IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-2346, SC00-2348,
& SC00-2349

PALM BEACH COUNTY CANVASSING BOARD, et al.,
Petitioners

vs.

KATHERINE HARRIS, et. al., Respondents.

BRIEF OF AMICI CURIAE THE FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE

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STATEMENT OF THE CASE AND FACTS

Amici Curiae, the FLORIDA HOUSE OF REPRESENTATIVES and the FLORIDA SENATE (the "Legislature"), hereby adopt the Statement of the Case and Facts as reported in the per curiam decision of the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board,* No. 00-836, 531 U.S. --- (Dec.4, 2000).

INTRODUCTION AND SUMMARY

The Legislature is pleased to have this opportunity to advise the Supreme Court of Florida as to its views on the great issues now before this Court regarding the Presidential Election of 2000. As this Court knows, the Legislature was unable to advise the Court of its views before it rendered its prior decision because it was not until November 21, 2000, that the Legislature had a House Speaker and Senate President who could authorize the hiring of counsel. FLA. CONSTITUTION ART. III, §2, §3a. Because the parties before this Court were focused on different concerns, the prior briefing thus did not inform this Court regarding the important and distinctive legal interests the Legislature has both (a) in preserving its plenary power to direct the manner by which Presidential Electors are appointed, and (b) in satisfying beyond any doubt the safe harbor provisions of 3 U.S.C. §5 in order to assure Florida is represented in the Electoral College. These considerations were recognized as legally valid by the United States Supreme Court in its unanimous decision, and each played a pivotal role in its decision to vacate the prior decision of this Court. The Legislature respectfully submits that those important state interests require this Court to replace its vacated decision with a new opinion that confirms the original deadlines for certifications and county manual recounts set forth in the prior enactments of this Legislature.

ARGUMENT

Both houses of the Florida Legislature normally do not unite at the bar of this Court unless it is to advocate an institutional interest of the Florida Legislature, usually based on separation of powers principles. For instance, in *Chiles v. Phelps, et al.*, 714 So.2d 453 (Fla. 1998), the Florida Legislature argued separation of powers doctrine in a dispute between the legislative branch and the executive branch concerning the validity of a veto override, specifically citing this Court's earlier interpretation requiring the judiciary to "refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable test of the constitution." *McPherson v. Flynn*, 397 So.2d 665, 667 (Fla. 1981). This case raises issues of parallel import – the proper role of the Florida Legislature in implementing the exclusive and demonstrable obligation assigned to it by Art. II, Sec. 1, U.S. Constitution; and Title III, Sec. 2, U.S. Code.

A. THE STATE LEGISLATURE'S PLENARY POWER TO DIRECT THE MANNER BY WHICH ELECTORS ARE CHOSEN BARS ANY STATUTORY INTERPRETATION OR USE OF THE STATE CONSTITUTION THAT MIGHT CIRCUMSCRIBE THAT POWER.

In its opinion, the U.S. Supreme Court recognized that in "the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution." Per Curiam Op. at 4.

This constitutional clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).[1]

Furthermore, this direct grant of authority "operates as a limitation upon the State in respect of any attempt to circumscribe the legislative power." Per Curiam Op. at 5 (quoting *McPherson,* 146 U.S. at 25). In particular, neither state courts nor state constitutions may circumscribe the plenary power of a state legislature to direct the manner in which the State chooses its Presidential electors:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The U.S. Supreme Court vacated the prior opinion of this Court in part because it concluded that portions of this Court's opinion could be read as allowing provisions of the state constitution to affect its

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[1] Ordinarily, of course, when federal law remits a matter to the States it takes the state legal system as it finds it, including the relations within that system of the various branches of the state government. Article II, section 1, clause 2, like Article V of the United States Constitution, however, specifically assigns functions to the state legislature as such. We respectfully submit that it is no more appropriate for this Court, applying its interpretation of the State's Constitution or general equitable principles, to circumscribe the Legislature's authority in this matter than it would be to attempt to alter the Legislature's determination in respect to its power under Article V of the United States Constitution. In those two unusual instances the Legislature's authority derives directly from the Constitution of the United States.

