IN THE SUPREME COURT OF FLORIDA

JUDITH SHARON ABRAMSON, No. 81,230

Petitioner,

vs.

THE FLORIDA PSYCHOLOGICAL ASSOCIATION and PARKE FITZHUGH,

Respondents.

CAROL SEIDMAN,

Petitioner, No. 81,248

vs.

THE FLORIDA PSYCHOLOGICAL ASSOCIATION and PARKE FITZHUGH,

Respondents.

_______________________________________/

On petition to review a decision of
the District Court of Appeal, First District

BRIEF OF AMICUS CURIAE THE FLORIDA CHAMBER OF COMMERCE, INC.

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STATEMENT OF THE CASE AND OF THE FACTS

The course of proceedings below.

These cases are before the Court on petitions by Abramson and Seidman for review of Abramson v. Florida Psychological Ass'n, 610 So.2d 447 (Fla. 1st DCA 1992), which certified the question set out below [1] to be of great public importance. Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v). The Chamber files this *amicus* brief by leave of Court.

Petitioners' **Statement of the Case** is incomplete. In support of respondents' **Statement**, we offer further details exemplifying the danger to Florida's lawful governance in any of its agencies presuming power to "settle" federal litigation in a manner determining Florida law or policy in the absence of other affected citizens, excluded from the federal forum, whose party-participation the normal processes of Florida administrative law would depend on to assure the integrity of that agency decision.

The question certified is not equal to the question presented. Exercising its prerogative, [2] the Court may wish to recast the question, perhaps in these terms:

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[1] 610 So.2d at 450:

> **When is it lawful for the Attorney General of the State of Florida, as the legislatively appointed counsel for a state board or agency, to settle a lawsuit between said board or agency and a private individual under terms or conditions that are not expressly authorized by the board's legislative grant of power?**

[2] E.g., Capital City Country Club, Inc., v. Tucker, 613 So.2d 448, 450 (Fla. 1993); Pioneer Nat'l Title Ins. Co. v. Fourth Commerce Prop. Corp., 487 So.2d 1051, 1053 (Fla. 1986).

When is a Florida regulatory agency empowered to agree, in order to settle federal litigation aimed at invalidating Florida law or commanding its interpretation in a certain way, that the agency will implement or interpret that law in a way violating that law or prejudicing Chapter 120 processes for its interpretation?

That, in its fullest ramifications, was the question presented to the district court of appeal on the appeal by petitioners Abramson and Seidman (R 240, 248) from a circuit court judgment (R 233) granting respondents Florida Psychological Association and Fitzhugh declaratory and coercive relief.

As respondents' brief has noted, the Department of Professional Regulation and Larry Gonzalez its Secretary, and the Florida Board of Psychological Examiners, were active defendants in the circuit court. They also appealed from the adverse judgment, by a notice signed by the Attorney General and their own counsel (R 242, 245). Yet they made no appearance in the district court of appeal, as attested by the case style and counsel appearances listed in the opinion. Though the agencies remained appellants there and are nominal respondents here, [3] they apparently no longer claim to have had power to "settle" with Abramson and Seidman outside the statutory framework. The Attorney General's *amicus* brief, served after the parties' briefs were filed, simply disassociates that office from the position it took for the agencies in the federal and circuit court cases.

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[3] The agencies were parties appellant in the district court of appeal, by virtue of Fla. R. App. P. 9.020(f)(1). They would have been appellees had they not appealed. Rule 9.020(f)(2). They are nominal respondents here. Rule 9.020(f)(4).

Petitioners Abramson and Seidman were among nearly 200 practitioners in psychology and related disciplines who in 1981, for want of statutory educational qualifications, were denied licensure by the responsible Florida agencies. They then sued the agencies from 1981 to 1991 in the U. S. District Court for the Middle District of Florida, [4] alleging that the disqualifying statutes were unconstitutional facially and as applied.

During that federal litigation, respondent here, Florida Psychological Association ("FPA"), whose membership requirements harmonize with the education standards set by Florida licensing statutes over the years, DX 2 p. 13, sought to intervene as a defendant. DX 9. The federal court denied that motion, DX 8 p. 2, holding that "the FPA has not overcome the presumption that its interest in having Chapters 490 and 491 upheld against Plaintiffs' challenge is adequately protected by the State of Florida." *Amicus* will show in **Argument** that federal courts resist party-intervention by citizens of a state whose agencies are caught in litigation; and while this serves perceived federal interests in efficiency and clarity of issues, it also tends to isolate the agencies under incentives to "settle" the adversary's demands by sacrificing other interests that would be taken into account, typically through parties such as FPA, in Chapter 120 proceedings to the same end as sought by the federal litigation.

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[4] The original federal court complaint is DX 11 in the circuit court record as certified to the district court of appeal, following R 251, the last consecutively-numbered page in the Record. The sixth and last amended complaint is DX 10.

By partial summary judgment for the defendant agencies in April 1990, DX 3, the federal district court rejected plaintiffs' omnibus Due Process and Equal Protection claims including their claim that the statute violates the First Amendment in forbidding unlicensed persons to refer to themselves commercially as "psychologists." Then after a bench trial the district court entered a final judgment, DX 2, rejecting plaintiffs' remaining claim that Ch. 81-235, Laws of Fla., is unconstitutional in refusing plaintiffs the license that the Act offered to others then in the field who had educational qualifications that plaintiffs did not have. [5]

The 1981 Act, entitled the "Psychological Services Act," created a new Chapter 490 regulatory scheme as of January 1, 1982, to fill the void left by the sunsetting of Chapter 490, Fla. Stat. (1979), on July 1, 1979, as noted in FLORIDA STATUTES 1979. From July 1, 1979, to January 1, 1982, psychologists and others in the field worked without licenses. The new Act then "grandfathered" licenses for psychologists whom the expired law previously licensed, § 490.19 et seq., Fla. Stat. (1979), and for others who had meanwhile entered the field with comparable credentials: to all of them the 1981 Act gave an opportunity for licensure by applications "on or before December 31, 1981."

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[5] The specified grandfathering qualifications, to be discussed under **Statement of the Facts**, do not appear in FLORIDA STATUTES 1981, nor of course in any subsequent edition, no doubt because those volumes were not published until late 1981 or 1982. Section **490.013(2) Exceptions** governing the grandfathered class of psychologists may be found only in Ch. 81-235, § 1, Laws of Fla.

Similar but not identical educational qualifications were specified prospectively by new § 490.005, Fla. Stat. (1981).

