IN THE SUPREME COURT OF FLORIDA

DEAN FORSBERG and WALTER FREEMAN,

Appellants,

vs.

THE HOUSING AUTHORITY OF THE CITY OF MIAMI BEACH AND MURRAY GILMAN, Executive Director,

Appellees.

Case No. 54,623

SUPPLEMENTAL BRIEF OF AMICI CURIAE THE MIAMI HERALD PUBLISHING COMPANY (The Miami Herald); GORE NEWSPAPERS COMPANY (The Fort Lauderdale News and the Sun-Sentinel); THE TRIBUNE COMPANY (Tampa Tribune and Tampa Times); SENTINEL STAR COMPANY (Orlando Sentinel Star); PALM BEACH NEWSPAPERS, INC. (The Palm Beach Post and The Palm Beach Times); and THE TALLAHASSEE DEMOCRAT, INC. (The Tallahassee Democrat)

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INTRODUCTION

Pursuant to this Court's order of November 26, 1980, amici curiae The Miami Herald Publishing Company (The Miami Herald); Gore Newspapers Company (The Fort Lauderdale News and the Sun-Sentinel); The Tribune Company (Tampa Tribune and Tampa Times); Sentinel Star Company (Orlando Sentinel Star); Palm Beach Newspapers, Inc. (The Palm Beach Post and The Palm Beach Times); and The Tallahassee Democrat,

Inc. (The Tallahassee Democrat) ("the amici curiae") submit this Supplemental Brief addressing the applicability of recently enacted Article I, Section 23 of the Florida Constitution ("the Privacy Amendment") to this case.

The Privacy Amendment provides:

> Right of Privacy - Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public right of access to public records and meetings as provided by law. (Emphasis added.)

The amici curiae demonstrate in their Argument below that: (i) this case deals solely with access to public records, and the express language of the Privacy Amendment emphasized above provides that it shall not be construed to bar access to public records; (ii) the Amendment's legislative history clearly shows it was not intended by its Framers to be so construed; (iii) this Court's unambiguous holding that the judiciary may not create non-statutory public policy exemptions to the Public Records Act has been constitutionalized by Article I, Section 23 with respect to asserted privacy interests.

ARGUMENT

I. THE EXPRESS LANGUAGE AND THE CLEAR INTENT OF THE PRIVACY AMENDMENT PRESERVE THE PUBLIC'S RIGHT OF ACCESS TO ALL PUBLIC RECORDS.

A. The Express Language of the Privacy Amendment Mandates Full Access to Public Records.

Where the language of a constitutional provision is plain and clear in its meaning, this Court is obligated to adopt and apply that meaning - and no other - when construing the provision.

> Where the words [of a constitution] are plain and clear and the sense direct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation.

State ex rel. West v. Gray, 74 So.2d 114, 116 (Fla. 1954).[1/]

The reasons for this fundamental rule of Constitutional interpretation are (i) the Framers of the Constitutional text are presumed to have exercised great discrimination in their selection of each word included in a constitutional provision,[2/] and (ii) the People have ratified the plain meaning of the constitutional language - and no other meaning - and it is only such ratification by the People that imbues the language with the force of fundamental law.[3/]

1/ E.g. State ex. rel. West v. Butler, 70 Fla. 102, 69 So. 771, 777 (Fla. 1915); City of Jacksonville v. Continental Can Co., 113 Fla. 168, 151 So. 488, 490 (Fla. 1933); City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817, 822 (Fla. 1970).

2/ City of Jacksonville, fn. 1, supra, at 490.

3/ See West v. State, 50 Fla. 154, 39 So. 412, 414 (Fla. 1905); Collier v. Gray, 116 Fla. 845, 157 So. 40, 45 (Fla. 1934); State v. State Board of Administration, 157 Fla. 360, 25 So.2d 880, 884 (Fla. 1946); City of St. Petersburg, fn. 1, supra, at 822.

The language of the Privacy Amendment expressly prohibits any construction of its terms which would limit the public's right of access to government records within the ambit of the Public Records Act. The relevant language of the Privacy Amendment is simple, straightforward, and unambiguous: "...This section shall not be construed to limit the public right of access to public records and meetings as provided by law." The Amendment speaks for itself.[4/] Because the word "shall" is not discretionary,[5/] the Privacy Amendment explicitly mandates that it not be construed to limit the public's right to inspect public records.

A judicial construction of the Amendment limiting the public's right of access to public records would be beyond the power of this Court:

> If the language is clear and not entirely unreasonable or illogical in its operation we have no power to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to words used therein.

