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**

## BRIEF OF RESPONDENT PALM BEACH COUNTY CANVASSING BOARD


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## QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. 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?

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## OPINION BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-38a) is unreported as yet, but available on Westlaw at 2000 WL 1725434. The orders of the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida (Pet. App. 43a-51a) are not reported.

## JURISDICTION

The final judgment of the Supreme Court of Florida was entered on November 21, 2000**.** This Court has jurisdiction to review a final judgment of the highest state court, under 28 U.S.C. § 1257. However, because the recounts that were permitted by the decision below have been completed, and the petitioner was certified on November 26, 2000 as the winner of the Florida election, the relief sought by the petitioner — to have been certified as the winner on November 14, 2000 — is superfluous, and the Article III, § 2 case or controversy requirement necessary for this Court's jurisdiction is questionable.

## STATEMENT

The primary parties, Governor Bush and Vice President Gore, have submitted, and will submit, extensive statements of the events since November 7, 2000. The Palm Beach County Canvassing Board submits this abbreviated statement of the actions it took to discharge, in a non-partisan way, its statutory duties — actions that led to the decision below.

Following the November 7, 2000 general election the Palm Beach County Canvassing Board granted a request by the Florida Democratic Party for a manual recount of the

votes cast for President and Vice President, as set forth in section 102.166(4)(a), Florida Statutes.[1] Pursuant to section 102.166(4)(d), the Canvassing Board conducted a manual recount of just over 1% of the total votes cast.[2] Based on the results of that limited manual recount, the Canvassing Board exercised its statutory option to conduct a manual recount of the entire County.[3]

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1. Subsection (4)(a) provides:

> Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

2. Subsection (4)(d) provides:

> The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

3. Subsection (5) provides three options following the initial limited manual recount:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(Cont'd)

After beginning the manual recount, the Palm Beach County Canvassing Board sought and obtained opinions from both the Secretary of State of Florida and the Attorney General of Florida as to as to whether the Canvassing Board could, in the circumstances presented and consistent with section 102.166(5), Fla. Stat., conduct a manual recount of the votes cast for the offices of President and Vice President of the United States in the November 7, 2000 general election, in accordance with the Board's unanimous vote to do so.[4]

The Secretary of State, through L. Clayton Roberts, Director, Division of Elections, provided an advisory opinion on November 13, 2000 (J.A. 56-58), which "construed the

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(Cont'd)

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
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> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

4. Specifically, the Board asked:

> Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system / software?

J.A. 47.

language 'error in vote tabulation' [in § 102.166(5)] to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched." Pet. App. 10a. That advisory opinion, indicating that the recount in Palm Beach County was unauthorized, was binding on the Palm Beach County Canvassing Board "until amended or revoked." § 106.23(2), Fla. Stat.

The next day, the Attorney General issued an opinion disagreeing with the Secretary of State's statutory analysis and concluding that a manual recount was not limited to situations presenting errors in the vote tabulation system or software. *See* November 14, 2000 Attorney General Opinion 2000-65. (J.A. 40-46). Faced with the binding advisory opinion and a conflicting Attorney General Opinion, on November 14, 2000 the Palm Beach County Canvassing Board voted to suspend its manual recount pending a judicial determination of its rights and responsibilities under the law. The Canvassing Board filed a Petition for Extraordinary Writ in the Supreme Court of Florida, asking that Court to provide the definitive statutory interpretation. (Pet. App. 2a, n.1). Based on an Interim Order of the Supreme Court of Florida stating that there was no impediment to the vote count continuing (Pet. App. 41a), and the opinion below issued November 21, 2000 (Pet. App. 1a-38a) resolving the issue contrary to the view of the Florida Secretary of State, the Canvassing Board resumed its manual recount and completed it on the evening of November 26, 2000.

Earlier, in order to avoid the certification of statewide election results without the Palm Beach County tabulation, the Palm Beach County Canvassing Board intervened on November 13, 2000 in a lawsuit brought by Volusia County

against the Secretary of State to enjoin her from ignoring results submitted after November 14, 2000. Pet. App. 4a. The decision below details the chronology of that action, which ultimately joined with the original action brought by the Canvassing Board and resulted in the decision below. Pet. App. 4a-8a. That decision, which permitted the recounted vote to be considered, and set the certification date of November 26, 2000 to accommodate the need for the manual recount, is the decision that the petitioner seeks to set aside.

## SUMMARY OF ARGUMENT

The Supreme Court of Florida's decision reconciling conflicting provisions of the Florida Election Code did not establish a new rule of law; did not depart from well established Florida law; did not violate the Due Process Clause or 3 U.S.C. § 5; and did not conflict with Article II, Section 1, clause 2 of the Constitution.

