CASE NO. SC04-1825

LOWER TRIBUNAL NO: 4D03-3268

In The

Supreme Court of Florida

McKENZIE CHECK ADVANCE OF FLORIDA, LLC,
d/b/a NATIONAL CASH ADVANCE,
STEVE A. MCKENZIE and BRENDA G. MCKENZIE,

Petitioner,

vs.

WENDY BETTS, on behalf of herself
and all others,
similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

AMENDED REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In her Answer Brief, Respondent Wendy Betts simply ignores the fundamental precepts of statutory interpretation and the preclusive effects of prior proceedings, both of which refute the Fourth District's analysis and holding in the opinion below. Instead, Respondent focuses her brief on materials which were not of record in the trial court and which lack evidentiary or persuasive value. To bolster her argument, she misstates the significance of the 2001 revision to the Money Transmitters' Code and ignores the important policy considerations that require reversal of the Fourth District's erroneous decision.

The Money Transmitters' Code and rules implementing it (before 2001) permitted deferred presentment transactions. The Fourth District engaged in judicial legislation by interpolating a non-existent prohibition into the Code. Even more ominous, however, is that the decision of the Fourth District undercuts both the authority of state agencies to exercise delegated legislative authority and the ability of regulated entities to rely upon duly promulgated regulations.

ARGUMENT

I. THE MONEY TRANSMITTERS' CODE DOES NOT PROHIBIT DEFERRED PRESENTMENT TRANSACTIONS.

Respondent's sole response to the compelling analysis authorizing pre-2001 conduct of deferred presentment transactions pursuant to Part III of the Money Transmitters' Code is to flatly state that the Department of Banking, the Division of

Administrative Hearings, the Florida Attorney General and the Fifth District Court of Appeal were all ignorant of the principles governing construction and implementation of a regulatory statute. This argument, though embraced by the Fourth District, violates the doctrine of issue preclusion, and undercuts all regulatory authority in this state.

A. The Department of Banking Properly Implemented Part III of the Code.

Although Respondent contends (and the Fourth District erroneously held) that the Money Transmitters' Code before its 2001 amendment did not encompass deferred presentment transactions, the Department of Banking at all times and in every official capacity interpreted such transactions to be lawful and within the scope of the statutorily regulated activity. In the February 24, 1995, letter from the Department to the Florida Check Cashers Association[1] (the "FCCA Letter"), later officially codified in 1997 by Florida Administrative Rule 3C-560.803[2] (the

[1]The Department explained its reasoning by reference to the plain language of the statute:

> Since Chapter 560, Florida Statutes, does not explicitly prohibit the concept of deferred deposits and since all other provisions of Chapter 560, Florida Statutes, would be adhered to, I see no reason to object to your offering of the above described services. Again, this analysis is based upon the fact that the deferred deposit service will be offered and managed pursuant to the provisions of Chapter 560.

Betts v. Ace Check Express, Inc., 827 So. 2d 294, 297 (Fla 5th DCA 2002).

[2]Rule 3C-560.803, Fla. Admin. Code:

> **Postdated Check.** A check casher may accept a postdated check, subject to the fees established in Section 560.309(4), F.S.

"Rule"), and again in the May 5, 1998, letter of advice to all licensed check cashers, the Department embraced and implemented the principle of logic that statutory regulation of the whole regulates the subparts of the whole, and that silence as to the individual subparts does not signal legislative prohibition thereof.

Every deferred presentment provider licensed in the state was required, in the process of application for its license, to explain the nature of the business in which it intended to engage and the manner in which it intended to operate. [R. 439, 441; R 360, Plaintiffs' Exhibits 1 and 2] Every license issued by the Department was an official authorization to conduct that business in that manner.

The Department continued to refine its implementation of the statute and to fine-tune its regulation of deferred presentment providers over the years. Rule 3C-560.803, permitting (but not requiring) deferred presentment providers to accept post-dated checks is an official implementation of the uncontroverted fact, recognized by the Fifth District Court of Appeal, that

> Chapter 560 . . . contains no requirements for the disposition of checks after receipt by the Defendants. As with any other business transaction, the Defendants were free to do whatever they desired with the check after receiving it, subject only to the deferral agreement with the Plaintiffs.

Ace Cash Express, 827 So. 2d at 297. Because the statute does not prohibit holding a check for deposit **or** for redemption, the Department recognized that it lacked authority to prohibit it. Nothing in the statute authorized the Department

(or an appellate court) to transform a statutorily created fee into illegal interest so long as a deferred presentment provider was acting within the scope of the business the regulator licensed it to conduct and in compliance with the regulator's duly promulgated administrative rules.

