No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH AND RICHARD CHENEY,
Petitioners,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT JOHN E. THRASHER IN SUPPORT OF PETITIONERS

GEORGE S. LEMIEUX*
ROBERT S. HACKLEMAN
GUNSTER, YOAKLEY & STEWART, P.A.
500 East Broward Blvd., Ste. 1400
Fort Lauderdale, Florida 33394
(954) 462-2000

W. ROBERT VEZINA, III
FREDERICK J. SPRINGER
VEZINA, LAWRENCE & PISCITELLI, P.A.
318 North Calhoun Street
Tallahassee, Florida 32301
(850) 224-6205

*Counsel of Record

Counsel for Respondent

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SUMMARY OF ARGUMENT

The Florida Supreme Court's actions stand in direct violation of this Court's Order in *George W. Bush v. Palm Beach County Canvassing Board*, dated December 4, 2000, which "vacated" the Supreme Court of Florida's November 21, 2000 decision. First, the Florida Supreme Court disobeyed this Court's Order by continuing to regard its vacated decision as binding precedent. In the case under review, the Florida Supreme Court reversed the lower court, in part, for failing to follow the Florida Supreme Court's vacated decision. Second, the Florida Supreme Court violated this Court's remand "for further proceedings not inconsistent with this opinion" by misconstruing Section 102.168, Florida Statutes (2000), to apply to presidential elections.

This violated the express intent of the Florida Legislature, in the exercise of its plenary authority under Article II, Section II, Clause 2 of the United States Constitution. Third, the Florida Supreme Court allowed parties without standing to bring a Section 102.168 contest claim. Finally, assuming Section 102.168 applies to a presidential election, the Florida Supreme Court declined to recognize the successful presidential electors as indispensable parties, in violation of Sections 102.168 (4) and 103.011, Florida Statutes.

John E. Thrasher, a certified presidential elector, intervened and sought dismissal on these grounds in the trial court, also raising these grounds before the Florida Supreme Court. However, the Florida Supreme Court declined, in footnote 7 of its December 8, 2000 opinion, to rule upon these critical, constitutional issues, which were timely raised by Thrasher, allegedly because Bush, a separate party, neglected to timely raise them until too late in the day.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA VIOLATED THIS COURT'S DECISION IN *GEORGE W. BUSH V. PALM BEACH COUNTY CANVASSING BOARD.*

In its December 8, 2000 decision in *Albert Gore, Jr. v. Palm Beach County Canvassing Board,* the Supreme Court of Florida overstepped its authority by violating the United States Constitution, the federal statutes governing presidential electors and this Court's order. This Court, in its December 4, 2000 decision in *George W. Bush v. Palm Beach County Canvassing Board*, vacated the Supreme Court of Florida's November 21, 2000 decision, stating:

> 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 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.*

George W. Bush v. Palm Beach County Canvassing Board, 2000 WL 1769436, *3 (emphasis added).

Following the entry of this Court's December 4, 2000 Order remanding the case to the Florida Supreme Court, that court elected *not* to conduct further proceedings and *not* to render a further opinion. The decision not to render a further opinion has important legal and practical consequences. On the one hand, it leaves undisturbed the Circuit Court judge's decision in *McDermott v. Harris,* No. 00-2700, unpublished order at 7 (Fla. 2d. Cir. Ct. Nov. 17, 2000) (upholding Secretary Katherine Harris' discretion in declining to certify late returns). On the other hand, all actions taken pursuant to that now vacated decision are without any legal effect, including the manual recounts undertaken at the Florida Supreme Court's direction in Miami-Dade, Broward, and Palm Beach Counties, Florida. Thus, Secretary of State Harris' initial decision under Section 102.112, Florida Statutes (2000), not to accept late returns, remains in full force and effect.

