

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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

Appellant,

v.

Case No. 1D06-5447  
L.T. Case No. 2006-CA-002619

KAREN THURMAN, as Chairman of the  
FLORIDA DEMOCRATIC PARTY; and the  
FLORIDA DEMOCRATIC PARTY, *et al.*

Appellees.

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**INITIAL BRIEF OF  
SUE M. COBB,  
SECRETARY OF STATE OF THE STATE OF FLORIDA**

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## **PRELIMINARY STATEMENT**

On appeal, Appellant, Sue M. Cobb, Secretary of State of the State of Florida, will be referred to as “the Secretary.” Appellees, Karen Thurman, as Chairman of the Florida Democratic Party and the Florida Democratic Party will be referred to as “the Appellees.”

Reference to the record on appeal shall be by “R” followed by the volume number and page number(s), e.g., (R1–25-26.)

All emphasis is supplied unless otherwise indicated.

## STATEMENT OF CASE AND FACTS

This case presents the question whether election officials may post facially neutral notices informing voters of the fact that a vote cast for a withdrawn candidate whose name appears on the ballot will be counted as a vote for the legal candidate whose name does not appear on the ballot.

On September 29, 2006, Mark Foley (“Foley”), a Republican member of Congress representing Florida’s 16th Congressional District, resigned his office and withdrew as a candidate for reelection. (R1–29.) This withdrawal created a vacancy in nomination, leaving the Republican Party without a nominee in that race. (R1–29.) The Secretary of State, as required by Section 100.111(4)(a), Florida Statutes, notified the chair of the Republican State Executive Committee of the vacancy, and, on October 2, 2006, the Executive Committee designated Joe Negron (“Negron”), a member of the Florida House of Representatives, as its new nominee. (R1–29.)

Because the Executive Committee nominated Negron after the certification of the results of the 2006 Primary Election, Foley’s name, rather than Negron’s, appears on the General Election ballot. (R1–29.) Foley’s name, however, serves only as a placeholder for Negron’s:

[T]he 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.

§ 100.111(4)(a), Fla. Stat. (2006). Thus, Florida law requires the ballot to display the name of the withdrawn candidate—not the name of the lawful candidate—and all votes cast for the withdrawn candidate will be counted for the substituted candidate. (R1–29.)

On October 3, 2006, Dawn K. Roberts, Director of the Division of Elections, sent an e-mail to the Supervisors of Elections for the eight counties that comprise the 16th Congressional District, recommending that the following “notice language” be posted “at all early voting sites and polling places”:

**NOTICE TO VOTERS REGARDING  
REPRESENTATIVE IN CONGRESS, DISTRICT 16**

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).

(emphasis in original). (R1–29–30.) The notice was designed to prevent voter questions arising from the fact that the ballot displays the name of a former candidate and omits the name of the legal candidate where the law provides that a vote for the withdrawn candidate will be counted as a vote for the substituted candidate. (R1–30.)

In conjunction with this recommendation, the Supervisors of Elections for the affected counties collectively discussed and evaluated their responsibilities

under Florida law. (R1-159-160.) On October 11, 2006, the Florida State Association of Supervisors of Elections (the “Supervisors”) circulated a memorandum outlining the product of this discussion. (R1-15.) The memorandum recommended that the Supervisors of Elections place the following “information sheet” at polling places:

**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 (DEM), THE DEMOCRATIC CANDIDATE.
- A VOTE FOR EMMIE ROSS (NPA) WILL BE COUNTED FOR EMMIE ROSS (NPA), THE NO PARTY AFFILIATION CANDIDATE.

(emphasis in original). (R1-15-16.) In a memorandum accompanying its proposed notice, the Supervisors explained the reasons for their decision:

Voters may be confused when presented with the ballot and in determining how to utilize the system, with questions raised as to why Foley remains on the ballot and where the other potential candidate they have heard of, is located. In order to minimize that confusion and how to cast a ballot, an information sheet placed at the polling place may help. In addition, and more importantly, it will avoid poll workers and other elections officials from advising or instructing voters concerning this issue, foreclose explanations of the ballot and

differing information being provided, or how voters are to vote once they are engaged with the voting system. (R1–15.)

On October 13, 2006, Appellees filed this action, alleging that the proposed notice violates Florida law and seeking to enjoin election officials from posting them at polling places. (R1–16.) On October 18, 2006, after a temporary injunction hearing at which the parties agreed to the entry of a final judgment, the lower court granted the injunction in the following terms:

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.