The Department again enunciated its interpretation of the authority implicit in Chapter 560 in its letter of advice, issued to all check cashers on May 5, 1998, which expressly recognized the existence and legality of deferred presentment transactions as regulated by Chapter 560 and the promulgated administrative rules.

Each of these pronouncements derived from the Department's earliest interpretation of the statute. The Legislature had not seen fit to prohibit deferred presentment transactions; thus the Department lacked delegated legislative authority to do so. § 120.536, Fla. Stat. (1996).

B. The Fourth District Accurately Interpreted the Rule but Exceeded the Scope of its Review in Holding the Rule to be Invalid.

In *Betts v. McKenzie Check Advance of Florida, LLC,* 879 So. 2d 667, 671 (Fla. 4th DCA 2004), the Fourth District recognized that the Rule (together with others promulgated in Part VIII, Chapter 3C-560, Florida Administrative Code) "expressly approved deferred presentment transactions." In its Amended Initial Brief, Petitioners asserted that the Fourth District committed legal error by invalidating the Rule in order to rule in Respondent's favor. [Amended Initial Brief ("AIB") at 26 to 44] That peremptory invalidation by judicial fiat ignored the

fact that the Rule had previously been declared valid by an Administrative Law Judge in a Final Order to which the Respondent was a party and did not appeal[3]. Instead of appealing the Administrative Law Judge's decision, Respondent chose to attack the validity of the Rule anew in the Fourth District, which improperly accepted Respondent's argument. [AIB at 37, *et seq*.]

Now, in her Answer Brief, Respondent has attempted to distance herself completely from the very argument that became a cornerstone of the Fourth District's ruling. Respondent seizes upon paragraph 22 of the Administrative Law Judge's Findings of Fact to signal that the result of the rule challenge was an order holding that the Rule does not permit deferred presentment transactions. This is a complete reversal of Respondent's prior legal argument, which the Fourth District accepted, that the Rule expressly authorized deferred presentment transactions.

This new position by Respondent can perhaps best be seen as Respondent's recognition that the Fourth District was wrong to evaluate the validity of a rule that had already survived a rule-challenge resulting in a determination with preclusive effect upon Respondent's efforts to revisit the issue. Even if Respondent's new argument is taken at face value, however, it is still wrong. Respondent takes

[3]*Betts v. Dept. Banking and Finance*, Case No. 01-1445RX (Fla. Div. Admin. Hearings September 7, 2001). *See also Paretsky v. Miami-Dade Co. Bd of Co. Comm'rs*, 30 Fla. L. Weekly, D462 (Fla. 3d DCA Feb. 16, 2005)(Plaintiff collaterally estopped to bring new action raising issue finally decided by county commissioners in quasi-judicial proceeding and affirmed on certiorari appeal.

paragraph 22 out of context, in a manner that does not reflect the Administrative Law Judge's consideration of the facts and circumstances surrounding the promulgation of the Rule. *See Betts v. Dept. of Banking,* Final Order at ¶¶23 through 33. The Administrative Law Judge found that the Rule was promulgated for the express purpose of adopting the legal opinion contained in the Department's February 24, 1995, FCCA Letter as an official statement of Department policy--which, as noted above in footnote 1, specifically approved deferred presentments.

On its face, the Rule recognizes that a check casher can agree with its customer to hold a check until some later date and may, but is not required to, accept a post-dated check as part of that agreement. The fact that the Rule does not use the term "deferred presentment" does not mean that the Rule did not cover the activity. Previously, not even Respondent took that position, as shown by her prior rule challenge--at least until she was faced with arguing against the preclusive effect of the rule challenge once it failed.

C. The Florida Attorney General Gave Proper Weight to the Department's Interpretation of the Money Transmitters' Code.

Precisely the same question posed to the Fourth DCA and to this Court was posed to the Attorney General in 2000, before Chapter 560 was revised. In answering this question, the Attorney General, Florida's chief legal officer[4], vested

[4]Art. IV, § 4, Fla. Const.

with the authority to prosecute usury violations both civilly and criminally[5], carefully analyzed the usury statute, and, by implication, the breadth of his own power and the power of law enforcement officials across the state. Giving appropriate deference to the principles of statutory construction and the regulatory authority of another cabinet agency, the Attorney General properly limited the reach of the usury statute and opined: "to the extent that a transaction comports with the provisions of [the Money Transmitters' Code], it would not violate the usury provisions in Chapter 687." AGO 2000-26. The Attorney General's legal opinion gave another green light to the industry and circumscribed government enforcement of the usury statute in this context.