Rather than clarify its vacated decision as directed by this Court, the Florida Supreme Court elected to selectively treat portions of that nullified decision as good law. This is explicitly demonstrated by the Florida Supreme Court's reversal of Judge N. Sanders Sauls' decision not to include the belated Palm Beach County returns. In reversing Judge Sauls, the Florida Supreme Court relied on its vacated holding in *Palm Beach County Canvassing Board v. Harris,* No. 00-2346, 2000 WL 1725434 (Fla. Nov. 21, 2000), which extended the certification deadline to November 26, 2000, and prohibited the Secretary of State from exercising her discretion to decline the filing of late returns, unless it would effectively prevent an election contest or endanger the votes

of the Florida presidential electors. The Florida Supreme Court's reliance on its vacated decision to reverse Judge Sauls is made plain from a reading of the following excerpt:

> The circuit court concluded as to Palm Beach County that there was not any "authority to include any returns submitted past the deadline established by the Florida Supreme Court in this election." This conclusion is erroneous as a matter of law. The deadline of November 26, 2000, at 5 p.m. was established in order to allow maximum time for contests pursuant to section 102.168. The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the Election Canvassing Commission's certification of the results of a recount of less than all of a county's ballots. In that same decision we held that all returns must be considered unless their filing would effectively prevent an election contest from being conducted or endanger the counting of Florida's electors in the presidential election.

Albert Gore, Jr. v. Katherine Harris, 2000 WL 1800752 (Fla. Dec. 8, 2000).[1]

Moreover, the implicit foundation of the Florida Supreme Court's decision now rests upon unsupported reference to "essential principles" and the "essence of the structure of our democratic society." *Id.* This is nothing more than an end-run attempt around this Court's admonition that state courts not make "ambiguous or obscure adjudications" which fail to account for the direct constitutional grant to the state legis-

[1] This may well represent the first occasion in the judicial history of the United States that a trial court judge was reversed by a state supreme court, "as a matter of law", for failing to follow a decision vacated by the United States Supreme Court.

latures under Art. II, § 1, cl. 2, of the United States Constitution.[2]

Disregarding this Court's decision in *George W. Bush v. Palm Beach County Canvassing Board*, the Florida Supreme Court has improperly legislated what may amount to a statewide manual recount just days before the safe harbor provision of 3 U.S.C. § 15 requires the meeting of the presidential electors. Florida's electoral vote is now jeopardized by a standardless recount that fails to make, as Chief Justice Wells stated in his dissent, any provision for:

> (1) the qualifications of those who count; (2) what standards are used in the count—are they the same standards for all ballots statewide or a continuation of a county-by-county constitutionally suspect standards; (3) who is to observe the count; (4) how one objects to the count; (5) who is entitled to object to the count; (6) whether a person may object to a count; (7) the possible lack of personnel to conduct the count; (8) the fatigue of the counters; and (9) the effect of the differing intra-county standards.

Albert Gore, Jr. v. Katherine Harris, 2000 WL 1800752 (Wells, C.J., dissenting).

As the Florida Supreme Court ignored this Court's order vacating the Florida Supreme Court's prior opinion, this Court should now reverse and vacate the Florida Supreme Court's opinion requiring a manual recount.

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[2] These ambiguous and obscure adjudications are similar to the Florida Supreme Court's statement that legislative enactments are only valid "if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage", which this Court at minimum disfavored and at worst rejected in its December 4, 2000 opinion. *See id.* at 3.

II. FLORIDA'S SCHEME FOR ELECTING PRESIDENTIAL ELECTORS DOES NOT PERMIT GORE'S ELECTION CONTEST.

As Thrasher argued below in the Florida Supreme Court, Vice President Gore's ("Gore") election contest is an action by the wrong party, seeking relief under the wrong statute, brought against the wrong defendants. Voters in this country do not directly elect the President and Vice-President of the United States. Instead, under Article II, section 1, clause 2 of the United States Constitution, the Florida Legislature has exclusive authority to determine the method and manner of nominating presidential electors for each political party. *See* § 103.021(1), Florida Statutes (2000) (codifying the method and manner by which presidential electors are selected in Florida). Once a slate of presidential electors for each political party has been nominated in accordance with Florida's statutory scheme, each voter of the State of Florida then votes at the general election for one of the political party's slate of presidential electors. *See* § 103.011, Florida Statutes (2000). The slate of presidential electors receiving the plurality of Florida's popular vote then, in turn, vote for the Presidential and Vice-Presidential candidates themselves at a meeting of presidential electors on December 18, 2000. *See id.*

