IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1344

CITIZENS FOR OPEN GOVERNMENT, INC.,

Petitioner,

vs.

CITIZENS FOR REFORM,

Respondent.

CITIZENS FOR REFORM'S RESPONSE IN OPPOSITION TO CITIZENS FOR OPEN GOVERNMENT, INC.'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondent, Citizens for Reform, accepts the non-argumentative portions of the Statement of the Case and Facts in the Jurisdictional Briefs of Miami-Dade County and Citizens for Open Government, Inc.[1] Simply put, Citizens for Reform submitted a proposal to amend the Miami-Dade County Charter; the Board of County Commissioners approved it as to form; a sufficient number of signatures were obtained to cause an election; opposition groups (Citizens for Open Government and a South Florida AFL-CIO and Transport Workers

[1] Both Miami-Dade County (Case No. SC06-1345) and Citizens for Open Government (Case No. SC06-1344) have docketed jurisdictional briefs seeking review of the same decision of the Third District Court of Appeal. We are submitting the same opposition to jurisdiction brief in each separately numbered case so that the Clerk can have a complete file with regard to each numbered case. For that reason we address the arguments of both petitioners in this Brief, changing only the cover page to reflect the respective cases.

Union) sued to enjoin the election process; the circuit court granted the injunction; and the District Court of Appeal reversed, allowing the election to be considered by the voters. The District Court denied rehearing, *en banc* review and certification and denied requests to stay the mandate.

The County took no position on the merits during the circuit court trial or the District Court of Appeal briefing and oral argument.

SUMMARY OF THE ARGUMENT

There is no jurisdiction to review the decision of the District Court of Appeal because the District Court of Appeal did not expressly construe any provision of the Florida Constitution. The Petitioners assert jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, claiming that the decision below expressly construes Article VIII, section 6(e) which states that the Board of County Commissioners

"shall be the governing body" of Miami-Dade County.

Petitioners are incorrect. There was no need to construe the Constitution because all parties and the court recognized that under the Constitution the Board of County Commissioners is the governing body of Miami-Dade County. The only question before the court below was whether the proposed Charter Amendment was inconsistent with the Board being the governing body. The only "construction" that occurred was construction of the proposed amendment and the Charter. None of the cases offered by the Petitioners supports the notion that in this case there was an express construction of the Constitution. Therefore there is no jurisdiction under Article V, section 3(b)(3).

ARGUMENT

THERE IS NO JURISDICTION BECAUSE THE CONSTITUTION WAS NOT EXPRESSLY CONSTRUED

Judge Padovano has written:

> A decision of a district court of appeal is not reviewable under Article V, section 3(b)(3) merely because it has the practical effect of construing a provision of the state or federal constitution. Section 3(b)(3) plainly requires a written, statement explaining or defining the disputed constitutional language.
>
> Many district court of appeal decisions involve an application of state or federal constitutional principles to the facts of the case. A mere application of constitutional principles, however, does not amount to a construction of the provision involved. Therefore a decision that turns on factual applicability does not furnish a basis to invoke the discretionary jurisdiction of the supreme court under section 3(b)(3).

P. Padovano, FLORIDA APPELLATE PRACTICE, § 3.8 at 62-63 (2006) (footnotes omitted).

The decision below fits that description. There was no dispute about the meaning of, or language of, the Florida constitutional provision – Article VIII,

section 6(e). Everyone agreed that it requires the Board of County Commissioners to be the governing body of the County:

> The electors of Dade County, Florida are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida under which the Board of County Commissioners of Dade County shall be the governing body.

Article VIII, § 6(e), Fla. Const. Thus, the only question for the court was the application of that principle to the facts, i.e., the effect of the proposed amendment. The court succinctly stated the issue:

> The issue presented on appeal is whether the proposed amendment to the Charter effectively removes the Miami-Dade County Commission as the "governing body." If it does, the proposed amendment is unconstitutional as no provision of the Charter may conflict with the Florida Constitution or general Florida law. *See Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002); *Ellis v. Burk*, 866 So. 2d 1236 (Fla. 5th DCA 2004). If the proposed amendment does not remove the County Commission as the "governing body," the amendment would survive this particular constitutional challenge.

App., p. 5. The court ***was not saying*** it is a constitution it was construing; rather it was a Charter, and a proposed amendment to the Charter, that it was construing.

Miami-Dade County and Citizens for Open Government seek to avoid the plain import of the decision's analysis by contending that the mention of the constitutional provision equates with express construction of the constitution and supports jurisdiction.