II. THE RECORDS OF THE COMPTROLLER'S MONEY TRANSMITTERS TASK FORCE ARE IRRELEVANT TO THE INTERPRETATION OF THE STATUTE.

Appellee urges this Court to look to records of the Comptroller's Money Transmitter's Task Force, **not part of the record below**, as evidence of legislative intent as to the scope of Chapter 560 when it was first enacted.[6] As a threshold issue, the meetings of the Comptroller's Money Transmitter's Task Force were not

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[5]By the delegation of authority to the Statewide Prosecutor. § 16.56, Fla. Stat.

[6] *Amici* AARP, *et al.*, cite this extraneous material to explain the manner in which deferred presentment transactions can be abused. However, the matters they present are in reality policy issues more appropriately the subject for review by Legislature when it enacted the 2001 revision to Chapter 560. That revision continued to recognize deferred presentment as a socially useful form of short-term lending, but subjected the transactions to additional consumer protections.

legislative activity. An agency of the executive branch has no authority to legislate; certainly a task force created by an executive branch agency has no authority to set public policy. To argue otherwise demonstrates a fundamental misunderstanding of the separation of powers doctrine. Article II, §3, Fla. Const. While the Legislature may consider recommendations proffered by a cabinet agency, its staff, or even members of a task force, it is clear that it must do so in public hearings, through witnesses, and thereby create a documented legislative history. Article III, §5, Fla. Const. The Legislature does not rely on executive branch agencies to document its intent, nor is it permitted to do so. The Money Transmitters Task Force carried no legislative imprimatur or statutory authority; it simply existed by appointment of and in service to advise the Comptroller.

Taken in the light most favorable to Appellee, the records of the Money Transmitters Task Force Report supports the conclusion that the Legislature was aware of the deferred presentment transactions and decided not to regulate them more stringently than other check-cashing transactions. However, there is no evidence in the legislative record—and Appellee has presented none—that the Legislature ever considered the records of the Money Transmitters Task Force.

A. The Records Of The Comptroller's Money Transmitters Task Force Cannot Provide A Basis For Construing The Legislative Enactment.

As noted above, the Records of the Comptroller's Money Transmitters Task Force are fundamentally and irremediably not legislative. Significantly, the Report

was published in November of 1994, six months *after* the statute was enacted in May of 1994; it could not have been before the legislature in the form here presented[7]. The record does not indicate that the legislature reviewed or considered the Task Force records in its revision of Chapter 560.[8] The limited scope of judicial notice of legislative history is clearly delineated in *Jacksonville Electric Authority v. Department of Revenue*, 486 So. 2d 1350, 1354 (Fla. 1st DCA 1986).

> It is certain that the Journals of the House and Senate may be judicially noticed to furnish insight into the legislative intent. [*Amos v. Mosely*, 77 So. 619 (1917)] When the investigation beyond the journals appears appropriate, it is our view that the correct practice and procedure is to give way to the evidentiary character of legislative proceedings and to require close scrutiny by the factfinder under chapter 90, Florida Statutes.

The fact that an agency assembles an advisory panel to assist it in the development of legislation the agency itself supports before the legislature does not magically convert the agency's efforts into legislative proceedings of evidentiary character.

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[7]Notably, the Department, which was headed by the Comptroller who sponsored the Task Force, expressly interpreted the enacted statute as authorizing deferred presentment transactions in the February, 1995, FCCA Letter, a mere three months after the Comptroller published the Task Force Report.

[8] Records "received in connection with the official business of the Legislature as provided for by the constitution of this state" shall be open for inspection. § 11.62, Fla. Stat. The Task Force Report cannot be among those records as it did not exist when Chapter 560 was first enacted. If the testimony, documents, or other materials considered by the Task Force were considered by the Legislature, Respondent should have included them in the record, but it has failed to do so.

