IN THE
SUPREME COURT OF FLORIDA

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

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

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL

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INTRODUCTION

On December 4, 2000, the United States Supreme Court vacated this Court's November 21, 2000 judgment and remanded for further proceedings. The United States Supreme Court abided by its general rule that "this Court defers to a state court's interpretation of a state statute" (Slip op. p.4), but the Court was unsure as to "the precise grounds for the decision" of this Court. (*Id.* at p. 6, citing *Minnesota v. National Tea Company*, 309 U.S. 551, 555 (1940)). The Court concluded that "[t]his is sufficient reason for us to decline at this time to review the federal questions asserted to be present." (*Id.*)

The United States Supreme Court's concern focused on two issues. First, the Court noted that in devising a method for selecting 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." (*Id.* at 4). The Court seemed unsure as to whether this Court was merely construing and resolving conflicts among the statutes enacted by the legislature, or whether it might also be deeming such statutes to be modified by the Florida Constitution.

Second, the United States Supreme Court was unsure of the extent to which this Court considered the provisions of 3 U.S.C. § 5, inasmuch as this Court's

November 21, 2000 opinion "did not discuss § 5." (*Id.* at 6.)

ARTICLE II

The applicable provision of U.S. Const., Article II grants states the authority to select Presidential electors "in such Manner as the Legislature thereof may direct." Consistent with this provision, the Florida Legislature has directed that presidential electors are to be selected by public elections in accordance with the general election laws of the State. Section 103.011, Florida Statutes. Further, the Legislature has delegated to the judicial branch the responsibility for "adjudicating any conflicts arising from the interpretation or application of the laws." Section 20.02(1), Florida Statutes. The United States Supreme Court, in its December 4 decision recognized this traditional authority of the judicial branch of State government, even in elections to select presidential electors. (Slip op. p. 4.)

We view this Court's November 21, 2000, opinion as a routine exercise of the authority granted by the Legislature. The Court was faced with a number of statutory provisions which conflicted by their own terms and in implementation. The State's chief legal officer and the State chief election official differed on the meaning of the Florida election laws. Time schedules for requesting manual recounts coupled with the time necessary to perform such recounts made it virtually impossible for large urban counties to complete the recounts within seven days of

the election. And the provisions of State law seemed to conflict regarding the authority of the Secretary of State to accept returns after the expiration of seven days. These are ordinary "conflicts arising from the interpretation or application of the laws" and the Legislature has delegated the authority to this Court to resolve such conflicts. As the United States Supreme Court held: "[The Supreme] Court defers to a state court's interpretation of a state statute." (Slip op. at 4.) Such action is entirely consistent with the provisions of Article II.

The inquiry from the United States Supreme Court centers on whether this Court might have applied State constitutional provisions, as modifying legislatively enacted provisions, in addressing the issues before the Court.[1] The United States Supreme Court cited to statements from this Court's November 21 opinion which raised this issue.

The United States Supreme Court noted that this Court's opinion said: "To the extent that the Legislature may enact laws regulating the electoral process, those

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[1] Based on the questioning at the December 1, 2000 oral argument before the United States Supreme Court it appears that some members of the Court are concerned that it may be improper for this Court to consider anything but the legislatively enacted provisions for selecting Presidential electors. That view might preclude reliance on the Florida Constitution to the extent that it modifies the statutory scheme. The issue was raised at argument but it was not decided in the December 4 *Per Curiam* decision. In our view, the Florida Legislature always acts within the confines of the Florida Constitution, and we do not believe that such a method of operation contravenes Article II. But it is not necessary to consider that issue in this litigation since the Court's traditional role in resolving statutory conflicts was the basis for the Court's decision. The statutory analysis did not conflict with the constitutional analysis, and the constitutional language was dicta.

laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage." (Slip op. at 5, citing November 21 opinion at 31.) While we agree that the quoted statement, and the text that accompanies it, are correct statements of Florida legal standards, the discussion was not necessary to support the Court's conclusion. This Court did not find any provision of Florida law to be "invalid" because of a conflict with the State Constitution. This Court merely interpreted and defined the legislatively intended interplay among state statutory provisions. In other words, the quoted statement and the related discussion are dicta.

