IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

JAMES APTHORP,

Appellant,

v. **CASE NO.: 1D14-3592**

KENNETH W. DETZNER,
in his capacity as
Florida Secretary of State,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No.: 2014 CA 1321
John C. Cooper, Judge

INITIAL BRIEF OF APPELLANT

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QUESTION PRESENTED

Does Section 112.31425(5), Florida Statutes, which allows constitutional officers and candidates to report only the lump sum holdings and earnings of a "qualified blind trust" on financial disclosure statements rather than filing itemized reports, satisfy the requirements of Article II, Section 8, of the Florida Constitution that financial disclosure must be "full and public"?

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STATEMENT OF THE CASE AND FACTS

Preliminary Statement

References to the Record on Appeal are designated "R." and followed by the page number(s), all in parentheses. Online materials are listed in the Table of Authorities with full electronic addresses; in the body of the brief, they are cited without the electronic addresses. Materials from the files of former Governor Reubin Askew in the State Archives of Florida are listed in the Table of Authorities with the appropriate series, box, or carton numbers; in the body of the brief, they are cited by title and date only.

Nature of the Case

The Appellant, James Apthorp, seeks a determination that Section 112.31425(5), Florida Statutes, which allows reporting of so-called "qualified blind trusts" in financial disclosure statements, violates Article II, Section 8, of the Florida Constitution, which requires constitutional officers and candidates for those offices to file full and public financial disclosure**.**

The Appellant submits that Section 112.31425(5) is unconstitutional because it deprives the citizens of Florida of their constitutional right to receive the benefits of full and public financial disclosure by constitutional officers and candidates.

The issue before the Court is the question presented: Does Section 112.31425(5), Florida Statutes, which allows constitutional officers and candidates

to report only the lump sum holdings and earnings of a "qualified blind trust" on financial disclosure statements rather than filing itemized reports, satisfy the requirements of Article II, Section 8, of the Florida Constitution that financial disclosure must be "full and public"?

Course of Proceedings

This case originally was brought on May 14, 2014, as an Emergency Petition for Writ of Mandamus in the Florida Supreme Court (R. 11-44), seeking a ruling that the challenged statute is unconstitutional and a writ of mandamus directing the Secretary of State to refuse filing papers that include a blind trust rather than full and public financial disclosure. *Apthorp v. Detzner*, SC 14-924 (Fla. 2014). Response and Reply briefs were filed within a week (R. 101-140; 180-199), as were an amicus brief by the Florida League of Women Voters on behalf of the Petitioner (R. 141-153), an amicus brief by the First Amendment Foundation and various media organizations on behalf of the Petitioner (R. 84-100), and an amicus brief by the Legislature on behalf of the Respondent. (R. 54-79).

On May 21, 2014, the Supreme Court transferred the case to the Second Judicial Circuit in and for Leon County. (R. 5). Circuit Judge John C. Cooper conducted a scheduling conference on May 28, 2014, at which he granted the Petitioner's *ore tenus* motion to amend his pleading to assert a claim for declaratory relief. (R. 208-211). The amended pleading, styled as a complaint for

declaratory judgment and petition for writ of mandamus, was filed on June 9, 2014. (R. 212-219).

At the invitation of the trial judge, both parties filed dispositive motions on June 11, 2014, and filed responses to the opposition motions on June 17, 2014. (R. 220-255; 256-288; 289-308; 309-313). A hearing on the motions and responses was held on June 19, 2014. (R. 344-475). The petition for writ of mandamus was dropped and Mr. Apthorp maintained only the complaint for declaratory judgment at the hearing. (R. 361-362).

Disposition in the Lower Tribunal

Judge Cooper issued a Final Order on July 28, 2014, denying the Defendant's motion to dismiss, denying the Plaintiff's motion for summary judgment, granting the Defendant's motion for summary judgment, and finding the challenged statute constitutional. (R. 329-343). He reaffirmed the order in a Final Judgment on August 5, 2014. (R. 480-483).

