IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF STATE,
DIVISION OF ELECTIONS,

Appellant, CASE NO: SC04-2265

v.

JOSEPH MARTIN, *et al.*,

Appellees.
_____/

APPELLANT DEPARTMENT OF STATE, DIVISION OF ELECTIONS INITIAL BRIEF

On Appeal From the District Court of Appeal
First District of Florida

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STATEMENT OF THE CASE AND FACTS

Appellant, Department of State ("Department") is, through its subunit the Division of Elections ("Division"), charged with the responsibility of administering the Florida Election Code, chapters 97-106, Florida Statutes. Section 101.253(2), of the Florida Election Code, provides:

> No candidate's name, which candidate is required to qualify with a supervisor of elections for any primary or general election, shall be printed on the ballot if such candidate has notified the Department of State in writing, under oath, on or before the 42nd day before the election that the candidate will not accept the nomination or office for which he or she filed qualification papers. **The Department of State may in its discretion allow such a candidate to withdraw after the 42nd day before an election upon receipt of a written notice, sworn to under oath, that the candidate will not accept the nomination or office for which he or she qualified.**

§ 101.253(2) Fla. Stat. (2004) (emphasis added). The First District held that the second sentence of this provision was facially unconstitutional and the sentence was not severable. Accordingly, the First District declared section 101.253(2) unconstitutional in its entirety. *Department of State, Division of Elections v. Martin*, 885 So. 2d 453, 458 (Fla. 1st DCA 2004).

This action was initiated based upon a series of events during the recent election cycle. Appellees are members of Congressional District 22 Democratic Party Executive Committee ("Committee"), which had the responsibility, pursuant

to section 100.111(4)(b), Florida Statutes, to designate a Democratic nominee to fill a vacancy, should one occur after September 15, in the race for the Florida Congressional District 22 seat in the 2004 general election.

During the relevant qualifying period provided in the Florida Election Code, James R. Stork qualified as the Democratic Party's candidate for the Congressional District 22 seat in the 2004 general election. On September 23, 2004, less than 42 days from the date set for the general election,[1] Stork sent a letter to the Division indicating his intent to withdraw from the District 22 Congressional race. By return letter dated September 29, 2004, the Division informed Stork that his withdrawal would not be permitted because of the potential for disruption of the election. In support of its decision, the Division relied on section 101.253(2), Florida Statutes, which grants the Department of State discretion to reject such requests.

Appellees then filed a complaint on October 5, 2004, in the Circuit Court for the Second Judicial Circuit along with a Motion for Temporary Injunction, asserting, among other things, that the Division abused its discretion in denying

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[1]Stork's withdrawal letter was received on September 24, 2004, 40 days prior to November 2, 2004, which was "election day" for the 2004 general election. However, the "election" actually commenced when early voting began-15 days prior to "election day." *See* § 101.657, Florida Statutes. As such, the Division of Elections received Stork's letter 25 days "before the election" commenced.

Stork's request to withdraw from the election. (Complaint ¶ 9.)

The circuit court held a hearing on October 8, 2004, and heard undisputed testimony from Sara Jane Bradshaw, Assistant Director of the Division, establishing that it would take five weeks to reprogram the touchscreen voting equipment in use within District 22 in order to reflect a new candidate for the District 22 congressional race. [Tr., 54:25-55:9.] Moreover, alluding to section 101.253(3), which allows a candidate's name to be stricken by rubber stamp on a paper ballot, Bradshaw testified that "you can't use a rubber stamp on a touch screen . . . it becomes a very problematic issue." [*Id.*, 63:1-4.] Given the time constraints presented by Stork's untimely request, her conclusion that it would be impossible for the local supervisors of elections to change the ballots was also undisputed. [*See id.*, 58:19-59:1.] Bradshaw also testified that the overseas and absentee ballots reflecting Stork's name as the District 22 candidate had already been mailed to the voters, [*id.*, 56:21-58:18,] and since it would take three weeks to produce new paper ballots, [*id.*, 52:10-16,] it would be impossible for the supervisors to change the name on those ballots.[2]

The circuit court prefaced its decision by recognizing that the manner of

[2] Bradshaw testified, "It's my understanding that a ballot change at this point could not be made." [*Id.*, 58:19-25, 59:1.]

addressing candidate vacancies that occur during the election process varies throughout the United States and that there exist important policy concerns underlying the legislative enactment addressing this issue in Florida as well as in other states.[3] While recognizing the various policy concerns, the court determined that Appellants' interpretation of the statutes "ignore[d] the strong public policy in this state of providing the voters with greater choice and ensuring ballot access."

