IN THE SUPREME COURT OF FLORIDA

MARC D. SARNOFF, TOME HYDE, STEVEN REGISTER, CHARLES STAHMAN, HARRY BRADY and MELISSA RICHIE, both individually and on behalf of all others similarly situated,

Petitioners,

vs. Case No. SC01-351

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
STATE OF FLORIDA

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 337609

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
850/414-3300
850/488-5865 (FAX)

Counsel for the Respondent
Department of Highway Safety
Motor Vehicles

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

LAWS OF FLORIDA

FLORIDA RULES OF APPELLATE PROCEDURE

FLORIDA ADMINISTRATIVE CODE

PRELIMINARY STATEMENT

The Plaintiffs in the trial court below, the Appellees before the First District Court of Appeal and the Petitioners before this Court are Marc D. Sarnoff, Thome Hyde, Steven Register, Charles Stahman, Harry Brady and Melissa Richie. They will be referred to as "the Petitioners" in the Answer Brief.

The Defendant in the trial court below, the Appellant in before the First District Court of Appeal and the Respondent before this Court is the Department of Highway Safety and Motor Vehicles. It will be referred to as "the Department" in the Answer Brief.

The trial court below was the Second Judicial Circuit in and for Leon County, Florida. It will be referred to as "the trial court" in the Answer Brief. The Court below was the First District Court of Appeal. It will be referred to as "the First District" in the Answer Brief.

STATEMENT OF THE CASE

Petitioners' Statement of the Case and Facts obscures the issue presented for review through omissions and misstatements. Accordingly, pursuant to Rule 9.210(c) Fla. R. App. P., the Department offers the following clarifications:

OVERVIEW

This case does **not** involve a constitutional challenge to a statute.[1] It involves Petitioners' constitutional challenge to an administrative rule, Rule 15C-6.003, Fla. Admin. Code. Whether this is considered an "as applied" challenge to the statute implemented by the rule, or a direct challenge to the rule, the fact that the rule (rather than the statute) is the object of the challenge distinguishes this case from the "facial" statutory challenges in *Department of Revenue v. Nemeth*, 733 So. 2d 970 (Fla. 1999) and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994).

The object of the challenge – rule, rather than statute – properly frames the issue in this case as whether *Kuhnlein* and *Nemeth* permit all refund claims to be presented in a circuit court even in situations where the administrative process or procedure can provide the very relief the plaintiff seeks.

THE MOTOR VEHICLE INSPECTION PROGRAM (MVIP)

Petitioners' discussion of the MVIP omits the pertinent details of its creation and operation which provide a context for this dispute.

In 1988, the Florida Legislature adopted the Clean Outdoor Air Law (COAL). *See* Ch. 88-129, Laws of Fla. (codified as amended in Sec. 325.01, Fla.

---

[1]/ This appeal involves only Count I of the Amended Complaint. Count II of the Amended Complaint, which is not before the Court, involves a statutory challenge; however, the statutory challenge involves the 1998 version of Sec. 325.214(2), Fla. Stat., not the 1989 and 1995 versions of the statute pursuant to which the challenged rule was promulgated.

Stat., *et seq.)*. The MVIP was a component of COAL and its goal was to improve air quality in the Florida counties that have been declared ozone nonattainment areas by the federal Environmental Protection Agency. Vehicles owned by residents of those counties were required to undergo emissions testing through the MVIP. Sec. 325.203(3), Fla. Stat. (1989). The Legislature delegated to the Department the authority to "direct the implementation, operation, and regulation of [the required] omissions inspections." Sec. 325.207, Fla. Stat. (1989). As part of its delegated authority, the Department was directed to establish a fee for the emissions testing. The fee was "not to exceed $10." Sec. 325.214(2), Fla. Stat. (1989). More specifically, the statute provided the following additional direction:

> By rule, the department shall set a regulatory amount to be included in the fee which is commensurate with the cost of administering and enforcing the inspection program. It is the intent of the Legislature that the program be self-supporting.

Id.[2]/ The Department adopted a rule to implement the statute which provided that "[t]he emissions inspection fee . . . is $10.00 per inspection." Rule 15C-6.003(2)(a), Fla. Admin. Code (1989). The $10 fee included two components: (1) the amount owed to the entities who contracted with the Department to perform the MVIP, and (2) the Department's cost of administration and enforcement. The rule provided that the administration cost was "the difference between the contractor contract price for an emissions inspection and the [$10] inspection fee." Rule 15C-6.003(2)(a)2., Fla. Admin Code (1989).

The gravamen of Petitioners' Amended Complaint is that the fee is

---

[2]/ Contrary to the statement of the Petitioners in footnote 2 on page 3 of their Initial Brief, the Legislature never stated in Chapter 325 that the Department was to "set a fee at an amount *no greater that necessary* . . ." (Emphasis in the original). All the Legislature stated was that the fee be "comensurate" and "that the program be self-supporting." Sec. 325.214(2), Fla. Stat. (1989) and (1995).

unconstitutional because the sum of these components is less than $10. More specifically, Petitioners' contend that the portion of the fee designated as the Department's administrative cost ($10 less contract price) is not "commensurate with the cost of administering and enforcing the inspection program."

