No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,
Petitioner,
v.

PALM BEACH COUNTY CANVASSING BD., ET AL
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COALITION FOR LOCAL SOVEREIGNTY SUPPORTING WRIT OF ERROR TO SUPREME COURT OF FLORIDA

Kenneth B. Clark, *Counsel of Record*
COALITION FOR LOCAL SOVEREIGNTY
611 Pennsylvania Ave, SE - # 169
Washington, DC 20003
(301) 579-6100

QUESTIONS PRESENTED

I. Does the US Constitution give a constitutional "right to vote" for presidential electors?

II. Did Congress intrude upon an area of law constitutionally reserved to the States in adopting the Uniformed and Overseas Citizens Absentee Voting Act?

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INTEREST OF AMICUS CURIAE[1]

As the only national organization devoted to the support of state and local sovereignty as an uncompromising principle, Coalition for Local Sovereignty approaches the current case, not from the standpoint of one party or the other, but with no other interest than to preserved fundamental principles of federalism which are at issue in this case.

We believe that CLS brings to the case a unique perspective which will not reflect the narrow political interest of either party.

Counsel to the petitioner, and counsel to the respondent have consented to the filing of this amicus brief. General letters of consent from the counsel to the petitioner, and from the counsel to the respondent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Although selection of electors is a matter almost exclusively of State law, the Supreme Court of Florida in its ruling in the current case did make two determinations with respect to federal law, which are subject to review by this Court.

1. The Florida Court ruled that the "right to vote" in presidential elections was guaranteed by both state and federal law. The US Constitution, however, in granting to State legislatures full

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission. Pursuant to the Court's order in the Grant of Certiorari, this brief has been prepared in accord with Rule 33.2.

authority to determine the manner of selecting electors means that citizens of a State have no constitutional right to vote for president. The possibility of voting is left at the option of the State legislature. The "right to vote" insofar as it may or may not exist, is not a right guaranteed by federal law, as the Florida Court suggested. A clarification of this point by this Court, would help clarify an important matter of federalism, and help legitimate appointment of electors by the State legislature, should this become necessary either in the current dispute or in some future dispute.

2. The Florida Court relied in its decision upon the belief that the Uniformed and Overseas Citizens Absentee Voting Act was a constitutional preemption of State law. In passing the Uniformed and Overseas Citizens Absentee Voting Act Congress relied upon its grant of power in Article 1 section 4 of the US Constitution which grants that "Congress may at any time make or alter such regulations" as to the "manner of holding elections for senators and representatives." The Constitution, however, gives Congress no such power with regard to selection of presidential electors. The Uniformed and Overseas Citizens Absentee Voting Act therefore was an unconstitutional attempt by Congress to usurp a power reserved to the States. As such, State law requiring that all absentee ballots must be received by 7 p.m. on the day of election, is controlling.

ARGUMENT

I. The US Constitution does not give individuals the right to vote for president, or presidential electors.

A. THE method of choosing presidential electors is vested exclusively with the States.

It is no doubt believed by most Americans that there is a constitutional right to vote for president. There is no such right in the US Constitution. Art 2 sect 1 merely declares that each State shall appoint electors in such manner as each state legislature shall determine. Likewise, the Twenty-third Amendment says that the District of Columbia will appoint electors "in such manner as Congress may direct."

We believe that a clarification by this Court, that there is no constitutional right to vote for president, and that popular suffrage in presidential elections is a matter of State law, would be beneficial and would help clarify the authority of the State legislature to appoint electors as may be necessary in the current controversy.

Appointment by the State legislature might well be viewed by some people as an illegitimate means of determining electors, a reaffirmation of that principle by this court could help to guarantee the perceived legitimacy of the president-elect, should the legislature of Florida be the deciding factor in the election.

1. The Constitution guarantees the right to vote for Congress but not Presidential electors.

The Constitution makes explicit and important distinction between elections to Congress and selection of presidential electors. Art 1 section 2 says that members of the House of representatives shall be chosen "by the people," while the Seventeenth Amendment says that Senators shall also be chosen "by the people." In addition, Art 1 sect 4 says that with regard to Congressional elections

"Congress may at any time make or alter such regulations" prescribed by the State legislatures. In start contrast to this wide latitude given Congress with regard to Congressional elections, Art 2 simply says that each State shall appoint electors "in such manner as the legislature thereof may direct."

