

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 AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

Steven R. Shapiro
(Counsel of Record)
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10025
(212) 549-2500

Laughlin McDonald
Bryan Sells
American Civil Liberties Union Foundation
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

James K. Green
Randall Marshall
American Civil Liberties Union of Florida Foundation
3000 Biscayne Boulevard
Suite 215
Miami, FL 33137-4129
(305) 576-2337

Counsel for Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. As a nonpartisan organization, the ACLU has never in its eighty year history taken a partisan position on any electoral contest and takes no such position on this presidential election. The ACLU has, however, frequently defended the right to full and fair participation in the electoral process because we recognize, as this Court has recognized, that the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, as this Court has stated, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The fact that both sides in this dispute claim to be acting in furtherance of the right to vote and in support of fair electoral procedures is hardly unusual. But it is equally routine in our system of government for such disputes to be resolved through the judicial process. Because this case calls into question the propriety of that traditional judicial function, it raises issues of profound importance. In our view, the resolution of those issues is likely to have an enduring impact on the electoral process even beyond the obviously enormous stakes of the current presidential contest. In particular, we are concerned that the theory of judicial review put forth by petitioner will unduly impair the ability of courts, both state and federal, to use their equitable powers in voting rights cases to craft effective remedies designed to preserve both the right to vote and the right to have one's vote counted. For that reason, the ACLU respectfully submits this *amicus* brief.

STATEMENT OF THE CASE

By this point, the facts of this case are well known to virtually everyone in the country and need not be repeated here at great length. On Tuesday, November 21st, the Florida Supreme Court ruled in a unanimous opinion that Florida's Secretary of State had erred, as a matter of state law, in categorically refusing to accept the results of any manual recounts submitted to her after the November 14th deadline that she had previously announced for the submission of all final vote tallies. *Palm Beach County Canvassing Board v. Harris*, Pet. App. 1a-38a.

The court noted in its opinion that Florida law created a conflicting set of statutory mandates. On the one hand, Fla. Stat. § 102.111 provides that any county returns that are not received by the Department of State by 5 p.m. on the seventh day following either a state or federal election "shall be ignored."⁽²⁾ On the other hand, Fla. Stat. § 102.112 also addresses the question of what to do if county returns are not received by the Department of State by 5 p.m. on the seventh day after the election but, in contrast to the mandatory language of § 102.111, states that "such returns *may* be ignored and the results on file at that time *may* be certified by the department." (Emphasis added.) The permissive nature of this sanction is underscored by the following subsection of § 102.112, which directs the Department of State to fine each county canvassing board member \$200 "for each day such returns are late, the fine to be paid only from the board member's personal funds."⁽³⁾ As the court below noted, that clock would never tick if late filings were subject to automatic rejection under § 102.111. Pet. App. 25a.

Adding to the confusion, Florida law provides that any candidate may submit a written request to the county canvassing board for a manual recount at any time "prior to the time the canvassing board certifies the results for the office being protested . . ." Fla. Stat. 102.166. Upon receiving such a request, a county canvassing board "may" authorize a sample recount by hand. The sample must include at least three precincts and one percent of the total votes cast for the candidate requesting the recount. If the result of the sample recount "indicates an error in the vote tabulation which could affect the outcome of the election," Fla. Stat. § 102.166(4) (b), the canvassing board is required to address the error in any one of three ways, including a full manual recount, Fla. Stat. § 102.166(5)(c). Section 102.166 does not, on its face, indicate when the manual recount must be finished. It is fair to assume, however, that the Legislature understood that manual recounts take time, as the facts of this case undeniably demonstrate.

Faced with this tangled web of conflicting laws, the Florida Supreme Court applied a series of well-established rules of statutory construction "in an effort to determine legislative intent." *Id.* at 24a. First, it held that a more specific statute takes precedence over a more general one. *Id.* In this case, the court concluded, that meant that the inflexible seven day deadline of § 102.111 had to give way to the more flexible procedures of § 102.112, which authorize the Department of State to fine county canvassing board members for filing late returns rather than rejecting the late returns themselves. Second, the court noted that a later statute generally takes precedence over an earlier one. *Id.* Here, § 102.111 was enacted in 1951 and § 102.112 was enacted in 1989. Third, the

court ruled that enforcing the inflexible seven day deadline of β 102.111 would render it impossible ever to impose the daily fine for late returns that β 102.112 expressly contemplates, in violation of the interpretive canon that every provision of a statute must be assumed to have meaning and be given effect. *Id.* at 25a. Fourth, the court observed that strict adherence to the seven day deadline of β 102.111 would, in many instances, make it impossible to complete the manual recount that β 102.166 explicitly authorizes, in violation of the rule that related statutory provisions should be read harmoniously, whenever possible. *Id.* at 25a-26a. Finally, the court reiterated its longstanding view that election laws should be "liberally construed in favor of the citizens' right to vote," given Florida's deep constitutional commitment to protecting the right of suffrage. *Id.* at 30a.