In May 1990, before District Judge Fawsett held that the grandfathering and other provisions of Ch. 81-235 did not unconstitutionally discriminate against the plaintiffs, the Board of Psychological Examiners on advice of Assistant Attorney General John Rimes, its counsel in the litigation, offered settlement terms of licensure [6] to 28 federal plaintiffs who never had held a Florida license. Those 28 had been practicing psychologists in the unregulated period, 1979-1981, but the 1981 Act offered them no licensure by grandfathering, and barred them from the licensing examination of new practitioners, [7] because those plaintiffs had doctoral degrees from institutions that were not accredited under the terms of the Act.

The Board's "offer of settlement," so denominated, was to license any of the 28, notwithstanding their disqualification, who could pass the examination in two attempts. R 128, 132, 133, 135-36. The offer first proposed "a consent judgment" having those "terms and conditions," but as later agreed the settlement

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[6] The issue in the case is the same whether it was the Attorney General or the Board itself, as the Attorney General's *amicus* brief insists, who initially conceived the settlement. The Board's minutes of May 10, 1990, do seem to show, however, that Assistant Attorney General Rimes recommended the action. R 39.

[7] From the Board's April 1990 minutes, R 126: "[Mr. Rimes] indicated that the individuals involved had practiced psychology during the time period after Chapter 490 was sunset, but the legislature did not provide a way for them to obtain licensure when licensure was reinstated. This was based on them not being able to meet the requirements for licensure by exception."

was effectuated by the several plaintiffs who accepted it - Abramson and Seidman among them, DX 4 Tr. 5/21/90 - simply by their dropping out of the federal lawsuit. DX 4 pp. 3-7.

Then, with those several no longer parties plaintiff, Judge Fawsett entered judgment against those remaining, holding that the grandfathering provisions in Ch. 81-235 did not unconstitutionally discriminate against the plaintiffs who entered the unregulated practice before January 1982 but could not show the educational qualifications that the 1981 Act required under any of its licensing routes. DX 2 p. 13-16.

The disappointed federal plaintiffs then prosecuted their appeal to the Eleventh Circuit. Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992). [8] Meanwhile respondents here, the FPA and Fitzhugh, filed their circuit court action for declaratory and coercive relief against the agencies' licensure, according to the settlement, of four former federal plaintiffs including petitioners Abramson and Seidman. R 1, 85. The circuit court found that FPA and Fitzhugh had standing to sue, R 235 - a ruling that was not contested to or addressed by the district court of appeal - and held that the Florida agencies and its counsel simply had no power to "ignore the plain statutory requirements for licensure, including the contested grandfather clause." R 236. The court held, at R 237-38:

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[8] Abramson's name appears in the court of appeals case style because Fed. R. App. P. 12(a) dockets appeals "under the title given to the action in the district court, with the appellant identified as such . . . ."

> [T]his decision is not about reasonable interpretations of legislative statutes; nor is it about reasonable evidence relied upon to exercise discretion. This decision is about an agency following clear legislative mandates . . . . [T]he BOARD's power to certify an applicant is dependent upon a mandatory consideration of the standards in Section 490.005, among them being minimal educational requirements. . . .

The circuit court held further, R 237:

> A regulatory statute binds the officers administering such statute as well as the persons being regulated. Administrative officers have no power to authorize or acquiesce in matters not authorized by statute and unauthorized acts cannot work an estoppel against the State.

The district court of appeal held: "From our review of the record, it is clear that the appellants here did not meet the educational requirements plainly set forth in section 490.005(1)-(b)1., 2., Florida Statutes (1989)." Abramson v. Florida Psychological Ass'n, 610 So.2d 447, 449 (Fla. 1st DCA 1992). And: "It is axiomatic, therefore, that an agency generally may not act in a manner which exceeds the authority granted to it through statutes." 610 So.2d at 449.

In January 1992, while Abramson and Seidman appealed to the First District, the Eleventh Circuit decided the remaining litigants' appeal from the federal judgment. The court held that while Florida's licensure requirements for psychologists are constitutional, the statute violates the First Amendment by forbidding the unlicensed to refer to themselves commercially as "psychologists" - a prohibition that the divided panel found was Chapter 490's only regulatory effect on unlicensed practitioners. Abramson v. Gonzalez, 949 F.2d 1567, 1576 (11th Cir. 1992):

> As long as the plaintiffs do not hold themselves out as licensed professionals, they are not saying anything untruthful, for they are in fact psychologists and are permitted to practice that profession under current state law.

The dissenting judge "acknowledge[d] that Florida does not yet explicitly forbid the practice of psychology by anyone--regardless of their qualifications," but thought the statute plainly intended to confine the practice to those who are licensed as "psychologists." 949 F.2d at 1583.

In consequence of that federal appeal, Abramson and Seidman and all others who claim to be psychologists, licensed or not, may hold themselves out in Florida as "psychologists."

The 1990 Legislature amended Chapter 490 to provide, "beginning October 1, 1995," that no one "shall practice psychology in this state, as such practice is defined in s. 490.003(4), for compensation, unless such person holds an active valid license to practice psychology issued pursuant to this chapter." Ch. 90-263, Laws of Fla., § 490.012(5), Fla. Stat. (1991). This will restore the restraint of unlicensed practitioners that the law imposed before July 1, 1979. [9]

Statement of the facts.

The pertinent facts are few or several depending on how the case is conceived. The Chamber as *amicus* would submit that

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[9] Sec. 490.17, Fla. Stat. (1979): "It shall be unlawful for anyone to practice psychology in the state without first procuring a license and license certificate in accordance with the provisions of this chapter."

the First District decision deserves the Court's approval and elaboration both in its narrowest and its broader meaning.

Narrowly conceived, the decision below is that state agencies cannot settle federal litigation by agreeing to take action that clearly is unauthorized by a substantive regulatory statute. Broadly, the decision is that agencies cannot bargain away or prejudice the enacted purpose of *any* Florida law affecting their duties; so that when the substantive statute in litigation is less than clear as to the agencies' duties, Florida agencies are not empowered to settle with a federal plaintiff by agreeing to an interpretation or policy choice that the Administrative Procedure Act of 1974, Chapter 120, entrusts to the agency only after other affected citizens, excluded or otherwise absent from the federal litigation, have had a genuine opportunity to persuade the agency to another view.

