

IN THE SUPREME COURT OF FLORIDA

**Case No. SC20-1814
Lower Tribunal No. 2D20-2750**

**STATE OF FLORIDA, AGENCY FOR HEALTH CARE
ADMINISTRATION,**

Petitioner,

vs.

YBOR MEDICAL INJURY & ACCIDENT CLINIC, INC.,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT**

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellee, State of Florida, Agency for Health Care Administration (“AHCA” or “the Agency”) hereby agrees with, and adopts, the facts as stated in: the State of Florida, First District Court of Appeal’s (“First DCA”) Order on Motion for Stay (“Order”), published as Beach Club Adult Center, LLC v. Agency for Health Care Administration, 303 So. 3d 582 (Fla. 1st DCA 2018) (“Beach Club”); and the State of Florida, Second District Court of Appeal’s (“Second DCA”) Order on Appellant’s Motion for Stay of Final Order (also, “Order”), published as Ybor Medical Injury & Accident Clinic, Inc. v. Agency for Health Care Administration, 310 So. 3d 1060 (Fla. 2d DCA 2020) (“Ybor Clinic”). Additionally, AHCA provides the following for this Court’s consideration:

A. Background on Florida’s Administrative Procedure Act, Chapter 120, Florida Statutes (“APA”).

The APA sets forth certain procedural requirements that apply to all executive branch administrative agencies unless more specific statutes control. §§ 20.02, 20.03(2), (11), 120.50-120.515, Fla. Stat.¹; McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). These include procedural requirements for licensing, notice of agency actions, administrative

¹ All references herein are to the 2019 and 2020 versions of the Florida Statutes and Florida Administrative Code rules.

hearings, recommended and final orders, and judicial review. §§ 120.52(1)-(3), (7), (10)-(11), (15), 120.569, 120.57, 120.60, 120.68, Fla. Stat.

Licensing. The APA defines a “license” broadly to encompass “a franchise, permit, certification, registration, charter, or similar form of authorization required by law ...” § 120.52(10), Fla. Stat. It defines “licensing” as “the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license.” § 120.52(11), Fla. Stat.

Section 120.60 prescribes general licensing procedures. It requires a licensing agency to: give an applicant for licensure or licensure renewal written notice when it intends to “grant or deny” an “application for license”; but to file and serve an administrative complaint against the licensee when it intends to “revoke, suspend, annul, or withdraw a license.” § 120.60(3), (5), Fla. Stat.

Hearing procedures and judicial review. Sections 120.569 and 120.57 proscribe procedures for administrative hearings and recommended and final orders. See § 120.52(7), (15), Fla. Stat. (defining “final order” and “recommended order,” respectively). Section 120.68 affords the opportunity to for judicial review of an agency final order by an appropriate District

Court of Appeal (“DCA”).

Stays/Supersedeas. Section 120.68(3), which is at issue in this case, authorizes an agency and/or a reviewing court to grant a stay or supersedeas of an agency final order during the pendency of an appeal.² It states:

(3) The filing of the petition [for a stay or supersedeas] does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.

§ 120.68(3), Fla. Stat.

B. Background on AHCA and Its Licensing of Florida Health Care Facilities Under the Health Care Licensing Procedures Act, Chapter 408, Part II, Florida Statutes (“HCLPA”), Authorizing Statutes, and Applicable Rules.

AHCA is the Florida executive branch agency charged with licensing

² Section 120.60(4), Florida Statutes, authorizes a reviewing court to stay the expiration of a license, but only if it does not “automatically expire by statute.” The licenses issued by AHCA automatically expire by statute, as explained herein at Statement of the Case and Facts at B and Argument at B.1-2.

and regulating Florida's health care facilities. Ch. 408, pt. II, Fla. Stat.; §§ 20.02, 20.03(2), (11), 20.42(1), (3), 120.50-120.52(1), Fla. Stat. The 25 types of health care facilities that AHCA licenses and regulates are listed at section 408.802, Florida Statutes.³ They vary greatly in size, complexity of operations, the number and type(s) of health care services they provide, and the number of Floridians they serve at a time and/or yearly.

AHCA and the health care facilities it licenses and regulates are subject to: (1) the APA, located at chapter 120; (2) the HCLPA, located at chapter 408, part II; (3) authorizing statutes specific to each facility type, as listed at section 408.802; (4) licensing rules at Florida Administrative Code chapter 59A-35; and (5) and rules specific to each facility type, located at Florida Administrative Code chapters 59A-1 through 59A-33 and 59A-36 through 59A-38. §§ 408.801-408.803(1), (3), 408.819, Fla. Stat.⁴

³ The list of facilities that AHCA licenses and regulates includes: forensic toxicology laboratories (also known as drug free workplace laboratories); birth centers; abortion clinics; crisis stabilization units; residential treatment facilities, including for adults and for children and adolescents; hospitals; ambulatory surgical centers; nursing homes; assisted living facilities; home health agencies; nurse registries; companion and homemaker services providers; adult day care centers; hospices; adult family care homes; homes for special services; transitional living facilities; prescribed pediatric extended care centers; home medical equipment providers; intermediate care facilities for persons with developmental disabilities; health care services pools; health care clinics; and organ, tissue, and eye procurement organizations. §§ 408.802(1)-(25), Fla. Stat.

⁴ To simplify its explanation of the regulatory scheme under which licensure

Licensure period and expiration. Under the HCLPA, a “license” is a “permit, registration, certificate, or license issued by [AHCA].” § 408.803(1), (9), Fla. Stat. A “standard” operating license issued by AHCA automatically “expires” and becomes “void” by statute two (2) years from the date it was issued unless the licensee applies for licensure renewal before that date and ultimately obtains renewal. See §§ 408.803(2), (4)(a)-(b), (8)-(9), 408.806(2)(a), (4)(a)-(b), (6), 408.808(1), Fla. Stat. The effective date and expiration date are printed on the face of each license. § 408.806(4)(b), Fla. Stat.; see (R.63-72) (examples of past licenses AHCA has issued to Ybor Clinic).⁵

Licensure application process and decision-making. A health care facility may apply to AHCA for: (a) initial licensure (when a facility is not currently licensed and the owner(s) want a license); (b) for licensure

decisions are made, AHCA has chosen herein to cite to the APA and/or HCLPA and exclude any additional references to authorizing statutes or administrative rules unless they are necessary to understand the issues. However, there are many different health care facility types that AHCA licenses and regulates and many layers of applicable statutes and rules with varying licensing and procedural requirements that may apply to them.

⁵ Herein, the Record on Appeal is referenced as “R,” followed by any appropriate Bates number(s). The Certified Copies of Appellate Papers is referenced “AP,” followed by any appropriate Bates number(s). The hearing Transcript is referenced as “T,” followed by any appropriate page number(s).

renewal (when a license is about to expire and the owner(s)/licensee(s) want a license for the following period so the facility may operate continuously with no gap in licensure); (c) for initial licensure due to a change of ownership (when a licensed facility is being sold or transferred, and the new owner(s) want a license that will take effect immediately upon transfer so the facility may operate continuously with no gap in licensure); or (d) for an amendment to a license (when owner(s)/licensee(s) want to amend a license so the facility may, for instance, provide additional services or operate in a different location). See §§ 408.802(2), (5), (7)-(9), (14), 408.806-408.808, Fla. Stat.; Fla. Admin. Code R. 59A-35.030(1), 59A-35.040, 59A-35.060, 59A-35.070.

To apply for a license in any of these circumstances, the facility owner(s)/licensee(s) must timely submit the appropriate licensure application and fee to AHCA, accompanied by proof the facility meets minimum requirements of law for licensure (as set forth in the HCLPA, authorizing statutes, and all applicable rules), and pay any outstanding fines or fees.