Statement of the Facts

Article II, Section 8, of the Florida Constitution (the "Sunshine Amendment") was Florida's first successful constitutional initiative. It was a centerpiece of the late Governor Reubin Askew's ethics reform programs, and was added to the Constitution by an overwhelming majority of Florida voters in November 1976. During that time, the Appellant served as Askew's chief of staff.

Martin Dyckman, *Reubin O'D. Askew & the Golden Age of Fla. Politics* 215-223 (Univ. Press of Fla. 2011).

The Campaign for Reform. The years before the Amendment were adopted were a time of widespread and widely publicized government corruption, much of it related to improper financial dealings by public officials. Federal scandals included Watergate, the resignation of Vice President Spiro Agnew, the reprimand of Florida Congressman Bob Sikes, and the ethical difficulties of Florida U.S. Senator Ed Gurney. *Plante v. Gonzalez*, 575 F. 2d 1119, 1122 n. 3 (Former 5th Cir. 1978); James N. Naughton, *Agnew Quits Vice Presidency and Admits Tax Evasion in '67* . . ., N.Y. Times at A1 (Oct. 11, 1973).

Florida state government also was shocked by scandal: Three Florida Cabinet members, at least three Supreme Court justices, at least one state legislator, and even Askew's lieutenant governor were exposed for their ethical lapses[1] -- some resulting in prison terms.

[1] The Cabinet members were: Commissioner of Education Floyd Christian (false testimony, accepting money for state contracts); Treasurer and Insurance Commissioner Tom O'Malley (extortion, mail fraud); Comptroller F. O. "Bud" Dickinson (plea bargain for a misdemeanor). Dyckman, 164, 166-71, 192-4, 212, 213, 216. Supreme Court Justices Hal Dekle, Joe Boyd, and David McCain were subject to impeachment inquiry; Dekle resigned, as did McCain, but only after articles of impeachment had been voted against him. Justice Vassar Carlton resigned after a gambling junket was exposed. *Id*., 164, 172-75, 177, 203-04. State Senator George Hollahan was indicted on bribery charges. Lieutenant Governor Tom Adams resigned after it was disclosed that he had improperly used state employees for work on his farm. *Id.*, 152-55, 158-60, 168-70.

The Campaign for Reform: In response to the scandals, Askew pushed for ethics reforms, including financial disclosure, after he took office in 1971. Legislators enacted limited disclosure, but rebuffed Askew's attempt to pass stronger laws. Dyckman 176-80; *see also* Fla. Dept. of State, Great Floridian Film Series, *Reubin O'Donovan Askew* (1998).[2] In November 1975, he began a campaign to put full and public disclosure into the Florida Constitution.[3]

Askew stumped for eight months to get the more than 200,000 voter signatures necessary to place the Amendment on the ballot – meeting with citizen groups and editorial boards, personally handing out signature cards in shopping centers and at rallies, and running advertisements with slogans like "This is your chance to endorse government free of suspicion and hidden motive." *See, e.g.*, Tom Fiedler, *Sunshine Amend. is on Nov. ballot*, St. Petersburg Times 1-2B (July 30, 1976); *see also* Fla. Dept. of State, Great Floridian Film Series, *Reubin O'Donovan Askew*.

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[2] The portion of the film concerning the Sunshine Amendment and Askew's legacy of financial disclosure begins at Part II, minute 3:43, and continues through Part II, minute 7:35.

[3] "Askew's commitment to the public trust persuaded him to sponsor a constitutional amendment requiring full financial disclosure for all public officials. . . . Askew felt that government belonged to the people and that this relationship was jeopardized by special interests. . . . He felt that there was no such thing as shining too much light on government. . . . " David R. Colburn, *From Yellow Dog Democrats to Red State Republicans: Fla. & Its Politics Since 1940*, 92-93 (Univ. Press of Fla. 2007).

