "the need for accuracy . . . against the need for finality"). In the context of a presidential election, the Florida Supreme Court's rewriting of the election code and substitution of its own policy views for those of the Florida Legislature cannot be squared with Art. II, § 1, cl. 2.

The Florida Supreme Court also rewrote the Florida election code by arrogating remedial authority clearly and exclusively granted to the trial court. Fla. Stat. § 102.168(8) expressly grants broad discretionary authority to "[t]he circuit judge to whom the contest is presented." The Legislature provided that the circuit judge "may fashion such orders as he or she deems necessary . . . to provide any relief appropriate under such circumstances." *Id*. Here, the circuit court heard all the evidence and declined to order any remedy. As Petitioner has pointed out, *see* Pet. Stay Application at 24-25, it is not clear that the Florida Supreme Court even has

jurisdiction to review the circuit court's disposition of an election contest. Despite this Court's admonition that the Florida Constitution has no place in interpreting the election code as applied to a presidential election, the Florida Supreme Court based its jurisdiction, not on any statute, but on Art. V of the Florida Constitution. Even assuming *arguendo* that the Florida Supreme Court had jurisdiction, however, it clearly had no authority to fashion a remedial scheme from whole cloth. At most, the Florida Supreme Court, after finding a legal error in the circuit court's analysis, should have remanded so that the circuit judge – who enjoys the benefits of *both* statutory authorization and having heard all the relevant evidence – could have "fashion[ed] such orders as he . . . deem[ed] necessary . . . to provide any relief appropriate under such circumstances." Fla. Stat. § 102.168(8).

Not only did the Supreme Court lack authority to order any remedy, but its chosen remedy conflicts with the Florida election code. First, as already noted, where a recount is appropriate, Florida law requires county officials to "recount *all* ballots." *See* Fla. Stat. § 102.166(5)(c). Indeed, even the court below recognized that canvassing boards have a "mandatory obligation to recount all of the ballots in the county." *Gore*, slip op. at 30. The Florida Supreme Court claimed to honor this statutory command by ordering a statewide count of the so-called undervote. But the statute requires a recount of "all" ballots, not all ballots missed by the machine. "All" is a term of complete inclusion. Counting every ballot that fits within a certain subset of all ballots cast simply is not counting all ballots.

Likewise, in ordering a statewide recount of the undervote, the Florida Supreme Court authorized a standardless review

with no mooring in any statutory text. The Florida Supreme Court's first difficulty was that the only statutory authorization for a recount is in the protest provisions included in § 102.166. That section vests the sole authority over recounts in local canvassing boards. Fla. Stat. § 102.166(4)(c); *see also Gore*, slip op. at 47, 50-51 (Wells, C.J., dissenting). There is no analogous provision in § 102.168 authorizing courts to order recounts. Even though the only authority for recounts vests discretion in the county canvassing boards, the Florida Supreme Court faulted the circuit court for reviewing the canvassing boards' discretionary recount judgments deferentially. The Florida Supreme Court accordingly set up a system where authorized decisions by local canvassing boards to have recounts during the protest phase are reviewed by courts deferentially, while unauthorized recounts are ordered by the courts during the contest phase without any deference to the local boards. In a normal case, such a bizarre scheme would amply demonstrate the dangers of deviating from the statutory text. In this context, it also amply demonstrates a violation of Art. II, § 1, cl. 2.

In light of the complete absence of any statutory authorization for recounts at the contest stage, let alone recounts directed only at the so-called undervote, it should come as no surprise that the Florida Supreme Court had to create its remedial system out of whole cloth. Florida's election contest statute provides no clue as to who should do the recounts or how the recounts should be done. Accordingly, the Florida Supreme Court has authorized a completely standardless recount fraught with equal protection problems.

In the end, it is clear that, whatever its wisdom, the Florida

Supreme Court's newly-minted election contest scheme is not the election contest procedure enacted by the Florida Legislature. *See Gore*, slip op. at 41 (Wells, C.J., dissenting) ("My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the under-votes from either Miami-Dade County or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion").

