IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC 18-79
Lower Tribunal Case Numbers: 5D16-2509, 5D16-2511

ORANGE COUNTY, FLORIDA,
Petitioner,

v.

RICK SINGH, ETC., ET AL.,
Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

GREGORY T. STEWART
Florida Bar No. 203718
CARLY J. SCHRADER
Florida Bar No. 14675
EVAN J. ROSENTHAL
Florida Bar No. 0106643
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070
(850) 224-4073 (Facsimile)
gstewart@ngnlaw.com
cschrader@ngnlaw.com
erosenthal@ngnlaw.com
legal-admin@ngnlaw.com

JEFFREY J. NEWTON
County Attorney
Florida Bar No. 887390
WILLIAM C. TURNER, JR.
Assistant County Attorney
Florida Bar No. 0871958
Orange County Attorney's Office
Orange County Administration Center
201 S. Rosaline Avenue, Third Floor
P.O. Box 1393
Orlando, Florida 32802-1393
jeffrey.newton@ocfl.net
gail.stanford@ocfl.net
WilliamChip.Turner@ocfl.net
judith.catt@ocfl.net

COUNSEL FOR PETITIONER ORANGE COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Petitioner, Orange County, Florida, will be referred to as "the County" or "Petitioner."

Respondents Jerry L. Demings, Orange County Sheriff; Rick Singh, individually and as Orange County Property Appraiser; and Scott Randolph, individually and as Orange County Tax Collector, will be referred to collectively as "Respondents."

Reference to the Record on Appeal will be designated "R." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

In 2014, the citizens of Orange County voted to amend Section 703 of the Orange County Charter to provide for term limits and nonpartisan elections for county constitutional officers including the Orange County Sheriff, Property Appraiser, Tax Collector, Supervisor of Elections, Clerk of the Circuit Court and Comptroller. The Charter Amendment was placed before Orange County voters for a referendum through an enabling ordinance passed by the County's Board of County Commissioners. The Amendment to Section 703, as set forth in the enabling ordinance, reads as follows (the "Charter Amendment"):

> **Sec. 703. County officers.**
>
> A. The charter offices of property appraiser, tax collector and sheriff formerly created by this section 703 are abolished. The functions and duties of each of these respective charter offices are transferred to the property appraiser, tax collector, and sheriff, as county officers under Article VIII, Section 1(d) of the Florida Constitution and each of these offices is hereby reestablished under Article VIII, Section 1(d) of the Constitution of the State of Florida.
>
> This subsection A. shall take effect on January 8, 1997. The holders of the former charter offices of property appraiser, tax collector and sheriff as of the effective date shall be retained and shall constitute the initial county officers serving as property appraiser, tax collector and sheriff, as those offices are reestablished under Article VIII, Section 1(d) of the Constitution of the State of Florida.

B. Except as may be specifically set forth in the Charter, the county officers referenced under Article VIII, Section 1(d) of the Florida Constitution and Chapter 72-461, Laws of Florida, shall not be governed by the Charter but instead governed by the Constitution and laws of the State of Florida. The establishment of non-partisan elections and term limits for county constitutional officers shall in no way affect or impugn their status as independent constitutional officers, and shall in no way imply any authority by the board whatsoever over such independent constitutional officers.

C. Elections for all county constitutional offices shall be non-partisan. No county constitutional office candidate shall be required to pay any party assessment or be required to state the party of which the candidate is a member. All county constitutional office candidates' names shall be placed on the ballot without reference to political party affiliation.

In the event that more than two (2) candidates have qualified for any single county constitutional office, an election shall be held at the time of the first primary election and, providing no candidate receives a majority of the votes cast, the two (2) candidates receiving the most votes shall be placed on the ballot for the general election.

D. Any county constitutional officer who has held the same county constitutional office for the preceding four (4) full consecutive terms is prohibited from appearing on the ballot for reelection to that office; provided, however, that the terms of office beginning before January 1, 2015 shall not be counted.

(R. at 43-45 (emphasis added)). Section 703(C) of the Charter Amendment pertaining to nonpartisan election of county officers contained language similar to an existing provision directing the selection of County Commissioners by non-partisan election, in place since 1992. (R. at 707-08).

Three of the County Officers—the Sheriff, Property Appraiser, and Tax Collector—filed an action for declaratory judgment, challenging the underlying county ordinance, including the provisions regarding term limitations and nonpartisan elections.[1] (R. at 11-369). In all, the lawsuit was brought in four separate counts: Count I—"Ballot Summary Defects"; Count II—"Single Subject Violation"; Count III—"Independent Status"; and Count IV—"Injunctive Relief." (R. at 11-43). The County raised certain affirmative defenses, including lack of standing. (R. at 539-626).

In the circuit court, the parties filed competing motions for summary judgment, which included arguments on the merits, as well as the County's partial summary judgment on its affirmative defense of lack of standing. (R. at 630, 1081, 1100). The Complaint was later amended to add the County Officers Scott Randolph, Orange County Tax Collector, and Rick Singh, Orange County Property

[1] Though the lawsuit was brought against Orange County, Bill Cowles, Orange County Supervisor of Elections, and the Orange County Canvassing Board, only Orange County raised a substantive defense. (R. at 539-580). The Orange County Canvassing Board was dismissed (R. at 525); and the Supervisor of Elections maintained a neutral position throughout the lawsuit.

Appraiser, individually (R. at 1169-1535, 1544-1911), and the trial court granted the County's partial motion for summary judgment based on lack of standing, as to the Officers in their official capacities. (R. at 2529-30). Subsequently, a hearing was held on the pending motions for summary judgment on the merits. On June 16, 2016, the trial court issued its order on these motions, granting summary judgment to the County as to Counts I and II, determining there was no ballot summary defects, and that the Ordinance did not violate the single subject rule. (R. at 2532-65). Count IV, seeking preliminary injunctive relief, was later subsequently denied by separate order, on grounds that the request was rendered moot by the court's disposition of the other counts. (R. at 2888-89).