The circuit court thus construed the applicable statutes to require that the Division accept Stork's withdrawal.[4] In coming to this conclusion, the circuit court held that the provisions of section 100.111(4)(b), Florida Statutes, having been enacted subsequent to and being more specific than the provisions of section 101.253(2), Florida Statutes, "govern[ed] the decision [in this case]." The court then ordered the Division to permit Appellees' replacement candidate to be

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[3] *See* **Appendix 1**.

[4] Judge Ferris stated in her order:

> The Defendant's interpretation also ignores the principle of statutory construction that related statutory provisions must be read together and harmonized, if possible. If they cannot be harmonized, the later enacted or more specific statute will prevail over the earlier enacted or more general statute.
>
> Here, the statutes can be harmonized.

Martin, No. 04CA2400, at *9.

designated and available for the electorate's consideration in the 2004 general election as provided in section 100.111(4)(b), Florida Statutes.

The circuit court concluded that its interpretation of the statutes at issue was necessary to preserve the constitutionality of section 101.253(2), Florida Statutes. According to the circuit court, unless the two statutes were "harmonized," section 101.253(2), Florida Statutes, would violate Article II, Section 3, Florida Constitution, since otherwise the statute granted to the Division the right to exercise "unbridled discretion in applying the law."

The Department filed its notice of appeal on October 11, 2004 with the First District Court of Appeal, thereby invoking an automatic stay. Fla. R. App. P. 9.310(b)(2). On October 12, 2004, Appellees moved to vacate the automatic stay in the circuit court, and, after a hearing, the court lifted the stay that day. Upon suggestion by Appellees, the district court certified this case as a question of great public importance requiring immediate resolution by this Court. This Court declined to exercise its jurisdiction and the case proceeded to disposition in the district court.

On October 25, 2004, the district affirmed.[5] In reaching its decision the

[5] *See* **Appendix 2**.

district court did not attempt to "harmonize" the provisions of section 100.141(4)(b), Florida Statutes, and section 101.253(2), Florida Statutes. Instead, the district court found that section 101.253(2) was facially unconstitutional insofar as the second sentence of that statute violated Article II, Section 3 of the Florida Constitution, by "vest[ing] unbridled discretion in the Department." *Martin*, 885 So. 2d at 458. Moreover, because it found that the first sentence of section 101.253(2) could not be severed from the second sentence, the district court invalidated the statute section in its entirety. *Id*.

On November 2, 2004, voters in Congressional District 22 cast their ballots in the general election and the supervisors of elections for Broward and Palm Beach counties did not change the existing ballots to replace the name of Jim Stork. *See* Robert Santiago, *Broward Weighs its Options if Election Lineup Changes*, The Miami Herald, Oct. 14, 2004, at 8B; George Bennett, *Democratic Fill-In's Name Unlikely to Make Ballots*, The Palm Beach Post, Oct. 13, 2004, at 5C. On November 24, 2004, the Department timely filed its notice of appeal.

STATEMENT OF JURISDICTION

This Court has mandatory review of a district court decision rendering a state statute invalid. Art. V., § 3(b)(1), Fla. Const.

STANDARD OF REVIEW

A lower court's decision rendering a statute facially invalid presents an issue of law that is subject to *de novo* review. *City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002). Even when the lower court declares a statute unconstitutional, on appeal the statute remains favored with a presumption of constitutionality and all reasonable doubts as to the constitutionality of the statute are resolved in favor of upholding its constitutionality. *See In re Estate of Caldwell*, 247 So. 2d 1, 3 (Fla. 1971). Moreover, this court has a "judicial obligation" to uphold a statute's constitutionality if possible. *Armstrong v. City of Edgewater*, 157 So. 2d 422, 425 (Fla. 1963).

SUMMARY OF ARGUMENT

Section 101.253(2) is not an unconstitutional delegation of legislative authority. Reading this statute *in pari materia* with the requirements of the Florida Election Code reveals there is no unconstitutional delegation. The unique characteristics of Florida's county-dominated election process, requires the Division to exercise discretion in determining withdrawal requests. The mere delegation of discretion is not "standard less." Whenever discretion is authorized, there already exists a standard for its exercise; it must not be "arbitrary and

capricious."[6] The Department's exercise of discretion was not arbitrary and capricious because the specific factual circumstances surrounding the late withdrawal, including the undisputed problems associated with reprogramming touch screen computer ballots, the lengthy process for reprinting new paper ballots, and the prior mailing of the overseas ballots, compelled the Division to deny the request.

