IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC00-2372

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ANDRE FLADELL, ET AL., **vs.** **PALM BEACH COUNTY CANVASSING BOARD, ET AL.,**

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APPELLEE BRIEF OF RESPONDENT GEORGE W. BUSH

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STATEMENT OF THE CASE AND FACTS

This appeal arises from two of several complaints filed by electors challenging the legality of the form and design of the "butterfly ballot" utilized in Palm Beach County for the elections conducted on November 7, 2000. The gravaman of the plaintiffs' complaint was that the ballot was laid out in a manner that may have confused voters, and that it did not conform to certain state law requirements.

On November 20, 2000, the Circuit Court elected to bifurcate the issues raised in the pleadings and issued an order addressing, as an initial matter, the legality of ordering a re-vote for President and Vice President as a remedy to any of the plaintiffs' alleged violations of law. The Circuit Court held that it was without legal authority to order a re-vote, and consequently found that it was unnecessary to address the factual issues raised in the plaintiffs' various complaints. Due to the large amount of publicity generated by events in Palm Beach, new cases were constantly being filed, but the Circuit Court's order encompassed all cases known to exist at the time when it was issued.

The Circuit Court first observed that the United States Constitution protects the right of all qualified citizens to vote in state and federal elections. See Order at 4. However, the Court also found as a matter of law that the United States Constitution expressly delegated to the United States Congress the authority to determine the day on which electors for the Office of President and Vice President would be chosen. See Order at 14. As Article II, Section 1, Clause 4 of the United States Constitution provides: "The Congress may determine the time of choosing the electors, and the day on which they shall give their vote; which day shall be the same throughout the United States." In order to fulfill its Constitutional duties, the Circuit

Court found that the United States legislature had passed a "clear and unambiguous" statute providing that, in this case, Tuesday, November 7, 2000 would be the day that the Presidential electors must be appointed in each State. See Order at 5. That statute provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. Section 1.

The Court noticed that other provisions of federal law allow for the state legislature to appoint electors if any State "fail[s] to make a choice on the day proscribed by law," see 3 U.S.C. Section 2, and defer to state "methods . . . for final determination of any controversy or contest concerning the appointment of any and all electors" provided "such a determination [is] made at least six days before the time fixed for the meeting of the electors." See 3 U.S.C. Section 5.

The Circuit Court then addressed the plaintiffs' argument that one state law provision, Section 102.168(8), Florida Statutes, which affords circuit judges the authority to "fashion such orders as he or she deems necessary" to remedy election contests, would allow the Court to order a new election in the event the "electors" were not elected on the appointed day. The plaintiffs urged the Court that this statute was "the mechanism devised by the Florida legislature in response to [the permission granted] in 3 U.S.C. Section 2 to deal with the situations in which Florida `has failed to make a choice on the day prescribed by law.'" Order at 6 (quoting 3 U.S.C. Sec. 2). The Court disagreed.

The Court found that the state legislature had codified the procedures and mechanics for conducting elections for Presidential electors in Section 103.011, Florida Statutes, which provides:

> Electors of President and Vice President known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who received the highest number of votes.

The Circuit Court found this provision to be clear and unambiguous, and that it "conveyed a clear and definite meaning." Order at 8. The Circuit Court then explained:

> The statute is silent as to what should occur in the event Florida fails to choose its electors on the First Tuesday after the First Monday in November. Undoubtedly, if the Florida Legislature intended for Section 102.168 to be the applicable fallback procedural mechanism permitted by Congress, it would have included clear and unambiguous language in Section 103.011 to that effect.

Id. The Court believed that this was especially true given that the legislature had added additional text to the language used in 3 U.S.C. Section 1 when it enacted Section 103.011, thus indicating that the legislature was willing to make express distinctions when it desired to do so.

As additional support for the Court's holding, the Court noted that the legislature would be extremely unlikely to have intended Section 102.168 to be the mechanism for resolving the "controversy" referenced by federal law, given the tight time constraints posed by Congress for a final determination under 3 U.S.C. Section 5. Indeed, as the Court noted "the time limitations included in Section 102.168 do not necessarily coincide with the time constraints of 3 U.S.C. Section 5." Order at 9. Specifically, the provision allowing for 10 days in which

to file a complaint and 10 days in which to file an answer, with a hearing to follow immediately thereafter, made it unlikely that the controversy could be resolved in time to satisfy the statutory requirements.