As to Count III, "Independent Status," the trial court upheld the portion of the Charter Amendment regarding term limits but struck down the provision requiring nonpartisan elections. (R. at 2557-65). Initially, the trial court discussed this Court's opinion in Telli v. Broward County, 94 So. 3d 504 (Fla. 2012), and determined that the decision permits charter counties to impose term limits upon their county officers. As to the provision regarding nonpartisan elections, the trial court noted that under Telli, restrictions on a charter county's home rule power must be express, and not implied, and that the county officers had failed to identify such an express restriction. Significantly, the court provided:

> As noted in Telli, under the constitution, Orange County voters can make those offices appointive offices. Thus, the voters can surely take the less undemocratic step of making those officers nonpartisan elective offices, as there is no express prohibition against a charter county doing so.

(R. at 2559). On that basis, the trial court determined that the first sentence of Section 703(C) of the County Ordinance, providing for nonpartisan elections, is valid.

Nonetheless, in examining the remaining amendment to Section 703(C), the trial court determined that although the County is authorized to make the county offices nonpartisan elective offices, the County may not regulate the elections for such offices because those matters are preempted to the Legislature, rendering section 703(C), with the exception of the first sentence, unconstitutional. The court then determined that without the invalid provisions, there is no method to hold nonpartisan elections, "as the Election Code does not provide for the nonpartisan election of county constitutional officers," and therefore, the purpose of the valid provision—nonpartisan elections—cannot be accomplished without the unconstitutional provisions of section 703(C). On that basis, the court determined the invalid provisions are not severable, and section 703(C) in its entirety is invalid. (R. at 2559-64).

After final judgment was entered by the trial court, the County appealed to the Fifth District Court of Appeal. The Respondents filed a cross appeal and

separate appeal, which were consolidated for all purposes. On appeal, the Fifth District affirmed in all respects. Orange County v. Singh, 230 So. 3d 639 (Fla. 5th DCA 2017). The opinion specifically rejected the County's argument it has constitutional authority to provide for nonpartisan elections of constitutional officers. However, the Fifth District reached this result by a different rationale than did the trial court. Although recognizing the County's broad grant of home rule authority under the Florida Constitution, the Fifth District did not agree that Article VIII, section 1(d), Florida Constitution, provides authorization for charter counties to provide for nonpartisan elections of county constitutional officers. Id. at 642. The Fifth District ruled instead that this provision "simply authorizes a charter county to select its county constitutional officers in some other manner than by election," and that "[i]t does not grant a charter county the power to regulate elections for those officers." Id. The court determined that the County cannot regulate the "method and timing" of its elections for county constitutional officers because that subject area has been preempted to the State. Id. at 641. Unlike the trial court order, the Fifth District provided no citation to or analysis of Telli in its written opinion.

Following the decision issued by the Fifth District, the County timely filed a notice to invoke the discretionary jurisdiction of this Court on the grounds that the decision: (1) expressly construes a provision of the State Constitution; and (2)

expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of law as decided in the case of Telli v. Broward County, 94 So. 3d 504 (Fla. 2012). On April 6, 2018, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Charter Amendment is valid and constitutional in its establishment of non-partisan elections for all county officers within Orange County. The opinion of the Fifth District should be reversed in part, to the extent it holds that Orange County, as a charter county, is not authorized under Article VIII, sections 1(d) and 1(g) to designate its county officers to be chosen by nonpartisan election, and that this issue is preempted to the State. The Fifth District's construction of Article VIII, section 1(d) is in contravention of this Court's precedent, including Telli, which specifically recognized that charter counties have broad authority under this provision that allows them to "decide to select the officers in any manner of their choosing." 94 So. 3d at 512 (citing to Cook v. City of Jacksonville, 823 So. 2d 86, 96 (Fla. 2002) (Anstead, J., dissenting)). Limitations cannot be implied from other provisions of the Florida Constitution that do not expressly restrict this authority.

In addition, the designation of the manner of selection of county officers by way of nonpartisan election is separate and apart from the "matters set forth in chapters 97-105" of the Florida Election Code, which have been preempted to the state, "except as otherwise specifically authorized by state or federal law." § 97.0115, Fla. Stat. Nothing within the Florida Election Code seeks to prescribe all offices that can be designated as nonpartisan elected offices, and the express preemption provided by section 97.0115 cannot be read as a restriction on the

County's authority to designate the manner of selection of county officers expressly provided by Article VIII, section 1(d), of the Florida Constitution, as this is a matter specifically authorized by state law. The Florida Election Code governs the means and methods of conducting elections and ascertaining the results. In contrast, a charter county's authority to designate an elective office as nonpartisan does not concern election means and methods, but is rather more in the nature of an eligibility or qualification requirement, akin to term limits. To read the Florida Election Code otherwise would impermissibly allow the Legislature to alter an express authorization in the Florida Constitution by implication. To the extent any other provisions in the Charter Amendment are preempted under section 97.0115, Florida Statutes, these can be severed from the valid portion of the Charter Amendment, providing for nonpartisan election of county officers, under the well-established standards set forth in Florida case law.

