IN THE SUPREME COURT OF FLORIDA
CASE NO. SC00-2341
DCA Case No. 1D00-4745
Circuit Court Case No. 00-2808

ALBERT GORE, JR., Nominee of the Democratic Party of the United States for President of the United States, and JOSEPH I. LIEBERMAN, Nominee of the Democratic Party of the United States for Vice President of the United States,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

BRIEF OF INTERVENOR, JOHN E. THRASHER

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As one of the twenty-five Republican electors chosen by Florida voters on November 7, 2000, and certified by Governor Jeb Bush, John E. Thrasher was granted leave to intervene in the circuit court proceedings. Although he agrees with the practical outcome of the final judgment from which appeal is taken (and, therefore, has not cross-appealed), he submits this brief demonstrating why the circuit court lacked jurisdiction to grant the relief plaintiffs sought.

STATEMENT OF THE CASE AND FACTS

The election to select the presidential electors from the State of Florida was held on November 7, 2000, the same day as the election for other states' electors. *See* §103.011, Fla. Stat. (2000). Prior to the election, the Governor of the State of Florida nominated and certified to the Secretary of State competing slates of presidential electors for the Republican Party of Florida and the Florida Democratic Party, as well as other political parties. *See* § 103.021(1), Fla. Stat. (2000). The names of the candidates for President and Vice President of the United States were printed on the ballots that were used in the election on November 7, and Florida voters cast their votes for these candidates. *See* § 103.011, Fla. Stat. (2000). Under Florida law, however, those votes are only "counted as votes for the presidential electors supporting such candidates." § 103.011, Fla. Stat. (2000).

The results of the election were certified by each county canvassing board and forwarded to the Department of State. *See* § 102.111, Fla. Stat. (2000). The Elections Canvassing Commission thereafter certified the returns of the election. *See id.*

The certification Plaintiffs challenge in this action took place on November 26, 2000, when the Elections Canvassing Commission certified returns of the November 7 general election. Thereafter, the

Governor executed a Certificate of Ascertainment certifying the twenty-five Republican Presidential Electors for the State of Florida. The Certificate of Ascertainment certified that the Republican Presidential Electors received a plurality of the votes in the General Election held in Florida on November 7, 2000. On November 27, 2000, the Governor forwarded this Certificate of Ascertainment to the United States Archivist.

The President and Vice President of the United States will ultimately be chosen on January 6, 2000, during a joint session of Congress where the electoral votes of each state will be counted. Once the votes are counted, the result will be delivered to the President of the United States Senate, who will then announce the vote. That announcement will be deemed a sufficient declaration of the persons elected President and Vice President of the United States. *See* 3 U.S.C. § 15.

SUMMARY OF ARGUMENT

This case arises out of a complaint filed by appellants, contesting the results of the general election held on November 7, 2000, and certified on November 26, 2000. The case demonstrates a fundamental misunderstanding of how this country elects its President and Vice-President.

Voters in this country do not directly elect the President and Vice-President of the United States. Instead, under Article II, section 1, clause 2 of the United States Constitution, the Florida Legislature has exclusive authority to determine the method and manner of nominating presidential electors for each political party. *See* § 103.021(1), Fla. Stat. (2000) (codifying the method and manner by which presidential electors are selected in Florida). Once a slate of presidential electors for each political party has been nominated in accordance with Florida's statutory scheme, each voter of the State of Florida then votes at the general election for one of the political party's slate of presidential electors. *See* § 103.011, Fla. Stat. (2000). The slate of presidential electors receiving the plurality of Florida's popular vote then, in turn, votes for the Presidential and Vice-Presidential candidates themselves at a meeting of presidential electors on December 18, 2000. *See id.*

Florida law provides no statutory mechanism for contesting the election of these presidential electors. Instead, Section 102.168, Florida Statutes (2000), applies only to a contest to the election of "any person to office." The presidential electors selected on November 7 do not hold any "office" under Florida law, thereby making Section 102.168 inapplicable to their election on November 7. Moreover, Plaintiffs themselves were not candidates in any election on November 7 but, instead, are candidates for President and Vice-President of the United States in an election that will take place when Florida's

presidential electors cast their votes on December 18, 2000. As a result, Section 102.168 has no bearing, and cannot be read to apply, to the election for of the President and Vice-President of the United States. Because no other statutory mechanism exists for contesting the election of presidential electors or the election of President and Vice-President, the circuit court lacked authority to entertain the challenge.