In this case, prior to the election, the Governor of the State of Florida nominated and certified to the Secretary of State competing slates of presidential electors for the Republican Party of Florida and the Florida Democratic Party, as well as other political parties. *See* § 103.021(1), Florida Statutes (2000). The names of the candidates for President and Vice President of the United States were printed on the ballots that were used in the election on November 7, and Florida voters cast their votes for these candidates. *See* § 103.011, Florida Statutes (2000). Under Florida law, however, those votes are clearly "counted as votes for the presidential electors supporting such candidates." § 103.011, Florida Statutes

(2000). Voters in the State of Florida elected the Republican Party's slate of electors on November 7.

The results of the election were certified by each county canvassing board and forwarded to the Department of State. *See* § 102.111, Florida Statutes (2000). The Elections Canvassing Commission thereafter certified the returns of the election. *See id.* The election was first certified on November 15, 2000 and, because of a Supreme Court of Florida ruling, supplemental certifications were permitted through November 26 at 5:00 p.m. The challenged certification in this action took place on November 26, 2000, when the Elections Canvassing Commission certified returns of the November 7 general election. Thereafter, the Governor executed a Certificate of Ascertainment certifying the twenty-five Republican Presidential Electors for the State of Florida. The Certificate of Ascertainment certified that the Republican Presidential Electors received a plurality of the votes in the November 7, 2000 General Election in Florida. On November 27, 2000, the Governor forwarded this Certificate of Ascertainment to the Archivist of United States.[3] The President and Vice President of the United States will ultimately be chosen on January 6, 2000 during a joint session of Congress where the electoral votes of each state will be counted. Once the votes are counted, the result will be delivered to the President of the United States Senate, who will then announce the vote. Under the federal statutes, that announcement is deemed a sufficient declaration of the persons elected President and Vice President of the United States. *See* 3 U.S.C. § 15.

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[3] The execution of the Certificate of Ascertainment is an official action of the executive branch of the State of Florida. This Court can take judicial notice of this official action, as well as the official action of sending the Certificate of Ascertainment to the United States Archivist. *See* 90.202, Florida Statutes (2000) (Florida Evidence Code).

Florida law provides no statutory mechanism for contesting the election of these presidential electors. Instead, Section 102.168, Florida Statutes (2000), applies only to a contest to the election of "any person to office." The presidential electors selected on November 7 do not hold any "office" under Florida law, thereby making Section 102.168 inapplicable to their election on November 7. Moreover, Gore is actually a candidate for President of the United States in an election that will take place when Florida's presidential electors cast their votes on December 18, 2000. As a result, Section 102.168 has no bearing, and cannot be read to apply, to the election for of the President and Vice-President of the United States. Because no other Florida statutory mechanism exists for contesting the election of presidential electors or the election of President and Vice-President, the Florida courts lack authority to enter a judgment of ouster of the President of the United States or any "presidential elector." The ability to remove a sitting President lies exclusively with Congress under Article I, Sections 2 and 3, not with a Florida Circuit Court judge in Leon County, Florida.

Moreover, even if a cause of action does exist under Section 102.168, Gore lacks standing to bring this action. Section 102.168(1), Florida Statutes (2000), grants standing for an election contest only to the "unsuccessful candidate for . . . office," a Florida taxpayer, or an elector qualified to vote in Florida. Gore cannot become "an unsuccessful candidate" until the presidential electors' votes are counted on January 6, 2001, in a joint session of Congress. 3 U.S.C. § 15. As a result, Gore has no standing under the express terms of Section 102.168.

Finally, Section 102.168(4) compels that each "successful candidate" be named as a party defendant. The "successful candidates" in the November 7 election were not Governor George W. Bush and Richard Cheney. To the contrary, the successful candidates, if there are any under the meaning of that statute, are the Republican Party's presidential electors,

one of whom was Thrasher. Accordingly, even if Section 102.168 applies to the election of presidential electors, Gore has failed to join as defendants the twenty-five presidential electors who have been certified pursuant to Section 103.011. For this reason alone, the Court below had no jurisdiction to determine the matter before it.