Because each of these traditional rules of statutory construction pointed in the same direction, the court determined that it could best effectuate the legislative intent expressed through these varied and apparently inconsistent provisions by extending the deadline for submitting the results of manual recounts until 5 p.m. on Sunday, November 26th.⁽⁴⁾ *Id.* at 38a. In so doing, the court concluded, it would simultaneously respect the Legislature's recognition that a manual recount can help assure an accurate vote tally, guarantee that the manual recounts will not drag on indefinitely, allow adequate time for the post-certification contests that Florida law allows, and preserve the state's overriding interest in certifying its presidential electors by the federal deadline of December 12th.

The Florida Supreme Court is, of course, the ultimate arbiter of Florida state law. The question of whether it correctly interpreted what the Legislature intended is therefore not before this Court. Instead, what this Court must now decide is whether the decision below so fundamentally altered the rules of the election after it was held that the decision cannot be sustained as a matter of federal law.

SUMMARY OF ARGUMENT

As a matter of principle, the ACLU wholeheartedly agrees with petitioner's assertion that the rules governing an election should be established before an election is held. That principle is embodied in basic notions of due process. And, in the case of presidential elections, it is codified in the provisions of 3 U.S.C. β 5, which was enacted by Congress in 1887 following the disputed election of Rutherford B. Hayes eleven years earlier. But, unlike petitioner, we do not believe that the rather standard exercise of statutory interpretation engaged in by the court below can or should be characterized in such apocalyptic terms.

Petitioner's assertion that the Florida Supreme Court usurped the constitutional authority of the state legislature to direct the manner in which presidential electors shall be chosen ignores the fact that the Florida Legislature exercised that authority in this case by imposing a set of conflicting instructions. Presented with that conflict, the Florida Supreme Court did what courts in this country do every day: it attempted to reconcile the legislature's conflicting instructions by applying neutral canons of statutory construction. Whether one agrees or disagrees with its result, that judicial undertaking cannot be regarded as a usurpation of the legislative role without calling into question every act of statutory construction. Trying to discern what the Legislature meant when it crafted an ambiguous set of rules for choosing presidential electors is not the same as supplanting the Legislature in its constitutionally appointed task. Petitioner's claim that the decision below conflicts with the constitutional allocation of power set forth in Art. II, Section 1, Clause 2, is therefore without merit.

Likewise, petitioner's contention that the decision below violates due process, in general, or 3 U.S.C. β 5, in particular, cannot withstand scrutiny. Petitioner repeatedly invokes 3 U.S.C. β 5 for the proposition that the selection of presidential electors must be based on law "enacted prior to" election day. As noted above, we do not quarrel with that proposition in the abstract. It is not, however, what the statute actually provides. Read in its entirety, 3 U.S.C. β 5 addresses the process for resolving "any controversy or contest concerning the appointment" of presidential electors. Based on the language of the statute, it is the state's dispute resolution process, "by judicial or other methods or procedures," that must be in place before the election is held, and that must be completed six days before the electors will meet to choose the next president. Florida's decision to commit electoral disputes to the courts for judicial resolution was in place long before this election was held, and it is difficult to see how following that established process in this case can lead to a violation of 3 U.S.C. β 5.

Petitioner's argument also mischaracterizes the process of judicial interpretation. Whatever 3 U.S.C. β 5 does or does not require -- and like everyone else, we recognize that we are dealing with a statute that has rarely been cited, much less authoritatively construed -- we readily acknowledge that due process places some constraints on the ability of either the legislative or judicial branches to apply new substantive rules to an election that has

already been completed. A court that resolves the ambiguity in preexisting rules, however, is engaged in a very different enterprise. As this Court has explained, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)(footnote omitted). The decision below undeniably construed Florida's existing election code but, contrary to petitioner's view, that is not the equivalent of creating a new code from whole cloth.

