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IN THE SUPREME COURT OF FLORIDA

DONALD G. RESHA,

Petitioner,

vs.

KATIE D. TUCKER,

Respondent.
_____/

CASE NO. 83,597

FILED
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**ON REVIEW OF A CERTIFIED QUESTION FROM THE FIRST DISTRICT COURT OF APPEAL**

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# RESPONDENT'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Respondent adopts Resha's record reference system. Additionally, references herein to Resha's Initial Brief shall be to "Init.Br."

## STATEMENT OF THE CASE

This review arises from the First District Court of Appeal's reversal of the amended final judgment in Tucker v. Resha, 634 So. 2d 756 (Fla. 1st DCA 1994). The district court held that Resha's defamation claim was barred by absolute privilege and that money damages were not recoverable for governmental intrusion under the Florida Constitution. The latter question was certified, while the former is presented by Resha under a species of pendent jurisdiction.

There are two related courses of litigation. The first, mentioned in Resha's brief at page 4, is pending before this Court: Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992), review granted, 623 So. 2d 496 (Fla. 1993). Contrary to Resha's assertion, the district court in that case did not conclude that "Tucker violated clearly established law." It acknowledged that Resha had alleged this and that Resha's allegations were sufficient to defeat Tucker's petition for a writ of certiorari to review the trial court's denial of her motion for summary judgment.[1] Resha did not file any counter motion for summary judgment. Thus, not only is Resha's summary of the holding in that case incorrect, his

[1] "[W]e find a genuine factual issue exists regarding Tucker's conduct, so as to preclude a grant of summary judgment based on qualified immunity." 610 So. 2d at 466.

attempt on pages 4-5 of his brief to link that decision with his petition before this court is improper and argumentative.

The second litigated case is completed: Resha demanded access to sealed criminal court files and to an FDLE investigative file pertaining to respondent, but his request was denied in part by the trial court and disallowed entirely by the appellate court. Resha v. Tucker, 600 So. 2d 16 (Fla. 1st DCA 1992), petition for review dismissed, 615 So. 2d 159 (Fla. 1993), certiorari denied, ____ U.S. ____, 114 S. Ct. 381, 126 L. Ed. 2d 330 (1993). The trial court then granted respondent's motion in limine on this issue, (R. 1235, 1252) and there was no evidence before the jury of any criminal investigation which led to any arrest or sentencing. (T. 523-27) Resha's statement on page 44 of his brief that respondent was "the target of a criminal investigation in which she was eventually arrested and sentenced" is totally without support in the record of this case.

## STATEMENT OF THE FACTS

Respondent agrees with Resha that the facts necessary to this court's review are essentially those recited by the district court. She takes issue, however, with the accuracy of some of the "facts" Resha has brought before this court in his brief:

(1) Resha includes improper argument throughout his statement of the facts, and he colors many of the facts with pejorative and derogatory adjectives and adverbs, geared to portray respondent in the worst light possible while avoiding the need to provide support in the record. Respondent requests that this court disregard the argument and the unsupported assertions of fact.

(2) Resha states on page 2 of his brief that respondent "used the machinery of government" to illegally obtain a report on Resha from the credit bureau. Resha introduced no evidence to prove that respondent requested anyone to do anything illegal, and, specifically, there was no evidence that respondent requested anyone to obtain a credit report on Resha. (T. 218)[2]

(3) Resha states at page 2 of his brief that respondent is responsible for "subjecting him to a criminal investigation, entering upon his premises, examining the records of his two businesses, and examining his personal financial records." However, at the time of the audits and investigation, Resha was the sole owner and operator of two Subchapter S corporations, neither of which was made a party to this action. (T. 478-80, 518-19) The trial court allowed Resha to proceed generally as if he and the corporations were one entity.

(4) Contrary to Resha's assertion on page 2 of his brief that respondent "fabricat[ed] and spread[] allegations that Resha was involved in organized crime, tax evasion, money laundering, and illegal trafficking in guns, drugs, and pornography," there was no evidence that respondent said anything of such nature to anyone except those persons within the chain of command of the Department of Revenue directly responsible for taking appropriate action and Florida Department of Law Enforcement ("FDLE") investigators acting pursuant to a directive from the FDLE Commissioner. In addition,

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[2] At trial the department investigator testified as to his state of mind during his investigation: He obtained the credit report, and <u>he</u> believed this act was illegal. (T. 257-58)

there was no evidence that respondent disseminated any information about Resha to the public; in fact, the only evidence introduced on this point tended to show that confidential information about Resha initially was leaked by persons other than respondent and not at her direction. (T. 181-82, 285-86, 348-49)

(5) Respondent did not, as Resha contends on pages 39-40 of his brief, admit in her responses to his request for admissions that the Department of Revenue had "no statutory or other authority to investigate or prosecute violations of laws relating to pornography or firearms. (T. 386)." The responses with regard to both of these subjects were "qualified by further stating that persons selling illegal arms are typically failing to pay taxes and the Department of Revenue may become involved in the investigation into that aspect of illegal activities," (Request #194, T. 384), and "qualified by further stating that persons selling illegal pornography are typically failing to pay taxes, and the Department of Revenue may become involved in an investigation into that aspect of the illegal activities." (Request #192, R. 236)

## SUMMARY OF THE ARGUMENT

In a thoughtful and well-reasoned opinion, the First District Court reversed the judgment for damages entered against respondent for violation of Resha's constitutional right to be free from governmental intrusion and for defamation. This decision is correct and should be approved. Although the section is self-executing as to declaratory and injunctive relief, there is nothing on the face of article I, section 23, or in its legislative history, to indicate intent that a remedy in damages is available for governmental intrusion. In fact, the rights granted in that section are expressly made subject to other provisions of the constitution, among which is the provision allowing the legislature to enact by general law a waiver of the sovereign's immunity from liability for damages. The legislature has not done so, and the judiciary cannot.

Even if the doctrine of sovereign immunity does not prevent this court from exercising its judicial power to create a cause of action for damages, it should not do so. There are many competing policies which must be considered in creating a damages remedy for the constitutional right of privacy. It is established law that governmental intrusions will be evaluated in actions for declaratory and injunctive relief under the compelling state interest/least intrusive means test. If a cause of action for damages were to be judicially-created, this court would additionally have to determine what defenses, immunities, and privileges would be available, what an appropriate limitations period would be, and whether there should be a damages cap, among

numerous other issues. These decisions are best left to the legislature, which has already enacted a comprehensive statute waiving sovereign immunity in tort. Thus, a tort remedy for damages for invasion of privacy is available as an alternative to a judicially-created constitutional remedy.

The district court also ruled correctly that respondent was entitled to the absolute privilege from liability for defamation available to executive officials acting within the scope of office. There is no question that the power of the Department of Revenue to enforce the tax laws of this state is extremely broad and extends to the investigation of suspected criminal activity which might implicate the nonpayment of taxes. As Executive Director of the department, respondent was acting well within her powers when she initiated an audit and investigation of Resha's businesses. Any statements she made to her subordinates regarding Resha's possible involvement in criminal activities were also made within the scope of her responsibilities and duties. The absolute privilege likewise applies to statements she made to agents of the Florida Department of Law Enforcement during the interview conducted in her office as part of an investigation into the legality of the department's audit and investigation of Resha's businesses. The statements were made in her capacity as the Executive Director of the agency under investigation and so were made within the scope of her duties. Because there was no dispute about the facts and circumstances in which the statements were made, the issue of absolute privilege should have been decided by the trial court as a matter of law.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY HELD THAT ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION (1980) IS NOT SELF-EXECUTING IN THE SENSE OF PROVIDING A CAUSE OF ACTION FOR DAMAGES.