The Legislature amended Sec. 325.214(2), Fla. Stat., in 1998 in connection with a revamp of the MVIP. As amended, the statute provides that "[t]he inspection fee shall be $10." Sec. 325.214(2), Fla. Stat. (1998 Supp.). The statute does not give the Department any discretion to set the fee less than $10 based upon cost of administration or other factors; it requires a flat fee of $10. As noted above, the validity of the 1998 version of the statute is raised in Count II of the Amended Complaint which is still pending before the trial court and not part of this appeal.

THE PETITIONERS' CONSTITUTIONAL CHALLENGE

On pages 4 and 5 of their Initial Brief, Petitioners imply that they challenged the facial invalidity of Sec. 325.214(2), Fla. Stat. (1989) and (1995). That interpretation must not be taken from a reading of the Petitioners' Initial Brief. Both the Complaint and the Amended Complaint do not allege facial invalidity of Sec. 325.214(2), Fla. Stat. (1989) and (1995). Rather, Petitioners asserted that Sec. 325.214(2), Fla. Stat. (1989) and (1995) is invalid because of the interpretation and implementation of Sec. 325.214(2), Fla. Stat. (1989) and (1995) by the Department. Citing from the Amended Complaint (Pet. A2), the Petitioners plead unconstitutionality because:

a. The Department's **implementation** has improperly usurped legislative authority. (Pet. A 2, pp. 9-11, 12, and 17, para.'s 24, 33 and 44); and

b. The Department's **implementation** has resulted in a fee greater than the cost of the air emissions program. (App. 2, pp. 10, 13, and 17, para.'s 24c, 33, and 44).

THE FIRST DISTRICT'S DECISION

The Petitioners mischaracterize the First District's decision because they have not included all of the First District's explanation of its decision. The First District analyzed both *Nemeth* and its predecessor, *Department of Revenue v. Kuhlein*, 646 So. 2d 717 (Fla. 1994). The First District did not "narrow" those two decisions. Rather, it properly distinguished those cases. Starting on page 5 of the decision (Pet. A9), the First District noted that, while this Court did not use the term "facial" in either decision, both *Nemeth* and *Kuhnlein* involved solely facial challenges to legislative statutes. (Pet A9, pp. 5-6 and 11-12). A challenge to a rule setting a fee or an "as applied" challenge to either a rule or statute was not before this Court in either *Nemeth* or *Kuhnlein*.

After looking at the facts of this case, the First District concluded a facial challenge to a statute was not present in Count I and that fact mandated a different result than that reached in either *Nemeth* or *Kuhnlein*. In particular, the First District said of this case:

> In the instant case, appellees have asserted a constitutional basis for their challenge to section 325.214(2). However, the gravamen of Count I of their complaint is an attack upon the implementing rule promulgated by the Department, and the manner in which the Department has administered and enforced the statute. Appellees contend the rule promulgated by the Department imposes an inspection fee in excess of the amount initially authorized by the legislature, i.e., a fee in an amount commensurate with the cost of operating the emissions inspection program. In essence, appellees challenge the Department's interpretation and application of section 325.214, not the facial constitutionality of the provision. "A circuit court should not, as a matter of policy, entertain an action alleging the facial unconstitutionality of an agency rule because an adequate remedy remains available in the administrative process." See Key Haven Associated Enterprises v. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 157-58 (Fla. 1982); Florida Marine Fisheries v. Pringle, 736 So. 2d 17, 23 (Fla. 1st DCA 1999).
>
> * * * * *
>
> A review of Count I of the amended complaint shows that appellees do not challenge the validity of the provisions imposing an inspection fee; rather, appellees challenge only the Department's implementation of the

> statute authorizing the fee. Thus, appellees have raised an "as applied" challenge to section 325.214(2). Pursuant to Nemeth, appellees were required to seek a refund under section 215.26, before filing suit in circuit court. Due to appellees' failure to pursue administrative remedies, the order granting class certification as to Count I of the amended complaint must be reversed.

(Pet. A9, pp. 10-12).

SUMMARY OF THE ARGUMENT

Because Count I does not involve the facial challenge to a fee or tax **statute**, the decision of the First District is in no way express and direct conflict with any decision of this Court or any other District Court, especially *Department of Revenue v. Nemeth*, 733, So. 2d 970 (Fla. 1999), *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) or *Department of Revenue v. Amrep Corporation*, 358 So. 2d 1343 (Fla. 1978).

To the contrary, the First District's decision in this case is a correct interpretation of *Nemeth*. This Court's decision in *Nemeth* was based upon the fact that the Nemeths as Mr. Kuhnlein did before, presented a "facial" challenge to the very validity of the taxing statute itself. Because the Comptroller cannot declare a statute unconstitutional, it would have been futile for the Nemeths and Mr. Kuhnlein to present their refund claim to the Comptroller. Those cases addressed a facial challenge to a statute, not a rule or an agency interpretation of a statute. The First District clearly saw the difference between the two types of challenges and understood the import of footnote 6 in *Nemeth*.

It is critical to understand what this case, concerning Count I of the Plaintiffs' Amended Complaint, is **not** about. Count I does not now, nor ever has been a challenge to a **statute**, either in the form of imposing a tax or a fee. Rather, this case is a **rule challenge** to the Department's setting of the amount of the fee within the range provided the Department by the Legislature in the statute. The

Petitioners' real complaint is that, allegedly, through the rule making process, the Department invalidly promulgated and applied Rule 15C-6.003, Fla. Admin. Code, beyond its delegated legislative authority and set a fee more than the cost of an inspection. What Count I has been and remains is a challenge to the Department's setting of a fee at a level higher than what the Petitioners believe **should have been set**. The Petitioners continued use of the term "tax" when applied to the administrative fee is misleading.