Finally, it is important to note that Florida is not the only state in the nation with an ambiguous election code nor has this been the only closely contested election in our nation's history. The combination of those two facts frequently places courts in the position of refereeing election disputes in an effort to determine the will of the voters. Properly understood, that process is not an impediment to fair elections, it is a guarantee of them. Yet, courts cannot be expected to perform that role if they are stripped of the tools they have traditionally employed to discern legislative intent and then enforce that intent through appropriate remedies. Other than the glare of the a presidential election, what the Florida Supreme Court did in this case is not that unusual. If that decisionmaking process is now called into question, the role of the courts as a guardian of voting rights is likely to diminish.

ARGUMENT

I. THE DECISION BELOW INTEPRETING FLORIDA'S ELECTION LAW DOES NOT IMPROPERLY USURP THE POWER OF THE LEGISLATURE TO DETERMINE THE MANNER IN WHICH THE STATE SELECTS ITS PRESIDENTIAL ELECTORS

Article II of the Constitution undeniably assigns to each state legislature the power to determine the manner in which its presidential electors will be selected.⁽⁵⁾ It is equally undeniable that the Florida Legislature has exercised that constitutionally assigned power by enacting a comprehensive election code that includes, among other things, a mechanism for judicial review of election protests (before certification of the election results) and election contests (after certification of the election results).⁽⁶⁾ Pursuant to that legislative grant of authority, the Florida Supreme Court has now determined that the provisions of the election code at issue in this case are neither clear nor internally consistent. This Court is bound by that state court judgment, which involves a pure matter of state law. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569 (1941). By endeavoring to resolve the conflicts in state law, the Florida Supreme Court was not usurping the legislature's role; it was, instead, attempting to reconcile the various expressions of legislative intent in a way that respected both the will of the Legislature and the will of the voters. It would be an odd conclusion, indeed, to hold that the Florida Supreme Court was constitutionally compelled to leave Florida's election law in the muddle it found it. We do not believe that the language of Article II, Section 1, Clause 2 should be read to produce such an awkward result.

The decision by the framers to allow each state legislature to determine the method of selecting its presidential electors was a compromise, like so many other decisions at the Philadelphia Convention. But the competing positions had little to do with the respective roles of the legislative and judicial branches within a given state. Instead, the focus of the debate, typically enough, was on whether the new national government should set uniform standards for the election of its chief executive officer and, if so, what those standards should be. Thus, the Convention considered and rejected proposals to have the president elected by "the citizens of the United States," by the "people," by "electors to be chosen by the people of the several states," or by "electors appointed for that purpose by the legislatures of the states." *McPherson v. Blacker*, 146 U.S. 1, 28 (1892).

The dispute was described by James Wilson as one that "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide." 2 M. Farrand, *The Records of the Federal Constitutional Convention* 501 (New Haven: rev. ed. 1937). In the end, of course, the Convention chose to give each state latitude to choose its electors as it saw fit and, at least in the early days of the Republic, that latitude produced a variety of different electoral schemes. *See McPherson v. Blacker*, 146 U.S. at 29-34.

Although the power given to the states in this regard has often been described as plenary, it is not absolute. As this Court explained in *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution." For example, states may not choose a scheme for selecting presidential electors that discriminates

against third party candidates, *Williams v. Rhodes, supra*; *Anderson v. Celebrezze*, 460 U.S. 780, 795 n.18 (1983), or that attempts to dictate who the parties must seat as delegates to their nominating conventions. *Democratic Party v. LaFollette*, 450 U.S. 107, 126 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 495 (1975).

