IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC00-2431

On Appeal from the Second Judicial Circuit

CASE NO. 1D00-4745

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,

CASE NO.

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,

Petitioners,

vs.

KATHERINE HARRIS, as SECRETARY OF STATE STATE OF FLORIDA, and SECRETARY OF AGRICULTURE BOB CRAWFORD, SECRETARY OF STATE KATHERINE HARRIS AND L. CLAYTON ROBERTS, DIRECTOR, DIVISION OF

ELECTIONS,
individually and as members of and as THE FLORIDA ELECTIONS CANVASSING COMMISSION,

Respondents.

REPLY TO APPELLEES' "CLARIFICATION OF ARGUMENT"

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REPLY TO APPELLEES' "CLARIFICATION OF ARGUMENT"

Appellants just became aware this morning that Appellees have filed an 11-page "Clarification of Argument" (even though this Court had previously denied the parties' motions for enlarging the page limits of their briefs and the matter was already submitted), changing appellees' position on the issue of jurisdiction and rearguing certain issues on the merits.

As the Chief Justice noted at the oral argument yesterday, neither side raised any question of the Court's jurisdiction in their briefs. Indeed, all parties agreed in their briefs that this Court had jurisdiction. Plaintiffs urged the Court to exercise its jurisdiction; Governor Bush argued that this Court might decline to exercise its jurisdiction; the Secretary of State took no position as to whether or not this Court should exercise its jurisdiction. All parties, however, agreed that this Court had jurisdiction, and that the only issue was whether this case was a matter of great public importance that required immediate resolution.

At the oral argument, counsel for all parties (plaintiffs' counsel and both defendants' counsel) again reiterated their position (and the clear settled law) that this Court has jurisdiction to review the Circuit Court's ruling. We respectfully submit that the conclusion could not be otherwise.

The Legislature clearly intended that Section 102.168 contests generally be subject to judicial review. Nor is there any support for the proposition that Section 102.168 was not intended to apply to Presidential elections as well as other elections. (Again, it could not be otherwise; what legislature would deny the protections of Section 102.168 in the most important election of all – and do so by omission alone?) Nor is it plausible

that the Legislature intended that contests of Presidential elections be decided finally and without any appellate review by the Circuit Court that was assigned the case – again, by omission alone.

ARGUMENT

I. UNDER WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION, THE FLORIDA LEGISLATURE HAS CONFERRED JURISDICTION ON THIS COURT TO REVIEW AN ELECTION CONTEST PROCEEDING.

Under the statutes enacted by the Florida Legislature, the results of this election – and every election – are subject to judicial determination in an election contest proceeding. *See* Section 102.168, Fla. Stat. Subsection (1) of that statute provides that the initial determination is made in a Circuit Court. *See id.* The issue here is whether that proceeding is subject to review here, or anywhere, on appeal. Under the settled law of Florida, which existed before this election occurred and this dispute arose, this Court has appellate jurisdiction over all matters determined in the lower courts *unless the Legislature has expressly precluded such review*. *See, e.g.*, *Leanard v. State*, 760 So. 2d 114, 118 (Fla. 2000) (Legislature will not be presumed to erect jurisdictional bar to appellate review without express statement to that effect; Florida statutes are traditionally construed to preserve judicial review "rather than limiting the subject matter of the appellate courts").

The Florida Constitution (in Florida, unlike in many states, itself an act of the Legislature), provides that this Court has appellate jurisdiction over "***any*** order of judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance." Article V, Section 3(b)(5) (emphasis added). This is also true as an established matter of statutory interpretation of state law, even aside from the Florida Constitution.

"It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero v. Shadywood Villa Homeowners Ass'n*, 657 So. 2d 1193, 1195-96 (Fla. 3d DCA 1995); *State ex rel. Szabo Food Servs. v. Dickinson*, 286 So. 2d 529, 531 (Fla. 1973) (Legislature in re-enacting statutes is presumed to know and adopt the settled construction placed thereon by state tribunals). The Legislature enacted the election contest

statutes against a backdrop of this Court exercising appellate review in legions of cases involving disputes about the proper outcomes of elections. *See, e.g., State v. Peacock*, 125 Fla. 810 (1936); *Farmer v. Carson*, 110 Fla. 245 (1933); *State v. Smith*, 107 Fla. 134 (1932); *State v. Williams*, 97 Fla. 159 (1929). Never before has this settled jurisdiction even been questioned under Florida law.