This case is before the court on the following question certified by the First District Court of Appeal as being of great public importance:

> DOES A VIOLATION OF ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION GIVE RISE TO AN ACTION FOR MONEY DAMAGES?

Tucker v. Resha, 634 So. 2d 756, 760 (Fla. 1st DCA 1994). This court has jurisdiction to review certified questions pursuant to article V, section 3(b)(4), of the Florida Constitution. Respondent urges this court to answer the certified question in the negative.

Article I, section 23, of the Florida Constitution (1980) provides:

> 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's right of access to public records and meetings as provided by law.

The first sentence of this provision was originally included as article I, section 23, of the Revised Constitution of the State of Florida proposed by the 1978 Constitutional Revision Commission and put before the voters at the general election of November, 1978. The proposed revised constitution was defeated, including the provision guaranteeing freedom from government intrusion.

In 1980, the legislature acted pursuant to the power granted it in article XI, section 1, of the Florida Constitution and passed by joint resolution a proposal for a constitutional right of

privacy. The first sentence of this proposal, Committee Substitute for House Joint Resolution 387, was identical to the language proposed by the 1978 Constitutional Revision Commission. However, the legislature added the second sentence to the proposal to make explicit its policy decision that the individual's right of privacy would be subordinate to the public's right of access to public records and meetings.[3] This proposal was presented to the public in the general election of 1980, with the following ballot language: "Proposing the creation of section 23 of Article I of the State Constitution establishing a constitutional right of privacy." The proposal was adopted.

In Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985), this court set out the standard by which all claims brought under the constitutional right of privacy will be assessed. First, the complainant must demonstrate that he or she has a "reasonable expectation of privacy" in the subject matter on which the claim is based. Id. at 547. Once this "threshold question" has been determined favorably for the complainant, the government must "demonstrat[e] that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Id. The court cautioned, however, that even though this imposes on the government a "strong standard to review a claim under article I, section 23, 'this constitutional standard was not intended to provide an

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[3] This right of access was elevated to constitutional status by the adoption in 1992 of article I, section 24, of the Florida Constitution "Access to Public Records and Meetings."

absolute guarantee against all governmental intrusion into the private life of an individual.'" Id. (quoting Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71, 74 (Fla. 1983)). Applying this test, this court concluded that, even though individuals have an expectation of privacy in financial documents, the Division of Pari-Mutuel Wagering could appropriately issue subpoenas duces tecum for appellant's bank records without violating his constitutional right of privacy against governmental intrusion. Id.

In In re T.W., 551 So. 2d 1186 (Fla. 1989), this court considered the constitutionality of a statute limiting a minor's access to an abortion to those situations in which the minor has the consent of either her parents or a court of law. A majority of this court declared that the statutory restriction was unconstitutional as a violation of the minor's right of privacy guaranteed by article I, section 23. Although a majority of the justices did not agree on the rationale to support this result, one proposition that provoked no disagreement was that a person's constitutional right of privacy in Florida is subject to "a highly stringent standard." Id. at 1192. Justice Shaw stated in the lead opinion that an especially high value is placed on decisional autonomy in Florida, "emphasized by the fact that no government intrusion in the personal decisionmaking cases . . . has survived." Id. Conversely, in cases involving disclosure of private information, "government intrusion generally was upheld as sufficiently compelling to overcome the individual's right of privacy." Id.

In addition to allowing a state agency to subpoena financial records in Winfield and declaring a state statute unconstitutional in In re T.W., the courts of Florida have excluded evidence from use in criminal trials because of a violation of Florida's constitutional right of privacy, State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985); prohibited discovery of confidential information disclosing the names and addresses of blood donors in a civil suit brought by a person infected with AIDS, Rasmussen v. South Florida Blood Service, 500 So. 2d 533 (Fla. 1987); reversed a trial court order allowing a hospital to administer a blood transfusion over the objections of a patient based on her rights to privacy and freedom of religion, Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989), aff'g 500 So. 2d 679 (Fla. 3d DCA 1987); and allowed a surrogate to assert the constitutional right of privacy of an incompetent person to refuse medical treatment, In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990).

However, as the court below recognized, no court in this state has ever considered a case in which a person has sought damages for violation of the right of privacy guaranteed by article I, section 23. Tucker, 634 So. 2d at 759. In fact, no court in Florida has considered the question of whether a person has the right to sue directly under the constitution for damages for violation of any right guaranteed by the Florida Constitution. This case truly presents an issue of first impression in this state.

In its decision, the court below identified the question presented as "whether the provision [article I, section 23, right of privacy] is self-executing so as to provide for money damages."

Id. The court held "that the trial court erred in allowing the alleged cause of action for 'governmental intrusion' into private life to go to the jury. The constitutional provision fails to sufficiently delineate a rule by which the right to money damages can be 'determined, enjoyed, or protected.'" Id. (quoting Schreiner v. McKenzie Tank Lines, 408 So. 2d 711, 714 (Fla. 1st DCA 1982), appr'd and adopted, 432 So. 2d 567 (Fla. 1983)). In reaching this conclusion, the court recognized that the constitution protects the right of privacy against governmental intrusion,[4] so that any action under that section must necessarily be an action against the government. Tucker, 634 So. 2d at 759.

Accordingly, the court found that the doctrine of sovereign immunity would be implicated in any suit to recover damages under this provision, including the instant suit against the respondent. The court found the lack of any "specific, clear, unambiguous waiver of immunity in the constitutional provision, or in any statute" to be dispositive of the issue as to whether a direct cause of action for damages may be inferred from article I, section 23. Id. The court did not accept Resha's argument that his only recourse to vindicate his right of privacy was by an action brought directly under the constitution for money damages; it noted that

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[4] The Committee on Ethics, Privacy, and Elections of the 1978 Constitutional Revision Commission reported out a privacy provision in Proposal 132 that included a subsection (b) in the proposed article I, section 23, which would have required the legislature to take action to implement a right of privacy against private intrusion. The commission rejected this position and deleted subsection (b), leaving only the language protecting against governmental intrusion. Dore, P. Of Rights Lost and Gained, 6 Fla. St. U. L. Rev. 609, 651 (1978).

access to the courts for redress is provided through the common law tort of invasion of privacy first recognized by this court in Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944).[5] The court, therefore, held that the right of privacy expressed in article I, section 23, is not "self-executing so as to provide for money damages," and this court should approve this holding.

### A. THE COURT BELOW CORRECTLY CONCLUDED THAT, AT A MINIMUM, SOVEREIGN IMMUNITY MUST BE WAIVED BEFORE DAMAGES CAN BE AVAILABLE TO REMEDY GOVERNMENTAL INTRUSION INTO PRIVATE LIFE.

Resha takes issue with the finding of the district court that sovereign immunity is implicated in determining the availability of damages in this case. In his brief at pages 7-12, Resha castigates the court below for its reliance on the doctrine of sovereign immunity to conclude that no cause of action for damages is authorized by article I, section 23.[6] Resha asserts that sovereign immunity is irrelevant to the issue of whether he is entitled to money damages, firstly, because the damages awarded in this case were awarded against respondent in her private capacity, not against the "government" and, secondly, because the state was not even named as a defendant in this action. Init.Br. at 7-8.

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[5] Section 768.28 of the Florida Statutes contains a limited waiver of sovereign immunity for liability in tort in circumstances in which a private person would be held liable.