Were we writing on a clean slate, we would urge this Court to hold that the right of the judiciary to decide what its state election laws mean and how they should be applied in particular circumstances is another important limitation on the otherwise unfettered power of the state legislature to choose a method for selecting presidential electors. In the classic words of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803):

It is emphatically the duty and province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

However, it is not necessary for the Court to go that far in this case because the Florida Legislature has already invited the judiciary into the process by authorizing the courts to resolve electoral disputes that arise both before and after certification. Surely, there is no reason to believe that the Florida Legislature intended the courts to resolve those disputes without first determining the meaning of the law that the courts have been asked to apply, including which law controls if two or more laws are in conflict. At the very least, it would be wrong to presume such a design on the part of the Legislature without a clear statement of its intent (which would then have to be tested against constitutional norms) to dramatically curtail the traditional prerogatives of a coordinate branch of the state government. *Cf. Webster v. Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear").⁽⁷⁾

Absent such a clear statement, the decision by the Florida Supreme Court to exercise its traditional powers of statutory construction pursuant to a specific jurisdictional grant of authority by the Florida Legislature to resolve election disputes cannot plausibly be construed as a usurpation of the legislative role. Suppose, for example, that the Florida Legislature had enacted two statutes. One provided that the counties had to submit their vote tallies to the state within seven days in all statewide elections. The other provided that the counties had ten days to submit their vote tallies to the state in presidential elections. If a challenge was brought to the vote tally submitted in a presidential election by a Florida county on the eighth day, it is absurd to suggest that the courts would be barred from deciding which statute takes precedence, especially if the court reached that result by applying well-established rules of statutory construction.

That is all that the Florida Supreme Court has done in this case. It did so, moreover, in a carefully crafted decision that began and ended its legal discussion with a reference to legislative intent as the guiding "polestar." This Court engages in a similar exercise on a routine basis when it fills in the interstices of federal law by deciding, for example, whether Congress intended to create an implied right of action, *see Cort v. Ash*, 422 U.S. 66 (1975), or when it interprets the appropriate scope of an ambiguous federal statute. *E.g., Bailey v. United States*, 516 U.S. 137 (1995) (holding that federal statute imposing additional penalties for "use" of a firearm during drug offense requires more than evidence of simple possession).

In short, the Florida Supreme Court did not substitute its judgment for the judgment of the Legislature, it did its best to divine what the Legislature intended when it enacted each of the provisions of this complex election code. Nothing in Article II, Section 1, Clause 2 renders that undertaking illegitimate. To the contrary, by giving force and effect to the Legislature's intent as authoritatively construed by the Florida Supreme Court, the decision below does far more to promote the constitutional scheme of selecting presidential electors than to undermine it.

II. THE DECISION BELOW DID NOT CREATE THE SORT OF NEW RULE THAT CANNOT BE IMPOSED ONCE THE ELECTION IS OVER

Petitioner's second argument, as we understand it from the petition for *certiorari*, proceeds as follows. Even if the decision below did not usurp the legislature's constitutionally assigned function of choosing the method for selecting presidential electors, the act of statutory interpretation engaged in by the Florida Supreme Court nonetheless announced a new rule for manual recounts that was then applied to a completed election in violation of 3 U.S.C. § 5 and, perhaps, due process as well.

In support of this claim, petitioner repeatedly highlights a portion of 3 U.S.C. § 5 that refers to "laws enacted prior to the day fixed for the appointment of the electors," which federal law sets as Election Day. *See* 3 U.S.C. § 1 (designating Election Day as the "time of appointing electors"). Read in its entirety, however, 3 U.S.C. § 5 has less to do with setting the rules for the election than with establishing in advance a procedure for resolving election disputes. To begin with, the section is entitled: "Determination of controversy as to appointment of electors." And, while a statute's title is not dispositive of its meaning, the text in this case in fact mirrors the title. It provides:

If any state shall have provided, by 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*, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis added.)

As previously described, Florida had in place before Election Day a procedure for resolving election controversies that might arise after Election Day. That procedure contemplated exactly what took place here -- namely, the filing of election challenges in the appropriate state court with an ultimate appeal to the Florida Supreme Court. To the best of our knowledge, that procedure was not altered in any way, either in this case or in any of the other myriad challenges that were filed. Indeed, if 3 U.S.C. § 5 has any relevance at all, it appears on its face to foreclose petitioner's claim rather than support it since the statute indicates that any election dispute that is resolved by the state courts pursuant to pre-existing procedures at least six days prior to the date that the Electoral College is scheduled to meet on December 18th "shall be conclusive."