The Circuit Court also relied on federal preemption to support its holding. The Court stated "the Congressional rule which sets the date of Presidential elections is paramount." Id. relying on *Foster v. Love*, 522 U.S. 67, 68 (1997), which stated that "[t]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative" the Court found that the "time constraints imposed by Section 102.168 potentially conflict with the time constraints imposed by 3 U.S.C. Section 5; consequently, the Florida Legislature could not have intended for Section 102.168 to be the applicable fallback procedural mechanism suggested by Congress." Order at 10.

Finally, the Court stated that it was the "clear and unambiguous intention of the framers of the Constitution of the United States that the presidential elections be held on a single day throughout the United States." Id. The Court reasoned that United States Congress must therefore have envisioned remedies other than a re-election when it referenced mechanisms for resolving disputes in 3 U.S.C. Section 2. See id. Comparing the case to *Foster v. Love*, 522 U.S. 67 (1997), in which the Court struck down a Louisiana open primary system that often resulted in the election of Congressmen and Senators prior to November 7 on the grounds that the state law was preempted by 3 U.S.C. Section 2, the Court found that permitting a re-vote would run afoul of two evils discussed by the Court in that case. See Order at 13. Specifically, a new election posed the risk of unfairly advantaging one of the candidates,

unfairly advantaging the voters of Palm Beach County with respect to other voters, and burdening other voters of Palm Beach County by forcing them to have to vote twice. See Order at 13-14.

On November 20, 2000, plaintiffs in two of the cases filed Notices of Appeal, and this Appeal followed. The District Court of Appeal for the Fourth District elected to pass certification of this matter to this Court as a matter of great public importance, pursuant to Florida Rule of Appellate Procedure 9.125, but not without dissent. Judges Klein and Warner, two of the judges assigned to the three judge panel that were to hear the case, dissented because the relief requested, a revote, was contrary to federal law and because the case was filed in an improper venue. § 102.1685, Fla. Stat. Additionally, Judges Klein and Warner found that, even if a revote were permissible, no revote could occur without all of the voters participating, including those outside Palm Beach County.

SUMMARY OF ARGUMENT

Federal law mandates that the election for the Presidency and Vice Presidency occur on a single day throughout the United States. 3 U.S.C. Section 1. The court below did not abuse its discretion by finding that nothing in Florida or federal law authorizes a Florida circuit court to require a new election or "re-vote" of that race in a particular county. *Foster v. Love*, 522 U.S. 67 (1997). Moreover, this Court should decline to grant discretionary jurisdiction under Article V, Section 3 (b)(5), Florida Constitution. Finally, the cases below were filed in an inappropriate venue.

ARGUMENT

I. THE LOWER TRIBUNAL DID NOT ABUSE ITS DISCRETION IN DETERMINING CLAIMS FOR NEW ELECTION OR RE-VOTE SHOULD BE DENIED.

On appeal in these consolidated cases is an Order issued by the Honorable Judge Jorge Labarga on November 20, 2000. Judge Labarga's Order[1] addressed the bifurcated issue of whether the court could legally permit a re-vote or new election for the Presidency and Vice Presidency of the United States. The Order has been described as a "Final Order" by Appellants in their Notices of Appeal.

The Order has the effect of dismissing the Appellants' claims for a new general election in Palm Beach County, Florida. The abuse of discretion standard of review is applicable to dismissal of a complaint for declaratory judgment. *Laganella v. Boca Grove Golf and Tennis Club Inc., 690 So.2d 705 (Fla. 4th DCA 1997); Arbuzzo v. Haller*, 603 So.2d 1338, 1339 (Fla. 1st DCA 1992). The general standard of review in declaratory judgment actions is set forth in *Williams v. General Insurance Co.*, 468 So.2d 1033, 1034 (Fla. 3rd DCA), *rev. denied*, 476 So.2d 673 (Fla. 1985), where the court stated that "the trial court's decision in a declaratory judgment action is accorded a presumption of correctness."

The lower court did not abuse its discretion. Indeed, the correct decision was rendered. Article II, Section 1, Clause 4 of the United States Constitution provides: "the Congress may determine the time of choosing the electors and the day on which they shall give their vote; which day shall be the same throughout the United States." The United States Congress implemented this power by enacting 3 U.S.C. Section 1;

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[1] The Order was titled "Order on Plaintiffs Complaint for Declaratory, Injunctive and Other Relief arising from Plaintiffs' Claims of Massive Voter Confusion resulting from the use of a 'Butterfly Type' Ballot during the election held on November 7, 2000."

