STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FAIRDISTRICTSFLORIDA.ORG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-5665RX
	)	
DEPARTMENT OF STATE, DIVISION OF ELECTIONS,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on January 15, 2008, in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Herron, Esquire
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For Respondent: Gary J. Holland, Esquire
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 1S-2.009(8) constitutes an invalid exercise of delegated legislative

authority, as defined in Section 120.52(8), Florida Statutes (2007).[1]

PRELIMINARY STATEMENT

This proceeding was initiated on December 12, 2007, when FairDistrictsFlorida.org ("FDF"), filed with the Division of Administrative Hearings a Petition to Determine Invalidity of Existing Rule, in which it challenged Florida Administrative Code Rule 1S-2.009(8) as an invalid exercise of delegated legislative authority as defined in Section 120.52(8), Florida Statutes. The matter was assigned to the undersigned Administrative Law Judge on December 12, 2008. On December 17, 2007, FDF filed an Amended Petition to Determine Invalidity of Existing Rule, to which it attached several exhibits. Florida Administrative Code Rule 1S-2.009(8) was enacted by Department of State, Division of Elections ("Department"), and FDF challenges Florida Administrative Code Rule 1S-2.009(8) on the specific grounds that the Department "has exceeded its grant of rulemaking authority" in violation of Section 120.52(8)(b), Florida Statutes; that the "rule enlarges, modifies, or contravenes the specific provisions of the law implemented" in violation of Section 120.52(8)(c), Florida Statutes; and that the rule is "arbitrary or capricious" in violation of Section 120.52(8)(c), Florida Statutes.[2]

The final hearing was held on January 15, 2008, pursuant to the request of FDF, without objection from the Department, which constituted a waiver of the requirement in Section 120.56(1)(c), Florida Statutes, that the final hearing in a challenge to an existing rule be held within 30 days of the date on which the matter is assigned to an administrative law judge. On January 10, 2008, the parties filed a Pre-Hearing Stipulation to which they appended a Stipulation of Facts that contains numerous facts on which the parties agree. At the final hearing, the parties presented oral argument and offered Joint Exhibits 1 through 23, which were received into evidence. Neither party presented the testimony of witnesses.

FINDINGS OF FACT

Based on the Stipulation of Facts and on the joint exhibits received into evidence at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

The Parties

1. FDF is a political committee registered pursuant to Section 106.03, Florida Statutes, to advocate a change in the way Florida draws legislative and congressional district lines. FDF is engaged in developing and implementing initiative petitions to place constitutional amendments on the ballot to

provide standards by which state legislative and federal congressional district boundaries are drawn.

2. The Division of Elections is a division within the Department of State, the head of which is the Secretary of State. § 20.10, Fla. Stat.

The challenged rule, relevant statutes, and rule and legislative history

3. Florida Administrative Code Rule 1S-2.009(8), which is the subject of this rule challenge, provides: "Bundling: No initiative petition form circulated for signature may be bundled with or attached to any other petition."

4. The rule was adopted on March 16, 2006, as part of a number of amendments to Florida Administrative Code Rules 1S-2.0011, 1S-2.009, and 1S-2.0091. Fla. Admin. Weekly, Vol. 32, No. 10, Mar. 10, 2006, p. 1131.

5. According to the Notice of Proposed Rule published November 23, 2005, "the proposed amendments reflect changes in practice and procedure and implement changes made during the 2005 Legislative Session in Chapter 2005-278, Laws of Florida, that pertain to the procedures governing submission and approval of initiative petitions and ballot position assignments for constitutional amendments" and "update the rule to reflect current practices, procedures, and legislative changes relating to the procedures governing the submission and approval of

initiative petitions and ballot position assignments for constitutional amendments." Fla. Admin. Weekly, Vol. 31, No. 47, Nov. 23, 2005, pp. 4308 - 4312.

6. The Department received no comments or objections from the public or from the Florida Legislature's Joint Administrative Procedures Committee during the rulemaking process for Florida Administrative Code Rule 1S-2.009.

7. The specific authority for Florida Administrative Code Rule 1S-2.009 is identified in the Florida Administrative Code as Sections 20.10(3), 97.012(1), 100.371(3), (7), and 101.161(2), Florida Statutes. The law implemented is identified as Sections 100.371 and 101.161, Florida Statutes.

8. As noted above, the amendments to Florida Administrative Code Rule 1S-2.009 were enacted to implement Chapter 2005-278, Laws of Florida, which was effective January 1, 2006. This law revised the procedures by which constitutional amendments by initiative are placed on the ballot and included amendments to Section 100.371, Florida Statutes. Pertinent to this proceeding, one of the amendments deleted former Section 100.371(2), Florida Statutes (2005), and re-numbered former Section 100.371(3), Florida Statutes (2005), as Section 100.371(2), Florida Statutes (2006). No changes were made to the text of the newly re-numbered Section 100.371(2), Florida Statutes.