statutory construction, which would violate the *McPherson* doctrine that the state constitution cannot "circumscribe the legislative power" over Presidential electors. Per Curiam Op. at 5, 7. The Legislature respectfully submits that this concern is well-founded, and that the same statutory construction could not reasonably have been reached without the state constitutional principles referred to by this Court in its prior opinion. In its prior opinion, this Court stated that the state constitutional principle of advancing the will of the people must prevail over "technical statutory requirements" like deadlines for filing returns. It also relied on its particular conception that as a matter of state constitutional law the will of the people is best ascertained by manual recounts that not only re-count but re-interpret the ballots counted by machines.

1. This Court Used State Constitutional Law to Circumscribe the Statutory Discretion the Legislature Directed the Secretary Would Have.

This Court's references to the state constitution played a necessary role in the portion of this Court's opinion (Part VIII) that circumscribed the statutory discretion that this Court found the Legislature had given the Secretary of State. *See Palm Beach County Canvassing Board v. Harris*, 2000 W.L. 1725434, at *12-13 (Fla.); *see also* Per Curiam Op. at 5 (quoting many of these references). In the portions of its vacated opinion leading up to Part VIII, this Court had concluded that the Legislature intended to vest the Secretary of State with discretion to ignore late returns. *See Palm Beach*, 2000 W.L. 1725434, at *11. This Court then concluded that this statutory discretion must be circumscribed by state constitutional law.

This Court ended Part VII of its opinion by stating that "[t]o determine the circumstances under which the Secretary may lawfully ignore returns . . . it is necessary to examine . . . constitutional law at both the state and federal levels." *Id.* Then, after citing only state constitutional law on the right to vote in Part

VIII, this Court stated: "Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion." *Id.* at *13. Since the word "foregoing" could refer only to state constitutional law, it was clearly the basis for this Court's decision to circumscribe the statutory discretion of the Secretary.

Indeed, this Court expressly disapproved the legislative direction that an appropriate penalty for missing the statutory deadline was to ignore late county returns.[2] This Court reasoned that this "penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them. . . . To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law." *Id.* at *13. By the term "longstanding law" the Court must have been referring to the state constitutional law it had just quoted on preserving the right of voter franchise, since that is the only law that could be said to have been "violated" by a statutory penalty that the Court felt infringed the right of franchise.[3] Consistent with this reading, this Court concluded that late county returns could be ignored *only*

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[2] See Fla.Stat. § 102.111 (2000) ("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 the results shown by the returns on file shall be certified."); Fla.Stat. § 102.112 (2000) ("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.")

[3] After reaching this conclusion that such statutory discretion would violate state constitutional law on the right of franchise, this Court went on in Part VIII to cite two cases from the U.S. and Illinois Supreme Courts. *Id.* at *13-14. But since these cases were discussed afterwards, they clearly were not the basis for this conclusion. Indeed, these cases were not cited to establish the right of franchise at all, but rather to support this Court's empirical premise that manual recounts produced a more accurate vote count. *Id.*

when the Court determined that enforcing the deadline would advanced the state constitutional right of franchise in some other way, like preserving a period for election contests or making sure Florida is represented in the Electoral College. *Id.*

In short, this Court concluded that: "Technical statutory requirements must not be exalted over the substance of this right" of franchise under state constitutional law. *Id.* In other contexts, such a ruling might be permissible. But in this context, as the U.S. Supreme Court has made clear, those "technical statutory requirements" are legislative directions about the manner in which Presidential electors will be chosen, and because of the express authority given to state legislatures under the U.S. Constitution, those legislative directions trump any contrary state constitutional right.

In exercising its plenary power to determine the manner in which Presidential electors are chosen, a State Legislature is free to place discretion in the hands of election officials without having that discretion circumscribed by state constitutional law or any judicial review based on inherent equitable powers. Indeed, Congress has expressly recognized that a State can render its election results conclusive by providing for the "final determination of any controversy or contest . . . by judicial or *other* methods or procedures," which would plainly include the "other method" of having the Secretary of State decide the issue. 3 U.S.C. §5 (emphasis added). *See also* LUCIAS WILMERDING, JR., THE ELECTORAL COLLEGE 42-43 (Rutgers University Press 1958).