(R1–91, 126–127.) The lower court recognized that “the proposed notice is truthful, and does not misstate anything about the Congressional District 16 race.” (R1–85.) It also “stated, very clearly and definitively, that the Court perceives no improper motive on the part of the Defendants.” (R1–85.) The lower court even acknowledged that “confusion [was] likely to result where voters know that the person reflected on the ballot is no longer seeking the position,” (R1–87), and that the proposed “notices might clarify” that a vote cast for the withdrawn candidate will be counted as a vote for the substituted candidate. (R1–86.)

Without the customary deference to administrative officials charged with

interpreting the Election Code, the lower court concluded that election officials have no statutory authority to post the proposed informational notices. (R1–86.) Specifically, the Court held that Section 100.111(4)(a), Florida Statutes, by providing that “the ballot shall not be changed, and the former party nominee’s name will appear on the ballot,” operates as a prohibition against posting informational notices, despite the fact that it “does not specifically preclude the posting of notices.” (R1–86–87.) The lower court distinguished several provisions of the Election Code that authorize election officials to educate, inform, and instruct voters, by finding that they do not authorize election officials to educate, inform, and instruct voters as to “a particular race.” (R1–88.) Carrying this inference into the injunction, the lower court enjoined election officials in the affected counties and indeed throughout the entire state from responding to voters’ requests for assistance if the response may include the name of an individual candidate or nominee. (R1–91.) This appeal ensued. (R1–94–106.)

## SUMMARY OF ARGUMENT

In the upcoming General Election for Florida's 16th Congressional District, voters who select "Mark Foley" on their ballots will, in fact, be casting votes for Joe Negron. Appellees initiated this lawsuit to prevent election officials from posting notices at voting sites to inform voters of this fact. The only issue before this Court is whether Florida's Election Code prohibits election officials from providing clear, concise, facially neutral, and legally accurate information to the public to enable voters to cast intelligent and informed ballots, to minimize the polling place disruption occasioned by an unexpected vacancy in nomination, and to forestall voter confusion and misunderstanding. As shown below, it does not.

Florida law in clear and expansive terms clothes election officials with authority to educate, inform, and instruct voters. Here, the exercise of this authority is consistent with the judicial deference traditionally accorded to election officials in the exercise of their duties, with the constitutional right of voters to cast their votes effectively, and with Florida's compelling interest in fostering an informed electorate and preventing voter confusion. And, while the information provided by election officials to voters may not partake of official favoritism, the proposed notice, a virtual recitation of Florida law, was carefully drafted to ensure neutrality.

The lower court held that Section 100.111(4)(a), Florida Statutes, which

requires the name of the withdrawn candidate to remain on the ballot, operates as a prohibition against posting the proposed notice. In so doing, the Court conflated two components of the voting process: neutral election information and the ballot. While Section 100.111(4)(a), Florida Statutes, speaks to ballots, it is silent concerning notices. Nor does its silence prohibit the proposed notice. The Legislature was aware that other statutes were already in place, authorizing election officials to educate, inform, and instruct voters. In light of these common-sense provisions, vesting local officials with necessary discretion to respond to local needs and circumstances, a prohibition against informational notices would, to the contrary, require express statutory language.

Finally, the lower court enjoined election officials from responding to voters' requests for assistance if the response includes any reference to a particular race, candidate, or nominee. This limitation is without foundation in Florida law, in reason, or in past practice. In fact, it usurps the functions of the Legislature by rendering superfluous several carefully delineated legislative prohibitions against official favoritism. The confusing and staggering breadth of the lower court's "gag order" handcuffs election officials as polls open across the state and whittles away the needed discretion vested in them by law. Worst of all, it presumes that the Legislature intended that essential facts are to be concealed from voters.

The lower court's entry of an injunction was in error and must be reversed.

## ARGUMENT

### I. STANDARD OF REVIEW.

Because this appeal raises only questions of law, the standard of review is de novo. *See, e.g., Smith v. Coalition to Reduce Class Size*, 827 So. 2d 959, 962 (Fla. 2002) (quoting *Operation Rescue v. Women’s Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993)) (“To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal.”).

### II. THE PROPOSED NOTICE IS CONSISTENT WITH FLORIDA LAW.

Florida law authorizes election officials to provide voters with neutral information concerning elections. The notice proposed in the instant case does precisely that—it informs voters, in clear, concise, and accurate terms, and without favoring any candidate or political party, of the means of casting an effective vote. Because the proposed notice is consistent with Florida law, the lower court’s injunction must be quashed.