STANDARD OF REVIEW

The de novo standard of review applies to a court's decision to grant or deny final summary judgment, as well as its rulings on the constitutionality of a county charter or ordinance. See Demings v. Orange County Citizens Review Board, 15 So. 3d 604, 606 n.1 (Fla. 5th DCA 2009). All legislation is presumed to be valid and constitutional, and all doubts must be construed in favor of constitutionality. Crist v. Florida Association of Criminal Defense Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008); Adhins v. First Horizon Home Loans, 44 So. 3d 1245, 1250 (Fla. 5th DCA 2010).

ARGUMENT

I. AS RECOGNIZED IN TELLI, ARTICLE VIII, SECTIONS 1(D) AND 1(G), FLORIDA CONSTITUTION, PROVIDE EXPRESS AUTHORITY FOR A CHARTER COUNTY TO SPECIFY THE MANNER IN WHICH COUNTY OFFICERS ARE CHOSEN, INCLUDING BY NONPARTISAN ELECTION, AND RESTRICTIONS TO THIS BROAD AUTHORITY CANNOT BE IMPLIED.

Initially, this case presents the question of whether the Florida Constitution provides express authorization for charter counties to specify that county officers be chosen by nonpartisan election. The Fifth District erred by rejecting the County's argument that such express authorization exists under Article VIII, sections 1(d) and 1(g), and in ignoring this Court's prior decision and analysis in Telli.

The local government provisions of the Florida Constitution are set forth in Article VIII, including section 1, which provides for counties as political subdivisions of the State, and allows for county government to be established by charter. Generally, under the Florida Constitution, charter counties derive their broad home rule power directly from Article VIII, section 1(g), which gives such counties:

> all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.

Art. VIII, § 1(g), Fla. Const. Under this provision, charter counties are automatically vested with inherent powers of self-government, including those constitutionally granted to municipalities. See, e.g., State v. Broward County, 468 So. 2d 965, 969 (Fla. 1985).

Article VIII, section 1(d) provides generally for the election of certain county officers, namely a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court. However, Article VIII, section 1(d) also grants charter counties considerable discretion with respect to such county officers, including the ability to regulate the manner of their selection and even to abolish such offices:

> (d) COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Art. VIII, §1(d), Fla. Const. (emphasis added); see also Cook v. City of Jacksonville, 823 So. 2d 86, 96 (Fla. 2002) (Anstead, J. dissenting) (providing that

the broad language contained in Article VIII, section 1(d) "was obviously intended to allow charter counties wide latitude in enacting regulations governing the selection and duties of county officers").

Charter counties' broad authority under these two constitutional provisions was analyzed at length in Telli, in which this Court expressly determined to recede from Cook v. City of Jacksonville, 823 So. 2d 86 (Fla. 2002), and instead adopt Justice Anstead's dissenting opinion in that same case. Telli v. Broward County, 94 So. 3d 504 (Fla. 2012). At issue in Cook was the validity of term limits within a county charter for county officers. The majority opinion determined such term limits were unconstitutional. However, Justice Anstead issued a dissenting opinion which would have affirmed the authority of the counties to set forth term limits in their charters because "the constitution explicitly grants broad authority to charter counties over charter officers, and consistent with that grant, imposes no restrictions on a county's authority to regulate those officers." Cook, 823 So. 2d at 95 (Anstead, J., dissenting) (emphasis added).

The dissenting opinion in Cook cited to Article VIII, sections 1(g) and 1(d) of the Florida Constitution, explaining "the autonomy of local governments is at the heart of these two sections." Id. at 95-96. The language in these constitutional provisions gives charter counties "wide latitude" regarding both the selection and duties of county officers, consistent with the framers' intent "for charter counties to

be self-governing in both providing for county officers and in providing for the manner in which county officials will be selected." Ultimately, Justice Anstead determined:

> I can find no legal justification for concluding that charter counties should not be allowed to ask their citizens to vote on eligibility requirements of local elected officials, including term limits, since they could abolish the offices completely or decide to select the officers in any manner of their choosing.

Id. at 96 (emphasis added).

Ten years later in Telli, the specific question before this Court was whether a charter county, Broward County, may restrict term limits of County Commissioners. In ruling that such term limits are constitutional, this Court determined that "[n]ot allowing Broward County in this case to decide whether its county commissioners should be subject to term limits brings into focus the broad implication of the Court's prior ruling in Cook, and the limitation it has on the exercise of Florida counties' home rule power as authorized by the Florida Constitution." Id. at 507. The Court determined to recede from Cook, and instead, acknowledged its agreement with Justice Anstead's dissent, citing directly to language from that opinion. In so ruling, the Court stated:

> In this case, the prior opinion in Cook undermines the ability of counties to govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution. Interpreting Florida's

> Constitution to find implied restrictions on powers otherwise authorized is unsound in principle. We agree with the First District in Cook that express restrictions must be found, not implied.

Id. at 513.

In the present case, the Fifth District, without analyzing or citing to the past precedent of this Court, failed to recognize the express constitutional authority of charter counties to "decide to select [county] officers in any manner of their choosing," as recognized in Telli. Instead, the Fifth District impermissibly read an implied restriction into Article VIII, section 1(d) that the "selection" of county officers cannot be in the manner of nonpartisan election. However, no constitutional limitation is placed on the manner in which a county officer may be chosen in a charter county. Article VIII, section 1(d) simply applies a default rule that operates in the counties of this State unless otherwise provided for by county charter or special law approved by the electors. As specifically set forth in that provision, county officers in charter counties may be elected, chosen in some other manner, or the offices may even be abolished, and the applicable duties transferred to another office. Even in providing the default rule of election, this provision does not specify that the election must be partisan or nonpartisan. As recognized and determined by the trial court, the voters of a charter county can make county offices appointive offices and therefore "can surely take the less undemocratic step

of making those offices nonpartisan elective offices, as there is no express prohibition against a charter county doing so." (R. at 2559). The trial court acknowledged that Florida law recognizes several manners which are used to select state and local officials, including appointment, nonpartisan election, partisan election, and merit retention. (R. at 2559).