Thus, when this Court itself concluded that the Legislature intended to vest the Secretary of State with discretion to ignore late county returns, and then circumscribed that statutory discretion with principles of state constitutional law, this Court necessarily also circumscribed the Legislature's appointment authority.

That is impermissible, as was made clear in both *McPherson* and in the U.S. Supreme Court decision which vacated this Court's prior decision.

2. This Court Also Used State Constitutional Law to Drive Its General Statutory Construction

The use of state constitutional principles in the vacated opinion was not limited to circumscribing statutory discretion. This Court also began that opinion with the proposition that election cases must be guided by the state constitutional principle of advancing the "will of the people" rather than on a "hyper-technical reliance upon statutory provisions." *Palm Beach*, 2000 W.L. 1725434, at *4. This was deemed by this Court as "the paramount consideration." *Id.* This "fundamental principle" that the Court acknowledged guided its decision, *id.*, was not cited as mere makeweight. Rather, this principle, and the particular state constitutional conception that the will of the people is more accurately ascertained by manual recounts that not only re-count but re-interpret the ballots counted by machines, led this Court to adopt the premise that the state legislature must have meant to provide for such interpretive manual recounts.

Without this premise, there would have been no convincing reason to reject the Secretary of State's opinion that instead the Legislature meant only to provide for manual recounts when the machines commit an error in counting rather than in interpretation. *See id.* at *5-6. The Secretary's opinion was more consistent with the legislative history of Fla. Stat. §102.166, which plainly indicated that it was enacted to respond to a county-specific error in machine counting, not a claim that manual recounts are more accurate than machine recounts because of errors in punch cards. The Legislature, in determining the manner of conducting Presidential elections, is surely free to adopt the premise (contrary to this Court when it interprets the state constitution) that absent an uncorrectable machine error in counting, machine interpretations are more accurate than "interpretive" manual recounts, which are susceptible to problems

of fatigue, human error, unintended ballot alteration, conscious or unconscious bias, and fraud or other mischief. The Secretary's opinion was also more consistent with Florida election practice prior to this election because, as the Attorney General conceded in oral argument before the U.S. Supreme Court, no county had previously done a manual recount because of a claim that a county's machines were missing partially perforated or indented chads. *See* Oral Arg. Tr. 39-40.[4] The Secretary's opinion was also consistent with the fact that the statutory protests that can lead to manual recounts are county-specific complaints about a particular county's machines, whereas a complaint about punchcards generally undercounting votes really raises a statewide issue that should be pursued, if at all, only in a statewide contest.

Perhaps most important, the Secretary's opinion was plainly within the authority conferred on her by the Legislature, which expressly gave the Secretary (not the courts) the power to issue opinions interpreting the election code that would be binding on county canvassing boards.[5] Again, it is plainly within the U.S. constitutional power of the Legislature to direct the manner of appointing Presidential electors by giving the Secretary (rather than the courts) this power, and the United States Code plainly contemplates that the States can resolve election controversies using non-judicial "methods or procedures," 3 U.S.C. §5, such as having them resolved by the Secretary of State. This Court's decision to

[4] This concession was made by Paul Hancock, representing the Attorney General. Obviously this Court cannot be faulted for being unaware of this concession since it was made after its decision, but this Court may now properly take it into account on remand.

[5] FLA. STAT. §106.23(2) ("The Division of Elections shall provide advisory opinions when requested . . . . The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. §97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

circumscribe this statutory power with this Court's belief that manual recounts are more accurate at interpreting ballots than machine counts thus unconstitutionally circumscribed the Legislature's plenary power to determine the manner by which Presidential electors are appointed.

