IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2431

ALBERT GORE, Jr., Nominee of the Democratic Party of the United States for President of the United States, *et al.*,

Appellants,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, *et al.*,

Appellees.

CLARIFICATION OF ARGUMENT FOR APPELLEES GEORGE W. BUSH AND DICK CHENEY

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POINTS OF CLARIFICATION

I. This Court Cannot Grant the Relief Requested

In response to Chief Justice Wells' questions at oral argument, Respondent George W. Bush hereby clarifies his position on this Court's jurisdiction over this challenge to the certification of the presidential election and electors. Under *McPherson v. Blacker*, 146 U.S. 1 (1892), the Supreme Court made explicit that Article II authorizes the states to appoint electors only in "such Manner as the Legislature thereof may direct" and thus the federal Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" of the State. U.S. Slip Op. at 5 (quoting *McPherson*, 146 U.S. at 25).[1]

Regardless of whether the Florida Election Code allows for some form of an appeal from a contest in these circumstances, it is absolutely clear under Florida and federal law that this Court does not have authority to grant

[1] In particular, as the Supreme Court also made clear in *McPherson*, "[t]his 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 . . . ." 146 U.S. at 34 (quoting Senate Rep. 1st Sess., 432 Cong. No. 395). Notwithstanding the preexisting Florida Rules of Appellate Procedure allowing appellate review of Circuit Court judgments generally, it is plain that, as Appellants plead this case, this case is before this Court jurisdictionally only by virtue of Article V, Section 3(b)(5) of the Florida Constitution.

the *relief* sought by Appellants. Appellants ask this Court to: 1) completely substitute itself for both the county canvassing boards and the state canvassing commission; 2) engage in a selective recount of certain ballots in a few Florida counties; 3) adopt an unprecedented "standard" for divining voter intent; and 4) declare the results of a statewide election of federal electors based upon this selective recount. This Court does not have authority to grant such relief under Florida law or federal law.

Moreover, doing so would clearly constitute a change in the manner in which Florida selected its electors, thus violating both the Federal Constitution and federal statute. This "judicially selected" slate of Presidential electors would not be validly chosen and, unlike the presently certified slate of electors, their votes would not be "conclusive" under 3 U.S.C. § 5 and the judicial mandate would be contrary to *McPherson v. Blacker*.

If, as Vice President Gore contends, this Court may conduct a *de novo* review of ballots, without deferring either to the manual recount decisions of county canvassing boards (such as Palm Beach) or to certified election results (such as the manually recounted votes certified in Volusia and Broward Counties), it must conduct a *de novo* review of the 176 votes

counted by Palm Beach, *as well as* all manually recounted votes in Volusia and Broward. The Court plainly cannot erect a dual standard of deferring to canvassing boards when it *helps* Vice President Gore (for the 176 "votes" in Palm Beach and the 567 additional "votes" in Broward), but engage in *de novo* review of manual recount decisions challenged by Vice President Gore (*e.g.* the ballots rejected in Palm Beach and in Dade counties). Moreover, since a determination of who received the "highest number of votes" throughout the state is the only basis for determining which presidential candidate won and may be certified, the Court must also count *every* vote not registered by a machine.[2]

Additionally, for the first time in their brief to this Court, Appellants make the remarkable assertion that this Court should exercise *original* jurisdiction in this matter. They then ask the Court to engage in its own selective recount of certain ballots, declare a winner to the statewide Presidential election on this basis, nullify a previously certified result and actually direct the Secretary of State to "'certify as elected the presidential

[2] In addition to common sense, the plain language of 103.111 mandates this rule because it requires certification of the "candidates for President and Vice President who received the *highest number of votes*." Consequently, the court cannot order or undo a certification unless it *knows*

electors of' Al Gore and Joe Lieberman, under Section 113.011." Such a course of conduct would clearly violate the United States Constitution and federal statutes,[3] and, just as clearly, it is not authorized by Florida law. Since, as the Vice President acknowledges, this All Writs power is derived from "Article V of the Florida *Constitution*," the Court would violate Article II of the federal Constitution by exercising a power not given it by the Florida legislature. Mandamus or other equitable relief cannot lie because, as this Court has frequently noted, "the original and appellate jurisdiction of

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who received the highest number of votes – which it cannot do if that question is in doubt.