The decision below clearly violates this Court's decision in *Bush* in a second major respect. Not even a week ago, this Court vacated the Florida Supreme Court's previous decision and admonished the Florida Supreme Court not to read the Florida Constitution as trumping the federal Constitution's delegation of primary and plenary authority over the process of appointing electors to the state legislatures. *See, e.g.*, *Bush*, slip op. at 5 (directing the Florida Supreme Court to consider "the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power'") (quoting *McPherson*, 146 U.S. at 25).

The court below has not yet reconsidered its November 21 decision in the "further proceedings" contemplated by this Court's vacatur order. *Bush*, slip op. at 7. Indeed, in the decision below, the Florida Supreme Court brushed aside this Court's unanimous decision and continued to rely expressly on its prior opinion as if this Court's vacatur order had never occurred. *See Gore*, slip op. at 34-35. But although it has not yet addressed the federal-law objections that required the vacatur, the court below has repeated its erroneous reliance on the Florida Constitution.

Rather than taking to heart this Court's admonition concerning reliance on the Florida Constitution, the court

below simply made a greater effort to disguise its use of the Florida Constitution to reinterpret the statutory scheme enacted by the Florida Legislature. Subtle evasion is no substitute for compliance.

In its first decision, the Florida Supreme Court framed its analysis based on *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975), a case that openly disparaged "sacred, unyielding adherence to statutory scripture" when adherence to statutory text would impinge on "the right to vote . . . the right to speak, but more importantly the right to be heard." Relying on *Boardman*, the court began by stating that "the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases." Nov. 22 Pet. App. at 8a. After emphasizing at length the importance of the right to vote under the Florida Constitution, *see id.* at 28a-31a, the court declared that "[t]echnical statutory requirements must not be exalted over the substance of this right." *Id*. at 31a. The court then returned to *Boardman* to conclude its analysis, reiterating its belief that "the will of the electors supersedes any technical statutory requirements," and that "'[t]here is no magic in the statutory requirements.'" *Id*. at 36a (quoting *Boardman*, 323 So.2d at 267).

With the benefit of this Court's *Bush* opinion, the court below refrained from expressly invoking the Florida Constitution (except when asserting its own jurisdiction), but the substance of its analysis remained unchanged. The court simply substituted citations of its prior decisions (which expressly relied on the Florida Constitution) or vague allusions *sans* citation to broad "legislative purposes." For example, citing *Boardman*, the court again preferred to look to "the primary guiding principle" of the "will of the voters," rather

than to the particular statutory provisions actually enacted by the Legislature. Slip Op. at 18. This time, the court omitted *Boardman*'s frank disparagement of statutory text, but included a long block quote of the same passage of *Boardman* that the court used to justify its approach in its vacated decision. *Compare id.* at 18-19 *with* Nov. 22 Pet. App. at 9a. Likewise, the court below asserted that "[i]n interpreting the various statutory components of the State's election process," it was required to be mindful that "the purpose of the statute is to give effect to the legislative directions ensuring that the right to vote will not be frustrated." Slip Op. at 7-8. For this proposition the court cited *Firestone v. News-Press Pub. Co.*, 538 So.2d 457 (Fla. 1989), a case that, like *Boardman*, gave a narrowing construction to an election statute to avoid a constitutional problem. *See id.* at 459-60.

Whereas the court previously had looked to the state constitution to support broad statements such as that the election statutes must be interpreted so as "to obtain an honest expression of the will or desire of the voter," Nov. 22 Pet. App. at 30a (quotation omitted), in the decision below, the court studiously avoided any direct reference to the state constitution. Instead, the decision below purported to ascertain a "legislative policy" to the same effect. *See* Slip Op. at 19 (asserting that "[t]he clear message from this legislative policy is that every citizen's vote [must] be counted whenever possible"); *id.* at 16-17 (asserting that "[t]his election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process," and that the "essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code").

