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IN THE SUPREME COURT OF FLORIDA

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

ORANGE COUNTY, FLORIDA,
Petitioner,

v.

RICK SINGH, et al,
Respondents.

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

AMICUS BRIEF OF FLORIDA ASSOCIATION OF COUNTIES, INC. IN SUPPORT OF ORANGE COUNTY, FLORIDA

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STATEMENT OF INTEREST

The Florida Association of Counties, Inc. (the "Association") is a Florida not-for-profit corporation that was created specifically to protect, promote, and improve the mutual interests of all counties within the State of Florida. The Association represents all of the state's 67 counties, including Florida's 20 charter counties.

The Fifth District Court of Appeal's opinion in this case involves issues of great public importance, potentially impacting the ability of electors in charter counties to determine the selection of county constitutional officers, specifically contemplated by Article VIII of the Florida Constitution. Presently, the voters in Columbia, Lee, Leon, Orange, Miami-Dade, Palm Beach, Polk, and Wakulla Counties have adopted charter provisions providing for the election of one or more county officials on a nonpartisan basis. The Fifth District's opinion jeopardizes the enforceability of all such charter provisions and impermissibly infringes upon the home rule authority constitutionally granted to the electors in charter counties.

SUMMARY OF THE ARGUMENT

Since 1968, the Florida Constitution has granted charter counties broad home rule authority. As part of the specific grant of authority, charter counties, including Orange County, may provide the manner in which county constitutional officers, including the sheriff, tax collector, property appraiser, supervisor of elections, and the clerk of court, are selected, and may even abolish these offices.

Fundamental to the home rule changes in 1968 was the creation of the empowerment of voters to choose their form of county government. Whether elections at the county level should be partisan or nonpartisan are well within the scope of the self-governance powers given to voters in charter counties. Nothing in general law or special act approved by the voters preempted the ability of Orange County citizens to choose that its county constitutional offices should be nonpartisan in nature. In fact, Article VIII, § 1(d) and (g) so authorize and in concluding otherwise, the Fifth District relied on inapplicable legal authority, ignored the history of home rule in Florida, and applied an incorrect legal standard to evaluating the charter provision at issue.

STANDARD OF REVIEW

Amicus Curiae adopts the Standard of Review set forth within Orange County's Initial Brief.

ARGUMENT

THE FLORIDA CONSTITUTION GRANTS THE PEOPLE OF FLORIDA THE RIGHT TO CHOOSE THEIR FORM OF COUNTY GOVERNMENT.

A key feature of county government is the constitutional officers and the role they play in executing county policies and state mandated duties at the local level. Floridians ratified their right to choose this role for themselves by approving the 1968 Home Rule Amendments to the Florida Constitution. Prior to the home rule

amendments, the basic form of county government was an elected county commission which established policy and made legislative decisions and countywide elected, commonly referred to, "constitutional officers" (the tax collector, the property appraiser, the supervisor of elections, the clerk of the court, and the sheriff). The constitutional officers carried out state mandated duties and policies enacted by the county commission. In addition, prior to 1968, Florida was a Dillon's Rule state in terms of local government authority. No local government – city, county, special district – could enact or execute any policy unless that policy was expressly authorized by the Legislature. Accordingly, before 1968, Florida county government followed centuries-old models and forms.

However, the 1968 Home Rule Amendments to the Constitution changed this landscape in two key areas for purposes of this case: (1) the people of a county could choose the manner in which the responsibilities of the constitutional officers were executed;[1] and (2) charter counties[2] could enact any policy that was not inconsistent

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[1] See *Art. VIII, §1(d), Fla. Const*. ("There shall be elected by the electors of each county, . . . a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by the vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office").

[2] See *Art. VIII, §1(g), Fla. Const*. ("Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors").

with legislative acts.[3] The practical implication of these novel home rule provisions with respect to constitutional officers and the form of county government is that, over the course of the decades, Floridians have chosen to exercise their rights in this areas in several respects:

- Currently, 13[4] of the 20[5] charter counties have altered the constitutional offices in some regard, up to and including abolishing the offices altogether.
- Three[6] of the 20 charter counties have created an elected executive form of county government where the chief executive of the county is a countywide elected position.
- Voters in 11[7] of the 20 charter counties in the state have term limits on the office of county commissioner.