[6] While this was one aspect of the district court's reasoning in reaching the conclusion that the cause of action for damages under article I, section 23, should never have gone to the jury, this point is inextricably intertwined in the district court's opinion with its reasoning that article I, section 23, could not be self-executing with regard to money damages because legislative action is needed to provide content and context for such a cause of action. This question will be discussed in detail in ISSUE **I. B.**

Resha takes much too narrow an approach to the question presented in this case and he misses the point of the ruling below: The district court found that all respondent's activities complained of in this litigation were performed "within the scope of . . . [her] office at the Department of Revenue as a matter of law," Tucker, 634 So. 2d at 758, and that any action for money damages for "governmental intrusion" is, by definition, "an action against the government rather than against a private person," id. at 759; so that "[t]he award of money damages against Tucker naturally implicates the doctrine of sovereign immunity" and cannot be sustained without a waiver of that immunity. Id. The district court simply refused to distinguish between the government and the government officials and employees carrying out the government's lawful activities for purposes of article I, section 23.

The district court was correct in holding that sovereign immunity must be waived by the legislature in order for there to be a cause of action for money damages for governmental intrusion into private life. Enforcement of this privacy right is made subject to the other provisions of the Florida Constitution by the express limitation "except as otherwise provided herein." Shaktman v. State, 529 So. 2d 711, 716 n. 7 (Fla. 3d DCA 1988), appr'd, 553 So. 2d 148 (Fla. 1989). In article X, section 13, of the Florida Constitution, the legislature is authorized to provide "by general law for bringing suit against the state as to all liabilities existing or hereinafter originating." (Emphasis supplied). Article I, section 23 must be construed in pari materia with article X, section 13, in order to give meaning to both of the

provisions. Thus, in order for there to be a cause of action for money damages arising out of article I, section 23, there must be a general law waiving sovereign immunity for such suits.

The cases cited by Resha in support of his argument that the doctrine of sovereign immunity does not apply here are not relevant to this point. First, Resha relies on several cases dealing with the tort liability of government officials and employees pursuant to the limited waiver of sovereign immunity in section 768.28. In District School Board v. Talmadge, 381 So. 2d 698, 700 (Fla. 1980), cited at page 8 of the Resha's brief, the court considered the effect of the limited waiver of sovereign immunity for liability in tort "on the liability or immunity of the individual state employee" under the then recently-enacted section 768.28(9) of the Florida Statutes (1975).[7] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1016-17 (Fla. 1979) and Department of Health and Rehabilitative Services v. Yamuni, 529 So. 2d 258 (Fla. 1988) also deal with the state's limited waiver of sovereign immunity in section 768.28, under which the state can be held

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[7] Footnote nine in Talmadge explains that the court's

> use of the term "immunity" in this decision denotes mere nonsusceptibility to suit under the statute [section 768.28]. As in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1012 n. 1 (Fla. 1979), "[w]e do not deal here with personal immunity of individual officers acting in their official capacity. This distinct principle of law is explored in cases such as McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966), and Rivello v. Cooper City, 322 A.2d 602 (Fla. 4th DCA 1975)."

Personal immunity will be dealt with in Issue **II.** below.

liable in tort in circumstances in which a private person would be liable.

In Commercial Carrier, this court refused to exempt from the waiver all uniquely "governmental" functions, that is, functions performed exclusively by government and not by private persons. Rather, this court concluded that the waiver of sovereign immunity had been waived only as to those activities of government which involve operational, as opposed to discretionary, governmental activities. 371 So. 2d at 1016-22. In Yamuni, this court rejected HRS's argument that it should not be liable for negligence for the failure of its caseworkers to protect children from child abuse because caseworker activities in investigating child abuse and in taking measures to protect children are "exclusively governmental and are not performed by private persons." 529 So. 2d at 260. The court relied on its reasoning in Commercial Carrier and held that such a limitation on liability would nullify the waiver of sovereign immunity in section 768.28. Id.

The instant case does not concern the question of whether this or that activity constitutes a governmental function which may or may not be performed by private persons as applicable to the section 768.28 waiver of sovereign immunity for liability in tort. As noted by the district court, article I, section 23, can only be violated by the government because it prohibits only "governmental" intrusion. Tucker, 634 So. 2d at 759. Thus, cases construing the extent of the waiver of sovereign immunity in section 768.28 cannot provide any basis for evaluating the government's liability for damages under article I, section 23. No person acting in a private

capacity could violate or cause a violation of Florida's constitutional right to be free from governmental intrusion; only governmental officials acting in their official capacities could violate or cause a violation of this right.[8]

Respondent agrees with Resha that the opinion of this court in State Road Department v. Tharp, 146 Fla. 145, 1 So. 2d 868 (1941) is delightful and does speak to the lack of immunity of the state with regard to unconstitutional acts. See Init.Br. at 10. Respondent must, however, disagree with Resha's contention that the decision in Tharp has any relevance to the issue of whether sovereign immunity bars a cause of action for damages under article I, section 23. In Tharp, this court decided that a suit in equity for injunctive relief or for just compensation under the Takings Clause of the Florida Constitution was not barred by the "nonsuability of the State." Id. at 869.

Likewise, this court's reaffirmance in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912,

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[8] Resha's reliance on the distinction between official-capacity and private-capacity suits against government officials discussed in Hafer v. Melo, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) is misplaced. See Init.Br. at 9. Hafer dealt only with the scope of personal immunity available to state officials sued for damages under 42 U.S.C. § 1983. A case decided under § 1983 which is perhaps more relevant to this discussion is Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 2434, 110 L. Ed. 2d 32 (1990), in which the Court held that sovereign immunity is not an operative concept in a suit for damages under 42 U.S.C. § 1983 in either federal or state courts, although it would provide immunity from suit under state causes of action. In actions brought under §1983 against state government or state government officers acting in their official capacity, protection from the imposition of damages is provided by the Eleventh Amendment. Will v. Michigan Dept. of State Police, 491 U.S. 58, 112 S.Ct. 2304, 2308, 105 L. Ed. 2d 45, (1989) ("a State is not a person within the meaning of § 1983").

918 (Fla. 1985) of the principle that the judicial branch of government can interfere with the discretionary functions of the other branches of government only when there is "a violation of constitutional or statutory rights" does not provide support for Resha's argument. The cases cited in Trianon Park in support of this proposition are Commercial Carrier, in which the court held that the waiver of sovereign immunity in section 768.28 did not extend to discretionary functions of government, and Askew v. Schuster, 331 So. 2d 297, 300 (Fla. 1976), in which the court refused to declare a statute unconstitutional, observing that it could not "substitute its judgment for that of the Legislature" absent a "violation of due process or a specific constitutional guarantee." Clearly, neither of these cases refer to or approve of suits against the state for money damages for violation of a constitutional right.

Significantly, the jury in this case did not find in its verdict that respondent personally intruded into Resha's privacy or that the Department of Revenue acted outside its authority or acted illegally when it investigated and audited Resha's businesses. (R. at 1092-93) The jury found that the (lawful) Department of Revenue investigation improperly intruded into Resha's privacy. Id. at 1092. The jury found that respondent initiated the (lawful) Department of Revenue investigation. Id. The jury found that ordering the (lawful) Department of Revenue investigation was not within the scope of respondent's duties as Executive Director of the Department of Revenue or that respondent did not have proper motives when she ordered the (lawful) investigation and audit. Id.

The jury concluded, therefore, that respondent was personally liable for damages for Resha's shame and humiliation arising out of the improper intrusion into his privacy occasioned by the (lawful) Department of Revenue investigation and audit and for punitive damages because of her general ill will toward Resha. Id.