Almost every Florida newspaper and numerous civic organizations endorsed the Amendment, and many helped distribute the signature cards. On election morning, the St. Petersburg Times editorialized: "Florida voters have a unique opportunity to require that future candidates and officeholders make meaningful financial disclosures that will help show them worthy of the public's trust." *And a big vote for Sunshine*, 12A (Nov. 2, 1976).

Floridians, weary of scandal and hungry for reform, passed the measure by a vote of 1,765,626 to 461,940. It was approved in all 67 counties. Dyckman, 219.

The Sunshine Amendment: The Amendment that voters ratified so overwhelmingly was titled "Ethics in Government," but it was and remains popularly known as the "Sunshine Amendment." Now entrenched in the Florida Constitution, it reads in part:

> 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*.

Art. II, § 8(a), Fla. Const. (emphasis added).

The Amendment contained a schedule for implementing its financial disclosure requirements – including disclosure of each asset, liability, and source of income in excess of $1,000, including secondary sources of income – but

allowed the schedule to be altered by statute. Art II, § 8(i), Fla. Const.[4] The Amendment also authorized the Florida Legislature to adopt stricter disclosure requirements and prohibitions than those in the Constitution, but forbade any construction that would "limit disclosure." Art. II, § 8(h), Fla. Const. Lawmakers made some changes in the original schedule, but none diluted the requirement for full and public financial disclosure. § 112.3144, Fla. Stat.

Compliance with constitutionally mandated disclosure: A small group of legislators who had fought Askew on financial disclosure in the Legislature and on the campaign trail filed challenges to the Sunshine Amendment that were rejected by Florida and federal courts.[5] *Plante v. Gonzalez*, 575 F. 2d 1119, and *Plante v. Smathers*, 372 So. 2d 933 (Fla. 1979). Subsequently, officeholders and candidates – including most plaintiffs in the two cases above – complied with the disclosure mandates without significant problems for more than thirty years.

"Blind trusts" proposed and used in lieu of full and public disclosure. A new issue concerning financial disclosure arose in 1991. Then-Comptroller Gerald Lewis asked the Florida Commission on Ethics whether he could place bank stocks

[4] The schedule was amended by 1998 revisions to the Constitution, but those changes did not alter any language pertinent to this case. Notably, they retained the requirement that secondary sources of income over $1,000 must be reported.

[5] Senators who challenged the Sunshine Amendment in these cases had complied with the disclosure statute in place before adoption of the Amendment, but resisted filing under the "full and public" standard. *Plante v. Gonzalez*, 575 F. 2d at 1123.

he had inherited into a blind trust. The Commission replied that the stocks still would be in conflict with Lewis's regulatory authority over banks, and instructed him to sell the holdings. Calling blind trusts a "laudable" idea, the Commission said it did not have "authority to, in effect, legislate an entirely new concept into the ethics laws of this state." Comm'n on Ethics Ops. 91-24 and 11-05.

The Commission again advanced the idea of blind trusts in 2006, when it recommended that the Legislature enact laws requiring the Governor and Cabinet members to put their stocks and bonds into either publicly traded mutual funds or "qualified blind trusts." Steve Bousquet, *Blind trusts urged for leaders' stocks*, St. Petersburg Times (Nov. 30, 2006).

Florida's 2010 gubernatorial election brought the issue into sharper focus. Candidate Alex Sink filed tax returns as disclosure, revealing that more than half her net worth was in a blind trust created in 2006, supposedly to avoid conflicts of interest after she became Chief Financial Officer. Sydney P. Freedberg & Adam C. Smith, *CFO Alex Sink's blind trust limits pub. fin. disclosure*, St. Petersburg Times (July 31, 2009).

Then-candidate Rick Scott also disclosed tax returns[6] and announced he

[6] When constitutional officeholders and candidates file financial disclosure statements, they submit a so-called Form 6 containing the previous year's information. Thus, what candidates Scott and Sink filed in 2010 were Form 6 disclosures for their financial interests at the end of calendar year 2009.

would create a blind trust. Mary Ellen Klas, *Alex Sink, Rick Scott agree to release tax returns & to debate*, TCPalm (Sept. 10, 2010). In 2011, the new Governor's attorneys sought and obtained an opinion from the Commission approving his use of a blind trust. Comm'n on Ethics Op. 11-05; *see also* Ltr. from Richard E. Coates & James T. Fuller to Fla. Comm'n on Ethics (2011).