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[3] The grant of home rule to county commissions was directly from the people of Florida, through the Constitution, for charter counties. Non-charter counties required legislative implementation for full home rule authority to be granted. That legislatively provided home rule for non-charter counties came in amendments to Chapter 125, Florida Statutes, during the 1969 (*Ch. 69-234, Laws of Fla*.) and 1971 (*Ch. 71-14, Laws of Fla.)* legislative sessions.

[4] Brevard, Broward, Clay, Duval, Lee, Leon, Miami-Dade, Orange, Osceola, Palm Beach, Polk, Sarasota, and Volusia Counties.

[5] Alachua, Brevard, Broward, Charlotte, Clay, Columbia, Duval, Hillsborough, Lee, Leon, Miami-Dade, Orange, Osceola, Palm Beach, Pinellas, Polk, Sarasota, Seminole, Volusia, Wakulla Counties.

[6] Duval, Miami-Dade and Orange Counties.

[7] Brevard, Broward, Clay, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Polk, Sarasota and Volusia Counties.

- Voters in seven[8] of the 20 charter counties have made one or more of the constitutional offices nonpartisan.

- Voters in two[9] of the 20 charter counties have reinstated term limits for constitutional officers after this Court receded from its opinion invalidating those term limits in *City of Jacksonville v. Cook*, 765 So.2d 289 (Fla. 2000) in *Telli v. Snipes*, 98 So. 3d 1284 (Fla. 2012).

There is great wisdom in the broad local control measures that the voters approved in 1968 in this state. "In responding to the need for change, state lawmakers began to take notice of a growing national home rule movement which seemed to offer partial solutions for Florida's local problems." *See*, "*Charter County Government in Florida: Past Litigation and Future Proposals,*" 33 U. Fla. L. Rev. 505, 508-09 (1981). "Home rule, in its purest sense, dictates that *the electorate of each county determine what particular governmental structure is needed, rather than having a specific form of government imposed it*." *See id.* at 508-091 (*emphasis added*). This article summed up the legislative history of the 1968 constitutional proposals as noting that "the two primary objectives of charter government were to reduce the demand for local bills in the legislature and *to allow citizens greater latitude in forming the county plan most responsive to their needs*." *See, id. at 510*

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[8] Columbia, Lee, Leon, Orange, Palm Beach, Polk and Wakulla Counties.
[9] Duval and Orange Counties.

(emphasis added). Fundamental to this "county plan" is being able to choose whether elected county offices are partisan or non-partisan in nature. That choice was granted to the people of Florida in 1968 and the Fifth District incorrectly ruled otherwise.

A. The Florida Legislature Has Not Preempted The Ability Of Voters In Charter Counties To Select The Partisan Nature Of The Constitutional Offices.

The test for whether a charter provision is unconstitutional is whether that provision is inconsistent with general law or with a special act approved by the voters. *See Art. VIII, section 1(g), Fla. Const.* Absent either express or implied preemption or inconsistency, a charter provision is lawful. Express, specific constitutional or statutory language is NOT required.

Interestingly, Volusia County's charter history provides a poignant example of how the Legislature has chosen to preempt charter counties and their voters from altering the partisan nature of the county constitutional offices. During the 1969 legislative session, immediately following the 1968 constitutional revisions, the Legislature created the "Volusia County Charter and Study Commission," appointed its members, and charged the Commission with drafting a charter for Volusia County. *See, Ch. 69-1704, §6, Laws of Fla.* A year later, the Legislature up took up the recommendations of the Volusia Charter Commission during the 1970 legislative

session and enacted Chapter 70-966, Laws of Florida which proposed a charter for Volusia County to be approved by its voters.