City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So.2d 817, 822 (Fla. 1970).

4/ See City of Jacksonville, fn. 1, supra, at 489-90; State ex. rel. West v. Gray, 74 So.2d 114, 115-16 (Fla. 1954); City of St. Petersburg, fn. 1, supra, at 822.

5/ See Neal v. Bryant, 149 So.2d 529, 532 (Fla. 1962). ("This construction [that certain statutory provisions are mandatory] is compelled by the use of the word 'shall' in the statute in question which, according to its normal usage, has a mandatory connotation.")

B. The Legislative History of the Privacy Amendment Demonstrates It Was Intended By Its Framers To Preserve Full Access To Public Records.

Where, as here, constitutional language is crystal clear, this Court must not, and need not, look further to discover the intent of the Framers of the provision. However, were the language of the Privacy Amendment not clear and were an inspection of its "legislative history" therefore proper, this Court would be bound[6/] to conclude the Privacy Amendment may not be construed to create exemptions to the Public Records Act. As the Privacy Amendment was initiated by proposal of the Florida Legislature,[7/] the Framers of the Amendment were the House of Representatives and Senate of the State of Florida. In ascertaining their intent in promulgating the proposed Amendment, it is necessary to examine the legislative history and background of the particular provision.[8/] The relevant transcripts (reproduced as the Appendix hereto) reveal that the explicit intent of the Florida Legislature in adding the second sentence to the original text of the Privacy Amendment was to preclude the Florida Courts from using the Privacy Amendment to create exemptions to the Public Records Act.

6/ See City of Jacksonville, fn. 1, supra, at 489. ("The fundamental purpose of construing a constitutional provision is to ascertain and give effect to the intent of the Framers and the people who adopted it. The object sought to be accomplished therefore, must be kept constantly in view.")

7/ As provided for by Article XI, Section 1 of the Florida Constitution.

8/ City of St. Petersburg, fn. 1, supra, at 822.

The principal draftsman of the Privacy Amendment, Professor Patricia Dore, explained the reason for the addition of the second sentence of the Privacy Amendment:

> I understand that at the committee meeting last week that Barry Richard, representing some media interests, had raised some problems with the possible impact of the proposed constitutional amendment guaranteeing the right to be let alone on public records. And I share the concerns of Barry Richard and we have talked and discussed this with Representative Mills and I believe he has an amendment that we think will take care of the problem. The amendment would simply make clear that the right to be let alone, if approved by the legislature and ultimately by the people, would not be construed to limit the public's right of access to public records or to public meetings as provided by law.
>
> * * *
>
> * * *
>
> It says "access to public records and meetings as provided by law," so that the power still rests with the legislature to make exceptions to the public records law.9/

9/ Comments of Professor Patricia Dore, Professor of Law at the Florida State University College of Law and advisor to the Ethics, Privacy and Elections Committee of the 1978 Florida Constitution Revision Commission, to the April 16, 1980 meeting of the House Governmental Operations Full Committee. (App. at p. A-17-18) Professor Dore's comments concerning the presentation of Barry Richard, representing the Florida Bar Association and the Florida Society of Newspaper Editors, were in reference to the following remarks of Mr. Richard to the April 9, 1980 meeting of the House Governmental Operations Full Committee:

During the floor debate, Senator Jack Gordon noted:

> And the "except as otherwise provided herein" means that the Sunshine Amendment is not affected by this and there's also the other amendment which says that it does not interfere with the public records law and those are the two exceptions but this would give constitutional status to that right of privacy and was significantly favored by the Constitutional Revision Commission and is now being presented as an independent item.10/

Thus, the Framers intended to protect the public's right of access to public records from the creation of privacy exemptions based on Article I, Section 23.

(Footnote 9 continued)

> Some years ago when I was a member of the legislature and chaired a select committee on right to privacy, we struggled with the same problem as did the Constitution Revision Commission, that in an effort to protect the rights of the private citizen from undue intrusion by government that what we did would be interpreted instead to keep the private citizen from knowing about his government. A complete reversal of the intention of the legislature. Everybody who has dealt with this problem in the past officially has recognized that difficulty. The only thing that the amendment is designed to do - my clients have no objections whatsoever to the intention of the sponsors of this bill - it's just designed to make clear that this does not intend to limit the right of the legislature by law to continue to keep open the doors of government through the government-in-the-sunshine/public records law. And it is worded so that as you see it says it's provided by law - it retains, within the legislature the option to define public records law and government-in-the-sunshine law.