#### A. Florida’s Election Code Expressly Authorizes Election Officials to Educate, Inform, and Instruct Voters.

Florida law confers broad authority in explicit and unmistakable terms on both the Secretary and the Supervisors of Elections to educate, inform, and instruct voters. The Secretary is “the chief election officer of the state.” § 97.012, Fla. Stat. (2006). As such, she is authorized to “[p]rovide voter education assistance to

the public.” § 97.012(6), Fla. Stat. (2006). Moreover, Florida law authorizes her to “[p]rovide technical assistance to the Supervisors of Elections on voter education.” § 97.012(4), Fla. Stat. (2006). The Department of State is also authorized to provide informational cards, containing any information the Department deems necessary, to the Supervisors of Elections for the voters’ use. Specifically, the Department may:

[P]rint, in large type on cards, instructions for the electors to use in voting. . . . The election inspectors shall display the cards in the polling places as information for electors. The cards shall contain information about how to vote and such other information as the Department of State may deem necessary.

§ 101.031(1), Fla. Stat. (2006). In addition, the Voter’s Bill of Rights with expansive language entitles “[e]ach registered voter in this state” to “[w]ritten instructions to use when voting” and “oral instructions in voting from elections officers.” § 101.031(2), Fla. Stat. (2006). What's more, the Legislature has determined the voters have a responsibility to ask questions, where needed.

§ 101.031(2) Voter Responsibilities 9., Fla. Stat. (2006). Section 101.5611(1), Florida Statutes, further authorizes the Supervisors of Elections to “provide instruction at each polling place regarding the manner of voting with the system.” These expansive terms show, with clarity, that the Legislature intended to confer on election officials the needed authority to provide voters with important and objective information. The allegation that the Supervisors of Elections are

powerless to provide basic, factual information to voters cannot withstand scrutiny, practical or judicial.

Foley's name will appear on the ballot but will be a placeholder for Negron's, creating a complexity in voting that must be made known to voters to enable them to cast an informed and intelligent ballot. 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. In light of the ample powers vested in election officials to educate, inform, and instruct voters, it is inconceivable that Florida law mandates that voters be kept in the dark about these circumstances while the identity of the actual, lawful candidate is concealed from view. It is still less plausible that confused voters should be required to *guess* as how their vote will be counted, or that they should be forced to question poll workers and rely on the potentially inconsistent, incomplete, or partial information provided by them. Under these circumstances, posting a clear, concise notice informing voters that a vote for the withdrawn candidate whose name appears on the ballot will be counted for the legal candidate whose name is not on the ballot is profoundly responsible and in the best interests of voters. It is fundamental that voters should know *how* to cast an effective vote.

Recognizing the unique nature of the election process, Florida courts have traditionally shown deference to the judgment of election officials:

The election process is subject to legislative prescription and constitutional command and is committed to the executive branch of government through duly designated officials all charged with specific duties . . . . [The] judgments [of those officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judges might deem more appropriate.

*Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 845 (Fla. 1993) (quoting *Boardman v. Esteve*, 323 So. 2d 259 (Fla. 1975), *cert. denied*, 425 U.S. 967 (1976)) (accord[ing] latitude to the judgment of election officials in the “process of validating signature petitions”) (ellipsis and alterations in original); accord *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 31 Fla. L. Weekly D2078 n.3 (Fla. 1st DCA 2006) (“*Krivanek* stands for the proposition that election officials are accorded deference in interpreting election laws and performing their duties.”). Judicial deference is proper in this case as well. Because the proposed notice is “rational and not clearly outside legal requirements,” the lower court erred when it “substituted . . . the impression [it] deem[ed] more appropriate.”

This judicial deference reflects not only the unique nature of the election process, but also the deference to which all executive agencies are entitled in the interpretation and implementation of the statutes they are charged with administering. As this Court has observed, “[w]e accord due deference to an agency’s interpretation of a statute it administers and will overturn that

interpretation only if it is clearly erroneous.” *Dockery v. Hood*, 922 So. 2d 258, 260 (Fla. 1st DCA 2006); accord *Gulfstream Park Racing Ass’n, Inc. v. Tampa Bay Downs, Inc.*, 31 Fla. L. Weekly S591 (Fla. 2006) (quoting *Gulfstream Park Racing Ass’n v. Tampa Bay Downs, Inc.*, 294 F.Supp.2d 1291, 1300 (M.D. Fla. 2003)) (“[I]n Florida, courts give great deference to the interpretation of a statute by an administrative agency charged with the statute’s enforcement.”); *Board of Trustees of Internal Imp. Trust Fund v. Levy*, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995) (“[I]f an agency’s interpretation of its governing statutes is one of several permissible interpretations, it must be upheld, despite the existence of reasonable alternatives.”). Deference in such cases is called for by the executive agencies’ “greater familiarity with the statutory scheme” and their “expertise in the field regulated.” *Rice v. Department of Health and Rehabilitative Services*, 386 So. 2d 844, 850 (Fla. 1st DCA 1980). Under the circumstances of this case, the Secretary and the Supervisors of Elections are the administrative officials to whom the courts should defer.