The Governor's attorneys did not ask the Commission whether a blind trust meets the requirements for full and public financial disclosure, and Opinion 11-05 does not treat that subject. Instead, the issue was posed and answered solely as whether such a trust would help avoid conflicts of interest. As had been true twenty years before – when the Commission noted it had no "authority to, in effect, legislate an entirely new concept into the ethics laws of this state" (Comm'n on Ethics Op. 91-24) – nothing in the Florida Statutes authorized Scott in 2011 (or Sink in earlier years) to satisfy disclosure requirements with a blind trust. Yet the Commission okayed Scott's request.

Following issuance of the opinion, Scott filed disclosure papers showing only the lump-sum value of his blind trust, without listing the assets in the trust or their individual values; his disclosures filed in 2012 and 2013 also submitted the

lump-sum blind trust without specifying its holdings,[7] or noting whether the individual holdings had been bought or sold, or whether they had changed in value.

Statute purporting to satisfy disclosure requirements with a "qualified blind trust." In 2013, the Legislature enacted, and the Governor approved, a statute allowing officeholders and candidates to put assets into a so-called "qualified blind trust" and report the trust as a lump sum in their financial disclosure statements. § 112.31425, Fla. Stat. Most of that law governs the mechanics of such trusts, and is not the subject of this litigation. The challenged portion of the statute reads:

> (5) The public officer shall report the beneficial interest in the qualified blind trust and its value as an asset on his or her financial disclosure form, if the value is required to be disclosed. The public officer shall report the blind trust as a primary source of income on his or her financial disclosure forms and its amount, if the amount of income is required to be disclosed. *The public officer is not required to report as a secondary source of income any source of income to the blind trust.*

§ 112.31425(5), Fla. Stat. (emphasis added).

The statute – which nowhere states that reporting a blind trust this way satisfies the constitutional requirement of full and public financial disclosure – was part of an omnibus ethics-reform package. CS/SB 2, Reg. Sess. (Fla. 2013). The legislation came in the wake of a U.S. Department of Justice finding that

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[7] Scott's financial disclosure statements for 2010 and 2011 are available at http://www.integrityflorida.org/rick-scott/. His 2012 disclosure is at http://public.ethics.state.fl.us/Forms/2012/232592-Form6.pdf and his 2013 disclosure is at http://public.ethics.state.fl.us/Forms/2013/232592-Form6.pdf.

Florida led the nation in the number of government officials convicted of corruption in the decade between 1998 and 2007. Bill Marsh, *Illinois Is Trying. It Really Is. But the Most Corrupt State Is Actually* . . . , N.Y. Times, Dec. 13, 2008.

A 2010 statewide grand jury investigating public corruption had proposed various provisions of the omnibus bill, including blind trusts (19th Statewide Grand Jury, Case No. SC 09-1910, First Interim Rpt., *A Study of Pub. Corruption in Fla. & Recommended Solutions* (Dec. 29, 2010)) and the Ethics Commission in 2012 called for legislation allowing blind trusts for Cabinet officers. Comm'n on Ethics, *Annual Rpt. to the Fla. Legis. for Calendar Year 2012*, at 26. But a former executive director of the Commission warned lawmakers before the bill passed that the blind-trust proposal lacked numerous safeguards and would allow trusts that blind only the public, not the officeholder. Memo from Philip Claypool to Dan Krassner & Ben Wilcox, Integrity Fla. (Mar. 9, 2013).