It is implicit in Resha's argument that all government officers or employees acting under the authority granted by rule or statute should be exposed personally to actions for damages on the basis of nothing more than a person's objection to a particular request for information or to the inclusion of information about the person in a public record. Regardless of whether the information is required by law in order to apply for a license to engage in business or to obtain public employment or to obtain a marriage license or to take advantage of the myriad of services provided by the state and its agencies and subdivisions or to engage in any activity which subjects him or her to the tax laws of the state, under Resha's theory, government officers and employees could be forced into court not only to defend against the imposition of a personal judgment for damages for doing their jobs but also to defend the state's right to collect information and to investigate a person's fitness for a license or compliance with the laws of Florida under lawfully enacted statutes and rules.

The doctrine of sovereign immunity does not prevent any person from enforcing his or her right to be free from governmental intrusion. He or she could seek a declaration that particular statutes and rules are unconstitutional or a prohibitive or mandatory injunction against the state. However, because the

constitutional right to be free from governmental intrusion can only be violated by the "government," the lack of a clear and specific waiver of sovereign immunity prohibits a suit for damages against either the state or its officers and employees. On this basis alone, this court should answer the certified question in the negative and approve the decision of the district court that article I, section 23 is not self-executing as to a cause of action for damages.

### B. THERE IS NOTHING IN THE LAW OR JURISPRUDENCE OF FLORIDA TO SUPPORT AN AWARD OF DAMAGES FOR VIOLATIONS OF ARTICLE I, SECTION 23, EVEN IF THIS COURT FINDS THAT SOVEREIGN IMMUNITY DOES NOT BAR AN ACTION FOR DAMAGES.

Resha concedes on page 13 of his brief that the court below is the only Florida court to have considered the question of whether any provision of the Florida Constitution is self-executing as to damages. He asserts, however, that "the question has been so thoroughly surrounded by Florida law that it is merely a matter of filling the smallest of gaps. It is much like a connect-the-dots drawing in which only one small line remains to be drawn to complete the picture." Init.Br. at 13. And yet, he has failed to identify any support for his position in Florida law. Not one of the cases cited even remotely supports a conclusion that Florida courts have come close to finding a self-executing right to money damages arising directly out of a constitutional provision.

The cases cited on pages 13-14 do allow a property owner to recover "damages" for the taking of private property. The "damages" referred to are those amounts required by the Takings Clause, article X, section 6, of the Florida Constitution, to be

paid to a property owner as compensation for the value of property taken under the power of eminent domain. It has long been established in Florida that the Takings Clause is self-executing:

> We feel our constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain.

Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 291 (Fla. 1958); see also Flatt v. City of Brooksville, 368 So. 2d 631, 632 (Fla. 2d DCA 1989).

The cause of action for "damages" on a theory of inverse condemnation is just a variation on the basic principle that the right to just compensation is expressly provided in the Takings Clause and is, therefore, self-executing:

> Inverse condemnation has been defined as the popular description of a cause of action against a government defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. (Citations omitted). . . . [I]nverse condemnation is a method of compensation wherein "an owner asserting a claim for appropriation of his property may pursue his right by an action in equity for an injunction, and for damages; the court may then, as an alternative to the injunction, make an award for the taking."

City of Jacksonville v. Schumann, 167 So. 2d 95, 98-99 (Fla. 1st DCA 1964). Clearly, the cases holding that there exists a direct cause of action for "damages" under article X, section 6, do not support Resha's argument that article I, section 23, is self-executing as to money damages. There is no express right to compensation for governmental intrusions. Nor does the decision in Schreiner v. McKenzie Tank Lines & Risk Management Services,

Inc., 408 So. 2d 711 (Fla. 1st DCA 1982), appr'd and adopted, 432 So. 2d 567 (Fla. 1983), discussed at page 14 of Resha's brief and at pages 1-3 of the Amicus Brief filed by the American Civil Liberties Union, hold that Florida's Equal Protection Clause in article I, section 2, of the Florida Constitution is self-executing so as to provide a cause of action for money damages. The court in Schreiner recognized the well-settled maxims that a court must construe constitutional provisions in such a way that they are meaningful and that some constitutional provisions are self-executing to provide relief from prohibited activities. 408 So. 2d at 714. As articulated by this court in Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960), a constitutional provision is self-executing if it includes sufficient guidelines

> by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. . . . The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

This rule provided the basis for this court to find in Gray that the constitutional provision relating to the appointment, terms, and number of circuit judges was self-executing and needed no implementing legislation because the provision "lays down a sufficient rule." Id. at 851. And, in Schreiner, it is apparent that the court found the Equal Protection Clause of the Florida Constitution to be self-executing in the same sense: The clear terms of the clause prohibiting discrimination on the basis of handicap provided adequate guidance to the court to provide relief from such discrimination. However, nowhere in Schreiner does the

court state that the relief sought was money damages. There is nothing in Schreiner from which it can be inferred that the relief contemplated by the court included remedial relief through money damages rather than injunctive relief to reverse the discriminatory action.

### 1. This Court Should not Create a Cause of Action for Money Damages to Remedy Governmental Intrusion Into Private Life but Should, Rather, Leave This Decision to the Legislative Process.

Of course the courts may enforce constitutional rights in the absence of implementing legislation, as long as the provisions meet the criterion set out in Gray that there be sufficient guidance in the provision to allow the courts to discern the nature of the right protected and the extent of the protection intended by the people. 125 So. 2d at 851. This is obvious from the many provisions of the Florida Constitution which the courts have found self-executing. See e.g., City of Sarasota v. Mikos, 374 So. 2d 458 (Fla. 1979) (exemption from taxation for property owned by municipalities, art. VII, §3(a)); Plante v. Smathers, 372 So. 2d 933 (Fla. 1979) (full financial disclosure of candidates for elective office prior to or at time of qualification, art. II, § 8(a)); State v. Harris, 136 So. 2d 633 (Fla. 1962) (jurisdiction of supreme court to review decisions of the district courts on the basis of conflict, art. V, § 4(2)); Gray v. Bryant, 125 So. 2d 846 (Fla. 1960) (recalculation of the number of judges assigned to each circuit based on updated census data, art. V, § 6(2)); Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958) (award of just compensation for the government's exercise of

its power of eminent domain, art. X, § 6); State v. G.P., 429 So. 2d 786 (Fla. 3d DCA 1983) (appeals to district courts from final judgments of trial courts, art. V, § 5(3)).

As Resha concedes, however, none of the cases in Florida dealing with the self-executing nature of various constitutional provisions permit a direct cause of action for damages. Init.Br. at 15. In fact, the court in Schreiner expressly stated that "no case has ever found that violation of a constitutional provision permits monetary relief merely because it is self-executing." 408 So. 2d at 714 (citing Figueroa v. State, 61 Haw. 369, 604 P.2d 1198, 1206 (1979)). Resha attempts to distinguish Figueroa on the ground that it dealt only with the question of whether sovereign immunity barred suit against the state for money damages. Init.Br. at 15, 23. However, the ruling in that case is not so limited.

Although the Hawaiian Constitution includes a section declaring that all provisions of the state constitution are "self-executing to the fullest extent that their respective natures permit," art. XIV, § 15, Haw. Const., the court held that this did not, of itself, "constitute a waiver of sovereign immunity for money damages for constitutional deprivations." Figueroa, 604 P.2d at 1206. The doctrine of sovereign immunity was not, however, at issue when the court observed:

> The self-executing clause means only that the rights therein established or recognized do not depend upon further legislative action in order to become operative. (Citations omitted). No case has construed the term "self-executing" as allowing money damages for constitutional violations.

Id.

As noted above, the core of article I, section 23, originated with the 1978 Constitutional Revision Commission. The section was put in its final form by the legislature and submitted to the voters in the general election of 1980 with a ballot summary which notified the voters in general terms that the provision created a constitutional right of privacy. "In construing the Constitution, we first seek to ascertain the intent of the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent." Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) (citing Gray). There is nothing in the ballot summary or in the legislative history of the provision to indicate a more specific intent than to create a right of privacy against intrusion by government.

