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IN THE SUPREME COURT OF FLORIDA

Case No.: SC14-924

JAMES APTHORP

Petitioner,

vs.

KEN DETZNER, as Secretary of State of Florida

Respondent.

BRIEF OF FIRST AMENDMENT FOUNDATION, INC.; MORRIS PUBLISHING GROUP, LLC, d/b/a *THE FLORIDA TIMES-UNION*; FLORIDA PRESS ASSOCIATION, INC.; THE ASSOCIATED PRESS; THE MCCLATCHY COMPANY (OWNER OF *THE MIAMI HERALD, EL NUEVO HERALD* AND *THE BRADENTON HERALD*); ORLANDO SENTINEL COMMUNICATIONS COMPANY, LLC d/b/a *ORLANDO SENTINEL*; SUN-SENTINEL COMPANY, LLC d/b/a *SOUTH FLORIDA SUN SENTINEL*; FLORIDA SOCIETY OF NEWS EDITORS; *THE NEWS-PRESS*; *PENSACOLA NEWS JOURNAL*; *FLORIDA TODAY*; *THE TALLAHASSEE DEMOCRAT*; FIRST COAST NEWS; AND WTSP-TV AS AMICI CURIAE

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TABLE OF CONTENTS

I.	TABLE OF CONTENTS	ii
II.	TABLE OF AUTHORITIES	iii
III.	IDENTITY OF AMICI AND STATEMENT OF INTEREST	1
IV.	SUMMARY OF THE ARGUMENT	2
V.	ARGUMENT	
	A. The Primary Purpose of the Sunshine Amendment is to ensure that the Florida citizenry is *fully* apprised of an elected official's financial conflicts of interest.	3
	B. While the Sunshine Amendment grants the Legislature Authority to adopt heightened disclosure requirements, The Legislature does not have the authority to make Disclosure more limited than the Constitution requires.	7
VI.	CONCLUSION	11
VII.	CERTIFICATE OF SERVICE	12
VIII.	CERTIFICATE OF TYPEFACE COMPLIANCE	13

TABLE OF AUTHORITIES

Cases

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976), *superseded by statute* 10

Dep't of Rev. v. Fla. Boaters Ass'n, Inc. 409 So. 2d 17, 19 (Fla. 1981) 8

Florida Supreme Court Judicial Ethics Advisory Committee Opinion 97-33 5

Plante v. Smathers, 372 So. 2d 933, 937 (Fla. 1979) 4, 9

Richardson v. Richardson, 766 So. 2d 1036, 1038 (Fla. 2000).....8

Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980) 2

State v. Florida State Improvement Comm'n, 47 So. 2d 627, 630 (Fla. 1950) 8

State v. McMillan, 38 So. 666, 667-68 (Fla. 1905) 1

Constitution and Statutes

5 U.S.C. app. §§ 101-111.....7

Fla. Const. art. II, § 8(h).....8, 10

Fla. Const. art II, § 8(a).....2, 3, 10

Fla. Stat. § 112.31425(4).....6

Fla. Stat. § 112.31425(5).....2, 3, 5

Rule 9.370 Florida Rules of Appellate Procedure 1, 11

Other

Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 Kan. L. Rev. 43, 59 (2007).....5, 10

Louis D. Brandeis, Other People's Money 92 (1932) 10

Robert Smith, Just How Blind are Blind Trusts, Anyway?, National Public Radio (July 20, 2012, 4:11PM), http://www.npr.org/blogs/money/2012/07/20/157119003/just-how-blind-are-blind-trusts-anyway 5

Website for United States Office of Government Ethics, http://www.oge.gov/Laws-and-Regulations/Statutes/5-U-S-C--app--4-§§-101-111---Public-financial-disclosure-requirements/ 7