Florida appellate courts, including this Court, as well as the Florida Attorney General, have recognized the ability of a charter county to provide for the selection of county offices by nonpartisan election in other contexts. See County of Volusia v. Quinn, 700 So. 2d 474 (Fla. 5th DCA 1997) (determining that a charter provision providing for nonpartisan elections for school board members was valid; noting that Volusia County's charter also provided for nonpartisan elections for county officers)[2]; see also School Board of Palm Beach County v. Winchester, 565 So. 2d 1350 (Fla. 1990) (determining that a special act providing for nonpartisan elections of school board members in Palm Beach County was constitutional and valid because Palm Beach County is a charter county); Op. Att'y Gen. Fla. 2000-02 (2000) (relying on Quinn and Winchester in opining that a Lee County charter

[2] At the time of the opinion, the Florida Constitution made no specific provision for nonpartisan elections of school board members. See Justice Gerald Kogan and Deborah K. Kearney, Feature: Revision 11: Election Reform—Striving for a More Open and Equitable Process 72 Fla. Bar. J. 57 (Oct. 1998). However, the Constitution was amended in 1998 to specifically provide these elections would be nonpartisan. Art. IX, § 4, Fla. Const.

provision providing for nonpartisan election of county commissioners is valid). This Court has also recognized that charter counties are not subject to the limitation of Article III, section 11(a)(1), Florida Constitution[3], and that the Legislature may adopt general laws of local application and special laws providing for nonpartisan elections in these counties. Winchester, 565 So. 2d 1350; Op. Att'y Gen. Fla. 2000-02. Thus, there is a well-established line of precedent acknowledging the broad authority of a charter county to designate certain offices as nonpartisan.[4]

In rejecting the County's arguments on appeal, the Fifth District's Opinion also relied on Article VI, section 1, Florida Constitution, which provides that

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[3] Article III, section 11(a)(1), Florida Constitution, provides as follows:

> (a) There shall be no special law or general law of local application pertaining to:
> (1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies;

(Emphasis added).

[4] The Fifth District's reliance on the Opinion of the Florida Attorney General 86-82 (1986) was error, as this opinion was issued prior to this Court's decisions in Winchester and Quinn. The Opinion was also essentially discredited by this Court's decision in Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880 (Fla. 2010), determining the Florida Election Code then existing did not preempt the field of election law. Nor does In re Advisory Opinion to the Governor, 313 So. 2d 717 (Fla. 1975) have any bearing on the issues in this case, as that opinion reviewed the ability of the Governor to fill vacancies in the office of the County Tax Collector, and simply concluded that Article VIII, section 1(d) did not have any bearing on that issue.

"elections shall . . . be regulated by law." However, such reliance is misplaced and should be rejected by this Court. Article VI, section 1 does not expressly restrict a charter county's broad authority to designate the manner in which county officers are chosen, including by nonpartisan election. Rather, it simply provides that the Legislature is charged with the responsibility for regulating the method, conduct, and timing of elections. See AFL-CIO v. Hood, 885 So. 2d 373 (Fla. 2004) (providing that under Article VI, section 1, "the Legislature is directed to enact laws regulating the election process" (emphasis added)); State v. Grassi, 532 So. 2d 1055 (Fla. 1988) (interpreting the phrase in Article VIII, section 1(e) of the Florida Constitution that county commissioners "shall be elected as provided by law" to delegate to the Legislature the task of establishing procedures for election, and not the power to set qualifications for that office); see also Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (explaining that though the Legislature is charged with the authority and responsibility of regulating the election process, these regulations must be reasonable and necessary restraints on the elective process "and not inconsistent with the constitution of this state").

In contrast, the designation of an office as nonpartisan is more in the nature of an eligibility requirement or qualification, akin to term limits, separate and distinct from those subjects governed by the Florida Election Code, which concerns the process of conducting elections and certifying the results. See Telli,

94 So. 3d at 512 (acknowledging that charter counties have the ability "to ask their citizens to vote on eligibility requirements of local elected officials . . . since they could abolish the offices completely or decide to select the officers in any manner of their choosing").[5] Article VIII, section 1(d) is specific to charter provisions concerning the selection of county officers, and controls in this case over Article VI, section 1 which more broadly directs the Legislature to adopt election procedures, and these provisions must be construed so as to harmonize their meaning. See, e.g., Lewis v. Leon County, 73 So. 3d 151 (Fla. 2011) (stating that when reviewing constitutional provisions, this Court "follows principles parallel to those of statutory interpretation"); Mendenhall v. State, 48 So. 3d 740, 748 (Fla. 2010) (providing the rule of statutory construction that "a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms"); Barnett v. Antonacci, 122 So. 3d 400, 404 (Fla. 4th DCA 2013) (quoting State v. Div. of Bond Fin. Of Dep't of Gen. Servs., 278 So. 2d 614, 617 (Fla. 1973), for the proposition that "[i]t is a fundamental rule of construction that, if possible, amendments to the Constitution should be construed so as to harmonize with other constitutional provisions."). Restrictions on express constitutional authority cannot be implied. Telli, 94 So. 3d

[5] The Florida Election Code is discussed in more detail in Section II of the Argument, infra.

at 513. Nothing within Article VI, section 1 itself provides any express constitutional limitation on the ability of charter counties to designate the manner of selection of county offices as nonpartisan elective offices. Thus, Article VI, section 1, Florida Constitution, does not provide support for the conclusion reached by the Fifth District.