The Volusia County charter, as proposed by the Legislature and adopted by the voters, abolished the offices and transferred the duties of the clerk of the court, the sheriff, the property appraiser, the tax collector, and the supervisor of elections to newly created departments. *See, §§ 601.1, 601.2, Ch.70-966, Laws of Florida*. These newly created department directors were to remain elected positions but the Volusia voters also approved nonpartisan elections for all these new department directors. *See, Ch. 70-967, §§ 1, 2, and 3, Laws of Florida.*

Volusia's history is instructive. While a charter proposal that originates as a special act of the Legislature carries the same dignity of law as that proposed by county ordinance or local charter review commission, it is not without significance that the Legislature was directly on notice, as it voted as an entire legislature, on this charter proposal that county constitutional offices could be altered to be nonpartisan. The Legislature had this notice and took this action in the same statutory environment that exists today: one where no express provision of law prohibited, preempted or was in conflict with the proposed Volusia Charter. It can be presumed that if the Legislature felt it needed such supplemental, express authority or was otherwise voting in a way that was inconsistent with other general or special laws, it would have either rejected the Volusia proposal or it would have otherwise amended

the statutory scheme. The Legislature did neither. Instead, it approved a direct, clear, express charter authority, for the Volusia County electors to choose for themselves whether county constitutional officers should be partisan or nonpartisan in nature.[10]

Accordingly, had the Legislature intended to preempt the right of the voters of charter counties to impose nonpartisan elections on their county officers, the Legislature should have stated that intention clearly. The revisions to the Constitution in 1968 provided home rule for the people of Florida in local affairs and allowed charter counties to have all powers of self-government not inconsistent with state law. For that reason, the authority granted to charter counties is liberally construed to effectuate the will of the local voters. Legislation preempting the express will of the voters is compelled to expressly state its intent and opponents of local decisions should not be empowered to challenge the will of the voters from the shadows of legislative silence.

B. The Fifth District Applied Inapplicable Law In Concluding That The Voters Of Orange County Could Not Elect Their County Officers In Nonpartisan Elections.

The Fifth District relied, in part, on *In re Advisory Opinion to the Governor*, 313 So. 2d 717 (Fla. 1975) and the *Opinion of the Florida Attorney General* 86-82

[10] Since the adoption of the Volusia County charter in 1970, the voters of Columbia, Lee, Leon, Orange, Palm Beach Polk, and Wakulla Counties have made one or more of their county officers elected by nonpartisan race.

(1986) for the proposition that Article VIII, section 1(d) does not authorize Florida voters, through county charters, to provide for the election of county officers by nonpartisan elections. The Fifth District below stated "That provision simply authorizes a charter county to select its county constitutional officers in some other manner than by election. It does not grant a charter county the power to regulate elections for those officers." *See Orange Cty. v. Singh*, 230 So. 3d 639, (5th DCA 2017). The Fifth District's reliance on these authorities was misplaced because (1) the facts underlying the Supreme Court's advisory opinion are not applicable to the present case; and (2) the standard of interpretation inferred by the Fifth District is not the correct standard for determining whether a charter provision is a lawful exercise of the constitutional power of local self-government.

The Supreme Court issued its opinion in *In re Advisory Opinion to the Governor*, 313 So. 2d 717 (Fla. 1975), in response to a request from Governor Askew as to his authority under the 1968 constitution to fill a vacated Tax Collector office in Sarasota County. The Sarasota charter provided a local method for filling the vacated office that was different than how Governor Askew viewed his authority to fill the vacancy. The Advisory Opinion was premised on the 1968 constitutional amendment to Article IV, section 1(f) which changed the Governor's authority to

fill vacancies.[11] The facts and issue of the Advisory Opinion are inapplicable to the present case very simply because the Governor's powers under Article IV, section 1(f), Florida Constitution are not at issue in this case and neither is the issue of how to fill an unexpired county office term at issue. Accordingly, the resulting interpretation cannot apply to the question of whether a county charter may provide for non-partisan elections.

