

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT

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JON S. WHEELER
Clerk District Court Of Appeal
1st District

SUE M. COBB, Secretary of State,
State of Florida,

Appellant,

vs.

Case No.: 1D06-5447
L.T. No.: 06-CA-2619

FLORIDA DEMOCRATIC PARTY, and
KAREN THURMAN, Chairwoman of the
Florida Democratic Party,

Appellees.

APPELLEES' ANSWER BRIEF

Mark Herron
Florida Bar No. 199737
Robert J. Telfer III
Florida Bar No. 0128694
MESSER, CAPARELLO & SELF, P.A.
P.O. Box 15579
Tallahassee, FL 32317
Telephone: (850) 222-0720
Facsimile: (850) 558-0569

Stephen F. Rosenthal
Florida Bar No. 0131458
25 West Flagler Street, Suite 800
Miami, FL 33130
Telephone: (305) 358-2800
Facsimile: (305) 358-2382

David M. Buckner
Florida Bar No. 060550
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
Telephone: (305) 372-1800 / Facsimile: (305) 372-3508

Richard B. Rosenthal
Florida Bar No. 0184853
Law Offices of Richard B. Rosenthal,
P.A.
Alfred I. DuPont Building
169 East Flagler Street, Suite 1422
Miami, FL 33131
Telephone: (305) 779-6097
Facsimile: (305) 779-6095

Charles H. Lichtman
Florida Bar No. 501050
BERGER SINGERMANN
350 E. Las Olas Boulevard, Suite 1000
Ft. Lauderdale, FL 33301
Telephone: (954) 627-9913
Facsimile: (954) 523-2872

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STATEMENT OF THE CASE AND FACTS

The withdrawal of Mark Foley as the Republican candidate for nomination and election as a member of Congress from the 16th Congressional District of Florida began a chain of events that resulted in the instant litigation. Shortly after Mr. Foley withdrew as a candidate, the Republican Party of Florida, pursuant to Section 100.111(4), Florida Statutes, selected Joe Negron as its designated replacement Republican candidate for nomination and election as the member of Congress from the 16th Congressional District of Florida. The 16th Congressional District includes voters from all or portions of Palm Beach, Martin, St. Lucie, Okeechobee, Highlands, Glades, Hendry and Charlotte counties.

When a “vacancy in nomination” occurs, Section 100.011(4)(a), Florida Statutes specifically provides, in pertinent part, as follows:

If the name of the new nominee is submitted after the certification of the results of the preceding primary election, however, the ballots shall not be changed and the former party nominee’s name will appear 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.

On October 11, 2006, Ronald A. Labasky, the general counsel for the Florida State Association of Supervisors of Elections, issued a memorandum in which he concluded that “an information sheet” may be placed at the polling places within the affected areas within the counties comprising the 16th Congressional District advising and instructing voters regarding the substitution of Republican candidates in the 16th Congressional District (RI-15; Plaintiffs’ Exhibit 1).

Also included with the memorandum was an “informational sheet” that provided as follows:

IN THE CONGRESSIONAL DISTRICT 16 RACE

- A VOTE FOR MARK FOLEY (REP) WILL BE COUNTED FOR JOE NEGRON (REP), THE REPUBLICAN CANDIDATE.
- A VOTE FOR TIM MAHONEY (DEM) WILL BE COUNTED FOR TIM MAHONEY, THE DEMOCRATIC CANDIDATE.
- A VOTE FOR EMMIE ROSS (NPA) WILL BE COUNTED FOR EMMIE ROSS (NPA), THE NO PARTY AFFILIATION CANDIDATE.

(RI-16; Plaintiffs’ Exhibit 2). Several of the supervisors of elections in the counties comprising the 16th Congressional District indicated that they would post signs at the polling places consistent with the advice set forth in Mr. Labasky’s memorandum.

The advice provided by Mr. Labasky’s followed separate advice given by the Department of State suggesting that notice by provided which stated:

Due to a withdrawal of a candidate after the Primary Election which resulted in the substitution of a new candidate by the respective party:

In the race for Representative In Congress, District 16, any vote cast for Mark Foley (REP) shall be counted as a vote for Joe Negron (REP).

This litigation ensued to assure that Florida law is followed by the supervisors of elections in the counties comprising the 16th Congressional District, as well as by the Secretary of State, regarding the issue of informing electors at polling places of the substitution of Mr. Negron for Mr. Foley.