In this case, the power of election officials to provide critical information to voters is further enhanced by the Florida Supreme Court’s direction that election laws “must be construed consistently with” the “important constitutional right[]” of voters to “cast their votes effectively.” *Reform Party of Florida v. Black*, 885 So. 2d 303, 308 (Fla. 2004); accord *Krivanek v. Take Back Tampa Political*

*Committee*, 625 So. 2d 840, 844 (Fla. 1993) (“[E]lection laws should generally be liberally construed in favor of an elector.”); *State ex rel. Carpenter v. Barber*, 144 Fla. 159 (1940) (“It is the intention of the law to obtain an honest expression of the will or desire of the voter.”). The right of voters to cast their votes effectively has long been “rank[ed] among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). As the U.S. Supreme Court explained:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*Williams*, 393 U.S. at 30. The Voter’s Bill of Rights echoes the fundamental nature of this right, ensuring to each voter the right to “have his or her vote accurately counted.” § 101.031(2), Fla. Stat. (2006). When, by a reasonable interpretation of statute, the result can be avoided, voters should not be compelled to exercise their “most precious freedoms” while election officials are muzzled concerning essential facts. An explanatory notice informing voters of an out-of-the-ordinary voting mechanism is essential to ensure that voters are able to exercise their constitutional right to cast their votes effectively. Consistent with this objective, Florida law expects no less than full disclosure.

Furthermore, the State of Florida has a long-recognized interest in fostering an informed electorate, providing voter education, preventing voter confusion, and conducting elections equitably and efficiently. The U.S. Supreme Court has noted

that “[c]ertainly the State has a legitimate interest in fostering an informed electorate.” *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 228 (1989). “There can be no question about the legitimacy of the State’s interest in fostering informed and educated expressions of the popular will in a general election.” *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983). The Florida Supreme Court has held that the state has a “compelling” interest, “well established under decided cases,” in “avoiding voter confusion.” *Reform Party of Florida v. Black*, 885 So. 2d 303, 315 (Fla. 2004) (quoting *Lubin v. Panish*, 415 U.S. 709, 715 (1974)). “[P]rotect[ing] the integrity of the election process by . . . increasing the fund of information available to the electorate” is a “valid state concern[.]” *Doe v. Mortham*, 708 So. 2d 929, 932-33 (Fla. 1998). And the U.S. Supreme Court has “approved the States’ interests in . . . seeking to assure that elections are operated equitably and efficiently.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995).

In furtherance of these interests, remedial measures similar to the challenged notice have been implemented in similar cases. In 2004, Jim Stork, a Democratic nominee for Congress, withdrew his candidacy. *See Martin v. Department of State, Division of Elections*, No. 04-2400 (Fla. 2nd Cir. Ct. Oct. 8, 2004). (R1-41-52.) While Stork’s name remained on the ballot, votes cast for him were counted as votes for the substituted candidate. The Broward County Supervisor of

Elections posted a factual notice providing voters with substantially the same information contained in the notice challenged in this action, without any protest from anyone. (R1–53.)

Similarly, a Court that recently disqualified a candidate for the Florida Legislature ordered a “conspicuous notice” to be placed at the polls and in absentee ballot envelopes, informing voters that the disqualified candidate, whose name remained on the ballot, is not an official candidate. *See Planas v. Cobb*, No. 06-14721 (Fla. 11th Cir. Ct. Aug. 10, 2006). (R1–54–58.) Courts in other states have approved similar measures. *See, e.g., In re Election Contest of Democratic Primary Held May 4, 1999*, 725 N.E.2d 271, 266 (Ohio 2000) (rejecting claim that failure to remove withdrawn candidate’s name from ballot was an election irregularity, noting with approval that election officials “diligently proceeded to notify electors that [the candidate] had withdrawn” and that “[n]otices were placed in each absentee-ballot envelope and individual voting booth.”); *Leuch v. Milwaukee County Board of Election Comm’rs*, 12 N.W.2d 61, 65-67 (Wis. 1943) (rejecting challenge to election results where election officials placed stickers on ballots to display the name of a substitute candidate).

The notice proposed in the instant case is authorized by the clear and expansive language of Florida law and is consistent with both the fundamental rights of citizens and the compelling interests of the State of Florida. This Court

should reverse the lower court's contrary holding.

**B. The Proposed Notice Does Not Favor or Solicit a Vote for Any Candidate or Political Party.**

The authority of election officials to provide information to voters is subject to one general limitation: the information may not partake of partisan electioneering. Thus, Section 101.5611(1), Florida Statutes, which authorizes the Supervisors of Elections to “provide instruction” at the polling place, provides that, “[i]n instructing voters, no precinct official may favor any political party, candidate, or issue.” In the same vein, Section 102.031(4), Florida Statutes, prohibits any person, within a polling place or within 100 feet of its entrance, from “[s]eeking or attempting to seek any vote.”<sup>1</sup> These limitations on the authority of election officials to educate, inform, and instruct voters serve the essential purpose of preserving the neutrality of election officials and promoting the fundamental fairness of the election process.