9. Section 100.371(2), Florida Statutes, provides in pertinent part that "[t]he Secretary of State shall adopt rules pursuant to s. 120.54 prescribing the style and requirements of such form." This language has been in Section 100.371, Florida Statutes, since the statute's inception in 1979. The only substantive change occurred in 2002 when the current term "adopt" replaced its predecessor term "promulgate" in the sentence.

10. The amendments to Section 100.371, Florida Statutes, in Chapter 2005-278, Laws of Florida, did not address bundling of initiative petitions nor did the amendments provide any rulemaking authority to the Department regarding constitutional amendment initiative petition forms other than that already included in Section 100.371(2) and (7), Florida Statutes.

11. During the 2006 legislative session, bills were introduced that would have amended Section 100.371(2), Florida Statutes, to include a provision that "[t]he form shall consist of a single card or sheet of paper unconnected with any other card or sheet of paper and must be circulated for signatures in this context."

12. Pertinent to these proceedings, the Senate Staff Analysis and Economic Impact Statement for Committee Substitute for one of the bills introduced during the 2006 legislative session, Senate Bill 720, contained the following:

> During the 2004 election cycle, numerous stories appeared in newspapers concerning fraud in the petition process to place constitutional amendments on the ballot. Two petition gatherers were arrested in Santa Rosa County for over 40 counts each of uttering a forged document. Several other elections supervisors found petitions signed with the names of dead voters.
>
> The Florida Department of Law Enforcement (FDLE) issued a press release in October of 2004 indicating that it had received numerous complaints relating to voting irregularities, and had initiated several investigations. Specifically, the FDLE created regional elections task forces to address the issue of voter fraud in a statewide manner. While the FDLE did not reveal details of the investigations, it noted that the investigations focused on the following conduct: In some cases, persons who believed they were signing petitions later found out that their signatures or possible forged signatures were used to complete a fraudulent voter registration. In other instances, it appears that workers hired to obtain legitimate voter registrations filled in the information on the registration forms that should have been completed by the registrants. On several occasions, workers appear to have signed multiple voter registrations themselves using information obtained during the registration drive. In many of the situations complained about, the workers were being paid on the basis of each registration form submitted.

(Footnotes omitted.) Similar language was contained in the House of Representatives Staff Analysis for Committee Substitute for the other bills, CS/HB 773.

13. On April 19, 2006, the Senate Judiciary Committee voted unfavorably on the passage of Senate Bill 720, and the bill never made it to the Senate floor for consideration.

CS/HB 773 was placed on the House Calendar on April 11, 2006, but it died on the House Calendar on May 5, 2006.

14. No legislation providing that "[t]he form [of an initiative petition] shall consist of a single card or sheet of paper unconnected with any other card or sheet of paper and must be circulated for signatures in this context" was enacted into law during the 2006 Legislative session or in any subsequent session of the Legislature.

15. Since the 2006 regular legislative session, the Florida Legislature has met in regular session and in four special sessions in 2007. In 2007, the Legislature made several amendments to Section 100.371, Florida Statutes, but no amendments to Section 100.371(2), Florida Statutes, were enacted. See Ch. 2007-30, § 25, at 19-21, Laws of Fla.

16. Florida Administrative Code Rule 1S-2.009 was amended on October 15, 2007, but Florida Administrative Code Rule 1S-2.009(8) remained unchanged. The Department received no comments or objections from the public or the Florida Legislature's Joint Administrative Procedures Committee during the rulemaking process for Florida Administrative Code Rule 1S-2.009 when it was amended on October 15, 2007.

Definitions

17. The following terms have the definitions as stated:

a. Bundle: "A group of things fastened together for convenient handling." Merriam Webster Online Dictionary. "Several objects or a quantity of material gathered or bound together." Random House Webster's College Dictionary (2d ed. 1999).

b. Attached: "Joined, connected, bound." Random House Webster's College Dictionary (2d ed. 1999).

c. Style: "A particular manner or technique by which something is done, created, or performed." Merriam Webster Online Dictionary. "A particular type or sort, with reference to form, appearance, or character."; "To design or arrange in accordance with a given or new style."; "To bring into conformity with a specific style." Random House Webster's College Dictionary (2d ed. 1999).

d. Requirement: "Something required." Merriam Webster Online Dictionary. "Something required."; "A requirement is some quality or performance demanded of a person in accordance with certain fixed regulations." Random House Webster's College Dictionary (2d ed. 1999).

Substantial effect of rule on FDF

18. In a letter hand-delivered on October 31, 2006, Mr. Ben Wilcox, Chairman of Floridians for Fair Elections, submitted

to the Department four initiative petitions concerning legislative and congressional district boundaries for approval as to format. Mr. Wilcox stated in the letter that Floridians for Fair Elections intended "to bundle these proposals as a package for gathering signatures."

