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 REPLY BRIEF OF APPELLEES

CITY OF MIAMI BEACH
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SUPPLEMENTAL BRIEF OF APPELLEES

This brief is filed pursuant to the Court's November 26, 1980 Order requesting supplemental briefs on the applicability to this case of Article I, Section 23 of the Florida Constitution.

Section 23 of Article I of the Florida Constitution provides:

> "Section 23. Right of Privacy -- Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein. This Section shall not be construed to limit the public's right of access to public records and meetings as provided by law." (emphasis supplied)

Article I, Section 23 was approved by the Florida electorate on November 4, 1980, to become effective January 6, 1981. Because the Florida electorate approved the Amendment by a margin of over 600,000

votes, Appellees concur in Appellants' view that the Amendment may be considered by the Court even though dehors the record on appeal.

Because of the broad mandate of Section 23,[1/] as well as the overwhelming popular support for the Amendment, it is obvious that the Amendment must be construed to work a substantial change in the relationship between citizens and their government. Guaranteeing individuals the virtually unqualified constitutional right to be let alone and free from government intrusion into their private lives will almost certainly place in doubt State laws prohibiting, inter alia, consensual sexual activities between adults and private non-commercial possession of marijuana. See Ravin v. State, 537 P.2d 494 (Alas. 1975), concluding that Alaska citizens were afforded the right to possess and use "substances such as marijuana in a purely personal, non-commercial context in the home...", based in part on the equivalent Alaska Privacy Amendment (Alas. Const. Art. I, §22). But see NORML v. Gain, 161 Cal. Rptr. 181 (Cal. App. 1979), to the contrary.

Indeed, the only explicit qualification in Section 23 is the proviso that public records shall remain accessible to the public, thus plainly distinguishing this case from future cases involving personal sexual and "controlled-substance" activity by adults.

There can be no reasonable doubt that the present case is governed by the second sentence of Section 23, which unequivocally preserves public access to government records. Every brief filed

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1. For example, Section 23 is not limited to "unreasonable" or "unwarranted" government intrusions, as had been advocated by many legislative and legal authorities, and should be interpreted by the courts in accordance with that legislative history. See e.g. Cope, "To Be Let Alone: Florida's Proposed Right of Privacy," 6 Fla. St. U.L. Rev. 671 (1978).

in this case concedes the legal question to be whether a constitutional right of privacy exists which excludes certain government records from public scrutiny. Article I, Section 23 clearly answers that question: The broad new constitutional right of privacy, though casting in doubt Laird v. State, 342 So.2d 962, 965 (Fla. 1977), which refused to follow Ravin v. State, supra (because the Alaska privacy amendment had "no analogue in Florida"), plainly reaffirms public access to government records pursuant to Chapter 119, Fla. Stat. (1979).

Therefore, while Appellees agree that Article I, Section 23 creates a remarkably broad right of privacy for Florida citizens, a right which places in extreme doubt many State laws restricting personal conduct, the Amendment on its face preserves public access to (and government disclosure of), the Housing Authority records which are at issue in this case, pursuant to Chapter 119, Fla. Stat., (1979).[2/]

Appellants have argued in their Supplemental Brief that the Privacy Amendment has elevated personal privacy to a fundamental constitutional right, and "therefore" that Chapter 119 disclosure must serve a compelling public purpose, which the State has failed to demonstrate. Even conceding Appellant's premise, Appellant's conclusion is a logical non-sequitur. The citizens of Florida adopted Section 23 of Article I to provide that they would be protected from two forms of government malfeasance: (i) government intrusion into their private activities, and; (ii) government secrecy. As "principals" in the agency relationship between citizens and their government representatives, the voters of Florida obviously are entitled to disclaim secrecy by their

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2. As suggested by Cope, A Quick Look at Florida's New Right of Privacy, Fla. Bar J, January 1981 at p. 13, the Privacy Amendment may, however, limit government acquisition of private data from individuals and from banks with which they do business.

agents in public office, notwithstanding the possible advantage of such secrecy, and despite even the competing claims for privacy by individuals doing business with or accepting benefits from their agents.

It is not merely illogical to argue, as Appellants have, that citizens are prohibited from using constitutional means, pursuant to Article XI of the Florida Constitution and the 10th Amendment of the United States Constitution, to organize society. The true impact of Appellant's reasoning is that the sovereign people may no longer govern themselves by striking a constitutional balance between personal privacy and government secrecy, and that only the Judiciary can finally determine the wisdom of the Constitution itself, based on notions of "disclosural rights" deriving from Higher Law. On the contrary, the "compelling interest" which supports public disclosure under Section 23 and Chapter 119 is that the sovereign has chosen through constitutional means to strike that particular balance between privacy rights and governmental disclosure. In a constitutional democracy, no other "justification" would seem to be necessary.[3/]

Finally, in response to Appellant's creative attempt to define "Public Records" to exclude records filed with public entities containing "private, personal and familial information," Appellees note that such a distinction would as a practical matter destroy public records

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3. It is equally illogical for Appellants to argue that the Privacy Amendment is defective because it permits the Legislature to expand or limit "disclosural rights" by amending Chapter 119. By approving a Constitutional Amendment expressly incorporating public disclosure of government records, the electorate obviously affirmed such disclosure, and delegated further "balancing" to its representatives, similar to the "enforcement clauses" of numerous other constitutional amendments.

disclosure in this State. As suggested by this Court's opinion in Shevin v. Byron, Harless, Schaffer, etc., 379 So.2d 633, (Fla. 1980), the public's access to government records is not determined by the documents' subject matter but rather by its function and location. If a document is formally submitted to a public entity in conjunction with a request for public benefits, such writing must be defined as a public record under the Privacy Amendment unless exempted by the Amendment or by Chapter 119.

Therefore, Appellees urge this Court to hold that Article I, §23, Fla. Const., reaffirms public disclosure of all government records pursuant to Chapter 119, Fla. Stat. (1979).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to LESTER WISOTSKY, Legal Services of Greater Miami, 420 Lincoln Road, Suite 240, Miami Beach, FL 33139; JIM SMITH, Attorney General, State of Florida, Department of Legal Affairs, 725 Calhoun Street, Tallahassee, FL 32304, FRANKLIN G. BURT, Paul & Thompson, 1st National Bank Building, Miami, FL 33131 this 9th day of January, 1981.

THOMAS M. PFLAUM