SUPREME COURT OF FLORIDA

CASE NOS.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD	vs.	KATHERINE HARRIS, ETC., ET AL.,
VOLUSIA COUNTY CANVASSING BOARD	vs.	MICHAEL MCDERMOTT, ET AL.,
FLORIDA DEMOCRATIC PARTY	vs.	MICHAEL MCDERMOTT, ET AL.
Petitioners/Appellants		Respondents/Appellees

APPELLANTS'/PETITIONERS' BRIEF ON REMAND

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INTRODUCTION The United States Supreme Court has issued a decision declining to review the federal questions asserted to be presented in this case, vacating this Court's prior judgment, and remanding for clarification on two specific points. In doing so, it applied the same procedures followed in *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). On remand in that case, the Minnesota Supreme Court properly decided to "examine anew the issues we thought had been determined in our prior opinion …. Having so re-examined them, we conclude that our prior decision was right," whereupon that court reinstated the judgments that the U.S. Supreme Court had vacated. *National Tea Co. v. State*, 294 N.W. 230, 231 (Minn. 1940).

The same resolution is justified here. Notwithstanding respondents' overwrought claims to the contrary, this Court's prior decision was correct, and relied on traditional canons of statutory construction and established principles for reviewing whether an official has abused her discretion. This Court should enter an Order clarifying its decision in this respect. In addition, it should clarify that its ruling did not trigger the concerns of 3 U.S.C. §5, because it did not "change the rules of the game" when it interpreted and applied Florida statutes. To the contrary, this Court's decision was (as the Court noted) compelled by settled Florida law.

Moreover, while any *other* result would have raised a concern under 3 U.S.C. §5, the actual result here did not. (In fact, this Court's decision was

expressly intended to maintain Florida's ability to comply with the timeline established for utilizing the "safe harbor" provided by federal law.) Once having addressed these points, this Court should reinstate the judgment vacated by the U.S. Supreme Court in this case. *See, e.g., National Tea Co., supra,* at 231 (reinstating the vacated judgments), *on remand from Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

STATEMENT OF THE CASE AND FACTS

The United States Supreme Court has remanded this case for clarification of the basis of the decision and the relief ordered by this Court in *Palm Beach County Canvassing Board v. Harris*, Florida Supreme Court Case Nos. SC00-2346, SC00-2348 and SC00-2349 (Nov 21, 2000). The U.S. Supreme Court's Per Curiam Opinion concluded:

> Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl.2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U.S.C. §5. The judgment of the Supreme Court of Florida is therefore vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Bush v. Palm Beach County Canvassing Board, No. 00-836, at 7 (December 4, 2000).

SUMMARY OF ARGUMENT

Providing the requested clarification is a straightforward matter. This Court did not rely dispositively upon the Florida Constitution when reconciling the conflicting provisions of Sections 102.111, 102.112 and 102.166 of the State's Election Code. Instead, it issued an opinion applying traditional canons of statutory construction governing interpretation of Florida statutes – nothing more, nothing less.

The Court's ruling on the limits of a state governmental official's discretion interpreting and applying state law within the limits set by the Florida legislature was also unexceptional. The Court resolved the issue of whether a member of this State's Executive Branch had abused her authority in a manner and using decisional rules that would be unremarkable in a different context.

Most importantly, this Court did not – as the U.S. Supreme Court worried – rely upon the Florida Constitution to circumscribe the Legislature's authority to establish a method for the selection of electors, under the U.S. Constitution. This Court's discussion of the Florida Constitution merely confirmed that its statutory interpretation was consistent with the principles of that Constitution. In no way was the Legislature's power under Article II of the U.S. Constitution constrained by application of the Florida Constitution here; far from thwarting the Legislature's statutory design, all that this Court did was play its traditional part in implementing that design.

Moreover, nothing in this Court's opinion put Florida in jeopardy of losing the "safe harbor" of 3 U.S.C. §5. Thus, the Court's decision, which only applied "the

rules of the game," was not any sort of "change" in those rules "after the fact."

As a result, this Court should clarify its earlier decision; make it plain that that decision rested on Florida's statutes and case law; and reinstate its judgment in favor of petitioners.