Pursuant to Rule 9.370 Florida Rules of Appellate Procedure, the First Amendment Foundation, Inc.; Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*; Florida Press Association, Inc.; The Associated Press; The McClatchy Company (owner of *The Miami Herald*, *El Nuevo Herald* and *The Bradenton Herald*); Orlando Sentinel Communications Company, LLC d/b/a *Orlando Sentinel*; Sun-Sentinel Company, LLC d/b/a *South Florida Sun Sentinel*; Florida Society of News Editors; *The News-Press*; *Pensacola News Journal*; *FLORIDA TODAY*; *The Tallahassee Democrat*; First Coast News; and WTSP-TV (collectively, "Amici"), respectfully submit this brief and would show the Court as follows:

I. IDENTITY OF AMICI AND STATEMENT OF INTEREST

The Amici are organizations and media outlets devoted to ensuring that the citizenry's constitutional guarantee of open government is not diluted and that Florida's government is conducted in the sunshine, subject to the searching view of the public. While the Amici are organizations and media outlets, they file this brief for the benefit of all Floridians whom the constitutional guarantees of open government and transparency are intended to benefit.

Florida has a long history of requiring that its government operate in the "sunshine." Indeed, as early as 1905, the Florida Supreme Court stressed Florida's commitment to open government. *State v. McMillan*, 38 So. 666, 667-68 (Fla.

1905). Most people do not obtain information by first hand observation or work of mouth, but chiefly acquire information through the print and electronic media. In that sense, the media function as a surrogate for the public at large. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1983).

The Amici are frequently confronted with the opportunity to report on and inform the citizenry of campaign issues, including possible conflicts of interest of office holders and candidates for public office. However, because of the unconstitutional barrier to access discussed in the instant Petition, the Amici have been unable to fully inform the public of the financial interests and possible conflicts of interests of Florida's elected officials. The Amici have a strong interest in seeking what the constitution demands — disclosure.

II. SUMMARY OF THE ARGUMENT

Article II, Section 8(a), Florida Constitution, implements a single mechanism to ensure that elected officials and candidates for public office are not tied to special interests. That mechanism is *disclosure*. Despite Respondents urgings, nothing short of disclosure will satisfy the constitutional mandate.

In enacting section 112.31425(5), the Legislature authorized a mechanism by which elected officials attempt to remove themselves from a conflict of interest. However, the citizenry has already established the only mechanism by which conflicts of interest are avoided — full and public disclosure. The Sunshine

Amendment authorizes the Legislature to adopt stricter requirements for disclosure, but expressly forbids legislation that makes such disclosure more narrow than the Constitutional mandate. *See* Fla. Const. art. II, § 8(a) ("This section shall not be construed to limit disclosures . . . .").

Because section 112.31425(5) limits the disclosure requirements of office holders and candidates for public office, that statute is unconstitutional and it is this Court's solemn duty to declare it void.

III. ARGUMENT

A. The Primary Purpose of the Sunshine Amendment is to ensure that the Florida citizenry is *fully* apprised of an elected official's financial conflicts of interest.

In 1976, the Florida citizenry adopted an amendment, now enshrined in the Florida Constitution, entitled Ethics in Government, but commonly referred to as the "Sunshine Amendment." In pertinent part, the amendment provides:

> SECTION 8. Ethics in government.-- A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file *full* and *public* disclosure of their financial interests.

Fla. Const. art. II, § 8(a) (emphases added). The Sunshine Amendment, which represents the first successful attempt to amend the Florida Constitution by citizen initiative, establishes an unambiguous mechanism to guard against abuses of public

trust: full and public disclosure.

Indeed, while Respondent touts blind trusts as an effective mechanism for avoiding conflicts of interest, this Court has previously recognized that deterrence of conflicts is merely one of several legitimate concerns advanced by the people. *See Plante v. Smathers*, 372 So. 2d 933, 937 (Fla. 1979). In *Plante*, this Court explained that there are four legitimate concerns that the Florida citizens advanced: (1) the public's right to know an official's interests, (2) deterrence of corruption and conflicting interests, (3) creation of public confidence in Florida's public officials, and (4) assistance in detecting and prosecuting officials who violate the law. Of those concerns, the most important is the public's right to know an official's interests. *Id.* ("Of utmost importance of our determining the intent of the people in adopting article II, section 8(a) and (h), is their expressed desire to be informed as to the personal finances of those they will be voting to put into office . . . .").