Even if the second sentence of section 101.253(2) violates Article II, Section 3, the offending provision may be severed from the statute. When possible, this Court should allow a statute to survive by severing the unconstitutional language from the remainder of the statute. *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). Here, the First District simply stated that the removal of the second sentence "would create an irreconcilable conflict between the remaining sentence of subsection [101.253](2) and subsection [101.253](3) and possibly between subsection [101.253](2) and section 100.111(4)(b) as well." *Martin*, 885 So. 2d at 458. This Court should find this analysis erroneous, and instead construe the

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[6] "Arbitrary and Capricious" is a term of art defined as a "[c]haracterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." BLACK'S LAW DICTIONARY 105 (6th ed. 1990) (citation omitted).

statute in accordance with its plain meaning and legislative intent. The section remains intact without the second sentence and creates no conflict within the statute or with another statute. Severance allows the statute to survive with specific guidelines, while eliminating the discretion from the decision-making of the Department.

ARGUMENT

I. SECTION 101.253(2), FLORIDA STATUTES IS CONSTITUTIONAL.

Section 101.253(2), provides in pertinent part:

> The Department of State **may in its discretion**[7] allow such a candidate to withdraw after the 42nd day before an election upon receipt of a written notice, sworn to under oath, that the candidate will not accept the nomination or office for which he or she qualified.

(emphasis added). The First District held section 101.253(2) an unconstitutional delegation of power in violation of Article II, Section 3 of the Florida Constitution, which prohibits one branch from exercising powers "appertaining to either of the other branches unless expressly provided" for by the constitution. *Martin*, 885 So. 2d at 457. In support of its contention, the district court cited this Court's decisions in *Lewis v. Bank of Pasco County*, 346 So. 2d 53 (Fla. 1977) and *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), and referred to a line of cases on unlawful

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[7] According to *Westlaw*© there are 283 instances of the word sequence "may in its discretion" contained in the Florida Statutes. *See e.g.*, § 15.15, Fla. Stat. (2004) (The Department of State **may in its discretion** publish summaries . . .); § 17.59, Fla. Stat. (2004) (The Chief Financial Officer **may, in his or her discretion,** establish a fee for processing, servicing, and safekeeping deposits and other documents or articles of value . . .); § 20.121, Fla. Stat. (2004) (The division **may, in its discretion,** impose an administrative penalty for failure to comply with this subparagraph . . .). (Emphases added).

delegation of legislative authority.

This line of cases prohibit a delegation of legislative authority under two circumstances: (1) when such delegation results in an abdication of the Legislature's obligation to make fundamental policy choices, and (2) when such delegation results in the agency decision evading meaningful judicial review because the law is lacking in substance such that the court cannot determine if the agency is following legislative intent in implementing the law. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-923 (Fla. 1978). Unlike the precedent relied upon by the First District, the fundamental legislative intent in the case at bar is easily discernible and provides sufficient standards for meaningful judicial review.

The two primary cases cited by the district court - *Lewis* and *Schiavo* - each found an unlawful delegation of authority in non-technical areas outside the core competency of the governmental unit. In *Lewis*, a statute provided that, regardless of the Florida "Sunshine Laws," bank documents maintained by the Division of Banking would not be made public records without consent of the Comptroller. *Lewis*, 346 So. 2d at 55. This Court found that the "Constitution does not permit this delegation of legislative power." *Id.* In so holding, this Court stated that "statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The

statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." *Id.* at 55-6.

Lewis contrasts with the Court's decisions in *Avatar Development Corporation v. Florida*, 723 So. 2d 199 (Fla. 1998) and *Brown v. Apalachee Regional Planning Council*, 560 So. 2d 782 (Fla. 1990) in which the Court upheld statutes granting discretion to an agency, when the exercise was in a technical area within the agency's core competency. *See also, Microtel v. Florida Pub. Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985) ("adequate standards and guidelines are provided in this statute in light of the legislative objective . . .").

In *Avatar*, the Court held that a statute did not constitute an unlawful delegation even when it directed the Department of Environmental Protection to "issue permits on such conditions as are necessary to effect the intent and purpose of this section." *Avatar*, 723 So. 2d at 207. The Court reasoned it was sufficient that the department's authority be "limited to establishing administrative rules consistent with this specific legislative intent." *Id.*

In *Brown*, the Court held that a provision allowing a planning council to levy fees where appropriate was not an unlawful delegation because the entire "statutory scheme in chapters 160, 163, and 380 contains sufficient indicia of legislative

purpose to render [the fee provisions] valid." *Brown*, 560 So. 2d at 785. Therefore, unlike in *Lewis*, 346 So. 2d at 55, where the Comptroller had "unrestricted and unlimited power" to exempt particular bank records from inspection under the public records law, standard and guidelines existed in *Brown* in the form of a comprehensive statutory scheme that provided a general framework upon which courts could oversee agency discretion.