In that first and narrower view of the case, the only pertinent *facts* are that petitioners Abramson and Seidman hold doctoral degrees in psychology from Heed University, which was open between 1973 and 1986, R 6, and:

° Heed University was not "a program approved by the American Psychological Association . . . or a university maintaining a standard of training comparable to those universities having programs approved by the American Psychological Association" - the licensure standard in § 490.19(1)(c), Fla. Stat. (1979), sunsetted July 1, 1979, and reenacted as the

standard for admission to the examination by Ch. 81-235, Laws of Fla., eff. Jan. 1, 1982, as § 490.005(1)(b), Fla. Stat. (1981);

° Heed University was not "accredited by an accrediting agency approved by the United States Department of Education in a program that is primarily psychological in nature," as required by Ch. 81-235, Laws of Fla., in § 490.013(2)(b) (never codified) for grandfathered licensure of persons with "5 years' experience, primarily psychological," applying before December 31, 1981;

° Neither Abramson nor Seidman held, during Florida's unregulated period between 1979 and 1982, "a valid certificate to practice psychology issued by the Florida Psychological Association [FPA] or the Florida Association of Practicing Psychologists [FAPP]," as alternatively required by Ch. 81-235, Laws of Fla., in § 490.013(2)(b) (never codified) for grandfathered licensure of persons applying before December 31, 1981.

In the second and broader perspective of the case, the additional pertinent *facts* are that the federal judicial system and Florida's law governing agency action prescribing law or policy or determining the substantial interests of citizens, harbor certain conflicting interests and dynamics:

° ***"Settlement" influences upon state agencies defending federal litigation.*** In constitutional and other adjudication within its Article III powers, the federal judiciary with its crowded dockets favors settlements as a matter of policy. Moreover those courts are strongly disposed by interests in efficiency and litigation control to regard state agencies as

adequately representing all interests of a state and its citizens. Federal courts therefore are disposed against party-intervention by citizens to defend litigation aimed at setting aside or coercing an agency's interpretation of state law or policy. Extended litigation thus presses the defending state agency toward "settlement" meeting some demands, at least, of persons whose only distinction is that they are federal plaintiffs, at the expense of others whose distinction is that they were excluded from the litigation and from the negotiations.

° ***Florida's interest in the independence of its agencies and the authenticity of their Chapter 120 process.*** Antithetical to the federal settlement dynamics described above, Florida's means of self-government places value upon agency interpretations and discretionary policy choices only as they occur within the discipline of Chapter 120 processes, wherein the agency itself exercises those powers only after broad participation by affected citizens whom Florida law assures a genuine opportunity to influence the agency's action.

SUMMARY OF THE ARGUMENT

I. Overviewing what is at stake. This Court's decision on some variation of the certified question is necessary to Florida's governance. Florida's agencies need direction as to their settlement powers in the exigencies of federal litigation.

II. Certain counterforces to Florida's lawful governance hold sway in federal litigation against Florida agencies. For what federal courts consider to be sound motives for efficiency,

federal litigation practice creates incentives for agency "settlement" which are antithetical to basic principles of Florida's governance as enacted in Chapter 120. Notable among those influences is the exclusion of other affected citizens.

III. Florida is constitutionally entitled to its own governance. Florida's choice of Chapter 120 processes as a central means of self-governance is not only wise, it is protected by the Tenth Amendment and the Guarantee Clause of the U. S. Constitution from intrusion or seizure by federal powers including its judiciary.

IV. The practical solution. To preserve Florida's chosen means of self-government the Court should declare Florida agencies not empowered to "settle" federal litigation by agreeing to take agency action encompassed by Chapter 120, except in court conditions that approximate the authentic processes of Chapter 120 - specifically including the full party-participation of any citizens, or their representative, who would be heard in agency proceedings to adopt the settlement as policy. If the court cannot accommodate those interests the agencies cannot "settle" but must proceed to judgment.

ARGUMENT

I. Overview of the necessity for the Court to speak.

This *amicus* entirely endorses, and will only briefly elaborate, the argument by respondents FPA and Fitzhugh showing that the First District decision is correct in its holding narrowly considered: Florida agencies have no power, either

within or without federal litigation, to disregard clear directions given by a Florida statute to govern the agency's exercise of delegated powers.

The 1981 Psychological Services Act created different avenues to licensure, but only for those who held doctoral degrees from university programs approved by the American Psychological Association, or the equivalent, or from programs approved by the United States Department of Education; or who, in the 1979-1981 interregnum, held equivalent certifications by the FPA or the Florida Association of Practicing Psychologists. [10] Supra pp. 9-10.

For the reasons and on the authorities presented by respondents FPA and Fitzhugh, notably this Court's decision in Palm Harbor Spec. Fire Control Dist. v. Kelly, 516 So.2d 249, 250 (Fla. 1987), the decision below should be approved in its narrow holding: inasmuch as "an administrative agency has no power to declare a statute void or otherwise unenforceable," necessarily a Florida agency has no power to agree to treat a statute as void

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[10] The statutory rationale for this last avenue to grandfathering certification was well described by Judge Fawsett's judgment, DX 2 p. 13:

> The certification requirements of FPA and FPPA during the sunset period were comparable to the requirements to be licensed by the State under Chapter 490 prior to the sunset of Chapter 490. . . . By permitting certified members of the FPA and FPPA to be licensed without examination, Florida recognized that those who met the qualifications under the old Chapter 490 and who had continued to practice, should be licensed without the burden of examination.

or unenforceable - for any reason including its wish to dispose of litigation.

That this particular "settlement" neither disposed of the federal litigation nor deprived Abramson and Seidman of the benefits they secured through former co-plaintiffs appealing to the Eleventh Circuit, supra pp. 7, 8, simply verifies the practical wisdom of Florida's staunch principle withholding from administrative agencies the power to disregard, for any reason other than a judicial declaration of unconstitutionality, the mandate of a Florida statute.

If a general policy favoring the settlement of litigation [11] were reason enough for an agency to agree to act otherwise than a statute requires, there is no principled reason why that policy should not prevail over settled APA disciplines in an agency's own § 120.57 proceedings to determine a party's substantial interests. If the presence of a constitutional question, as in Abramson and Seidman's federal litigation, were supposed necessary to empower an extra-statutory agency settlement, that condition is not unknown to Florida APA processes. E.g., Key Haven v. Board of Trustees, 427 So.2d 153, 157 (Fla. 1982). But in truth, if a settlement override exists at all, there is no

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[11] E.g., Robbie v. City of Miami, 469 So.2d 1384, 1385 (Fla. 1985); Utilities Comm'n of City of New Smyrna Beach, 469 So.2d 731, 732 (Fla. 1985). In the latter case, the policy favoring settlement of litigation was declared subservient to the Public Service Commission's duty to ensure that the settlement proposal "works no detriment to the public interest." It manifestly works detriment to the public interest for a Florida agency to suspend the clear effect of a Florida statute in order to preempt a judicial declaration of its constitutionality.

principled reason to confine it to the exigencies of constitutional litigation.

