IN THE
SUPREME COURT OF FLORIDA

CASE NO.

PALM BEACH COUNTY CANVASSING BOARD,

Petitioner,

vs.

KATHERINE HARRIS, as Secretary of State of the State of Florida, and **ROBERT A. BUTTERWORTH,** as Attorney General of the State of Florida,

Respondents.

EMERGENCY PETITION FOR EXTRAORDINARY WRIT
(Expedited Consideration Sought)

A Petition for Extraordinary Writ Directed to State Officers,
Invoking the Court's Original Jurisdiction

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CERTIFICATE OF FONT SIZE AND STYLE

This Petition is typed using a Times New Roman 14-point font.

JURISDICTION

This Court has original jurisdiction pursuant to Article V, § 3(b)(7), Fla. Const., which provides that this Court "may issue . . . all writs necessary to the complete exercise of its jurisdiction." *See generally*, *Chiles v. Public Employees Relations Comm'n*, 630 So. 2d 1093, 1094-1095 (Fla. 1994), *citing Florida Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) (this Court may issue all writs necessary to aid the Court in exercising its "ultimate jurisdiction").

The issue presented in this petition involves two conflicting legal opinions issued by the Secretary of State's office and the Attorney General, on the same issue. This Court has the ultimate power to direct state officers in the conduct of their duties. *See* Article V, § 3(b)(8), Fla. Const. The dispute squarely presented by this case -- whether the Palm Beach County Canvassing Board may proceed with a manual recount of the ballots cast for President of the United States -- has assumed state-wide, and indeed national, significance, because it affects the ultimate tally of votes certified by Florida voters to the electoral college, in an election in which the results literally hinge upon the outcome in Florida. Thus, any legal proceeding

attempting to resolve the Canvassing Board's uncertainty over which State officer's legal opinion is correct and therefore controlling (a purely legal issue not dependant upon any facts) (*see* discussion below), would ultimately find its way into this Court. Expeditious resolution of this matter is in the public interest, warranting this Court's exercise of its discretionary jurisdiction.

FACTS

Petitioner, the Palm Beach County Canvassing Board, is a three-member body that operates pursuant to § 102.141, Florida Statutes. Its members are the Honorable Charles Burton, Chair; Supervisor of Elections Theresa LePore, and County Commissioner Carol Roberts. A substantial question has arisen under Florida law as to whether the Canvassing Board may, consistent with its statutory duties and obligations, conduct a manual recount of the votes cast for the offices of President and Vice President of the United States in the November 7, 2000 general election, in accordance with the Board's unanimous vote to do so. This is an original action for declaratory relief – in the nature of an interpleader – brought by the Canvassing Board against Respondent Katherine Harris, as Secretary of State of the State of Florida and against Respondent Robert A. Butterworth, as Attorney General of the State of Florida. Petitioner is uncertain about its rights, responsibilities, and duties

under Florida law, and seeks a final adjudication by this Court to resolve conflicting legal opinions that have been issued by the two Respondents on the question of whether, in the circumstances presented, the Canvassing Board may conduct a manual recount of the votes cast for President and Vice President.

The Canvassing Board has a bona fide fear of exposure to double liability unless this Court resolves the dispute presented by the conflicting legal opinions of the Secretary of State and the Attorney General.

* * *

On November 7, 2000, a general election was held in which Governor George W. Bush and Dick Cheney, and Al Gore and Joseph Lieberman, were the Republican and Democratic candidates, respectively, for the Offices of President and Vice President of the United States of America. Since the general election, issues have been raised by various persons regarding the accuracy of the ballot count in Palm Beach County in the election for the office of President of the United States.[1] As a

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[1] Multiple lawsuits are pending against the Palm Beach County Canvassing Board and/or its members in their official capacities, challenging the Board's decisions with regard to a manual recount. *See*, *e.g., Siegel v. LePore*, S.D. Fla. No. 00-9009-Civ-Middlebrooks (plaintiffs' motion for preliminary injunction to stop manual recount denied Nov. 13, 2000, "Emergency Notice of Appeal" filed Nov. 14, 2000 at 4:00 p.m.); *Florida Democratic Party v. Palm Beach County Canvassing* Board, Fla. 15th Jud. Circ. No. CL0011078AG; *Fladell v. Palm Beach County Canvassing Bd.*, Fla. 15th Jud. Circ. No. 00-1096 AN; *Rogers v. Elections Canvassing Comm'n et al.*, Fla. 15th Jud. Circ. No. CL0010992AF; *Elkin v. LePore*, Fla. 15th Jud.

result, and in accordance with Florida law (§ 102.166, Fla. Stat.) Petitioner has conducted machine recounts of the ballots and a limited manual recount of one percent of the total votes from four precincts. *See* § 102.166(4)(d), Fla. Stat.