Respondent offers these materials to prove a negative, arguing that because the report does not address deferred presentment transactions, the Legislature intended to exclude them from regulation, although the plain language of the statute encompasses deferred presentment transactions in the definitions of "check cashing." This is not only factually erroneous, but flies in the face of established principles of statutory construction. [AIB at 12-14, 26-29]

B. The "Plain Language Of The Statute," Negates Reliance on Legislative—Or Other—History To Aid Construction.

The first words of argument in Respondent's brief are "The plain language of Part III of the Money Transmitters' Code . . .." The primary axiom of statutory construction is that courts may not resort to extraneous materials to interpret a statute plain on its face. *James Talcott, Inc. v. Bank of Miami,* 143 So. 2d 657, 659 (Fla. 3d DCA 1962)("[W]e are not free to add words to steer it to a meaning and limitation which its plain wording does not supply."); *Armstrong v. City of Edgewater*, 157 So. 2d 422, 425 (Fla. 1963); *Platt v. Lanier*, 127 So. 2d 912, 913 (Fla. 4th DCA 1961) ("[I]t is not within the province of the court to sit in judgment upon the wisdom of the legislative policy embodied in it nor to assume that the legislature meant something which does not appear upon the face of the statute.")

Petitioners stand on the plain language of Chapter 560, as explicated in its Initial Brief. The Department of Banking, the Division of Administrative Hearings, the Attorney General of Florida, and the Fifth District Court of Appeal

all limited their analysis of the statute to the words that actually appear there. Only the Fourth District, at Respondent's urging, held that "the legislature meant something which does not appear upon the face of the statute." *Id.* at 913.

III. THE FOURTH DISTRICT COURT OF APPEAL MISCONSTRUED THE EFFECT OF THE 2001 AMENDMENT TO CHAPTER 560.

Respondent argues that the 2001 amendment to the Money Transmitters' Code either served to legalize formerly illegal deferred presentment transactions or demonstrated that Mrs. Betts' transactions were illegal "rollovers."[9] This argument manages to misstate the holdings of BOTH the Fourth and the Fifth Districts. *McKenzie,* 879 So. 2d at 667; *Ace Check Express*, 827 So. 2d at 294.

The Fourth District erred in ruling that the 2001 amendment had the effect of, for the first time, removing deferred presentment transactions from the scope of Florida's usury law. As Petitioners have painstakingly demonstrated in their Amended Initial Brief, deferred presentment transactions are within the statutory definition of check cashing transactions and function as a subcategory of those legislatively defined transactions. Florida's constitutional separation of powers,

[9]Respondent misstates both law and fact in her Statement of Facts when she posits, without authority, that certain types of transactions "are known" as Type I, Type II and Type III rollovers [Answer Brief at 2] then interpolates her own definitional construct into the 2001 amendment to Chapter 560. [*Id*. at 5] These definitions – and the concomitant legal distinction Respondent implies is generally accepted— does not derive from statute, agency action or judicial interpretation. This is a further example of Respondent's disregard for the limitations of the record before the Court and her attempts to cloak argument as fact established by evidence.

prohibits **either** the Department of Banking **or** the Fourth District Court of Appeal from excising from the statute a transaction that falls within the definition of that transaction. Thus, because the legislature did not exclude deferred presentment transactions from the section 560.302(1), which establishes the fee a check casher could charge for cashing checks, the Department correctly determined it lacked the authority to do so. The Fourth District engaged in judicial legislation to provide what, in its opinion, the legislature had unwisely omitted.

On the other hand, Respondent also errs in arguing that the Fifth District's opinion requires a finding that Mrs. Betts' transactions were illegal because they did not observe the newly imposed twenty-four hour waiting period between transactions. The definition of "rollover" is entirely new in the 2001 amendment, as is the requirement of the waiting period. These provisions represent new regulations applied to heretofore legal transactions. Respondent's argument that the amended law applies retroactively to pre-amendment transactions ignores constitutional prohibitions against *ex post facto* laws. Art. I, § 7, Fla. Const.

The 2001 amendment reflects the legislative determination that deferred presentment transactions provide social benefits commensurate with the fees permitted by law. It does not make legal that which was heretofore illegal. It does not make illegal that which was heretofore legal. Respondent's argument that it must do one or the other is wrong.

Respondent also contends, illogically, that her transactions were all "rollovers" of one self-defined type or another. This statement is not supported by any finding of fact on the record and is denied by Petitioners and refuted by the record. Petitioners voluntarily provided to the court the records of all Mrs. Betts' transactions. Seven of the first eight checks were redeemed by replacing a check with another check and paying additional fees. **All other transactions[10] were concluded by Mrs. Betts' redeeming the check for cash.** [R. 1034-048; 1054-180] Notably, at the time Petitioners were permitting redemption of a check with a check, nothing in the statute prohibited that action and the Department had offered no formal or informal guidance on the subject. When the Department notified Petitioners of its regulatory determination that that a check could be redeemed only for cash, Petitioners immediately and consistently complied with that directive.