Following enactment of the law, the Governor's attorneys sought another opinion on the ethics of filing a blind trust to avoid conflicts of interest; the second opinion essentially reaffirmed the earlier opinion. Comm'n on Ethics Op. 13-14; *see also* Ltr. from Peter Antonacci and James T. Fuller to Fla. Comm'n on Ethics (2013) (on file with the Comm'n on Ethics).[8] Once more, the issue of whether a blind trust met the requirement for full and public financial disclosure was not

[8] This letter was accompanied by an exhibit which, for the first time, disclosed the initial assets of Scott's 2011 blind trust and the value of each asset.

posed or answered. The papers Scott filed in 2013 again listed the lump-sum blind trust, with no specific information about its individual contents or their values.

Current context: The original petition in this case was brought shortly before the 2014 filing period opened for statewide constitutional officers and candidates; at the time, Scott appeared to be the only such individual holding a blind trust. On June 16, 2014, he filed his financial disclosure, revealing that he had revoked the 2011 blind trust and purporting to list its assets and their values at the time of revocation; Scott then created a new blind trust. Jim Turner, *Gov. Rick Scott's Net Worth: $132.7 Million*, FlaglerLive, June 16, 2014; Mary Ellen Klas & Marc Caputo, *Gov. Rick Scott's complex fins. raise new questions about his state disclosure*, Miami Herald (Oct. 4, 2014).

The Appellant knows of no constitutional officer or candidate who incorporated a blind trust in the most recent financial disclosure statements.

SUMMARY OF THE ARGUMENT

The history of the Sunshine Amendment, its plain words, rules of constitutional construction, and past court rulings all demonstrate that the Florida Constitution demands full and public financial disclosure, and that including a so-called "qualified blind trust" on a disclosure statement violates the constitutional requirement. The Amendment was drafted and passed with clear requirements in order to assure that a hostile Legislature could not limit disclosure. Helping

prevent conflicts of interest is only one purpose of the Amendment, and is subordinate to the principle of full and public disclosure. It is the people of Florida – not appointed trustees nor elected politicians – who have to right to determine if conflicts of interest appear to exist. Section 112.31425(5), Florida Statutes, is unconstitutional on its face.

Standard of Review

Because this case involves the constitutionality of a statute and the interpretation of a constitutional provision, the standard of review is *de novo*. *Crist v. Fla. Ass'n of Crim. Def. Lawyers*, 978 So. 2d 134, 139 (Fla. 2008); *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011). "The appellate court is not required to defer to the judgment of the trial court." Philip J. Padovano, *Fla. App. Practice*, § 9.4, 65 (2006 ed.)

ARGUMENT

I. FLORIDA'S CONSTITUTION DEMANDS FULL AND PUBLIC DISCLOSURE OF FINANCIAL INTERESTS.

The Sunshine Amendment placed two words into the Constitution to describe the basic requirements for financial disclosure: It must be *full* and it must be *public*. When legislation violates both the letter and the spirit of the Constitution, "it becomes not a mere privilege, but a solemn duty of the court to declare such act unconstitutional and void." *State ex rel. Davis v. City of Largo*, 149 So. 420, 421 (Florida 1933). Applying the rules of constitutional construction,

examining the history behind the Sunshine Amendment, and turning to past court decisions show that Section 112.31425(5), Florida Statutes, violates both the letter and the spirit of the Constitution.

A. The Plain Language of the Sunshine Amendment and Rules of Constitutional Construction Demonstrate That Reporting Blind Trusts Cannot Satisfy the Requirements of Full and Public Financial Disclosure.

1. Analysis starts with the constitutional language.

Courts traditionally enforce constitutional mandates whose language is clear. *Allen v. Butterworth*, 756 So. 2d 52, 61 (Fla. 2000) (constitutional language on court jurisdiction may not be "enlarged or abridged" by the Legislature). As the Florida Supreme Court said in *Ford v. Browning*: "If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written, and courts do not turn to rules of constitutional construction." 992 So. 2d 132, 136 (Fla. 2008).

