IN THE SUPREME COURT OF FLORIDA
CASE NOS.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD	**vs.**	**KATHERINE HARRIS, ET AL.**
VOLUSIA COUNTY	**vs.**	**MICHAEL MCDERMOTT, ET AL.**
FLORIDA DEMOCRATIC PARTY	**vs.**	**MICHAEL MCDERMOTT, ET AL.**

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

AMICUS CURIAE BRIEF OF REPRESENATIVE LOIS FRANKEL, A MEMBER OF THE FLORIDA LEGISLATURE AND THE MINORITY LEADER OF THE FLORIDA HOUSE OF REPRESENTATIVES

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INTRODUCTION

Lois Frankel as a member of the Florida Legislature and as minority leader of the Florida House of Representatives files this amicus curiae brief solely for purposes of clarification regarding the presiding officers' amicus curiae brief filed in this Court.

The rules of the Florida Senate and the Florida House of Representatives permit the intervention in any suit by the presiding officers of these bodies. Those rules are silent, however, regarding as to the representations which must be made concerning the circumstances of the filing.

The circumstances here require disclosure. Both the *amicus curiae* brief filed by the presiding officers in this Court and the *amicus curiae* brief filed in the United States Supreme Court by the presiding officers are as the result of the unilateral decision of the President of the Florida Senate and the Speaker of the Florida House of Representatives. They are not the result of any vote of the Florida Senate or Florida House of Representatives, and as such do not represent the position of the body of the Florida Legislature.

ARGUMENT

I. THE *AMICUS CURIAE* BRIEF FILED BY THE FLORIDA LEGISLATURE WAS NOT ADOPTED BY APPROPRIATE LEGISLATIVE PROCESSES.

The "Brief of the Florida Senate and House of Representatives as *Amici Curiae* in Support of Neither Party" filed in this matter in the United States Supreme Court purported to be a document expressing the views of the Florida Senate and Florida House of Representatives. Additionally, the *Amicus Curiae* brief filed in this Court by counsel representing the President of the Florida Senate and the Speaker of the Florida House of Representatives, as well, purports to be a document expressing the views of the Florida Legislature.

The *Amicus Curiae* brief in fact was authorized, without notice, debate, or approval, by only two of the 160 members of the Florida Senate and House of Representatives.

While the Rules of the Florida Senate and Rules of the Florida House of Representatives do permit in certain limited circumstances the President of the Senate and Speaker of the House of Representatives to "authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit,"

the United States Supreme Court has held that a position taken in litigation by members of a legislative body must not be attributed to the legislative body as a whole unless the body as a whole has specifically authorized its members to take such a position. *Raines v. Byrd*, 521 U.S. 811, 829-30, n. 10 (1997).

In this case, the Florida Legislature at no point authorized the position asserted in the *Amicus Curiae* brief purportedly filed on behalf of the Florida Senate and Florida House of Representatives. The brief was filed in reliance on House and Senate rules that generally authorize, respectively, the Speaker of the House of Representatives and the President of the Senate to retain counsel. But such a general authorization is not equivalent to a decision by the legislative body. *Id.* at 829-30.

The *Amicus* brief purportedly filed on behalf of the Florida Legislature in the case *sub judice* was filed under provisions of rules of the Florida House of Representatives and the Florida Senate, which provide, respectively:

> The Speaker may authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit[1] on behalf of the House, a committee or council

> of the House, a Member of the House (whether in legal capacity of Member or taxpayer), a former Member of the House, or an officer or employee of the House when such suit is determined by the Speaker to be of significant interest to the House and the Speaker believes that the interest of the House would not be otherwise adequately represented. Expenses incurred for legal services in such proceedings may be paid upon approval of the Speaker.

FLA. HOUSE OF REP. R. 2.6(b).

* * *

> The President may authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit[1] on behalf of the Senate, a committee of the Senate, a Member of the Senate (whether in legal capacity of Member or taxpayer), a former Member of the Senate, or an officer or employee of the Senate when such suit is determined by the President to be of significant interest to the Senate and when it is determined by the President that the interest of the Senate would not otherwise be adequately represented. Expenses incurred for legal services in such proceedings may be paid upon approval of the President.

FLA. SENATE R. 1.4.

Under these rule provisions, the Speaker of the Florida House of Representatives and the President of the Florida Senate, without conferring with the whole of the legislative membership, hired counsel to draft the *Amicus* brief filed in this proceeding.

The Florida Constitution creates the Florida Legislature and affirms its operating parameters. Article III of the State Constitution deals with the Legislature and states in part:

> **Section 4. Quorum and procedure.—**
>
> . . . .
>
> (e) The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

FLA. CONST. art. III, § 4.

Thus, it is clear from the Florida Constitution that the Florida Legislature acts through its membership, following appropriate committee meetings, introduction of resolutions or bills,

public input, deliberation by the legislative membership, and final votes on matters of legislative concern.