§§ 408.806(1)-(2)(e), (5)-(6), (8), 408.8065, 408.807(1)-(2), 408.809, 408.810, 408.831(1)-(2), Fla. Stat.; Fla. Admin. Code R. 59A-33.002, 59A-35.050(4), 59A-35.060(1)-(2), (4), (6), 59A-35.062, 59G-35.070, 59A-

35.090, 59A-35.100. The minimum requirements of law that an applicant must demonstrate vary depending on the facility type and circumstances under which the application is filed, but generally include such basic necessities as proof: the facility is appropriately staffed with qualified and trained individuals who have undergone the required criminal background screening; the facility has appropriate insurance coverage; the facility has passed a fire safety inspection and is otherwise safe and sanitary; the facility has an emergency management plan; the facility has satisfactorily explained any exclusions, suspensions, or terminations from Medicare, Medicaid, or federal Clinical Laboratory Improvement Amendment programs; the applicant has the right to occupy the property where it operates/intends to operate; and, in the case of an initial license or initial license due to a change of ownership, the applicant has the financial ability to operate. See generally §§ 408.802, 408.806(1), (7), (8), 408.8065, 408.809-408.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)(a)-(b), 59A-35.062, 59A-35.070(1)(a)-(2), 59A-35.090, 59A-35.100, 59A-35.110.⁶

⁶ For specific facility types, see also §§ 383.301, 383.305(2), 383.307(2)-(3), 383.309(1)(a)-(c), 390.014(1), 390.015, 394.876, 394.879(1)-(2), 394.90, 395.003(1)(a), (5)(a), (7), 395.0161, 395.1055(1)(a)-(e), 400.071(1)(d), 400.121(1)(a), (3), 400.141(1)(a)-(c), (1)(h), (1)(n), (1)(q), 400.19, 400.215, 400.23(2)(b)-(d), (2)(f)-(g), (3)(a), 400.464(1), 400.471(1)-(2)(b), (3)(a)-(b), 400.484(1), 400.492, 400.506(1)-(2), (8)-(9), (12), (18), 400.509, 400.512, 400.602(1)(a), 400.605(1)(a), (1)(h), 400.606(1)(f)-(g), 400.607(2)(a)-(b), 400.610(1)(b), (1)(d), 400.6105, 400.801(2)(a)-(b),

Within 30 days of receiving an application for licensure or licensure renewal, AHCA must review it, notify the applicant in writing of any errors or omissions, and request any additional information needed. § 408.806(3)(a), Fla. Stat.

If an applicant fails to file any requested omitted information with AHCA within 21 days, section 408.806(3)(b) requires “the application **shall be** deemed incomplete and **shall be** withdrawn from further consideration and the fees shall be forfeited.” (Emphasis added). If AHCA intends to deem an application incomplete and withdrawn from further consideration, it must notify the applicant in writing of the decision, the grounds therefore, and its right to an administrative hearing to dispute the Agency’s decision.

See

§§ 120.569, 120.57, 120.60(3), Fla. Stat. The applicant may choose to pursue its administrative hearing rights and/or may immediately reapply for licensure. See §§ 408.806(1)-(2)(e), (4)(a), (6), 408.808(1), Fla. Stat. (Note:

If the applicant was seeking licensure renewal and its license has expired

400.907, 400.93(3), 400.931(1), (3), 400.932, 400.933, 400.934(4)-(5), (8), (16), (18)-(20), 400.962(1), (4), 400.964, 400.968, 400.980(2)-(3), (5), (8)(a), 400.991(1)-(2), (3)(b), (4)(b), 400.9935(1), 400.995(1), 400.9972(1), (3)(b), (3)(d)-(e), 400.9975(1)(a), (1)(i), 400.9978(1)-(2), 400.998(1), 400.9982(1), (2)(b), (2)(e), 429.07(1), 429.17(2), 429.174, 429.28(1)(a), (1)(j), (3)(a), 429.34, 429.435(2)(c), 429.52, 429.67(1)-(2), (4), (6), 429.69, 429.75, 429.85(1)(a), (1)(j), 429.907(1), 429.909, 429.911(1)-(2)(c), (2)(e), 429.919, 429.927, Fla. Stat.

in the interim, it must file an application for initial licensure. § 408.806(1)-(2)(a), (4)(a), (6), 408.808(1), Fla. Stat.).

If AHCA timely receives all necessary information from an applicant, it will conduct an unannounced inspection of the facility to determine if the applicant is compliant with governing law, including the HCLPA, authorizing statutes, and applicable rules. §§ 408.806(2)(a)-(3)(c), (5)-(7)(a), (7)(c)-(9), 408.809-408.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7). If the licensure inspection is satisfactory or any identified violations of law (also called deficiencies) are timely and satisfactorily corrected, AHCA will deem the application complete. §§ 408.811(4)-(5), 408.813(2)-(3), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7). (Note: Some facilities and/or facility types may be exempt from the licensure inspection requirement in some circumstances. § 408.806(7)(a)-(b), Fla. Stat.; Fla. Admin. Code R. 59A-35.120(4)).

AHCA has broad discretion to determine the fitness of applicants for licensure or licensure renewal and may deny an application for any of the reasons permitted under the HCLPA or authorizing statutes. §§ 120.60(3), 408.815(1), (4)-(5), 408.831(1), (3), Fla. Stat. If AHCA intends to deny an application, it must notify the applicant in writing of the decision, the grounds therefore, and of its right to an administrative hearing to dispute

the decision. §§ 120.569, 120.57, 120.60(3), Fla. Stat.

Inspections. AHCA is authorized to inspect health care facilities at any time, including in routine circumstances and/or to investigate incidents or complaints (in addition to the licensure inspections, described previously).

§ 408.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.120.

Disciplinary actions against facilities. AHCA may suspend or revoke a health care facility's license or impose administrative fines for any of the reasons permitted under the HCLPA or authorizing statutes, including for violations of law found during facility inspections. §§ 120.60(5)-(6), 408.813, 408.814, 408.815(1), 408.817, 408.831(1)(a)-(b), (3), Fla. Stat. If AHCA decides to take one of these actions, it must file and serve an administrative complaint stating the grounds for its decision and notifying the licensee/facility of its right to request an administrative hearing to dispute it.

§§ 120.569, 120.57, 120.60(5)-(6), Fla. Stat.

Administrative Hearings, Agency Final Orders, and Judicial Review. When a health care facility timely requests an administrative hearing to dispute the Agency's notice of intent or administrative complaint, the procedures set forth at APA sections 120.569 and 120.57 apply. If the

facility requests a formal administrative hearing pursuant to section 120.57(1), an evidentiary hearing will be held at the Division of Administrative Hearings before an Administrative Law Judge, who will issue a recommended order for AHCA's consideration. If the facility requests an informal administrative hearing pursuant to section 120.57(2), an informal hearing (at which the facility may dispute the applicable law and present evidence in support of mitigation but may not dispute the facts alleged by the Agency in its notice of intent or administrative complaint) will be held before an AHCA Hearing Officer, who will issue a recommended order for the Agency's consideration. In either circumstance, AHCA has final order authority, and its final order may be appealed to an appropriate DCA pursuant to section 120.68. §§ 120.569(2)(l), 120.57(1)(l), Fla. Stat.

If AHCA renders a final order that deems a licensure renewal application incomplete or withdrawn from further consideration, denies a licensure renewal application, or revokes an existing license, AHCA may (in its final order) extend the effective period of any existing license for up to 30 additional days to allow for the safe and orderly discharge of the facility's residents/clients per section 408.815(6). During this short extension period, AHCA typically works with the facility and other appropriate agencies or organizations to ensure that residents/clients are

transferred to another appropriate facility/placement without any disruption in their services.

Upon motion by a health care facility, either the Agency or a reviewing court may grant a stay or supersedeas of a final order, pursuant to APA section 120.68(3).⁷ If a stay or supersedeas is granted before the facility's existing license has expired, the order will have the effect of extending the licensure period for the duration of the appeal. §§ 120.68(3), 408.806(2)(a), (4)(a)-(b), (6), 408.808(1), 408.815(6) Fla. Stat.; Fla. R. App. P. 9.190(e)(1)-(2), (e)(4); supra Statement of the Case and Facts at B.

C. Facts of Beach Club.

Beach Club was an AHCA-licensed adult day care center subject to the APA, the HCLPA, authorizing statutes at chapter 429, part III, and administrative rules at chapters 59A-35 and 59A-37. §§ 408.802(15), 429.907(1), Fla. Stat.; Beach Club, 303 So. 3d at 582; Ag. for Health Care Admin. v. Beach Club Adult Ctr., LLC, No. 18-045PH (AHCA Apr. 9, 2018) (Final Order No. 8594936) (available at http://apps.ahca.myflorida.com/dm_web/DMWeb_DocsFO/8594936.pdf); supra Statement of the Case and Facts at A-B.

⁷ Section 120.60(4) does not apply because AHCA's licenses "automatically expire by statute." See § 408.806(2)(a), (4)(a), (6), 408.808(1), 408.815(6), Fla. Stat.