Here, the discretion afforded to the Division is not "unrestricted and unlimited," as in *Lewis*, but constrained by a comprehensive statutory scheme that meaningfully limits the discretion of the Division. While the Division makes the final determination whether to allow the withdrawal of a candidate within the 42-day window, this discretion is limited by section 97.012, Florida Statutes, which appoints the Secretary of State as the chief elections officer and obligates the Secretary to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Indeed, implicit in this appointment is the legislative intent to ensure orderly elections. In fact, chapters 97-103 are dedicated to this singular goal.[8] In *Lewis*, no such comprehensive scheme existed and,

[8] The comprehensive legislative scheme, among other requirements, describes how and when voters register to vote, how to maintain voter registration rolls, how a candidate obtains a ballot position, the uniform ballot design, the absentee uniform ballot design, when early voting begins, when overseas and

therefore, no limitation existed on the Comptroller's unrestricted and unlimited power to determine what constituted a bank public record.

Moreover, *Lewis* involved a Comptroller having to make a public record decision, an area outside the core competency of the agency. While the statutes provide guidance for the Comptroller in areas such as finance and accounting, there was no direction given to the Comptroller in making the determination of what constituted a bank public record. In comparison, the Division has one main responsibility, elections. The entire Election Code provides guidance. *See, e.g.*, § 100.111(5), Fla. Stat. (the Department of State shall have the authority to provide for the conduct of **orderly elections**.) (emphasis added). The Division must look to the Code as a whole in determining what would be reasonable in allowing the withdrawal of a candidate while still maintaining a smooth, efficient and uniform election process. In this context, the provision permits the Division to reject the withdrawal of the candidate only when such rejection is necessary for the orderly administration of the election. *See Department of Citrus v. Griffin*, 239 So. 2d

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absentee ballots are mailed, time of opening and closing of the polls, notices for polling locations, manner of ascertaining results, manner of certifying voting equipment and the manner of filling vacancies. *See, e.g.*, § 101.657(1)(a), Fla. Stat. (early voting begins the 15th day prior to the election); Fla. Admin. Code R. 1S-2.032 (uniform ballot design rule).

577, 581 (Fla. 1970) ("[the challenged delegations] must be considered within the context of the Act itself and its stated purposes."). The complicated and ever-changing nature of the election process requires that the Division be given the discretion to determine when the rejection of a withdrawal is necessary.[9]

In *Schiavo*, this Court held the Act at issue was facially unconstitutional as an unlawful delegation of legislative power. *Id.* This Court stated, the "absolute, unfettered discretion to decide whether to issue and then when to lift a stay makes the Governor's decision virtually unreviewable." *Id.* at 334.

Like *Lewis*, *Schiavo* is distinguishable from the case at bar. The Governor, like the Comptroller, had no statutory guidelines that provided standards and it was not within the Governor's core competency to make those types of determinations. Unlike the Division's use of the Election Code for guidance, no information about the issuance of a stay was contained in the statutes for the Governor.

Also of importance to this Court's determination in *Schiavo* that the Governor's decision would be "virtually unreviewable." This is in contrast to the Division's decision as an administrative agency subject to review through

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[9] "The Court appreciates the complexity of the elections process, and acknowledges that the complexity has apparently been exacerbated by the advent of the touch-screen voting machine." *See Martin*, No. 04CA2400, at *5.

administrative proceedings and the courts. The decision of whether a candidate may withdraw and have his name replaced on the ballot is one that is easily reviewed.

The question of a candidate's withdrawal is governed by the Legislature's specific guidance for the Division's running of a smooth election. *See, e.g.*, § 101.62(4)(a), Fla. Stat. (directing the Division to mail absentee ballots "not fewer than 45 days before the second primary and general election."). These time line requirements are instituted to help the Division run smooth, efficient and standardized elections. Therefore, the Division must make all withdrawal determinations based upon whether such withdrawal would interfere with this stated goal of and requirement for orderly elections. Therefore, the withdrawal request would be judged on a reasonableness standard against past, present and future withdrawal requests.

A. SECTION 101.253(2) IS A CONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The doctrine of nondelegation "does not preclude the exercise of all agency discretion." *Florida League of Cities, Inc. v. Administration Comm'n*, 586 So. 2d 397, 410 (Fla. 1st DCA 1991). Courts have explained that, "[a]lthough the legislature is obliged by the nondelegation doctrine to establish adequate standards

and guidelines the drafting of detailed or specific legislation may not always be practical or desirable." *Ameraquatic, Inc. v. State of Florida, Dep't of Natural Res.*, 651 So. 2d 114, 117 (Fla. 1st DCA 1995).