Despite Respondent's urgings, the people of Florida have already established that the proper mechanism for determining whether a conflict of interest exists is disclosure. Nothing short of full and public disclosure will satisfy the constitutional directive because the people have already established that they are the only appropriate judge of a candidates' possible conflict of interest.

In 2013, the Legislature changed that calculus. Rather than disclosing a particular holding, section 112.31425, Florida Statutes, allows an office holder or

candidate for public office to avoid disclosure of his or her financial interests in that holding by the creation of a "blind trust." § 112.31425(5), Fla. Stat. ("The public officer is not required to report as a secondary source of income any source of income to the blind trust."). In doing so, the candidate or office holder attempts to shield the candidate's holdings from himself or herself in an attempt to avoid a conflict of interest. The problem with this device is that it also shields the existence of the holdings from the public — which is the opposite of what the Florida citizenry sought to accomplish with the Sunshine Amendment.

Moreover, the effectiveness of a blind trust is subject to debate. *See* Robert Smith, *Just How Blind are Blind Trusts, Anyway?*, National Public Radio (July 20, 2012, 4:11PM), http://www.npr.org/blogs/money/2012/07/20/157119003/just-how-blind-are-blind-trusts-anyway ("Well, all trusts are not created equal."); *see also* Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 Kan. L. Rev. 43, 59 (2007) ("[T]he existence of a blind trust may appear to eliminate the possibility that a conflict of interest will arise for a policymaker, when it in fact does not. A blind trust does not automatically shield a policymaker from conflicts."); Florida Supreme Court Judicial Ethics Advisory Committee Opinion 97-33, *available at* http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/ninet7/97-33.html (stating that a conflict of interest still exists where a judge rents office space to attorneys that appear before the judge, even though the office building is

managed under a "blind trust," which precludes the judge's involvement in the management of the building).

It should also be noted that the new section 112.31425, Florida Statutes, does not establish a truly blind system. There are many exceptions which allow the trustee to communicate with the elected official and knowledge about trust assets which the elected official will know. For example, the original assets in the trust are known to the public official. While the trustee could replace some assets, the likelihood of the trustee replacing all of the assets is miniscule. The public official is allowed to communicate with the trustee about maximizing trust assets, Fla. Stat. § 112.31425(4)(b), which include the assets that existed at the time the trust is established and which the official already knows about. Although the official is not to know about the assets, the statute provides that the official can instruct the trustee to divest the trust of assets which would create a conflict of interest. Fla. Stat. § 112.31425(4)(d).

Notably, there is nothing in section 112.31425 regarding full and fair disclosure to the public. Nor could there be, because disclosure to the public would necessarily be disclosure to the public official. Thus, even if section 112.31425 established a truly blind trust, it would only protect one of the public's interests in the constitutional guarantee — conflicts of interest — while eviscerating the other — open access to information by the public at large. Even

the federal disclosure statute recognizes "disclosure as an end in itself." See 5 U.S.C. app. §§ 101-111; *Website for United States Office of Government Ethics*, http://www.oge.gov/Laws-and-Regulations/Statutes/5-U-S-C--app--4-§§-101-111--Public-financial-disclosure-requirements/.

Because the Constitution demands nothing less than full and public disclosure, this Court should determine that section 112.31425, Florida Statutes, is unconstitutional and issue an extraordinary writ of mandamus directing the Secretary of State to comply with the Sunshine Amendment.

B. While the Sunshine Amendment grants the Legislature authority to adopt heightened disclosure requirements, the Legislature does not have the authority to make disclosure more limited than the Constitution requires.