Comparison of the language of Article 1 and Article 2 leaves no doubt as to the plenary power of State legislatures in appointing electors.

State legislatures are under no Constitutional obligation to permit a popular vote. If a state legislature decides to have some sort of popular election for president then such election cannot discriminate against voters on the basis of race (Amdt 15), sex (Amdt 19), age (Amdt 26) or failure to pay a poll tax (Amdt 22). Other than that, the Constitution places no restrictions on a State legislature's authority to run elections. The only other limitation is that Congress in certifying a presidential election, appears to have authority to reject a State's electoral vote if it regards the method of appointment as nefarious or underhanded.

2. The Fourteenth Amendment does not include the right to vote.

Parties on both sides of this issue have argued that there is a federal right to vote contained in the Fourteenth Amendment. There is not.

If a state legislature decides to have some sort of popular election for president then such election cannot discriminate against voters on the basis of race (Amdt 15), sex (Amdt 19), age (Amdt 26) or failure to pay a poll tax (Amdt 22). If Congress, or the Courts, were empowered by the Fourteenth Amendment to direct state elections, then these amendments would be unnecessary,

and superfluous.

It was the position of this Court for an entire century, and it is totally clear from both the text of the Constitution itself, and the legislative history of the adoption of the Fourteenth and Fifteenth Amendments, that the"equal protection clause" does not include the right of suffrage.

Statements by the framers of the Fourteenth Amendment that right to suffrage was not included were numerous and explicit.

Senator Bingham, principle author of Fourteenth Amendment declared:

> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. . . .To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States (Globe 2542).

Acting Chairman of the Senate Reconstruction Committee, Senator Howard, explained the meaning of the Equal Protection Clause to the Senate as follows:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. ... But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive *local* law (Globe 2766).

Numerous statements by other legislators of their understanding of the wording of the Fourteenth Amendment concur. We cite just a couple here. Senator Miller declared:

> Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for

itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age (Globe 2510).

Senator Johnson, declared:

> Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States . . . not only the right, but the exclusive right, to regulate the franchise. . . . It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government of the United States will be impotent to redress. (Globe 3027).

These statements and similar ones which could be cited leave no doubt as to the original intent of the framers.

This Court has also long maintained the view that suffrage was not guaranteed by the Fourteenth Amendment. Proponents of women's suffrage repeatedly argued, and this court repeatedly rejected, the view that the Fourteenth Amendment's equal protection and/or due process clauses guaranteed the right to vote. Although women were undoubtedly "free citizens of the United States" citizenship did not include the right to vote.

In *Minor v. Happersett*, 21 Wall. 162, (1874) this Court ruled that:

> [A]fter the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

In *Guinn v. United States*, 238 U.S. 347 (1915) this court ruled:

> Beyond doubt the [Fifteenth] Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

The Court also made clear in *Guinn* that any restriction on the States' control over elections was a result of the Fifteenth Amendment, not the Fourteenth: "the United States . . . says State power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon." No reasonable interpretation of the Fourteenth, Fifteenth, Nineteenth, Twenty-second and Twenty-sixth Amendments taken together can conclude otherwise.

As Madison noted in *Federalist 41*, the "enumeration of particular powers" by the Constitution excludes all pretense to a general powers: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?" The same argument applies to the Fifteenth, Nineteenth, Twenty-second and Twenty-sixth Amendments. These amendments must be read as particular exceptions to an otherwise plenary State power to regulate suffrage and the process of voting.

The Warren Court departed from 100 years of precedent in 1964 in *Reynolds v. Sims*, in ruling that the Fourteenth Amendment's "equal protection clause" included the "one man, one vote" principle. Even so, the line of cases culminating in *Reynolds v. Simms* was always with respect to *legislative representation*; either in Congress or in state legislatures. Over and over in *Reynolds* the majority opinion emphasized that "equal protection" was in elections for representatives: "With

respect to the allocation of *legislative* representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." The *Reynolds* line of cases repeatedly speaks only of "*legislative apportionment.*"

The Warren Court decreed that each citizen's share in making laws through representation should be approximately equal. Since electors do not "make law" and are not "legislative" in any way, the "one-man, one-vote" principle does not even seem to apply to choosing electors.

In fact, *Reynolds* explicitly said that there was a great difference between the selection of presidential electors and elected representatives: "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite." Thus in *Reynolds* the Court explicitly suggested that the "one-man, one-vote" principle which applies in legislative representation does not apply with respect to the choosing of electors.