In the proceedings below, Appellees laboriously characterized the proposed notice as “partisan activity” or “electioneering.”<sup>2</sup> The lower court correctly determined that the proposed notice is neutral. At the final hearing held October

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<sup>1</sup> Similarly, in the related context of oral instructions given in response to inquiries by voters who have entered the “voting booth,” Section 101.031(4), Florida Statutes, prohibits poll workers and others from “request[ing], suggest[ing], or seek[ing] to persuade or induce any elector to vote for or against a particular ticket, candidate, amendment, question, or proposition.”

<sup>2</sup> Neither is a defined term in the Election Code.

18, 2006, the Court noted:

I know that the information that's being proposed—and I certainly think that the information is neutral. I don't dispute that. It's neutral.

(R1–185–186.) Accordingly, in its Order granting the injunction, the lower court recognized that “the proposed notice is truthful, and does not misstate anything about the Congressional District 16 race.” (R1–85.) And, not only did the lower court determine that the proposed notice is neutral, it also “stated, very clearly and definitively, that the Court perceives no improper motive on the part of the Defendants to influence the outcome of the . . . election by providing the proposed notices.” (R1–85.)

The proposed notice, by design, observes strict neutrality as to all candidates in the 16th Congressional District. It follows the text of governing law, adapted to existing facts, nearly verbatim. In fact, the notice not only follows Section 100.111(4)(a), Florida Statutes, it repeats that text, in identical terms, with respect to each candidate in the race. A comparison of the relevant part of Section 100.111(4)(a), Florida Statutes, and the substance of the proposed notice strikingly illustrates this fact. As a virtual recitation of Florida law, the proposed notice ensures objectivity and impartiality. Thus, the proposed notice is consistent with Florida law and does not give rise to the evils which the Legislature, by prohibiting official favoritism, intended to prohibit.

On its face, the proposed notice shows no partiality toward any candidate or party, and is not the sort of partisan advocacy that Florida law proscribes. The notice contains no words of favoritism, advocacy, or persuasion. It contains no word, implication, or innuendo that promotes, attacks, supports, or opposes any political party or candidate. On the contrary, its tenor is exactingly neutral. It conveys an objective and legally accurate explanation that informs voters of a critical oddity in the method of voting. And the fact that the proposed notice was drafted by consensus of the Supervisors of Elections for the counties comprising the 16th Congressional District powerfully refutes a contrary inference.

**C. Section 100.111(4)(a), Florida Statutes, Does Not Prohibit the Proposed Notice.**

The lower court held that the following words of Section 100.111(4)(a), Florida Statutes, prohibit the proposed notice:

[T]he ballots shall not be changed and the former party nominee's name will appear on the ballot.

The Court reasoned that:

This provision . . . refutes the Defendants' argument that Section 100.111(4) is "silent" on the issue of what should be done. Although Section 100.111(4) does not specifically preclude the posting of notices, it does specifically require that the person no longer seeking the office appear on the ballot. The Legislature has therefore acknowledged the issue of whose name should appear when another candidate has been nominated, but, for whatever reason, decided to require that the former candidate's name appear on the ballot.

(R1-86-87.) The lower court thus conflated two distinct concepts: a ballot and

information. The quoted language refers only to “ballots”—a term defined in Section 97.021(3), Florida Statutes—not notices. The Secretary does not contend that the ballot should be amended in any manner. On the contrary, the Secretary recognizes that Section 100.111(4)(a), Florida Statutes, requires the withdrawn candidate’s name to appear on the ballot. The only question is whether, in light of this fact, election officials may post a notice—distinct from the ballot—informing voters that a vote cast for the withdrawn candidate will be counted for the substituted candidate. The quoted language simply does not address this issue. By confounding the idea of a ballot with that of a notice, the lower court incorrectly concluded that Section 100.111(4)(a), Florida Statutes, checkmates the Supervisors of Elections in silence in the inevitable face of voter inquiry.