ARGUMENT

A. This Court Employed Only Traditional Canons of Statutory Interpretation in Reconciling Conflicting State Statutes

The Court's opinion first held that the plain language of section 102.166(5) authorized local canvassing boards to conduct manual recounts of ballots. *Harris* at pp. 14. This Court then took on the difficult task of reconciling several statutes that did not neatly mesh. In doing so, this Court applied long established principles of statutory construction to reconcile facially conflicting statutory provisions, in order to give maximum effect to each, and to honor the Legislature's intent. First, this Court was faced with two statutes, one saying "shall" and a later one saying "may."[1] *Harris, supra,* at 22-24, 27-29. Second, this Court was faced with a recently

[1] During the trial court's hearing, the Secretary of State conceded that section 102.112, Florida Statutes, "is a later expression of the legislature, it, in effect has repealed the earlier statute [102.111, Florida Statutes]." *McDermott et al. v. Harris, et al.*, Case No. 00-2700 (Fla. 2nd Jud. Cir. Ct.), T.36, Nov. 13, 2000, hearing .

enacted statute, section 102.166, creating a right to protest election results and an opportunity to have ballots manually counted that created windows of time when the right could be exercised. *Harris, supra*, at 18-22, 24-27. That statute, as well as section 102.112, would have been rendered meaningless by the interpretations of sections 102.111 and 102.112 urged by Governor Bush and Secretary of State Harris. And third, the Court faced competing deadlines for "county returns" and "official returns." *Harris, supra*, at 29.

The Court found the statutes ambiguous and conflicting. *Harris, supra*, at pp. 18-24. Like courts everywhere, this Court resorted to traditional principles of statutory construction – principles that give statutes meaning, force, and effect without reliance on the Constitution or other extraordinary texts. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" of Internal Revenue Code); *Sanderson v. United States*, 210 U.S. 165, 175-76 (1908) (interpreting statute for granting of new trial motions as allowing for extension of the time to grant such motions.) Citing opinions of Florida cases, it applied four longstanding canons of statutory construction. They were:

- Where two statutory provisions conflict, the specific controls the general;
- Where two statutory provisions conflict, the more recently enacted controls the earlier;
- A statute should not be construed in a way that renders other statutes

meaningless or absurd;

- Related statutory provisions creating an overall scheme of regulation must be construed as a cohesive whole.

Applying these principles, this Court concluded that the Division of Elections had the authority to accept returns certified after 5:00 PM. on the 7th day following the general election. This construction was important, among other things, to give meaning to the protest procedure *created by the Legislature,* the opportunity for manual counts *created by the Legislature* in Section 102.166, as well as give meaning to the requirement of section 101.5614(8), *created by the Legislature*, that the official returns of a Canvassing Board must include write-in, absentee, and manually counted votes. In this way, the Court's decision was no effort to thwart the Legislature's statutory design, but rather, to give that design force and effect in application.

In the end, this Court's decision, as the U.S. Supreme Court suggested, "construed the Florida Election Code," *Bush, supra,* at 5 – nothing more or less. Its references to broader principles, including the Florida Constitution (*see Section C, infra*), in engaging in that exercise in statutory interpretation was neither exceptional, nor a departure from existing law.[2]

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[2] It appears that, under the direction of the Republican leadership of that body, the Florida legislature may be filing a brief in this proceeding. *See* Motion of the Florida Legislature to Participate as Amicus Curiae, *Palm*

Nor did the Court's statutory decision announce any new legal principles. In concluding that Canvassing Board returns would be accepted after the seventh day after an election, the Court noted, *see Harris* at 36-37, that its decision was based on a comparable ruling in *Chapell v. Martinez*, 536 So. 2d 1007 (Fla. 1998). In *Chapell*, a Board certification received late, but phoned in earlier, was reviewed. This Court held in *Chapell* that late filed returns could be ignored only if a "compelling reason" existed to do so. *Chapell, supra*, 536 So.2d at 1009. Likewise, this Court rejected appellees argument below that the returns submitted after the seventh day should be ignored because the Boards had not be diligent in conducting their manual counts. *Harris*, at 33. This, too, was not a new legal principle. As this Court noted, Harris, at 33 n. 54, it had held in *Boardman v. Esteva*, 323 So.2d 259, 268-69 (Fla. 1975), that when voters "have done all that the statute has required them to do, they will not be disenfranchised solely on the basis of the failure of the election

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Beach County Canvassing Board v. Harris, No. SC00-2346. Should this Court decide to accept such a filing, petitioners note that the views of a contemporary legislature – let alone a portion of that legislature -- are not entitled to any deference as to the meaning of statute enacted in 1951 (102.111) or 1989 (102.112).

officials." *See also Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720, 726 (Fla. 1998).

To summarize, for more than 100 years, in construing election statutes, it has "consistently adhered to the principle that the will of the people is the paramount consideration." *Harris*, at 9. *See State v. Barber*, 198 So. 49, 51 (Fla. 1940); *Boardman*, *supra*, at 269.

B. This Court's Finding of an Abuse of Discretion by the Secretary of State Was Based on Traditional Principles of Adjudication

The Court's subsequent holding, pursuant to the statutes that it interpreted – that Secretary of State Harris abused her discretion in refusing to accept election returns, even where the Canvassing Boards offered substantial reasons for the time they were taking to complete their tabulations – was unexceptional as an application of state law and Florida precedents.