[3] Moreover, this Court is barred as a matter of federal law from "nullifying" a certification of an election by executive officials in the State of Florida or choosing its own set of judicially designated electors. After certification of an election pursuant to Florida law, which has now occurred, the manner of voting and the validity of the votes of Presidential electors is governed by federal law. Pursuant to 3 U.S.C. § 6, it is "the duty of the executive of each State" to communicate the selection of a slate of presidential electors to the Archivist of the United States. Under 3 U.S.C. § 15 it is *only* the votes of presidential electors "whose appointment has been lawfully certified according to section 6 of this title" that are deemed conclusive in the face of congressional challenge. Moreover, if two slates of electors are presented from any State and a dispute ensues between the two Houses of Congress, "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, *shall be counted*." 3 U.S.C. § 15 (emphasis added). Thus, appointing a competing judicially-selected slate of Gore electors is not an available form of relief as a matter of federal law. It would result in a contest in Congress, which 3 U.S.C. §§ 6 and 15 make clear would be won by the electors certified by the

the courts of Florida is derived entirely from article V of the Florida Constitution, *not* by the Florida legislature." *Allen v. Butterworth*, 756 So.2d 52, 63 (Fla. 2000). *See also*, *Dresner v. City of Tallahassee*, 134 So.2d 228, 229 (Fla. 1961) ("This Court derives its appellate jurisdiction from article V, Florida Constitution.").

Ultimately, it is not the Florida Constitution nor is it the view of other State Supreme Courts that control the disposition of this matter. Nor is this matter amenable to resolution by resort to this Court's equitable powers, derived from the State Constitution or otherwise, to alter Florida's laws in effect as of Election Day. Nor can this matter be definitively resolved under any Florida caselaw that was not decided under the modern Florida election code. Instead, it is the Florida Election Code, as enacted by the Florida Legislature pursuant to Article II of the U.S. Constitution – and that alone – that controls this case, and the relief that can be granted.

II. Under the Florida Election Code, Section 102.168 Does Not Apply to Presidential Elections, and to Apply it now Would Violate Article II of the U.S. Constitution, *McPherson v. Blacker*, and 3 U.S.C. § 5.

In addition to the question whether this Court has statutory jurisdiction over this appeal, there is no basis or precedent in Florida law for

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executive pursuant to the election itself – in this case the 25 Bush electors

applying the ultimate judgment of a successful Section 102.168 contest proceeding at all to a presidential election. Indeed, by its terms, the Section 102.168 remedy does not apply to presidential elections.

This issue was recently addressed by the Circuit Court in its Order of November 20, 2000 in *Fladell v. The Elections Canvassing Comm'n of the State of Fla*., (15th Judicial Circuit).[4] The court, after an extensive analysis of the Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was *not* intended to apply to Presidential elections. *See id.* at 10-15.

The *Fladell* court noted that the provisions for certifying the election of presidential electors are set forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted §103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." *Fladell*, slip op. at 6. The Court further noted that Section 103.011, entitled "Electors of President and Vice President," makes *no* provision for a

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certified on November 26, 2000.

[4] On December 1, 2000, the Florida Supreme Court concluded that rulings by the *Fladell* court on this issue were unnecessary and affirmed on other grounds. *See Fladell v. Palm Bch. County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

"contest" of the Presidential election. The Court concluded from this omission that the Florida Legislature did *not* intend for Section 102.168 to apply to Presidential elections.[5] *Id.* at 15. Rather, the Court held, "[a] review of the statutes that immediately follow §102.168 point to the conclusion that §102.168 was intended to apply to elected officers *other than the Presidency.*" *Id.* at 9, n.3 (emphasis added).