Petitioners continue to mislabel Count I as a challenge to a "statute" and not a rule. Petitioners continue to confuse the law between a challenge of a rule and the challenge of a statute. Since Count I is really a rule challenge, the decision of the First District is not in conflict with *Nemeth*, *Key Haven Associated Enterprises, Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982), or *Amrep Corp.*

Petitioners' reading of *Nemeth* is incorrect. Petitioner's interpretation of *Nemeth* results in an overruling by this Court of *Key Haven* without this Court ever having addressed that issue. *In Key Haven,* this Court stated a constitutional challenge to a rule had to be presented to the administrative agency because the agency could offer relief.

ARGUMENT

I. THIS CASE IS NOT IN CONFLICT WITH *NEMETH* OR *KUHNLEIN*

The Petitioners first argue that the decision of the First District conflicts with two recent decisions of this Court dealing with constitutional challenges to state taxes.[3] Those cases are *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) and *Department of Revenue v. Nemeth*, 733 So. 2d 979 (Fla. 1999). The Petitioners have confused the facts presented in those two cases with the facts present here and upon which the First District made its decision. The very nature of the legal challenges in those cases are different from the underlying nature of the legal challenge presented by the Petitioners.

In both *Kuhnlein* and *Nemeth*, this Court was presented with a "facial" constitutional challenge to a "statute" enacted by the Legislature that imposed a fee or tax upon certain persons. Thus, it was the Legislature's very action that this Court had to adjudicate. As stated in more detail below, the reason this Court allowed an exception from the requirements of the general refund statute, Sec. 215.26, Fla. Stat., with its administrative exhaustion requirements, was that it was "futile" to have person pursue administrative remedies when the administrative process, by its very nature, was without the power to declare the challenges "statute" invalid and provide the relief the party sought. That is not the case here.

A. THE REASONING BEHIND *NEMETH*

The decision of the First District is not in conflict with this Court's decision of *Nemeth*. The Petitioners' entire argument is based upon the incorrect assertion

---

[3]/ The District Court's opinion that Petitioner had no standing to seek a tax refund was strictly a question of law to which a *de novo* standard of review applies. *See Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000); *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998).

that this case concerns a challenge to a tax "statute." However, that is not the case here. The Petitioners' complaint here is that the Department really set the "fee" for the auto emissions inspection beyond that necessary to pay for and sustain the emissions testing program.

Consequently, this case involves an administrative rule and agency action and nothing more. The validity of a tax "statute" is not, nor ever has been, at issue in Count I of the Amended Complaint.[4]/ The only question is the appropriateness of the fee set in Rule 15C-6.003, Fla. Admin. Code, in light of the language contained in the delegating statute, Sec. 325.214(2), Fla. Stat.

The Petitioners claim that the decision of the First District limits the direct-file exception this Court clarified in *Nemeth*. That is not so. A review of *Nemeth* and the state of the law to challenge a statute clearly reveal that *Nemeth* is limited to a facial statutory challenge and is especially not to be applied, as Petitioners desire, to a case where an administrative rule is at issue.

At the time of *Nemeth*, it was well recognized that executive officers could not declare a statute to be invalid. *See Key Haven,* 427 So. 2d, at 157. Because of this, certain language was used by this Court in *Nemeth* to describe the futility of going to the Comptroller, or any administrative officer, in a facial challenge to a statute. In both *Kuhnlein* and *Nemeth*, this Court dealt with two "facial" challenges to tax statutes[5]/, statutes that left no opportunity for a taxpayer to challenge the tax before payment. It was in this context that the two decisions were written.

---

[4]/ Neither is the question, which the Petitioners want desperately to propose, of the validity of a tax **statute** in an "as applied" situation.

[5]/ Under these circumstances, it is no wonder this Court did not specifically use the word "facial." The Court did not have to since the two cases dealt only with the facial validity of a statute.

This Court started its *Nemeth* decision with a summation of its opinion:

> We answer the certified question in the negative except we expressly hold that a taxpayer's claim based **solely** upon the **tax being unconstitutional** may be [directly] filed in the appropriate court rather than with the Comptroller. (e.s.)

Nemeth, 733 So. 2d, at 971. After a brief discussion of the facts, this Court began its legal analysis with the *Kuhnlein* decision, stating that:

> Despite the failure of the class members to apply for a refund from the Comptroller in accordance with the statute, we concluded [in *Kuhnlein*] that they could proceed with the class action challenge of the tax and sue for a refund.

Nemeth, 733, So. 2d, at 973. This Court continued:

> Our [*Kuhnlein*] decision established that in cases where the plaintiff is challenging the constitutionality of an involuntarily paid tax and seeking a refund for the same the taxpayer need not comply with the "administrative" requirements in section 215.26.

This language was followed by the additional language:

> we expressly hold that a Florida taxpayer may file directly in the appropriate court without filing an administrative claim pursuant to section 215.26 if the **sole basis claimed** for the refund is that the **tax is unconstitutional**. (e.s.)