Judicially approving such an erosion of the legislative power would have implications beyond literally violating Article II, Section 3. It would severely undermine the nondelegation principle which until now this Court has consistently derived from that constitutional provision. To what end did this Court labor in Gulf Pines Mem. Park v. Oaklawn Mem. Park, 361 So.2d 695 (Fla. 1978), for example, if the standards enforced there, having been enacted to meet an earlier deficiency in legislative guidance, may be set aside by the agency to "settle" a lawsuit claiming those standards are unconstitutional?

And what would justify the district courts of appeal closely attending the statutory text of educational standards for dental hygienists, Dept. of Prof. Reg. v. Florida Dental Hygienist Ass'n, 612 So.2d 646 (Fla. 1st DCA 1993), if the agency may simply dispense with them in order to "settle" litigation over their constitutionality?

Abramson and Seidman seem to suggest that DPR and the Board of Psychological Examiners, and the Attorney General, are especially empowered in this way in consequence of the litigation having taken place in federal court. "No less an authority than the United States Supreme Court," Abramson says brief p. 24 - as though that Court were authoritative on the powers of Florida agencies under state law - is said to support agency litigants suspending their statutory governance in order to settle federal

lawsuits. Citing United States v. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

Precisely because those conflicting interests ***do in fact exist***, it is necessary that this Court, addressing those implications, do the state's part in the reconciliation. That necessity is further attested, we submit, by an able Attorney General who would not dream of advising the Board of Psychological Examiners to dispense with legislated standards in their own agency affairs, having felt justified in "settling" federal litigation on that basis exactly - and yet the General's *amicus* brief cannot explain why. The federal court's exclusion of FPA as a party only increased the estrangement of the agencies from their citizenry: the Attorney General refused to discuss the settlement plans with the very citizens whose professional standards the agency was supposed to protect. [12]

In other words, there is a clear implication in the agencies' conduct of the federal case, and in Abramson and Seidman's arguments here, that Florida agencies owe what they took to be their special empowerment in the premises to the forum in which they exercised that power.

Here is both an opportunity and an obvious need, we respectfully submit, for the Court to declare that Florida's sovereign interest in the integrity of its statutes and

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[12] In response to an FPA inquiry, R 33, the Attorney General replied, R 36, saying "it would not be appropriate for the Attorney General's office to comment upon the merits or the strategies involved in pending litigation, except with our clients . . . ."

administrative processes are not available as "settlement" chips to buy off federal court litigation, either by consent decree or unadorned dismissal, against Florida agencies who may think it in their interest, or the public's, so to bargain.

II. Federal settlement impacts on Florida's lawful governance.

The Attorney General suggests, *amicus* brief p. 13, that the proper extent of an agency's power to set aside or prejudice Florida law, settling federal litigation, depends on "too many variables" to be "susceptible to concise delineation or bright line rules," therefore that this Court should leave the agencies, and we gather the Attorney General, uninstructed in the premises.

We disagree. It is not only possible it is essential to constitutional harmony between the state and federal sovereigns that this Court now concisely state the whole duty of state officers in such circumstances. To leave their instruction unattended now would surely promote the clash between the state and federal sovereigns which the case of Abramson and Seidman fortuitously avoided, and which that case now fortuitously enables this Court to *prevent* by circumscribing the agencies' power in the premises. Another opportunity will not likely come this way again without the attending reality of that conflict.

Fortuitously, these agencies escaped continuing federal court supervision over their lawful state-law duties affecting Abramson and Seidman when those federal plaintiffs did not insist on the Attorney General's proffered "consent judgment with the following terms and conditions," R 43. Instead the plaintiffs

simply dismissed themselves from the litigation.[13] But if the Attorney General and the agencies are not instructed now on the extent of their powers to agree as they did here, we may be sure that future Abramsons and Seidmans will not repeat that strategic error. They will insist on a consent decree, and it will be a federal court, not this Court, which decides the power of state agencies to dispense with a Florida statute and surrender their regulatory functions to supervision by federal judge, rather than litigate to judgment.

The ensuing conflict between the state and federal courts - or worse, the masking of that conflict by state courts skirting disagreement with an earlier preemptive federal decision - can be prevented only by declaring now the conditions in which Florida agencies may so modify Florida law and administrative processes in order to satisfy federal plaintiffs. With that guidance from this Court, federal courts can then properly decide whether to accept any tendered "settlement agreement" of that sort, or to set the case for trial; and the agency itself, knowing the limits of its power, will have been guarded from the temptation that lengthy federal litigation - in this case, 10 years of it - is apt to create, and may be intended to create.

There is no reason for this Court to default to the federal judiciary the responsibility for initially judging a

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[13] Presented with unadorned motions to drop the named plaintiffs, the federal district judge declined to hear the terms of the agreement: "I don't need to get into that, unless there's something that's going to impact the trial . . . ." DX 4 p. 7.

state agency's power to settle litigation by disobeying clear state statutes or by interpreting those less clear conveniently for a federal plaintiff. There are self-evident reasons why this Court should *not* default.

Consent decrees are in the main a federal judicial phenomenon, even so they are controversial for their intrusive effect upon ***federal*** executive and legislative branch powers. [14] That this is so testifies ominously to their greater intrusion upon Florida's processes for executive branch governance, on two counts: ***First***, it is the federal ***judiciary*** not the representative Congress which appears to tolerate consented power transfers from an agency defendant to a federal plaintiff and court. ***Second***, there is no reason to suppose that federal courts, unassisted by firmness from a state's judiciary, will extend greater deference to the state's separation of powers jurisprudence - in Florida, a matter of rare dignity and stature - than they extend to the similar but less robust analogues in federal jurisprudence.