For these reasons, this Court should find Gore unable to bring the current challenge, based on Section 102.168, Florida Statutes (2000).

III. FLORIDA STATUTES SECTION 102.168 DOES NOT APPLY TO A PRESIDENTIAL ELECTION.

Florida does not recognize any common law right to contest an election. *See McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *see also Pearson v. Taylor*, 159 Fla. 775, 776, 32 So. 2d 826, 827 (Fla. 1947); *Harden v. Garrett* , 483 So. 2d 409, 411 (Fla. 1985). To the extent that right exists, it must be expressly granted by the Florida Legislature. *See McPherson*, 397 So. 2d at 668.

The Florida Supreme Court has long recognized that where the language of a statute is "clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction, the statute must be given its plain and obvious meaning." *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998). The Supreme Court of Florida reaffirmed that principle in its recent decision in *Palm Beach County Canvassing Bd. v. Harris*, 2000 WL 1725434 (Fla. Nov. 21, 2000), where the Court held:

> Where the language of the [Florida Election] Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code. Section 102.168 is unambiguous. According to its terms, it does not provide any cause of action to

contest a presidential election, or the election of "presidential electors."

In its Order of November 20, 2000 in *Fladell, et al. v. The Elections Canvassing Comm'n of the State of Fla., et al.*, (15th Judicial Circuit), *affirmed in part and nullified in part, Fladell v. Palm Beach County Canvassing Bd.*, Nos. SC00-2372 and SC00-2376 (Fla. Dec. 1, 2000),[4] the Palm Beach County Circuit Court, after an extensive analysis of the Legislature's intent in drafting Sections 102.168 and 103.011, held that Section 102.168 was not intended to apply to Presidential elections. *See id.* at 10-15. The Florida Supreme Court affirmed the Circuit Court's decision on an alternative legal ground and stated "we conclude that all other issues ruled upon by the trial court were not properly reached, and, therefore, the court's rulings are a nullity." *Fladell v. Palm Beach County Canvassing Bd.*

Subsequently, Thrasher intervened in the instant action in order directly to raise anew the legal argument that the Florida Supreme Court in *Fladell* declined to address regarding the inapplicability of section 102.168 to presidential elections. After the trial court denied Thrasher's motion to dismiss, Bush appealed and Thrasher filed his intervenor brief with the Florida Supreme Court. The Florida Supreme Court again avoided deciding this critical threshold issue claiming in footnote 7 that the argument was inconsistent with Bush's prior positions and belated, because Bush failed to raise the issue until after oral argument on appeal. The majority decision of the Florida Supreme Court curiously omitted to note that the argument had previously been directly presented to it in the *Fladell* appeal and timely raised anew by Thrasher in the instant case. Chief Justice Wells,

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[4] On December 1, 2000, the Florida Supreme Court concluded that pertinent rulings by the *Fladell* court are a nullity. *See Fladell v. Palm Beach County Canvassing Bd.*, Nos. SC00-2372 & SC00-2376, at 4 (Fla. Dec. 1, 2000).

however, in his dissent recognized the importance of these threshold issues:

> [t]he local election officials, state election officials, and the courts have been attempting to resolve the issues of this election with an election code which any objective, frank analysis must conclude never contemplated this circumstance. Only to state a few of the incongruities, the time limits of sections 102.112, 102.166, and 102.168 and 3 U.S.C. §§ 1, 5, and 7 simply do not coordinate in any practical way with a presidential election in Florida in the year 2000. Therefore, section 102.168, Florida Statutes, is inconsistent with the remedy being sought here because it is unclear in a presidential election as to: (1) whether the candidates or the presidential electors should be party to this election contest; (2) what the possible remedy would be: and (3) what standards to apply in counting the ballots statewide.

Gore v. Harris, 2000 WL 1800752 (Wells, C.J., dissenting). Moreover, subject matter jurisdiction cannot be waived.