Neither the case law, commentators or the constitution support their position. The County offers *Ocala v. Nye*, 608 So. 2d 15, 16 (Fla. 1992), *County of Dade v. Saffan*, 173 So. 2d 138, 139 (Fla. 1965) and *Board of County Commissioners v. Boswell*, 167 So. 2d 866, 867 (Fla. 1964) to support jurisdiction. But none of those cases has application here. In *Boswell* the Court found that the decision below "effectively defined the meaning and effect of the constitutional proscription. . . ." 167 So. 2d at 867. In *Saffan*, the district court of appeal had expressly construed the constitution, addressing the interplay between Article V, § 6(e), the Dade County Charter adopted pursuant to Article VIII, § 11, Florida Statutes and Florida Appellate Rules. *Saffan v. County of Dade*, 159 So. 2d 102 (Fla. 3d DCA 1964). Justice Ervin's special concurrence in this Court – "I agree with the opinion of Justice O'Connell, but add that I think section 11(1)(f), Art. VIII and pertinent provisions of Art. V of the Constitution should be read together" – helps to demonstrate that *Saffan* was an express construction case, unlike the instant case.

The County's other case – *Ocala v. Nye* – also exemplifies express construction. The district court of appeal had to construe a municipality's home rule powers under Article VIII, section 2(b) to utilize eminent domain in light of constitutional (Article X, section 6) and various statutory provisions. *Nye v. City of Ocala*, 559 So. 2d 360 (Fla. 1st DCA 1990). This Court quashed the district court opinion, explaining that "Article VIII, section 2, Florida Constitution, expressly grants to every municipality the authority to conduct municipal government. . . ." including the eminent domain use it sought. *Ocala v. Nye*, 608 So. 2d 15, 17 (Fla. 1992).

Citizens for Open Government's offerings – *Florida Commission on Ethics v. Plante*, 369 So. 2d 332 (Fla. 1979) and *Alsdorf v. Broward County*, 333 So. 2d 457 (Fla. 1976) – miss the jurisdictional mark too. *Plante* required the express construction of the meaning of the Sunshine Amendment – Article II, section 8 of the Constitution. In *Alsdorf*, the lower court expressly construed Article VIII, section 1(h) of the Constitution, finding that the article "'is too vague by itself to be workable. There are no standards, no guidelines by which to aide the municipalities and counties in their attempt to work within the Constitutional provision."' *Alsdorf*, 333 So. 2d at 457. That is express construction.

The finding below in this case – that it "is the unassailable fact that not one

single power of the County Commission, as provided in Article I of the Charter, is altered in any way by the proposed amendment. Under the proposed amendment, the County Commission retains all of the powers afforded to it under Article 1" (App., p. 13) – is not a construction of the Constitution. Whether the words "governing body" appear in the Charter is not decisive (*id.*); whether the Board governs is the question, a question that was answered by looking at the Charter and the proposed amendment, not the Constitution.

Citizens for Open Government confuses jurisdiction with ultimate merits when it argues that the Third District's decision "runs counter" to *Metro-Dade Fire Rescue District v. Metropolitan Dade County*, 616 So. 2d 966 (Fla. 1993). First, neither the County or Citizens for Open Government can claim jurisdiction using *Fire Rescue* because it came to this Court as an *en banc* certified question of great public importance. 616 So. 2d at 967. Second, the decision below was not discordant with *Fire Rescue* because it honored the County Commission's right to govern.

* * *

The County, assuming jurisdiction exists, also argues that its "exercise" is necessary. Jurisdictional Brief of Petitioner Miami-Dade County, p. 6. The County's *raison d'etre* is that if the voters approve the proposed Charter

amendment giving a strong mayor administrative power "such a drastic shift in power would likely have a significant effect on the County's approximately 2.4 million residents." *Id.*

Aside from the speculation ("if approved"; "would likely"), the County (which took no position on the merits of the proposal in the circuit court trial or the appellate court briefing and argument) has forgotten an important part of the Charter and the Constitution. The Charter provides for citizen initiatives and referenda (Article 7) and the Constitution grants the electors of the County the "power to adopt, revise and amend from time to time a home rule charter of government for Dade County. . . ." Article VIII, section 6(e). So if the proposed amendment passes, the "significant effect" would be the will of the voters; a will which the County must honor.

The County's listing of cases in which the Court reviewed Third District decisions "that construed the County's home rule powers" (County Jurisdictional Brief, pp. 6-7) provides no authority for exercising jurisdiction in this case. *Board of County Commissioners v. Wilson*, 386 So. 2d 556 (Fla. 1980) was a certified question of great public importance (*id.* at 558), as was *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 496 (Fla. 1999). *Laborers'*

International Union of North America, Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989) was an express constitutional construction case (*id.* at 1161) as was *Metropolitan Dade County v. City of Miami*, 396 So. 2d 144 (Fla. 1981) ("The trial judge based his ruling on a declaration that Article VIII, section 4, Florida Constitution prevails over Article VIII, section 6(e), Florida Constitution.") (footnotes omitted).

The end result is that there is no support for the exercise of this Court's jurisdiction.

CONCLUSION

There is no jurisdiction under Article V, section 3(b)(3) of the Florida Constitution. The Court should enter an Order denying jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla. R. App.P., and is prepared in Times New Roman 14-point font.

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