Accordingly, "[i]t has been said that the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself." *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968). "So long as the agency is following the legislative purpose, there is no invalid delegation." *Florida League of Cities*, 586 So. 2d at 410; *see also, Brewer v. Insurance Comm'r & Treasurer*, 392 So. 2d 593, 595 (Fla. 1st DCA 1981) ("When neither the agency nor the courts can determine whether the agency is carrying out the intent of the Legislature, unlawful delegation of legislative power may result.") (internal citations and quotations omitted).

The district court concluded that the withdrawal of candidacy provision of section 101.253(2), Florida Statutes, contained an unconstitutional delegation of legislative power because "the subsection includes no criteria which provide standards to guide the Department [of State] in the exercise of the power delegated." *Martin*, 885 So. 2d at 458. Section 101.253(2), Florida Statutes,

obligates the Division to accept a candidate's request for withdrawal, so long as the candidate offers adequate notification at least 42 days prior to the election. The Division's discretionary authority to decline a candidate's request to withdraw only arises if the request is received when the election is imminent (*i.e.*, within 42 days, as determined by the Legislature). The obvious import of this provision is that the Division may deny the application if, given the time constraints occasioned by a candidate's request and given the particularized circumstances of the election at issue (county, office, applicable technology, available resources, etc.), withdrawal of candidacy is no longer feasible without imposing an undue burden on the Division or jeopardizing an orderly election.

B. THE PLAIN LANGUAGE AND LEGISLATIVE INTENT OF SECTION 101.253(2) FAVORS UPHOLDING ITS VALIDITY.

When interpreting a statute, "courts must determine legislative intent from the plain meaning of the statute." *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996); *see also, Stoletz v. State*, 875 So. 2d 572, 575 (Fla. 2004) (recognizing that ascertaining the plain meaning of statutory language is the first consideration of statutory construction).

The language of this statute could not be any more clear, if the candidate's attempt to withdraw from the election is within 42 days of the election, the Division

is granted the discretion to either accept or reject the withdrawal. The purpose and intent behind this statute is clearly to discourage late withdrawals because of the time, money and preparation involved with the election process. Because Stork's withdrawal request was received within 42 days of the election, the district court's decision invalidating the statute is contrary to the intent of the Legislature as expressed in plain and unambiguous terms.

The question is whether the legislative scheme provides sufficient instruction for the court to determine whether or not an executive official abused discretion by acting inconsistently with the legislative intent. *See, e.g.*, *Florida Teaching Prof'l-Nat'l Educ. Ass'n v. Turlington*, 490 So. 2d 142, 146 (Fla. 1st DCA 1986) ("the question for the Court in this context is whether the challenged statutes permit the unrestricted exercise of discretion by officials of the [agency]."). If legislative intent can be discerned, as it can be here, the delegation question fades away. *Florida League of Cities*, 586 So. 2d at 410 ("So long as the agency is following the legislative purpose, there is **no invalid delegation**.") (emphasis added). To find a delegation problem in the face of readily discernible legislative intent would essentially permit the courts to challenge legislative policy decisions under the aegis of nondelegation analysis.

This Court has explained in the delegation context that an act should not be

declared unconstitutional "unless the Legislature has clearly exceeded its powers." *Sims*, 754 So. 2d at 669 (quoting *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978)). As such, "[s]tatutes should not be annulled by the courts merely because doubts may be suggested as to their constitutionality." *Id.* (quoting *Granviel*, 561 S.W.2d at 515). Accordingly, where, as here, sufficient criteria exist in the statutory scheme to measure the Division's exercise of discretionary authority, and the Division has acted consistently with those criteria, this Court should conclude that the Division acted appropriately, and in accordance with a constitutional delegation of authority.

C. EXCEPTIONS TO THE EXPRESS STANDARD REQUIREMENT.

This Court has recognized that there are exceptions to the general requirement that agency discretion must be guided by express standards supplied by the Legislature. Moreover, the Court has recognized that in certain regulatory schemes, especially those involving complex or time sensitive decision-making, it may not be possible or desirable to articulate standards which normally would be required. Thus, when exercising the police power to preserve and protect the public health, safety, and welfare, a statute granting discretion to an agency meets the constitutional test so long as the "discretion to be exercised is a reasonable or

judicially reviewable discretion," and ". . . the language of the statute, read in context, supports this view." *North Broward Hospital District v. Mizell*, 148 So.2d 1, 8 (Fla. 1962). In such circumstances "it is not essential that a specific prescribed standard be expressly stated in the legislation. . . the courts will infer that the standard of reasonableness is to be applied." *Id.* at 4; *Astral Liquors, Inc. v. Department of Business Regulation*, 463 So. 2d 1130 (Fla. 1985).