ARGUMENT

A. Section 102.168 Does Not Apply To A Presidential Election.

Florida does not recognize any common law right to contest an election. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *see also Pearson v. Taylor*, 159 Fla. 775, 776, 32 So. 2d 826, 827 (Fla. 1947); *Harden v. Garrett*, 483 So. 2d 409, 411 (Fla. 1985). To the extent that right exists, it must be expressly granted by the Florida Legislature. *See McPherson*, 397 So. 2d at 668. This Court has long recognized that where the language of a statute is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). The Court reaffirmed that principle in its recent decision in *Palm Beach Canvassing Bd. v. Harris*, No. 00-2346, at 25-26 (Fla. Nov. 22, 2000), where the Court stated:

> Where the language of the [Florida Election] Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.

Section 102.168 is unambiguous. According to its terms, it does not provide any cause of action to contest a Presidential election, or the election of "presidential electors."

This exact 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).[1] The court,

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[1]On December 1, 2000, this Court concluded that pertinent rulings by the *Fladell* court are a nullity, because the Court affirmed on other grounds. *See Fladell v. Palm Bch. County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

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 plaintiffs in *Fladell* sought an injunction against certification of the results of this Presidential election. They argued that the election should be declared void and that the winner should be declared in an election contest under Section 102.168 because of alleged irregularities in the form of the ballot used in Palm Beach County. The plaintiffs in *Fladell* thus argued that the contest provision of Section 102.168 provided the alternative means of selecting presidential electors provided by 3 U.S.C. § 2, which allows the Florida Legislature to apply alternative means to select electors where a state "has failed to make a choice on the day prescribed by law."

The *Fladell* court engaged in an extensive and careful analysis of the state and federal procedures for nominating and electing presidential electors. The 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 "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. *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).

The analysis of this issue by the *Fladell* court is indisputably correct. Section 103.011 provides for the certification of the election of "presidential electors." That section, which specifically relates to the election of Presidential electors, does not provide for any contest of the election. 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 mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

A plain reading of Section 102.168 further confirms that that section was *not* intended by the Florida Legislature to apply to the contest of a Presidential election.

First, had the Florida Legislature intended for Section 102.168 to be a means for contesting a Presidential election, it would not have provided that the action was available only to contest "the certification of election . . . of any person *to office*." *See* § 102.168(1), Fla. Stat. Despite the inclusion of the names of Governor Bush and Vice President Gore on the ballot on November 7, the only persons "elected" in connection with the Presidential election on that date were "presidential electors." *See* § 103.031, Fla. Stat. (2000).

It is altogether possible for a candidate for President of the United States to be "successful" in the Presidential election in Florida, yet take no office. This is in fact what happened in the 1992 Presidential election, for example, where President Bush received the most votes in the Florida Presidential election, but did not take office because he did not receive the majority of votes cast by the presidential electors.

As this example demonstrates, the only "successful" candidates in any Presidential election in Florida are the "presidential electors."

It is further clear that "presidential electors" are not "successful candidates" for "office" as that term is used in the Election Code. In light of the "resign to run" law set forth in Section 99.012, Florida Statutes, and Article 2, section 5 of the Florida Constitution, the term "office" cannot be interpreted to include the position of "presidential elector." Indeed, if "presidential elector" were an office, then numerous presidential electors proposed by the candidates prior to the November 7 election would have been required to resign from any office they currently held in Florida. *See* Art. II, § 5, Fla. Const.; § 99.012(3)(a), Fla. Stat. (2000) ("No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other.");[2] *cf*. § 102.168(1), Fla. Stat. (2000) (providing that an unsuccessful "candidate for such office" may file a contest).