19. In a letter dated November 2, 2006, the Department informed Mr. Wilcox that the four petition forms did not meet the format requirements of Florida Administrative Code Rule 1S-2.009 and the Form DS-DE 19 incorporated into the rule. The Department's letter also stated that the rule "provides that no initiative petition form circulated for signature may be bundled with or attached to any other petition form."

20. In a letter hand-delivered to the Department on August 7, 2007, Barry Richard, on behalf of Floridians for Fair Elections, submitted four constitutional amendment initiative petition forms concerning legislative and congressional district boundaries. The letter stated:

> The box in the upper left-hand corner for insertion of the voter's identifying information will be carbon treated so that the voter only has to fill it out one time for all four petitions. However, the signatures will not copy from one form to another and each signature line can be seen only by lifting the preceding page. This has been done to avoid the fraud potential that was inherent in the bundled forms used in the past and now prohibited by your rules.

21. On behalf of Floridians for Fair Elections, Mr. Richard sought the Department's approval to use NCR paper to

print and circulate the proposed initiative petitions. The petitions were not attached to one another. Rather, they were presented as separate pages with three holes punched, to be placed in a loose-leaf, three-ring binder notebook for signature. The loose-leaf notebook design would permit the elector to fill-in identifying information on the top petition, and that information would be transferred by carbon to the petitions underneath the top petition. The signature line was not carbon treated and no signature could be transferred to any of the petitions underneath. The top petition would be shorter in length than the other three petitions; however, the signature line on the other three petition forms was not visible without lifting the preceding petition form. The elector would be able to review the text of the petition by lifting the preceding petition form.

22. In an e-mail dated August 14, 2007, the Department informed Mr. Richard that the information he orally provided the Department regarding the manner in which the petitions would be presented to the voters, that is, fastened in a three ring binder, would fall within the rule's prohibition against being "bundled with or attached to any other petition form."

23. In a letter dated September 17, 2007, Mr. Richard submitted to the Department on behalf of Floridians for Fair Elections two constitutional amendment initiative petition forms

relating to legislative and congressional redistricting. Nothing was stated about bundling these petitions and each was on regular, letter-sized paper.

24. In a letter dated September 19, 2007, hand-delivered to Department on September 20, 2007, Floridians for Fair Elections notified the Department that it had changed its name to FairDistrictsFlorida.org. The Department acknowledged the name change in a letter dated September 24, 2007.

25. In an e-mail dated September 25, 2007, FDF re-submitted the two petition forms to correct format mistakes on the petitions that Mr. Richard had presented on behalf of FDF's predecessor, Floridians for Fair Elections. After making further corrections, FDF re-submitted for approval the two initiative petitions via e-mail on September 27, 2007.

26. In letters dated September 28, 2007, the Department notified FDF that the format of its two initiative petitions was approved and that they had been assigned serial numbers 07-15 and 07-16. (A scrivener’s error exists on Petition 07-15 -- the "Date Approved" at the bottom of the form should read "9/28/07," not "7/28/07.").

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties thereto pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes (2007).

Standing

28. Section 120.56(3)(a), Florida Statutes, provides that any "substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule." The facts to which the parties have stipulated are sufficient to establish that the FDF has been substantially affected by Florida Administrative Code Rule 1S-2.009(8), and it, therefore, has standing to challenge this rule.

Validity/invalidity of Florida Administrative Code Rule 1S-2.009(8)

29. FDF challenges the validity of Florida Administrative Code Rule 1S-2.009(8) on the grounds that it constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b), (c), and (e), Florida Statutes, which provides:

> 8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *

> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
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> * * *
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational[.]
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> * * *
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

See also § 120.536(1), Florida Statutes.

30. For purposes of this challenge to an existing rule, FDF has the burden of proving by a preponderance of the evidence

that the rule is invalid. § 120.56(3)(a), Fla. Stat. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

31. Florida Administrative Code Rule 1S-2.009 provides in its entirety as follows:

> 1S-2.009 Constitutional Amendment by Initiative Petition.
>
> (1) Submission of Initiative Petition. Any proposed initiative amendment to the State Constitution to be placed on the ballot shall be submitted by the sponsoring political committee to the Division of Elections for approval as to format prior to circulation of the proposed initiative amendment. Such submission shall be in writing and shall include a copy or a facsimile of the proposed form to be circulated. No initiative petition form for signatures may be circulated unless approved by the Division of Elections.
>
> (2) Requirements and Approval of Initiative Petition Form. The Division shall review the initiative petition form solely for sufficiency of the format and shall render a decision within seven (7) days following receipt. The Division shall not review the petition form for legal sufficiency. The format of the petition form is deemed sufficient only if the petition form:

(a) Is printed on separate cards or individual sheets of paper. The minimum size of such forms shall be 3 inches by 5 inches and the maximum shall be 8 1/2 inches by 11 inches.