Mere delegation is not "standard less" in view of well-defined standards on the review of agency discretion. The Division's letter to Stork was an administrative decision subject to an abuse of discretion standard in a section 120 proceeding.[10] "Courts are at all times open to the citizen to seek relief against the

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[10] The agency is governed by an abuse of discretion standard:

> Section 120.68(7)(d) directs reviewing courts to set aside agency action or remand for further proceedings where the agency act is "outside the range of discretion delegated to the agency by law" or violates a "constitutional or statutory provision." An agency action that is arbitrary stands outside the range of discretion delegated to the agency for purposes of review under section 120.68. As this court has stated, "The general rule in Florida [is] that an agency's exercise of delegated legislative authority will not be disturbed on appeal unless shown by a preponderance of the evidence to be arbitrary, capricious, or an abuse of administrative discretion." *Island Harbor Beach Club, Ltd. v. Dep't of Natural Res.*, 495 So. 2d 209, 218 (Fla. 1st DCA 1986).

International Truck and Engine Corp. v. Capital Truck, Inc., 872 So. 2d 372

arbitrary action of governmental or other agencies, but the rule is settled in this country that in the absence of fraud or gross abuse of discretion equity will not interfere with or restrain an administrative agency in the exercise of legislative power vested in it." *Johnson v. McNeill*, 10 So. 2d 143, 144 (Fla. 1942) (citation omitted). Therefore, the authority of administrative agency is "limited only by the lawful exercise of their discretion . . . the Court will not substitute its judgment for that of administrative agencies." *Lewis v. State*, 95 So. 2d 248, 253 (Fla. 1957).

In the instant case it is apparent that these requirements have been met and that the determinations of the Department on candidate withdrawal requests are to be judged against the standard of reasonableness. The Division's actions pass the reasonableness test. The denial of the withdrawal was reasonable because only 40 days remained until election day and only 25 days remained until early voting began with the overseas absentee ballots already printed and mailed. The unique characteristics of a county-dominated election system requires some discretion on the part of the Division in making quick decisions as the central authority over a fragmented process.

(Fla. 1st DCA 2004).

D. THE DISTRICT COURT ERRONEOUSLY REJECTED THE DEPARTMENT'S REASONABLE INTERPRETATION OF SECTION 101.253(2), FLORIDA STATUTES, AND FAILED TO READ SECTION 101.253(2), *IN PARI MATERIA* WITH SECTION 100.111(4)(b), FLORIDA STATUTES.

The First District disagreed with the Department's reading of the statute because the court felt that doing so would render the provisions of section 100.111(4)(b), Florida Statutes, meaningless.[11] However, the court should have given deference to the agency's reading of 100.111(4)(b). The Division read

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[11] Section 100.111(4)(b) states:

> If the vacancy in nomination occurs later than September 15, . . . no special primary election shall be held and the Department of State shall notify the chair of the appropriate state, district, or county political party executive committee of such party; and, within 7 days, the chair shall call a meeting of his or her executive committee to consider designation of a nominee to fill the vacancy. The name of any person so designated shall be submitted to the Department of State within 14 days of notice to the chair in order that the person designated may have his or her name printed or otherwise placed on the ballot of the ensuing general election, but in no event shall the supervisor of elections be required to place on a ballot a name submitted less than 21 days prior to the election. If the vacancy occurs less than 21 days prior to the election, the person designated by the political party will replace the former party nominee even though the former party nominee's name will be on the ballot. Any ballots cast for the former party nominee will be counted for the person designated by the political party to replace the former party nominee.

§ 100.111(4)(b), Fla. Stat.

100.111(4)(b) to "not be a standalone statute" that must be read together with 101.253 because 100.111(4)(b) concerns vacancies and not withdrawals. [TR., 16:7-12.] A withdrawal request does not necessarily become a vacancy unless the withdrawal is granted. In *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002), this Court explained that "[a]n agency's construction of the statute it is charged with enforcing is entitled to great deference." As such, this Court instructed, "a court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly erroneous.'" *Id.* (citing *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988)). The Department's interpretation of section 100.111(4)(b) is not clearly erroneous.