Nor does the silence of Section 100.111(4)(a), Florida Statutes, concerning informational notices operate as an implied prohibition against their use. The reason for this silence is obvious: the Legislature was well aware, when in 2005 it redrafted Section 100.111(4)(a), that it had provided ample authority to the Supervisors of Elections, authorizing education, information, and instructions to voters by their public officials. *See* §§ 97.012(4) and (6), 101.031(1) and (2), 101.5611(1), Fla. Stat. (2006). In Florida, it is a “well-settled rule of statutory construction . . . that the legislature is presumed to know the existing law when a statute is enacted.” *Crescent Miami Ctr., LLC v. Fla. Dep’t of Revenue*, 903 So. 2d

913, 918 (Fla. 2005). A special authorization to post notices would, therefore, have been redundant and superfluous, and would have implied that preexisting grants of authority to election officials were insufficient or imperfect. In fact, considering the numerous statutory provisions authorizing election officials to educate, inform, and instruct voters, the Legislature, had it intended to prohibit notices such as the one at issue here, would necessarily have done so in explicit terms. To construe Section 100.111(4)(a), Florida Statutes, to prohibit the proposed notice is to create, by implication, a new and heretofore unknown limitation on the general authority of election officials to provide voters with neutral information and to conduct elections generally.

The silence of Section 100.111(4)(a), Florida Statutes, concerning informational notices does not imply that the Legislature intended to mandate official secrecy and voter ignorance concerning the means of casting an effective vote. Rather, it recognizes the traditional, practical authority of the Supervisors of Elections to act according to their professional judgment of local needs and circumstances. The Legislature presumably was aware that, in some cases, posting an informational notice might be impracticable. Where, for example, a vacancy in nomination and the substitution of a new candidate occur very near in time prior to the General Election, it might be impossible for the Supervisors of Elections to print, distribute and post informational notices at hundreds of precincts. By its

silence concerning notices, the Legislature left the Supervisors of Elections ample room to exercise their authority to educate, inform, and instruct voters according to their reasoned discretion and best estimate of the endless variety of circumstances that might occur during the election process.<sup>3</sup>

The legislative history of Section 100.111(4)(a), Florida Statutes, supports this conclusion. Before Section 100.111(4)(a), Florida Statutes, took its present shape in 2005, Florida law provided that, where a substitute nominee was designated fewer than 21 days prior to the election, the withdrawn candidate's name would appear on the ballot and votes cast for the withdrawn candidate would be counted for the substituted candidate. *See* § 100.111(4)(b), Fla. Stat. (2004). Where, however, a substitute nominee was designated at least 21 days prior to the election, the Supervisors of Elections had the option to reprint the ballots so as to display the name of the substituted candidate, or to affix to the ballots, by means of "a rubber stamp or appropriate printing device," the name of the substituted candidate. *See* § 101.253(3), Fla. Stat. (2004). The legislative history shows, however, that, when the Legislature in 2005 abolished the latter requirement—that the substituted candidate's name appear on the ballot if the substitution was made

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<sup>3</sup> The Kentucky statute cited by the lower court does not compel a different conclusion. (R1–86.) The fact that Kentucky mandates the posting of notices in analogous cases does not negate the conclusion that the Florida Legislature left the decision to post notices to the judgment of election officials who, by law, possess broad authority to educate, inform, and instruct voters.

at least 21 days prior to the election—its purpose was not to ensure a benighted electorate, but to conform Florida law to practical realities brought to light during the 2004 election.

In 2004, Jim Stork, the Democratic nominee for Florida’s 22nd Congressional District, withdrew his candidacy 40 days prior to the election. *See Florida Dep’t of State, Div. of Elections v. Martin*, 916 So. 2d 763, 765 (Fla. 2005). The Division of Elections, “in the interest of avoiding disruption and confusion,” refused to accept Stork’s withdrawal, and litigation ensued. *Id.* During this litigation, the Division’s Assistant Director testified that compliance with Section 101.253(3), Florida Statutes (2004)—which required the substituted candidate’s name to appear on the ballot—would be impossible because new touchscreen voting equipment could not be reprogrammed in fewer than five weeks, nor could rubber stamps be affixed to them. *See* DOS Brief, at 3, available at [http://www.floridasupremecourt.org/clerk/briefs/2004/2201-2400/04-2265\\_ini.pdf](http://www.floridasupremecourt.org/clerk/briefs/2004/2201-2400/04-2265_ini.pdf). And, while the courts directed the Division of Elections to accept Stork’s withdrawal and the substitution of a new nominee, *see Dep’t of State, Div. of Elections v. Martin*, 885 So. 2d 453, 459 (Fla. 1st DCA 2004), Stork’s name in fact remained on the ballot at the General Election. *See* DOS Brief, at 6.