The words "full and public" are clear and direct, as shown by their dictionary definitions. *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 511 (Fla. 2008) ("Historically, this Court has resorted to dictionary references in defining terms contained in constitutional provisions.") *See also Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978) ("[W]e initially consult widely circulated dictionaries, to see if there exists some plain, obvious, and ordinary meaning for the words or phrases approved for placement in the Constitution.")

Merriam-Webster Online defines "full" as: "1: containing as much or as many as is possible or normal . . . . 2a: complete especially in detail, number, or duration <a full report> <gone a full hour> <my full share> [2]b: lacking restraint, check, or qualification <full retreat> <full support> . . . ." The same dictionary defines "public" as "exposed to general view."

The statute authorizing blind trusts does not even mention full and public financial disclosure, but makes evident that such instruments cannot satisfy the constitutional requirements – particularly when it states that "[t]he public officer is not required to report as a secondary source of income any source of income to the blind trust." § 112.31425(5), Fla. Stat. By lessening disclosure in this manner, the statute does not comply with the principle of "full" or "public" disclosure.

An officer or candidate who includes a blind trust[9] in financial disclosure statements discloses only the lump-sum value of holdings within the trust and lump-sum income earned on those holdings. *Id*. This is neither complete in detail and number nor exposed to general view; it is neither full nor public disclosure. By their very definition, blind trusts cannot satisfy the Sunshine Amendment.

[9] *Merriam-Webster Online* defines a "blind trust" merely as "an arrangement in which the financial holdings of a person in an influential position are placed in the control of a fiduciary in order to avoid a possible conflict of interest." It does not mention disclosure. [Note that, in such an arrangement, the trustee holds the legal interest in the trust, while the beneficiary holds an equitable interest – that is, a "financial interest" subject to disclosure.]

2. The Sunshine Amendment must not be construed to reach an absurd result.

A standard rule of constitutional construction states that "an interpretation of a constitutional provision which will lead to an absurd result will not be adopted when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people." *Plante v. Smathers*, 372 So. 2d at 936. That Court concluded it would be "an absurd result totally incongruous with the will of the people" to hold that candidates who qualified for office after July 1 did not need to file financial disclosure until the following July." *Id*. at 937.

The Sunshine Amendment reflects the will of the people that the financial interests of public officials should be fully revealed; the challenged statute allows them to be concealed. It would be absurd to conclude that a blind trust is an adequate substitute for full and public financial disclosure.

B. The History of the Sunshine Amendment Shows That It Was Intended to Produce Full and Public Disclosure.

Plante v. Smathers set forth a framework for construing the Sunshine Amendment: "We may glean light for discerning the people's intent from historic precedent . . . present facts . . . common sense, and . . . an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented." 372 So. 2d at 936. Those principles, applied here, demonstrate that the Amendment was drafted and passed to require full and public disclosure.

1. The drafters intended full and public disclosure.

Askew, the Amendment's principle drafter and advocate, made strong and consistent statements about the intent:

* At the opening of the petition drive: "[The] cornerstone is full and public financial disclosure . . . . There are no panaceas; but I am firmly convinced that adoption of the Sunshine Amendment is the greatest single step, and perhaps the most positive step, we can take to restore the confidence of the people . . . . " Sunshine Amendment Petition Drive Kickoff Remarks (Nov. 19, 1975).

* In his speech to the Legislature on the opening day of the 1976 legislative session: "The people of Florida are telling us we must be accountable for what we do and what we say in public office. They are telling us that public office must be viewed as a public trust." *Gov's Address*, J. of the H. of Reps. 7 (Apr. 6, 1976).

* On the day the Amendment was certified for the ballot: "I think the people would want to be assured that public officials are working for them and not for any selfish interest." Assoc'd Press, *Askew Sunshine Petitions Put Proposed Law on Ballot*, Ocala Star Banner 4A (July 30, 1976).

* After the final election results were announced: "The people have spoken clearly and decisively in placing a strong mandate in the Constitution for ethics in

government." Assoc'd Press, *Sunshine Amend. Gets OK*, Daytona Beach Morning J. 3A (Nov. 3, 1976).