This is to say, ***First***, it is the unelected federal judiciary which appears to say that since settling disputes is generally laudable, "the executive branch *must* be free in litigation to make promises sufficient to settle cases

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[14] See F. Easterbrook, "Justice and Contract in Consent Judgments," 1987 U. CHI. LEGAL FORUM 19; D. Laycock, "Consent Decrees Without Consent: the Rights of Nonconsenting Third Parties," 1987 U. CHI. LEGAL FORUM 103; P. Shane, "Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion," 1987 U. CHI. LEGAL FORUM 241; M. McConnell, "Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change," 1987 U. CHI. LEGAL FORUM 295.

effectually." As Judge Frank Easterbrook of the Seventh Circuit has demonstrated, "this is a non sequitur" equivalent to saying that since contracts are socially desirable, the courts should support unauthorized agents in contracting for principals who are known to have forbidden it. Easterbrook, *op. cit. supra* n. 14, 1987 U. CHI. LEGAL FORUM at 38; and at 38-40 (emph. added):

> The existence of a good end does not imply much about means. If the executive branch could draw on the Treasury without an appropriation, that would facilitate settlements; ***if the executive branch could promise not to enforce valid statutes, or vary the terms of statutes, that would facilitate settlements***; if the executive branch could sign away the rights of unrepresented parties, that too would facilitate settlements. The list can be extended, all without implying anything about which of these limits on authority should be realized in the course of litigation. . . .
>
> . . .
>
> Ultimately there is no good reason to allow consent decrees to make binding promises that exceed the authority the parties would have in the absence of litigation. This is a minority view so far. The unwillingness of courts to take seriously the contractual basis of consent judgments has led the Department of Justice, which controls litigation against the United States, to forbid settlements that pledge the government to promulgate or maintain regulations.

As Judge Easterbrook reported, the U. S. Department of Justice adopted guidelines in 1986, 54 U. S. Law Week 2492 (appended to this brief), in an effort to prevent "expansion of the powers of the judiciary, often with the consent of the government, at the expense of the executive and legislative branches." The Justice Department renounced not only the obvious violation or suspension of a statute by an agency but also the

bending of agency discretion "by consent decree where [the agency] would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion." The Department further counseled, *id.* at 2492:

> The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through procedures set forth in the Administrative Procedure Act.

The Attorney General's *caveat* to federal agencies is entirely consistent with the idea that it is Congress which makes the statutes, and makes many of them intending that they be interpreted and applied primarily by designated agencies acting under a prescribed discipline. On that unremarkable assumption, Professor Peter Shane of the University of Iowa advances this principle, *op. cit. supra* n. 14, 1987 U. CHI. LEGAL FORUM at 265:

> First, the executive lacks authority to make promises to bind its future discretion . . . when the discretion involved is statutorily vested, and a promise to render such discretion less revisable is in contravention of statute or cannot reasonably be regarded as within Congress's authorization.

In support of this principle Professor Shane offers an example which might have been composed of the very stuff of this Abramson-Seidman lawsuit. *Ibid.*, 1987 U. CHI. LEGAL FORUM at 263:

> It is fair to say that the executive would not have authority to promise to exercise its administrative discretion in contravention of a regulatory statute. Thus, for example, if a statute prescribes ten exclusive decision-making criteria with respect to a particular regulatory decision, the implementing agency could not promise to be bound by an eleventh unnamed factor or to ignore one of the ten.

Now, if the U. S. Attorney General and scholarly commentators on the federal judiciary sense constitutional trouble in this flow of agency power to federal plaintiffs and federal courts, then as we have said these federal settlements and consent decrees are all the more dangerous to *state* governance which may be caught in the federal judicial maw.

The *Second* necessity, then, for this Court speaking to the integrity of Florida's governance under her own law, is that federal courts have far less institutional reason to resist the surrender to them of *state* administrative powers, by agencies rendered so disposed by enervating litigation, than they have to resist similar concessions by federal agency defendants.

Compared to what they know of the *federal* government and relations between the branches, federal courts are apt to know little of the centrality to Florida's governance of unique processes which have no exact federal analogue - the Administrative Procedure Act of 1974. And in federal litigation such as by Abramson and Seidman, aimed at changing Florida law or an agency's stewardship of it, this relative lack of judicial awareness is exacerbated by the absence, whether designed by the plaintiff or elected by the court, of a contrary voice - a party who would insist that the agencies hold fast to another view of the statutory command, or else adjourn to authentic Chapter 120 processes the proposed interpretation or policy choice that the federal plaintiff demands from the statute in issue.

In October 1989, several months before Florida agencies offered settlement to Abramson and Seidman, the federal district court denied respondent FPA's motion to intervene, DX 8 p. 2, citing Athens Lumber Co. v. Federal Election Comm'n, 690 F.2d 1364 (11th Cir. 1982) for the general rubric that "the applicant must demonstrate that his interest is represented inadequately by the existing parties," and "a presumption of adequacy exists when the applicant has the same ultimate goal as a party."

By attributing to FPA and the agencies "the same ultimate goal," notwithstanding their plainly different interests, the district court showed the federal antipathy to "a cluttering of lawsuits with multitudinous useless intervenors." [15] But that perceived efficiency also cultivated the "three key sources of danger" to other affected interests, as cited by Professor Shane. *Op. cit. supra* n. 14, 1987 U. CHI. LEGAL FORUM at 270:

> The three key sources of danger to these interests in the process of settlement are lack of representation, lack of adversariness between the settling parties, and a lack of regard for principle in the formulation of a decree.

The dangers that befell Florida's lawful statute and its lawful administrative governance in the Abramson-Seidman settlement were those three, precisely: a lack of representation, a lack of adversariness, and a lack of regard for principle. Respondent FPA, had it been present in federal court and allowed to speak as fully as in any Chapter 120 proceedings on similar

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[15] 7C Wright, Miller & Kane, FEDERAL PRAC. AND PROC.: CIVIL 2D § 1909 at 316, quoting the 1966 Advisory Committee's Reporter.

questions, would surely have minimized those "three key sources of danger" to Florida's chosen means of governance.

Federal party-joinder and -intervention doctrines under FRCP 19 and 24 do not take account of the "three key sources of danger" that federal litigation may present, by way of unilateral settlement incentives, to state agencies who stand alone in the defense. Federal party doctrines being concerned for litigation integrity, not settlement integrity, are content to assume that nonparty citizens are "adequately represented" by state agencies or that nonparties will not be "bound" or "precluded" by a decree to which only the state is a formal party. See Martin v. Wilks, 490 U.S. 755, 765, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989).[16]

In other words, federal party doctrines are inclined to hold that nonparty citizens have no "legal right" at stake in litigation by others upon a common statute against the agency in charge of it,[17] and that "the state" represents nonparties at least sufficiently to validate federal adjudication in their

[16] "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit."

[17] E. g., Frederick County Fruit Growers v. Martin, 968 F.2d 1265, 1270-72 (D.C.Cir. 1992), precluded growers who sought to relitigate an earlier decree affecting them, to which they were not parties. The court held the earlier decree affected no "legal right" of the growers, therefore though "adversely affected" the growers were in the position of one who "simply disagrees."

absence. [18] What Easterbrook and Shane and others question in this premise is not that it allows the agency as solo defendant to litigate to judgment, but that it encourages the agency to be rid of the litigation by dispensing with the statute, or with disciplines that govern its stewardship of the statute, or both.