Further, without this Court's premise that the Legislature must have wanted to provide for interpretive manual recounts, there would not have been the supposed statutory "conflict" between the seven-day deadline and the manual recount protest procedure that this Court cited to deviate from the deadline. *Palm Beach*, 2000 W.L. 1725434, at *7-8. There would have been no conflict because a machine counting error arises seldom and is normally correctable without need of a manual recount by corrections to the machines or software. Further, even when it arises, such a ministerial manual recount (as opposed to an elaborate "interpretive" manual recount) can easily be done within a seven-day period by hiring additional counting teams, *see* Fla. Stat. §102.166(7)(a) ("The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots."), and is not subject to the bottleneck problem that results when interpretive decisions must be made by a three-person canvassing board for each county.

In short, the state constitutional principle that favors manual recounts as the best means of ascertaining the will of the voters was not just invoked to help resolve a statutory ambiguity; it was the premise that created the supposed statutory conflict and ambiguity to begin with.

3. This Court's Statutory Construction Also Deviated From the Legislature's Directions in Other Ways.

The other supposed statutory conflict this Court found was between the "shall" and "may" provisions of FLA. STAT. §§102.111-112, which this Court resolved with other canons. *Palm Beach*, 2000 W.L. 1725434, at *9-10. But the supposed conflict is dubious. An important canon of statutory construction states that statutory provisions must, if possible, be read to be consistent and to avoid making some statutory language meaningless. Although the Court cited this canon, *id.* at 10, the Court's opinion seems to miss the fact that its interpretation does render the "shall" provision of §102.111 utterly meaningless. A reading that would be consistent with both provisions and give meaning to both would be to say that §102.111 governs the Secretary, and constitutes a legislative direction as to what she "shall" do to late returns, whereas §102.112, after stating that the county officials "shall" meet the deadline, also warns them that if they fail to do so their county returns "may" be disregarded. The direction as to what the Secretary "shall" do also seems a far more specific direction to govern her actions than a statute warning the canvassing boards about the consequences if they fail to meet the deadline.

The canon that a later statute can implicitly repeal an older one is valid, but its application here misses a key fact about legislative procedure in Florida. Although §102.112 was originally enacted after §102.111, both statutory provisions have been repealed and re-enacted every other year. *See, e.g.*, ch. 11.2421, 11.2422, Florida Statutes (1999). In each re-enactment, then, the Legislature must have thought the two provisions were consistent. Thus they should be read to give meaning to both rather than to allow one to repeal the other. Further, the legislative history of the original adoption of §102.112 shows a clear intent to retain the deadline and mandatory wording of §102.111. Although the Senate had proposed

amending §102.111 to extend the deadline from seven to thirteen days and to change the "shall" to a "may", *see* 1989 Senate Journal, p. 819, the House rejected both amendments, *see* 1989 House Journal, p. 1320, and then the Senate agreed to the House version. Chapter 89-338, §30 at 2162, Laws of Florida. The intent of the legislature in enacting §102.112 was thus not to extend deadlines or create discretion to do so. It was rather merely to codify *Chappell v. Martinez*, 536 So.2d 1007 (Fla. 1988), which allowed the State Elections Canvassing Commission to include in its certification county returns that were not in the proper form but were timely under §102.111, and not to authorize the Secretary of State or the Commission to delay certification to a later date.

Finally, this Court concluded that the statute must be read to allow late returns because otherwise the statutory fine provision would be meaningless. *Palm Beach*, 2000 W.L. 1725434, at *10. But we doubt the Court meant to put much weight on this point since a closer look reveals that the point clearly does not hold. The Court reasoned: "if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines." *Id.* The flaw in this logic is that nothing in the statute suggests that a board could avoid fines by filing no returns. To the contrary, the statute expressly states that "[t]he department shall fine each board member $200 for each day such returns are late." §102.112(2). Thus, if a board is already late with returns that will thus be disregarded, the penalty still gives boards an incentive to deliver their returns because for every additional day the board is late each board member will be fined another $200.