The parties having agreed that the hearing on our motion for temporary injunction could proceed to a final judgment in order to facilitate judicial review by this Court, the trial court concluded that "there is no authority for the posting of such notices, however correct they may be, and the Supervisors of Elections should be prohibited from doing so." Final Judgment Granting Injunctive Relief at 3 (RI-85).

In addition, the trial court found:

First, the Court finds that irreparable injury will occur if the unauthorized notices are posted or delivered to voters. Since the issues here involve elections, the ballot, and the sanctity of the voting booth, there can be little debate that interference with that process, especially in a manner not contemplated by the Legislature, would cause irreparable harm. There is also no adequate remedy at law to address the complained of activity. Finally, because the Court finds that the proposed notices are not authorized, the Plaintiff's have demonstrated a clear legal right to the injunctive relief requested.

Id. at 8-9 (RI-90-91).

The Secretary filed a Notice of Appeal, triggering the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2) (RI-94-106). Appellees filed a Motion to Vacate Stay on October 19, 2006 (RI-107-110) and, recognizing the exigencies of the circumstances, the trial court held a hearing on the motion that same day. In granting our motion to vacate the stay, the trial court reiterated that it had found, in granting injunctive relief:

that irreparable injury would occur if the unauthorized notices in question were posted or delivered to individual voters. Considering that early voting is scheduled to begin on October 23, 2006, immediate operation of this court's order is necessary to prevent irreparable harm from occurring. Furthermore, even greater confusion and disparities in the voting process would arise if notices were posted for part of the early voting process and then, if the First District affirms this Court, taken down for the latter part. In addition, given that this court found Plaintiffs to have a clear legal right to the injunctive relief requested, based on the statutory authority addressed by this Court, the Court finds that the Plaintiff here has a substantial likelihood of success on the merits. . . .

Order Granting Motion to Vacate Automatic Stay at 2 (RI-112).

In addition, the trial court concluded that "compelling circumstances" justified vacatur of the automatic stay:

Here, the fact that this case involves an election to be held on November 7, 2006, and that an early voting period set to begin three days from now on October 23, 2006, constitute exceptionally compelling circumstances for the vacating of the automatic stay.

Id. at 2 (RI-112).

Appellants sought expedited review in this Court, urging the Court “to expedite proceedings so that all parties may be heard and this case adjudicated before November 7, 2006” – but neither the Secretary nor Mr. Negron mentioned that early voting was to begin this past Monday (October 23), nor did they ask for a ruling prior to that date. The Court granted Appellants’ request, directing them to file their merits briefs by noon on October 23 and directing us to file this merits brief by noon today (October 25). The eight Supervisors of Elections filed a notice that they would not appeal from the injunction, and that they would take no position either way on appeal.

The Secretary also filed an appellate motion to reinstate the automatic stay. This Court issued a show cause order directing us to respond to the motion by noon on Monday. On Monday afternoon, the Court denied the Secretary’s motion.

SUMMARY OF ARGUMENT

The Appellants' briefs essentially avoid mentioning the elephant in the living room – the fact that early voting has already begun and thousands of Florida voters have already cast their ballots. Forty-eight hours ago, in addressing the Secretary of State's request to reinstate the automatic stay of the trial court's injunction, we wrote:

Granting the Secretary's Motion would raise grave Equal Protection problems because early voting has already begun. Several hours ago, voters in all eight of the affected Counties began casting their ballots. Under Section 101.657(1)(d), Florida Statutes, early voting began as early as 8:00 AM. And pursuant to the trial court's injunction, elections officials at the polling places have not informed those voters that a vote for Mark Foley would be tabulated as a vote for Joe Negron. Providing such notice now only to future voters would raise obvious constitutional problems. *See Bush v. Gore*, 531 U.S. 98 (2000). To put it simply, the ship has sailed.