Because no such express preclusion is contained in the statutes governing contest proceedings, the courts have continued to exercised their accepted authority to exercise appellate review in such cases. *See, e.g., Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998); *Harden v. Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984); *McPherson v. Flynn*, 397 So. 2d 665 (Fla. 1981).

None of these established principles of Florida law applies any differently in election contest proceedings than in any other judicial proceeding. Because the contest statute does not expressly preclude judicial review, this Court has the authority under Florida law to exercise its traditional appellate jurisdiction to decide this matter.

II. SECTION 103.011 DOES NOT PURPORT TO OVERRIDE THE CONTEST PROCEEDINGS ESTABLISHED IN SECTION 102.168.

Appellees argue that somehow Section 103.011, which discusses the selection of Presidential electors, overrides the provisions of Section 102.168, which provides for determination of election contests in all elections, without exception. Appellees base this unique suggestion on the ministerial statute which directs the Secretary of State to certify as elected the Electors of the Presidential candidate "who receive[d] the highest number of votes." Fla. Stat. 103.011 (2000). Yet this ministerial act cannot nullify the presence of the remaining statutes – enacted by the Legislature – which are designed to determine which Presidential candidate did in fact receive the highest number of votes (and therefore, is entitled to the benefit of 103.011).

The single case on which Appellees rely is the Circuit Court opinion in *Fladell v. Florida Elections Canvassing Comm'n*, which has since been vacated by this Court, which expressly held that "the Court's rulings thereon are a nullity." *See Fladell v. Palm Beach County Canvassing Bd.*, Nos. 00-2372 & 00-2376, slip op. at 4 (Fla. Sup. Ct. Dec. 1, 2000). Moreover, by reaching the merits of that case, this Court implicitly concluded that indeed

it *had* jurisdiction over a contest involving the Presidential election.

III. ARTICLE II OF THE U.S. CONSTITUTION DOES NOT PRECLUDE THIS COURT FROM EXERCISING THE JURISDICTION CONFERRED BY THE FLORIDA LEGISLATURE.

The question raised by this Court at oral argument is whether any principles of federal law would preclude this Court from exercising appellate jurisdiction in this matter. The question appears to focus on the possible effects of Article II of the U.S. Constitution, Title 3 of the U.S. Code, and the Supreme Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892). None of these authorities militates for changing established principles of Florida law providing that this Court has the authority to exercise its traditional function of appellate review unless *expressly* precluded by the Legislature, which has not occurred here.

Title 3 of the U.S. Code counsels strongly against subsequent changes in the laws governing the choice of Presidential electors that were in place on the date of the election. The U.S. Supreme Court recently reinforced this point. *See Bush v. Palm Beach County Canvassing Bd.*, No. 00-836, slip op. at 6 (U.S. Dec. 4, 2000). Again, the laws in place at the time of the election here were the statutes governing the contest proceeding, the statutes providing for established appellate review of trial court decisions, and the standard principle of Florida law – a principle of statutory construction – that appellate review is authorized unless *expressly precluded* by the Legislature. *See supra* Section I. Indeed, Title III expressly recognizes and approves the fact that a State Legislature may choose to make "its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures." 3 U.S.C. Sec. 5.

Also, Article II of the U.S. Constitution and *McPherson*, ***do not in any way overturn this Court's appellate jurisdiction in this matter as provided by Florida law***.

Under Article II of the U.S. Constitution, the Florida Legislature has plenary power over the place and manner of choosing Presidential electors, but the Congress has plenary power over the time of choosing the electors. Congress has exercised that power by providing for a uniform Election Day nationwide. *See* 3 U.S.C. 1. Thus, the Legislature has plenary power to provide how electors will be chosen, under the Constitution, but that choice must occur on Election Day. Here the Legislature provided, by laws in

place at the time of the election, that electors are to be determined by popular vote, subject to judicial contest proceedings to determine the actual outcome of that popular vote. Those laws cannot be changed after the election, either by the Legislature purporting now to appoint its own electors, or by this Court or any other court explicitly altering the standard principles of Florida law governing the appellate jurisdiction of the courts.