In short, reading the "shall be ignored" provision of §102.111 out of the election code does not conform to the constitutional requirement that Presidential elections must be conducted in the manner

directed by the Legislature. Since all "shall" provisions are read to avoid absurd results not contemplated by the Legislature, the fact that the Secretary conceded that this provision would not be enforced in the event of a hurricane does not undermine her interpretation. But the possibility of manual recounts cannot be deemed an event uncontemplated by the Legislature when it set the deadline in the same statute that created the manual recount provisions.

B. THE STATE LEGISLATURE HAS AN OVERRIDING INTEREST IN HAVING STATE COURTS INTERPRET ITS ELECTION CODES TO AVOID ANY CONSTRUCTION THAT CONGRESS MIGHT DEEM TO BE A CHANGE IN THE LAW.

In its opinion, the U.S. Supreme Court also emphasized that this Court must take into account that "a legislative wish to take advantage of the 'safe harbor' [provided by 3 U.S.C. §5] would counsel against any construction of the Election Code that Congress might deem to be a change in law." Per Curiam Op. at 6. This was an issue that was not adequately briefed before because the Legislature was not previously represented before this Court on the matter.

The Legislature does have a powerful legislative wish to take advantage of the safe harbor provisions of 3 U.S.C. §5. Any statutory construction that Congress "might deem" a change in law would mean that the election results might no longer be binding on Congress when it counts the electoral votes, and that Florida might go unrepresented in the Electoral College. *See* 3 U.S.C. §§ 5, 15. It would be a travesty, after all Florida has been through these past few weeks, for the end result to be that all 6 million voters in Florida might be disenfranchised in the Electoral College.

In assessing this issue, it is crucial to frame it in the way the U.S. Supreme Court did. The question is not whether this Court believes that its statutory construction constituted a change in the law. The question is whether this Court feels there is any reasonable risk that "Congress might deem" its statutory construction as a change in law. Per Curiam Op. at 6. The Legislature respectfully submits that, whether or not this Court accepts the arguments described above, there is a reasonable risk that Congress might accept those arguments, and thus refuse to count Florida's electoral votes.

In short, because any State Legislature would have a strong interest in assuring its electoral votes are counted by Congress, the construction of statutes governing Presidential elections must be governed by a powerful canon against any construction that might be deemed to constitute a change in law. Indeed, scholars have argued that this is a general canon that should govern the interpretation of all statutes. *See* David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 928 (1992). But the general force this canon has must be rendered conclusive when the risk that the interpretation would be deemed a change in law would have a result so plainly contrary to legislative intent: depriving Florida of representation in the Electoral College.

There is also another risk that, if realized, would mean that the Florida election results would not be binding on Congress when it counts the electoral votes. That is the risk that contests would not finally be determined by midnight December 11, 2000. 3 U.S.C. §5. If the contests go beyond that date, there is again the risk that Congress will not regard the election results as conclusive and that Florida might go unrepresented in the Electoral College. The Legislature thus urges that this Court take all reasonable steps to assure that all contests and appeals are finally adjudicated and appealed before that deadline.

If these risks do not abate, it would appear that the only way the Legislature could assure that Florida's electors would be represented in the Electoral College would be for the Legislature to conclude that Florida's election of Presidential electors "failed to make a choice" and to appoint those electors directly under 3 U.S.C. §2. While the statutory term "failed to make a choice" probably encompasses other cases (e.g., a hurricane on election day), it seems plain that at a minimum it should be understood to permit a state legislature to conclude that an election has failed to make a choice when the relevant Congressional statute provides that the election result is not binding on Congress. Congress could not have meant that a State faced with the problem that its election contests have not been finally concluded by December 12th can do absolutely nothing about the fact that under 3 U.S.C. §5 the votes of its electors are no longer assured of being counted by Congress.

But plainly it would be far more preferable if this Court could avoid any arguable changes in law and resolve all contests before December 12, 2000, so that legislative action becomes unnecessary.

CONCLUSION

This Court should replace its vacated decision with a new opinion that confirms the original deadlines for certifications and county manual recounts set forth in the prior enactments of this Legislature. This Court should also enter such orders as are necessary to resolve all election contests without making any arguable changes in law by midnight December 11, 2000.

Respectfully submitted December 5, 2000.

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