IN THE
SUPREME COURT OF FLORIDA

CASE NOS. SC00-2346, SC00-2348 & SC00-2349

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| PALM BEACH COUNTY CANVASSING BOARD, ET AL. | vs. | KATHERINE HARRIS, ETC., ET AL. |
| VOLUSIA COUNTY CANVASSING BOARD, ET AL. | vs. | KATHERINE HARRIS, ETC., ET AL. |
| FLORIDA DEMOCRATIC PARTY | vs. | KATHERINE HARRIS, ETC., ET AL. |
| Petitioners/Appellants | | Respondents/Appellees |

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# AMENDED SUPPLEMENTAL BRIEF OF KATHERINE HARRIS, AS FLORIDA SECRETARY OF STATE, AND KATHERINE HARRIS, L. CLAYTON ROBERTS, AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA ELECTIONS CANVASSING COMMISSION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### UNITED STATES CONSTITUTION



### UNITED STATES CODE



### FLORIDA STATUTES

## INTRODUCTION

Appellees Katherine Harris, as Florida Secretary of State, and Katherine Harris, L. Clayton Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, respectfully submit this Supplemental Brief on the implementation of the Mandate of the United States Supreme Court.

## ARGUMENT

### I. This Court's Decision of November 21, 2000, Relied on the Paramount Importance of the Right of Suffrage Under the Florida Constitution.

In its decision of November 21, 2000, this Court addressed, along with another issue, the apparent conflict between section 102.166(4), Florida Statutes (the time frame for conducting a manual recount) and section 102.111 (the time frame for submitting and certifying county returns), as well as the apparent conflict between the mandatory language in section 102.111 and the permissive language of section 102.112. Palm Beach Canvassing Bd. v. Harris, 2000 WL 1725434 at *4 (Fla. Nov. 21, 2000).

From the outset of its opinion, this Court made clear that "hyper-technical statutory requirements" must give way to the of suffrage implicit in the Florida Constitution. See id. at *4 ("the will of the people, not hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases."); at

*6 ("all political power is inherent in the people"). After reviewing the relevant portions of the Florida Election Code, the Court observed that:

> the County canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount, it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

Id. at *11.

The Court then looked to principles of Florida constitutional law that the judiciary must "attend with special vigilance whenever the Declaration of Rights is in issue," and that "[t]he right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished." Id. at *12. In accordance with these general principles, the Court stated the seemingly applicable proposition of law that "the Legislature may enact laws regulating the electoral process . . . only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage." Id.

Looking as well to the principles of Florida constitutional law for guidance, the Court concluded**:**

> 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. The Secretary may ignore such returns only if 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 election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

Id. at *15.

The United States Supreme Court subsequently granted Governor Bush's petition for certiorari review to address whether the Court's decision conflicted with federal constitutional and statutory law. Bush v. Palm Beach Canvassing Bd., 2000 WL 1731262 (U.S. Nov. 24, 2000). On December 4, 2000, the Supreme Court issued an opinion in which it vacated this Court's decision and remanded for clarification of the basis for this Court's conclusion.

In its decision, the U.S. Supreme Court has asked this Court to clarify the holdings of its decision vis-a-vis federal statutory and constitutional principles, obviously recognizing this Court's ability to develop Florida law. Apparently recognizing that this Court did not center its opinion on federal law, the high court asks this Court to clarify its opinion as to impact on the legislature's power to select the method of appointing electors for President and Vice President of the United States, or recognition of state constitutional rights that might collide with 3 U.S.C. § 5 or article II of the U.S. Constitution. In so doing, the Supreme Court of the United States counsels:

> 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.

Bush v. Palm Beach County Canvassing Board, 2000 WL 1769093 at *3 (U.S. Dec. 4, 2000).

## II. In Presidential Elections, the Application of Article II, Section 2 Supercedes the Right of Suffrage Under the Florida Constitution.