Federal courts are thus apt to perceive no loss to Florida, or to affected nonparty citizens, in federal litigation offering such incentives to Florida agencies. Those courts are unlikely to understand intuitively why Florida has chosen the means of self-governance it has chosen; indeed they may tend to assume that the United States Constitution is unconcerned for the measures Florida has provided for its self-governance, above those required by the Constitution for minimal Due Process.

"To recognize a consitutional right to participate directly in government policymaking," the U. S. Supreme Court has stated, "would work a revolution in existing government practices." [19] But "revolutionary" governance of that sort is very nearly if not exactly what Florida has chosen for its own self-governance. [20] And that discipline is precisely what a

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[18] E. g., United States v. Yonkers Board of Education, 902 F.2d 213, 218 (2d Cir. 1992), quoting precedents to the effect that citizens in "their common public rights . . . were represented by the State in those proceedings, and, like it, were bound by the judgment"; and "A state is presumed to represent the interests of its citizens . . . when it is acting in the lawsuit as sovereign."

[19] Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 284, 104 S.Ct. 1058, 79 L.Ed.2d 299 (1984).

[20] S. Maher, "We're No Angels: Rulemaking and Judicial Review in Florida," 18 FLA. ST. UNIV. L. REV. 767, 790 n. 112 (1991), (continued...)

federal plaintiff demands be surrendered, and what a compliant agency surrenders, in agreements such as these agencies made with Abramson and Seidman.

The question is, What must the Florida judiciary say and do to preserve Florida's unique methods of self-governance which are largely unknown in the forums where they are most at risk?

III. Florida is constitutionally entitled to its own governance.

Florida's jurisprudential commitment to the dignity of Chapter 120 processes, by such decisions as Gulf Pines Mem. Park, Inc. v. Oaklawn Mem. Park, Inc., 361 So.2d 695 (Fla. 1978), and Key Haven Assoc. Enterprises, Inc. v. Board of Trustees of Internal Imp., 427 So.2d 153 (Fla. 1983), is not due entirely or even primarily to the legislature having thus occupied a field where previously the judiciary exercised control from time to time. The legislature took pains to say in § 120.73, after all, that it was *not itself* excluding the judiciary from that field. The Court in Gulf Pines noted this, 361 So.2d at 698, and added that any judicial decision to abstain was "ultimately one of policy rather than power . . . ."

In the Court's sponsorship of that general abstinence is a clear sense of responsibility to preserve Chapter 120 processes as integral to Florida's chosen means of self-government. It was

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[20](...continued) commenting on Minnesota State Bd., supra n. 19: "The Florida APA was designed to guarantee greater adjudicatory process than does the United States Constitution in connection with rulemaking. For this reason, it is 'revolutionary.'"

not to afford minimal "due process" or even "standing," as that doctrine is usually circumscribed, that Florida Home Builders Ass'n v. Dept. of Labor, 412 So.2d 351, 346-47 (Fla. 1982), admitted the Association to challenge an agency's policymaking. What this Court found decisive was rather that: "Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act."

It was not alone for the Home Builders' benefit, in other words, but to promote Florida's sound public governance as well, that the Association was admitted to the Chapter 120 forum. Very similar considerations are evident in the First District looking to the purposes of the statute to define a qualifying "standing" injury broadly or narrowly, Friends of the Everglades v. Board of Trustees of Int. Improvement, 595 So.2d 186, 190 (Fla. 1st DCA 1992); and in that court's sense that broader access may be necessary to agency proceedings where policy is being made than when a simple licensing decision is required, see Florida Soc. of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1287-88 (Fla. 1st DCA 1988), rev. den., 542 So.2d 1333 (1989).

That Florida affords objectors broad standing or narrow, as appropriate to the requirements of sound judgment in the particular decision at hand, is shown again by Dept. of Prof. Reg. v. Florida Dental Hygienist Ass'n, 612 So.2d 646, 652 (Fla. 1st DCA 1993). The court frankly declared, "In all fairness, to deny the hygienists' standing to challenge unauthorized actions

of the Board detrimental to their interests *would produce the anomalous result that virtually no one would have such standing"* - *"a result" that "under the facts presented here" would "thwart the purposes of section 120.54(4)."* (Emph. added.)

Not only on "standing" issues but in other APA contexts as well, the centrality of Chapter 120 disciplines in Florida's self-governance has been evident for years. Repeated individual challenges to an agency's nonrule policy, and the consequent necessity for repeated agency proofs, are relied on as agency initiatives to public rulemaking. [21] And a prime object of § 120.57 proceedings, though they are instituted for some party's private gain, is the public purpose of subjecting agencies "to the sobering realization [that] their policies lack convincing wisdom," by requiring them "to cope with the hearing officer's adverse commentary." [22]

It may no doubt be said of many statutes, as was said of a statute prescribing how the newborn shall be surnamed on birth certificates, that "any court could have answered the question for HRS as a matter of law," [23] but not without destroying a

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[21] McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 580 (Fla. 1st DCA 1977). Those rulemaking incentives are now augmented by § 120.535, Fla. Stat. (1991), which again depends upon at least one citizen initiating a DOAH proceeding by which that citizen cannot individually profit, to induce the public governance by rules that the legislature deems preferable to orders.

[22] *Id.* at 583.

[23] Key Haven Assoc. Enterp., Inc. v. Board of Trustees of Intern. Impr., 400 So.2d 66, 73 (Fla. 1st DCA 1981), aff'd in part and rev'd in part, 427 So.2d 153 (Fla. 1982) - speaking, of course,
(continued...)

valuable opportunity, this Court observed in Key Haven, for the agency to "reevaluate[] the rule and determine[] that the statute did not require the agency to so narrowly restrict the surnames." "The agency was thus able to modify its rule, in the context of the administrative process, to accord with constitutional requirements." [24]

In all of these respects, private APA initiatives, in one form or another, are considered in Florida to serve the ends of public self-governance under law.

And all these ends are entirely sacrificed or rendered trivial when a Florida agency, to buy off federal litigation, agrees to dispense with a statutory command or to read a statute as the federal plaintiff demands - outside the APA discipline that Florida regards as central to its governance.

Given such decisions as Gulf Pines and Key Haven, it is difficult to imagine a Florida circuit judge approving, or a Florida district court of appeal affirming, a litigation settlement agreement as proposed and sponsored by a Florida agency to such ends as these.