(b) Is clearly and conspicuously entitled at the top of the form "Constitutional Amendment Petition Form."

(c) Includes adequate space for the voter's name, residential street address, city, county, voter registration number, date of birth, signature, and date of signature.

(d) Contains the ballot title that shall not exceed 15 words and the ballot summary of the proposed amendment or other public measure that shall not exceed 75 words in length as prescribed in subsection (4).

(e) Conspicuously contains in the following order:

1. The ballot title;

2. The ballot summary;

3. The article and section being created or amended; and

4. The full text of the amendment being proposed. If the text must be printed on both sides of the form, it shall be clearly indicated that the text is continued or begins on the other side.

(f) Contains space for only one voter's signature to be located below the full text of the amendment being proposed. The Division will not approve petition forms providing for multiple signatures per page.

(g) Is marked, in accordance with Section 106.143, F.S., governing political disclaimers, with "paid political advertisement" or contains the abbreviation

"pd. pol. adv." and identifies the name of the sponsoring political committee, and the name of the entity paying for the advertisement if different from the name of the sponsoring political committee.

(h) Contains space, in accordance with Section 106.19(3), F.S., for the name and address of a paid petition circulator, in the event the petition form is gathered by a paid petition circulator.

(3) Sample Petition Form. The format of an initiative petition submitted for review and approval by the Division of Elections shall be substantially in accordance with Form DS-DE 19 (effective 10-15-07), entitled "Constitutional Amendment Petition Form." Form DS-DE 19 is hereby incorporated by reference and is available from the Division of Elections, Room 316, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, (850)245-6500, or by download from the Division of Elections' rules webpage at: http://election.dos.state.fl.us

(4) Word Count. The following provisions apply to determine the word count for a ballot title and summary:

(a) Hyphenated compound words count as two or more words.

(b) An ampersand or a plus or minus sign shall count as one word.

(c) Punctuation such as commas, periods, hyphens, question marks, parentheses, quotation marks or exclamation points does not affect the word count.

(d) Each word joined by a forward or back slash to another word counts separately as a word.

(e) Each part of a date counts as one word. Example: January 1, 2025 shall count as three words.

(f) Each word in a name is individually counted. Example: George Washington shall count as two words.

(g) Each whole number shall count as a word.

(h) Spaces do not affect the word count.

(5) Additional Information or Materials. Other than providing information or a method by which the petition form may be returned by mail to the sponsoring committee, no additional information or materials that support the proposed amendment shall be printed directly on the form.

(6) Assignment of a Serial Number. The Division shall assign a serial number to each approved petition form. The serial number shall begin with the last two digits of the calendar year in which the petition form is approved followed by a number in numerical sequence. For example, the first petition form approved in 2006 is assigned the serial number 06-1. The serial number assigned must be printed in the lower right hand corner of the petition form.

(7) Changes. Any change to a previously approved petition form shall be submitted to the Division of Elections for review. No person or entity other than the sponsoring political committee of the previously approved petition form can submit a change or changes to the previously approved petition form. The Division of Elections must approve any material change to a previously approved petition form. A material change constitutes a change in the wording of the text of the proposed amendment, the ballot title, or ballot summary, or a change in punctuation or

layout, or a change in the name of the sponsoring political committee. A translation into another language does not constitute a material change to an initiative petition form. Any material change submitted for approval to a previously approved initiative petition constitutes a request for approval of a new petition form and shall be assigned a different serial number upon approval by the Division of Elections.

(8) Bundling. No initiative petition form circulated for signature may be bundled with or attached to any other petition form.

(9) Reproduction. Petition forms may be reproduced in newspapers, magazines, and other forms of printed mass media or made available through the internet for download printing, provided such forms are reproduced in the same format as approved by the Division. The petition forms may be included within a larger advertisement, provided the forms are clearly defined by a solid or broken line border.

(10) Submission of Signed Petition Forms. All signed petition forms shall be returned to the sponsoring political committee. Only the sponsoring political committee shall submit the signed petition forms to the Supervisors of Elections for verification of signatures in accordance with Rule 1S-2.0091, F.A.C.

(11) Effect on Previously Approved Petition Form. Any petition form approved by the Division of Elections prior to the effective date of this rule may continue to be used and circulated for signature gathering unless a material change to the previously approved petition form has been approved by the Division of Elections or until the sponsoring political committee notifies the Division of Elections that the committee is no longer seeking to obtain ballot position,

or the registration of the sponsoring political committee has been revoked in accordance with Rule 1S-2.021, F.A.C.

AUTHORITY: Specific Authority 20.10(3), 97.012(1), 100.371(3), (7), 101.161(2) Florida Statutes.

Law Implemented 100.371, 101.161 FS.