The legislative history of House Joint Resolution 387 and Senate Joint Resolution 935, which ultimately were enacted as Committee Substitute for House Joint Resolution 387, is devoid of any indication that article I, section 23, was designed to provide a remedy in money damages for governmental intrusion into private life. Neither the House nor Senate staff summaries reflect any potential fiscal impact on government as a result of the provision. Professor Patricia A. Dore answered questions regarding the content and purpose of the constitutional right "to be let alone and free from governmental intrusion into . . . private life" during her testimony before the Executive Subcommittee on Reorganization of the House Committee on Government Operations on March 11, 1980, and before the Senate Rules and Calendar Committee on May 6, 1980. Nothing in her testimony or in the questions or comments of the

representatives and senators even alluded to a cause of action for damages.

Rather, the emphasis in the meetings was on the need to provide an absolute right of privacy in order to give great weight to personal privacy interests in evaluating whether such interests should be overridden by governmental interests in intrusion. It was never contemplated that the right of privacy would be absolute and superior to other provisions of the constitution. In fact, an explanation of the protection was given by Prof. Dore: The right of privacy would provide an opportunity for a person to bar governmental intrusion into private life if it is proven that the personal interest in privacy outweighs the government's interest in the intrusion.

The cases cited on page 8-10 of this brief demonstrate that the intent of the people and of the legislature has been fulfilled; the courts are always open to actions for declaratory relief and injunctions to prohibit governmental intrusions into private life. Therefore, article I, section 23, is a self-executing constitutional provision. However, evaluated under established principles of Florida jurisprudence, the provision is not self-executing with respect to actions for money damages. The legislature is the appropriate body to "add to or prescribe a penalty for violation of a self-executing constitutional provision" such as article I, section 23. Schreiner, 408 So. 2d at 714. See also Manatee County v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla. 1978) (court cannot go beyond equitable remedy provided by

legislature and use its judicial power to "enter money judgment against a county for past tax years").

Resha cites numerous cases on pages 15-26 of his brief to support his request that this court create a cause of action for damages for violation of article I, section 23. Among these are seven Florida cases, none of which provide the needed support. The courts in Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959), Florida Freight Terminals, Inc. v. Cabanas, 354 So. 2d 1222 (Fla. 3d DCA 1978), and Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136 (Fla. 5th DCA 1987), quashed in part on other grounds, 549 So. 2d 1374 (Fla.), appeal dism., 493 U.S. 929, 110 S. Ct. 296, 107 L. Ed. 2d 276 (1989), do not, as Resha contends on pages 15 and 16 of his brief, create causes of action for money damages for violation of a statute or administrative rule. The courts in those cases considered whether, in an action for negligence, violation of a statute or rule by the alleged tortfeasor is negligence per se or merely evidence of negligence.

Unquestionably, the courts of Florida will not allow the exercise of a self-executing constitutional right to be frustrated by the legislature's failure to enact implementing legislation. In Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980), cited at page 17 of Resha's brief, this court held that "a competent, adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue medical treatment where all affected family members consent." The court stated a preference that the legislature take up this issue and craft legislation dealing with all of the complexities and

ramifications of the right to refuse medical treatment, but it refused to abdicate its responsibility to enforce a terminally ill patient's right to decisional autonomy. Id.[9]

In Dade County Classroom Teachers Association, Inc. v. The Legislature of the State of Florida, 269 So. 2d 684 (Fla. 1972), cited at pages 17 and 21 of Resha's brief, this court refused to issue a writ of mandamus to the legislature directing it to enact legislation setting out guidelines regulating collective bargaining for public employees. The constitutional right of public employees to engage in collective bargaining under article I, section 9, of the Declaration of Rights had been recognized by the court in a prior case, and the only issue in Dade County Classroom Teachers Association was the effect of the legislature's failure to enact the legislation previously suggested by the court. The petition for writ of mandamus was denied, and the court expressed every confidence that the legislature would enact legislation within a "reasonable time." Id. at 688. If the legislature did not, the court made it very clear that it "would have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility." Id. In 1974, the legislature added Part II to chapter 447 of the Florida

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[9] The legislature subsequently enacted comprehensive legislation recognizing that every adult has the fundamental right to make decisions involving the extent to which he or she will accept medical treatment and providing methods by which those decisions are to be expressed and carried out. Ch. 765; § 765.102(1), Fla. Stat. (Health Care Advance Directives).

Statutes governing the rights of public employees under article I, section 6.

The decisions in Satz and Dade County Classroom Teachers Association stand for the proposition that the courts of this state will use their judicial power to ensure that the residents of Florida enjoy the rights protected by the state constitution. As discussed above, this is not a proposition new to Florida jurisprudence, nor are the principles set out in Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936) and Florida East Coast Railway Co. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933) cited on page 18 of Resha's brief. In Winn & Lovett, this court recognized the right to recover punitive damages in tort in a proper case and in Florida East Coast Railway, this court reversed an award of punitive damages in a wrongful death action because they were not authorized by the statute creating the cause of action. Neither Winn & Lovett, Florida East Coast Railway, nor any of the other five Florida cases cited by Resha even address the issue of whether, in the absence of implementing legislation, the courts of Florida will create a direct cause of action for money damages for violation of any right guaranteed under the Florida Constitution, much less for violation of the right to be free from governmental intrusion.[10]

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[10] The court in Shuttleworth v. Broward County, 639 F. Supp. 654, 660 (S.D. Fla. 1986), cited by Resha on page 16 of his brief as a Florida case allowing a direct cause of action for damages for violation of the Florida constitutional right to be free from discrimination on the basis of handicap, included no discussion or citation of authorities to support its conclusion on this point. The only Florida case cited in Shuttleworth dealt with the availability of alternative remedies for discrimination under both

2. **Neither the Federal Bivens Doctrine nor the Decisions of the Courts of any Other State Provide a Suitable Basis for the Judicial Creation of a Cause of Action for Damages to Remedy Governmental Intrusions into Private Life.**[11]

Resha urges this court to follow the lead of the federal courts and of the courts of the few states which either have created direct causes of action for money damages for violation of constitutional rights or have recognized in dicta such a cause of action.[12] Init.Br. at 17-27. He relies for support primarily on the analysis and decision of the United States Supreme Court in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and its progeny. In an opinion authored by Justice Brennan, the Court created an action for damages against federal agents directly under the Fourth Amendment of the United States Constitution.[13] The Court first rejected actions for damages "in tort, under state law, in the state courts" as inadequate remedies for violation of the Fourth Amendment by federal officials. Id. at 391, 91 S. Ct. at 2002. Secondly, the Court did not find any "special factors counselling hesitation in the absence of affirmative action by

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sections 760.01-.10 and section 112.042 of the Florida Statutes. Id. at 660.

[11] Resha's sub-subpoints 2, 3, 4, and 5 have been combined for purposes of this response.

[12] The American Civil Liberties Union makes these same arguments in its Amicus Brief.

[13] Causes of action for damages against state actors for violation of the federal constitution or laws are expressly authorized by 42 U.S.C. § 1983.

Congress" to inhibit it from creating the cause of action. Id. at 397-98, 91 S. Ct. at 2005.

Applying the test established in Bivens, the Court in Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), approved an action for damages against a member of Congress for violation of an employee's constitutional right to be free from discrimination on the basis of gender. The primary rationale for the Court's decision was that there was no remedy available to rectify the congressman's discrimination except a judicially-created remedy for damages; no remedy was available in equity for reinstatement because the offending party was no longer in Congress. Id. at 245, 99 S. Ct. at 2277. In Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), the Court allowed damages for the death of a prisoner in violation of the Eight Amendment. In reaching this conclusion, the Court noted that, although a partial remedy was available under the Federal Tort Claims Act, Congress had expressly declared its intent that Bivens-type remedies were to be parallel and complementary to actions under the FTCA. Id. at 19-20, 100 S. Ct. at 1471-72.