These words are equally applicable today. Now two and one-half days of early voting have transpired, and thousands of Florida voters have already cast their ballots – without having been told by an elections official that a vote for Mark Foley will be tabulated as a vote for Joe Negron. Altering the voting environment within the polling place during the middle of an election would plainly be impermissible.¹

¹ While scarcely mentioning that the election has already begun, the Appellants make the ironic claim that “voter confusion” generally ought to be avoided. We could not agree more. However, given the intense national media coverage of Mr. Foley's late withdrawal from the race, the likelihood of a voter's

Even if it were not too late to grant the relief the Appellants have requested – it plainly is – there is no legal basis for reversing the trial court’s injunction. That ruling is based on a plain reading of the Legislature’s words in the Election Code, predicated on well established methods of statutory construction. The Appellants attempt to distract from this straightforward analysis through the repeated incantation that they are seeking to “inform the voters.” In the abstract, of course, that is a laudable goal. But as the trial court properly described, it is merely the beginning of the analysis, not the end.

The operative question is not, as the Appellants suggest, whether Florida’s Election Code permits the Secretary to “inform voters.” The question is what information is allowed to be conveyed. On this point, the Legislature has spoken clearly: elections officials may inform voters only about the “manner of voting” – i.e., the method by which the voter can cast a legal vote. *See* Section 101.031(4); 101.5611(1), Florida Statute. Elections officials are not empowered to discuss with voters the method by which those legal votes will be tabulated; what the implications

ignorance is overstated. And accepting Appellant’s invitation to overturn the trial court’s well-reasoned injunction will only inject confusion into the matter. As the Supreme Court warned just last week: “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell v. Gonzalez*, 2006 WL 2988365 at *2 (October 20, 2006).

of a vote for a particular candidate or ballot proposition will be; or any other sort of information venturing into the realm of electioneering.

Moreover, upon enacting a replacement candidate statute that does not call for elections officials to provide any notice to the voters about the replacement – Section 100.111(4)(a), Florida Statutes – the Legislature simultaneously repealed the previous provision, which had called for elections officials to provide such notice. *See* Section 101.253, Florida Statute (repealed by Ch. 2005-77, Section 77, Laws of Florida). The wisdom of this legislative choice, of course, is not a matter for the courts.

ARGUMENT

STANDARD OF REVIEW: Appellees agree with the Secretary that the standard of review is *de novo*.

I. BECAUSE THE ELECTION HAS ALREADY BEGUN, THE RELIEF APPELLANTS SEEK CANNOT BE GRANTED.

In our response to the Secretary's appellate motion to reinstate the automatic stay, we explained how –as of Monday morning – the clock had effectively run out on this litigation. We reiterate what we wrote on Monday:

We will not detain the Court with an extensive discourse on the myriad *Bush v. Gore* implications if the injunction were to be vacated now that voting has already begun at the polls. Those problems are self-evident. It suffices to say that it would be impermissible not to inform one group of voters at the polls that a vote for Mr. Foley will be tabulated as a vote for Mr. Negron, but then suddenly to reverse course and begin informing other voters at the polls about it.² As such, the appeal must fail.

This time problem might have been avoided had the Secretary advised this Court last Thursday in her request to expedite the appeal that receiving a decision on

^{2/} The notion of allowing voting first, and then later ruling upon what the proper voting environment should be evokes echoes of Justice Scalia's words from the disputed election of 2000: "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in grant of stay pending review).

the merits was essential before early voting began. But the Secretary failed to mention the early voting period in that request, and instead she “urge[d] this Court to expedite proceedings so that all parties may be heard and this case adjudicated before November 7, 2006.” Motion to Expedite at 1, ¶ 1. Had the Secretary conferred with us regarding expediting the appeal, we would have consented to the fastest possible scheduling track so that a decision hopefully could have been issued before early voting began.

Even after the trial court vacated the automatic stay last Thursday, the Secretary did not immediately ask this Court to reinstate the stay; and when she did file the appellate motion to reinstate the automatic stay, it was not styled as an Emergency Motion. Similarly inexplicable was that motion’s contorted assertion:

Because the [appeal] will be adjudicated before the general election scheduled for November 7, 2006, the imminence of the election is not a circumstance that compels lifting the automatic stay. And, in intervening [sic] early voting period, the stay is essential to preserve the traditional authority of the Supervisors of Elections to provide facially neutral information according to their best professional judgment of local needs and circumstances.

Motion at 6. That statement defied logic, but it did make one thing unmistakably clear: The Secretary was cognizant of the early voting period yet somehow believed that an appellate ruling issued after its commencement, but before November 7, would resolve any problems. That is plainly not so.