Beach Club applied to AHCA to renew its adult day care center license, such that the effective period of its existing license was automatically extended per section 408.806(2)(a) until AHCA made a final decision on its application. Beach Club, 303 So. 3d at 582; Beach Club, Case No. 18-045PH. AHCA reviewed Beach Club's application and notified it of omissions in writing. § 408.806(3)(a), Fla. Stat.; Beach Club, 303 So. 3d at 582; Beach Club, Case No. 18-045PH at Ex. 1. Having received no timely response to the omissions notice, AHCA notified Beach Club of its intent to deem its application incomplete and withdrawn from further consideration per section 408.806(3)(b). Beach Club, 303 So. 3d at 582; Beach Club, Case No. 18-045PH at 1, Ex. 1. Beach Club requested an informal hearing, but the proceeding was dismissed as a sanction. §§ 120.569, 120.57(2), Fla. Stat.; Beach Club, Case No. 18-045PH at Ex. 2. AHCA then rendered a Final Order that: 1. deemed Beach Club's application incomplete and withdrawn from further consideration; and 2. extended the effective period of its existing license for 30 days to allow for the safe and orderly discharge of clients per section 408.815(6). §§ 120.57(2), 408.806(3)(b), Fla. Stat.; Beach Club, 303 So. 3d at 582; Beach Club, Case No. 18-045PH at 1-2.

Beach Club appealed the Agency's Final Order to the First DCA and

then moved for a stay, claiming entitlement under section 120.68(3) and rule 9.190(e)(2)(C). Beach Club, 303 So. 3d at 582-83. The First DCA rendered and published an Order denying the stay. Id. The First DCA reasoned: (a) “the final order does not revoke [Beach Club]’s license. Instead the final order deemed the application withdrawn”; (b) “[s]ection 120.68(3) and rule 9.190(e)(2)(C) only apply if the ‘agency decision has the effect of suspending or revoking a license[,]” (c) in Terrell Oil Company v. Department of Transportation, 541 So. 2d 713 (Fla. 1st DCA 1989) (“Terrell Oil”), the First DCA “held that section 120.68(3) did not apply to stay a final order denying an application for recertification as a disadvantaged business enterprise because it did not meet the statutory criteria for recertification” and “stated that there is a qualitative difference between the type of order that denies renewal of a license that has expired or is about to expire and one that suspends or revokes an active license” (quotation taken from Beach Club, 303 So. 3d at 583); and (d) cited Silver Show, Inc. v. Department of Business & Professional Regulation, 763 So. 2d 348 (Fla. 4th DCA 1998) (“Silver Show”), in which the Fourth DCA held “an agency’s decision to deny a license application is regulatory in nature, not a sanction; thus, a denial of a license application is not equivalent to a license revocation for purposes of section 120.68(3).” Beach Club, 303 So.

3d at 583.

D. Facts of this Case.

Appellant Ybor Medical Injury & Accident Clinic, Inc. (“Ybor Clinic”) is an AHCA-licensed health care clinic located in Tampa, Florida, and is subject to the APA, HCLPA, authorizing statutes at chapter 400, part X, and administrative rules at chapters 59A-33 and 59A-35. §§ 400.991(1), 408.802(24), Fla. Stat.; (R.5, 8-10, 13, 20, 25, 33, 63).

Ybor Clinic applied to AHCA to renew its health care clinic license, which automatically extended the effective period of its existing license – otherwise due to expire on October 11, 2019 – until AHCA made a final decision on its application per section 408.806(2)(a). Ybor Clinic, 310 So. 3d at 1061; (R.5, 8-10, 63; T.8-9). AHCA reviewed Ybor Clinic’s application and notified it of omissions in writing. § 408.806(3)(a), Fla. Stat.; Ybor Clinic, 310 So. 3d at 1061; (R.5, 8-10, 19-20, 24, 26, 32-34, 44-47). Having received no timely response to the omissions notice,⁸ AHCA notified Ybor Clinic of its intent to deem the application incomplete and withdrawn from

⁸ In the case pending before the Second DCA, Ybor Clinic contests that it received the Omissions Letter when it was first sent by email on September 17, 2019. Ybor Clinic, 310 So. 2d at 1061; (R.23-24, 26-27). But, as the Hearing Officer pointed out, even assuming the complained of error occurred, it was harmless since the Record showed Ybor Clinic had received the Omissions Letter by January 2, 2020 and failed to supply the requested omitted information within 21 days thereafter or at any time prior to the July 13, 2020 informal hearing. (R.33-35, 37-38).

further consideration per section 408.806(3)(b). Ybor Clinic, 310 So. 3d at 1061; Fla. Admin. Code R. 59A-35.030(2); (R.5-11, 19-21, 23-24, 26, 31-32, 38, 44-45; T.16). Ybor Clinic requested and received an informal hearing, after which AHCA's Hearing Officer recommended that AHCA uphold the notice. §§ 120.569, 120.57(2), Fla. Stat.; Ybor Clinic, 310 So. 3d at 1061; (R.12-18, 20, 24, 28-29, 31-36, 37-48; T). AHCA then rendered a Final Order that adopted the Hearing Officer's recommendations, deemed Ybor Clinic's licensure renewal application incomplete and withdrawn from further consideration per section 408.806(3)(b), and extended the effective period of the existing license for 30 additional days to allow for the safe and orderly discharge of clients under section 408.815(6). §§ 120.57(2), 408.806(3)(b), Fla. Stat.; Ybor Clinic, 310 So. 3d at 1061; (R.37-48).

Ybor Clinic appealed AHCA's Final Order to the Second DCA and moved for an "expedited stay." Ybor Clinic, 310 So. 3d at 1061; (R.49-62; AP.4-17, 23-43, 176). In its motion, Ybor Clinic claimed it was entitled to a stay under section 120.68(3) and rule 9.190(e)(2)(C), but also addressed the stay factors prescribed by case law (discussed infra Argument at A.3). Ybor Clinic, 310 So. 3d at 1061; (AP.23-43, 176-77). The Second DCA granted a temporary stay of 30 days and directed AHCA to respond to Ybor

Clinic’s motion, stating “[b]ecause it appears that the stay requested is governed by section 120.68(3), Fla. Stat. (2019), and Florida Rule of Appellate Procedure 9.190(e)(2)(C), [AHCA] shall, if it opposes the stay, incorporate in its response the petition called for in section 120.68(3).” (AP.44, 176). AHCA responded and argued that section 120.68(3)’s presumptive “stay” provision and rule 9.190(e)(2)(C) are inapplicable because: (a) the Final Order at issue did not suspend or revoke an existing license, but instead deemed an application for licensure renewal incomplete and withdrawn from further consideration; and (b) the requested stay should be considered and denied under the section 120.68(3)’s general provisions, rule 9.190(e)(1)-(2)(a), and the case law factors (as discussed infra Argument at A.1-3). (R.49-173).

The Second DCA granted a stay of AHCA’s Final Order for the duration of the appeal, thus extending the effective period of Ybor Clinic’s existing license for the same period. (R.174-81). In its published Order, the Second DCA concluded: (1) section 120.68(3) and rule 9.190(e)(2)(C) applied because the order appealed did not suspend or revoke a license per se but “ha[d] the effect of suspending or revoking [Ybor Clinic’s] license” as its resulted in the facility being unable to operate; (2) “[a]lternatively, and to the extent that AHCA argues in response to the

Clinic's motion that the Clinic can, after its current license lapses, apply for a new license, the order on appeal can be seen as 'ha[ving] the effect of suspending the Clinic's license to operate"; (3) "the phrase 'has the effect of' suspension or revocation" in section 120.68(3), "contemplates something broader than suspension or revocation alone"; (4) since "the legislature has provided an opportunity for a licensee to maintain its license pending appeal in the face of agency action as serious as revocation or suspension of its license, it seems reasonable that the same opportunity would be available when the agency takes some lesser action against the licensee that, as here, 'has the effect of' as suspension or revocation"; (5) Terrell Oil's observation of the "'qualitative difference' between an order denying or withdrawing an application and an order that outright suspends or revokes a license ... does not necessarily inform whether the former 'has the effect of' the latter"; (6) Silver Show's "explanation that an agency decision to deny a license application is not a sanction, which revocation is, but regulatory, such that the denial of an initial license application is not equivalent to a license revocation" is inapposite to the inquiry whether an order withdrawing an application "has the effect of suspending or revoking a license"; and (7) AHCA failed to show Ybor Clinic's continued operation "would constitute a probable danger to the health, safety, or welfare of the

state,” so as to oppose the stay. Ybor Clinic, 310 So. 3d at 1061-63; (AP.175-81). The Second DCA expressly acknowledged its view conflicted with the First DCA’s Order in Beach Club, 303 So. 3d 582, and certified conflict per article V, section 3(b)(3), of the Florida Constitution. Ybor Clinic, 310 So. 3d at 1063; (AP.175-81).