> The electors of President and Vice President shall be appointed, and each state, on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. Section 1.

Thus, the uniform election date for President and Vice President has been established by federal law. The United States Constitution also delegates to the states the ability to regulate the particularities of such elections:

> [t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State of the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.

Article I, Section 4, Clause 1 of the United States Constitution.

The Florida legislature has enacted a statute codifying its procedures for conducting elections, including the date upon which presidential elections shall occur. Section 103.011, Florida Statutes, provides:

> Electors of President and Vice President known as presidential electors, shall be elected in the first Tuesday, after the first Monday in November of each year the number of which is a multiple of four. Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates. The Department of State shall certify as elected as the presidential electors of the candidates for President and Vice President who receive the highest number of votes.

Section 103.011, Florida Statutes is clear and conveys a definite meaning as correctly noted by the court below. The statute sets forth a single date upon which elections must be held. The Florida Supreme Court has found that "the Courts of this State are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of

legislative power." *McLaughlin v. State*, 721 So.2d 1170 (Fla. 1998); See also *Bolden v. State Farm Mut. Auto. Ins. Co.*, 689 So.2d 339 (Fla. 4th DCA 1997).

As importantly, the federal statute which sets the date of the election of presidential elections is controlling. 3 U.S.C. Section 1. As noted by the United States Supreme Court in *Foster v. Love*, 522 U.S. 67, 68 (1997), "[t]he regulations made by Congress are paramount to those made by the State Legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." See also, Article VI, Clause 2, U.S. Const. (Supremacy Clause); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). So, the time constraints of 3 U.S.C. Section 1, must control.

In *Foster*, the United States Supreme Court addressed a Louisiana primary election system which allowed for congressional candidates to be elected on a date other than that date prescribed by Congress in 2 U.S.C. Sections 2,7, statutory requirements much like the presidential one found at 3 U.S.C. Section 1. *Foster*, 522 U.S. at 69-70. The Louisiana "open primary" allowed elections of candidates in October, rather than in November. The race allowed for all members of all parties to vote for all candidates with any majority winner claiming title to the congressional seat.

The Supreme Court found that this scheme violated federal law. Although the time, place and manner of holding elections for senators and representatives may be prescribed by a state, the Congress may alter such regulations. Article I, Section 4, Clause 1, U.S. Const. Article II, Section 1, of the United States Constitution set the date of elections for the Executive Branch. In *Foster*, the Supreme Court affirmed the mandate that all federal candidates, including presidential candidates, be voted in elections occurring on a single day:

> ...Title 2 U.S.C. Section 7 was originally enacted in 1872, and now provides that "the Tuesday next after the first Monday in November in every even numbered year, is established as the day for the election, in each of the States and territories of the United States, of representatives and delegates to the congress commencing on the third day of January next thereafter." This provision, along with 2 U.S.C. Section 1 (setting the same rule for electing Senators under the 17th Amendment) and 3 U.S.C. Section 1 (doing the same for selecting Presidential electors), mandates holding all elections for Congress and the Presidency on a single day throughout the Union.

Foster, 522 U.S. at 69-70. Thus, The Supreme Court found that the "day" of the election was mandated by federal statutes. States had only the right to regulate the time of the election. *Foster*, 522 U.S. at 70. Under that ruling, no new vote or "re-vote" is contemplated under the U.S. Constitution or permitted under federal law.

Plaintiffs below argue that a federal law allowing for run-off elections created an exception to the federal requirement of a single election on a single day. Cf. 3 U.S.C. Section 2 with corresponding language found in 2 U.S.C. Section 8, and addressed in *Foster*, 522 U.S. at 72, n. 3. Judge Labarga correctly found, however, that the intention of Congress to require presidential elections on a specific day foreclosed any new window Appellants would allege are created by run-off elections. As the Court in *Foster* found:

> While the conclusion that Louisiana's open primary system conflicts with 2 U.S.C. Section 7 does not depend on discerning the intent behind the federal statute, our judgment is buttressed by an appreciation of Congress's object "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough*, 110 U.S. 651, 661, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1984). As a sponsor of the original bill put it, Congress was concerned both with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of federal officers and Presidential elections years.

Foster, 344 U.S. at 73.