Nemeth, 733 So. 2d, at 973-974. The reason was clear, with the long standing rule of law that executive offices cannot declare statutes unconstitutional, this Court stated:

> [w]e recognize that the Comptroller cannot declare a tax unconstitutional, and thus, when the claim is solely that the refund is required because the tax is unconstitutional, to file the claim with the Comptroller would be a futile act.

Nemeth, 733 So. 2d, at 974.

If there were any question remaining after that statement, recognizing only facial challenges were included in the exception, that confusion was dispelled by these two additional sentences. First, this Court set out footnote 6, which made clear that:

> If the refund is claimed on any other basis, there must be compliance with section 215.26, and this decision in no way alters that requirement.

Nemeth, 733 So. 2d, at 974, n.6. Second, this Court summed up its opinion stating:

> . . ., we now explicitly hold that a plaintiff challenging the **constitutionality of a tax statute** and seeking a refund, . . . (e.s.)

Id. In sum, *Nemeth* stated an exception to Sec. 215.26, Fla. Stat., where a **statute** was being facially challenged, a task the Comptroller is barred from deciding.

That was not the situation before the First District or now before this Court. In this case, the Petitioners' objections have been, and continue to be, to an administrative rule. In Sec. 325.214(2), Fla. Stat, the Legislature delegated to the Department the authority to set the fee for the repayment of an auto emissions test up to $10.00. In Rule 15C-6.003, Fla. Admin. Code, the Respondent set the fee at $10.00. However, after the fee was set, the contracts for the costs of the inspections turned out to be less than the $10.00 set by the Rule. Thus, in light of the language contained in the delegating statute, Sec. 325.214(2), Fla. Stat., the Petitioners seek to test the appropriateness of the fee set in Rule 15C-6.003, Fla. Admin. Code. Sec. 325.214(2), Fla. Stat., (1989) and (1995), themselves are not under attack by the Petitioners. The First District saw this and articulated the distinction between a facial challenge to a "statute" and the challenge to an agency's implementation of a statute through a rule.

B. THE LANGUAGE USED BY THIS COURT IN *NEMETH* AND *KUHNLEIN* REFLECTS A DESIRE TO LIMIT THE EXCEPTION TO "FACIAL CHALLENGES

By the use of specific words in the *Nemeth* decision, it is clear that this Court did not intend to create a general exception to Florida's refund statute. The Department asserts that the First District's language stating that *Nemeth* is limited to "facial" challenges is based directly on the language used by this Court in *Nemeth* and many other earlier decisions. While this Court did not use the words "facial" or "as applied" in *Nemeth*, that distinction was not crucial there because *Nemeth*, like *Kuhnlein*, clearly involved only facial challenges to legislatively created statutes setting a tax.

More important to this case, what the Petitioners have missed from this Court's language in *Nemeth* is the basic constitutional proposition that there is a distinction between "facial" and "as applied" challenges and the distinction can determine how a challenge is heard. *See Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962 (1941); *Agency for Health Care Admin. v. Associated Industries of Florida, Inc*, 678 So. 2d 1239, 1243 (Fla. 1996); *Key Haven*; *State v. Hill*, 372 So. 2d 84, 85 (Fla. 1979); and, *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965).

When this Court used the phrase "it would be futile," in *Nemeth* or in other cases like *Key Haven*, this Court meant that language to apply to a "facial" challenge. The use of that phrase is also found in district court decisions. *See Florida Public Employees Council 79, AFSCME v. Department of Children and Families*, 745 So. 2d 487, 491 (Fla. 1st DCA 1999) [Discussing *Key Haven*].

When there is an "as applied" challenge or a rule challenge, the Comptroller, or any executive agency, **can** act and change the conduct, the rule or the agency application of the law to have it conform to constitutional conduct. When the

Supreme Court described the "direct-file" language in *Nemeth*, the Court was limiting the use of the direct-file method to facial challenges to legislative statutes.

What makes the use of the wording in *Nemeth* and the emphasis on the word "futile" important is this Court's desire to have a valid, useful "process" available and open to a taxpayer so that taxpayer may both seek a refund but do it in a timely, useful fashion. What was not present in either *Nemeth* or *Kuhnlein* was an administrative process through which the taxpayers could obtain the relief they sought, i.e., the Comptroller did not have the power to declare a statute invalid and order a refund under those circumstances.[6]/

However, by using the language that "it would be futile" to take the case to the Comptroller because the Comptroller could not declare the law invalid, this Court did not intend to have the courts usurp the administrative process or procedure where the administrative process does have the power under law to provide the relief the taxpayer seeks. Under proper administrative process and procedure, agencies to possess the power to alter their conduct, their interpretation of legislative statutes, and the rules the agencies themselves have written.

To follow the Petitioners' argument that they could proceed directly to a circuit court when a rule is at issue would require this Court to withdraw from this Court's holding in *Key Haven* and the long established law of administrative

---

[6]/ As this Court has emphasized for a long time, it is the adequacy and meaningfulness of the administrative process and procedures that are the keystones of the "futility" question in the exhaustion of administrative remedies issue before a court. As this Court stated in *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978):

> it is pointless to require applicants to endure the time and expense of full administrative proceedings to demonstrate "need" before obtaining a judicial determination as to the validity of that statutory prerequisite.