More fundamentally, the notion that courts create new rules when they attempt to harmonize existing statutory provisions, as the Florida Supreme Court did in this case, or when courts attempt to discern the legislative meaning behind an ambiguous enactment, as the Florida Supreme Court also did in this case, misconstrues the nature of the judicial process. The Court addressed this issue directly in *Rivers v. Roadway Express*, 511 U.S. 298, when it considered the impact of the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, on its earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Relying on the fact that their lawsuit was filed before this Court's decision in *Patterson* was announced, the plaintiffs in *Rivers* had argued that the 1991 Act merely restored the law to what it had been prior to *Patterson* and thus did not raise any retroactivity questions. This Court disagreed. Writing for the majority, Justice Stevens asserted:

[I]t is not accurate to say that the Court's decision in *Patterson* "changed" the law that previously prevailed in the Sixth Circuit when the case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Court of Appeals had misinterpreted the will of the enacting Congress.

Id. at 313 n.12 (emphasis in original). It is because a judicial decision authoritatively construing an existing statute does not make new law that it is presumed to apply retroactively, *Harper v. Dep't of Taxation*, 509 U.S. 86, 97 (1993). By contrast, a statute enacted by the legislature is presumed to apply prospectively precisely because it does make new law, by definition, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

This would undoubtedly be a more difficult case if the Florida Supreme Court had adopted a new set of election rules untethered to any existing statutory scheme. Under those circumstances, serious questions of First Amendment due process might well arise. *See generally*, Monaghan, "First Amendment 'Due Process,'" 83 Harv.L.Rev. 518 (1970). But the Florida Supreme Court was plainly not acting in a statutory vacuum when it attempted to make sense of the conflicting state laws governing manual recounts and establishing the operative dates for filing certified returns. Like this Court's decision in *Patterson*, the Florida Supreme Court's holding that the more recent and more specific provisions of § 102.112 are controlling did not make new law, it merely clarified what the law had been since § 102.112 was enacted in 1989, even if there had been no prior occasion to say so.

The logical extension of petitioner's argument is that courts could never decide issues of first impression in the context of election disputes. If adopted, that rule would be far more novel than anything the Florida Supreme Court did in this case. Indeed, the fact that this dispute has apparently presented an issue of first impression under Florida law weakens, not strengthens, petitioner's unfairness claim. In *Patterson*, the Court found no cognizable reliance interest despite acknowledging that its interpretation of 42 U.S.C. § 1981 was directly at odds with the prior holdings of several appellate courts. Those decisions, the Court said, were simply incorrect and entitled to no weight. 511 U.S. at 313.

If, as we believe, the Florida Supreme Court's decision to give precedence to § 102.112 over § 102.111 did not create a new legal standard in violation of either due process or 3 U.S.C. § 5, then petitioner is reduced to arguing that the court below erred by imposing its own deadline for the filing of an amended certification. It is true that the court's choice of 5 p.m. on Sunday, November 26th, as the final deadline for the filing of amended certifications cannot be found in any pre-existing statute. But the argument that the adoption of a judicially imposed deadline was therefore improper as a *post hoc* rule is unpersuasive for at least two reasons.

First, the failure to adopt a filing deadline for amended certifications under § 102.112 would have jeopardized the ability to carry out the post-certification contests that the Legislature clearly contemplated within the time set by federal law for designating the state's presidential electors. The November 26th deadline set by the court was thus part and parcel of its effort to reconcile the conflicting mandates imposed by the Legislature, and to determine how best to effectuate legislative intent under the unique and daunting circumstances of the present controversy.

Second, the role of the legislature is to determine the rules of the electoral contest. The role of the courts is to fashion an appropriate remedy once those rules are violated. Here, the Florida Supreme Court determined that the rules of the electoral contest established by the Florida Legislature permitted manual recounts. Having reached that judgment, it acted well within its equitable discretion in permitting a window of opportunity to allow those recounts to go forward in an effort to achieve a more accurate assessment of the will of the voters. As detailed below, the exercise of that equitable discretion is critical to the ability of courts to serve as impartial referees in electoral contests around the country and, by performing that function, to preserve the right of every citizen to full and fair participation in the electoral process.