A. Validity of Florida Administrative Code Rule 1S-2.009(8) pursuant to Section 120.52(8)(b), Florida Statutes, and Section 120.52(8)(c), Florida Statutes

32. If an agency exceeds "its grant of rulemaking authority" in adopting a rule, the rule constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b), Florida Statutes. Likewise, if a rule "enlarges, modifies, or contravenes the specific provisions of law implemented," the rule constitutes an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(c), Florida Statutes.

33. The Legislature has explicated the limitations on the extent of an agency's authority to adopt rules in the "flush left" paragraph in Section 120.52(8) and in Section 120.536(1), Florida Statutes, which require not only that an agency adopting a rule have a grant of rulemaking authority but also that the rulemaking authority granted by statute extend no further than the implementation or interpretation of "the specific powers and duties granted by the same statute."

34. In interpreting the provisions of the "flush left" paragraph of Section 120.52(8) and in Section 120.536(1), Florida Statutes, the First District Court of Appeal observed in Southwest Florida Water Management District v. Save the Manatee Club, Inc., et al., 773 So. 2d 594, 599 (Fla. 1st DCA 2000), that

> [t]he new law gives the agencies authority to "implement or interpret" specific powers and duties contained in the enabling statute. A rule that is used to implement or carry out a directive will necessarily contain language more detailed than that used in the directive itself. Likewise, the use of the term "interpret" suggests that a rule will be more detailed than the applicable enabling statute. There would be no need for interpretation if all details were contained in the statute itself.
>
> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not.

35. The court in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696, 701 (Fla. 1st DCA 2001), observed that the question of an agency's exceeding its grant of rulemaking authority and the question of a rule enlarging or modifying the specific provisions of law implemented are interrelated but present two different issues for consideration in determining whether a rule is an invalid

exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and Section 120.52(8)(c), Florida Statutes. In this case, however, the two questions are inextricably intertwined and can better be addressed if examined together.

36. As noted in the closing paragraph of Florida Administrative Code Rule 1S-2.009, the Department identified several statutory bases for its authority to adopt Florida Administrative Code Rule 1S-2.009: Sections 20.10(3); 97.012(1); 100.371(3)(renumbered as Section 100.371(2)) and (7); and 101.161(2), Florida Statutes.

37. The first two statutory sections are general grants of rulemaking authority. Section 20.10(3), Florida Statutes, authorizes the Department of State to adopt rules to "administer the provisions of law conferring duties upon the department." Section 97.012(1), Florida Statutes, confers on the Secretary of State the responsibility to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." In order to carry out this responsibility, the Department of State is authorized in Section 97.012(1), Florida Statutes, to "adopt by rule uniform standards for the proper and equitable interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code."

38. Under the limitations imposed in the "flush left" paragraph in Section 120.52(8), Florida Statutes, the general

grants of rulemaking authority are not sufficient of themselves to confer on the Department the authority to adopt Florida Administrative Code Rule 1S-2.009(8); a "specific law to be implemented" is also required. In the final paragraph of Florida Administrative Code Rule 1S-2.009, the Department cites Sections 100.371 and 101.161, Florida Statutes, as the specific laws implemented by the rule.

39. Section 100.371, Florida Statutes, provides:

> 1) Constitutional amendments proposed by initiative shall be placed on the ballot for the general election, provided the initiative petition has been filed with the Secretary of State no later than February 1 of the year the general election is held. A petition shall be deemed to be filed with the Secretary of State upon the date the secretary determines that valid and verified petition forms have been signed by the constitutionally required number and distribution of electors under this code, subject to the right of revocation established in this section.
>
> (2) The sponsor of an initiative amendment shall, prior to obtaining any signatures, register as a political committee pursuant to s. 106.03 and submit the text of the proposed amendment to the Secretary of State, with the form on which the signatures will be affixed, and shall obtain the approval of the Secretary of State of such form. The Secretary of State shall adopt rules pursuant to s. 120.54 prescribing the style and requirements of such form. Upon filing with the Secretary of State, the text of the proposed amendment and all forms filed in connection with this section must, upon request, be made available in alternative formats.

(3) Each signature shall be dated when made and shall be valid for a period of 4 years following such date, provided all other requirements of law are met. The sponsor shall submit signed and dated forms to the appropriate supervisor of elections for verification as to the number of registered electors whose valid signatures appear thereon. The supervisor shall promptly verify the signatures within 30 days of receipt of the petition forms and payment of the fee required by s. 99.097. The supervisor shall promptly record in the statewide voter registration system, in the manner prescribed by the Secretary of State, the date each form is received by the supervisor, and the date the signature on the form is verified as valid. The supervisor may verify that the signature on a form is valid only if:

(a) The form contains the original signature of the purported elector.

(b) The purported elector has accurately recorded on the form the date on which he or she signed the form.