Why then would Florida jurisprudence leave a Florida agency to its own devices in a federal court where, perhaps

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[23](...continued) of Rice v. Dept. of Health and Rehab. Serv., 386 So.2d 844, 848 (Fla. 1st DCA 1980).

[24] Key Haven, 427 So.2d at 158, speaking of the agency decision in Rice v. Dept. of Health and Rehab. Serv., 3 FALR 314-A (1981).

understandably, the incentives run to litigation-disposal rather than to authentic agency decisions on the statutes in their care?

Now as a matter of United States constitutional law, augmenting Florida law and policy, no Florida agency is empowered to consent to the exercise of its sovereign functions by any federal power - including its judiciary - on terms inconsistent with the forms of governance that Florida has prescribed, under law, for itself.

When deciding New York v. United States [25] last June, the U. S. Supreme Court revived the judicial dialogue that now continues here, on the power and duty of a state to confine its agents to the republican form of government guaranteed by Article IV, Section 4. That a state controls the power exercised by its agents was expounded by Madison in 1788, speaking of the states' "residuary and inviolable sovereignty." [26] The Supreme Court in 1819 attested the state's sovereignty "with respect to the

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[25] 505 U.S. , 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[26] THE FEDERALIST No. 39, on the power of the federal government and its judiciary vis-a-vis sovereign functions of the states:

> [I]ts jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.

objects committed to it." [27] In New York the Court held that the Tenth Amendment, and perhaps the Guarantee Clause as well, preserves those residual sovereignties against encroachment even by Congress, such that while Congress may directly regulate in a field affecting interstate commerce, it may not commandeer state regulatory processes to that end.

Of greatest moment to the present case, the Court held also that state agencies are powerless under the Constitution to *consent to* surrender their state powers to an unauthorized Congress, or to those whom an unauthorized Congress might name to supervise state regulators in their state duties.

Agencies exercising supposed *consent* powers is the heart of the problem. An able note in the COLUMBIA LAW REVIEW, "Federalism and Federal Consent Decrees Against State Governmental Entities," surveyed what Professor Horowitz had termed "the problem of [state agency] defendants who would like to lose" their federal litigation. [28] There is no reason to suppose that either the agencies or their counsel were so motivated in the Abramson-Seidman litigation. But the phenomenon is sufficiently common in federal consent decree contexts, and it is sufficiently insidious where it exists, to be treated as a serious risk to sovereign states which permit their agencies to

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[27] In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), speaking of two governments "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

[28] Note, 88 COLUMB. L. REV. 1796, 1806 (1988).

litigate alone and uninstructed in federal courts. The COLUMBIA note collects from other sources to this effect: [29]

> In litigation against state governments, "[n]ominal defendants are sometimes happy to be sued and happier still to lose." The particular state entity - or its lawyers - may actually agree with the plaintiff, or realize that an agreement to undertake certain actions may augment that entity's power. Consent to a decree thus readily becomes a "shortcut around political constraints."
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> The organizational fragmentation and self-interest of state governmental entities make their consent to a decree problematic in terms of federalism. If a federal court accepts a state entity's consent unquestioningly, it risks assisting that entity to evade political accountability for its actions, thereby distorting the state political process.

Agencies purporting to *consent* for their principal, as we say, is the problem. The University of Chicago's Professor Michael McConnell perceived a collusive motive, or at least a gravely mistaken one, in the U.S. Environmental Protection Agency "settling" Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), by a consent decree which empowered the Environmental Defense Fund to prescribe policy for the EPA: [30]

> Robert Percival defends the decree on the ground that the Environmental Protection Agency ("EPA") had been in violation of time limits for the promulgation of standards. Percival, 1987 U. Chi. Legal F. at 338-40 [citation omitted]. While this statutory violation presumably could be the basis for a remedy, however, it could provide no justification for this sort of remedy. In effect, Mr. Percival's group, the Environ-

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[29] *Op. cit. supra* n. 28 at 1806 (citations omitted).

[30] M. McConnell, *op. cit. supra* n. 14, "Why Hold Elections?," 88 U. CHI. LEGAL FORUM at 312-13 n. 64.

mental Defense Fund ("EDF"), bargained with EPA to allow the agency to violate the unrealistic time limits set by Congress, in exchange for giving the EDF a degree of control over the agency's substantive policy. This sort of bargain bears no resemblance to the statutory scheme, and has the alarming feature of effectively delegating governmental authority to a private interest group.

Even where there is no hint of collusion, Professor McConnell rightly identifies the central characteristic of federal "settlement" agreements, or consent decrees, which is most antithetical to "a central tenet of democracy" - the right of the people and their officials to change their minds: [31]

> It is easy to understand the reluctance to make a stark choice: discretion-limiting consent decrees . . . are enforceable, or they are not. But the precarious middle ground position nevertheless undermines a central tenet of democracy: the people, and their officials, ***must be allowed to change their minds.*** (Emph. added.)

Students of Chapter 120, Florida Statutes, know that this is a central tenet of Florida's self-governance, as well.

New York v. United States reinforces Florida's interest in preserving its means of self-governance from surrender by the purported ***consent*** of its agencies. The reasoning is impeccable: Inasmuch as the powers of the national government are identified in the Constitution by reference to its proper subjects, such as trade among the states, and not by ordaining "a sovereignty over sovereigns, a government over governments," the reserved sovereignty of the states can neither be directly commandeered by Congress nor surrendered by the states. 112 S.Ct. at 2431.

[31] M. McConnell, *op. cit supra*, "Why Hold Elections?," at 318.

Any purported *consent* by a state or its agencies, to commandeering by Congress of its sovereign functions, is simply ineffective. Answering the question, "How can a federal statute be found an unconstitutional infringement of State sovereignty when state officials consented to the statute's enactment?," the Court stated, 112 S.Ct. at 2431:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. "Rather, federalism secures to citizens the liberties that derive from the diffusion of power." (citation omitted.)

The Court might have been paraphrasing, on a more general scale, the very aberrations cited by Professor McConnell and the COLUMBIA LAW REVIEW in consent decrees, quoted above, when the Court gave further reasons for spurning the "consent" of state agencies to surrender the sovereign functions entrusted to them. Thus, 112 S.Ct. at 2432 (emph. added):

> State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of this case raise the possibility that ***power incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.***

And:

> The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

And finally, 112 S.Ct. at 2434-35:

> The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Except to make clear that a state agency's spurious *consent* adds nothing to the powers of the national sovereign, New York does not attempt to survey the power of Article III federal courts to command state action by judgments within their subject-matter jurisdiction. The Court distinguished the federal judiciary's power to adjudge "cases" and "controversies" within its jurisdiction, and to enforce its judgments, from the want of power in Congress to commandeer a state's means of governance. 112 S.Ct. at 2430. Justice Stevens' separate opinion, 112 S.Ct. at 2446-47, further exemplifies instances in which "we," the courts, "have not hesitated to direct States to undertake specific actions" to secure federal rights, or even to discharge common law obligations.