The Fifth District's reading of an implied restriction on the broad powers provided to charter counties under Article VIII, sections 1(d) and 1(g), should be rejected by this Court, as inconsistent and in direct conflict with Telli.

II. A CHARTER PROVISION SPECIFYING THAT COUNTY OFFICERS MAY BE CHOSEN BY NONPARTISAN ELECTION ADDRESSES THE SUBJECT MATTER OF THE MANNER OF SELECTION, AS CONSTITUTIONALLY PERMITTED, AND IS NOT PREEMPTED BY STATUTORY REGULATION OF THE "METHOD AND TIMING" OF ELECTIONS SET FORTH WITHIN THE FLORIDA ELECTION CODE.

Despite the direct constitutional authorization permitting charter counties to select county officers in any manner of their choosing, the Fifth District below concluded that the County was expressly preempted from designating the county offices as nonpartisan, pursuant to section 97.0115, Florida Statutes. However, this analysis is flawed, as it: (1) incorrectly interprets the scope of the express preemption provided by section 97.0115; (2) incorrectly categorizes the designation of a county office as nonpartisan as a regulation on the "method and

timing" of elections; and (3) as interpreted by the Fifth District, would alter, contract, or enlarge Article VIII, section 1(d), Florida Constitution.

There are two ways a county ordinance can be inconsistent with state law, and therefore, unconstitutional. Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309, 314 (Fla. 2008). First, a county cannot legislate in a field if the subject area has been preempted to the State. Second, a county cannot enact an ordinance that directly conflicts with a state statute. Id. There is conflict between a local ordinance and a state statute when the local ordinance cannot coexist with the state statute. Id.

As to State preemption, it can be either express or implied. Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 101 (Fla. 1st DCA 1994). Express preemption requires that the statute contain specific language of preemption directed to the particular subject at issue. Id. Implied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field, creating a danger of conflict between local and state law. Id.

Even where express preemption exists, whether the preemption is broad enough to encompass the action under review is open to interpretation, and the cases in which courts have found express state preemption are rare. Judge James R. Wolf and Sarah Harley Bolinder, The Effectiveness of Home Rule: A Preemption and Conflict Analysis, 83 Fla. Bar J. 92 (June 2009); Hillsborough

County v. Fla. Rest. Ass'n, 603 So. 2d 587 (Fla. 2d DCA 1992). Ascertaining legislative purpose has been described as the "ultimate touchstone" in determining the scope of preemption. Joe Nagy Towing, Inc. v. Lawless, 101 So. 3d 868, 874 (Fla. 2d DCA 2012) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). "This exercise in statutory interpretation requires a court to 'not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" Id. (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). Furthermore, "[d]oubts must be resolved against preemption." Id.; HTS Indust. v. Broward County, 852 So. 2d 382 (Fla. 4th DCA 2003).

The language of express preemption relied upon by the Fifth District is found in section 97.0115, Florida Statutes, which was adopted in 2010. Before the passage of section 97.0115, Florida Statutes, this Court considered the issue of legislative preemption by the Florida Election Code in Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880 (Fla. 2010). In Browning, the Court reviewed an amendment to the Sarasota County Charter which set forth detailed election requirements, including the use of particular voting equipment and systems, audit requirements, and the process for certifying election results. In reviewing the issue of preemption, the Court noted that while the Florida Election Code is extensive, it contained no express language of preemption. Thus, the issue

was whether implied preemption rendered the County's amendment invalid. Though the Court agreed that the Florida Election Code was detailed and extensive, it concluded that "the Legislature's grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws." Id. at 886-87. However, the Court found certain provisions of the charter amendment conflicted with specific provisions of the Florida Election Code, which rendered these provisions invalid and unconstitutional, but that these provisions could be severed from the valid portions of the amendment. Id. at 888-91.

In 2010, and in apparent reaction to the Browning decision, section 97.0115, Florida Statutes, was adopted, which provides the following express language of preemption:

> All matters set forth in chapters 97-105 are preempted to the state, except as otherwise specifically authorized by state or federal law. The conduct of municipal elections shall be governed by s. 100.3605.

§ 97.0115, Fla. Stat. (emphasis added); Ch. 2010-167, Laws of Fla. The language used in section 97.0115 evidences an express intent of legislative preemption; however, the issue is whether this preemption is broad enough to cover the County's Charter Amendment in this case. As set forth specifically within section 97.0115, this preemption is limited in two separate ways. First, the preemption

applies only to matters "set forth" in chapters 97-105, Florida Statutes. Second, the preemption does not apply as to matters "otherwise specifically authorized by state or federal law."

Importantly, chapters 97-105, Florida Statutes, must be read together as one statutory scheme, and no one provision should be read in isolation. See, e.g., O'Hara v. State, 964 So. 2d 839, 843 (Fla. 2d DCA 2007) (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). Taken together, these chapters regulate the method, conduct, and timing of elections. They include: registration and education of voters (chapters 97-98); registration of candidates and process for qualifying for election or nomination (chapter 99); process for general, primary and special elections (chapter 100); voting methods and procedures (chapter 101); conducting elections and ascertaining results (chapter 102); regulation of presidential electors, political parties and committees (chapter 103); violations and penalties of the election code (chapter 104); and nonpartisan elections (chapter 105).

Chapter 105, Florida Statutes, relied on by the Fifth District as part of its analysis of the preemption issue, sets forth certain procedures for nonpartisan elections. However, nothing within chapter 105 specifically, or the Florida Election Code more broadly, indicates an intent to prescribe all of the offices which are nonpartisan. Though certain regulations in chapter 105 apply to the nonpartisan offices of the judiciary and school board members, it is evident that the

Legislature intended its procedures for nonpartisan elections to apply outside of the context of the judiciary and school board members.