In short, we now stand where we stand – the polls have opened; the voters are voting; and the election officials have not told them that a vote for Foley will be a vote for Negron. We maintain this process is entirely consistent with Florida law, and we will demonstrate that below. But whether or not this Court believes the trial court’s injunction was correct is now largely irrelevant – the overriding concern at this point is consistency. Changing the rules within the polling place during the middle of the election would be fraught with Equal Protection problems.³ Because the injunction cannot lawfully be vacated at this late date, the relief sought by Appellants cannot be granted.

³ The Secretary’s appellate brief does not even bother to acknowledge the fact that the election has already begun. Mr. Negron’s brief buries this critical fact in a footnote on page 22 of his appellate brief, arguing that while some of the voters who have already cast their ballots “might have been prejudiced by this lack of information, the public interest is still better served in providing these informational notices to avoid yet further confusion[.]” Negron’s Appellate Br. at 22 n.5. This argument completely ignores the Equal Protection Clause, which of course trumps any state statutory concerns under the Supremacy Clause.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE LEGISLATURE DID NOT AUTHORIZE THE POSTING OF NOTICES REGARDING REPLACEMENT CANDIDATES.

The trial court did not err in granting the injunction that has governed during the first two and one-half days of this election. The judgment therefore should be affirmed.⁴

Section 100.111(4)(a), Florida Statutes, amended by the Legislature in 2005 – *see* Ch. 2005-277, Section 20, Laws of Florida – speaks directly to the situation presented here, when a particular candidate vacancy occurs after the primary election.

It provides in relevant part:

In the event that death, resignation, withdrawal, removal or any other cause or event should cause a party to have a vacancy in nomination which leaves no candidate for an office from such party, the Department of State shall notify the chair of the appropriate state, district, or county political party executive committee of such party; and within 5 days, the chair shall call a meeting 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 7 days after notice to the chair in order that the person designated may have his or her name on the ballot of the ensuing general election. If the name of the new nominee is submitted after the certification of results of the preceding primary election,

⁴ The Appellants do not appear to contest the existence of two of the four prerequisites for the issuance of injunctive relief – lack of an adequate legal remedy and irreparable harm. Instead they contend that our claim should have failed on the merits and that the public interest would not be served by the injunction. We devote our discussion only to those two contested points.

however, the ballots shall not be changed and the former party nominee's name will appear 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.

Section 100.111(4)(a), Florida Statute (2005) (emphasis supplied).

The statute, as all parties acknowledge, was enacted largely in response to a 2004 race in Florida's 22nd Congressional district in which, shortly before the election, the Democratic party candidate withdrew from the race due to health concerns and was formally replaced by another candidate. Thus, the Legislature was well aware of the complications associated with a vacancy that occurs shortly before the election. The Legislature's solution, embodied in Section 100.111(4)(a), was to establish a process by which a replacement candidate may be designated by the political party that has lost its original nominee.

That statute does not, however, provide for the posting of any sort of advisory notices to voters within the polling place. Indeed, while plainly contemplating the exact scenario that has occurred in the 16th Congressional district race here, the statute contains the mandate that "the ballots shall not be changed and the former party nominee's name will appear on the ballot." *Id.*⁵ As the trial court noted:

⁵ The Secretary insists that ballots and notices should not be "conflated." But the very statute the Secretary cites defines the ballot as the "printed sheet of paper . . . containing the names of the candidates." Section 97.021(3)(a), Florida Statute Here Appellants are seeking to provide the voters an additional piece of

In addressing what should appear on the ballot in the event of a vacancy in nomination, the Legislature could have adopted various options: it could have required the name of the new nominee be included on the ballot, or could have mandated the posting of a notice informing electors of the replacement, as the Kentucky Legislature did. See Section 118.227(3). Ken. Rev. Anno. (2006).

Order Granting Injunctive Relief at 4 (RI-86).

Moreover, the specificity and detail of the process outlined in Section 100.111(4)(a) confirms that the Legislature considered this possibility and chose to eschew the posting of notices. Even further evidence of the Legislature's conscious decision to disallow posted notices is the fact that the Legislature, in the same enactment that amended Section 100.111(4)(a), repealed Section 101.253. See Ch. 2005-277, Section 77, Laws of Florida. The repealed provision had provided a mechanism to advise voters of a late-term replacement candidate's name:

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 that 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 of 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

paper containing the name of a different candidate – by definition, changing the ballot. As the trial court reasoned: “doesn't the notice contravene the ballot – in other words, you've injected a new name – forgive me, Mr. Negron's name into the ballot. . . . My concern is by handing a voter something that has somebody else's name on it in regard to that race, does not comport with the statute, with what the Legislature wants to happen here.” (RI-162-163).

supervisor may, as an alternative, reprint the ballots to include the name of the new nominee.