(c) The form accurately sets forth the purported elector's name, street address, county, and voter registration number or date of birth.

(d) The purported elector is, at the time he or she signs the form, a duly qualified and registered elector authorized to vote in the county in which his or her signature is submitted.

The supervisor shall retain the signature forms for at least 1 year following the election in which the issue appeared on the ballot or until the Division of Elections notifies the supervisors of elections that the committee which circulated the petition is no longer seeking to obtain ballot position.

(4) The Secretary of State shall determine from the signatures verified by the supervisors of elections and recorded in the statewide voter registration system the total number of verified valid signatures and the distribution of such signatures by congressional districts. Upon a determination that the requisite number and distribution of valid signatures have been obtained, the secretary shall issue a certificate of ballot position for that proposed amendment and shall assign a designating number pursuant to s. 101.161.

(5)(a) Within 45 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, the Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative. The Financial Impact Estimating Conference shall submit the financial impact statement to the Attorney General and Secretary of State.

(b) The Financial Impact Estimating Conference shall provide an opportunity for any proponents or opponents of the initiative to submit information and may solicit information or analysis from any other entities or agencies, including the Office of Economic and Demographic Research.

(c) All meetings of the Financial Impact Estimating Conference shall be open to the public. The President of the Senate and the Speaker of the House of Representatives, jointly, shall be the sole judge for the interpretation, implementation, and enforcement of this subsection.

1. The Financial Impact Estimating Conference is established to review, analyze, and estimate the financial impact

of amendments to or revisions of the State Constitution proposed by initiative. The Financial Impact Estimating Conference shall consist of four principals: one person from the Executive Office of the Governor; the coordinator of the Office of Economic and Demographic Research, or his or her designee; one person from the professional staff of the Senate; and one person from the professional staff of the House of Representatives. Each principal shall have appropriate fiscal expertise in the subject matter of the initiative. A Financial Impact Estimating Conference may be appointed for each initiative.

2. Principals of the Financial Impact Estimating Conference shall reach a consensus or majority concurrence on a clear and unambiguous financial impact statement, no more than 75 words in length, and immediately submit the statement to the Attorney General. Nothing in this subsection prohibits the Financial Impact Estimating Conference from setting forth a range of potential impacts in the financial impact statement. Any financial impact statement that a court finds not to be in accordance with this section shall be remanded solely to the Financial Impact Estimating Conference for redrafting. The Financial Impact Estimating Conference shall redraft the financial impact statement within 15 days.

3. If the members of the Financial Impact Estimating Conference are unable to agree on the statement required by this subsection, or if the Supreme Court has rejected the initial submission by the Financial Impact Estimating Conference and no redraft has been approved by the Supreme Court by 5 p.m. on the 75th day before the election, the following statement shall appear on the ballot pursuant to s. 101.161(1): "The financial impact of this measure, if any,

cannot be reasonably determined at this time."

(d) The financial impact statement must be separately contained and be set forth after the ballot summary as required in s. 101.161(1).

(e)1. Any financial impact statement that the Supreme Court finds not to be in accordance with this subsection shall be remanded solely to the Financial Impact Estimating Conference for redrafting, provided the court's advisory opinion is rendered at least 75 days before the election at which the question of ratifying the amendment will be presented. The Financial Impact Estimating Conference shall prepare and adopt a revised financial impact statement no later than 5 p.m. on the 15th day after the date of the court's opinion.

2. If, by 5 p.m. on the 75th day before the election, the Supreme Court has not issued an advisory opinion on the initial financial impact statement prepared by the Financial Impact Estimating Conference for an initiative amendment that otherwise meets the legal requirements for ballot placement, the financial impact statement shall be deemed approved for placement on the ballot.

3. In addition to the financial impact statement required by this subsection, the Financial Impact Estimating Conference shall draft an initiative financial information statement. The initiative financial information statement should describe in greater detail than the financial impact statement any projected increase or decrease in revenues or costs that the state or local governments would likely experience if the ballot measure were approved. If appropriate, the initiative financial information statement may include both estimated dollar amounts and a description placing the estimated dollar amounts into

context. The initiative financial information statement must include both a summary of not more than 500 words and additional detailed information that includes the assumptions that were made to develop the financial impacts, workpapers, and any other information deemed relevant by the Financial Impact Estimating Conference.

4. The Department of State shall have printed, and shall furnish to each supervisor of elections, a copy of the summary from the initiative financial information statements. The supervisors shall have the summary from the initiative financial information statements available at each polling place and at the main office of the supervisor of elections upon request.

5. The Secretary of State and the Office of Economic and Demographic Research shall make available on the Internet each initiative financial information statement in its entirety. In addition, each supervisor of elections whose office has a website shall post the summary from each initiative financial information statement on the website. Each supervisor shall include the Internet addresses for the information statements on the Secretary of State's and the Office of Economic and Demographic Research's websites in the publication or mailing required by s. 101.20.