AHCA filed a timely Notice invoking this Court’s jurisdiction to review the Second DCA’s Order. (AP.188-202). After briefing, this Court accepted jurisdiction. (AP.291-92). The appeal in the Second DCA regarding the merits of AHCA’s Final Order remains pending. See generally (AP).

SUMMARY OF ARGUMENT

As certified, there is an express and direct conflict between the Second DCA’s Order in Ybor Clinic and the First DCA’s Order in Beach Club on the question whether a final order deeming a licensure renewal application incomplete and withdrawn from further consideration is an “agency decision [that] has the effect of suspending or revoking a license” for purposes of section 120.68(3). Section 120.68(3) affords a rebuttable presumption that a movant is entitled to “supersedeas” unless an agency can demonstrate that supersedeas “would constitute a probable danger to the health, safety, or welfare of the public.” This Court should resolve the conflict by holding section 120.68(3)’s presumptive supersedeas provision

does not apply to an agency final order deeming a licensure renewal application incomplete and withdrawn from further consideration. Indeed, this is the only result this Court could reach that is consistent with the plain meaning of the statute's language, the APA, HCLPA, and case law, including from this Court.

Per its plain language, section 120.68(3)'s presumptive supersedeas provision only applies if an "agency order has the effect of suspending or revoking a license." The AHCA Final Order at issue in this case deems a licensure renewal application "incomplete and withdrawn from further consideration" per section 408.806(3)(b). The Final Order did not have the effect of suspending or revoking a license. Rather, the licensee's existing license expired by operation of law and as the result of the licensee's failure to timely act on its renewal application.

The APA and HCLPA treat disciplinary decisions or proceedings regarding existing licenses separately and distinctly from regulatory actions or proceedings on licensure applications, confirming the two are not equivalent. A close comparison demonstrates that an AHCA final order suspending or revoking a license and an AHCA final order deeming a licensure renewal application incomplete and withdrawn from further consideration do not have the same practical effect. In drafting the HCLPA,

the Legislature deliberately: chose not to give an applicant for a health care facility a property right or any legal expectation to licensure renewal; placed the burden squarely on the applicant to timely file and complete a licensure renewal application and demonstrate it is qualified and fit for licensure renewal; and chose to give AHCA broad discretion to determine the fitness of licensure applicants, but no discretion to accept a late application or to do anything but deem an application incomplete and withdrawn from further consideration if the applicant fails to timely respond to the Agency's notice of omissions. If a facility's license expires such that there is licensure gap after AHCA deems its licensure renewal application incomplete and withdrawn from further consideration, the expiration occurs by operation of statute as part of the natural life-cycle of the license and because the facility failed to timely complete its application – not because AHCA has acted on the license.

Under the HCLPA, APA, and case law (including from this Court), an agency decision to suspend or revoke an existing license is disciplinary or punitive, the agency must charge the facility by administrative complaint and has the burden to prove the grounds for its action by “clear and convincing evidence” in an administrative proceeding, the action is taken against an existing license and prevents the facility from operating under it

(either temporarily or permanently) during the license's effective period, and the agency's decision may affect the licensee's ability to successfully apply for licensure in the future. In contrast, an agency decision on a licensure application is regulatory, the applicant has the "burden of ultimate persuasion at each and every step" to demonstrate it is qualified and fit for licensure by the "preponderance of the evidence," the agency's intended action must be noticed and is taken against an application for licensure for a future period and does not directly affect an existing license or the facility's ability to operate under an existing license, and the agency's decision does not affect the facility's ability to successfully apply for licensure in the future.

As this Court has said, an agency's discretionary authority to determine the fitness of a licensure applicant is especially broad when a profession is practiced as a privilege, rather than a right, or is potentially injurious to the public. Imposing the burden on AHCA to demonstrate an applicant for health care facility licensure poses "a probable danger to the health, safety, or welfare of the public" is inconsistent with the principle that the "burden of ultimate persuasion at each and every step" of the license application proceeding is on the applicant to demonstrate it is qualified and fit for licensure. It is also impractical because, while a health care facility

that does not meet minimum requirements for law for licensure is inherently dangerous, the Agency likely does not have enough information at the time a stay or supersedeas is requested to prove to a court's satisfaction that the danger is "probable."

Moreover, public policy considerations support requiring an applicant for licensure renewal to demonstrate to the satisfaction of the agency or reviewing court that the case law factors support its request for a stay or supersedeas. If these case law factors are not considered (and they are not under section 120.68(3)'s presumptive supersedeas provision), the agency or court may be required to grant a stay that extends an existing license for months or years as an appeal moves through the court system, without first engaging in a review of the facts, circumstances, and merits of the case. Such a result is clearly contrary to the statutory text and legislative intent. It would place the public at unnecessary risk of harm, given that the Agency has not determined the facility meets minimum requirements of law to continue to be licensed and operate. And it would afford a movant/applicant a windfall, especially where the movant/applicant has no demonstrable likelihood of succeeding on the merits of its appeal.

STANDARDS OF REVIEW

The following standards of review apply in this case:

A lower tribunal's findings of fact must be upheld on review if supported by competent and substantial evidence in the record. E.g., Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 926 (Fla. 2017); Strand v. Escambia Cnty., 992 So. 2d 150, 154 (Fla. 2008).

Questions of law, including the construction and application of statutes and rules, are considered de novo. E.g., Planned Parenthood of Greater Orlando, 211 So. 3d at 926; Van v. Schmidt, 122 So. 3d 243, 245-46 (Fla. 2013); Strand, 992 So. 2d at 154; Griffin v. State, 980 So. 2d 1035, 1036 (Fla. 2008).

Generally, a tribunal's decision on a motion for stay or supersedeas is predicated on the consideration of the various case law factors and, thus, is reviewed for an abuse of discretion. E.g., Waves v. Hialeah, Inc. v. Machado, 300 So. 3d 688, 688 (Fla. 3d DCA 2018); Everett v. Everett, 196 So. 3d 483, 484 (Fla. 1st DCA 2016); Planned Parenthood of Greater Orlando v. MMB Props., Inc., 148 So. 3d 810, 811-12 (Fla. 5th DCA 2014); Sunbeam TV Corp. v. Clear Channel Metroplex, Inc., 117 So. 3d 772, 772 (Fla. 3d DCA 2012).

But where, as here, the lower tribunal's decision to grant or deny a motion for stay or supersedeas rests upon the construction of a statute or

rule, review is de novo. Waves, 300 So. 3d at 688 (“We generally review the trial court’s order on a motion for supersedeas bond under an abuse of discretion standard. However, to the extent that the trial court’s determination rests upon the construction of a rule or statute, our review is de novo.”) (internal citations omitted); R.J. Reynolds Tobacco Co. v. Sikes, 191 So. 3d 491, 492-93 (Fla. 1st DCA 2016) (“Whether an automatic stay must be entered” under section 569.23(3), Florida Statutes, and “under the circumstances presented in this case presents a question of law that we review de novo.”); infra Argument at A.1 Cf. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (finding a trial judge’s decision should be reviewed for an abuse of discretion since “there was no rule of law which dictated the property disposition and the alimony terms”); Bank of N.Y. Mellon v. Garcia, 254 So. 3d 565, 567 (Fla. 3d DCA 2018) (“Evidentiary rulings are generally reviewed under an abuse of discretion standard. However, to the extent that such ruling is based upon a construction of a statute or rule, our standard of review is de novo.”) (internal citations omitted); Decks N Such Marine, Inc., v. Daake, 297 So. 3d 653, 655 (Fla. 1st DCA 2020), Raza v. Deutsche Bank Nat. Tr. Co., 100 So. 3d 121, 123 (Fla. 2d DCA 2012), Valcarcel v. Chase Bank USA NA, 54 So. 3d 989, 990 (Fla. 4th DCA 2010), and T & W Devs. Inc., v. Salmonsens, 31 So. 3d 298,

301 (Fla. 5th DCA 2010) (Generally, an order on attorney's fees is reviewed for an abuse of discretion. But when entitlement rests on the interpretation of a statute or contract, review is de novo) (emphasis added).