Specifically, after harmonizing and interpreting the statutes under state law, *see Harris* at 34, the Court then turned to the task of determining if Secretary Harris's decision -- that returns filed after seven days would not be accepted, barring peculiar circumstances not present here – was consistent with Section 102.166 of the Election Code. Fla. Stat. 102.166 (2000)

The case came before this Court with a record. That record established the following without dispute:

- On November 13, 2000, the Secretary of State advised that all Canvassing Boards had to provide certified returns by 5:00 p.m. on November 14, 2000, seven days after the election, or they would be rejected. (Court's Exhibit 3; R-273, Notice of Third Supplemental Filing, Ex. A)
- Below, the Circuit Court for Leon County had issued an injunction stating that Secretary Harris' actions were contrary to law, and that the Secretary could not arbitrarily ignore returns filed after November 14th. (R-41-48)

- While that injunction was in force, several County Canvassing Boards sent Secretary Harris letters advising that they were manually counting ballots pursuant to section 102.166 and wished to submit certified results after November 14 that included the results of those manual counts. (R-273, Notice of Third Supplemental Filing, Ex. G)[1] Those letters identified the time required for a hand count, large voter turnout, large populations, logistical problems, litigation delays, conflicting opinions of the Secretary and the Attorney General, and the time required for a mandatory machine recount as reasons for accepting their returns after November 14.

- Secretary Harris peremptorily rejected all requests. (R-273, Notice of Third Supplemental Filing, Ex. H) She chose to judge each request by the standards established for judicial contests of elections in section 102.168, Florida Statutes (2000). She determined that only fraud, machine malfunction or acts of God would cause acceptance of certified returns after November 14, 2000.
- This Court found that those rejections applied the wrong legal standard and were therefore abuses of discretion:

> [W]e conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial

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[1] This is the exhibit Mr. Boies referred to during rebuttal in response to the Court's question about record evidence.

> and personal and are levied on each member of a board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but rather the county's electors, for it in effect disenfranchises them.
>
> Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Harris at pp. 33-34. Thus, far from reaching an extraordinary or unusual conclusion, this Court performed one of its most traditional functions under Florida law: determining whether an official of the State's Executive Branch exceeded her authority when exercising her discretion under state statutes – a determination made against a backdrop of a prior judicial determination that a prior proposed exercise of that discretion was contrary to law.

C. This Court Did Not Impermissibly Rely on the Florida Constitution in Rendering Its Decision

This Court's brief reference to, and discussion of, the Florida Constitution in its decision does not suggest that it used that Constitution to impermissibly constrain the power of the legislature of Florida, under Article II of the U.S. Constitution, to establish a procedure to select Florida's electors on the day prescribed by Congress. *See* U.S. Const., Art. II, Section 1, Cl. 2; U.S. Const. Art. II, Section 1, Cl. 4.

Indeed, the Court's analytical references to the Florida Constitution – contained in just three pages of its 40 page opinion, *see Harris*, at 30-31, 38 – merely stand for the unexceptional proposition that, as a matter of statutory construction, this State's laws should be interpreted in light of the fundamental principle that the basic right to vote is treasured and valued in this State. As one Justice of the U.S. Supreme Court suggested at Argument:

> "[S]uppose the [Florida Supreme] court had said, look, we reach our result based on the canons we found in Blackstone. Now, nobody is going to say they said 'Blackstone is selecting the electors'….
>
> "I suppose they said, we reached this decision based on the values found in the Constitution. That would be like Blackstone." *Bush*, *supra*, Trans. of Oral. Arg., at 57-58.

Making brief references to, and a few citations of, the Florida Constitution as an interpretative guide does not change the fundamental nature of this Court's decision: it was an exercise in statutory construction, plain and simple.

Moreover, while this Court did say that legislative enactments were valid only "if they impose[d] no 'unreasonable or unnecessary' constraints on the right of suffrage," *Harris*, at 31, it did NOT go on to employ that dictum to hold any

specific legislative enactment invalid here under the Florida Constitution, or to constrain in any way the Florida legislature's powers under Article II of the U.S. Constitution.[2] It did not find that the Florida Constitution limited or invalidated the exercise of legislative authority *in this case*. The Court also did not rely on the Florida Constitution as legal support for imposing restrictions on the legislature *in this case*. It simply used the values embodied in the Florida Constitution as one of several guides that confirmed that its statutory interpretation to bring order to an ambiguous and conflicting quilt of statutes *in this case* was consistent with those values.