Section 101.253(3), Florida Statute (emphasis supplied).

Even if one assumed *arguendo* that the Legislature simply overlooked the issue of notice in the event of a replacement candidacy,⁶ it still would not be the role of the judiciary to re-draft the statute in a more “ideal” way. As the trial court correctly noted, principles of judicial restraint counsel against such intervention:

The Court is not at liberty to question the Legislature’s decision, or its judgment, in enacting the statute, and there can be little doubt that it understood the confusion likely to result where voters know that the person reflected on the ballot is no longer seeking the position.

Order Granting Injunction at 5. (RI-87)

Moreover, even if Section 100.111(4)(a) had not spoken directly to this issue, still other provisions of the Election Code would preclude the posting of notices that Appellants seek. The Secretary makes the point that she is the chief election officer and is entitled to “provide voter education assistance to the public.” *See* Secretary’s Appellate Br. at 8-9. Nonetheless, this does not mean that she may transgress the specific limits the Legislature set on her “education” efforts. The Legislature

⁶ The Secretary concedes this point by stating that “it is a ‘well-settled rule of statutory construction . . . that the legislature is presumed to know the existing law when a statute is enacted.’” Secretary’s Appellate Br at 19 (quoting *Crescent Miami Ctr., LLC v. Fla. Dep’t of Revenue*, 903 So. 2d 913, 918 (Fla. 2005)).

repeatedly specified that election officials are limited to instructing voters regarding “the manner of voting” – not about the manner of vote tabulation. SectionSection 101.031(4); 101.5611(1), Florida Statute

In her appellate brief, the Secretary admits that the method vote of tabulation – rather than how to cast a legal vote in the first place – is what she wants to tell the voters. *See* Secretary’s Appellate Br. at 10 (“Without some explanation, a ballot that omits the name of the legal candidate leads to doubt and uncertainty about how a vote will be counted.”) (emphasis supplied). But the long, often convoluted topic of vote tabulation – involving, *inter alia*, absentee ballots; provisional ballots; canvassing boards; eventual certification by the Secretary; and possible post-certification election contests – is traditionally (and, more to the point, statutorily) never discussed with the voters at the polling place. And for good reason: election officials are present at the polling places to enable voters to cast a legal ballot and to avoid fraud at the polls – not to lead seminars on Florida election law; not to explain what the possible implications of a legal vote might or might not be; and certainly not to assist any particular candidate or party garner last-minute name-recognition.⁷

⁷ Wholly irrelevant to this inquiry is the Secretary’s repeated truism that the proposed “Negron for Foley” notice is “truthful” and “facially neutral.” Whether or not the proposed notice is facially-accurate was never at issue in this litigation – the issue is that the Election Code does not permit election officials to convey some admittedly-accurate information to voters as they enter the polls. Moreover,

Reinforcing this point is the “Voter Responsibilities” provision of the Election Code, which makes the matter of learning the candidates one of personal responsibility for the voter – not election officials. *See* Section 101.031(2), Florida Statute (“Each registered voter of this state should familiarize himself or herself with the candidates and issues.”) (emphasis supplied). It is a perfectly legitimate legislative choice to put this onus on the voters themselves, and to allow the political campaigning process run its course everywhere except within 100 feet of the polling place.⁸ Once again, the wisdom of such a legislative choice is not for the courts to decide.

Along these same lines, we would be remiss if we did not address Appellants’ baseless charge that voters are being kept in the dark. The trial court’s injunction

while the Secretary’s proposed notice is phrased neutrally, under the circumstances its effect is anything but neutral. No voter, of course, needs to be told that a vote for Tim Mahoney is a vote for Tim Mahoney, or that a vote for Emmie Ross is a vote for Emmie Ross. (Note that no similar “informative” tautology is provided to voters in any other race.) Thus, the only “benefit” of the notice would be a partisan benefit to Mr. Negron and the Republican Party – in violation of Section 101.5611(1): “In instructing voters, no precinct official may favor any political party, candidate, or issue.”