ARGUMENT

ISSUE: WHETHER A FINAL ORDER DEEMING A LICENSURE RENEWAL APPLICATION INCOMPLETE AND WITHDRAWN FROM FURTHER CONSIDERATION “HAS THE EFFECT OF SUSPENDING OR REVOKING A LICENSE” FOR PURPOSES OF THE PRESUMPTIVE SUPERSEDEAS PROVISION IN SECTION 120.68(3), FLORIDA STATUTES?

As certified, there is an express and direct conflict between the Second DCA's Order in Ybor Clinic and the First DCA's Order in Beach Club on the question whether a final order deeming a licensure renewal application incomplete and withdrawn from further consideration is an “agency decision [that] has the effect of suspending or revoking a license” for purposes of the presumptive supersedeas provision in the first sentence of section 120.68(3)? The First DCA's Order has answered the question “No,” while the Second DCA's Order has said “Yes.”

This irreconcilable, interdistrict conflict means that AHCA, all other APA licensing agencies, and licensure applicants are subject to very different standards in the First and Second DCAs and will face uncertainty as to which standard applies in all other Florida DCAs, unless and until this Court resolves both question and conflict.

Accordingly, AHCA requests this Court resolve the interdistrict conflict by holding section 120.68(3)'s presumptive supersedeas provision **does not** apply to an agency final order deeming a licensure renewal application incomplete and withdrawn from further consideration. As the incorrect imposition of section 120.68(3)'s presumptive supersedeas provision in this case is a harmful, reversible error, AHCA also requests this Court reverse the Ybor Clinic Order and remand to the Second DCA to consider whether a stay should be granted under the case law factors discussed at Argument at A.3.

A. Summary of the Law Governing Stays and Supersedeas.

“The purpose of an appellate stay is to maintain the status quo in the lower tribunal while an appeal proceeds.” QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, Inc., 94 So. 3d 541, 555 (Fla. 2012). The law governing stays and/or supersedeas of agency orders, including those final orders that deem a licensure renewal application incomplete and withdrawn from further consideration, is discussed below.

1. Section 120.68(3).

Again, section 120.68(3) authorizes an agency and/or a reviewing court to grant a stay and/or supersedeas of an agency's licensing final order during the pendency of an appeal. It states as follows:

(3) The filing of the petition [for a stay or supersedeas] does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.

§ 120.68(3), Fla. Stat.

Under section 120.68(3)'s general provisions, an agency or reviewing court has **discretionary authority** to decide whether to grant a stay or supersedeas of an agency's licensing order "upon appropriate terms," after consideration of the case law factors described below. Infra Argument at A.3. As such, an order granting a stay or supersedeas under section 120.68(3)'s general provisions is reviewed for an abuse of discretion. Supra Standards of Review.

In contrast, section 120.68(3)'s first sentence affords a **rebuttable presumption** that a movant is **entitled** to "supersedeas" if the "agency[s] decision has the effect of suspending or revoking a license," unless the agency opposes the motion and demonstrates to the satisfaction of the court that "supersedeas would constitute a probable danger to the health,

safety, or welfare of the state ...” Under this language, a reviewing court has **no discretion** and **must** grant supersedeas if a request is made and the specified circumstances are present. Id. Thus, review of an order granting a “stay” or supersedeas under section 120.68(3)’s presumptive provision is de novo. Supra Standards of Review.

For all the reasons discussed herein, section 120.68(3)’s general provisions – and not its presumptive supersedeas provision – apply where, as here, an agency final order deems a licensure renewal application incomplete and withdrawn from further consideration. Infra Argument at B-D.

2. Florida Rule of Appellate Procedure 9.190(e).

Rule 9.190(e) informs section 120.68(3) by prescribing the procedures by which a stay or supersedeas may be requested, opposed, and granted or denied by an agency or reviewing court. Rule 9.190(e) states, in relevant part:

(e) Stays Pending Review.

(1) Effect of Initiating Review. The filing of a notice of administrative appeal or petition seeking review of administrative action shall not operate as a stay ...

(2) Application for Stay Under the Administrative Procedure Act.

(A) A party seeking to stay administrative action may

file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed. The filing of a motion shall not operate as a stay. The lower tribunal or court may grant a stay upon appropriate terms. Review of orders entered by lower tribunals shall be by the court on motion.

* * *

(C) When an agency has suspended or revoked a license other than on an emergency basis, a licensee may file with the court a motion for stay on an expedited basis. The agency may file a response within 10 days of the filing of the motion, or within a shorter time period set by the court. Unless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety, or welfare of the state, the court shall grant the motion and issue a stay.

(D) When an order suspending or revoking a license has been stayed pursuant to subdivision (e)(2)(C), an agency may apply to the court for dissolution or modification of the stay on grounds that subsequently acquired information demonstrates that failure to dissolve or modify the stay would constitute a probable danger to the public health, safety, or welfare of the state.

* * *

(4) Duration. A stay entered by a lower tribunal or court shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, unless otherwise modified or vacated.

Fla. R. App. P. 9.190(e)(1)-(2)(A), (e)(2)(C)-(D), (e)(4) (emphasis in original).

The general provisions of rule 9.190(e)(1) and (2)(A) apply where, as here, a stay is sought of an agency's final order that does not "suspend or revoke a license." Infra Argument at D.

3. *The Stay Factors Prescribed by Case Law.*

Generally, to obtain a **discretionary stay** from an agency or court, including under section 120.68(3)'s general provisions, case law holds the movant must establish (1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay. E.g., Everett, 196 So. 3d at 484; Planned Parenthood of Greater Orlando, 148 So. 3d at 812; Sunbeam TV Corp., 117 So. 3d at 772; Perez v. Perez, 769 So. 2d 389, 391 n.4. (Fla. 3d DCA 1999). Cf. Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005) (“Ordinarily, there are two principal considerations that courts must take into account when deciding whether to vacate a stay: the likelihood of irreparable harm if the stay is not granted and the likelihood of success on the merits by the entity seeking to maintain the stay.”). Where, as here, a requested stay will have the effect of enjoining enforcement of a final order, case law holds the agency or court should also consider whether the moving party has demonstrated: (3) lack of an adequate remedy at law; and (4) that considerations of public interest or public policy support injunctive relief. E.g., Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1258 (Fla. 2017); Howell v. Orange Lake Country Club, Inc., 303 So. 3d 1009, 1011 (Fla. 5th DCA 2020); Gyptec, S.A. v. Hakim-Daccach, 299 So. 3d 481, 483-84 (Fla. 3d DCA 2020); Scott v. Trotti, 283 So. 3d 340, 343

(Fla. 1st DCA 2018); XIP Techs., LLC v. Ascend Global Servs., LLC, 253 So. 3d 1183, 1185 (Fla. 2d DCA 2018); Concerned Citizens for Judicial Fairness, Inc. v. Yacucci, 162 So. 3d 68, 72 (Fla. 4th DCA 2014).

B. Section 120.68(3)'s Presumptive Supersedeas Provision Is Inapplicable to an Agency Final Order Deeming a Licensure Renewal Application Incomplete and Withdrawn from Further Consideration Because the Agency's Decision Does Not "Ha[ve] the Effect of Suspending or Revoking a License."

Again, the question before this Court is whether a final order deeming a licensure renewal application incomplete and withdrawn from further consideration is an "agency decision [that] has the effect of suspending or revoking a license" for purposes of the presumptive supersedeas provision in the first sentence of section 120.68(3)? The answer to this inquiry under the plain language of section 120.68(3) – and under the APA, the HCLPA, and case law – is a resounding "No."

1. *An Agency Final Order Deeming a Licensure Renewal Application Incomplete and Withdrawn from Further Consideration Does Not “Ha[ve] the Effect of Suspending or Revoking a License” Under the Plain Text of Section 120.68(3).*

In determining the meaning of a statute, the plain language is the place to start. As this Court stated in Page v. Deutsche Bank Trust Company Americas, 308 So. 3d 953, 958 (Fla. 2020):

In interpreting statutory language, we of course “begin[] with the language of the statute.” [Lieupo v. Simon’s Trucking, Inc., 286 So. 3d 143, 145 n. 2 (Fla. 2019).] As we recently explained, we “adhere to the ‘supremacy-of-text principle’: ‘The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.’” Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)). We thus strive to determine the text’s objective meaning through “the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.” Scalia & Garner, Reading Law at 33.

Page, 308 So. 3d at 958.