Finally, the Florida Supreme Court noted in *Palm Beach County Canvassing Board v. Katherine Harris, etc., et al.*, 2000 WL 1725434 (Fla. 2000)(slip opinion), the urgency with which disputes over election results must be dispatched. This urgency stems in part from a desire to avoid the rejection of returns because their inclusion will preclude Florida voters from participating fully in the federal electoral process. *Id*., at p. 15. Certainly, no provision is made in Florida or Federal law which would allow for a re-vote or new election. Additionally, based on the standard set forth by the Florida Supreme Court, such new elections may have the effect of precluding Florida's voters from participating fully in the electoral process. Thus, re-votes cannot be permitted under the standard set forth by the Florida Supreme Court.

II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION UNDER ARTICLE V, SECTION 3 (b)(5), FLORIDA CONSTITUTION.

Article V, Section 3 (b)(5) of the Florida Constitution provides that this Court may review a decision of a District Court of Appeal certified by the District Court to be "of great public importance," or "to have a great effect on the proper administration of justice throughout the state," and certified to require immediate resolution by this Court. The lower court certified the matter as being one of great public importance requiring immediate resolution. In fact, the issues in the case fail to satisfy either of the two required elements. This Court has held that cases involving questions of great public importance are those "in which the public may have an intense concern growing out of private litigation." *Lake v. Lake*, 103 So.2d 639 (Fla. 1958). This case involves a challenge to the form of a ballot used in

some, but not all, Florida counties. Palm Beach County is the only one in which the ballot form has been challenged. Consequently, a decision in this case regarding the ballot form would affect no voters outside of Palm Beach County and there is no reason to assume that the issue would arise again in the future.[2] In essence then, the issue is a purely local one that has attracted the attention of a hand full of challenging voters in a single county.

The matter also fails to satisfy the requirement that it be a matter requiring immediate resolution. In it's recent opinion in *Palm Beach County Canvassing Board v. Harris*, 2000 WL 1725434 (Fla. November 21, 2000), the Court recognized the December 12, 2000 deadline date for the submission of Florida's presidential electors. The relief that was requested in the case at bar and denied by the trial court was a new election in Palm Beach County for presidential electors. Because the Court found that it was out of their authority to provide such relief and declined to hold an evidentiary hearing, no discovery was ever commenced in the case. It is clearly impracticable for the parties to conduct discovery, the Court to conduct a trial, and the county to conduct an election in sufficient time to meet the December 12, 2000 deadline. Consequently, even assuming that the issue would not be moot, there would be no urgency sufficient to justify this Court assuming jurisdiction without intervening consideration by the District Court of Appeal.

III. THE CASES BELOW WERE FILED IN AN INAPPROPRIATE VENUE.

In *Rogers v. The Elections Canvassing Commission of the State of Florida, et al.*, (Fla. 15th Cir. Ct. 2000)(Lower Case. No. CL 0010992), the State Elections Canvassing

[2] There is no prior challenge, at least that has reached the Appellate level, involving the same ballot. Moreover, in light of unrelated issues involving this particular ballot form, there is good reason to believe that we will not be seeing a similar ballot form used in future elections.

Commission, Governor Jeb Bush, Secretary of State Katherine Harris, and Director of the State Division of Elections Clay Roberts are named as defendants, as they were in other cases now consolidated before this court. The State Elections Canvassing Commission, charged with the duty to ultimately certify state-wide elections, is composed of the Governor, the Secretary of State, and the Director of the State Division of Elections pursuant to Section 102.111, Florida Statutes.

The principal headquarters of the offices of State Elections Canvassing Commission, the Governor, the Secretary of State, or the Director of the State Division of the Division of Elections, is Leon County, Florida.§§14.01, 15.01, 20.10, Fla. Stat. The exclusive venue for filing an action against such officers is Leon County. It has long been the established common law of Florida that venue in civil actions brought against the state or one of its subdivisions, absent waiver or exception, properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters. *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362, 363-64 (Fla. 1978.) Such a rule promotes orderly and uniform handling of state litigation and helps to minimize expenditure of public funds and manpower. *Id*.

Additionally, as correctly noted in the dissenting opinion below, venue is addressed in a governing statute:

> Venue.- The venue for contesting a nomination or election or the results of a referendum shall be in the county in which the contestant qualified or in the county in which the question was submitted for referendum or, *if the election or referendum covered more than one county, then in Leon County*. (Emphasis added).

§102.1685, Fla. Stat.

Because the election for the United States Presidency was state-wide, the case below should have been filed in Leon County, Florida so that it could be treated in a manner consistent with other suits to contest the election.

CONCLUSION

Respondent, George W. Bush urges this Court to affirm the decision of the lower tribunal.

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