The same analysis is applicable to the other statement referenced by the United States Supreme Court: "Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote." (Slip op. at 5, citing November 21 opinion at 32.) We again voice our concurrence with this statement, but also contend that it was not necessary in deciding the issues presented to this Court. The November 21 opinion states specifically that "[l]egislative intent - as always - is the polestar that guides a court's inquiry into the provisions of the Florida Election Code." (November 21 opinion at 24.) This Court also specifically declined to go further than an interpretation of legislative design when it said: "We decline to rule more expansively, for to do so

would result in this Court substantially rewriting the Code." (November 21 opinion at 39.)

In sum, the Court's November 21 decision is based on the results of traditional methods of statutory analysis and references to the Florida Constitution were not necessary to reach the decision.

3 U.S.C. § 5

Regarding 3 U.S.C. § 5, the United States Supreme Court's decision recognizes "that whatever else may be the effect of this section, it creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." (Slip op. at 6.) With this in mind, the Court suggested that "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." *Id.*

As noted, this Court's November 21 opinion merely described the legislative design of laws which were in place long before the November 7, 2000 election. The only suggested "change in the law" resulting from the November 21 opinion of this Court was the establishment of a date – November 26 – for the submission of amended certifications following the manual recounts. However, this action was not a change in law within the meaning of Section 5.

In resolving the conflicts within Florida law, this Court upheld the propriety of legislatively authorized manual recounts and also held that the statutory structure authorizes the Secretary to receive such recounts after the expiration of seven days. But the law did not specify any particular outer limit of the time period during which the manually recounted returns must be submitted. The Legislature left that decision to the discretion of the Secretary; and in exercising her discretion the Secretary must act reasonably and consistent with law. *Eight is Enough of Pinellas County v. Ruggles*, 678 So. 2d 878, 900-901 (Fla. 2d DCA 1996). Thus, this Court did not "change" any statutory date. Rather the Court discerned the legislative intent as to the outer limits of the Secretary's discretion under s. 102.112 to ignore statutorily authorized manual recounts, and also addressed the proper legal standard that the Secretary must apply in exercising her discretion.[2]

This Court carefully considered the impact of Section 5 in establishing the outer limits of the time period and the nature and extent of the Secretary's discretion. It is reasonable to assume that the Legislature was aware of the provisions of Section 5 and would want the recounts completed in the time period

[2] The Legislature did not limit the judiciary's statutory responsibility to interpret and apply elections laws regarding the manner of appointment of presidential electors – although the Florida Constitution imposes such a limitation on judicial review in the context of legislative elections. See e.g. Art. III, sec. 2, Fla. Const., which provides in relevant part that: "Section 2. Members; officers.– Each house shall be the sole judge of the qualifications, elections, and returns of its members . . ."

which would allow the safe harbor that might be provided by Section 5. The Court balanced concerns about the time necessary for recounts under s. 102.166, and the time necessary for contests under s. 102.168, against the need for finality and the time requirements of Section 5. This exercise in statutory interpretation led to the conclusion that the earliest the Secretary, in her discretion, could ignore recounts was November 26. Events have shown the Court's date to be prescient. Mr. Gore was able to mount a contest under s. 102.168 within the time allowed. *See Gore v. Harris*, Case no. 00-2808 (2d Cir. Dec. 3, 2000). This Court's conclusion was consistent with legislative intent. In fact, in establishing this date, this Court said it was motivated by its "reluctance to rewrite the Florida Election Code." (November 21 opinion at 39.) The safe harbor protections of Section 5 are not endangered by this action.

CONCLUSION

The concerns of the United States Supreme Court regarding this Court's decision of November 21 are narrow and can be addressed by minor clarifications of the November 21 opinion. We suggest that the Court clarify that its decision is supported by traditional methods of statutory construction, even if the dictates of the Florida Constitution are not considered. The constitutional discussion in the opinion is dicta. We further suggest that the Court clarify that it was aware of, and

carefully considered, the impact of 3 U.S.C. § 5 in reaching the November 21 decision. The Court did not intend to "change" existing law. The Court merely intended to "define" existing law.

RESPECTFULLY SUBMITTED,

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