More recently, the Court has been reluctant to create direct causes of action for damages for constitutional violations, especially when there are alternative remedies available to redress the injury. In Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983), the Court refused to allow a damages remedy for violation of a federal employee's First Amendment right to free speech. The Court noted that it was not foreclosed from exercising its judicial power even though Congress had enacted an extensive

regulatory system governing federal employees and providing equitable remedies of reinstatement and back pay for employment actions violating constitutional rights. Id. at 381-91, 103 S. Ct. 2413-17. Using the "special factors" criteria of the Bivens test, the Court declined

> to create a new substantive legal liability without legislative aid, . . . because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.

Id. at 391, 103 S. Ct. at 2417 (citation omitted). This court should likewise and for the same reason decline to create a cause of action for money damages for governmental intrusion.

Because there are "special factors counselling hesitation in the absence of affirmative action by" the Florida legislature, Bivens, 403 U.S. at 397-98, 91 S. Ct. at 2005, this court should defer to the legislature and allow it to balance the conflicting policy considerations and determine whether a damages remedy for governmental intrusion into private life would be appropriate.[14] In fact, this court in Williams v. Smith, 360 So. 2d 417, 420 (Fla. 1978), recognized that some constitutional provisions "require[] so much in the way of definition, delineation of time and procedural requirements, that the intent of the people cannot be carried out without the aid of legislative enactment." (Footnote omitted).[15]

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[14]Of course, the legislature must first decide whether to waive sovereign immunity for such an action. See the discussion in Issue **I. A.** above.

[15]The provision at issue was article 2, section 8(d), of the Florida Constitution (forfeiture of rights and privileges by public officers convicted of felony breaching public trust).

One example of legislation providing a cause of action for damages for violation of a Florida constitutional right is chapter 934 of the Florida Statutes, which implements the right in article I, section 12 to be free from the unreasonable interception of private communications. In section 934.02(5), "person" is defined to include public employees or agents as well as private actors. In section 934.10(1), the legislature provided a civil cause of action for equitable relief and for actual and punitive damages, costs, and attorneys fees against any person violating the provisions of sections 934.03-.09. In sections 934.10(2) and (3), the legislature identified the absolute defenses available to such an action and the limitations periods for bringing the action. In section 934.09, the legislature set out the procedures by which governmental agents can obtain permission to intercept private communications. Clearly, the legislature weighed competing policy considerations in deciding the exact contours of this civil action for damages.

This court should defer to the legislature and allow it to weigh the competing policy considerations and to determine whether and under what conditions a cause of action for damages for governmental intrusion would be appropriate. In addition to the basic policy decisions, the technical aspects of a civil damages action must be addressed, including the availability of defenses, privileges, or immunities; appropriate limitations periods, measure of damages, and damages caps; and the availability of pre-judgment interest, among others. There are "special factors counselling hesitation" on this issue because of the policy and technical

considerations best resolved in a legislative venue, and this court should refuse to create a cause of action for damages for governmental intrusion in the absence of legislative action. Without extensive and detailed guidelines for such a cause of action, this state could experience the danger recognized in Tharp that "the public service would be disrupted and the administration of government would be bottlenecked." 1 So. 2d at 869.

This court should not be persuaded to create a cause of action for damages under the second criteria set out in Bivens because there is an alternative remedy available to redress injuries suffered as a result of governmental intrusions into private life. In Bivens, the Court determined that it would be inappropriate to allow redress against federal officials for violations of the Fourth Amendment under the tort laws of the various states. More recently, however, the Court has recognized that state tort law does provide adequate alternatives to remedy violations of federal constitutional rights.

In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), the Court refused to allow damages in an action under 42 U.S.C. § 1983 for the negligent deprivation of property. It reasoned, first, that government could not protect against negligence because it is, by its very nature, unforeseeable and, secondly, that there was an adequate remedy under state tort law. In Hudson v. Palmer, 468 So. 2d 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), the Court extended this ruling to intentional torts. See also Emory v. Peeler, 756 F.2d 1547, 1554 n. 17 (11th Cir.

1985) (liberty interest in reputation adequately protected by defamation action under Georgia tort law).

Florida has recognized the tort of invasion of privacy since this court's decision in Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944). Resha and any other person who objects to a governmental intrusion may sue for damages under tort law. The state has waived sovereign immunity in section 768.28, so a litigant can recover damages against the state. The tort action for invasion of privacy is more appropriate than an action for damages under the constitution because the elements of the tort have been developed through decades of judicial decisionmaking and because the legislature has made policy decisions regarding the extent of the government's liability and the conditions attached to the right to recover damages.

Resha protests at pages 24-27 of his brief that a tort remedy for invasion of privacy might not result in the same compensation he would be entitled to under a Bivens-type action and that he might not be able to prove the elements of the tort. Even if this were true, such arguments do not affect the adequacy of the alternative remedy. For example, the Court in Bush v. Lucas assumed that the remedy provided by Congress for protection of the First Amendment rights of federal employees was "less than complete," 462 U.S. at 374, 103 S. Ct. at 2409, and yet it still refused to create a constitutional cause of action for damages. This point was also recognized in Economic Development Corp. v. Stierheim, 782 F.2d 952, 955 (11th Cir. 1986), when the court approved the dismissal of a claim under § 1983: "That EDOC may not

receive the same relief in state courts that it would in federal courts does not require us to hold that the available state law remedies are inadequate." Likewise, this court should find that an adequate remedy in tort exists to compensate for injuries suffered as a result of governmental intrusion.

Both Resha and the American Civil Liberties Union support their arguments that this court should adopt a Bivens-type damages action for governmental intrusion with citation to numerous cases which purportedly recognize the right to sue for money damages for constitutional violations. However, as noted by Resha on pages 22-23 and in note 13 of his brief, the courts of most states have not considered the issue, the courts of four states have refused to create causes of action for damages for constitutional violations, and the courts of only twelve other states have even considered or alluded to the issue. In the cited cases, the courts have variously referred to a direct cause of action for damages in dicta, based their decision on a Bivens-type analysis, or recognized a direct cause of action for declaratory and injunctive relief or relief in the form of extraordinary remedies. But regardless of whether the courts of other states recognize constitutionally-based damages actions, this court should not consider these decisions persuasive in deciding whether such actions should be judicially created in Florida. Florida's constitutional protection against governmental intrusion is unique. The courts of this state have spent years developing standards by which governmental intrusions are to be measured, and the decisions

of federal or other state courts have no bearing on the development of this right.

This court should approve the holding of the First District Court of Appeal refusing to create a private cause of action for damages for governmental intrusion. Nothing in the jurisprudence of this state supports the conclusion that Florida's fundamental, absolute constitutional right of privacy may be enforced by a damages action without some express constitutional or statutory authorization. Each person in this state has the right to prohibit government from intruding into his or her zone of privacy, or from presuming to make decisions that restrict how he or she will live life, or from disclosing to the public information that is of an intimate and personal nature. Without any legal authority other than that provided in article I, section 23, a natural person can seek injunctive relief to prohibit the government from doing a thing it may not do or to require it to do a thing it must. A person can seek a declaration that the authority under which the government acts, whether it is a statute, rule, or policy, is unconstitutional because it authorizes inquiries, intrusions, or disclosures which interfere with those areas of a person's life that he or she deems private. But this court should not act in a legislative capacity to waive sovereign immunity and create a cause of action for damages to remedy violations of this constitutional right, no matter how fundamental and precious.

