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IN THE SUPREME COURT OF FLORIDA

JAMES APTHORP,

Petitioner,

vs. Case No.: SC 14-924

KEN DETZNER, as Secretary of State of Florida,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Petition before the Court presents a pure question of law: Whether use of a blind trust in financial disclosures by constitutional officeholders and candidates for those offices satisfies the constitutional mandate that disclosure must be full and public.

The Petition was brought against the Secretary of State, who is both custodian of the state statutes and Florida's chief elections official. The Petition contains no factual controversies that warrant transfer of the case to trial court, and the requested remedies would affect Democrats and Republicans equally. It is not a partisan effort.[1]

This Reply addresses only issues related to the facial unconstitutionality of the so-called "qualified blind trust" statute, § 112.31425, Fla. Stat., and to the Court's ability to hear and resolve the questions raised in the Petition.

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[1] Some news coverage has suggested that the Petition was partisan because, when it was filed, Governor Rick Scott was the only official and the only candidate known to the Petitioner to file a blind trust in his financial disclosure reports. To Scott's credit, his campaign manager wrote a letter to the Secretary of State after the petition was filed, stating that, "whatever the rules are, the governor will gladly comply with them." Assoc'd Press, *Scott says he will obey law on fin. disclosure*, The Fla. Times-Union (May 15, 2014), available at http://jacksonville.com/news/politics/2014-05-15/story/scott-says-he-will-obey-law-financial-disclosure. This is consistent with Scott's conduct in seeking advice from the Commission on Ethics and obtaining a statute authorizing blind trusts. Even if a ruling here affects him, that is irrelevant to the pure legal question.

I. THE LEGISLATURE DOES NOT HAVE POWER TO LESSEN FULL AND PUBLIC DISCLOSURE OF FINANCIAL INTERESTS.

The central issue in this matter and the major conflict between the parties is the scope of legislative authority. Understandably, the Respondent looks to the opening words of Article II, Section 8(i), Constitution of Florida, which states that the Legislature has authority to define "full and public disclosure of financial interests." Focusing only on this language ignores both the history of the Sunshine Amendment (Art. II, § 8(a), Fla. Const.) and provisions made to assure that its terms would not be watered down by the Legislature.

Governor Reubin Askew and his staff were especially concerned that any new law should keep disclosure both full and public. They established the basics of disclosure by law in the schedule (now Art. II, § 8(i), Fla. Const.), but first declared that the amendment "*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." Art. II, § 8(h), Fla. Const. (emphasis added).

This language allows the Legislature to modify financial disclosure, but not in any way that would make it less than full and public or otherwise weaken the constitutional guarantees. The Respondent's submission would read the § 8(h) prohibition against limiting disclosure out of the Constitution.

The State Archives of Florida provides a great deal of information about the drafters' intent, including a letter from Askew to the Legislature written little more than four months after voters overwhelmingly passed the amendment:

> …. The [Sunshine] amendment establishes *a foundation and a framework* on which we can add the specificity that statutes permit.
>
> I am confident the Legislature will respect the expressed desires of the vast majority of Florida voters and move, in good faith, to carry out the will and intent of the voters, However, *we in government cannot accept a retreat from this constitutional mandate.*

Ltr. from Gov. Reubin O'D. Askew to the Fla. Legis. (Mar. 15, 1977), St. Archives of Fla., series 70, carton 24 (emphasis added).

A briefing paper from Askew's files in the Archives calls full and public financial disclosure "[t]he cornerstone of the amendment." The paper acknowledges that lawmakers may change the schedule, but "*in a manner consistent with the mandate*." It goes on to describe the purpose of legislative change as "*improvement* and refinement" or "*broaden[ing]* and *strengthen[ing]*" the amendment. *An Explanation of the Sunshine Amend.*, (undated), St. Archives of Fla., series 87, carton 1 (emphasis added).