The Sunshine Amendment grants the Legislature the authority to implement stricter requirements for disclosure, but does not allow the Legislature to adopt legislation that undermines its very purpose. In pertinent part, the Amendment provides:

> *(h) This section shall not be construed to limit disclosures* and prohibitions which may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.
>
> (i) Schedule--On the effective date of this amendment and until changed by law:
>
> (1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of $1,000 and its value together with one of the following:

Fla. Const. art. II, § 8(h) (emphasis added). This Court has previously held that "where constitutional provisions are clear and explicit in terms, or made so by the history of their adoption and by long continued application and recognition in governmental proceedings, the legislature cannot give the provisions a meaning in conflict with their clear and explicit terms." *State v. Florida State Improvement Comm'n*, 47 So. 2d 627, 630 (Fla. 1950); *accord Dep't of Rev. v. Fla. Boaters Ass'n, Inc.* 409 So. 2d 17, 19 (Fla. 1981) ("The flexibility thus granted to the Legislature does not empower it to depart from the normal and ordinary meaning of the words . . . .").

As this Court stated in *Plante*, the people's utmost desire in adopting the Sunshine Amendment was to be informed of each candidates' personal finances. *Plante*, 372 So. 2d at 937. Through this Amendment, the people established that they were the best judge of whether a conflict of interest existed. A statute that prohibits disclosure is the antithesis of this requirement.

Respondent argues that adoption of section 112.31425 is "laudable." This argument suffers from a number of deficiencies. First, the fact that a statute is laudable has absolutely no bearing on whether it passes constitutional muster. Indeed, this Court has recognized that the Legislature's good intentions are irrelevant in determining the constitutionality of a statute. *Cf. Richardson v. Richardson*, 766 So. 2d 1036, 1038 (Fla. 2000) ("While we recognize the obvious

good intentions of the Legislature in passing this legislation as well as the grandparent visitation legislation, we disagree with both of the grandmother's contentions."). Second, the Respondent has set up a strawman. The Respondent argues that "the Legislature acted consistent with the purpose of the Amendment." (Answer at p. 17). This assumes that the citizenry had only one purpose in adopting the amendment, which has already been squarely rejected by this Court. *See Plante*, 372 So. 2d at 937. Moreover, to the degree to which there was one purpose, the purpose was to allow the citizens the opportunity to determine for themselves whether a conflict of interest exists through disclosure. A law that limits disclosure runs afoul of subsection (h). Fla. Const. art. II, § 8(h); *see also Plante*, 372 So. 2d at 937 ("[T]he evils to be remedied by the constitutional provision must be constantly kept in view, and the provision must be interpreted to accomplish rather than to defeat them.").

One of the principal tenets of our republican form of government is that the electorate has the opportunity to make an enlightened choice on those individuals who will govern. In Florida, the people have expressly declared that they are the arbiter of conflicts of interest, they are the judge of credibility, and they are the ones who determine whether a candidate in suitable for public office. Section 112.31425(5) defines "full and public disclosure" in a manner that is in contravention of the Sunshine Amendment. By its very terms the statute enables a

candidate for public office to hide financial information from the electorate. Accordingly, it conflicts with the Florida Constitution and cannot stand. Fla. Const. art. II, § 8(h) ("This section shall not be construed to limit disclosures . . . .").

Article II, Section 8(a) is aimed at the perception, as well as the reality, that a public official's personal interest may influence a decision. Even the appearance of impropriety undermines faith in the democratic process. For that reason, the Florida electorate recognized that openness in the democratic process leads to accountability. *See generally Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976), *superseded by statute* ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). As Justice Louis Brandeis famously stated, "sunlight . . . is the best of disinfectants." *See* Louis D. Brandeis, Other People's Money 92 (1932).

Professor Ballard recognized the same in her 2007 law review article that focused on the shortcomings of so-called "blind" trusts. In pertinent part, she stated:

> Requiring officials to disclose the identity of their financial interests on public financial disclosure forms puts the burden on the public to discover a potential conflict of interest. Once financial interests are disclosed and a potential conflict brought to light, a policymaker could present evidence that no conflict is posed, seek a waiver from conflict of interest rules,

> divest himself of the interest, or recuse himself from official decision-making related to the private interest

The Florida electorate agreed and adopted the Sunshine Amendment, requiring all office holders and candidates for public office to provide a *full and public* financial disclosure. Because section 112.31425(5), Florida Statutes, conflicts with this requirement, it is unconstitutional and must be struck down.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the relief requested in the Emergency Petition.

Respectfully submitted,

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Counsel for Amici Curiae certifies that this Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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