III. COURTS HAVE BROAD EQUITABLE POWERS IN RESOLVING ELECTION DISPUTES

Courts have traditionally exercised broad equitable powers in resolving election disputes to insure that the election process proceeds in a timely and reliable manner, and that voters are not disfranchised. The right to vote is fundamental. For that reason the equitable and remedial powers of a court are particularly broad in this area of the law. A ruling that the Florida state court lacked power in the exercise of its remedial authority to resolve conflicting provisions of state law, or to provide for contingencies not expressly anticipated or foreseen by state law, would lead to inequitable results, would needlessly disfranchise thousands of state voters, and would be contrary to the long established practice of the courts in voting rights cases.⁽⁸⁾

A. The Right to Vote In a Fair and Reliable Election and to Have One's Vote Counted Are Constitutionally Protected

As the Florida courts have recognized, "federal and state constitutions guarantee the right of the people to take an active part in the . . . election process." *Boardman v. Esteve*, 323 So.2d 259, 263 (Fla. 1975). *See also In Re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170, 1173 (Fla. 3d D.C.A. 1998) ("the right to vote . . . is assured every citizen by the United States Constitution"), *rev. den'd*, 725 So.2d 1108 (Fla. 1998). The right to vote is entitled to special constitutional protection because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights." *Reynolds v. Sims*, 377 U.S. at 562.

The constitutionally protected right to vote is not limited to the simple act of putting a ballot in a box. In *United States v. Classic*, 313 U.S. 299, 315 (1941), the Court held that "included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." *Accord, Reynolds v. Sims*, 377 U.S. at 554 ("[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted") (citations omitted). In order to safeguard the right of voters to have their votes counted, the Court has held that ballots may not be destroyed or adulterated, *United States v. Classic*, 313 U.S. at 299, diluted by stuffing the ballot box, *Ex parte Siebold*, 100

U.S. 371 (1880), *United States v. Saylor*, 322 U.S. 385 (1944), diluted or debased through use of white primaries or white private political clubs, *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953), nor diluted through the use of a "blanket" primary, *California Democratic Party v. Jones*, 120 S.Ct. 2402, 2412 (2000) (the state scheme "adulterate[d]" a political party's candidate selection process "by opening it up to persons wholly unaffiliated with the party").

It would be a complete anomaly to hold that the protections of the state and federal constitutions did not apply to the most important elections conducted in the United States, those for the president. The legitimacy of elected office, including the presidency, and indeed the democratic system itself, depends upon the reliability of the electoral process.

B. A Court of Equity Has the Power and Duty to Grant Relief

As this Court has long noted, "there is inherent in the courts of equity a jurisdiction to . . . give effect to the policy of the Legislature." *Clark v. Smith* [38 U.S. 195], 13 Pet. 195, 203 (1839). See also *Mitchell v. De Mario Jewelry*, 361 U.S. 288, 292 (1960) (noting "the historic power of equity to provide complete relief in light of the statutory purposes").

Because of the overriding importance of equal voting rights, the remedial powers of the courts are particularly broad in cases involving the exercise of the franchise. The courts have, for example, enjoined and set aside the results of elections held in violation of the law, *Hamer v. Campbell*, 358 F.2d 215, 221 (5th Cir. 1966) (emphasizing "the broad equitable powers of the District Court to mould relief"), *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("[i]f affirmative relief is essential, the Court has the power and should employ it"), ordered new elections, *Hadnott v. Amos*, 394 U.S. 358, 367 (1969), enjoined prosecutions, *United States v. Wood*, 295 F.2d 772, 785 (5th Cir. 1961), frozen voter qualifications, *United States v. Duke*, 332 F.2d 759, 769 (5th Cir. 1964), ordered excluded minorities placed on the registration rolls, *Alabama v. United States*, 304 F.2d 583, 591 (5th Cir. 1961) ("[t]he aim of equity is to adopt judicial power to the needs of the situation"), and issued injunctions against economic coercion and intimidation of voters, *United States v. Beaty*, 288 F.2d 653, 657 (6th Cir. 1961).