Per its plain language, section 120.68(3)’s presumptive supersedeas provision only applies if an “agency order has the effect of suspending or revoking a license.” There is no question an AHCA final order is an “agency decision” for purposes of section 120.68(3); indeed, section 120.52(7) defines a “final order” as “a written final decision ... [that] includes final agency actions” And AHCA agrees with the Second DCA that the term

“effect” is synonymous with “result.” *Effect and Result Definitions*, Black’s Law Dictionary (11th ed. 2019), *available at* Westlaw (“effect” means “[s]omething produced by an agent or cause; a result, outcome, or consequence”; “result” means “[t]o be a physical, logical, or legal consequence; to proceed as an outcome or conclusion”). See Ybor Clinic, 310 So. 3d at 1062 (concluding “effect” in section 120.68(3)’s presumptive supersedeas language means “result”).

Nevertheless, section 120.68(3)’s express terms require the “effect” or “result” of the “agency decision” must be “suspending or revoking” a license. According to Black’s Law Dictionary, “suspend” means “[t]o interrupt; postpone; defer” or “[t]o temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege[.]” *Suspend Definition*, Black’s Law Dictionary (11th ed. 2019), *available at* Westlaw. “Revoke” means “[t]o annul or make void by taking back or recalling; to cancel, rescind, repeal, or reverse.” *Revoke Definition*, Black’s Law Dictionary (11th ed. 2019), *available at* Westlaw. “Revocation” and “suspension,” then, are acts taking something away that someone already has, either temporarily or permanently.

Here, Ybor Clinic’s existing license would have “expired” by operation of statute, absent entry of the stay. §§ 408.806(2)(a), (4)(a)-(b), (6),

408.808(1), 408.815(6), Fla. Stat. As Black's Law Dictionary states, "expire" means "[o]f an official document) to be no longer legally effective; to become null at a time fixed beforehand". *Expire Definition*, Black's Law Dictionary (11th ed. 2019), *available at* Westlaw.

The AHCA Final Order at issue in this case deems a licensure renewal application "incomplete and withdrawn from further consideration" per section 408.806(3)(b).⁹ The Final Order at issue in this case did not have the effect of suspending a license because the Final Order did not have the effect of interrupting or postponing a license or temporarily keeping the licensee from exercising a right or privilege. Similarly, the Final Order at issue did not have the effect of revoking a license because the Final Order did not have the effect of voiding, cancelling, rescinding, or repealing an existing license. Rather, the licensee's existing license expired by operation of law and as the result of the licensee's failure to timely act on its renewal application.

Additionally, section 120.68(3) says the "effect of suspending or revoking" must be on "a license." Here, "license" is defined as "a franchise, permit, certification, registration, charter, or similar form of authorization

⁹ Section 408.806(3)(b) is one of several statutes authorizing APA agencies to "deem" or "consider" an application for licensure to be withdrawn in specified circumstances. §§ 163.3208(8)(d), 373.4133(8)(a)2., 381.986(8)(e)1.d, 408.039(3)(a), Fla. Stat.

required by law” But the AHCA Final Order at issue concerned an “application” for licensure renewal, not a license. APA section 120.60(1) indicates that an application is a writing an applicant must submit to an agency to request a license. An “application,” then, is very different from a “license.” Since the terms “license” and “application” for licensure or licensure renewal refer to different written instruments that serve different purposes under the law, they cannot be considered equivalent for purposes of section 120.68(3)’s presumptive supersedeas provision.

A close review confirms the Second DCA in Ybor Clinic did not engage in an in-depth analysis of the section 120.68(3) presumptive supersedeas provision’s plain language in its Order. Indeed, the Second DCA failed to follow section 120.68(3)’s plain language that “the decision ha[ving] the effect” be on “a license” when it concluded, since the facility **would not be licensed or would have a licensure gap** because of AHCA’s decision **on the application**, that was sufficient to trigger section 120.68(3)’s presumptive supersedeas provision. 310 So. 3d at 1062. If the Legislature had intended an agency decision to deem a licensure renewal incomplete and withdrawn from further consideration and/or any subsequent expiration of the existing license by operation of statute to trigger a presumptive stay or supersedeas, it could have said so in the text

of section 120.68(3). But it did not. The Second DCA committed harmful, reversible error by applying section 120.68(3)'s presumptive supersedeas provision in circumstances beyond those which its express terms say it should apply to in order to grant a stay of AHCA's Final Order in this case. In contrast, the First DCA in Beach Club squarely recognized that section 120.68(3)'s presumption supersedeas provision is predicated on the agency's decision being taken **on "a license," rather than on an application**, and this was a determining factor in that court's decision. 330 So. 3d at 582-83.

The only "agency decision" in this case was AHCA's decision to deem the licensee's incomplete application to be withdrawn, which AHCA was mandated to do by Section 408.806(3)(b). There was no "agency decision" that "ha[d] the effect of suspending or revoking a license."

2. An Agency Final Order Deeming a Licensure Application Incomplete and Withdrawn from Further Consideration Does Not "Ha[ve] the Effect of Suspending or Revoking a License" Under the APA and HCLPA.

Under the APA and HCLPA, an AHCA Final Order deeming a licensure renewal application incomplete and withdrawn from further consideration does not "ha[ve] the effect of suspending or revoking a license." As such, section 120.68(3)'s presumptive stay provision is inapplicable.

The APA and HCLPA address licensure application proceedings in different statutory sections or subsections than licensure disciplinary proceedings. Compare §§ 120.60(1)-(4), 408.806, 408.8065, 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat. (concerning agency actions on applications for licensure) with §§ 120.60(5)-(6), 408.814(1)-(2), 408.815(1), Fla. Stat. (concerning actions against existing licenses); Silver Show, 763 So. 2d at 349 (pointing out “applications for licenses are treated in different statutes than license discipline proceedings. Compare § 120.60(1)-(3), and 561.17, with §§ 120.60(5)-(6) and 561.26, Fla. Stat. (1997).”). Thus, the APA and HCLPA treat disciplinary decisions or proceedings against existing licenses separately and distinctly from regulatory actions or proceedings on licensure applications, confirming the two are not equivalent.

Also, an AHCA final order suspending or revoking a license and an AHCA final order deeming a licensure renewal application incomplete and withdrawn from further consideration do not have the same practical effect. When AHCA renders a final order that suspends or revokes a health care facility’s license under the HCLPA:

- the action is punitive (not regulatory);
- the action must be preceded by an administrative complaint and

opportunity for a hearing (not a notice of intent);

- the action involves a determination that the facility is unfit for licensure and is discretionary (not mandatory);
- the action is taken directly against and on an existing license (and not on an application for a prospective license);
- the action negatively affects an existing license by preventing the facility from operating under it (either temporarily or permanently) during the license's effective period;
- the action has the potential to affect the licensee's ability to successfully apply for licensure in the future; and
- so, this Court has found the Agency's must prove the grounds for the action by clear and convincing evidence (rather than a preponderance of the evidence) at any administrative hearing.

§§ 120.57(1)(j), 120.60(5), 408.814(1)-(2), 408.815(1), 408.821(1), Fla. Stat.; Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 856-57 (Fla. 2015) ("Davis"); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-35 (Fla. 1996) ("Osborne Stern"); Beach Club, 303 So. 3d at 582-83; Terrell Oil, 541 So. 2d at 714-15; Silver Show, 763 So. 2d at 349-50; infra Argument at B.3.

In contrast, when AHCA renders a final order deeming a health care

facility's application for licensure renewal to be incomplete and withdrawn from further consideration under the HCLPA:

- the action is regulatory (not punitive);
- the action must be preceded by written notice and the opportunity for a hearing (not an administrative complaint);
- the action involves a determination that an application is incomplete and is mandatory (not discretionary);
- the action is taken directly against and on an incomplete application for a prospective license (rather than an existing license) and removes the incomplete application from further consideration, so that matters proceed under the HCLPA as if it were never filed;
- the action does not affect an existing license (either negatively or otherwise) or prevent the facility from operating under an existing license (either temporarily or permanently) during the license's effective period;
- the action does not have the potential to affect the licensee's ability to successfully apply for licensure in the future; and
- so, this Court has found the Agency must prove the grounds for its decision by a preponderance of the evidence (rather than by clear and convincing evidence) at any administrative hearing.

§§ 120.57(1)(j), 120.60(3), 408.806(1)-(2)(a), (3)(a)-(b), (4)-(7)(a), (7)(c), 408.8065, 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 933-35; Beach Club, 303 So. 3d at 582-83; M.H. v. Dep't of Child. & Fams, 977 So. 2d 755, 760-62 (Fla. 2d DCA 2008); Terrell Oil, 541 So. 2d at 714-15; Silver Show, 763 So. 2d at 349-50; infra Argument at B.3. Cf. § 408.831, Fla. Stat.