Although lacking precedential value, the Circuit Court's legal analysis of the Florida Election Code is nonetheless sound. The plaintiffs in *Fladell* sought an injunction against certification of the results of this presidential election. They argued that the election should be declared void and that the winner should be declared in an election contest under Section 102.168 because of alleged irregularities in the form of the ballot used in Palm Beach County. The plaintiffs in *Fladell* thus argued that the contest provision of Section 102.168 provided the alternative means of selecting presidential electors provided by 3 U.S.C. § 2, which allows the Florida Legislature to apply alternative means to select electors where a state "has failed to make a choice on the day prescribed by law."

The Circuit Court in *Fladell* engaged in an extensive and careful analysis of the state and federal procedures for

nominating and electing presidential electors. The court noted that the provisions for certifying the election of presidential electors are set forth elsewhere in the Florida Statutes: "The Legislature of the State of Florida, pursuant to the authority granted by Congress, enacted §103.011, Florida Statutes, in an effort to codify the procedure or mechanics for conducting elections for Presidential electors." *Fladell*, slip op. at 6. The Court further noted that Section 103.011, entitled "Electors of President and Vice President," makes *no* provision for a "contest" of the Presidential election. The Court concluded from this omission that the Florida Legislature did *not* intend for Section 102.168 to apply to Presidential elections. *Id.* at 15. Rather, the Court held, "[a] review of the statutes that immediately follow §102.168 point to the conclusion that §102.168 was intended to apply to elected officers *other than the Presidency.*" *Id.* at 9, n.3 (emphasis added).

The analysis of this issue by the Circuit Court in *Fladell* is compelling. Section 103.011 provides for the certification of the election of "presidential electors." That section, which specifically relates to the election of Presidential electors, does not provide for any contest of the election. Various provisions of Chapter 103 provide means by which presidential electors can be replaced. For example, when an elector is "unable to serve because of death, incapacity or *otherwise* . . . the Governor may appoint a person to fill such vacancy . . ." § 103.021(5), Fla. Stat. (2000) (emphasis added). Similarly, if an elector is absent from the meeting of electors, the remaining electors can vote to appoint a replacement. § 103.061, Fla. Stat. (2000). However, while Florida law provides these mechanisms for replacing "presidential electors" after the election is certified, it does *not* provide for any "contest" of that election.

A plain reading of Section 102.168 further confirms that that section was *not* intended by the Florida Legislature to apply to the contest of a presidential election. *First*, had the

Florida Legislature intended for Section 102.168 to be a means for contesting a presidential election, it would not have provided that the action was available only to contest "the certification of election . . . of any person *to office.*" *See* § 102.168(1), Fla. Stat. Despite the inclusion of the names of Governor Bush and Vice President Gore on the ballot on November 7, the only persons "elected" in connection with the Presidential election on that date were "presidential electors." *See* § 103.031, Fla. Stat. (2000).

It is altogether possible for a candidate for President of the United States to be "successful" in the presidential election in Florida, yet take no office. This is in fact what happened in the 1992 Presidential election, for example, where President Bush received the most votes in the Florida Presidential election, but did not take office because he did not receive the majority of votes cast by the presidential electors. As this example demonstrates, the only "successful" candidates in any Presidential election in Florida are the "presidential electors." It is further clear that "presidential electors" are not "successful candidates" for "office" as that term is used in the Election Code.[5] In light of the "resign to run" law set

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[5] The General Counsel to the Florida House of Representatives stated in a November 30, 2000 letter that a presidential elector is not an office. The General Counsel stated, in pertinent part, as follows:

"The question, therefore arises, as to whether an elector for President and Vice President of the United States is an office. It is my opinion that it does not, because an elector is not an officer of the state."

"Section 99.061, Florida Statutes, requires that any person seeking to qualify for nomination or election to federal, state, or multicounty district office, other than a judicial office...or the office of a school board member must file qualification papers. Electors have not been required to file such papers."

forth in Section 99.012, Florida Statutes, and Article 2, section 5 of the Florida Constitution, the term "office" cannot be interpreted to include the position of "presidential elector." Indeed, if "presidential elector " were an office, then numerous presidential electors proposed by the candidates prior to the November 7 election would have been required to resign from any office they currently held in Florida.[6] *See* Art. II, § 5, Fla. Const.; § 99.012(3)(a), Fla. Stat. (2000) ("No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other."); *compare* § 102.168(1), Fla. Stat. (2000) (providing that an unsuccessful "candidate for such office" may file a contest).