Id. at, 699.

exhaustion. This Court's *Nemeth* language did not alter or recede from *Key Haven*'s holding. The doctrine of exhaustion of administrative remedies in cases where the administrative process and procedure still precludes judicial intervention **where administrative procedures can afford the relief the litigant seeks** (e.s.). *Key Haven*, 427 So. 2d, at 157. *See also Florida Marine Fisheries Com'n (Div. of Law Enforcement) v. Pringle*, 736 So. 2d 17, 20, (Fla. 1st DCA 1999).

There is no question that a true "facial" challenge to a statute cannot be heard through the administrative process. *Key Haven, supra*. This Court there went on to state, however:

> When the facial unconstitutionality of an **agency rule is the focus of an aggrieved party's constitutional claim**, the administrative proceedings must be exhausted and the claim presented to the district court. A circuit court should not, as a matter of policy, entertain an action alleging the facial unconstitutionality of an agency rule because an adequate remedy remains available in the administrative process. (e.s.)

Id., 427 So.2d, at 157-58.

The Department asserts that the question of "facial" versus "as applied" in this case is no different from one discussed in *Florida Public Employees Council 79, AFSCME.* There, the First District stated:

> [A]s a matter of judicial policy, 'the circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available under Chapter 120.'

Id., 745 So. 2d, at 491. That court continued:

> While "[t]he facial constitutionality of a statute cannot be decided in an administrative proceeding," a party must exhaust available administrative remedies with respect to an as-applied constitutional challenge.

Id., *citing Chrysler v. Florida Department of Highway Safety*, 720 So.2d 563, 567-568 (Fla. 1st DCA 1998).

Thus, historically, the very use of the words found in *Nemeth* have been used by this Court and others to reflect the "futility" of requiring one to seek relief from one who has no power to grant the sought after relief. The law has not and will not allow such frustration.

C. SEEKING RELIEF THROUGH THE ADMINISTRATIVE PROCESS FIRST WOULD NOT HAVE BEEN "FUTILE"

It is clear that the Petitioners are really complaining about the conduct of the Department in the implementation of Sec. 325.214(2), Fla. Stat., between 1994 and 1998, not the facial validity of Sec. 325.214(2), Fla. Stat., or any other statute. A review of the language used by the Petitioners in their Amended Complaint shows complaint not with the statute itself but the Department's interpretation of the statute and the Department's implementation of the statute through its rule.

While the Petitioners have not couched their argument in terms that they claim it would have been futile to seek relief through the administrative process, that is exactly what they are stating in their Initial Brief as the underlying basis of why this Court should allow their case to be brought directly in a circuit court. But in this case "futility" is not an issue. The administrative process about which the Petitioners have complained does have the legal power to provide the process, procedure and relief they are seeking in the first place.[7]/

Because the First District recognized that an appropriate administrative

---

[7]/ While the Petitioners have implied about the futility of administrative procedures to address their complaints and provide them a remedy, at no time have the Petitioners presented evidence in any form that the administrative process could not provide the relief they have requested. There is a burden on the party seeking to bypass usual administrative channels to demonstrate that no adequate remedy exists under Ch. 120, Fla. Stat. *Flo Sun, Inc. v. Kirk,* 783 So. 2d 1029, 1040 (Fla. 2001), *quoting Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695, 699 (Fla.1978). Petitioners have not, in any concrete manner, shown why the administrative process and procedures could not address the rule they are challenging and provide them with the appropriate relief.

process and procedure existed to provide the Petitioners their requested relief, the First District's reliance on *Key Haven* was appropriate because Petitioners challenged the application, or more specifically, the implementation of a statute through an administrative rule. Accordingly, the First District properly viewed this case as a rule challenge controlled by this Court's decision in *Key Haven*:

> When facial unconstitutionality of an agency rule is the focus of an aggrieved party's constitutional claim, the administrative proceedings must be exhausted and the claim presented to the district court. A circuit court should not, as a matter of policy, entertain an action alleging the facial unconstitutionality of an agency rule because an adequate remedy remains available in the administrative process.

427 So.2d at 157-58.

Exhaustion of administrative remedies is not required where resort to the administrative process would be "futile;" that was decided by this court in both *Kuhnlein* and *Nemeth*. However, that exception is inapplicable in this case. The entire Florida Administrative Procedures Act is available to the Petitioners here. In this regard, the question is not whether a refund request made to the Comptroller would be futile; the question is whether resort to the administrative process would have been futile. The answer is no.

Petitioners had open to them 2 courses of action under the administrative process. Petitioners could have initially challenged the validity of the Department's rule, Rule 15C-6.003, Fla. Admin. Code, pursuant to Sec. 120.56(3), Fla. Stat. Like a declaratory action, they could have challenged the rule before the payment of the fee. Such a rule challenge would have to be heard by an Administrative Law Judge (hereinafter "ALJ") at the Division of Administrative Hearings. Although the ALJ could not have declared the rule unconstitutional, the ALJ could have declared the rule invalid if, as Petitioners contend, the portion of the $10 fee attributed to the Department's administrative cost was not

commensurate with the Department's actual costs of administration and enforcement, as required by Sec. 325.214(2), Fla. Stat. (1995). Then, after the rule was declared invalid, the Petitioners (and others similarly situated) could have requested and obtained refunds from the Comptroller.