What was meant by "a manner consistent with the mandate" can be derived from three things: (1) The ballot language required "full and public disclosure." See Const. Amend. Pet. Form, St. Archives of Fla., series 87, carton 3. (2) Information widely disseminated to explain the proposed amendment to voters

described the "full and public" language as a floor. See, e.g., Charlotte Hubbard, *The Sunshine Amend.: What it says and does*, Fla. Voter (Fla. League of Women Voters [LWV]), Dec. 1975-Jan. 1976, at 1 ("This is . . . a minimum requirement."). (3) After passage of the amendment, Askew said, "[I]t is vital that we hold the line at the high standards imposed upon us by an overwhelming 80 percent of the voters." Address of Reubin O'D. Askew to the Fla. Legis. (Apr. 4, 1978), Fla. St. Archives, series 65, container 16 (78-26).

This is the mandate: Any statutes purporting to amend the Sunshine Amendment must lead to greater disclosure, not less. The qualified blind trust statute is not consistent with the intent of the drafters or the will of the voters as embedded in the Constitution.

II. THIS COURT SHOULD DECIDE THE ISSUE.

The Respondent and the legislative amicus brief both deny that the Petition satisfies the requirements for a writ of mandamus – but it does. The Petitioner has a clear legal right to the relief he seeks; the Secretary of State has a legal duty to comply with the Florida Constitution; there is no viable alternative remedy; and the defense of laches is inappropriate.

A. There Is a Clear Legal Right to the Relief Sought.

The Sunshine Amendment demands that Floridians receive information about the personal finances of candidates and officeholders because, "armed with

this knowledge, they will be able to discern the interests to which a public official most likely will be responsive." *Plante v. Smathers*, 372 So. 2d 933, 937 (Fla. 1979). Citizens have a right to such disclosure. *Id.*; see also *Plante v. Gonzalez*, 575 F. 2d 1119 (Former 5th Cir. 1978).

It follows that, if the right is being violated, there must be a way to obtain remedy. Florida courts have established a rule of standing which entitles individuals like the Petitioner to seek remedy. Without such standing:

> [T]here would be no avenue of relief even if it were illegal, should the appropriate public officials choose not to sue. . . .[I]t is the "ordinary citizen" and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause. We would therefore not deny this right of attack. . . .

Dept. of Admin. v. Horne, 269 So. 2d 659, 661, 663 (Fla. 1972).

The Petitioner's right is "clear and complete" under the Sunshine Amendment and the cases that upheld it in great detail. The Petitioner does not seek to establish a new law, but merely to enforce the Constitution. He has standing to do so.

B. As Supervisor of Florida Elections and Custodian of the Statutes, the Secretary Has a Legal Duty to Comply with the Constitution.

The Respondent argues that, because Florida Statutes bar the Secretary of State from determining whether the contents of a candidate's qualifying papers are accurate (§ 99.061(7)(c)), he has "no indisputable legal duty" here. (Resp. at 9-13.) But the same statute charges the Secretary with reviewing the papers, which

include financial disclosure statements, to see that they have been "properly filed" and are "complete on [their] face." *Id*. Any financial disclosure that includes a blind trust cannot be properly filed or complete on its face.

The Secretary of State has other clear legal duties that are relevant in this case: In addition to supervising Florida elections, he is custodian of the original statutes. § 15.01, Fla. Stat. Challenges to the validity of statutes may be brought against the Secretary (*Brown v. Firestone,* 382 So. 2d 654 (1980)), and Respondent's brief cites cases in which Secretaries of State Tom Adams, George Firestone, R.A. Gray, Bruce Smathers, Richard Stone, and Ken Detzner himself were defendants or respondents in such challenges. As custodian of the statutes, this Secretary – like Firestone in the case above – bears responsibility for removing any statutes that are found unconstitutional.

C. There Is No Alternative Remedy.

The Respondent complains that there is no emergency, and is otherwise generous with suggestions about the manner in which this litigation should have been brought[2] – among them, that the petitioner should have waited until after the period for qualifying because the dispute "does not yet exist." (Resp. at 14.)

[2] Those suggestions do not include the Governor filing a request for an advisory opinion under the authority of Article IV, Section 1 (c), Constitution of Florida, although that may have been an expeditious way to conclude this matter.

This suggestion actually highlights the importance of the Petition and the necessity for prompt resolution. If the Petitioner were to wait until after filings are complete, he would be accused of "sand-bagging." Surely, it is better to raise the question now, giving notice to all candidates that relying on a blind trust is suspect.