We also agree with dissenting opinion of Justice Harlan that:

> Since it can, I think, be shown beyond doubt that state *legislative* apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, 4), the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

The *Reynolds* line of cases was the result of an activist period of the Warren Court, which runs afoul of the current court's tendency towards strict construction and respect for federalism. This Court might well take this opportunity for overturning *Reynolds*, but it would be a shocking reversal of the Court's recent jurisprudence, to actually expand the "equal protection" argument to the selection process for presidential electors when it had previously been applied only to legislative apportionment.

In conclusion then we repeat, since Article 2 section 1 grants full power to legislatures to determine the method of choosing electors, and since neither Art 1 section 4, nor the Fourteenth Amendment result in any diminution of that authority, there remains no federal right to vote in presidential elections. Although this point is commonly misunderstood, one would have hoped that such a distinguished and important body as the Florida Supreme Court would have recognized this fact, but since they appear to have missed or ignored it, it may be a proper exercise of this court's review function to remind that court and the American people of that fact.

II. The Florida Supreme Court was in error when it ruled that the Uniformed and Overseas Citizens Absentee Voting Act superceded State law.

The Florida Supreme Court decision relied heavily upon the Uniformed and Overseas Citizens Absentee Voting Act (Pub. L. 99-413), in its decision that the 7 day deadline required by Florida statute could not be executed:

> Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 pm on the day of the elections. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total of the county." Chapter 102 requires that the board submit the returns by 5 p.m. on the seventh day following the election. . . . This, of course, is not possible, because *our state statutory scheme has been superceded by federal law* governing overseas voters (Fl. SC00-2346, p. 28) [emphasis added].

The conflicting section of the Florida Code is 101.67(2) which declares: "All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office."

In short, the Florida Court relied upon its interpretation that the 7 day deadline was, in effect, illegal, because federal law required an extension. We believe, however, that this cannot be the case

since in passing the Uniformed and Overseas Citizens Absentee Voting Act Congress unconstitutionally intruded upon an area of election law reserved to the states. If the Overseas Voting Act, is unconstitutional then it cannot supercede the state law requiring that elections be certified 7 days after election day.

There are two articles of the US Constitution which discuss elections for federal office: article 1 section 4 (regarding Congress) and Article 2 section 1 (regarding president).

> Art 1 sec 4 "The times places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but Congress may at any time by law, make or alter such regulations, except as to the places of choosing senators."
>
> Art 2 sect 1 "Each 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."

Article 1 does seem to give Congress great leeway over the regulation of congressional elections; Article 2 – governing selection of electors – does not. Congressional enactment requiring acceptance of oversees ballots was passed pursuant to the broad grant of power found in article 1, section 4. However, article 1 section 4 applies only to Congressional elections. Article 2, which governs presidential elections leaves complete authority in the hands of the State legislature.

The District and Appellate Courts in the current controversy, in declining to intervene have both ruled that Article 2 of the US Constitution reserves to State legislatures virtually complete authority over presidential elections.

A. Because Congress exceeded its authority in passing the Uniformed and Overseas Citizens Absentee Voting Act, State law remains controlling with respect to the deadline for filing and certifying absentee ballots.

Although the Florida Secretary of State has agreed to follow the federal demand to count late overseas ballots, the Florida legislature has not approved this. The executive branch has put forward regulations in the Florida Administrative Code (1.S-2.013) to attempt to bring the state into compliance with the federal extension. The governor and Secretary of state have ignored the State law under the theory that federal law preempts the state law. But a federal law preempts state law only if it is constitutional.

In the absence of a valid federal preemption of state law, executive officials must execute the law as provided by the legislature.

Article 6 of the Constitution, says that "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the land; and the judges of every state shall be bound thereby." Obviously, if a Congressional enactment is unconstitutional then it cannot preempt State law.

The certification of the election, is obviously a matter of State law into which this court has no jurisdiction to intervene. It is, however, within the proper role of the this Court to declare that the Overseas Voting Act does not supercede or preempt State law, and remand to the Florida Courts for reconsideration based on this fact.

In fact, because the Florida decision is based largely on this apparent conflict between State and federal law, it is particularly appropriate for this court to address that apparent

conflict. State courts are obviously reluctant to declare federal provisions unconstitutional, leaving such responsibility up to this court upon review.

Respectfully submitted,

Kenneth B. Clark, *Counsel of Record*

November 27, 2000