(App. at p. A-15)

10/ Comments of Senator Jack Gordon during the May 14, 1980 Senate Floor Debate concerning the proposed Privacy Amendment. (App. at p. A-27)

II. ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION HAS CONSTITUTIONALIZED WITH RESPECT TO ASSERTED PRIVACY INTERESTS PRIOR DECISIONS OF THIS COURT PROHIBITING JUDICIALLY CREATED NON-STATUTORY PUBLIC POLICY EXEMPTIONS TO THE PUBLIC RECORDS ACT.

Appellants have petitioned this Court to carve out a judicially created exemption from the Public Records Act for the applications and other information which tenants voluntarily submitted to Appellee in order to secure public housing.[11/]

As was clearly articulated in both the Answer Brief[12/] and the Initial Brief of Appellees,[13/] this Court's decision in Wait v. Florida Power & Light[14/] held that the only records excluded from the scope of the Public Records Act are those specified by statutory exemptions. The Courts may not create non-statutory exemptions.

> We adopt the rationale of the Fourth District and hold that, in enacting Section 119.07(2), Florida Statutes (1975), the legislature intended to

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11/ Initial Brief of Appellants, pp. 5, 36.

12/ Answer Brief of Appellees, p. 17.

13/ Initial Brief of Appellees, p. 17.

14/ 372 So.2d 420 (Fla. 1979). See also Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980); Shevin v. Byron Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980).

> exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product. If the common law privileges are to be included as exemptions, it is up to the Legislature, and not this Court, to amend the statute.15/

In adopting the rationale of the Fourth District Court of Appeal decision in State ex rel Veale v. City of Boca Raton,16/ this Court specifically approved that language in Veale which construed the statutory expression "provided by law" to mean statutory law only.17/

> The term 'provided by law' has, however, quite a different meaning. As the Court said, in Fountain v. State, 149 Ga. 519, 101 S.E. 294, 295-296 (1919)
>
> > "We assume that no one will question that the term 'provided by law' means provided by statute law..."
>
> ... It seems obvious therefore that the very purpose of the statutory amendment was specifically to overrule the Second

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15/ Id. at 424.

16/ 353 So.2d 1194 (Fla. 4th DCA 1977), cert. den. 360 So.2d 1247 (Fla. 1978).

17/ Section 119.07(2)(a), Fla. Stat. (1975) provides:

> All public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1).

> District Wisher 18/ conclusion and preclude judicially-created exceptions to the Act in question. We are required to and do give effect to this clear indication of legislative purpose.

Veale, supra, at 1196.19/

Article I, Section 23 explicitly tracks the "provided by law" language construed in the Veale and Wait decisions discussed above. As is evident from this express language, as well as Professor Dore's April 16, 1980 testimony (see above) before the House Governmental Operations Full Committee, the language "access to public records and meetings as provided by law" was to retain its meaning as construed by the Veale and Wait Courts and expressly precludes non-statutory judicial exemptions from the Public Records Act to protect asserted privacy interests such as those asserted by Appellees.

The Legislature and the people of Florida have now elevated the phrase "provided by law" to constitutional status with regard to privacy, and this Court is bound by stare decisis and its own rules of constitutional interpre-

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18/ In Wisher v. News-Press Publishing, 310 So.2d 345 (Fla. 2d DCA 1975), a "public policy" exception to Chapter 119, Fla.Stat. was endorsed by the District Court. The decision of the District Court was quashed and remanded by this Court in News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977).

19/ E.g. State ex rel Cummer v. Pace, 118 Fla. 496, 159 So. 679, 681 (Fla. 1935); 1977 Op. Att'y Gen. Fla. 077-48 (May 19, 1977); 1977 Op. Att'y Gen. Fla. 077-69 (July 11, 1977).

tation to construe the constitutional amendment in accordance with the statutory interpretation articulated in Wait. Therefore, this Court should take this opportunity to hold that judicial or public policy exemptions to the Public Records Act to protect asserted privacy interests are not only prohibited by statutory and case law, but also by Article I, Section 23 of the Florida Constitution.

CONCLUSION

For the foregoing reasons public access to the public records here at issue should be granted.

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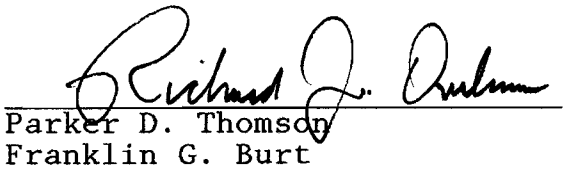

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Brief Of Amici Curiae was served by mail this 5th day of January, 1981, upon the following:

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