Article VIII, section 1(d), Florida Constitution (1968) establishes a default model for county government, and provides a local option to diverge from this model. It states in pertinent part:

> There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by

[11] Specifically, the amended Constitution required that the manner of filling a vacancy be provided for in the constitution. This requirement was in contrast to the 1885 constitution which had provided that the Governor could fill a vacancy only if "no mode is provided by this Constitution or by the laws of the State." Accordingly, before the 1968 revision, the Governor only had the power to fill vacant offices if no other method was provided. After the revision the Governor could fill the office unless the constitution otherwise specified. *In re Advisory Opinion to the Governor*, 313 So. 2d 717 (Fla. 1975) narrowly construed the text of Article VIII, section 1(d), Florida Constitution (1968) *in pari materia* with the Governor's authority to fill a vacant county office as amended by the1968 revision to the Constitution and determined that ability to choose an officer in another manner found in Article VIII, sec. 1(d), "does not deal with vacancies in office but rather deals with the filling of an office for a specified time," noting that the "question of vacancies in the Constitution is treated separately from the question of normal elections."

> county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office.

In interpreting this provision, the Fifth District's opinion below references an Attorney General's Opinion, which concluded that Article VIII, section 1(d) "merely authorizes a charter providing for the selection of county officers in another manner than election; it does not authorize the charter to regulate the manner of election of these officers."

However, Attorney General Opinion 86-82, like the Fifth District's opinion relying on it, did not consider the textual history of Article VIII, section 1(d) relevant to determining the authority to provide for the election of county officers. In 1968, the express grant of authority to the electors to choose the manner of selection for county officers was added to the constitution simultaneously with the *removal* of specific language requiring the Legislature to "provide for the election." Article VIII, section 6, the comparable provision in the 1885 constitution, stated: "*The Legislature shall provide for the election* by the qualified electors in each County of the following County Officers: A Clerk of the Circuit Court, a Sheriff, Constables, a County Assessor of Taxes, a Tax Collector, a Superintendent of Public Instruction and a County Surveyor[.]" *See id.* In contrast, the 1968 revision removed the

authority for providing for the election of constitutional officers from within the sole purview of the Legislature and placed it under the scope of county charters or special acts of the Legislature approved by the voters. In the 1885 removed clause, it was clear that the Legislature would provide for the manner by which the elections of the county officers would take place. In the 1968 revision, the framers instead allowed for a county charter or special law to provide for the manner by which the officers would be chosen. Had the drafters wished to expressly provide the Legislature with the continued, sole constitutional responsibility to provide for all elections, they certainly could have done so.

The Fifth District's reliance on *In re Advisory Opinion to the Governor*, 313 So. 2d 717 (Fla. 1975) and *Florida Attorney General Opinion* 86-82 (1986), is further in error because the reliance on those authorities resulted in the application of the wrong standard of interpretation. In rejecting the argument that Article VIII, section 1(d) provided for the manner of election of county officers to be established by county charter, the Fifth District below held that the provision "simply authorizes a charter county to select its county constitutional officers in some other manner than by election. It does not grant a charter county the power to regulate elections for those officers." *See, Orange County v. Singh, 230 So. 3d 639, 642 (Fla. 5th DCA 2017).* However, the standard that the Fifth District inferred -- whether the

Constitution has *authorized* a charter county's action -- is not the appropriate standard by which to evaluate a county charter provision.

C. Florida's History On Choosing County Forms Of Government Supports The Conclusion That Charter Counties Can Alter The Partisan Nature Of County Offices.

The 1968 Constitution provides broad authority to charter counties and their citizens to govern themselves, including the ability to determine the manner by which county officers are chosen. However, this ability to choose the manner by which county officials were selected was not completely new. Since its adoption in 1956, the Dade County Home Rule Amendment had expressly allowed for local choice over the manner by which county commissioners were elected, including the provision of nonpartisan elections for county offices.