(6)(a) An elector's signature on a petition form may be revoked within 150 days of the date on which he or she signed the petition form by submitting to the appropriate supervisor of elections a signed petition-revocation form adopted by rule for this purpose by the division.

(b) The petition-revocation form and the manner in which signatures are obtained, submitted, and verified shall be subject to the same relevant requirements and timeframes as the corresponding petition

> form and processes under this code and shall be approved by the Secretary of State before any signature on a petition-revocation form is obtained.
>
> (c) Supervisors of elections shall provide petition-revocation forms to the public at all main and branch offices.
>
> (d) The petition-revocation form shall be filed with the supervisor of elections by February 1 preceding the next general election or, if the initiative amendment is not certified for ballot position in that election, by February 1 preceding the next successive general election. The supervisor of elections shall promptly verify the signature on the petition-revocation form and process such revocation upon payment, in advance, of a fee of 10 cents or the actual cost of verifying such signature, whichever is less. The supervisor shall promptly record each valid and verified petition-revocation form in the statewide voter registration system in the manner prescribed by the Secretary of State.
>
> (7) The Department of State may adopt rules in accordance with s. 120.54 to carry out the provisions of subsections (1)-(6).
>
> (8) No provision of this code shall be deemed to prohibit a private person exercising lawful control over privately owned property, including property held open to the public for the purposes of a commercial enterprise, from excluding from such property persons seeking to engage in activity supporting or opposing initiative amendments.

40. Section 101.161, Florida Statutes, governs the submission of a "constitutional amendment or other public

measure . . . to the vote of the people" in an election or referendum.

41. In addition to the general grants of rulemaking authority in Sections 20.10(3) and 97.012(1), Florida Statutes, the Department cites Section 100.371(2) and (7), Florida Statutes, quoted above, as specific authority for the adoption of Florida Administrative Code Rule 1S-2.009. The grant of rulemaking authority in Section 100.371(2), Florida Statutes, limits the Department's rulemaking authority to rules "prescribing the style and requirements" of constitutional amendment initiative petition forms. The grant of rulemaking authority in Section 100.371(7), Florida Statutes, limits the Department's authority to adopt rules to implementing the powers and duties set forth in Section 100.371(1) through (6), Florida Statutes, which govern the contents of constitutional amendment initiative petition forms; the requirement that such forms be submitted to the Secretary of State for approval; the requirement that such forms be submitted to the various supervisors of elections for verification of signatures; the requirement that a financial impact statement be prepared for inclusion on the ballot, the requirement that such forms be filed with the Secretary of State; and the right to revocation and requirements for revocation petition forms.

42. Finally, Section 101.161(2), Florida Statutes, is cited by the Department as specific authority for its adoption of Florida Administrative Code Rule 1S-2.009. That statute grants to the Department of State the authority to adopt rules relating specifically to the approval by the Secretary of State of the substance and ballot title of a constitutional amendment proposed by initiative and to the assignment of a designating number for each proposed amendment, as follows:

> The substance and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54. The Department of State shall give each proposed constitutional amendment a designating number for convenient reference. This number designation shall appear on the ballot. Designating numbers shall be assigned in the order of filing or certification and in accordance with rules adopted by the Department of State. The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on.

§ 101.161(2), Fla. Stat.

43. The "anti-bundling" provision of Florida Administrative Code Rule 1S-2.009(8) prescribes the manner in which constitutional amendment initiative petitions which have been approved by the Secretary of State may be presented to the public for signature. The most specific grant of rulemaking

authority cited by the Department is in Section 100.371(2), Florida Statutes, which requires the Department to adopt rules governing the "style and requirements" for initiative petition forms. This provision does not, under any reasonable interpretation, encompass the authority to adopt a rule prescribing the manner in which approved constitutional amendment initiative petitions can be presented to the public for signature.

44. Section 100.371(7), Florida Statutes, is also a relatively specific grant of rulemaking authority for the Department to adopt rules implementing and interpreting the provisions of Section 100.371(1) through (6), Florida Statutes. Nothing in those statutory subsections, however, gives the Department the power or duty to prescribe the manner in which approved constitutional amendment initiative petitions can be presented to the public for signature.

45. The grant of rulemaking authority in Section 101.161(2), Florida Statutes, limits the Department to adopting rules governing the "submission and approval" of the substance and ballot title of constitutional amendment initiative petitions and to the assignment of designating numbers; there is nothing in Section 101.161, Florida Statutes, that grants the Department the specific power or duty to prescribe the manner in which approved constitutional amendment

initiative petitions can be submitted to the public for signature.[3]

46. Finally, nothing in Section 100.371, Florida Statutes, or in Section 101.161, Florida Statutes, supports the use of the general grants of rulemaking authority in Sections 20.10(3) and 97.012(1), Florida Statutes, to adopt limitations on the manner in which approved constitutional amendment initiative petitions can be submitted to the public for signature.

