**IN THE**
**SUPREME COURT OF FLORIDA**

**CASE NO. SC00-2431**
DCA Case No. 1D00-4745

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| ALBERT GORE, JR., ET AL. | vs. | KATHERINE HARRIS, ETC., ET AL. |
| Appellants | | Appellees |

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# BRIEF OF THE SECRETARY OF STATE AND THE ELECTIONS CANVASSING COMMISSION

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## I. THIS COURT'S DISCRETIONARY JURISDICTION

The Court has ordered that briefs in this matter address the issue of the Court's exercise of its discretion to accept this case. The Florida Rules of Appellate Procedure provide that the Supreme Court has discretionary jurisdiction to review orders and judgments of trial courts certified by district courts of appeal if the appeal requires immediate resolution and is a matter of great public importance. Fla. R. App. Proc. 9.030(B)(i) (2000). The Secretary of State ("Secretary") and the Elections Canvassing Commission ("Commission") acknowledge the applicability of this rule to the present case and leave it to the sound discretion of the Court as to whether it should exercise its jurisdiction here.

## II. SUMMARY OF THE ARGUMENT

In this case, Appellants must show that but for the irregularities alleged in the complaint, the Democratic Party's slate of electors would have won the statewide election. If the election contest proceeding provided for by section 102.168, Florida Statutes, is crafted to review alleged election irregularities affecting the election of Presidential electors it must be as a whole. Therefore, Appellants' burden must be met by demonstrating that any irregularity was pervasive enough within the *entire* state so that, if corrected, the *actual statewide results* of the

election would have been different. The Appellants did not meet this burden; therefore, the order below should be affirmed.

## III. ARGUMENT

### A. THE ELECTIONS CANVASSING COMMISSION PROPERLY CERTIFIED THE ELECTION RETURNS

The Commission is charged with canvassing election returns, certifying the results of the election, and declaring a winner for each office based on that certification. § 102.111, Fla. Stat. (2000). In performing this certification function, the Commission is not allowed to look beyond the face of a county's return or question its veracity. § 102.131, Fla. Stat. (2000). The Commission can only reject a return that "appear[s] to be irregular or false so that the [Commission] is unable to determine the true vote . . . ." Id.

The Appellants argued that the Commission should have rejected an amended certification from Nassau County and accepted a purported amended certification from Palm Beach County. Nassau County's amended certification was received before the deadline imposed by sections 102.111 and 102.112, Florida Statutes. The amended certification did not appear irregular or false, and the Commission had no power to reject it.

Palm Beach County sent the Commission a letter by facsimile purportedly enclosing an amended certification. This "amended certification" was irregular and could not be accepted by the Commission. On its face, the "amended certification" did not comply with section 102.151, Florida Statutes, because it did not contain "the total number of votes cast for each person nominated or elected . . . ." To the extent the "amended certification" reported anything, it reported a partial manual recount, in violation of the only state statute dealing with manual recounts that requires a canvassing board to "recount *all* ballots." § 102.166(5)(c), Fla. Stat. (2000) (emphasis added). Accordingly, the Commission was authorized to reject the irregular return and to include the previously submitted Palm Beach County return in its final certification, which were also restated in the purported "amended certification."

## B. THE PETITIONER FAILED TO PROVE THAT THE ALLEGED IRREGULARITIES ON A STATEWIDE LEVEL WOULD HAVE CHANGED THE RESULT OF THE ELECTION

Florida law provides for a contest to challenge the certified results of an election on the grounds of: (a) misconduct, fraud, or corruption on the part of any election official sufficient to change or place in doubt the result of the election; (b) ineligibility of the successful candidate; (c) receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result

of the election; (d) bribes; and (e) any other allegation that if sustained would show that a person other than the successful candidate was the person elected. § 102.168(1) & (3)(a-e), Fla. Stat. (2000).

Florida law is clear that "[t]here is no reason to require a recount unless there is a positive and clear assertion, allegation or claim that such recount *will change* the result of the election." McQuagge v. Conrad, 65 So. 2d 851, 853 (Fla. 1953) (emphasis added).[1] A complaint seeking to overturn an election fails to state a cause of action unless it sets forth grounds that, if true, would show a reasonable probability that the election result would change if the irregularities complained of were corrected. A plaintiff must, therefore, show something more than that the result "might" have been different or that there was a "mere possibility that the outcome of the election would have been different." Broward County Canvassing Board v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992); Smyth v. Tynes, 412 So. 2d 925 (Fla. 1st DCA 1982); Napp v. Dieffenderfer, 364 So. 2d 534 (Fla. 3d DCA 1978).

[1] See also State ex rel. Whitley v. Rinehart, 192 So. 819, 820 (Fla. 1940); State ex rel. Pooser v. Webster, 170 So. 736, 739 (Fla. 1936); Smith v. Tynes, 412 So. 2d 925, 926-27 (Fla. 1st DCA 1982); Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974).

In this case, the Appellants must show that but for the irregularities alleged in the complaint, the Democratic Party's slate of electors would have won the statewide election. This burden must be met by demonstrating that any irregularity was pervasive enough within the *entire* state so that if corrected the *actual statewide results* of the election would have been different. The Appellants cannot carry this burden in a statewide election by merely demonstrating that a defect would have changed the returns in isolated counties.

For example, if a deficiency in one type of ballot causes certain votes to not be counted to the extent that it would change the result of the election, the correct remedy is to recount all ballots in the election. Counting less than all of the ballots potentially affected by the defect produces results skewed by factors unrelated to the alleged defect, such as the differing types of voting systems employed among counties and, more importantly, the counties' differing political demographics. Recounting a subset of counties selected by the Appellants does not answer the ultimate question of whether there was a defect that would have changed the result of the statewide election. At most, such a procedure only demonstrates that the losing candidate would have had greater success in the *subset* of counties most favorable to that candidate.

