Restraining Judicial Application of the "Safe Harbor" Provision in the Electoral Count Act

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The Electoral Count Act of 1887, as codified in part at 3 U.S.C. § 5, includes a "safe harbor" for states to resolve disputes in their choices of presidential electors. Congress will treat as "conclusive" a "determination" about "any controversy or contest concerning the appointment" of presidential electors, if that determination is made "at least six days" before the time the electors are to meet. This is a rule governing how Congress handles "the counting of electoral votes as provided in the Constitution."[1]

It is not a judicially-enforceable rule for courts to heed. And it is a rule that state legislature may, not must, heed.

In the aftermath of *Bush v. Gore*, however, federal courts have wrongly construed the "safe harbor" as a timing mandate placed upon courts. A proper understanding of the "safe harbor," rightly understood through *Bush v. Gore*, reserves its influence to Congress and, occasionally, to state legislatures. Federal courts should take heed in the event of closely contested elections or recounts in the 2020 presidential election and beyond.

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In 2000, presidential electors were scheduled to meet and vote in their respective states on December 18. That meant the "safe harbor" deadline to choose presidential electors under 3 U.S.C. § 5 was December 12. Litigation proceeded rapidly across Florida, but the major case that would become *Bush v. Gore* reached the Florida Supreme Court as *Palm Beach County Canvassing Board v. Harris*. Early briefing from both Vice President Al Gore and Governor George W. Bush focused on December 18 as the presumptive deadline. But Secretary of State Katherine Harris filed a brief with the Florida Supreme Court explaining that "[t]he Legislature had good reasons to set strict time limits for the certification of elections," specifically citing the safe harbor of 3 U.S.C. § 5 as one such reason.

The Florida Supreme Court heard oral argument on November 20, 2000. The justices repeatedly referred to December 12 as a date that might put "Florida's votes in jeopardy." In a filing immediately after the

hearing, the Bush campaign seized on the December 12 date as placing Florida at "risk of not having is electors participate."

On November 21, the Florida Supreme Court issued its decision in *Palm Beach County Canvassing Bd. v. Harris*. It scrutinized the state constitution and state law concerning the Secretary of State's authority:

> Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process.

"Precluding Florida voters from participating fully in the federal electoral process" appears here for the first time, with a footnote citation, "*See* 3 U.S.C. §§ 1-10."

The Florida Supreme Court later restated this rule, tethered more obviously to Florida law: "We conclude that, *consistent with the Florida election scheme*, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." (emphasis added).

The United States Supreme Court highlighted this language—and the preferences of the state legislature in particular—in its unanimous per curiam decision in *Bush v. Palm Beach County Canvassing Board*:

> *the state legislature* has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors. The Florida Supreme Court cited 3 U.S.C. § 1-10 in a footnote of its opinion . . . but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, *a legislative wish* to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

The Court added, "We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. § 5." Describing § 5 as a "principle of federal law" is a noteworthy characterization, suggesting the Court recognized a "principle" was not necessarily binding on courts or states.

On remand in *Gore v. Harris*, the Florida Supreme Court noted, "We consider these statutes cognizant of the federal grant of authority derived from the United States Constitution and derived from 3 U.S.C. § 5 . . . ." Nevertheless, the case "is controlled by the language set forth by the Legislature" in statutes. Justice Harding's dissent likewise explained in a footnote, "There is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision."

At oral argument before the Supreme Court on December 11, Justice Souter emphasized that the safe harbor was "for the guidance of Congress." Later, when Harris's attorney mentioned the December 12 deadline, Justice Souter again emphasized that it was a "federal" safe harbor, to which counsel responded that the United States Supreme Court had identified "there was a desire and a wish by the legislature to preserve the safe harbor," which, Justice Scalia pointed out, "the Florida court accepted."