## II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT RESPONDENT WAS NOT LIABLE FOR DAMAGES FOR DEFAMATION BECAUSE, AS A MATTER OF LAW, HER STATEMENTS WERE ABSOLUTELY PRIVILEGED.

Resha requests that this court review the ruling of the First District Court of Appeal that respondent acted within the scope of her office and was, therefore, shielded by absolute privilege from liability to Resha for money damages. Tucker, 634 So. 2d at 758-59. This court should refuse to consider this issue even though, because of its review of the certified question, it has jurisdiction over the entire case. See Feller v. State, 637 So. 2d 911, 914 (Fla. 1994). Resha simply disagrees with the district court's analysis and conclusion and believes the court to be in error. Init.Br. at 28, passim. Resha also objects that the district court "steadfastly refused to even consider" what he believes is the central question in this case: Whether respondent's actions were illegal and, therefore, outside the scope of her responsibilities and duties. Id. at 27.

It is presumed that the district court fully considered the arguments presented in reaching its decision to reverse the judgment against respondent on the defamation count.[16] The district court's entire discussion of absolute privilege related to

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[16] As Judge John Wiggington observed in State v. Green, 105 So. 2d 817, 819 (Fla. 1st DCA 1958) (on petition for rehearing):

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.

whether respondent was acting within the scope of her official responsibilities and duties. Tucker, 634 So. 2d at 758-59. Resha argued to the district court that the subject matter of respondent's statements was outside of the scope of her official responsibilities and duties and that respondent's actions were outside the scope of her duties because they violated the law and the internal policies of the Department of Revenue. In fact, every point raised in point II of his brief to this court is simply a more expansive treatment of the arguments presented to the district court. Such reargument would not have been appropriate in a motion for rehearing to the district court; it is even less appropriate for Resha to request that this court grant "rehearing" and disapprove the ruling of the district court on this issue.

Furthermore, there is no independent basis for invoking this court's jurisdiction on the defamation issue. Contrary to Resha's contention on page 1 of his brief, the decision below does not affect "a class of state or constitutional officers." In Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974), this court explained that a decision affects a class of constitutional officers only when the decision "directly and, in some way, exclusively affect[s] the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers." (Emphasis in original). This is certainly not the case with the decision below. In addition, the decision does not conflict with any decisions of this or any other court in Florida. The court below merely applied the established rules of absolute privilege in defamation actions to the facts of this case and concluded that, as

a matter of law, respondent was entitled to claim the privilege. Thus, this court should decline to reach the issues raised in point II of Resha's brief. However, if this court chooses to consider Resha's arguments, it should conclude, as did the court below, that respondent acted with the scope of her office and was, therefore, absolutely immune from liability for damages for defamation, as a matter of law.

### A. VIOLATIONS OF THE LAW ARE ALWAYS BEYOND THE SCOPE OF OFFICE, BUT NO SUCH VIOLATIONS EXISTED IN THIS CASE.

In Resha's argument on what he terms the "context prong" of his analysis of absolute privilege, he examines "the regulatory scheme governing the offending communication." Init.Br. at 28. On page 31 of his brief, he concedes that "[m]alice alone will not take an action outside the scope of authority." But, he goes on to say, "illegality will." Id. Heports his accusations of illegality by stating that respondent knew she was required by statute to "treat Resha fairly and impartially;" the Equal Protection and Due Process Clauses of the Florida Constitencies having a legitimate interest in the department's afution; by observing that government cannot punish people for belonging to, or running for office in, a union; and by relying on the after-the-fact conclusions of respondent's subordinates at the Department of Revenue that her actions violated the department's "internal checks and balances." Id. at 31-33. In essence, Resha argues that respondent's action in initiating the investigative audit of his businesses was outside the context of her responsibilities and duties because the action

was illegal and that the action was illegal because she had bad motives for initiating the investigation and audit. Id. at 31-34.

Respondent does not dispute that illegal acts are outside the scope of an executive official's responsibilities and duties. She maintains, however, that the proper question is whether the statements she made to employees of the Department of Revenue as justification for initiating the investigation and audit were made within the scope of her office, as that term is defined in the landmark case of McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966). The court in McNayr held that absolute privilege extends to executive officials in actions for defamation "[h]owever false or malicious or badly motivated the accusation may be." Id. at 430. It also quoted at length in footnote 12 from Barr v. Mateo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959), because the "dissertation so effectively presents and disposes of the arguments on both sides." Id. at 431.

In that portion of the Barr opinion quoted in footnote 12 of McNayr, the United States Supreme Court recognized that the entire doctrine of absolute privilege would be defeated if the bounds of office were necessarily overstepped whenever the exercise of power was dishonest. Rather, as quoted in McNayr, the Court in Barr broadly stated the doctrine's applicability as follows:

> "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

Id. at 431 n. 12.[18] In other words, if the Executive Director of the Department of Revenue is ultimately responsible for directing audits and for directing investigations of taxpayers and their principals in an effort to uncover tax evasion and is expected to communicate with members of her staff and other investigative agencies having a legitimate interest in the department's affairs, then motive does not render either her statements or actions illegal.

The Department of Revenue administers the tax laws of the State of Florida. § 212.18(2), Fla. Stat. (1987). Respondent was the Executive Director of the department. As such, she was its "chief administrative employee or officer." § 20.03(6), Fla. Stat. (1987). The Governor and Cabinet, as the head of the department, § 20.21(1), may employ an executive director to administer their responsibilities, which include planning, directing, coordinating, and executing the powers, duties, and functions vested in the department without limitation even when powers and duties have been assigned to a division, bureau, or section of the department. § 20.05(1), (7).

Two major divisions of the department engage in audit and enforcement activities under the Executive Director's supervision. "The responsibilities of the Division of Audits shall be to plan, organize, administer, and control tax auditing activities. The

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[18] As noted by the court in Danford v. City of Rockledge, 387 So. 2d 967, 968 n. 1 (Fla. 5th DCA 1980), "Our Florida Supreme Court ha[s] adopted a broad definition of the phrase 'scope of office' when considering claims of absolute privilege for executive officials of government. (Citations omitted).

functions of this division shall include, but are not limited to, audit selection and standards development for those taxes collected by the department." § 20.21(3)(c). "The responsibilities of the Division of Collection and Enforcement shall include tax collection and enforcement activities. The functions of this division shall include, but are not limited to, investigative services and central and field operations." § 20.21(3)(d). Within this division is a Bureau of Enforcement, which includes the Investigation Section, responsible for conducting "investigations of suspected civil and criminal violations of revenue laws, focusing on cases where civil remedies are unsuccessful in bringing about compliance. This section also provides specialized investigative assistance to other divisions, bureaus, and sections, and enforces tax on illegal drugs." Rule 12-2.0092(3)(a), F.A.C.

As the court below recognized, the jurisdiction, powers and duties of the Department of Revenue, as implemented and supervised by its Executive Director, are sufficiently broad to include discussions, audits, and investigations of any state taxpayer in order to ascertain whether the tax laws are being fully complied with, whether drug laws are being violated, and whether goods are being sold without remission of sales taxes and to verify that large cash transactions are reported. The Executive Director of the Department of Revenue was in 1988, and remains today, fully authorized by law to audit corporations and to investigate those corporations and their sole shareholders, subject only to confidentiality requirements not shown to have been breached by respondent.