⁸Yesterday, a federal district court in Miami struck down the 100-foot barrier statute relative to exit polling of voters on their way out of the polling place, but sustained the law relative to interaction with voters as they enter the polling place. *See CBS Broadcasting Inc. v. Cobb*, Order Granting Plaintiffs Declaratory Relief, Case No. 06-22463-CIV-HUCK/SIMONTON (S.D. Fla. Oct. 24, 2006).

does no such thing. It does not prevent political parties or private individuals from notifying the public about Mr. Negron's status as the Republicans' replacement candidate for District 16. If the Republican Party wishes to park just outside the 100-foot electioneering zone at every polling place a tractor-trailer with the painted message "A Vote for Foley is a Vote for Negron," it is free to do so. The injunction, applying the Legislature's words from the Election Code, simply provides that state election officials at the polling place cannot be conscripted to perform this function. Their role is simply to inform voters about to how to cast a legal vote; it is not to inform them about how those legal votes will later be tabulated, or what the consequences of a vote for a particular candidate or ballot measure will be.

III. THE ELECTION CODE CANNOT BE CIRCUMVENTED BY AN APPEAL TO “DEFERENCE” TO VARIOUS CONFLICTING ADMINISTRATIVE INTERPRETATIONS.

The Secretary argues that her office, as the agency charged with enforcing the Election Code, is entitled to read into the statute a notice provision and issue directives accordingly. This argument finds no quarter for at least three independent reasons.

First, while agency interpretations of ambiguous statutes are ordinarily entitled to deference, no deference is appropriate in the circumstances presented here because the Legislature has spoken directly on the replacement candidate situation at hand. That principle is hornbook administrative law, and of course none of the cases the Secretary has cited suggest anything to the contrary. *See* Secretary’s Appellate Br. at 11. Her cases stand for the unremarkable proposition that administrative agencies can issue interpretations to fill in the gaps when the Legislature has not addressed an issue and delegated its authority to the administrative body – not where, as here, the Legislature has repealed a provision that formally directed elections officials to provide notice to the voters about a replacement candidate, and replaced that old provision with a new one that does not call for the providing of such notice. While Florida courts generally defer to an agency’s interpretation of statutes and rules it is charged with enforcing, the courts will not defer to an agency’s opinion that is

contrary to law. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1283 (Fla. 2000); *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000).

Second, there is no merit to the Secretary's assertion that "[u]nder the circumstances of this case, the Secretary and the Supervisors of Elections are the administrative officials to whom the courts should defer." Secretary's Appellate Br. at 12. In actuality, deference is particularly inappropriate where, as here, the various entities charged with effectuating the Election Code have themselves come to various differing conclusions about what the statute requires or permits them to do. Cf. *Navaho Nation v. Dep't of HHS*, 285 F.3d 864, 875 (9th Cir. 2002) ("In those circumstances where agencies do offer conflicting interpretations, we would be forced to employ some form of *de novo* review, either to choose the most reasonable of the reasonable interpretations offered by the agencies or to fashion our own interpretation of the statute."), *opinion vacated on other grounds*, 307 F.3d 997, and *replaced by*, 325 F.3d 1133 (9th Cir. 2002) (en banc); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (no deference is owed where agency's new interpretation conflicts with previous position). Properly viewed, there is not a single, clear administrative voice opining about whether notices should be posted, or even what form those notices

should take. Indeed, over the past week, there has been a cacaphony of differing opinions from the Secretary and the eight affected Supervisors of Elections.

In addressing this issue, the Secretary and the counsel for the Supervisors came to significantly different conclusions about the nature of the notice to be provided. The Secretary suggested a notice that referenced only the Republican candidate.⁹ The Supervisors' counsel suggested a notice that referenced all of the candidates in the race (RI-16, Plaintiffs' Exhibit 2).