Significantly, the Election Code contains an open-ended definition of "nonpartisan office." Section 97.021(22), Florida Statutes, defines nonpartisan office broadly as "an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." If the Legislature had intended to limit the offices designated nonpartisan through the Election Code, it could have so stated in the definition of "nonpartisan office." Thus, the "matter' of what offices may be deemed nonpartisan was not set forth in the Florida Election Code. Rather, the Legislature crafted an open-ended definition, consistent with allowing charter counties to exercise their home rule authority in establishing county offices as nonpartisan.

Furthermore, the language within chapter 105 indicates a clear intent that its provisions are intended to apply to elections beyond just those of school board members and judicial officers. For example, section 105.041(1), Florida Statutes, provides procedures for how candidates for nonpartisan office appear on the ballot. This section was amended in 2005, eliminating a specific reference to "candidates for judicial office and candidates for the office of school board member" and instead substituting more broadly "candidates for nonpartisan office." Ch. 2005-

286, § 22, Laws of Fla.[6] In addition, section 105.031(1), Florida Statutes, provides in part that "[e]xcept for candidates for judicial office, nonpartisan candidates for multi-county office shall qualify with the Division of Elections of the Department of State and nonpartisan candidates for countywide or less than countywide office shall qualify with the supervisor of elections." § 105.031(1), Fla. Stat. (emphasis added).

Reading chapter 105 as precluding nonpartisan elections for offices other than the judiciary and school board members would also create superfluous language within chapter 105 itself, as well as other provisions of the Florida Election Code. Compare § 105.051(1)(a), Fla. Stat. (setting forth procedures for unopposed candidates for the office of circuit judge, county court judge, or member of a school board) with § 105.051(1)(b), Fla. Stat. (providing identical procedures for unopposed candidates as set forth in subsection (1)(a), but providing no similar limitation on the offices to which this provision applies).

The proposition that nothing in chapter 105 or the Florida Election Code seeks to limit the types of offices designated as nonpartisan to only the offices of the judiciary or school board members is also supported by a review of other instances in which the Florida Legislature requires or authorizes nonpartisan

[6] Similarly, section 101.2512(2), Florida Statutes provides that the names on the general election ballot shall include "the names of each nonpartisan candidate . . . . who has obtained a position on the general election ballot."

elections outside the context of chapter 105. See §§ 189.04(2)(c), (3)(b) (designating elections for governing body members of single-county and multi-county special districts as nonpartisan, unless otherwise specified in the district's charter); 190.006(3)(b) (designating elections of board members of community development districts as nonpartisan); 191.005(1)(a) (designating that the elections for the governing board of independent special fire control districts shall be nonpartisan); 388.101(1) (designating that district boards of commissioners for mosquito control shall be elected on a nonpartisan basis); and 582.18(1) (designating that the office of the supervisor of a soil and water conservation district is a nonpartisan office), Fla. Stat. These provisions specifically reference the Florida Election Code as providing the procedures for nonpartisan elections.

This Court, in reviewing the validity of a regulation on the process for qualification provided by chapter 99, Florida Statutes, specifically analyzed the application of this provision to the mayoral election in the City of Miami Gardens, which is designated by charter as a nonpartisan election. Wright v. City of Miami Gardens, 200 So. 3d 765 (Fla. 2016). Moreover, the State's own rules and forms adopted by the Florida Secretary of State under the authority of the Florida Election Law acknowledge that offices other than the judiciary and school board members are properly designated non-partisan. See Fla. Admin. Code R. 1S-2.0001(4)(a) (providing separate forms for Candidate Oath, including forms for

"Nonpartisan Office," "School Board Nonpartisan Office," and "Judicial Office"). The procedures set forth in the Florida Election Code have been applied broadly to offices designated nonpartisan by both general law, and local government charters, and were not intended to exclude certain offices from being designated nonpartisan.

Further, the Court should decline to read section 97.0115, Florida Statutes, within the Florida Election Code to preempt the Charter Amendment because such preemption does not apply to matters otherwise authorized by state law. As thoroughly described in Section I supra, the Florida Constitution expressly authorizes charter counties to determine the manner in which county officers are chosen. Though the Florida Election Code and section 97.0115 may very well preempt certain means and methods of elections, they do not preempt the ability of charter counties to designate a county office as nonpartisan under Article VIII, section 1(d). The designation of an elected office as nonpartisan is more in the nature of an eligibility requirement or qualification for these offices, rather than an attempted regulation of election means and methods. See § 97.021(22), Fla. Stat. (defining nonpartisan office as "an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation" (emphasis added)). As set forth in Telli, there is no legal justification for concluding charter counties should not be allowed to ask their citizens to vote

on eligibility requirements of local elected officials "since they could abolish the offices completely or decide to select the officers in any manner of their choosing." Telli, 94 So. 3d at 512 (quoting Cook, 823 So. 2d at 96 (Anstead, J., dissenting)).

Courts have a duty to construe a statute in such a way as to avoid conflict with the Florida Constitution. E.g., State v. Gale Distrib., Inc., 349 So. 2d 150, 153 (Fla. 1977). If the Fifth District's analysis is allowed to stand, it would result in a reading of section 97.0115 and the Florida Election Code that alters the express constitutional authorization of charter counties to select county officers in any manner of their choosing. See Florida Bar v. Sibley, 995 So. 2d 346, 349 (Fla. 2008); see also Holmer v. State, 28 So. 2d 586, 588 (Fla. 1947) ("When the Constitution prescribes a remedy, the Legislature may regulate the manner of its exercise, but it is powerless to revoke or change it or to place an undue burden on its exercise."). For this reason alone, the Fifth District's analysis should be rejected.