Also important, in drafting the HCLPA, the Legislature **deliberately chose**: (1) not to give an applicant health care facility a property right or any legal expectation to licensure renewal; (2) to place the burden squarely on an applicant to timely file and complete a licensure renewal application and to demonstrate that it is qualified (i.e. meets minimum requirements of law) and fit for licensure renewal; and (3) to give AHCA broad discretion to determine the fitness of licensure applicants but no discretion to accept a late-filed application or to do anything but deem an application incomplete and withdrawn from further consideration when the applicant fails to timely respond to an omission notice. See §§ 408.806(1)-(2)(a), (2)(d)-(3)(b), (5)-(7)(a), (7)(c), 408.065, 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); supra Argument at B.1; infra Argument at B.3.

Indeed, to obtain continued licensure, the HCLPA requires a health care facility to file a timely and complete renewal application, undergo an inspection, and thereby demonstrate to the Agency's satisfaction that it meets minimum requirements of law and is otherwise fit for continued licensure. §§ 408.806(1)-(2)(a), (2)(d)-(3)(c), (5)-(7)(a), (7)(c), 408.809-408.811, 408.815, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7). If the applicant does not submit a renewal application before its existing license automatically expires and becomes void by statute, the expired license cannot be resurrected. See §§ 408.806(1), (4)(a)-(b), (6), 408.808(1), Fla. Stat.; supra *Expire Definition*, Black's Law Dictionary; supra Statement of the Case and Facts at B, Argument at B.1. Similarly, if the facility does not respond to the Agency's omissions notice on time, section 408.806(3)(b) requires the licensure renewal application "shall be deemed incomplete and shall be withdrawn from further consideration" And if AHCA finds a facility has not demonstrated it meets minimum requirements of law for continued licensure or finds the applicant is otherwise unfit for any of the reasons stated in the HCLPA or authorizing statutes, then AHCA may exercise its discretionary authority to deny the licensure renewal application. See §§ 408.806(1)-(2)(a), (3)(a)-(c), (5)-(7)(a), (7)(c), 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat.; Fla. Admin. Code R. 59A-

35.060(6)-(7); infra Argument at B.3. The “burden of ultimate persuasion at each and every step” is on the applicant to demonstrate that it is qualified and fit for licensure, including to the Agency and by a preponderance of the evidence at any administrative hearing. §§ 120.57(1)(j), 408.806(1)-(2)(a), (2)(d)-(3)(c), (5)-(7)(a), (7)(c), 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); Davis, 160 So. 3d at 855-57; Osborne Stern, 670 So. 2d at 933-35; M.H., 977 So. 2d at 760-62; infra Argument at B.3.

It is true that, absent a timely and complete renewal application, a health care facility’s license will expire and become void when its two-year effective period ends, resulting in a licensure gap such that the facility cannot lawfully operate; but this is part of the natural life cycle of the license, as contemplated by the HCLPA’s statutory scheme. §§ 408.802, 408.804(1), 408.806(2)(a), (3)(a)-(b), (4)(a)-(7)(a), (7)(c), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7). And, aside from the statutory expiration, the proximate cause of the loss of licensure is the facility’s own failure to timely complete its licensure renewal application (including by timely responding to AHCA’s request for the submission of omitted information), such that AHCA is mandated to deem its application incomplete and withdrawn from further consideration by section

408.806(3)(b). §§ 408.806(2)(a), (3)(a)-(b), (4)-(7)(a), (7)(c), 408.808(1), 408.815(6), Fla. Stat.; supra Argument at B.1. The loss of licensure is certainly not due, as Ybor Clinic would have this Court find, to any “agency decision” being taken on “a license.” § 120.68(3), Fla. Stat.; supra Argument at B.1.

3. *An Agency Final Order Deeming a Licensure Renewal Application Incomplete and Withdrawn from Further Consideration Does Not “Ha[ve] the Effect of Suspending or Revoking a License” Under Florida Case Law.*

Case law, including from this Court, supports that an agency decision on a licensure renewal application does not “ha[ve] the effect of suspending or revoking a license” for purposes of section 120.68(3)’s presumptive supersedeas provision. The following cases are instructive:

In Davis and Osborne Stern, this Court held there are inherent, qualitative differences between agency regulatory actions and agency disciplinary or penal actions so fundamental that the actions even have different burdens of proof that must be borne by different parties. 160 So. 3d at 856-57; 670 So. 2d at 933-35; supra Argument at B.1-2. An agency’s decision on an application for licensure or licensure renewal is a **regulatory** measure to which the “preponderance of evidence” burden of proof applies; although the burden may shift to the agency to prove any grounds for denial, the licensure applicant has the “burden of ultimate

persuasion at each and every step” of the proceeding to demonstrate that it is qualified and fit for licensure. Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 934-35. In contrast, an agency’s decision to suspend or revoke a license is **penal** in nature and may implicate property rights; thus, the agency must prove the grounds for taking a chosen disciplinary action by “clear and convincing evidence.” Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 933-35. See § 120.68(1)(j), Fla. Stat. Applying the “clear and convincing evidence” burden to licensure application proceedings would be “inconsistent with the discretionary authority granted by the Florida legislature to administrative agencies responsible for regulating professions under the State’s policy power,” and which “is particularly necessary where an agency regulates occupations which are practiced by privilege rather than by right and which are potentially injurious to the public welfare.” Davis, 160 So. 3d at 856-57 (quoting Osborne Stern, 670 So. 2d at 934-35 & Astral Liquors, Inc. v. Dep’t of Bus. Reg., 463 So. 2d 1130, 1132 (Fla. 1985)).

In 1989 in Terrell Oil, 541 So. 2d 714-15, the First DCA held an applicant whose application for renewal of its certification as a disadvantaged business enterprise (“DBE”) had been denied by DOT was not entitled to a “stay” as a matter of right under section 120.68(3). The

First DCA held section 120.68(3) was inapplicable because the order denying the application for recertification did not “ha[ve] the effect of suspending or revoking a license.” Id. at 714-15. It reasoned “a DBE certification is of finite duration and [] the enterprise must submit a complete updated application to remain certified.” Id. at 715. And it recognized the “qualitative difference between ... [an order] that denies renewal of a license that has expired or is about to expire and one which suspends or revokes and active license.” Id. at 715.

In 1998 in Silver Show, 763 So. 2d at 349-50, the Fourth District Court of Appeal (“Fourth DCA”) held a licensure applicant was not entitled to a “stay” as a matter of right under section 120.68(3) because the denial of an application for licensure did not “ha[ve] the effect of suspending or revoking a license.” It reasoned that the applicable statutory schemes, including the APA, treated “[a]pplications for licenses ... in different statute than license discipline proceedings.” Id. at 349.

The licensing statutes deal with the question whether a person is qualified to receive the license in the first instance, while the disciplinary statutes are penal in nature and concern whether a license already granted should be suspended or revoked. A licensee may have a valuable property right in an *existing* license, but a mere applicant for a beverage license has at best the hope of qualifying.

Id. at 349 (emphasis in original). The Fourth DCA pointed out the principles

this Court had outlined in Osbourne Stern and Astral Liquors (Davis had not yet been decided), and noted the state’s “broad powers” to regulate the alcoholic beverage industry and the “considerable discretion” afforded to DBPR to determine if an applicant is qualified for licensure, and concluded “[t]he principles governing the discipline of those who have already qualified for a license are thus inapposite to the principles governing the exercise of the agency’s discretion to grant the privilege to hold such a license.” Silver Show, 763 So. 2d at 349-50.

Most recently, in 2018 in Beach Club, the First DCA held an applicant whose incomplete licensure renewal application was withdrawn from further consideration by AHCA was not entitled to a “stay” as a matter of right under section 120.68(3) “because the final order does not revoke Appellant’s license. Instead, the final order deemed the application withdrawn.” 330 So. 3d at 582-83. The First DCA discussed the principles espoused by the DCAs in Terrell Oil and Silver Show and cited them in support of its decision. Beach Club, 303 So. 3d at 583.