The power of federal courts to adjudicate constitutional and other claims within their jurisdiction against a state, and to enforce their judgments, is one thing - a matter authorized and circumscribed by a distinct body of jurisprudence under Article III. [32]

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[32] That jurisprudence, too, confines the jurisdiction of Article III courts in matters touching upon sovereign functions of a state. Blatchford v. Native Village of Noatak, 111 S.Ct. 2578,
(continued...)

The power of state agencies to *consent* in such a forum to set aside state law or prejudice its lawful governance, when neither that law nor the state's method of governance has been held to be unconstitutional, is another matter entirely - and is wholly controlled by the responsibility of the state agent to its principal. And in Florida, that agent's duty is as plain as his or her prescribed oath of office: "I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida." Art. II, Sec. 5(b), FLA. CONST.

No exception is made in the prescribed oath for the oath-taker to enter upon strategic "settlement agreements" whereby for reasons satisfactory to the agent, the laws and governance of the State of Florida are voluntarily set aside to accommodate a federal plaintiff.

IV. A practical solution for Florida's sovereign interests.

The authority of Florida agencies to enter settlement agreements in federal court cannot be made to depend on the agency (or the federal judge!) making a precarious decision that the statute is of a sort that "plainly set[s] forth" agency

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[32](...continued)
2581, 115 L.Ed.2d 686 (1991) described "the presupposition of our constitutional structure" to be "that the States entered the federal system with their sovereignty intact; [and] that the judicial authority in Article III is limited by this sovereignty." Some of the consequences of this constraint appear in Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Gregory v. Ashcroft, 111 S.Ct. 2395, 2400-01, 115 L.Ed.2d 410 (1991); and Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), among other comparatively recent decisions.

duties that the agreement would violate, or is rather of a sort that simply does not "expressly authorize[]" what the agreement would require. [33]

Such a standard, highly problematic and manipulable in itself, is thankfully unavailable to Florida agencies operating under Chapter 120 disciplines. Whether the statute is crystal-clear, ambiguous, purposefully general and subject to agency refinement, or in some other condition of high or low revelation, makes no difference; all the potential meanings are equivalent - they are *nil* - until agency proceedings, under appropriate APA disciplines, makes one of them authentic.

What the surnaming statute means, the court held in Rice and Stitt, is not for the court initially but "is for HRS to say by order"; and "the agency's duty to speak by an order is invariable, even when the statute may seem to the agency to admit of only one possible construction." Rice v. Dept. of Heath & Rehab. Serv., 386 So.2d 844, 847 (Fla. 1st DCA. 1980), approved, Key Haven v. Board of Trustees of Intern. Impr., 427 So.2d 153, 158 (Fla. 1982).

In the freeform conditions of federal litigation, in other words, the agency not empowered by Florida law to make an effective decision as to its settlement authority based on what the agency thinks the statute requires, allows or prohibits.

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[33] As if to demonstrate the slipperiness of this distinction, the district court of appeal first characterized what this statute "plainly set forth," 610 So.2d at 449, then composed a certified question referring to "terms and conditions that are not expressly authorized by the board's legislative grant of power." At 450.

Short of prohibiting Florida agencies to "settle" federal litigation of this sort altogether, only one measure of agency control seems entirely feasible. If parties have been admitted to the federal litigation to support the view of the statute which the agency had in the first instance, provoking the federal plaintiff to sue, and if those parties are themselves full-fledged participants in the litigation and the proposed settlement agreement, [34] then the federal forum affords a rough equivalence to agency policymaking under Chapter 120.

In that circumstance only would Florida's sovereign interests in its chosen method of policy governance be accommodated, roughly, in the unnatural forum. In that circumstance only could this Court be satisfied that the essence of Florida Home Builders - "expansion of public access to the activities of governmental agencies" - had been achieved.

Achieving the presence of such a party would necessarily be the responsibility, under Martin v. Wilks, *supra* p. 24 at n. 16, of the parties who wish to "settle" at the expense of interests, including the larger public interest, that the absent party represents.

If these conditions are unsatisfactory to the parties litigant, or to the federal court, well and good - let the court decide the case.

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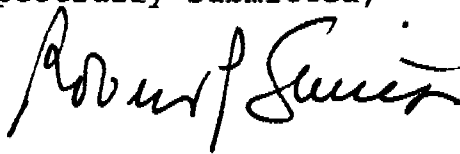
[34] The Model Rules elaborating the general authority of § 120.57(3) require the consent of "all parties" - coextensively with the broad party-access to Ch. 120 proceedings - for an "agreed settlement" or "consent order." Rule 60Q-2.033, Fla. Admin. Code.

To prescribe these principled restraints for Florida agencies, we respectfully submit, is this Court's duty and its rare opportunity.

CONCLUSION.

The decision of the district court of appeal should be approved, with elaboration as required for the full guidance of Florida agencies in federal litigation.

Respectfully submitted,



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AGENCY RULINGS

New Decisions, Orders, Regulations, Administrative Interpretations

Courts and Procedure

SETTLEMENT—

Department of Justice guidelines for government attorneys involved in negotiating consent decrees and settlement agreements are issued.

Because of their unique status as both contract and judicial act, consent decrees are a useful device for ending litigation without trial, providing the plaintiff with an enforceable order and insulating the defendant from the ramifications of an adverse judgment.

In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the executive branch in order to preempt the exercise of those prerogatives by a subsequent administration. These errors sometimes have resulted in an expansion of the powers of the judiciary, often with the consent of the government, at the expense of the executive and legislative branches.

Settlement agreements, similar in form to consent decrees not but not entered as an order of the court, remain a perfectly permissible device for the parties and should be strongly encouraged. These guidelines, however, place some restrictions on the substantive provisions that may properly be included in settlement agreements.

[Text] A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General *at least two weeks before the consent decree* is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines. **[End Text]**

—Department of Justice; Guidelines, 3/21/86.

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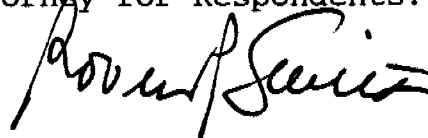

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