The Dade County provision requiring nonpartisan elections was unsuccessfully challenged as being outside the scope of constitutional authorization provided in the Dade County Homerule Amendment. In *Dade County v. Young Democratic Club*, 104 So. 2d 636 (Fla. 1958), this court upheld the authority for the charter to provide for non-partisan elections, finding that the scope of the words "method of election" included non-partisan elections. The court determined that the "method" of election pertained to "the way or means of doing a thing" and was synonymous with "the mode, plan, design or manner in which a project is executed."

See, id. at 639*; see also, Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1937)*(establishing that the primary meaning of the word "election" is "choice").*

The 1968 revision to the constitution largely rewrote Article VIII, Local Government, and greatly expanded the ability of voters, through their local governments, to manage their affairs without specific authorization from the Legislature. When the voters of the State went to the polls on November 5, 1968 to vote on the new constitution, the question on the approval of the Local Government Article was a separate ballot question from the rest of the revisions. The ballot language asking the voters to approve the new Local Government article of the Constitution provided in relevant part:

> No. 3 Revision of Article VIII Local Government. Proposing a Revision of Article VIII of the Constitution of the State of Florida relating to counties and municipalities, providing for creation of counties by law, … *allows method of election of certain elective officials to be changed or office abolished when prescribed in the county charter or by special law approved by the voters*…[12]

The ballot summary that the voters saw used the phrase found in the Dade County Homerule Amendment: "method of election." Significantly, the ballot summary was

[12] General Election Ballot, November 5, 1968, FSA, Series 2363, Carton 1, Folder 19.

drafted to provide that the discretion as to the "method of election" applied to "elective" officials such as the sheriff, supervisor of elections, tax collector, property appraiser, and clerk of court.

The significance of the words used is not likely to have escaped the members of the 1967-68 Constitutional Revision Commission ("CRC"), who were the primary drafters of the 1968 revision. The Chair of the Style and Drafting Committee of the 1967-68 CRC was Second Circuit Judge Hugh Taylor. Judge Taylor authored the circuit court opinion that was overturned by the Florida Supreme Court[13] to allow the Dade County Homerule Amendment on the ballot in 1956. *See, "Dade Rule Question Returned to Ballot," The Orlando Sentinel, 8 Sep 1956, p 13.*

The framers' choice to include a phrase that is synonymous with an existing phrase is evidence of the framers' adoption of the meaning of the phrase in the earlier constitution. Had the framers intended the section to merely authorize a decision between electing, appointing, or abolishing the office, they would not have chosen a phrase synonymous with the phrase in the 1885 Constitution. Adopting the interpretation of the courts in the cases construing the Dade County Homerule Charter avoids the highly limiting result of the Fifth District's interpretation, which would allow for only three options to select the county officers: (1) election every four years, (2) abolition of the office, or (3) some manner of appointment for four-

[13] *See, Gray v. Golden*, 89 So. 2d 785 (Fla. 1956).

year terms without the ability to locally remove the official between terms or the ability to fill the office once it becomes vacant.

The Fifth District's embrace of the strict construction of *In re Advisory Opinion to the Governor* (1975) undermines the broad grant of homerule authority, which is at odds with this Court's guidance in *Telli v. Broward County*, 94 So. 2d 504, 513 (Fla. 1977) that "[i]nterpreting Florida's Constitution to find implied restrictions on powers otherwise authorized is unsound in principle." The Fifth District should have construed the text in Article VIII, section 1(d) in pari materia with the grant of power in Article VIII, section 1(g) granting charter counties all powers of self-government not inconsistent with general law. Similar to the case in *Dade County v. Young Democratic Club*, this analysis would have breathed life into the will of the voters and been in harmony with the broad grant of homerule powers in the Constitution.

CONCLUSION

Amicus Curiae, in support of Orange County, respectfully asks this Court to reverse the Fifth District Court of Appeal's opinion and to uphold the will of the voters and the wisdom of the drafters of the 1968 constitutional provisions, allowing electors in charter counties to choose the partisan nature of their county constitutional officers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Amici Curiae hereby certified that this Amicus Brief is typed in 14 point Times New Roman, in compliance with Fla.R.App.P. 9.210.

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