The Respondent also suggests that this matter can be taken to the Ethics Commission (*Id.*), but the Commission has no authority to determine constitutionality and depart from the statute. *Comm'n on Ethics v. Sullivan*, 489 So. 2d 10 (Fla. 1986). The Commission may be the body before which to challenge the bona fides of an individual disclosure, but it is not one where the constitutionality of a statute contradicting the Constitution can be raised.

Finally, the Respondent proposes that the petition be transferred to the Circuit Court for resolution. (Resp. at 15.) That suggestion carries no hint of what purpose it would serve; it identifies no factual questions that must be addressed nor what is necessary for a "full record."

Respondent's brief does speculate on a possible future factual issue, stating that an issue "might" arise: "As one example, Petitioner asks the Court to direct the Secretary to refuse filing papers of anyone filing 'a blind trust or any similarly designed instrument that does not result in full and public financial disclosure.'" (Resp. at 16, n. 6.) The Respondent is correct to the extent that, if such an event occurs, it could be the basis for a factual inquiry appropriate for trial court. But no

factual issue is before this Court. The Petition raises only the legal question of whether a blind trust is full and public disclosure.

Delaying the case, litigating it in the Commission on Ethics, or transferring it to circuit court would not provide relief. This Court is the only forum where the Petitioner can obtain an adequate and timely remedy.

D. Laches Is Not Grounds for Dismissing the Case.

The Respondent argues that the Petition should be dismissed both because it was not filed earlier (Resp. at 4) and because it was not filed later. (*Id*. at 14). Having already commented on the second point, we now turn to the first.

The constitutional right of citizens to have knowledge about the financial interests of officers and candidates for office is, like other constitutional rights, not subject to decay. If citizens have a right to free speech and that right is infringed by a statute, they may attack the statute. If those citizens wait to challenge an unconstitutional statute, they do not lose their First Amendment rights. Similarly, they do not lose the right to receive constitutionally required information from officials or candidates merely because of delay in asserting it.

Mandamus may be denied on account of laches only if the delay has harmed, embarrassed, or disadvantaged someone. *State ex rel. Clendinen v. Dekle*, 173 So. 2d 452 (Fla. 1965). Even assuming the Petition was filed later than Respondent would like, no injuries were caused by the delay. In fact, there is a greater

likelihood of injury if the Petition is not acted on, and a candidate then files a blind trust as part of financial disclosure and later is challenged. Equities lie with hearing and resolving the issue in this Court, not in exposing officials or candidates to risk by denying or delaying the Petition.

Respondent argues that the Court will deny mandamus when delay "would result in disorder, confusion and disturbance." *State ex rel. Haft v. Adams*, 238 So. 2d 843, 844 (Fla. 1970), quoting *State ex rel. Long v. Carey*, 164 So. 199, 206 (Fla. 1935). But that argument ignores a case which distinguished *Haft* and rejected laches when a petition committee sought mandamus to force an election on the initiatives. *Wright v. Frankel*, 965 So. 2d 365, 371 (Fla. 4th DCA 2007) ("Although the City cites a few cases suggesting that mandamus actions are subject to the laches defense, none of these cases concern the power of the people to enact ordinances through referendum").

No rigid timeframe exists for determining if a request for mandamus is too late to be acted upon. "[I]t seems clear that a petitioner must act within reasonable temporal bounds." *Rice v. State*, 132 So. 3d 222 (Fla. 2013). Here, the Petition was filed in time to be resolved before qualifying begins for numerous affected candidates. This echoes another elections case, in which the Court found:

> The time constraint imposed by the date of the general election is sufficiently critical that we find a mandamus proceeding in this Court to be an appropriate remedy. Although the . . . response reminds us of the admonition against indiscriminate issuance of the

> writ of mandamus . . . , at the same time [it] points out that *the issue involved is a straightforward question of law*. Hence, the necessity for fact finding . . . does not here pose an impediment.

Republican St. Exec. Comm. v. Graham, 388 So. 2d 556, 559 (Fla. 1980) (emphasis added; citations omitted).

The issue before this Court is also a straightforward question of law.