Petitioners could also have challenged the validity of Rule 15C-6.003, Fla. Admin. Code, in the process of filing for a refund request, asserting that the portion of the $10 fee attributed to the Department's administrative cost was not commensurate with the Department's actual costs of administration and enforcement allowable under Sec. 325.214(2), Fla. Stat. Then, either one of two courses could have occurred. First, the Department could have agreed with the Petitioners' legal argument and noted that excess monies were collected. The Department would then have rewritten the Rule emission charges to reflect the asserted lower costs and have refunded the difference to the Petitioners and others who also filed for a refund.

Second, if the Department did not agree with the Petitioners and denied the Petitioners the requested refund, the Petitioners could either elect to challenge the denial in a circuit court under Sec. 26.012(2)(e), Fla. Stat., or request a formal administrative hearing under Sec. 72.011(1)(a), Fla. Stat., and Sec. 120.569, Fla. Stat.

What distinguishes this case from that of *Nemeth* and *Kuhnlein* is that the administrative remedial process open for the Petitioners here was **not** available to the plaintiffs in *Kuhnlein* and *Nemeth* because the fee was established by legislative statute. Neither DOAH nor the Comptroller had authority to invalidate the statutorily created impact fee of those cases. Accordingly, a direct judicial challenge was the only alternative to the plaintiffs in *Kuhnlein* and *Nemeth*.

To the contrary, here the Department had the power to change or alter Rule 15C-6.003, Fla. Admin. Code, to meet constitutional or statutory requirements. The Department has the legal power reset the fees to conform to statutes or the constitution and order refunds to those who paid too much. If the Department has the power to write a rule, it has the power to rewrite the rule to conform to the statutes if a problem arises.

D. TO ALLOW PETITIONERS' ARGUMENT TO PREVAIL WILL USURP THE BALANCE OF POWER BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES

To find that all non-facial constitutional challenges **must** go to court for a final decision ignores the long held judicial rule that both courts and administrative agencies are to resolve and dispose of issues in cases before them on any ground without addressing or adjudicating constitutional questions presented. *The Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970); *M.Z. v. State*, 747 So. 2d 978 (Fla. 1st DCA 1999). If the courts or agencies can make the party whole without deciding constitutionality, they are to do so. Here, that would mean if the Department has the ability to rewrite what Petitioners believe is an invalid rule, the Department must have the opportunity to rewrite the rule, before it or a court rules on the validity of a statute.

II. THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *AMREP CORPORATION* IN ANY MANNER

The Petitioners assert the First District created "confusion" by "relying upon the principles of exhaustion of administrative remedies" and this Court's decision in *Key Haven*. Petitioners' Initial Brief, p.20. It is Petitioners' assertion that no challenge to a rule or an agency interpretation of a valid statute is present in this case. However, that is not the case.

As we address the Petitioners' assertion, we must remind ourselves of two salient facts present in this case. The first is that this case concerns a refund of moneys already paid. This case does not concern itself with an "assessment" of a tax that the State seeks to collect. Second is that the facts of this case address a challenge to an agency's (Respondent Highway Safety and Motor Vehicles) interpretation of a statute (Sec. 325.214(2),Fla. Stat. (1989) and 1995)) and the agency's written rule policy (rewrite Rule 15C-6.003, Fla. Admin. Code) implementing unquestionably lawful delegation of powers. What we do not have at issue here is a direct, facial challenge to a statute itself.

With this Court's language in *Nemeth* speaking of challenging a tax statute, *id.*, 733 So. 2d, at 974, and that all other cases must abide by Sec. 215.26, Fla. Stat., *Nemeth*, 733 So. 2d, at 974, n.6, and the fact that this case involves the setting of a fee by rule, it is no wonder why the First District went outside of *Nemeth* to see just how a refund claim not falling within the direct confines of *Nemeth* was to be handled. In that light, the First District's decision is not only consistent with *Kuhnlein* and *Nemeth*, it is also consistent with both *Key Haven* and *Amrep*.

In spite of the difference in directly challenging a statute and a challenge to an agency rule or implementing policy, Petitioners continue to assert that the First District's decision conflicts with this Court's decision in *Amrep*. Petitioners' assertion is incorrect.

Amrep is consistent with this Court's reasoning in *Nemeth* and *Kuhnlein*, and the language used therein. Again, the key point that distinguishes this case from that of both *Nemeth* and *Amrep*, is the fact that both of those cases dealt with direct "facial" challenges to a Florida taxing **statute**, where, in the instant case,

Count I clearly deals with a challenge to the Department's interpretation of a fee, authorizing statute and the Department's written **rule.** If there is a difference between *Amrep Corp.* and *Nemeth*, *Amrep Corp.,* dealt with a tax "assessment," not a tax refund. *Nemeth* dealt with what a taxpayer is to do in a tax refund situation. If the First District more closely followed *Nemeth* it is because this case concerns a refund, not an assessment.

A detailed review of *Amrep* clearly shows why that case is like *Nemeth*, and not the case before this Court. This Court began the *Amrep* case by stating just what the case was about.

> This appeal tests the validity of the [statutory] exemption of intercompany accounts receivable from the intangible personal property tax afforded to domiciliary corporate "affiliated groups" under Section 199.023(7), Florida Statutes (1975), when measured against the Equal Protection Clause of the United States Constitution.[8]/

Amrep Corp., 358 So. 2d, at 1345. Right from the beginning we know that we are seeing a facial challenge to an exemption created by the Florida Legislature, not with the Department of Revenue's interpretation of the law but the law itself. The challenge to the statute is confirmed in this Court's description of the very nature of the action.