The First District erred at arriving at this conclusion because, although the statute itself does not contain express criteria, the court could have easily articulated sufficient guidelines from the legislative intent, which is readily discernible both from within section 101.253(2), Florida Statutes, itself, and as read *in pari materia* with the Election Code.[12] *See Apalachee Reg'l Planning Council*

[12] The First District declined to read the Florida Election Code *in pari materia* with the statute at issue. This decision was in error especially considering the court's apparent refusal to even read the Code. *See Martin*, 885 So. 2d at 458 ("While we have not personally accepted the Division's invitation to read those ten

v. Brown, 546 So. 2d 451, 453 (Fla. 1st DCA 1989) (inferring legislative intent, in analyzing delegation question, by reading statutes *in pari materia*). The Election Code, based on a system of uniformity, contains guidelines for the Division in making its determination on the candidate's eleventh hour withdrawal. *See*, *e.g.*, § 97.012, Fla. Stat. ("The Secretary of State is the chief election officer in the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of election laws."); § 100.111(5), Fla. Stat. (catch-all provision allowing Division discretion, in unforeseeable circumstances, to act in accordance with orderly elections); § 101.733(3) (Division has discretion to suspend or delay election for natural disasters in accordance with orderly elections).

II. SEVERANCE IS AN APPROPRIATE ALTERNATIVE REMEDY.

After determining that the second sentence of section 101.253(2), Florida Statutes, was unconstitutional, the district court held that the remainder of that

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chapters comprising some 124 pages, in an attempt to mine from them the standards intended to limit the Department's discretions, we doubt very much that prior decisions of our supreme court would require such a Herculean effort."). The Department respectfully maintains that reading the Election Code together with this statute would not be an outrageous proposition or a Herculean task as the two are intertwined.

statute could not be severed from the invalid portion. The court concluded that to do so "would create an irreconcilable conflict between the remaining sentence of subsection (2) and subsection [101.253](3),[13] and possibly between subsection (2) and section 100.111(4)(b) as well." *Martin*, 885 So. 2d at 458. As a result, the court held "that subsection (2) is unconstitutional in its entirety." *Id*.

The doctrine of severability and its precepts are well-known. The doctrine establishes the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions. *See State v. Calhoun County*, 170 So. 883 (Fla. 1936). This doctrine is derived from the respect of the judiciary for the separation of powers, and is "designed to show great deference to the legislative prerogative to enact laws."

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[13] Section 101.253(3) states:

> In no case shall the supervisor be required to print on the ballot a name which is submitted less than 21 days prior to the election. In the event the ballots are printed 21 days or more prior to the election, the name of any candidate whose death, resignation, removal, or withdrawal created a vacancy in office or nomination shall be stricken from the ballot with a rubber stamp or appropriate printing device, and the name of the new nominee shall be inserted on the ballot in a like manner. The supervisor may, as an alternative, reprint the ballots to include the name of the new nominee.

§ 101.253(3), Fla. Stat.

Schmitt v. State, 590 So. 2d 404, 415 (Fla.1991). The First District did not show the deference due the Legislature in refusing to sever the unconstitutional language.

The severability analysis answers the question whether "the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail." *Schmitt*, 590 So. 2d at 414. Succinctly stated: "The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *Martinez v. Scanlan*, 582 So. 2d 1167, 1173 (Fla. 1991) (quoting *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984)). In the instant matter the overall intent of the statute remains after the second sentence is removed.

In *Smith v. Department of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987), this Court articulated the factors to be applied in determining whether valid provisions of a statute may be severed from the invalid portions. In *Smith*, the Court held that the following questions must be resolved in favor of severability in order for the otherwise valid remainder of the statute to stand:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would

> have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Id. The criteria established by this Court in *Smith* are satisfied in the case at bar.

In the statute at issue the unconstitutional second sentence can easily be separated from the remaining valid first sentence leaving the following:

> No candidate's name, which candidate is required to qualify with the Department of State for any primary or general election, shall be printed on the ballot if such candidate has notified the Department of State in writing, under oath, on or before the 42nd day before the election that the candidate will not accept the nomination or office for which he or she filed qualification papers.

§ 101.253(2), Fla. Stat. Simply stated, this sentence reads that no candidate's name shall be printed on the ballot if that notification takes place on or before the 42nd day prior to an election. The candidate's withdrawal will be allowed and the candidate's name will not appear on the ballot if the notification of withdrawal occurs on or prior to the 42nd day before the election. The unconstitutional provision can be separated from the remaining valid portion. *Smith*, 507 So. 2d at 1089.