Second, had the Florida Legislature intended for Section 102.168 to be a means for contesting a Presidential election, it would not have identified the "unsuccessful candidate" as a proper plaintiff or required that the "successful candidate" be named as an indispensable party. *See* §§ 102.168(1), (4), Fla. Stat. (2000). The certification of a Presidential election by the Elections Canvassing Commission states only the number

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"Although the specific question you have asked has not been definitively answered by the courts, based upon the application of general statutory interpretation guidelines and the practices of the Department of State related to other provisions of the Florida Election Code, it is my opinion that Section 102.168, Florida Statutes is not intended to apply to the election of electors for President and Vice President of the United States."

[6] In the case of the presidential electors recommended prior to the election by the Florida Democratic Party, this would mean that Attorney General Bob Butterworth, Senate Minority Leader Buddy Dyer, Senators Daryl Jones, Kendrick Meek, and Les Miller, and Representative Robert Henriquez would all be in violation of Florida law because they failed to submit resignations from their current office before becoming candidates for the "office" of "presidential elector."

of votes received by the candidates for President. It does not "certify" the election of the President of the United States. The successful candidate for that office will not be determined until January 6, when the votes of the presidential electors will be counted. *See* 3 U.S.C. §15.

Third, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a presidential election, or the certification of presidential electors, it would have provided a mechanism for ordering meaningful relief under the statute. The relief contemplated under Section 102.168 is not only unavailable or inappropriate in light of the nature of the office, but preempted by federal law. For example, Section 102.168 provides, in the event "the contestant is found to be entitled to the office," for the entry of a judgment of "ouster" against the successful candidate. The courts of the state of Florida clearly lack the authority to enter a judgment of "ouster" against a sitting President of the United States. *See Fladell*, slip op. at 9, n.3 ("Surely, this Court is without authority to enter a judgment of 'ouster' against the President and Vice President of the United States.").[7]

Finally, had the Florida Legislature intended for Section 102.168 to provide a vehicle for contesting a presidential election, or the certification of presidential electors, it would have included procedures for the orderly contest of the election within the limited time allowed under federal law. Section 102.168 provides no guidance on this subject at all. *See Fladell*, slip op. at 9-10 ("The time limitations included in §102.168 do not necessarily coincide with the time con-

[7] The impracticality of applying Section 102.168 to presidential elections is well illustrated by the case of *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998), which involved a contest arising out of the November 5, 1996 election of a county sheriff which was not finally resolved until the issuance of the Florida Supreme Court's opinion on March 19, 1998.

straints of 3 U.S.C.A. § 5."). Instead, the statute provides that the defendant has 10 days in which to prepare and file an answer. *See* § 102.168(6), Fla. Stat. (2000). This statute clearly was not designed to contest a Presidential election.

IV. GORE LACKS STANDING TO BRING AN ACTION UNDER FLORIDA STATUTES SECTION 102.168.

Assuming *arguendo* that Section 102.168 applies, it affords no relief to Gore. Section 102.168(1) permits only qualified voters, taxpayers and unsuccessful candidates to pursue an election contest. Gore does not and could not allege in his contest complaint that he is a voter, taxpayer, or unsuccessful candidate. Indeed, as a matter of law, the unsuccessful candidate in this election is not Gore, but the persons nominated to serve as presidential electors on their behalf. § 103.011, Fla. Stat. (2000). Thus, Gore has no standing to bring a contest, even if Section 102.168 allows a contest of presidential electors. Gore is not yet an unsuccessful candidate and cannot be until January 6, 2001. The unsuccessful candidates are the Democratic slate of electors. Accordingly, Gore's contest claim must be dismissed for lack of standing.