Instead of following this constitutionally-established process, the House Speaker and Senate President, without introducing an appropriate resolution or bill, without notice, without subjecting same to public testimony, without membership deliberation, and without a vote of the legislative membership, drafted and filed the *Amicus* brief in this Court, representing it as a brief of the Florida Legislature.

The *Amicus* brief forwards an argument that places the Florida Legislature in diametrical opposition to a separate branch of Florida Government. Article II of the Florida Constitution specifies the branches of state government and reiterates that members of one governmental branch shall not exercise the powers of another governmental branch:

> **Section 3. Branches of government. —** The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

FLA. CONST. art. II, § 3.

The *Amicus* brief is of great consequence and impact to the Florida constitutional scheme. The position forwarded by the *Amicus* brief is not a position that should have been taken lightly, and instead should reflect the most somber deliberative effort that could be mustered in the Florida Legislature. But it does not. Instead, the amicus brief was filed by but

two members of the 160-member Florida Legislature, under narrow rules purporting to authorize the filing.

It is important for this Court, in evaluating the weight to be given to the referenced *amicus* brief, to understand that the brief was filed without adherence to the legislative process, and as such it does not bear the hallmarks of legislative action.

II. THE FLORIDA LEGISLATURE HAS ADOPTED LAWS PRIOR TO THE ELECTION IN THE SUBJECT MATTER IN CONFORMANCE WITH FEDERAL LAW.

Federal law provides that the legislature of a state may establish laws enacted prior to the day fixed for appointment of electors for finally determining controversies concerning the appointment of electors. 3 U.S.C. s. 5. Under that section, the Legislature is authorized to provide for determining controversies by "judicial or other methods or procedures . . ." *Id.* If the legislature of a state has done so, and the controversies have been determined at least six days prior to the time set for the meeting of the electors, the electors certified by the state "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution . . . ." *Id.*

In Florida, the Legislature has **prior to the day fixed for appointment of electors** determined the state's method for resolving controversies. It has done so by a judicial procedure established through a duly-enacted law, section 102.168, Florida Statutes. Thus, while the Legislature has "plenary" power to determine the method of resolving the controversies referenced in federal law, it has done so. It has exercised its plenary power.

There is nothing more left for the Legislature to do in this matter.

IV. THE INSTRUCTION OF THE FLORIDA LEGISLATURE TO THE COURT AS TO THE CORRECT APPLICATION OF THE ENACTED LAWS IS IMPROPER UNDER FLORIDA'S SEPARATION OF POWERS DOCTRINE.

In the "MOTION OF THE FLORIDA LEGISLATURE TO PARTICIPATE AS AMICUS CURIAE AND TO FILE A BRIEF," the presiding officers of each house, through their counsel, assert as one of the Legislature's interests:

> The correct application of laws enacted by the Florida Legislature pursuant to its powers under the Constitution of the United States and the Florida Constitution;

In short, what the presiding officers seek to do is to interject the Legislature into the proceedings constitutionally lodged in the judiciary. At least since Marbury v. Madison, it has been the province of the judiciary to determine what the law is.

Florida's separation of powers doctrine is explicit in the Florida Constitution. No person belonging to one branch of government may exercise any power appertaining to the other branches. Art. II, s. 3, Fla. Const. The lawmaking power is explicitly granted to the Florida Legislature in Article III, section 1 of the Florida Constitution, while the judicial power is vested in the Florida Supreme Court and specified subordinate courts of this state by Article V, section 1 of the Florida Constitution. Thus, the power to interpret the law is inherent in the judicial branch, and not the legislative branch. As the Florida Supreme Court so eloquently stated:

> Under our form of government it is the right that each department of government has to execute the powers falling naturally within its orbit when not expressly placed or limited by the existence of a similar power in one of the other departments.

Petition of Florida State Bar Ass'n, et al., 40 So.2d 902 (Fla. 1949). The power to declare what the law is may be exercised only by the judicial and the judiciary alone.

For the presiding officers, on behalf of the Florida Legislature, to instruct the judiciary on the "correct application" of the laws that the Legislature has duly enacted will undermine the doctrine of the separation of powers that is expressly provided in the Florida Constitution. Further, the intercession of the presiding officers on behalf of the Legislature in this matter will have the effect of undermining the confidence of the electorate in the judiciary, as well as the independence with which the judiciary is cloaked in our constitutional system of democratic government.

CONCLUSION

WHEREFORE, Amicus Curiae Senator Thomas E. Rossin respectfully requests that the Court consider his arguments and, for the reasons stated above, to consider that the Amicus Curiae Brief filed by the President of the Florida Senate and the Speaker of the Florida House of Representatives does not represent the view of the Florida Legislature as a legislative body.

Respectfully submitted,

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