III. A BLIND TRUST IS NEITHER LAUDABLE NOR CONSTITUTIONAL WHEN JUDGED AGAINST THE FULL AND PUBLIC DISCLOSURE STANDARD.

Submissions for the Respondent note that Committee Substitute for Senate Bill 2 (2013) – the omnibus legislation that contained the qualified blind trust language now codified as § 112.31425 – passed without a single negative vote and attracted praise from a number of sources, including organizations that now align themselves with the Petitioner. This is both true and beside the point.

Even a super-majority of the Legislature cannot enact legislation that is counter to the Constitution. CS/SB 2, a 36-page bill with a title that exceeded three pages, contained numerous worthy measures, and the blind trust provision may indeed have been an attempt to deter conflicts of interest. But support was mixed.

Some groups endorsed only specific portions of the massive bill. See Ltr. from First Amend. Found. Pres. Barbara A. Petersen to Sen. Jack Latvala (Feb. 18, 2013) (supporting just the provision requiring annual training in public records and public meetings laws for constitutional officers).

Others, like the LWV, gave tempered approval, noting that Florida ranked low in surveys of public integrity and that the bill might improve governmental ethics. Nicholas Kusnetz, *Fla. enacts ethics and campaign fin. package*, The Ctr. for Pub. Integrity, May 2, 2013, available at http://www.publicintegrity.org/2013/05/02/12613/florida-enacts-ethics-and-campaign-finance-package.

The legislation also drew pointed criticism, as in this analysis of the blind trust provision: "The bill also allows legislators to put their investments in blind trusts. But Philip Claypool, who in 2011 retired as the executive director of the state's ethics commission, said the provision fails to put in place safeguards that other states and the federal government use for such trusts."[3] *Id*.

[3] Congress treats blind trusts as an exception to, rather than a means of compliance with, the disclosure requirements of the Federal Ethics in Government Act of 1978. See 5a U.S.C. §§ 102 (f)(1) and 102 (f)(2) (2012). The federal blind trust law, though much stricter than Florida's, may not be used by federal judges or magistrates because it does not provide the necessary disclosure. Thomas R. White III, *To Have or Not to Have – Conflicts of Int. and Fin. Planning for Judges*, 35 L. & Contemp. Probs. 212-213 (1970).

Claypool's assessment is consistent with that of other critics of blind trusts,[4] but this litigation is not about the mechanics of such trusts (which the legislative amicus brief addresses at length). It is about full and public financial disclosure.

The Sunshine Amendment was drafted and passed in response to widespread government ethics scandals. The requirement of full and open financial disclosure makes citizens the judge of whether an official is placing personal interests above public interests. As the briefing paper in Askew's files states: "Those who would seek and hold public office should be willing to trust the people with the details of their campaign and personal finances before they ask the people to trust them with the responsibilities of government." *An Explanation of the Sunshine Amend*.

IV. CONCLUSION: EXTRAORDINARY RELIEF IS PROPER.

"Disclosure . . . makes voters better able to judge their elected officials and candidates. . . . It is relevant to the voters to know what financial interests the

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[4] See, e.g., Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 Kan. L. Rev. 43 (2007): "[B]lind trusts undermine the transparency essential to democratic governance." *Id*. at 48. The author concludes that "[g]overnment decision-makers should fully disclose their financial affairs." *Id*. at 49. See also Sydney P. Freedberg & Adam C. Smith, *CFO Alex Sink's blind trust limits pub. fin. disclosure*, St. Petersburg Times (July 31, 2009), available at http://www.tampabay.com/news/politics/cfo-alex-sinks-blind-trust-limits-public-financial-disclosure/1023641. The Respondent excerpts a quote from Sink praising blind trusts (Resp. at 2), but – as the headline suggests – the article overall portrayed such trusts as a limitation on disclosure: "There is less public disclosure about her finances than [about those of] other officials."

candidates have. *Plante v. Gonzalez*, 575 F. 2d at 1135. The Petitioner urges the Court to grant the requested relief.

Respectfully submitted,

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CERTIFICATES OF FONT SIZE AND SERVICE

We hereby certify that the Petitioner's computer-generated Reply Brief has been prepared using Times New Roman 14 point type, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

We also certify that the Petition was served electronically on the following persons this 21st day of May 2014:

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Also on this 21st day of May 2014, a courtesy copy of the Petitioner's Reply Brief was delivered electronically to the office of Governor Rick Scott.

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