V. IF SECTION 102.168 APPLIES, THEN THE PRESIDENTIAL ELECTORS ARE INDISPENSABLE PARTIES.

Florida Statute Section 102.168(4), if applicable, also requires the compulsory joinder of each "successful candidate" as an indispensable party. The successful candidates here are not George W. Bush and Richard Cheney. The successful candidates are the Republican presidential electors, who were elected and certified under Section 103.011.

Accordingly, even if Section 102.168 applied to presidential electors, which it does not, Gore has failed to join as Defendants, the twenty-five presidential electors who have been certified pursuant to Section 103.011. Thus, pursuant to Rule 1.140(b)(7), Florida Rules of Civil Procedure, Gore's

Complaint should have be dismissed for failure to join indispensable parties. *See, e.g., Commodore Plaza, Etc. v. Saul J. Morgan Ent., Inc.*, 301 So. 2d 783 (Fla. 3d DCA 1974).

VI. THE CERTIFICATION OF ELECTORS MOOTED GORE'S ELECTION CHALLENGE.

As the above discussion amply demonstrates, Section 102.168 of the Florida Election Code *cannot* be read to provide the Florida Supreme Court with jurisdiction to adjudicate a contest to the certification of the results of the Presidential election.[8] This section also provides no basis for challenging the "Certificate of Ascertainment" that identifies the presidential electors from the State of Florida.

The Secretary of State, acting under Florida law, certified the results of the presidential election held on November 7. That certification triggered a series of events under Florida and federal law, including the transmittal of the "Certificate of Ascertainment of Presidential Electors" to the Archivist of the United States on November 27. That document identifies the "Republican Presidential Electors for the State of Florida." This Certificate of Ascertainment has independent effect under federal law, *see* 3 U.S.C. § 6, and it has not been challenged in this case.

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[8] Even if Section 102.168 provided a cause of action to contest the election, it is clear that Vice President Gore and Joseph Lieberman do not having standing under Section 102.168(1) because neither is an "unsuccessful candidate for such office," an "elector qualified to vote " (i.e. a Florida voter, and not a presidential elector, *see* § 97.021(10) and § 97.041(1), Florida Statutes (2000)), or a "taxpayer" in Florida.

VII. THE FLORIDA SUPREME COURT IS BARRED FROM FASHIONING A *NEW* PROCEDURE FOR ELECTING PRESIDENTIAL ELECTORS.

The Florida Legislature established procedures for selecting presidential electors prior to the November 7 general election. Those procedures are set forth in Chapter 103, Florida Statutes. The procedures in effect on November 7, 2000 did not allow, and no statute then promulgated by the Florida Legislature contemplated, any action to contest the certification of the results of the Presidential election in the Florida courts. Similarly, no statute in effect at the time of the November election provided any mechanism for contesting the "Certificate of Ascertainment" which was forwarded to the Archivist of the United States on November 27. Florida law does not provide any basis other than those codified in Chapter 103, Florida Statutes, for replacing duly certified presidential electors. To interpret the Florida Statutes to provide for the contest of either the certification of the election or the certification of the presidential electors, the court would have to establish *new* procedures for selecting electors for the State of Florida.[9] Any electors selected by this new procedure would be selection in violation of federal law. *See* 3 U.S.C. § 5.

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[9] Plaintiffs may not be without a remedy. On the day the votes of the presidential electors are tallied by Congress, the President of the United States Senate will "call for objections." The procedure for making and resolving such objections, including any appropriate objection to the certification of presidential electors, is set forth in 3 U.S.C. § 15 and 3 U.S.C. § 17.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

GEORGE S. LEMIEUX*
ROBERT S. HACKLEMAN
GUNSTER, YOAKLEY &
STEWART, P.A.
500 East Broward Blvd., Ste. 1400
Fort Lauderdale, Florida 33394
(954) 462-2000

W. ROBERT VEZINA, III
FREDERICK J. SPRINGER
VEZINA, LAWRENCE &
PISCITELLI, P.A.
318 North Calhoun Street
Tallahassee, Florida 32301
(850) 224-6205

*Counsel of Record

Counsel for Respondent