The U.S. Constitution provides that "[e]ach 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." U.S. CONST. art. II, § 1, cl. 2. This provision grants plenary power to state legislatures to determine the manner for the appointment of electors for President and Vice President of the United States. In construing this constitutional provision in the context of a challenge to the methods set forth by the Michigan State Legislature to appoint electors, the Supreme Court made clear that the appointment of presidential electors is placed absolutely with the legislatures of the several states:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson v. Blacker, 146 U.S. 1, 27 (1892) (emphasis added).

In other words, there is no right of direct suffrage when it comes to the appointment of electors for President and Vice President of the United States. Absent an express delegation of authority, state courts possess no power, through the state constitution or otherwise, to alter the "manner" set by the legislature for the appointment of presidential electors. See U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) ("In the absence of any constitutional delegation to the States of

power to add qualifications to those enumerated in the Constitution, such a power does not exist."). There has been no such delegation of authority in this case.

In fashioning its November 21 decision, this Court relied heavily on the constitutional right of suffrage that the Court found implicit in Florida's Constitution. The Court's decision is a crafted compromise between this state constitutional right and the Florida Election Code. The issues this Court found troublesome and addressed in its decision can, however, be addressed by the Florida Legislature —the only body capable of doing so, for the U. S. Constitution and its implementing statutes require absolute deference to the legislative scheme.

## III. Under 3 U.S.C. § 5, Controversies or Contests Concerning the Appointment of Electors Must be Resolved Under Laws Enacted Before Election Day.

The United States Supreme Court has "recognized broad congressional power to legislate in connection with the elections of President and Vice President." Buckley v. Valeo, 424 U.S. 1, 14 n.16 (1976). Congress exercised that power when it enacted 3 U.S.C. § 5, which applies to state court determinations relating to "any controversy or contest concerning the appointment of all or any of the electors." Under that section, such controversies resolved by reference to "laws enacted prior to" election day and made at least six days before the meeting of the

electors "shall be conclusive, and shall govern in the counting of the electoral votes." 3 U.S.C. § 5.

This Court's decision did not address 3 U.S.C. § 5. See Bush, 2000 WL 1731262 at *3. This Court should examine section 5 and reconsider its previous ruling. A ruling from this Court consistent with section 5 "would assure finality of the State's determination" of this election controversy. Id. The "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 the law." Id.

This Court's previous decision may be viewed by Congress as having changed Florida's election laws. This Court sought to protect Florida voters, and its decision should not "compromise the integrity of the electoral process . . . by precluding Florida voters from participating fully in the federal electoral process." Palm Beach County Canvassing Bd., 2000 WL at *13. To ensure that Florida's participation in the electoral college is not prejudiced, and recognizing the unique aspects of Presidential elections, this Court should affirm the decision of Judge Lewis.

## CONCLUSION

This Court must reconsider its previous decision in light of the unique aspects of a presidential election. The application of state constitutional and equitable principles to modify the legislative scheme for a presidential election violates the United States Constitution and 3 U.S.C. § 5.

These Appellees respectfully suggest that since the issuance of this Court's original opinion on November 21, 2000, events may have rendered moot some of the issues addressed by the Court; thus, this Court may consider a more streamlined revised opinion. In any event, this Court should issue an opinion in which it addresses the Election Code in the specific context of a presidential election, and recognizes the overriding principles of federal law that place the power to determine the method for the appointment of electors solely in the Legislature. Affirming Judge Lewis's order as it applies to the November 7, 2000, election of presidential electors would serve this purpose and avoid the constitutional and statutory infirmities identified by the United States Supreme Court. Moreover, it would uphold and protect the right to vote for electors that the Florida Legislature has bestowed upon the State's citizens by stewarding Florida

into the safe harbor of 3 U.S.C. § 5, and thereby prevent a congressional challenge to the electors appointed by the State.[1]

Respectfully submitted,

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[1] This request by the U.S. Supreme Court is quite apropos of this Court's continued concerns articulated during oral argument and in its decision that Florida's electoral votes not be put in peril.

## CERTIFICATE OF FONT SIZE

This Supplemental Brief is typed using a Times New Roman 14-point font.

## CERTIFICATE OF SERVICE

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