These changes to the form of the court's analysis, however, do not alter the reality that the court continues to rely on the Florida Constitution (or other non-statutory principles) to reinterpret the Florida Legislature's will as expressed in its duly enacted statutes. Art. II, § 1, cl. 2 does not constitutionalize citation form, so that a state court can ignore the legislative scheme if avoids direct reliance on the state constitution. Instead, Art. II, § 1, cl. 2 grants the state legislatures plenary and exclusive authority over the process of the appointment of electors, and the state courts role in interpreting statutes governing that process is a narrow exercise in statutory interpretation. To avoid federal constitutional difficulties, the state courts must conduct their statutory interpretation with a clear focus on the statute as written. Neither the Florida Constitution nor broad principles imported from the case law provide any basis for deviating from the letter of the election code.

Indeed, the Florida Constitution has no proper role even as an interpretive principle for divining legislative intent. Principles of constitutional avoidance generally reflect a reluctance to exercise the judicial power to strike down a statute as unconstitutional and an interpretative norm that a legislature is unlikely to violate a constitutional principle they are oath-bound to respect.[11] Those principles have no application here. The Florida Supreme Court has no power to strike down a statute governing the federal election process as

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11. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it").

inconsistent with the state constitution, and the Florida Legislature is not constrained by the Florida Constitution when exercising its Art. II, § 1, cl. 2 authority. Simply put, the Florida Constitution has no legitimate place in the analysis of the court below, whether it comes in directly or through the backdoor.

The decision below also violates the third principle of this Court's *Bush* decision by not only rewriting Florida election law, but by doing so after federal election day in violation of 3 U.S.C. § 5. The decision below has frustrated the Florida Legislature's desire to take advantage of § 5's "safe harbor" by changing Florida law in place prior to the election. This Court in *Bush* held that "[s]ince § 5 contains a principle of federal law that would assure finality of the States's determination if made pursuant to a state law in effect before the election, 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."

The decision below denied this "legislative wish" by creating an election contest procedure after the federal election day. Indeed, as explained above, the Florida Supreme Court's scheme is flatly inconsistent with the legislative scheme in place on November 7, 2000. Whatever else is true about the remarkable statewide, undervote-only, standardless recount, however, no such procedure existed as of November 7, 2000. Accordingly, the results of these newly-minted procedures will not satisfy the requirements of § 5. On the other hand, a decision that restores the statutory deadline and respects the statutorily-granted authority of the circuit court would produce a result that fell comfortably within § 5's safe harbor.

Art. II, § 1, cl. 2 grants state legislatures the preeminent role

in appointing presidential electors. When a state court fashions new procedures out of whole cloth after election day, it risks not only a violation of 3 U.S.C. § 5, but also risks creating an election contest procedure that the Legislature did not and would not enact. Given the state legislature's preeminent role in determining the manner for the appointment of presidential electors, the Legislature's determination of sound policy should trump those of the state courts. The policies reflected in the Constitution and federal law do not permit state courts to have the final word on issues affecting presidential elections.

CONCLUSION

As noted at the outset, the court below came within one vote of resolving this election contest in a manner that, because of its consistency with Florida's election code, would have brought closure at last to this presidential election. Art. II, § 1, cl. 2 of the Constitution no doubt gives the Florida Legislature the power to correct the Florida Supreme Court's rewriting of the Florida election code. This Court has one last clear chance to bring closure to this election without the intervention of the Florida Legislature and without the prospect of a contentious proceeding in the U.S. Congress. This Court should seize this last clear chance and reverse the decision below.

Respectfully submitted,

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ADDENDUM

Participating *Amici*

The following individuals, who reside in Florida, voted on November 7, 2000, in Florida, in the presidential election contest, and are amici whose interests are presented for the Court's consideration in this brief:

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