As set forth above, the first sentence of Section 703(C) of the Charter Amendment, stating "[e]lections for all county constitutional offices shall be non-partisan," is valid and within the express constitutional authority of the County as a charter county. The Florida Election Code does not preempt this matter, as it is not regulated by chapters 97-105, Florida Statutes, and is specifically authorized by State law.

Unlike the Fifth District, in the underlying action the trial court acknowledged the validity of the first sentence of section 703(C), but determined that the remainder of that section was invalid, and could not be severed. The procedures set forth by the Charter Amendment echo those in place for Orange County Commissioners since 1992—nearly two decades prior to the Court's decision in Browning and the enactment of section 97.0115, Florida Statutes— and these procedures largely reflect what is already in the Florida Election Code, or are consistent with those provisions. However, to the extent these procedures are preempted by the Florida Election Code, they can be severed from the Charter Amendment. See Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005) (Ordinance regulating businesses selling fireworks was not preempted by chapter 791, Florida Statutes, however, provision within such ordinance allowing county to enact criminal penalties beyond those provided in chapter 791 was in conflict with state law and therefore severed from remainder of ordinance).

The severability doctrine is derived from separation of powers, and is "designed to show great deference to the legislative prerogative to enact laws." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999) (citing to Schmitt v. State, 590 So. 2d 404, 415 (Fla. 1991)). The purpose is to preserve the constitutionality of enactments where it is possible to do so; therefore, the burden of proof is properly

placed on the challenging party. Id. at 1281. The severability analysis has also been applied to charter amendments. Demings v. Orange County Citizens Review Board, 15 So. 3d 604 (Fla. 5th DCA 2009).

The test for severability provides that:

> When a part of a statute is declared unconstitutional, the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions; (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Ray, 742 So. 2d at 1281. Respondents contested only parts 2 and 3 of this test. (R. at 2503). In this case, the Orange County Charter provides a severability clause stating that "if any article, section, sub-section, sentence, clause or provision of this Charter or the application thereof is held to be invalid for any reason, the remainder of the Charter and any ordinances, regulations or resolutions made thereunder shall remain in full force and effect." (R. at 697). Section 3 of the enabling ordinance setting the referendum for the Charter Amendment also contains similar severability language. (R. at 45).

The legislative purpose of the first sentence of section 703(C) of the Charter Amendment can be accomplished independent of the provisions contained in the remainder of that section, and the act is complete in itself even if these provisions

are stricken. As discussed in depth above, the Legislature has in large part preempted the means and methods of conducting elections and ascertaining the results to the State, and the Florida Election Code should be read as one comprehensive statutory scheme. The Florida Election Code, reading its provisions comprehensively, supplies election procedures; chapter 105 provides certain specific procedures for nonpartisan elections, which control where there is a conflict with other more general provisions of the Election Code. § 105.10, Fla. Stat. ("If any provision of this chapter is in conflict with any other provision of [the Election Code], the provision of this chapter shall prevail."). Many of the provisions within chapter 105 apply generally to all nonpartisan elections, while certain provisions apply specifically to candidates for judicial office and/or school board members. However, the County disagrees with the trial court's determination in the underlying action that because certain portions of chapter 105, Florida Statutes, are specific to particular candidates for nonpartisan election, that the procedures are not provided by the Florida Election Code for other nonpartisan offices, such as the time for qualifying. For example, many of the provisions related to the process for qualifying can be found in chapter 99, Florida Statutes, and can be applied in the case of nonpartisan elections. See § 99.061(1), Fla. Stat. (setting forth qualifying dates generally for "each person seeking to qualify for nomination or election to a county office. . .").

In fact, several of the nonpartisan offices permitted or mandated by statute specifically reference the procedures set forth in the Florida Election Code in general, or specifically the qualifying procedures set forth in chapter 99, Florida Statutes. See §§ 189.04 (providing that for nonpartisan elections of governing body members of special districts, candidates "shall qualify as directed by chapter 99"); 190.006 (providing that nonpartisan elections of board members for community development districts "shall be conducted in the manner prescribed by law for holding general elections"); 191.005 (providing that for the nonpartisan elections of the governing board of special fire control districts, except as otherwise provided in this act, "such elections shall be held at the time and in the manner prescribed by law for holding general elections" and that candidates "shall qualify as directed by chapter 99"); 582.18 (providing that for nonpartisan election of supervisors for each soil and water conservation district, each candidate "shall qualify as directed by chapter 99" and that names shall appear on the ballot "in accordance with the general election laws"), Fla. Stat.; see also Op. Att'y Gen. Fla. 1975-292 (1975) (recognizing that where a special law provided for nonpartisan election for school board members in Lake County but failed to specify the qualifying fee, the nonpartisan candidates must pay the qualifying fees in the amount required in chapter 99, Florida Statutes, for independent candidates).

Elections for nonpartisan county officers would proceed under the provisions of the Florida Election Code, as any other election for nonpartisan office. Where chapter 105, Florida Statutes, does not set forth the specific procedures, it is appropriate to look to other more general sections of the Florida Election Code. This is consistent with the Legislature's approach for other nonpartisan offices, as described above. Furthermore, in many instances, the procedures in chapter 105 are the same as those found in other sections of the Election Code. Compare §§ 99.092 and 105.031(3), Fla. Stat. (providing filing fees and election assessments); §§ 99.061(5) and 105.031(5), Fla. Stat. (providing for disclosures of financial interest); §§ 99.061 and 105.031, Fla. Stat. (providing requirements to qualify); §§ 99.095 and 105.035, Fla. Stat. (providing process for qualification by petition). Therefore, any provisions within the Charter Amendment found to be preempted under section 97.0115, Florida Statutes, on the basis that they regulate the election means and methods, can be severed from the County's designation of the election of county officers as nonpartisan, as set forth in the first sentence of section 703(C) of the Charter Amendment.