2. Media reports and editorials show that voters were told the Amendment would require full and public disclosure.

In discerning voter intent, courts also often rely on publications that would have influenced and reflected the popular perception of a ballot measure. *Plante v. Smathers* stated: "The materials available to the voters at the time of their adoption of this constitutional provision reflect that they understood that all candidates would be required to disclose before they could ask the people to trust them with the responsibilities of government." 372 So. 2d at 937.

During the yearlong campaign, newspapers across Florida reported that the Sunshine Amendment would require "full and public disclosure of . . . financial interests" and that officials and candidates would be required to list all their assets over $1,000 and *either* their most recent federal income tax returns *or* a list of all income sources over $1,000. *See, e.g.*, Fiedler, *Sunshine Amend. is on Nov. ballot*, *supra.* Newspaper editorials were enthusiastic; one said the Amendment would "discourage public officials from attempting to direct business favors to their law partners or other associates. The people have a right to know any sources of an official's outside profits, direct or indirect." *And a big vote for Sunshine*, *supra*.

C. Courts Have Held That the Amendment Requires Full and Public Disclosure.

The Supreme Court grounded its decision in *Plante v. Smathers* on the voters' "expressed desire to be informed as to the personal finances of those they will be voting to put into office . . . since they feel that, armed with this knowledge, they will be able to discern the interests to which a public official most likely will be responsive." 372 So. 2d at 937.

This analysis is based on the opening statement of principle in the Sunshine Amendment: "A public office is a public trust." Art. II, § 8. Floridians have a constitutional right to know, through full and public disclosure, the interests that may guide a candidate or a politician before they entrust the public interest to that person.

Judge John Minor Wisdom's opinion in *Plante v. Gonzalez* had gone into even greater detail about the Amendment's purposes:

> Disclosure . . . makes voters better able to judge their elected officials and candidates for those positions. . . . *It is relevant to the voters to know what financial interests the candidates have*. As the [U.S.] Supreme Court said, in discussing campaign contributions, the knowledge will "alert the voter to the interests to which a(n official) [sic] is most likely to be responsive".

575 F. 2d at 1135 (emphasis added) (citations omitted).

Judge Wisdom continued his analysis: "[T]he existence of the reporting requirement will discourage corruption. Sunshine will make detection more

likely." *Id*. This opinion even spoke to the importance of reporting specific financial information, stating that "[w]hile sufficiently narrow ranges would convey much useful information, increasing the specificity will increase the value of the information." *Id*. at 1136.

The challenged statute decreases the specificity of information available to the voters, thus decreasing its value. It cannot withstand constitutional scrutiny.

II. THE LEGISLATURE DOES NOT HAVE POWER TO DILUTE THE CONSTITUTIONAL REQUIREMENT OF FULL AND PUBLIC FINANCIAL DISCLOSURE.

A central issue in this case is the scope of legislative authority. The Sunshine Amendment anticipates that statutes will be necessary to implement its directives, and grants the Legislature authority to implement stricter disclosure requirements. The Amendment also specifically prohibits legislation that undermines the constitutional mandate by limiting disclosure requirements. The challenged statute is precisely the sort of law the Amendment prohibits.

A. The Legislature Is to Be Deferred to Only If It Acts Constitutionally.

"[T]he judiciary has an obligation . . . to construe statutory pronouncements in strict accord with the legislative will, *so long as the statute does not violate organic principles of constitutional law*." *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 244 (Fla. 2001) (emphasis added). In authorizing the reporting of lump-sum blind trusts in financial disclosure statements, legislators ignored the

constitutional bar against laws that would limit disclosure. Art. II, § 8 (h), Fla. Const. This Court need not defer to such flawed legislative judgment.

1. <u>The Sunshine Amendment's provisions may not be weakened.</u>

In an early case construing the Amendment's full and public financial disclosure provision, the Florida Supreme Court made clear that the language on reporting is self-executing. *Plante v. Smathers*, 372 So. 2d at 937. The opinion quotes and applies the principles handed down in *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960):

> If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. . . . *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*.