The decision of the Supreme Court of Florida was a classic example of a court making sense out of a conflicting statutory election code that threatened to discount the right to vote, one of the most fundamental of rights.

The decision below utilized standard principles of statutory construction to alleviate the tension between a 1951 statute, which mandated the state certification of election results on the seventh day following an election, and a 1989 statute, which permitted later filed local returns to be included for certification. Since Florida law authorized manual recounts, and those recounts could take longer than seven days, the Supreme Court of Florida harmonized the conflict by setting a certification date — November 26, 2000 — that allowed each actor to complete his or her task: the

Canvassing Board could count; the voter could be protected; the Secretary of State could certify; a dissatisfied candidate or voter could contest the election after certification. All of this was pursuant to statutes enacted prior to November 7, 2000.

Therefore, the decision below was in accord with 3 U.S.C. § 5, which requires states to resolve controversies relating to the appointment of electors "under laws enacted prior to" election day, and the decision below was consistent with the Florida statutory law, thus guaranteeing that Florida's electors shall be appointed "in such Manner as the Legislature thereof may direct." Article II, Section 1, clause 2 of the Constitution.

The Supreme Court of Florida decision should be affirmed.

## ARGUMENT

### I.

### THE DECISION OF THE SUPREME COURT OF FLORIDA, RECONCILING THE STATUTORY AMBIGUITIES IN THE FLORIDA ELECTION CODE, DID NOT VIOLATE 3 U.S.C. § 5 OR THE DUE PROCESS CLAUSE

Karl Llewellyn, speaking of courts and statutes, wrote:

> But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use [Jerome] Frank's figure, take the music of any statute as written by the legislature; it must take

> the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and to play it in harmony with the other music of the legal system.

KARL LLEWELLYN, THE COMMON LAW TRADITION 373 (1960) (emphasis in original). The Supreme Court of Florida's decision achieved that harmonious result.

The Supreme Court of Florida reconciled "the time frame for conducting a manual recount under section 102.166(4) . . . with the time frame for submitting county returns under sections 102.111 and 102.112." Pet. App. 17a.

Under section 102.111(1), enacted in 1951, if the election returns of a county "are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored and the results shown by the returns on file shall be certified." Pet. App. 22a. But under section 102.112(1), enacted in 1989, if county returns are not received by the Department of State by 5 p.m. on the 7th day following the general election, "such returns may be ignored and the results on file at that time may be certified by the department." Under 102.112(2), also enacted in 1989, the "department shall fine each [county canvassing] board member $200 for each day such returns are late."

The "shall — may" conflict becomes critical when the manual recount provisions of section 102.166 are triggered. As the Supreme Court of Florida explained, because a manual recount can be requested as late as "the sixth day following the election" (Pet. App. 21a), the seven day limitation could render the recount provision meaningless: "logic dictates that

the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days." Pet. App. 21a.

The Supreme Court of Florida's reconciliation of the conflicting statutes utilized accepted canons of statutory construction: a specific statute controls a general statute; a more recently enacted statute controls an older statute; construction of a statute should not "render meaningless or absurd any other statutory provision;" and "related statutory provisions must be read as a cohesive whole." Pet. App. 24-25a. And these rules were applied on the canvas of the right to vote, the most fundamental of rights. *See Burdick v. Takushi*, 504 U.S. 428 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184. . . . (1979)").

It is undisputed that the Florida statutes giving rise to this case, and the statute providing for election contests, section 102.168, Fla. Stat., were enacted prior to November 7, 2000. That alone should end the claim of alleged conflict with Title 3 U.S.C. § 5, because the safe harbor provided by the statute is premised upon the existence of "laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures. . . ." Nevertheless, the petitioner contends that the Supreme Court of Florida's reconciliation of the statutes and setting of a November 26, 2000 certification deadline made new law, and thus violated Title 3 U.S.C. § 5:

> This arbitrary judicial departure from the well-established law of Florida — as it plainly stood prior

> to November 7, 2000 — is in flagrant violation of Congress' federally imposed requirement that controversy over the appointment of electors be resolved solely under legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.

Petition for Writ of Certiorari, pp. 15-16.

> Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

*Id.* at 17.

The petitioner errs in calling the Supreme Court of Florida's opinion "a new rule of law." That opinion did what a court should do: "to quarry out of a legislative text the best sense which the text permits. . . ." LLEWLLYN, *supra*, at 381. The Supreme Court of Florida carefully construed the Florida Election Code "as a whole." Pet. App. 37a. Faced with a 1951 statute's mandate to ignore an eighth (or later) day return (a mandate that could not be followed anyway because overseas voters have a 10-day window, *see* Pet. App. 27a, n.47), the court sought to apply the Code in a sensible way.