> The complaint asserted that **Section 199.023(7), Florida Statutes (1975)**, defining "affiliated groups" for the purpose of creating the privilege of filing a consolidated return exempting intercompany accounts receivable violated appellees' right to equal protection of the laws, and rendered the assessment void. (e.s.)

Amrep Corp., 358 So. 2d, at 1345. That case came to this Court because the "Circuit Court of the Second Judicial Circuit for Leon County, wherein the trial

---

[8]/ As this Court noted, "[t]he parties stipulated that with the exception of this residency requirement, appellees meet the definition of an 'affiliated group.'" *Amrep*, 358 So. 2d, at 1345. In plain language, this was a facial challenge to a "residency" requirement to qualify for a tax exemption.

judge declared the **statute** unconstitutional on Equal Protection grounds." *Amrep Corp.*, 358 So. 2d, at 1346.[9]/ Jurisdiction lay in this Court in *Amrep Corp.* because:

> the judgment of the trial court initially and directly passed upon the validity of Section 199.023(7), Florida Statutes (1975).

Amrep Corp., 358 So. 2d, at 1346.

Part of the Petitioners' misunderstanding of the meaning of *Amrep Corp.*, is the fact that this Court decided *Amrep Corp.* shortly after the enactment of Chapter 120, Fla. Stat., and the interplay between the past practice and the then new Administrative Procedures Act was not yet established. It was thought by some that the new APA supplanted all judicial activity when administrative agencies were involved. That feeling can be seen from this Court's language in *Amrep Corp.*, which stated:

> According to [the Department of Revenue], Section 199.242(1), Florida Statutes (1975), which was cited by appellees in their complaint as the basis for the circuit court's jurisdiction, was impliedly repealed by the Administrative Procedure Act. Appellant cites to Section 3, Chapter 74-310, Laws of Florida, a general repealer, as support for the proposition that one of the major purposes of the act was to achieve uniformity in the public's interaction with state agencies. Toward this goal, the act was meant to replace all other provisions dealing with any form of administrative adjudication by a state agency and judicial review thereof.

Amrep, 358 So. 2d, at 1347. That was the primary issue in the case and this Court confirmed that the APA did not supplant judicial review where the constitutionality of a statute itself was concerned.

---

[9]/ Repeated later in the opinion:

> At the culmination of pleadings, the court entered its final judgment, finding the statute unconstitutional and cancelling the assessments against Amrep's intercompany accounts receivable.

Amrep Corp., 358 So. 2d, at 1346.

Based upon its belief, the Department of Revenue moved to have the matter dismissed for failing to exhaust the administrative remedies under Chapter 120, Florida Statutes. *Amrep*, 358 So. 2d, at 1346. This Court rejected the Department of Revenue's administrative exhaustion argument, by stating:

> By its very terms Section 120.73, Florida Statutes (1975), provides that nothing in Chapter 120, Florida Statutes (1975), shall be construed to repeal any provision of the Florida Statutes which grants the right to a proceeding in the circuit court in lieu of an administrative hearing or to divest the circuit courts of jurisdiction to render declaratory judgments under the provisions of Chapter 86, Florida Statutes (1975).
>
> Furthermore, **the challenge here is to the constitutional validity of the statutory section** creating the exemption for "affiliated groups." **The attack is on the facial validity of the statute** as denying equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (e.s.)

Amrep, 358 So. 2d, at 1349.

Amrep was correctly decided. This Court's decisions of *Kuhnlein* and *Nemeth* follow that line of reasoning from *Amrep*. The First District's decision is also consistent with *Amrep.* However, Petitioners want to "blur" the distinction between a direct attack on the very underlying validity of a statute and an attack on an agency's interpretation/implementation of a valid statute. The fact that an agency may be improperly applying a statute does not mean the statute itself is invalid.

The interplay was settled in *Key Haven*. In *Key Haven*, this Court stated that there are three types of constitutional challenges that may be raised concerning the administrative decision-making process of an executive agency. Those three types are:

> (1) the facial constitutionality of a statute authorizing an agency action;
>
> (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute; or

> (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule.

Key Haven, 427 So. 2d, at 157. While it was unquestioned after *Amrep Corp.,* that the validity of a statute must be heard only in a court, this Court stated in *Key Haven*, however:

> When the facial unconstitutionality of an **agency rule is the focus of an aggrieved party's constitutional claim**, the administrative proceedings must be exhausted and the claim presented to the district court. A circuit court should not, as a matter of policy, entertain an action alleging the facial unconstitutionality of an agency rule because an adequate remedy remains available in the administrative process. (e.s.)

Id., 427 So.2d at 157-58.[10]/

Thus, it was not confusing for the First District in its opinion to discuss and rely upon *Key Haven* in a case where the underlying challenge was actually to a rule, not a statute, that set a fee. The Department asserts that *Amrep Corp.,* and *Key Haven* are consistent with each other and that the First District merely chose between those two cases which it followed based upon the type of legal challenge it had before it. Had the Petitioners really been challenging the validity of a statute, and not the implementation of a statute through a rule, then reliance on *Key Haven* would have been in error.