When the Legislature amended Section 100.111(4), Florida Statutes, in 2005, the Staff Analysis cited the litigation concerning Stork’s withdrawal as the

reason. *See* Fla. H.R. State Admin. Council, HB 1567 CS (2005) Staff Analysis 6 (Apr. 21, 2005), available at <http://www.flsenate.gov/data/session/2005/House/bills/analysis/pdf/h1567e.SAC.pdf>. Thus, the new requirement of Section 100.111(4)(a), Florida Statutes, that a withdrawn candidate's name remain on the ballot arose from practical requirements of authorized voting systems—not from a motive to conceal from voters a candidate's identity or the means of casting an effective vote. It arose from the fact that new voting equipment cannot be reprogrammed in sufficient time, and that rubber stamps and printing devices cannot be used to alter a touchscreen ballot. In fact, as noted *supra*, the Broward County Supervisor of Elections posted informational notices at the polling places at the 2004 General Election, and, while knowing of this fact, the Legislature might have prohibited such notices in 2005, it did not do so. The legislative intent, therefore, was plainly to accommodate Florida law to new realities—not to confuse voters and keep them in the dark.

For the foregoing reasons, Section 100.111(4)(a), Florida Statutes, does not prohibit the proposed notice.

### **III. FLORIDA LAW DOES NOT PROHIBIT ELECTION OFFICIALS FROM MENTIONING, IN NEUTRAL TERMS, A RACE, CANDIDATE, OR NOMINEE.**

Perhaps most significantly, the last sentence of the lower court's Order enjoins election officials from responding to voters' requests for assistance if the

response may include the names of individual candidates or nominees. (R1–91.)

The staggering breadth of this novel and confusing limitation raises critical issues of permissible communication at polling places in the affected counties and indeed throughout the state.

While it “acknowledge[d]” the statutes confer on election officials authority to educate, inform, and instruct voters, the lower court held that such authority does not extend to providing information “regarding a particular race.” The Court explained that these statutes:

[R]ecognize that instructions on the “manner of voting” and “the manner of voting with the system” may be necessary, due to the recent introduction of electronic touch screen machines and other new voting paraphernalia. These mandates do not, however, suggest that the phrase “manner of voting” can be interpreted to mean that the Supervisors can provide guidance as to the “manner of voting” in a particular race.

(R1–88.) Accordingly, the Court sweepingly ordered that “[a]ny 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.” (R1–91.) The lower court’s conclusion that Florida law does not authorize election officials to provide voters with information “regarding a particular race,” and that election officials may not mention the names of individual candidates or nominees finds no support in law, reason, or past practice.

Nothing in Florida law supports the limitation divined by the lower court.

No provision of Florida law prohibits election officials from providing information concerning a particular race or from mentioning the name of a candidate or nominee. Indeed, Florida law prohibits officials from attempting to “persuade or induce any elector to vote for or against a particular ticket [or] candidate,” from providing instructions that “favor any political party, candidate, or issue,” and from “[s]eeking or attempting to seek any vote.” §§ 101.031(4), 101.5611(1), 102.031(4), Fla. Stat. (2006). Far from prohibiting officials from mentioning a particular race, candidate, or nominee, however, these provisions prohibit official favoritism of any kind. In fact, they would be superfluous if the more sweeping limitation inferred by the lower court were well-founded. “It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.” *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). The lower court’s holding thus alters the limits of otherwise ordinary and predictable communication at polling places, supplanting carefully delineated legislative prohibitions of official favoritism by an all-embracing communications muzzle. The Court’s Order is unworkable in any practical sense, violates the Voter’s Bill of Rights, and guarantees voter dissatisfaction at early voting sites and on Election Day.

To reach its conclusion, the lower court relied exclusively on the phrase

“manner of voting,” inferring that this term excludes references to particular races. This phrase, however, appears in only one of several statutes that authorize election officials to provide voters with information concerning elections. *See* § 101.5611(1), Fla. Stat. (2006). And, contrary to the lower court’s conclusion that this provision was made “necessary, due to the recent introduction of electronic touch screen machines and other new voting paraphernalia,” Section 101.5611(1), Florida Statutes, has authorized election officials to provide instructions concerning the “method of voting” since at least 1977. Moreover, Section 101.5611(1), Florida Statutes, by its own terms refutes the lower court’s position that “manner of voting” refers only to “voting paraphernalia”:

The supervisor of elections shall provide instruction at each polling place regarding the manner of voting with the system. . . .  
Additionally, the supervisor of elections shall provide instruction on the proper method of casting a ballot for the specific voting system utilized in that jurisdiction.

The “additional” mandate that instruction be provided concerning the “specific voting system utilized” would be unnecessary if the phrase “manner of voting” meant nothing more. Finally, the definition of “voting system,” which includes the “procedures for casting and processing votes,” extends, by its clear language, to the present case. *See* § 97.021(43), Fla. Stat. (2006). The proposed notice does nothing more than inform voters of an out-of-the-ordinary procedure for casting a vote for a lawful candidate.