Courts have also routinely exercised their equitable powers in fashioning remedies for voting rights violations in the absence of any, let alone conflicting, state law remedy provisions. In *Emery v. Hunt*, CIV 00-3008 (D.S.D. 2000), for example, plaintiffs challenged a 1996 redistricting plan for the South Dakota house of representatives on the grounds that it violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and that it had been enacted in violation of the state constitution which prohibited interstitial redistricting. The federal court certified the state law issue to the state supreme court which ruled on July 26, 2000--several weeks after the June primary--that the 1996 plan had been enacted in violation of the state constitution and that the only lawful plan under state law was the plan first enacted after the census in 1991. See *In the Matter of the Certification of a Question of Law from the United States District Court*, 2000 SD 97. There was, however, no state law providing for a remedy where a primary had been held under a plan later found by a court to be unconstitutional.⁹ The absence of a state law remedy is hardly surprising since the legislature could not have reasonably foreseen that it would adopt a plan that violated the state constitution. The district court, after considering various proposals submitted by the parties, and despite the absence of state law providing for such a remedy, ordered that a new primary election be held in September prior to the November general election. See *Emery v. Hunt*, Order of August 10, 2000, a copy of which is included in the appendix to the brief at 1a. Any contention that the district court in *Emery* lacked inherent power to fashion a remedy under the particular facts of that case would be wholly inconsistent with this Court's repeated admonitions that courts must insure that elections go forward in a "timely fashion" and that voters have a fair opportunity to elect a governing body that properly represents them. *White v. Weiser*, 412 U.S. 783, 794-95 (1973), quoting *Reynolds v. Sims*, 377 U.S. at 586; *Connor v. Finch*, 431 U.S. 407, 426 (1977). State courts are no less obligated to fashion remedies, as the Florida court did here, that provide voters the fair opportunity to choose their elected officials.

Alden v. Board of Commissioners of Rosebud County, Montana, CV 99-148-BLG-DWM (D.Mont. 2000), is another example of a court's filling in the spaces or gaps in state law to remedy a violation of the law in order to allow elections to proceed in a timely manner. Shortly before the scheduled 2000 primary for the Rosebud County Commission, the district court found that the existing at-large system of elections violated Section 2 of the Voting Rights Act. Since there was less than 75 days between the date of the court order and the scheduled primary, the court concluded that a primary under a new plan could not be held in conformity with state law. Accordingly, it enjoined the primary and directed that a special general election be held in November 2000.

Political parties were allowed to nominate candidates and independents were allowed to file petitions for a place on the ballot. *Alden v. Board of Commissioners of Rosebud County, Montana*, Order of May 10, 2000, a copy of which is included in the appendix at 8a. As in *Emery*, the district court in *Alden* acted in light of clearly established equitable principles in fashioning a remedy to allow the election to proceed in an orderly manner so that voters would have a fair opportunity to elect officials that properly represented them.

The Florida Supreme Court, in resolving the conflicts in state statutory law and setting a deadline for acceptance of amended certifications by the Secretary of State and the Elections Canvassing Commission, was acting in light of well recognized principles of equity. To conclude that the court acted beyond its powers would result in the disfranchisement of voters whose votes were not counted by the voting machines and render the court impotent in remedying election disputes. Nothing in federal or state law should countenance such an implausible result or be deemed to preclude the judicial branch from crafting appropriate, narrowly tailored remedies to safeguard the right to vote, even (and perhaps most especially) in a presidential contest.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the decision below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
(Counsel of Record)
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10025
(212) 549-2500

Laughlin McDonald
Bryan Sells
American Civil Liberties Union Foundation
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

James K. Green
Randall Marshall
American Civil Liberties Union of Florida Foundation
3000 Biscayne Boulevard
Suite 215
Miami, FL 33137-4129
(305) 576-2337

Counsel for Amicus Curiae

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. Subsection 1 of the statute reads in its entirety, as follows:

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The

Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the results of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the County returns 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 results shown by the returns on file shall be certified.

3. Section 102.112 provides, in its relevant subsections, as follows:

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member \$200 for each day such returns are late, the fine to be paid only from the board member's personal funds . . .

4. Within hours of this court-imposed deadline, the Florida Secretary of State declared Governor Bush the winner of Florida's presidential election by 537 votes. That certification is being contested by Vice President Gore in the Florida state courts.

5. Specifically, Article II, Section 1, Clause 2 provides, in full:

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 in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

6. The relevant provisions of the election code are codified in Fla. Stat. §§ 97-106, and described in the decision below.

7. The fact that the current Legislature apparently disagrees with the particular decision of the Florida Supreme Court that is now under review is legally irrelevant. Were the rule otherwise, a legislative body could always respond to disappointing decisions by retroactively stripping the courts of jurisdiction to hear the dispute. *See Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995)(legislature may not interfere with final court judgments).

8. Aside from whether the Florida Supreme Court acted in conformity with 3 U.S.C. § 5, there can be no serious contention that the court abused the exercise of its equitable powers on other grounds.

9. State law provided a method for filling vacancies following a primary election only where the vacancy occurred "by reason of death or withdrawal." SDCL 12-6-56.