The principles this Court recognized in Davis and Osborne Stern, and which the DCA’s have espoused in Terrell Oil, Silver Show, and Beach Club, support AHCA’s position in this case. If regulatory decisions/proceedings regarding licensure applications and disciplinary

decisions/proceedings regarding existing licenses are separate and distinct and if there is a qualitative difference between licenses that have expired and those that are about to expire, then an AHCA final order deeming an application for licensure renewal incomplete and withdrawn from further consideration cannot “ha[ve] the effect of [an agency decision] suspending or revoking a[n existing] license” for section 120.68(3)’s purposes. Further, if the “burden of ultimate persuasion at each and every step” of a license application proceeding is on the applicant to demonstrate it is qualified and fit for licensure, consistency dictates the burden should remain with an applicant to persuade the agency or court that it should receive a stay of the agency’s final order denying or withdrawing that application because, among other things, it is likely to succeed on the merits of its appeal); it should not shift to AHCA to “demonstrate a probable danger to the health, safety, or welfare of the state” to oppose a stay or supersedeas. See §§120.57(1)(j), 120.60(4), 120.68(3), Fla. Stat.; Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 934-35; supra Argument at A.3, B.1-2; infra Argument at C.

C. Additional Considerations Support Placing the Burden on the Licensure Applicant to Demonstrate That an AHCA Final Order Withdrawing Its Application for Licensure Renewal Should Be Stayed Pursuant to the Case Law Factors.

Additional considerations support placing the burden on the applicant

to demonstrate that an AHCA final order withdrawing its application for licensure renewal should be stayed pursuant to the case law factors described above (rather than placing the burden on AHCA to demonstrate supersedeas should not be granted due to a “probable danger to the health, safety, or welfare of the public” under section 120.68(3)’s presumptive supersedeas provision).

As AHCA has already pointed out, imposing the burden on the Agency to demonstrate that a health care facility that has applied for licensure poses “a probable danger to the health, safety, or welfare of the public” is inconsistent with the principle recognized and announced by this Court that the “burden of ultimate persuasion at each and every step” of a license application proceeding is on the applicant to demonstrate it is qualified and fit for licensure. Davis, 160 So. 3d at 856-57; Osborne Stern, 670 So. 2d at 934-35. See § 120.57(1)(j), Fla. Stat.; supra Argument at B.2-3.

Imposing the burden on AHCA to rebut the presumption in favor of supersedeas is also impracticable, since the Agency does not have all the information it needs at the time a stay or supersedeas is requested to determine whether conditions at a facility “constitute a probable danger to the health, safety, or welfare of the public.” § 120.68(3), Fla. Stat.

Consequently, AHCA may not be able to oppose a stay or supersedeas even when it is appropriate and needed to protect the public from danger, simply because it does not have the information at hand to make the argument.

The information that AHCA needs to determine if conditions at a facility “constitute a probable danger to the health, safety, or welfare of the public” is largely the same information that AHCA needs to determine whether a facility meets minimum requirements of law and is otherwise fit for licensure. The HCLPA (and also the APA and case law) places the burden on the applicant for licensure renewal to provide this information to AHCA with its application. §§ 408.806(1)-(2)(a), (3)(a)-(7)(a), (7)(c), 408.809-408.811, 408.815(1), (3)-(5), Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); supra Argument at B.1-3. Where, as here, the applicant has failed to provide the required information, AHCA simply does not have it and cannot consider it for any purpose – either for the licensure renewal inquiry or the stay or supersedeas inquiry. Failure to meet its statutory obligation to provide the Agency with information, thus, actually benefits the applicant if the presumptive stay inquiry under section 120.68(3) is applied.

Further, as AHCA has already noted, the minimum requirements of law that an applicant must demonstrate to obtain licensure renewal include

such basic necessities as proof: the facility is appropriately staffed with qualified and trained individuals who have undergone the required criminal background screening; the facility has appropriate insurance coverage; the facility has passed a fire safety inspection and the premises are otherwise safe and sanitary; the facility has an emergency management plan; the facility has explained any exclusions, suspensions, or terminations from Medicare, Medicaid, or federal Clinical Laboratory Improvement Amendment programs; and the applicant has the right to occupy the property from which it intends to operate. §§ 408.802, 408.806(1)(a)2., (1)(d)-(e), (1)(g)-(h), (7)(a), (7)(c), 408.809, 408.810(1)-(3)(b), (6)-(7), (12), 408.811, Fla. Stat.; Fla. Admin. Code R. 59A-35.060(6)-(7); supra Statement of the Case and Facts at B. It is axiomatic that a health care facility that does not meet these minimum requirements is potentially dangerous to the public, including its clients. Nevertheless, it is unlikely that AHCA can demonstrate to a court that the danger is “**probable**” given the limited information available to it in an incomplete application scenario. § 120.68(3), Fla. Stat.

And AHCA does not have the resources to determine independently whether conditions at the facility are dangerous at the time supersedeas is requested. Indeed, the Agency does not conduct licensure inspections of

applicant facilities until **after** an applicant has submitted its application for licensure renewal and AHCA has received a satisfactory response to any omissions notice. §§ 408.806(3)(a)-(c), (7)(a), (7)(c), 408.811, Fla. Admin. Code R. 59A-35.060(6)-(7). And it is very difficult for the Agency to order and complete a survey or inspection of a facility in the short time period between the filing of a motion for stay and the time that its response is due, given the number of facilities that AHCA regulates, the limited number of surveyors at AHCA's disposal, and the pre-existing demands on surveyors' time. See Fla. R. App. P. 9.190(e), 9.300(a).

Finally, public policy considerations support requiring an applicant for licensure to demonstrate to the satisfaction of the agency or reviewing court that the case law factors support its request for a stay or supersedeas. Again, the case law factors that the agency or court must consider when a stay is discretionary include: (1) whether the movant/applicant has a likelihood of success on the merits; (2) the likelihood of irreparable harm if the stay or injunction is not granted; (3) whether there is another adequate remedy available at law; and (4) whether public policy considerations support the requested relief. Supra Standards of Review, Argument at A.3. If these case law factors are never considered (and, again, they are not under section 120.68(3)'s presumptive

supersedeas provision) then the agency or court may be required to grant an applicant a stay that extends its existing license for months or years as its appeal moves through the court system, without first engaging in a review of the facts, circumstances, and merits of the case. Such a result is clearly contrary to the statutory text and legislative intent. It would place the public at unnecessary risk of harm, given that the Agency has not determined the facility meets minimum requirements of law to continue to be licensed and operate. And it would afford a movant/applicant a windfall, especially where the movant/applicant has no demonstrable likelihood of succeeding on the merits of its appeal.

D. Applicability of Rule 9.190(e)(2)(C) to Section 120.68(3)'s Presumptive Supersedeas Provision.

The Second DCA's Order in Ybor Clinic finds rule 9.190(e)(2)(C) applies to this case, rather than rule 9.190(e)(1)-(e)(2)(A). 310 So. 3d at 1061-61. Cf. Beach Club, 303 So. 3d at 583 (stating, in-part incorrectly, that "[s]ection 120.68(3) and rule 9.190(e)(2)(C) only apply 'if the agency decision has the effect of suspending or revoking a license.>"). This is patently incorrect.

The text of rule 9.190(e)(2)(C) states it only applies "[w]hen an agency **has suspended or revoked** a license other than on an emergency basis." (Emphasis added). Here, AHCA has not "suspended or revoked a license." Supra Statement of the Case and Fact at C-D, Argument at B.1-2. Additionally, the scope of rule 9.190(e)(2)(C) is narrower than section 120.68(3)'s presumptive supersedeas provision because it does not include the "ha[ve] the effect of" language. Nevertheless, neither the First DCA in Beach Club, 303 So. 3d at 583, and the Second DCA in Ybor Clinic, 310 So. 2d at 1061-63, considered the fact that the statute and rule use slightly different language.

Thus, if this Court resolves the conflict, it should find rule 9.190(e)(1)-(e)(2)(A) is the applicable provision, not rule 9.190(e)(2)(C).

CONCLUSION

For all the foregoing reasons, the Second DCA committed harmful, reversible error when it applied section 120.68(3)'s presumptive supersedeas provision to grant a "stay" of AHCA's Final Order Ybor Clinic's licensure renewal application incomplete and withdrawn from further review. Accordingly, AHCA hereby respectfully requests this Court:

1. Resolve the interdistrict conflict between the First DCA's Beach Club Order and the Second DCA's Ybor Clinic Order by holding section 120.68(3)'s presumptive supersedeas provision does not apply to an agency final order deeming a licensure renewal application incomplete and withdrawn from further consideration; and
2. Reverse the Ybor Clinic Order and remand to the Second DCA to consider whether a discretionary stay is appropriate under the case law factors described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document has been furnished by Electronic Mail to Counsel for Appellant, Frank Bane, Esquire, frankbanelaw@gmail.com, 605 75th Avenue, St. Petersburg, Florida 33706, on June 28, 2021.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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