As the *Fladell* court compellingly observed, "[s]urely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States." Slip op. at 9, n.3.

Simply put, then, this is an action by the wrong parties, seeking relief under the wrong statute, brought against the wrong defendants. And for this Court, or any Florida Court, to now extend Florida statutes to reach it, would run afoul of Article II of the U.S. Constitution, *McPhereson v. Blacker*, and 3 U.S.C. § 5.

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[5] Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or *otherwise* . . . the Governor may appoint a person to fill such vacancy . . ." § 103.021(5), Fla. Stat. (2000) (emphasis added). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. §103.061, Fla. Stat. (2000). However, while Florida law provides these

III. Palm Beach County's Final December 4 Results Would Reflect a Net Gain of 176 Votes for the Vice President, Not 215 Votes.

Counsel for Vice President Gore repeatedly argued to this Court that the final net gain for Vice President Gore in Palm Beach County is 215 votes. Plaintiff's Exhibit 49 is a copy of the final posting of the Palm Beach County Canvassing Board on December 1, 2000, plainly indicating that the proper total was a net gain of 176, not 215.[6]

IV. Miami-Dade Did Not Terminate its Recount Solely because of Time Constraints

At oral argument, Appellants' counsel represented that the *sole* reason the Miaimi-Dade Canvassing Board stopped its manual recount was that it had insufficient time to complete it.[7] That representation was incorrect. On

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mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

[6] Appellants' counsel cite the testimony of Judge Burton for the 215 vote figure. That testimony, is simply a casual recollection of the approximately number, not the final Canvassing Board submission. Transcript at 278, ll. 8-19.

[7] Appellants also argued that the Circuit Court erred by utilizing a standard of "reasonable probability" for measuring their burden of proof of an effect on the election outcome, instead urging they need only establish rejection of legal votes sufficient to place in doubt the election result. "Place in doubt," however, is the required showing, not the burden of proof. Appellants still bear the burden of demonstrating a reasonable probability that the election result would be placed in doubt. Without such a standard,

November 22, the Board decided to terminate the ongoing manual recount because of concerns (1) about the ability of the Board to complete a full manual recount, and (2) that anything short of a full manual recount of all of the ballots would be unfair, and could disenfranchise the Cuban/Hispanic community in Miami. As the Chair of the Board explained:

> We cannot meet the deadline of the Supreme Court of the State of Florida, and I feel it incumbent upon this Canvassing Board to count each and every ballot and to not do a hand recount [that] would potentially even under the proposed plan of this morning, could disenfranchise a segment of our community.

Pltfs Ex. 31 at 27:11 to 27:20.

Finally, Appellants have identified nothing about these Miami-Dade votes that distinguishes them from the undervotes in the other counties in Florida. If the mere failure of counting machines to pick up a potential vote requires a court in a contest action to count them by hand, then fairness and accuracy require that all such votes must be counted.

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an election contest is merely a judicial recount to which a contestant is automatically entitled by mere allegation of tabulation error.

The reasonable probability standard used below is well established under Florida law for contest proceedings. *See Smith v. Tynes*, 412 So. 2d 925, 926-27 (Fla. 1st Dist. Ct. App. 1982). Moreover, the recent amendments to Section 102.168 merely codified existing contest case law. *See Comm. On Election Reform*, H.R. 99-399, Final Analysis on HB 281 at III. A. (Fla Jul. 15, 1999). The "reasonable probability" standard was part of

Respectfully submitted,

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the existing case law and thus continued in effect. *See, e.g., Davies v. Bossert*, 449 So. 2d 418, 420 (Fla. 3d Dist. Ct. App. 1984).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been furnished to the following on this 7th day of December, 2000.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that the font in this brief is Times New Roman 14 point and is in compliance with Florida Rules of Appellate Procedure.

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