This Court should reverse the decision of the Fifth District below, to the extent it ruled that the County is preempted from determining that its county officers be selected by nonpartisan election. If allowed to stand, the decision of the Fifth District will introduce considerable confusion in this area of the law. For

instance, within Orange County itself, a similar charter provision has provided for the nonpartisan election of county commissioners since 1992 and is not the subject of this proceeding. This type of confusion and inconsistency was exactly what the Court was attempting to remedy in Telli, when it receded from Cook.

In addition, the Fifth District's decision will present questions as to how it will apply to other charter counties providing for nonpartisan election of governmental officials, including county officers. This includes, for example, the counties of Columbia, Lee, Leon, Orange, Miami-Dade, Palm Beach, Polk, and Wakulla. It is also unclear whether the constitutional and preemption analysis set forth by the Fifth District could have any impact on municipal charters which designate elections as nonpartisan. The designation of county offices as nonpartisan is an issue that, as a matter of policy, is properly left to the local discretion of the voters of individual charter counties. In contrast, the means and methods of how such elections are conducted can be regulated by the Legislature, as part of the Florida Election Code.

CONCLUSION

Orange County respectfully requests that this Court reverse the decision of the Fifth District in part, as to the invalidation of the portion of the Charter Amendment providing for nonpartisan election of county officers, and affirm that Orange County, as a charter county, has the constitutional authority to provide for the same, and is not preempted by the Florida Election Code. To the extent any provisions of the Charter Amendment are deemed preempted by the Florida Election Code they can and should be severed from the valid designation of these offices as nonpartisan elective offices. Under such circumstances, elections for the county officers identified in Section 703 of the Orange County Charter would be conducted pursuant to the provisions of the Florida Election Code, as any other election for nonpartisan office. In other respects, the decision should be affirmed.

Respectfully submitted,

/s/ Carly J. Schrader
GREGORY T. STEWART
Florida Bar No. 203718
CARLY J. SCHRADER
Florida Bar No. 14675
EVAN J. ROSENTHAL
Florida Bar No. 0106643
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
(850) 224-4070
(850) 224-4073 (Facsimile)
gstewart@ngnlaw.com
cschrader@ngnlaw.com
erosenthal@ngnlaw.com
legal-admin@ngnlaw.com

JEFFREY J. NEWTON
County Attorney
Florida Bar No. 887390
WILLIAM C. TURNER, JR.
Assistant County Attorney
Florida Bar No. 0871958
Orange County Attorney's Office
Orange County Administration Center
201 S. Rosaline Avenue, Third Floor
P.O. Box 1393
Orlando, Florida 32802-1393
jeffrey.newton@ocfl.net
gail.stanford@ocfl.net
WilliamChip.Turner@ocfl.net
judith.catt@ocfl.net

COUNSEL FOR PETITIONER
ORANGE COUNTY, FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail via the Florida Courts E-Filing Portal, as authorized by Fla. R. Jud. Admin. 2.516, this 29th day of May, 2018, to:

Eric D. Dunlap
Assistant General Counsel
Orange County Sheriff's Office
Legal Services Section
2500 W. Colonial Drive
Orlando, Florida 32804
eric.dunlap@ocfl.net
Counsel for Respondent Jerry L. Demings, Sheriff of Orange County, Florida

Michael E. Marder
Greenspoon Marder, P.A.
201 E. Pine Street, Suite 500
Orlando, Florida 32801
michael.marder@gmlaw.com
trisha.snyder@gmlaw.com
Counsel for Respondent Rick Singh, Individually and as Property Appraiser of Orange County, Florida

John H. Pelzer
Greenspoon Marder, P.A.
200 E. Broward Boulevard
Suite 1800
Fort Lauderdale, Florida 33301
john.pelzer@gmlaw.com
dotti.cassidy@gmlaw.com
Counsel for Respondent Rick Singh, Individually and As Property Appraiser of Orange County, Florida

Gigi Rollini
Stearns Weaver Miller Weissler Alhadeff & Sitterson
106 East College Avenue, Suite 700
Tallahassee, Florida 32301
grollini@stearnsweaver.com
ptassinari@stearnsweaver.com
Counsel for Respondent Scott Randolph, as Tax Collector of Orange County, Florida

Scott Randolph, Esq. pro se
701 Delaney Park Drive
Orlando, Florida 32806-1321
randolphscott007@gmail.com

Nicholas A. Shannin
Shannin Law Firm, P.A.
214 East Lucerne Circle, Suite 200
Orlando, Florida 32801
nshannin@shanninlaw.com
service@shanninlaw.com
Counsel for Respondent, Bill Cowles, Orange County Supervisor of Elections

Jason Vail
Jolly, Peterson & Truckenbrod, P.A.
Post Office Box 37400
Tallahassee, Florida 32315
ejv@jollylaw.com
Counsel for Amicus Curiae The Florida Sheriffs Association

David H. Margolis
General Counsel
Orange County Clerk of the Circuit Court
425 North Orange Avenue
Suite 2110
Orlando, Florida 32801
David.Margolis@MyOrangeClerk.com
Counsel for Amicus Curiae Orange County Clerk of the Circuit Court

Laura Youmans
Associate Director of Public Policy
Florida Association of Counties
100 South Monroe Street
Tallahassee, Florida 32301
lyoumans@flcounties.com
Counsel for Amicus Curiae Florida Association of Counties, Inc.

/s/ Carly J. Schrader
CARLY J. SCHRADER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Carly J. Schrader
CARLY J. SCHRADER