Second, had the Florida Legislature intended for Section 102.168 to be a means for contesting a Presidential election, it would not have identified the "unsuccessful candidate" as a proper plaintiff or required that the "successful candidate" be named as an indispensable party. *See* §§ 102.168(1), (4), Fla. Stat. (2000). The certification of a Presidential election by the Elections Canvassing Commission states only the number of votes received by the candidates for President. It does not "certify" the election of the

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[2]In the case of the presidential electors recommended prior to the election by the Florida Democratic Party, this would mean that Attorney General Bob Butterworth, Senators Buddy Dyer, Daryl Jones, Kendrick Meek, and Les Miller, and Representative Robert Henriquez would all be in violation of Florida law because they failed to submit resignations from their current officer before becoming candidates for the "office" of "presidential elector."

President of the United States. The successful candidate for that office will not be determined until January 6, when the votes of the presidential electors will be counted. *See* 3 U.S.C. §15.

Third, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a Presidential election, or the certification of presidential electors, it would have provided a mechanism for ordering meaningful relief under the statute. The relief contemplated under Section 102.168 is not only unavailable or inappropriate in light of the nature of the office, but preempted by federal law. For example, Section 102.1682 provides, in the event "the contestant is found to be entitled to the office," for the entry of a judgment of "ouster" against the successful candidate. The courts of the state of Florida clearly lack the authority to enter a judgement of "ouster" against a sitting President of the United States. *See Fladell*, slip op. at 9, n.3 ("Surely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States."); *see also State ex rel. Bisbee v. Drew*, 17 Fla. 67 (1879).

Finally, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a Presidential election, or the certification of presidential electors, it would have included procedures for the orderly contest of the election within the limited time allowed under federal law. Section 102.168 provides no guidance on this subject at all. *See Fladell*, slip op. at 9-10 ("The times limitations included in §102.168 do not necessarily coincide with the time constraints of 3 U.S.C.A. § 5."). Instead, the statute provides that the defendant has ten days in which to prepare and file an answer. *See* § 102.168(6), Fla. Stat. (2000). This statute clearly was not designed to contest a Presidential election.

B. The Certification of Electors Mooted Plaintiffs' Contest Challenge

As the above discussion amply demonstrates, Section 102.168 of the Florida Election Code *cannot* be read to provide a circuit court with jurisdiction to adjudicate a contest to the certification of the results of the Presidential election. This section also provides no basis for challenging the "Certificate of Ascertainment" that identifies the presidential electors from the State of Florida.

The Secretary of State, acting under Florida law, certified the results of the Presidential election held on November 7. That certification triggered a series of events under Florida and federal law, including the transmittal of the "Certificate of Ascertainment of Presidential Electors" to the Archivist of the United States on November 27. That document identifies the "Republican Presidential Electors for the State of Florida."

This Certificate of Ascertainment has independent effect under federal law, *see* 3 U.S.C. § 6, and it has not been challenged in this case. Even if Plaintiffs were to succeed in this action, the circuit court could not have provided any meaningful relief.

C. The Court Cannot Fashion Any *New* Procedure For Electing Presidential Electors

The Florida Legislature established procedures for selecting presidential electors prior to the November 7 general election. Those procedures are set forth in Chapter 103, Florida Statutes. *Fladell*, slip op. at 6. The procedures in effect on November 7, 2000, did not allow, and no statute then promulgated by the Florida Legislature contemplated, any action to contest the certification of the results of the Presidential election. Similarly, no statute in effect at the time of the November election provided any mechanism for contesting the "Certificate of Ascertainment" which was forwarded to the Archivist of the United States on November 26.

Florida law does not provide any basis other than those codified in Chapter 103, Florida Statutes, for replacing duly certified presidential electors. To interpret the Florida Statutes to provide for the contest of either the certification of the election or the certification of the presidential electors, the court would have to establish *new* procedures for selecting electors for the State of Florida. Any electors selected by this new procedure would be selection in violation of federal law. *See* 3 U.S.C. § 5.

CONCLUSION

The foregoing analysis demonstrates that section 102.168 of the Florida Election Code does not apply to the unique exercise of electing the President and Vice-President of the United States.

Respectfully submitted,

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