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 FLORIDA SUPREME COURT

Reply Brief of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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ARGUMENT

I

THE SUPREME COURT OF FLORIDA DID MORE THAN INTERPRET THE LAW; IT CHANGED THE LAW

The threshold issue before this Court is whether the Supreme Court of Florida's decision changed the law on November 21 from what it was on election day, November 7. Arguments raised in support of the decision follow this logic line: (i) a state supreme court is the final arbiter of state law; (ii) the interpretation of state statutes is a matter of state law; (iii) the decision below was an "interpretation" of the Florida Election Code; (iv) an interpretation of the law is not a change in that law; and therefore, (v) there is no conflict with federal law, and no basis for this Court to review the decision of the Supreme Court of Florida. *See, e.g.,* Gore Respondents Br. at 13-21; Attorney General ("A.G.") Br. at 4-10; Palm Beach Br. at 6-10.

The Commission Respondents do not contest, and in fact embrace, the first two of these points. The logical flow dissembles, however, with the use of the word "interpretation" in the third point. All can agree that courts may interpret laws; indeed, that is their job. However, the decision below was not an "interpretation" — it was the creation of new principles of Florida law, drawn from equitable precepts and unfettered by "hypertechnical compliance with statutes." Bush Pet. App. at 36a. While the court's opinion starts with a discussion of statutory construction, it then departs from the statutory scheme "to reach the result that reflects the will of the voters, whatever that might be." Bush Pet. App. at 9a-10a. The court concludes that it had to invoke its "equitable power . . . to fashion a remedy . . ." to further Florida constitutional principles. Bush Pet. App. at 37a. Thus, as is clear from the opinion, the action taken by the Supreme Court of Florida was not an interpretation, but the creation of new Florida law. The third point in the line of logic is thus incorrect, and the fourth and fifth points fall of their own weight.

The position that the court engaged in "ordinary judging," using "garden variety" principles of statutory construction is untenable. Gore Respondents Br. at 13 ("The decision by the Florida Supreme Court was an ordinary exercise in statutory interpretation. . . ."); Palm Beach Br. at 10 ("What the Supreme Court of Florida did was not legislative, it was ordinary judging."). The decision was anything but ordinary. The court did not limit itself to interpreting the Florida Election Code. Rather, guided by the Florida Constitution and equitable principles, and denouncing "hypertechnical compliance" with the statutory requirements, the court went well beyond the text of the statute and created new legal rights, rewrote statutory deadlines, and created new criteria for making administrative determinations on election issues.[1]

For example, the court purported to resolve a conflict between section 102.112 (which provides that election results from the county canvassing board *may be ignored* if not filed by the statutory deadline) and section 102.111 (which states that the Commission *shall ignore* such returns) by holding that the Secretary *must accept* untimely election returns unless doing so *will* preclude a candidate, elector, or taxpayer from contesting the certification of election, or preclude Florida voters from participating fully in the federal electoral process. Bush App. at 37a. Both the virtually absolute duty to accept untimely returns and the "test" for rejecting such returns have

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1. The court itself recognized that it was creating new law, *see* Bush App. at 36-37a. ("Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed *after the initial statutory date* are limited.") (emphasis added), and remedies, *see* Bush App. at 37-38a ("[W]e conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here."). The Attorney General has also recognized that the court created a new substantive right. A.G. Br. at 5 ("Technical statutory requirements must not be exalted over the substance of this right.").

no basis in the legislative enactments. They are new judicially created provisions.

There are several other changes in the law that are not in real dispute. *First*, no party disputes that the court below *applied* the law differently in this election than in elections past. *Second*, no party disputes that the seven-day deadline in sections 102.111 and 102.112 has been replaced with a 19-day deadline for the purposes of this Presidential election and an indefinite standard created for future elections. *Third*, no party disputes that the contest period is shorter and the protest period longer than they would have been but for the decision below. The point is not to question the court's prerogative to create new rights under state law; the issue is simply whether that decision changed the law.[2]

Certain respondents raise the puzzling argument that only legislatures can change the law, and judicial decisions construing statutes cannot.[3] *See, e.g.*, Gore Respondents Br. at 18; A.G. Br. at 10-11; Palm Beach Br. at 10-13. This Court, however, has recognized instances in which judicial construction has changed the law. For example, "[i]f judicial construction of

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2. Moreover, the legislature vested the Secretary with the authority to maintain uniformity in the application, operation and interpretation of the election law and to issue legal opinions regarding that law. Fla. Stat. §§ 97.012(1), 106.23 (2000). In this case, the Secretary issued an opinion interpreting section 102.166(4) to mean that manual recounts for voter error were not authorized during the protest period. The court below created a new common law right to a manual recount in the protest period for almost any purpose. Though the Gore Respondents contend that the decision of the court below was "governed by state laws that long antedate this election," Gore Respondents Br. at 13, they do not, however, offer any legal support for that contention.

3. Additionally, the Attorney General argues that because the legislature was aware that courts interpret and expand the law when they passed the Election Code, the legislature has somehow consented to any possible modifications the courts may make to the statutes. A.G. Br. at 15-19. Such a delegation of power would violate separation of powers under any test.

a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). And, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. Specifically, in the context of election law, the United States Court of Appeals for the Eleventh Circuit recently recognized that a post-election judicial decision can constitute a change in the law. *Roe v. Alabama*, 43 F.3d 574 (CA11 1995) (holding that a post-election judicial decision affecting the requirements for filing absentee ballots constituted a change in the law).[4]

Finally, the contention that this case presents a matter of state law that should not be reviewed by this Court is incorrect and misconstrues the relief sought. Florida courts are, of course, free to create constitutional or common law rights. The question before this Court, however, is whether the law in Florida changed with respect to elections after November 7, not whether the change was correct or proper under state law. This Court does not have to express any opinion on the propriety of the common law and constitutional rights created below to answer this question.[5] Nor will this Court's decision affect the *prospective* application of those rights. The only issue is whether the newly-created state rights can be applied retroactively to this federal election. *Bouie*, 378 U.S. at 362 ("While such a construction is

4. The State of Alabama's Amici Brief discusses the history of this case, Ala. Br. at 4-10, 21-25, and provides poignant examples of how post-election changes in the law have serious and far-reaching ramifications, *id.* at 13-21.

5. Therefore, principles of federalism would not bar the relief sought in this case. Though this Court ordinarily does not review a state court's interpretation of a state statute, this Court and the lower federal courts certainly must review such matters to determine if they comply with federal law. *Cf. Carmell v. Texas*, 529 U.S. 513, n.31 (2000) ("Whether a state law is properly characterized as falling under the Ex Post Facto Clause, however, is a federal question we determine ourselves.").

of course valid for the future, it may not be applied retroactively, [any] more than a legislative enactment may be. . . .").

CONCLUSION

A reading of the decision below demonstrates that the Supreme Court of Florida changed the election law on November 21 in several important respects. If this Court finds that the Supreme Court of Florida's application of the new election law to this Presidential election violated federal law, the Court should modify the decision under review and order that no returns from manual recounts received after the November 14 certification should be permitted to be counted in the total of votes for Presidential Electors. Therefore, the totals certified on November 15 and the overseas ballots received by November 17 would constitute the complete certification for the Presidential Electors for the State of Florida.

Respectfully submitted,

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