47. For these reasons, FDF has met its burden of proving by a preponderance of the evidence that Florida Administrative Code Rule 1S-2.009(8) is an invalid exercise of delegated legislative authority. It exceeds the rulemaking authority granted to the Department in Sections 20.10(3), 97.012(1), 100.371(2) and (7), and 101.161(2), Florida Statutes, as prohibited by Section 120.52(8)(b), Florida Statutes, and it enlarges and modifies the provisions of Sections 100.371 and 101.161, Florida Statutes, the specific provisions of law implemented by Florida Administrative Code Rule 1S-2.009, neither of which mention the manner in which an approved constitutional amendment initiative petition can be presented to the public for signature, as prohibited by Section 120.52(8)(c), Florida Statutes.

B. Validity of Florida Administrative Code Rule 1S-2.009(8) pursuant to Section 120.52(8)(e), Florida Statutes

48. A rule is invalid pursuant to Section 120.52(8)(e), Florida Statutes, if it is arbitrary, defined as "not supported by logic or the necessary facts" or capricious, defined as "adopted without thought or reason."

49. The FDF has failed to meet its burden of proving by a preponderance of the evidence that Florida Administrative Code Rule 1S-2.009(8) is arbitrary or capricious. In adopting Florida Administrative Code Rule 1S-2.009(8), the Department could have been addressing the concerns regarding fraud in the constitutional amendment initiative petition process addressed in the 2006 staff analysis for Committee Substitute Bill 720. A limitation on the manner in which constitutional amendment initiative petitions can be presented to the public for signature is logically related to the elimination of fraud because it would require a person signing a constitutional amendment initiative petition to complete the personal information required by Florida Administrative Code Rule 1S-2.009(2)(c) for each petition, thereby alerting the public that two or more petitions were being presented for signature.

50. While the goal of the Department in adopting Florida Administrative Code Rule 1S-2.009(8) may be laudable, in the absence of a law specifically giving the Department the power to

regulate the manner in which constitutional amendment initiative petitions are presented to the public for signature, the Department does not have the authority to adopt a rule prohibiting "bundling."

Attorneys fees and costs

51. Section 120.595, Florida Statutes, provides in pertinent part:

> (3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3).--If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $15,000.

52. FDF is the prevailing party in this proceeding brought pursuant to Section 120.56(3), Florida Statutes, and is, therefore, entitled to an award of reasonable attorney's fees and costs, not to exceed $15,000.00, if the Department is unable

to prove "that its actions were substantially justified or special circumstances exist which would make the award unjust." § 120.595(3), Fla. Stat. Accordingly, jurisdiction is retained so that an evidentiary hearing may be conducted to determine if FDF is entitled to an award reasonable attorney's fees and costs against the Department and, if so, the amount that should be awarded.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED

1. Florida Administrative Code Rule 1S-2.009(8) is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b) and (c), Florida Statutes.

2. Jurisdiction is retained to determine whether FairDistrictsFlorida is entitled to an award of attorney's fees and costs against the Department of State and, if so, the amount of attorney's fees and costs to be awarded.

3. The parties shall file a joint status report with the Division of Administrative Hearings on or before March 12, 2008, in which they shall provide an estimate of the length of time necessary to conduct an evidentiary hearing on the entitlement to and amount of attorney's fees and costs and several dates on which the parties are available for hearing.

DONE AND ORDERED this 28th day of February, 2008, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2008.

ENDNOTES

[1]/ All references to the Florida Statutes herein are to the 2007 edition unless otherwise indicated.

[2]/ FDF also alleged in the amended petition that the rule was not supported by competent substantial evidence under Section 120.52(8)(f), Florida Statutes; however, the Petitioner withdrew this claim in the Pre-Hearing Stipulation.

[3]/ Consideration has been given to the stipulated facts that an "anti-bundling" provision was included in proposed legislation submitted during the 2006 legislative session but was not enacted into law and that the Legislature made significant amendments to Section 100.371, Florida Statutes, during the 2007 legislative session but that none of the amendments prohibited bundling. The parties urge that an inference be drawn, on the one hand, that the Legislature did not want to prohibit the "bundling" of constitutional amendment initiative petitions or, on the other hand, that the Legislature approved the Department's "anti-bundling" rule and felt it unnecessary to enact a statute prohibiting this practice. Because the Legislature's failure to amend Section 100.371, Florida Statutes, to include an "anti-bundling" provision is inherently

ambiguous, any attribution of meaning to this failure would be pure speculation. See Day Cruise, 794 So. 2d at 704, n. 8. Such speculation would add nothing to the legal analysis of the validity of Florida Administrative Code Rule 1S-2.009(8).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.