III. PUBLIC POLICY ARGUMENTS HAVE NO PLACE HERE

The Petitioners have inserted a public policy argument, raised for the first time in the Answer Brief before the First District, of why this Court should enlarge the limiting language and narrow exception to Sec. 215.26, Fla. Stat., set forth by this Court in *Nemeth*. This Court should decline this invitation. To do so would be

---

[10]/ Summing up the holding of *Key Haven*, and quoting one of its own earlier decisions, the First District stated "[w]hile '[t]he facial constitutionality of a statute cannot be decided in an administrative proceeding,' a party must exhaust available administrative remedies with respect to an as-applied constitutional challenge." *Florida Public Employees*, 745 So. 2d, at 491, (quoting, *Chrysler v. Florida Department of Highway Safety*, 720 So. 2d 563, 567-568 (Fla. 1st DCA 1998)).

directly contrary to both the separation of powers and the holding in *Nemeth* that all other basis for a refund other than a "facial" challenge must comply with Sec. 215.26, Fla. Stat. *Nemeth*, 733 So. 2d, at 974, n.6.

This Court considered the policy reasoning for the limited "direct-file" exception and determined that all others must follow Sec. 215.26, Fla. Stat. This same argument can be made of any tax or fee that is too small in the minds of the payers to challenge. However, as stated in Sec. 215.26(5), Fla. Stat., refund claims as small as $1.00 will be processed and paid. If there is a complaint with the refund procedures, as viewed by the Petitioners, then the place to make those complaints is to the Legislature to invite the Legislature to change how a refund can be sought. If there is to be a change in refund policy or procedure, that is for the Legislature to make, not the courts. The Petitioners' policy arguments should be addressed to the Legislature, not this Court.

Contrary to the Petitioners' argument that this Court should find the present administrative refund process inadequate and "legislate" a new order is this Court's position on the interplay between the judiciary and the executive/administrative branch. Known as the theory of "primary jurisdiction," this Court recently reaffirmed its position in *Flo Sun, Inc. v. Kirk,* 783 So. 2d 1029 (Fla. 2001). In that case, this Court stated that where possible, the judiciary should defer to the administrative agencies those questions coming within the substantive expertise of the agency. In explaining the theory, this Court stated:

> The doctrine of primary jurisdiction dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency. *See State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 589 (Fla. 1st DCA 1977); *see also Hill Top Developers v. Holiday Pines Serv. Corp.*, 478 So. 2d 368, 370 (Fla. 2d

> DCA 1985); *South Lake Worth Inlet Dist. v. Town of Ocean Ridge*, 633 So. 2d 79, 87-88 (Fla. 4th DCA 1994). The doctrine of primary jurisdiction enables a court to have the benefit of an agency's experience and expertise in matters with which the court is not as familiar, protects the integrity of the regulatory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy. *See Key Haven Associated Enters. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla.1982); *Hill Top Developers*, 478 So. 2d at 370. Pursuant to the doctrine, "[j]udicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government." *Key Haven Associated Enters.*, 427 So. 2d at 157; *see also Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695, 698-99 (Fla.1978) ("[I]f administrative agencies are to function and endure as viable institutions, courts must refrain from 'promiscuous intervention' in agency affairs 'except for most urgent reasons.' "); *Bal Harbour Village v. City of North Miami*, 678 So. 2d 356, 364 (Fla. 3d DCA 1996); *Willis*, 344 So. 2d at 589. It is also important to note that the application of the doctrine of primary jurisdiction is a matter of deference, policy and comity, not subject matter jurisdiction. *See Gulf Pines Mem'l Park*, 361 So. 2d at 699; *St. Joe Paper Co. v. Florida Dep't of Natural Resources*, 536 So. 2d 1119, 1122 (Fla. 1st DCA 1988); *Town of Ocean Ridge*, 633 So. 2d at 87.

Flo Sun, Inc. v. Kirk, 783 So. 2d, at 1036-1037.

In this case, the Petitioners complain of the amount of the fee chosen by the Department to reimburse the State for the emissions inspection program. The entire emissions program was operated by the Department through a contractor system. The cost of the program was determined, in large part, by the bids of the many contractors. The knowledge of the contracts and the emissions testing system are solely within the purview of the Department. Under sound public policy principles the administrative process through the Department is the best way for this case to proceed.

CONCLUSION

In sum, the complaints brought by the Petitioners in Count I are really against the Department's interpretation of Section 325.214(2), Florida Statutes (1990 Supp.) and the implementation of that statute through Rule 15C-6.003,

Florida Administrative Code. The challenge to the Department's action, even in seeking the relief of a refund of any monies in excess of the cost of the inspection, is controlled by *Key Haven,* not *Nemeth*.

The decision of the First District Court of Appeal is in conformance, not in conflict, with many decisions of this Court and other District Courts of Appeal. The decision below should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
Assistant Attorneys General
Florida Bar No.: 337609
Office of the Attorney General
The Capitol-Tax Section
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 488-5865 fax

Counsel for the Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Department's Answer Brief has been furnished by U.S. Mail to ALAN S. WACHS, Esquire, and CATHERINE J. TACKETT, Esquire, Holland & Knight, 50 North Laura Street, Suite 3900, Jacksonville Florida 32202, this _____ day of August, 2001.

ERIC J. TAYLOR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the Department' Answer Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Answer Brief uses Times New Roman 14-point font.

ERIC J. TAYLOR
Assistant Attorney General

C:\Supreme Court\08-22-02\01-351_ans.wpd