By enjoining election officials from mentioning any race, candidate, or nominee, the lower court created, by inference, a prohibition of staggering breadth that simply does not exist. A reasonable interpretation of plain, statutory language and practical polling-place management considerations compel reversal.

**IV. AN INJUNCTION WILL RESULT IN PUBLIC CONFUSION AND INJURY AND IS THEREFORE IMPROPER.**

Florida courts have long held that injunctive relief is inappropriate where an injunction will cause public confusion and injury that outweighs a litigant's right to relief:

This court is committed to the doctrine that extraordinary relief will not be granted in cases where it plainly appears that, although the complaining party may be ordinarily entitled to it, the granting of such relief in the particular case will result in confusion and disorder, and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks.

*Stanberry v. Escambia County*, 813 So. 2d 278, 280 (Fla. 1st DCA 2002) (quoting *Bronson v. Board of Public Instruction for Osceola County*, 108 Fla. 1, 10 (1933)) (affirming denial of permanent injunction, in part because denial served the public interest); *accord Florida Land Co. v. Orange County*, 418 So. 2d 370, 372 (Fla. 5th DCA 1982). By depriving voters of essential information concerning an out-of-the-ordinary method of voting, injunctive relief in this case would contribute to voter confusion and uncertainty and directly contravene the public interest.

A neutral explanation that Section 100.111(4)(a), Florida Statutes, operates

in a fashion that means a vote for the withdrawn candidate is a vote for the substituted candidate, is vital to the interests of voters. Voters who are presented with ballots displaying the name of a withdrawn candidate will question whether they received the correct ballot, and the lower court's injunction precludes election officials from giving voters any satisfactory answer. An injunction prohibiting election officials from explaining the voting mechanism to voters will occasion confusion, disorder, and uncertainty and allow a technical fiction to obscure the accurate expression of a voter's choice. Election officials should not conceal from the public the means of casting an effective vote.

As the Florida Supreme Court has held in the context of constitutional amendments proposed by petition initiative, “[t]he omission of . . . material information [from the ballot language] is misleading and precludes voters from being able to cast their ballots intelligently.” *In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994). This observation is equally applicable here. The omission of material information—here, the name of the legal candidate—from the ballot “is misleading and precludes voters from being able to cast their ballots intelligently.” And, although the omission of a candidate's name from the ballot arises out of Florida law, official secrecy concerning the method of voting for a voter's candidate of choice does not.

The injunction entered by the lower court creates a certainty of voter confusion at Florida's polls, threatening the efficiency and integrity of the election process. Because the injury to the public far outweighs any right alleged by Appellees, the injunction must be quashed.

## CONCLUSION

The proposed notice has one purpose and effect: to inform voters of the facts. By providing voters with information essential to their ability to cast an informed, intelligent vote, the notice helps avoid voter confusion. The notice is authorized by Florida law, which grants election officials ample authority to educate, inform, and instruct voters, and it neither favors nor solicits a vote for any candidate or political party. Section 100.111(4)(a), Florida Statutes, which requires the name of the withdrawn candidate to remain on the ballot, does not require, either expressly or impliedly, textually or purposively, that voters be kept in the dark regarding a plainly material fact. Finally, nothing in Florida law, reason, or past practice warrants the lower court's sweeping conclusion that election officials may not refer to any race, candidate, or nominee. This conclusion violates the Voter's Bill of Rights and the legislative declaration of Voter Responsibilities, and invades the traditional authority of election officials to act, consistent with Florida law, according to their best professional judgment of local needs and circumstances. Because it has no statutory foundation and negates several provisions of Florida law, the lower court's ban constitutes an impermissible and needless judicial foray into the operations of the executive branch.

Accordingly, the Secretary respectfully requests this Court to quash the injunction entered by the lower court.

Respectfully submitted,

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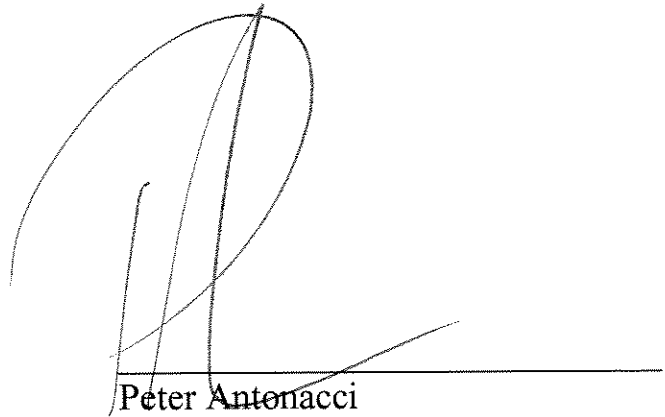
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with the Florida Rules of Appellate Procedure.



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