In the statute at issue the legislative purpose expressed in the valid provision can be accomplished without the invalid provision. The legislative purpose behind the first sentence merely states that no candidate's name shall be printed on the

ballot if notification occurs on or before the 42-day window. This purpose remains valid regardless of the invalid portion allowing discretion to the Division in making the withdrawal determination within the 42-day window. The valid portion deals with a name not being printed on the ballot if notification is received on or outside the 42nd day, while the invalid portion deals with discretion to allow withdrawal within the 42-day window. The legislative intent is still fully implemented by this minor modification to the existing statute, a result which this Court has approved on previous occasions. *See e.g.*, *Doe v. Mortham*, 708 So. 2d 929, 934-935 (Fla. 1998) (holding the last sentence of a statute ran afoul of the First Amendment, but the "offending language is minor and easily severable and we order it stricken.").

In the statute at issue the "good" and "bad" features are not so inseparable in substance that it can be said that the Legislature would not have passed the one without the other. The two sentences, although connected, are not inseparable. The first sentence states that when printing ballots, the candidate's name will not appear on the ballot if the withdrawal is received on or prior to the 42nd day prior to an election, while the second sentence allows discretion for a candidate to withdraw after the 42nd day prior to the election passes and not have his or her name appear on the ballot. The first sentence has meaning and purpose separate from that of the second sentence. *Smith*, 507 So. 2d at 1089. A complete act

remains after the invalid sentence in stricken. The invalid sentence merely creates an exception to the general rule pronounced in the first sentence. Removing the second sentence does not change the validity of the first sentence. *Id.*

A. SEVERANCE DOES NOT CREATE CONFLICT.

Contrary to the holding of the district court striking the entire section, the second sentence of section 101.253(2) does not create an "irreconcilable conflict" with either section 101.253(3) or section 100.101(4)(b). If the second sentence is severed then the following should remain valid law: When a withdrawal notification is received by the Division on or more than 42 days before the election the withdrawn candidate's name shall not be printed on the ballot at all. If the withdrawal notification is received between 41 and 21 days of the election, then, as provided in section 101.253(3), the supervisor has the option of either "strik[ing the withdrawn candidate's name] from the ballot with a rubber stamp or appropriate printing device, and . . . [inserting the] name of the new nominee...on the ballot in a like manner" or "[t]he supervisor may, . . . , reprint the ballots to include the name of the new nominee." If the notification occurs within 21 days of the election then "[i]n no case shall the supervisor be required to print on the ballot a name which is submitted less than 21 days prior to the election." Therefore, if the withdrawal

occurred within 21 days, the old name would most likely be printed on the ballot and the new candidate's would not appear because of insufficient time.

Section 101.253 does not have internal conflict if the statute is severed. The option of striking out a withdrawn candidate's name and substituting the name of a replacement candidate would not be available to the supervisor if the candidate's withdrawal occurred more than 42 days before the election. If the withdrawal occurred less that 42 days before the election date but more than 21 days then the strike-out and replacement option would be available to the supervisor. If the withdrawal occurred less than 21 days prior to the election, then the supervisor would not be required to strike and replace the names. Thus, there is no conflict between the remaining portion of section 101.253(2) and section 101.253(3).

Similarly, there is no conflict between section 101.253 and section 100.111(4)(b). The relevant portion of section 100.111(4)(b) provides the method by which a replacement candidate may be chosen by a political party and mandates that a replacement candidate's name shall be placed upon the ballot "but in no event shall the supervisor of elections be required to place on a ballot a name submitted less than 21 days prior to the election." § 100.111(4)(b), Fla. Stat. If a replacement candidate is designated less that 21 days before the election then "the person designated by the political party will replace the former party nominee even

though the former party nominee's name will be on the ballot," however, "[a]ny ballots cast for the former party nominee will be counted for the person designated by the political party to replace the former party nominee." *Id.*

Nothing in the remaining sentence of section 101.253(2) implicates the above provision at all, therefore no conflict is present. By providing that a withdrawn candidate's name shall not be placed on the ballot at all if the notice is received on or more than 42 days before the election and setting forth procedures to be followed in composing the ballot when a withdrawal occurs less than 42 days before the election, the provisions of the now truncated section 101.253(2), when combined with section 101.253(3), fully and seamlessly link with section 100.111(4)(b).

The consequence of the severance will allow the statute to survive with specific guidelines, while eliminating the discretion from the decision-making of the Department. The remaining statute will provide sufficient guidelines for the determination of a candidate's withdrawal, while highlighting the need, if this Court so decides, for the Legislature to provide further direction in the form of more specific guidelines for the Division's determination of a late candidate withdrawal request.

CONCLUSION

Based on the foregoing, the First District's decision holding section 101.253(2) to be unconstitutional should be reversed. The statute is a valid delegation of legislative authority. Even if this Court hold that the statute improperly delegates legislative authority, the offending sentence should be severed from the statute.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I certify that this brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
CHRISTOPHER M. KISE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this _____ day of February, 2005 to:

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