> [I]ncreasingly, as any statute gains in age [,] its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense

> originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting.

LLEWLLYN, *supra* at 374 (emphasis in original).

That judicial process is not "legislative;" it is quintessential common law judging — "the power to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court of Florida did adhere to preexisting law. Making sense out of that law does not, as the petitioner says, constitute "*post hoc* standards announced for the first time some two weeks after the election." Pet., p. 16, n. 4. What the Supreme Court of Florida did was not legislative, it was ordinary judging.

> More specifically, the judge is uniquely competent to place statutes in their temporal setting, taking account of what happens both before and after a statute is passed. Moreover, the exercise of this competence inevitably results from applying texts to facts, an exercise that forces the judge to think about how a text's meaning interacts with the past and the future (about the statute's intent). Once this thought process begins, judgment requires thinking about substantive values and comparative institutional competence; however, these are the results of ordinary judging. . . .

WILLIAM D. POPKIN, STATUTES IN COURT, THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 246 (1999).

The petitioner's premise — that "the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida legislature that were in place on November 7" — is based upon a misconception of the judicial function. One role of the courts is "to make sense rather than nonsense out of the corpus juris." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991). Justice Frankfurter put it another way, quoting Lord Justice Denning in *Seaford Court Estates, Ltd. v. Asher* [1949] 2 K.B. 481, 499 (C.A.): " 'A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases.' " Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365, 367 (1950).

The Supreme Court of Florida tailored its decision to preserve every aspect of the Florida Election Code. The opportunity to ensure the accuracy of the vote was preserved. The duty of the Secretary of State to certify election results was preserved. The opportunity to lodge a statutory post-certification election contest was preserved.

The Supreme Court of Florida decision was not arbitrary and it was not a departure from the well established law of process or the 3 U.S.C. § 5 requirement that controversy over the appointment of electors be resolved solely under

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5. *amicus curiae* Representatives, p. 12, contends that by allowing a later certification not be finally adjudicated" by December 12, 2000 and that "may adjudication of such contests." The speculativeness of that

## II.

## THE SUPREME COURT OF FLORIDA OPINION DID NOT VIOLATE ARTICLE II, § 1, CL. 2 OF THE CONSTITUTION

Article II, § 1, cl. 2 provides that Electors shall be appointed "in such manner as the Legislature thereof may direct." The petitioner contends that the Supreme Court of Florida "has seen fit to revise the 'manner' in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts. . . ." Under the petitioner's theory, no Florida court could reconcile conflicting state election statutes that implicate the choice of electors: "Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so, but the simple fact is that it did *not* do so." Pet., p. 20 (emphasis in original).

The simple fact is, of course, that the Florida Constitution and the Florida statutes provide Florida courts with jurisdiction to resolve all controversies. Article V, Fla. Const.; Ch. 25, Ch. 26, Ch. 35, Fla. Stat. Election law disputes are just one *genre* of controversy suited to judicial review. There is nothing extraordinary about the Supreme Court of Florida's assumption of jurisdiction in this case. Indeed, if the petitioner were correct, election law disputes touching upon presidential electors could only be addressed *before* an election. That cannot be, because election disputes only occur *after* an election.

The petitioner's flawed view of the judicial function spoils his argument under Article II, § 1, cl. 2, just as it did under Title 3 U.S.C. § 5.

Florida laws enacted prior to November 7, 2000 governed this election and disputes arising from that election. The Supreme Court of Florida's resolution of the subsequent-to-election dispute was not a legislative act, nor was it contrary to the "manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. While this election dispute may be extraordinary, the Supreme Court of Florida's decision was ordinary judging, and violated no federal constitutional or statutory principles.

## III.

## IF THIS COURT FOUND THAT THE DECISION OF THE SUPREME COURT OF FLORIDA DOES NOT COMPLY WITH 3 U.S.C. § 5, THE CONSEQUENCES WOULD BE NIL

If the Supreme Court of Florida decision were reversed, there would be no immediate consequences. The Secretary of State's certification of election results occurred on November 26, 2000. The petitioner sought to be certified as the election winner on November 14, 2000. His goal was delayed, not denied. Setting aside the Supreme Court of Florida decision would not change the certified election outcome. Indeed, the question posed in the jurisdiction portion of this brief seems pertinent; since certification has occurred, the remedy sought by petitioner is of little consequence now.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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