IV. PUBLIC POLICY REQUIRES THAT REGULATED ENTITIES BE ABLE TO RELY ON THE REGULATOR'S INTERPRETATION OF GOVERNING LAW.

Respondent argues that Petitioners are not entitled to claim the safe-harbor of section 560.107, Florida Statutes, because the Department's opinion letter and its letter of advice were not a "rule, order or declaratory statement" of the Department. Respondent also contends that the Department's "advisory opinion" is entitled to

[10]Except, of course, the last, defaulted transaction.

"no deference."[11] This argument ignores the existence of the Rule[12] and the Fourth District's express finding that the Rule authorized deferred presentment transactions. *McKenzie,* 879 So. 2d at 671 (Part VIII of Chapter 3C-560, Florida Administrative Code," expressly approved deferred presentment transactions.") Respondent also ignores the fact that the Department's interpretation of the statute was, from the beginning, entirely consistent with the Rule, which by its very terms acknowledges that deferred presentment transactions are regulated by Chapter 560.

The uncontroverted facts of record demonstrate that Petitioners made every effort to comply with the laws of this state as interpreted and enforced by the agency to which the legislature delegated authority to interpret and to enforce those laws. Having acted as a good corporate citizen, Petitioner, like its competitors, finds itself faced with potentially crippling liability. The importance of the safe-harbor protections is obvious. If the Fourth District's decision is upheld, all check cashers who engaged in deferred presentment transactions in compliance with the Department's interpretation and enforcement of the pre-2001 Code are potentially required to forfeit the amount of all such deferred presentment transactions that

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[11] Answer Brief at 38.

[12] Respondent also argues that Petitioners cannot claim the safe-harbor because it did not "rely" on the Rule, inasmuch as it did not require its customers to postdate their checks. The Rule clearly does not impose a requirement that a deferred presentment transaction provider accept only post-dated checks or run afoul of Chapter 560. The Rule expressly acknowledged the legality of deferred presentment transactions. Petitioners were entitled to rely on the effect of the Rule.

remain outstanding, section 687.071(7), Florida Statutes, to forfeit **twice** the revenues received from deferred presentment transactions during that period, section 677.04, Florida Statutes, and to face criminal prosecution for violation of the usury statute.[13] The effect of the Fourth District's ruling denies Petitioners the legal defense of good faith reliance the legislature created.

Such an outcome is contrary to the legislature's expressed intent to grant safe harbor. It also undermines the confidence regulated entities must repose in the agencies that regulate them. If businesses acting in reliance on guidance from their regulators can suddenly be held civilly and possibly, though inappropriately, criminally liable in Florida courts for the very activities approved by the regulators, they can no longer risk doing business in Florida. Petitioners and all check cashers who complied with the Department's interpretation of pre-2001 Code are entitled to the protection of section 560.107, Fla. Stat. (Supp. 1994).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this honorable Court quash the decision of the Fourth District Court of Appeal and affirm the decision of the Fifth District Court of Appeal in *Betts v. Ace Check Express, Inc.*

[13]Prosecutors may unjustifiably contemplate a RICO charge. Ch. 895, Fla. Stat. While all of the defenses asserted herein—regulatory approval, lack of intent, safe-harbor, or immunity—would be available at trial, the prospect of such litigation is fundamentally unfair and draconian. Notably the Florida Attorney General has already held that deferred presentment transactions do not violate the pre-2001 Code. AGO 2000-26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief was served by United States Mail, first-class postage prepaid, on Christopher C. Casper, Esquire, James, Hoyer, Newcomer & Smiljanich, P.A., One Urban Centre, Suite 550, 4830 West Kennedy Boulevard, Tampa, FL 33609-2517; on E. Clayton Yates, Esquire, E. Clayton Yates, P.A., 205 South Second Street, Fort Pierce, FL 34950; on Richard A. Fisher, Esquire, Richard Fisher Law Office, 1510 Stuart Road, Suite 210, Cleveland, TN 37312; on Deborah Zuckerman, Esquire, AARP Foundation, 601 E Street, N.W., Washington, D.C. 20049; on Lynn Drysdale, Jacksonville Area Legal Aid, Inc., 126 Adams Street, Jacksonville, FL 32202; and on Warren H. Husband, Esquire, Metz, Hauser & Husband, P.A., P.O. Box 10909, Tallahassee, FL 32302-2909, on the 8th day of March, 2005 this 9th day of May, 2005.

Virginia B. Townes, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Florida Rule of Appellate Procedure 9.210(a)(2) that the foregoing brief is printed in Times New Roman 14 point font.

Virginia B. Townes, Esquire