Consistent with this approach, Judge Sauls found the suggested methodology of manually recounting the no-votes in only two selected counties and adding those to the total to be fundamentally flawed, because the Appellants were required to "place at issue and seek as a remedy with the attendant burden of proof, a review and recount on *all* ballots, and *all* of the counties in this state with respect to the particular alleged irregularities or inaccuracies in the balloting or counting processes alleged to have occurred." Bench Op. at 12:13-13:1(emphasis added).

No-votes (ballots for which no vote for Presidential electors was recorded) exist throughout the state, not just in those counties selected by the Appellants. Of the 175,655 no-votes in the November 7, 2000, election in Florida, 28,492 occurred in Miami-Dade County and 29,366 occurred in Palm-Beach County. Division of Elections, Voter Turnout Report, S-DX 41; Division of Elections, General Election Results, S-DX 40.[2] Although the Democratic slate of electors won Miami-Dade County by 6% of the votes and won Palm Beach County by 25.25%, the Republican slate won the majority of the remaining 65 Florida counties. Selective

[2] Exhibits and documents in the record will be referred to by the exhibit numbers used in the trial court. Citations to the trial transcript will be cited by volume and page number.

recounts in Miami-Dade and Palm Beach counties alone thus skew the election results in favor of the Democratic slate of electors.

Much like the selective recount of no-votes, the application of disparate standards for judging voter intent from ambiguous ballots will give greater weight to one county's votes. Many counties throughout the state applied far more rigid standards than those applied in Palm Beach County.[3] If the Appellants were allowed to substitute the even more liberal standard that they advocate solely for Palm Beach County, the election results would be further skewed in favor of the Democratic slate of electors.

In this case, the Appellants never sought manual recounts of *all* the ballots in Florida's 67 counties; nor did they seek recounts of the 117,797 Florida no-votes. Instead, they sought to recount selected no-votes, or undervotes, in two counties where the Democratic slate of electors garnered 6% (Miami-Dade) and 25.25% (Palm Beach) more votes than the Republican slate. Complaint, *passim*. The Appellants' own expert, Professor Nicolas Hengartner, testified that determinations of voters' intent resulted in additional "found" votes in proportion to the overall results (with the Republican slate of electors even receiving a slightly greater

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[3] Counties that did no manual recount required all votes to be read by the machines, which meant that the voters had to follow instructions. In Palm Beach County, shifting criteria were used.

percentage). Tr. vol. III at 190-191. Thus, it was especially important for the Appellants to make a prima facia showing of a "reasonable probability" that any similar manual recount of votes in the remaining 65 counties (where the Republicans garnered more votes than the Democrats) would have changed the outcome. Mr. Hengartner admits that the Appellee's attempts to use figures from a 20% manual recount in heavily Democratic precincts and extrapolate to predict the results of a county-wide recount were not in accordance with sound statistical practice. Tr. vol. IV at 40:24-41:16. To extrapolate these figures to predict statewide results would be even more egregious. Judge Sauls correctly found that the Appellants failed to satisfy this burden of proof. In addition, Florida law does not permit an election to be decided by statistical sample.

The court below correctly reasoned that the selective recounting requested by the Appellants is not available under the election contest provisions of section 102.168. Instead, to properly state a cause of action to contest a statewide election:

> the plaintiff would necessarily have to place at issue and seek as a remedy with the attendant burden of proof, a review and recount of all ballots in all the counties in this state with respect to the particular alleged irregularity or inaccuracy in the balloting or counting processes alleged to have occurred.

Bench Op. at 12:21-13:1.

As Judge Sauls further recognized, section 103.011 provides that:

> The Department of State shall certify, as elected, the presidential electors of the candidates for president and vice president who receive the highest number of votes. There is in this type of election one statewide election and one certification. Palm Beach County did not elect any person as a presidential elector, but, rather, the election [was] a winner-take-all proposition, dependent on the statewide vote.

Bench Op. at 13:7-13:15.

Judge Sauls' conclusions are supported by the opinion of Florida's Attorney General, Bob Butterworth, cited in the trial court's opinion. On November 14, 2000, Mr. Butterworth issued a legal opinion requested by the Palm Beach Canvassing Board. In the cover letter to the opinion, the Attorney General opined that as the State's chief legal officer, he had a duty to warn that if a final-certified-election total was based on hand recounts in certain, but not all, counties, it would create a two-tier system causing the State to incur "legal jeopardy, under both the U.S. and State constitutions" that could potentially lead to Florida having all of its votes "disqualified" and being "barred from the Electoral College's selection of a President." S-DX 36, November 14, 2000, Opinion of Robert A. Butterworth,

Florida Attorney General, to the Honorable Charles E. Burton, Chair, Palm Beach County Canvassing Board.

In sum, the only way the Appellants could have successfully brought this contest was by proving that correcting the alleged irregularities or inaccuracies on a statewide basis would have changed the outcome of the election. Judge Sauls correctly found that "[i]n this case, there is no credible statistical evidence, and no other substantial evidence to establish . . . that the results of the statewide election . . . would be different." Bench Op. at 9:12-9:16. His order was well supported by the record and established case law and should be affirmed.

## IV. CONCLUSION

For the reasons expressed, Appellees respectfully request that this Court affirm the order of Judge Sauls.

## V. CERTIFICATE OF FONT SIZE

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

Respectfully submitted,

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