Lacking a clear and consistent message, the Supervisors themselves (perhaps not surprisingly) came to differing conclusions about what should be done. Six of the eight Supervisors appeared to take the position that they would post notices at the polling places. The seventh – the Supervisor of Elections of Palm Beach County – represented that he did not intend to post any notice but “he would only have it available in the event a question was posed by the voters with respect to that race[.]” (RI-129-30) The eighth – the Supervisor from St. Lucie County – declined to state

⁹ The Department of State's website includes a “notice to voters” that tells voters in District 16: “In the race for Representative In [sic] Congress, District 16, any vote cast for Mark Foley (REP) shall be counted as a vote for Joe Negron (REP).” See http://election.dos.state.fl.us/pdf/rep_congress_dist16.pdf (site last visited on October 25, 2006). In that notice, no mention is made about how votes cast for the Democratic candidate or the No Party candidate will be tabulated.

her intention other than that she would follow any directive from the Secretary or the Court. (RI-159-60)

Under such circumstances, it cannot be said that the entities charged with carrying out the Election Code have come to one definitive conclusion that notices are permitted, and therefore that the courts must steer clear. Indeed, the administrative responses to this situation have been all over the map, and at times, internally inconsistent.¹⁰ No deference is due to these varying decisions.

Third and finally, it is notable that the Secretary has elected not to issue any binding directive to the Supervisors but simultaneously has urged this Court to “defer” to its mere recommendation to the Supervisors. For the reasons previously stated, the Secretary could not, consistent with the statute, direct the Supervisors to

¹⁰ Even the Secretary’s own “notify in all circumstances” approach is of questionable consistency, in light of the fact that the Secretary’s office did not make the same recommendation in 2004, when a vacancy occurred in the Democratic Party’s nominee for Florida’s 22nd Congressional district and the Department of State had to be sued just to get a replacement candidate designated in the first place. *See Fla. Dep’t of State v. Martin*, 885 So. 2d 453 (Fla. 1st DCA 2004), *reviewed by* 916 So. 2d 763 (Fla. 2005). That case did not involve the current version of the statute, nor did it involve the question of whether notices should be posted to inform voters about the replacement. It is therefore deeply ironic that Mr. Negron’s appellate brief accuses us of hypocrisy. *See* Negron’s Appellate Br. at 22-26. Putting aside the fact that this is a political sound bite rather than a legal argument, it is not even based in reality. In actuality, our position has been (and will continue to be) entirely consistent: all provisions of the Election Code in effect at the time should be followed – not circumvented or undermined – by the Secretary.

post notice. In any event, the Secretary's decision to issue only a recommendation – but not a formal directive – is most curious, and it undercuts the notion that this Court should “defer” to the Secretary's recommendation. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (agency's opinion had “no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law); *Alaska Dep't of Environ. Conserv. v. EPA*, 540 U.S. 461, 477-78 (2004) (agency's interpretation of a statute in internal guidance memoranda does not qualify for the ordinary deference under *Chevron*); *Commonwealth Edison v. Vega*, 174 F.3d 870, 875 (7th Cir. 1999) (“The issue of the weight to be given under the *Chevron* doctrine to informal expressions of agencies' views is unresolved.”).

IV. THERE IS NOTHING IMPROPER ABOUT THE FINAL SENTENCE OF THE TRIAL COURT'S "ORDERED AND ADJUDGED" SECTION.

Unable to mount a serious a serious challenge to the substance of the trial court's order about the posting of notices, the Secretary takes aim at the final sentence of the trial court's "Ordered and Adjudged" section, which has nothing to do with the posting of notices. This argument goes nowhere.

The trial court's order concluded:

It is therefore ORDERED AND ADJUDGED that the Plaintiffs' request for issuance of an injunction is GRANTED. The Defendants are therefore ordered not to post the proposed notice, and may not deliver the notice to individual voters posing questions about the race in question. Any requests for assistance from voters should be handled in the same manner that they usually are, which would preclude discussion of individual candidates, or nominees, in any particular race.

(RI-91) (emphasis supplied). Regarding the underlined portion above, the Secretary breathlessly asserts: "The staggering breadth of this novel and confusing limitation raises critical issues of permissible communication at polling places[.]" Secretary's Appellate Br. at 24.

That argument is incorrect. There is nothing "staggering," "novel," or "confusing" about the final sentence of the trial court's opinion. All the court stated was that voters' requests for assistance "should be handled in the same manner that they usually are." It strains credulity to argue that a court's explanatory statement is

in any way “novel” when the statement itself is merely that things should be done “in the same manner that they usually are.” Indeed, we respectfully submit that this is the precise opposite of a novel statement. It is an indication that nothing should change.