Resha has not cited any internal rule, policy, procedure, memorandum or authority on pages 33-34 of his brief that would have informed respondent that her actions were outside the scope of her office. Rather, Resha asserts that, because long-time department employees Sam Alexander and Larry Wood thought, in hind-sight, that respondent's actions in ordering the audit and investigation "were improperly motivated and beyond the scope of . . . [her] legitimate authority," respondent is not entitled to the protection of the absolute privilege.[19]

Again, we come full circle to the crux of Resha's argument: Respondent had improper motivations when she ordered a Department of Revenue audit and investigation of Resha businesses; because she was improperly motivated when she initiated the audit and investigation, she was acting illegally and, therefore, outside the scope of her office; because she acted outside the scope of her office, she is not entitled to assert absolute privilege in Resha's defamation action. It is just this type of argument that this court in McNayr recognized would lead to an improper denial of the privilege:

> "[I]t can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep

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[19] There was no testimony by Mr. Alexander or by Mr. Wood that respondent violated departmental rules or policies. (T. 140-41, 167-68, 172, 177, 179, 184-85, 187) Moreover, Mr. Alexander testified that the Executive Director could initiate an audit or collection action; that the Executive Director has an obligation to come forward with information regarding a possible tax liability; that he had personally turned in questions about taxpayers, and that the department had an obligation to act on information received from outside sources. (T. 137, 140, 152)

> its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine [of absolute privilege]."

184 So. 2d at 431, n. 12 (quoting Barr v. Mateo). After considering all of Resha's arguments on this point, the district court concluded, correctly, that respondent was acting "within the scope of . . .[her] office at the Department of Revenue as a matter of law." Tucker, 634 So. 2d at 758.

### B. TUCKER'S STATEMENTS WERE WELL WITHIN THE "PERIMETERS" OF HER JURISDICTION AS EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE.

In Resha's argument on what he terms the "content prong" of his analysis of absolute privilege, he examines the "subjects of the statements" to determine if they were "beyond the outer perimeter the official's job." Init.Br. at 28, 34-44. He seeks to convince this court that the absolute privilege is not available if respondent's statements were made outside the "outer perimeter" of her duties as Executive Director of the Department of Revenue. Id. at 34 (citing Barr v. Mateo as the source of the term). On pages 34-36, Resha simply uses different terminology and different cases to make the same point he made in point II.A.: The absolute privilege is available to executive officials only when they act within the scope of the responsibilities and duties of their offices. Since respondent addressed this argument in Issue **II.A.** above, she will not repeat her argument here.

Resha contends that the "Department of Revenue is not a criminal justice agency," so that some of the criminal activities that respondent mentioned as possibly having been engaged in by Resha were not within the scope of the agency's authority to

investigate. Init.Br. at 39-41. It is true that suspected criminal activity involving pornography, illegal arms sales, and the like are investigated by FDLE or other criminal law enforcement agencies. However, respondent recognized, as an official in her position should have, that the applicable sales taxes are not typically paid by those engaged in the sale of contraband drugs, pornography, and illegal weapons and that it is proper for the department to ascertain whether taxes are being paid on those and other illegal transactions. It is also proper for the department to determine whether there are illegal transactions which incidentally evade the tax laws.[20]

Accordingly, the Department of Revenue did have authority to audit and investigate taxpayers suspected of violating criminal laws as well as tax laws, and respondent, as its Executive Director, was well within the "perimeters" of her official responsibilities and duties in initiating an audit and

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[20] For example, enforcement of narcotics laws through taxation of sales of illegal narcotics transactions was a major item in the legislature when respondent assumed her post in July 1988. The legislature had created section 212.0505 which imposed a 20% tax on illegal drugs to be collected by the Department of Revenue. In 1988, the legislature increased the tax to 50% of the price of the drug, added a 25% surcharge, and created the Drug Enforcement Trust Fund to receive half of all drug taxes and to be administered by the Department of Revenue. Ch. 88-381, §§ 15, 74, Laws of Fla. (1988).

Also, in 1987, the Department of Revenue adopted rule chapter 12-19, "Reports of Large Currency Transactions", to implement part of the "Money Laundering Control Act" eventually codified as section 896.102. The statute and regulations require reporting of large cash transactions to the Department of Revenue, and the department is charged with the "duty to enforce compliance" with the statutory reporting requirements. § 896.102(2).

investigation of Resha's businesses. Thus, all statements respondent made to her subordinates regarding Resha were made within the scope of her duties, and the district court correctly ruled that she was entitled to claim absolute privilege in Resha's defamation action.

### C. ABSOLUTE PRIVILEGE BARS THE DEFAMATION CLAIM ARISING OUT OF THE STATEMENTS MADE TO THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT INVESTIGATORS.

Resha also complains that the court below erred in holding that the absolute privilege applied to statements made by respondent to FDLE agents. Init.Br. at 41-44. He rests his argument on the recent case of Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992), in which, he contends, this court substituted a qualified privilege for the previously-recognized absolute privilege shielding statements made to law enforcement officials. Init.Br. at 42-44. Resha's reliance on Fridovich is misplaced; the district court allowed respondent the absolute privilege not because her statements were made to law enforcement agents but because they were made "within the scope of her duties." Tucker, 634 So. 2d at 759. As noted by the court below, her statements would have been privileged on this basis even if they had been made publicly to the press. Id. (citing Hauser v. Urchisin, 231 So. 2d 6, 8 (Fla. 1970)).[21]

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[21] The court in Hauser declared that:

> The public interest requires that statements made by officials of all branches of government in connection with their official duties be absolutely privileged. Under our democratic system the stewardship of public officials is daily observed by the

Respondent was interviewed by agents of the FDLE, a sister agency of the Department of Revenue, in the course of its investigation into whether the audits and investigations of Resha's businesses were legally conducted by the Department of Revenue. The FDLE pursued this investigation at the specific direction of the Governor, (T. 346-47, Pl. Exh. 17), and the Executive Director of the FDLE requested respondent's full cooperation. (T, 322, 349-50, 761) Respondent believed that, as Executive Director of the agency being investigated, she was under compulsion to respond fully to the inquiry and that her statements would be maintained as confidential. (T. 761-62) Respondent was obliged to disclose to the FDLE agents what had occurred and why it had occurred, including her own suspicions regarding Resha and his businesses. Even if her suspicions were baseless, she was absolutely privileged to express them as she did, at the request of the FDLE, in her office, and in her capacity as the senior official of the agency being investigated.

### D. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT SHOULD HAVE DECIDED THE ISSUE OF ABSOLUTE PRIVILEGE AS A MATTER OF LAW.

This court should reject out-of-hand Resha's argument that the issue of absolute privilege properly went to the jury. He again tries to focus this court's attention on respondent's motives in initiating the audit and investigation by contending that there were disputed facts as to respondent's motives, so that the jury,

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> public. It is necessary that free and open explanations of their actions be made.

Id. at 8.

as the finder of fact, was entitled to determine whether the absolute privilege applied. Init.Br. at 45-47. The only facts relevant to the absolute privilege dealt with whether respondent was acting within the scope of her office; Resha does not dispute when, where, in what context, and to whom the statements were made. The district court correctly concluded that she was entitled to the privilege as a matter of law.

The ruling of the district court reversing the defamation award against respondent should be approved. She did not act illegally or in violation of any established rule or policy of the Department of Revenue in initiating the audit and investigation which is the subject of this case. The statements she made explaining her reasons for initiating the audit and investigation to her subordinates were made within the scope of her responsibilities and duties as Executive Director, as were her statements to the agents of the FDLE. As the court below concluded, she is entitled to invoke the absolute privilege shielding executive officials of government from liability for defamation.

## CONCLUSION

For the reasons stated herein, Respondent, Katie D. Tucker, requests that this court approve in all respects the decision of the First District Court of Appeal in Tucker v. Resha, 634 So. 2d 756 (Fla. 1st DCA 1994).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of September, 1994, to:

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