Given that the laws in place at the time provided for appellate review in this Court unless the Legislature had *expressly precluded* such review, those laws do not run afoul of Article II. This is the law also under *McPherson*. *See* 146 U.S. at 39-40; *see also id.* at 24-26.

Indeed, any change in Florida law that would override the established principle that appellate review lies in the higher courts would itself constitute an impermissible change in Florida's election laws – subsequent to the date of the election – and would raise serious concerns under Title 3 of the U.S. Code.

Appellees' argument that reversing the Circuit Court would somehow change Florida law (and, therefore, implicate federal concerns) rests on the erroneous premise that current Florida law provides that judicial review of ballots is somehow new and must be based on an "abuse of discretion" standard.

Judicial review of contested ballots is a longstanding principle of Florida law. Every witness to address the issue at trial (witnesses for both plaintiffs and defendants) testified that manual recounts of ballots was necessary in close elections. And every time anyone has visually inspected ballots not read by the machines, hundreds of clear votes have been found.

There is, of course, no mention of canvassing board discretion in Section 102.168. In Section 102.166, the only discretion granted the board is whether or not to do a sample recount. Normal statutory interpretation principles dictate that the legislature having expressly provided for discretion in one instance, discretion should not be implied in other instances where the legislature did not provide for discretion.

No case holds that a canvassing board's interpretation of voter intent with respect to a ballot cast is entitled to deference in a subsequent judicial proceeding. The cases previously cited to the Court by plaintiff in fact demonstrate the contrary. Even the *Pullen v. Mulligan* case relied on by the defendants provides for original judicial review of contested ballots (561 N.E.2d at 609, 613, where the Illinois Supreme Court found it was error for the trial court not to "visually inspect" the ballots).

Moreover, with respect to the 9,000 Miami-Dade ballots at issue, there has never been a manual review of those ballots, and hence no

exercise of any “discretion” as to the voters' intent.

It is the position of defendants, not the position of plaintiffs, that would represent a departure from settled Florida law.

IV. APPELLEES' OTHER UNTIMELY MERITS ARGUMENTS MISSTATE THE RECORD.

1. The 215 net votes for Vice President Gore from the manual recount in Palm Beach County was undisputed at trial, as stated in the uncontradicted testimony of Judge Burton (Tr. 278), and the express admission of the Palm Beach County Canvassing Board in its Answer to paragraph 60 of the Complaint. There is no support in the record for defendants' post-trial assertion to the contrary.

2. The Miami-Dade County Canvassing Board stopped its manual recount (less than six hours after voting to count all undervotes) following the physical invasion of its offices by demonstrators and for the sole stated reason that it lacked sufficient time to complete the recount and an incomplete count would disfavor voters in uncounted precincts. As this Court is aware, plaintiffs' longstanding and repeated request (repeatedly opposed by defendants) has been, and is, to count all 9,000 of the remaining undervotes.

3. The only authority cited by defendants in support of the trial court's “reasonable probability” standard in *Smith v. Tynes* (a 1st DCA opinion decided before the present contest statute was adopted, which deals not with whether to judicially review contested ballots but with what evidence is required for a revote when all that is alleged is campaign violations) and *Davies v. Bossert* (a 3rd DCA opinion that does not even use the term “reasonable probability” and is not even an elections case). Plaintiffs have already stated their position as to why the “reasonable probability” standard is inconsistent with the statutory language of Section 102.168(3)(c), inconsistent with settled Florida precedent, and (in any event) cannot apply before ballots placed in evidence are even considered by the Court.

CONCLUSION

Under established principles of Florida law, which are not superseded by any federal law, this Court has appellate jurisdiction over this matter.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF DECEMBER 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, hand delivery or facsimile transmission this 8th day of December, 2000 to the following:

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