There is therefore no merit to the Secretary’s naked assertion that the statement renders the order “unworkable in any practical sense, violates the Bill of Rights, and guarantees voter dissatisfaction at early voting sites.” Secretary’s Appellate Br. at 25. As we have previously noted, the Election Code permits election officials to inform voters about how to cast a legal vote, not to discuss the implications of how a particular legal vote, once cast, will later be tabulated. Nor are they permitted to do or say anything that in the slightest way might “persuade or induce any elector to vote for or against a particular ticket [or] candidate . . . “ Section 101.031(4), Florida Statute. The same provision requires that elections official, after instructing the elector on how to cast a legal vote, “shall retire, and such elector shall vote in secret.” *Id.* The message is unmistakable – elections officials should give the voter the information he or she needs in order to cast a legal vote, and then should leave them be. That is also all the court’s language requires.

How this would violate “the Bill of Rights” is totally beyond us. Presumably, the Secretary is referring to the First Amendment (we doubt she was alluding to the right to bear arms or the right to a jury trial), but she provides zero legal authority to

support such a claim. Indeed, even if the order could be viewed as inhibiting certain expression by workers at the polls, such regulation would be entirely justified by the legitimate interest “in seeking to assure that elections are operated equitably and efficiently.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). That quote is taken directly from page 14 of the Secretary’s own brief, but she apparently forgot it by the time she got to page 25, where she asserts that it is somehow unworkable and unconstitutional to limit what elections officials say to voters.

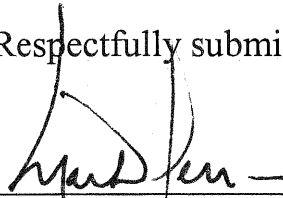
In short, there is simply no merit to the Secretary’s stated concern. The final sentence of the opinion merely attempts to clarify that things should be done the way they usually are done, and even if there is anything confusing about that, it does not alter the unmistakable terms of the injunction, which are stated in the two sentences which precede it.

We also fail to understand why this additional sentence will “guarantee[] voter dissatisfaction” at the polls. *See* Secretary’s Appellate Br. at 25. In any event, the Legislature has spoken, and it is up to them to change this procedure if indeed it leads to voter dissatisfaction. Were this Court to take upon itself this legislative task, it risks creating constitutional and practical problems that will only work to disturb the electoral process already underway.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,



Mark Herron
Florida Bar No. 199737
Robert J. Telfer III
Florida Bar No. 0128694
MESSER, CAPARELLO & SELF, P.A.
P.O. Box 15579
Tallahassee, FL 32317
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

Richard B. Rosenthal
Florida Bar No. 0131458
Law Offices of Richard B. Rosenthal, P.A.
Alfred I. DuPont Building
169 East Flagler Street, Suite 1422
Miami, FL 33131
Telephone: (305) 779-6097
Facsimile: (305) 779-6095

Charles H. Lichtman
Florida Bar No. 501050
BERGER SINGERMANN
350 E. Las Olas Boulevard, Suite 1000
Ft. Lauderdale, FL 33301
Telephone: (954) 626-9913
Facsimile: (954) 523-2872

Stephen F. Rosenthal
Florida Bar No. 0131458

25 West Flagler Street, Suite 800
Miami, FL 33130
Telephone: (305) 358-2800
Facsimile: (305) 358-2382

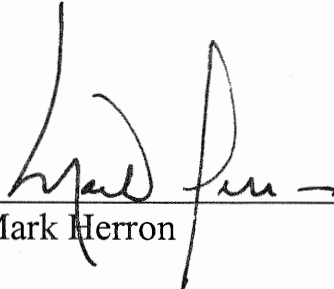
David M. Buckner
Florida Bar No. 060550
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
Telephone: (305) 372-1800
Facsimile: (305) 372-3508

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the attorneys listed below by U.S. Mail and by facsimile transmission, this 25th day of October, 2006.

Peter Antonacci
Andy V. Bardos
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302
Facsimile: (850) 577-3311


Robert H. Fernandez
Bill L. Bryant
Mia McKown
Akerman Senterfitt
One Southeast Third Avenue
28th Floor
Miami, FL 33131-1714
Facsimile: (305) 374-5095



Mark Herron

CERTIFICATE OF COMPLIANCE

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



Mark Herron