On December 12—the safe harbor date—the Supreme Court issued its decision in *Bush v. Gore*. For the per curiam majority, according the Florida Supreme Court, "the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5." That's a gloss on *Palm Beach County Canvassing Bd. v. Harris* as interpreted in *Gore v. Harris*. "[T]he Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5," which meant further delays in the recount would be "in violation of the Florida Election Code." The concurring opinion by Chief Justice Rehnquist followed the same path: the safe harbor "informs" application of the Constitution's grant of power to the state "Legislature," "which, as the Florida Supreme Court acknowledged, took that statute into account."[2]

The dissenting justices also recognized the "safe harbor" did not independently constrain Florida. Justice Stevens noted that Congress "did not impose any affirmative duties" on states with the safe harbor. Justice Souter noted that the safe harbor only operated as a date for the conclusive congressional recognition of electors in the event of a dispute, and "determination is to be made, if made anywhere, in the Congress" about how to handle electors selected before or after the safe harbor deadline. Justices Ginsburg[3] and Breyer had a similar understanding. And Justice Breyer went farther, arguing, "Nowhere in *Bush I* did we establish that *this* Court had the authority to enforce § 5."

In short, every justice took a similar approach to 3 U.S.C. § 5, albeit by different routes. Some emphasized that the Florida Supreme Court

understood Florida law to seek to take advantage of the "safe harbor" deadline. Others noted that § 5 is a rule for Congress to handle the treatment of electors. But no justice said it was an independent mandate upon federal courts, and no justice said that it was a mandate placed upon states absent some state legislative intent.[4]

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Since *Bush v. Gore*, however, and stripped of its context, the "safe harbor" has been invoked by lower courts to insist on recount deadlines. In 2016, for instance, Green Party candidate Jill Stein pressed for recounts in Wisconsin, Michigan, and Pennsylvania after the election. In a lawsuit in Michigan, the Sixth Circuit concluded, "Federal law requires that all disputes over a state's delegation to the Electoral College be resolved by December 13, 2016."[5] But, as noted, federal law requires no such thing.

In parallel litigation in Pennsylvania, a district court held, "[G]ranting the relief Plaintiffs seek would make it impossible for the Commonwealth to certify its Presidential Electors by December 13 (as required by federal law)." It continued, "Pennsylvania has opted into the federal 'safe harbor' that allows it to determine conclusively its Presidential Electors through state procedures." But the federal district court made no finding like the Florida Supreme Court in 2000—that the state legislature was "cognizant" of these laws when constructing recount deadlines.

Candidates seeking recounts will always want the later deadline, and candidates resisting them the earlier. But courts examining presidential election recount deadlines should be more careful. The "safe harbor" deadline is not a federal requirement placed upon states. It is a rule for Congress when counting electoral votes. True, it provides a benefit to states that meet the deadline. And in the *Bush v. Gore* litigation, the Florida Supreme Court expressly concluded that the state legislature *intended* to meet that "safe harbor" deadline for any recounts. But independent of an express finding that a state statute incorporates the "safe harbor" deadline, it would be a mistake for courts to add timing requirements to state laws in presidential election recounts.

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1 *Id.* (referring to U.S. CONST. amend. XII). *See e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1779–87 (2002) (disputing constitutionality of the Electoral Count Act as a law that can purport to bind future Congresses); Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral*

Count Act of 1887, 56 FLA. L. REV. 541, 587–608 (2004) (describing scope of the "safe harbor" provision to guide Congress in counting electoral votes); Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309 (2020) (examining role of the "safe harbor" provision in how Congress counts votes).

[2] *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). *See also id.* at 117 (construing Fla. Stat. 102.168 as "necessarily" terminating the time for a recount by the safe harbor date); *id.* at 120–21 (identifying the "'legislative wish' to take advantage of the safe harbor"); *id.* at 122 (noting a "legislative intent identified by the Florida Supreme Court" to meet the safe harbor deadline).

[3] *Id.* at 143–44 (Ginsburg, J., dissenting) (noting the "deadline" "lacks the significant the Court assigns it" because Congress must count votes even after the safe harbor deadline unless both houses reject the votes);

[4] *Cf.* Siegel, *supra* note 2, at 593 ("Whatever the origins and purpose of the six-day provision, it was meant as a 'safe harbor' and not as the end point for state-conducted election contests.").

[5] Stein v. Thomas, 672 Fed. App'x. 565, 568 (2016) (unpublished opinion) (per curiam). The district court, however, saw this not as a legal mandate, but as a potential harm to the state's interest: "Without completion of the recount, any controversy regarding which candidate's electors had been elected in the November 8 election might ultimately be decided by Congress, rather than conclusively determined by Michigan." *Stein v. Thomas*, 222 F.Supp.3d 539, 542 (E.D. Mich. 2016).