The limited manual recount produced different results than the machine recounts. The difference in results was not the result of malfunctions or errors in the hardware or software of the vote counting equipment.

Because the difference in results indicated a result that "could affect the outcome of the election," on Sunday, November 12, 2000, the Canvassing Board voted to conduct a manual recount of all of the ballots cast in Palm Beach County for the offices of President and Vice-President. On Monday, November 13, 2000, the Canvassing Board voted to seek an advisory opinion regarding the proper interpretation of the provisions of Florida Statute §102.166(5) from the Florida Secretary of State, Division of Elections, pursuant to Section 106.23, Florida

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Circ. No. CL-0010988-AE; *Gibbs v. Palm Beach County Canvassing Bd.*, Fla. 15th Jud. Circ. No. CL0011000AH; *Horowitz v. LePore*, Fla. 15th Jud. Circ. No. CL0010970AG. (This list is not complete). Without guidance from this Court on the narrow legal issue presented in this case, it is predictable and inevitable that, should the Canvassing Board follow the advice of either the Secretary of State or the Attorney General, additional lawsuits would be filed challenging that action.

Statutes.[2] At the same time, the Canvassing Board sought an opinion from the Florida Attorney General on the same subject matter. Copies of the letters requesting the opinions are attached as Exhibits A and B. Both posed the following questions:

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[2] Subsection (2) of that statute provides:

> 2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election- related duties, political party, committee, person, or organization has taken or proposes to take. . . . Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system / software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

Exh. A, p. 1; Exh. B, p. 1.

The Secretary of State's advisory opinion response answered the first question in the *negative*, and the second question in the affirmative. Exhibit C.

The Attorney General's opinion response answered the first question in the *affirmative*, and did not address the second question. Exhibit D.

Only the first question – posing the issue of when a full manual recount may be conducted – is presented here.

Florida Statute §106.23(2) provides that the opinion of the Division of Elections ". . . until amended or revoked, shall be binding on any person or

organization who sought the opinion or with reference to whom the opinion was sought . . ." (*see* footnote 2, *supra* p. 5). Therefore, faced with a binding Secretary of State advisory opinion, and a conflicting Attorney General Opinion, the Canvassing Board voted on November 14, 2000 to suspend the full manual recount, and later voted to resume the recount on November 15, 2000, while seeking a judicial determination of the Board's rights and responsibilities under Florida Statute § 102.166(5) and Florida Statute § 106.23(2) in these circumstances.

NATURE OF THE RELIEF SOUGHT

Petitioner seeks a final adjudication by this Court to resolve conflicting legal opinions that have been issued by the two Respondents on the question of whether the Canvassing Board may, in the circumstances presented, conduct a manual recount of the votes cast for President and Vice President. Unless this Court resolves the conflict created by the two opinions the Palm Beach County Canvassing Board will be subjected to further lawsuits; the state and federal courts of Florida will be inundated with further litigation; the outcome of the general election will remain in doubt and subject to additional litigation under § 102.168, Fla. Stat. (Contest of Elections).

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction of the case and expeditiously resolve the quotidian question of which State officer's legal opinion controls the Palm Beach County Canvassing Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) ROBERT BUTTERWORTH, ATTORNEY GENERAL, PL-01 THE CAPITOL, TALLAHASSEE, FL 32399-1050 (fax 850-410-2672), and (2) KATHERINE HARRIS, SECRETARY OF STATE, THE CAPITOL, TALLAHASSEE, FL 32399-0250 (fax 850 487-2214), by FedEx this 14th day of November, 2000.

BRUCE ROGOW

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