The Court's decision cites the Florida Constitution only once more in its analysis: suggesting that the importance of that Constitution's "right to vote" confirmed its decision as to whether the Secretary's exercise of her discretion was reasonable. *Harris*, at 38. As an initial matter, it is hard to see how – even if this passage meant that the Florida Constitution was being invoked to limit the Executive Branch's actions here – this would implicate in any way the discretion vested in the Legislative Branch under Article II of the U.S. Constitution. Whatever Article II's grant of power means, surely it does not mean that the Secretary of State of the State

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[2] That is not to suggest that there may not be limits, under the U.S. Constitution, federal law, or the Florida Constitution, on the State Legislature's exercise of this power. Rather, it is to suggest only that such limits were not at issue here, and certainly not imposed by this Court when it gave force and effect to the Legislature's enactments through its interpretation of conflicting statutes.

of Florida – an official of this State's Executive, not Legislative Branch -- has had her exercise of discretion insulated from judicial review.

Moreover, in the end, the brief citation to the Florida Constitution was not dispositive in constraining Secretary Harris' discretion. Rather, this Court made it clear it was constraining her discretion on two bases: first, to preserve the Florida Legislature's statutory design for a contest action, found in 102.168; and second, to protect Florida's role in the federal electoral process. *Harris*, at 38. The reliance on these touchstones did not run afoul of any federal principle found in Article II of the U.S. Constitution; the Court held only that the Secretary of State cannot use her authority unreasonably to limit the legislatively created rights to protest and contest elections.

D. This Court's Remedy Was Consistent with 3 U.S.C. §5

Having harmonized and construed the statutes, and having found the record demonstrated that the Secretary abused her discretion in interpreting and applying the statutes, this Court then turned to the task of crafting the proper remedy. Here the Court took great care to protect the Legislature's authority to provide the method for selecting electors. Indeed, it had already done that by construing and applying the statutes: these statutes are, after all, the Legislature's work.

In crafting the remedy, this Court assumed that the Legislature did intend to take advantage of the "safe harbor" established by 3 U.S.C. § 5. Though not relying on

that statute directly in reaching its determination under State law, its ruling was respectful of the presence of that statute, in two respects:

- First, the presence of the deadline created by 3 U.S.C. §5 guided the Court when it established the November 26th deadline for submitting amended certifications of manual recounts;
- And second, this Court did not, in any event, make a "change" in Florida's Election Code that might trigger concern under the "safe harbor" provision.

With regard to the first of these considerations, the November 26th deadline recognized the tight schedule in a Presidential election imposed by a state's desire to take advantage of the protections of 3 U.S.C. § 5. *Harris* at 33, n. 55. Indeed, the whole purpose of this Court's decision was to make certain that Florida would be able to take advantage of the safe harbor embodied in 3 U.S.C. § 5.

With regard to the second of these considerations, far from "changing the rules in the middle of the game," as respondents have suggested, this Court's decision was an effort to "apply the rules" so as to insure that the "game" was being conducted fairly under the rules that were in effect at the time of the November 7th election. One of the critical elements of the structure of these rules was that a "referee" is present to make sure that they are fairly applied: that "referee" is this State's judiciary -- ultimately, this Court.

In its decision in this case, this Court was doing nothing more than that: acting as a referee – not rewriting the rules. As the U.S. Supreme Court has previously held, when a court "construes a statute, it is explaining its

understanding of what the statute has meant continuously since the date when it became law … Thus, it is not accurate to say that the … court's decision … 'changed' the law that previously prevailed." *See Rivers v. Railway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994).

CONCLUSIONS

For the reasons presented above, this Court should enter an Order stating that, having reconsidered its decision in light of the Supreme Court's ruling, that the decision was correct and will be upheld. This Court need only issue a brief opinion responding to the Supreme Court's request for clarification on two points, which can be addressed as follows:

1. This Court should clarify that it merely interpreted Florida's election code under traditional canons of statutory construction. It did not find that the Florida Constitution circumscribed the Legislature's authority with respect to the selection of electors, and, in particular, did not find that the Florida Constitution altered or invalidated those laws in any respect. Likewise, it applied only established principles of state law in holding that the Secretary of State abused her discretion in this case;
2. This Court should clarify that the federal statute referenced by the U.S. Supreme Court -- 3 U.S.C. §5 -- was not transgressed here, because this Court's opinion merely construed and applied Florida's election laws, and did not constitute a change in those laws, while at the same time it maintained Florida's ability to comply with the "safe harbor" established in federal law;
3. Having addressed these points, this Court should issue an Order reinstating its prior judgment vacated by the U.S. Supreme Court. *See, e.g., National Tea Co. v. State*, 294 N.W. 230, 231 (Minn. 1940) (reinstating the vacated judgment), *on remand from Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *cf. Bush, supra,* at 6 (citing *National Tea Co.*).

Respectfully submitted this _____ day of December, 2000.

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