(Emphasis added; citations omitted.)

When constitutional provisions are self-executing, as they are here, "the Legislature may provide additional laws . . . assuming that such laws supplement, protect, or further the availability of the constitutionally conferred right, but the Legislature may not modify the right in such a fashion that it alters or frustrates the intent of the framers and the people." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1064 (Fla. 2010). The Sunshine Amendment itself directs that its provisions must "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. The Legislature is constitutionally prohibited from enacting statutes which erode or diminish the scope of financial disclosure.

2. Even a super-majority of the Legislature cannot enact laws based on a distorted reading of constitutional terms.

The Florida Supreme Court has long held that the Legislature may not twist the clear meaning of constitutional terms in order to adopt laws more to its liking. *State v. Fla. St. Improvement Comm'n*, 47 So. 2d 627, 630 (Fla. 1950); *Dept. 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. . . .").

Two cases from the 1940s illustrate this principle. Both cases concern legislative efforts to redefine fresh water bodies as salt water, after new constitutional provisions transferred authority over fresh water fishing from the Legislature to the newly created Game and Freshwater Fish Commission.

Resisting the constitutional shift of power, lawmakers enacted statutes declaring Lake Okeechobee and portions of the St. Johns River to be salt water, and therefore within the Legislature's power to regulate, although practical experience as well as science demonstrated the waters to be fresh.

The Court rejected those attempts to manipulate the Constitution. *State ex rel. Griffin v. Sullivan*, 30 So. 2d 919 (Fla. 1947) and *Beck v. Game & Fresh Water Fish Comm'n*, 33 So. 2d 594, 595 (Fla. 1948) ("The question is squarely presented – whether the Legislature can oust the constitutional Commission from control over fresh water fish . . . by making a legislative finding that said waters are salt.").

The legislative determination that a blind trust satisfies the constitutional requirement of full and public financial disclosure is as erroneous and misguided as the legislative findings that attempted to turn fresh water into salt. A legal instrument that does not fully disclose financial interests can never be reconciled with the Sunshine Amendment. Section 112.31425(5), Florida Statutes, is invalid.

B. All Provisions of the Sunshine Amendment Must Be Read Together.

"A constitutional provision should be 'construed as a whole in order to ascertain the general purpose and meaning of each part . . . .'" *Ford v. Browning*, 992 So. 2d at 136, quoting *Dept. of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996). *See also Ervin v. Collins*, 85 So. 2d 852, 855 (Fla. 1956) ("[I]t must be presumed that those who drafted the Constitution had a clear conception of the principles they intended to express . . . and arranged its provisions in the order that would most accurately express their intention.")

Here, Article II, Section 8(h), barring construction that limits disclosure, should be read together with Section 8(a), which commands full and public

disclosure, and Section 8(i), which provides a definition – one that may not be implemented to provide less disclosure. That definition is a floor, and Section 8(h) is a constitutional boundary line; it assures that the Legislature may not erase the requirement for full and public financial disclosure.

Askew had battled with a legislature that wanted softer disclosure requirements. Like the Court in *Ervin v. Collins*, this Court should assume that he arranged the provisions of the Sunshine Amendment in a fashion that would achieve his objectives of nothing less than full and public financial disclosure.[10]

C. The Trial Court's Order Improperly Applied Case Law and Overlooked History.

The trial court found that the Legislature had used its powers to produce a statute that is "reasonable, appropriate, and consistent with the Sunshine Amendment's purpose of promoting ethics in government." (R. 337). But the trial court apparently overlooked a significant provision of a Supreme Court decision it quoted at length in the Order.

[10] At several places in the Constitution, the Legislature is given authority to implement constitutional provisions. It is instructive to consider how this power has sometimes been abused. To cite only two examples: (1) the promise of improved education through use of lottery funds has never been realized because the Legislature has used the lottery funds to displace rather than to supplement general revenue funding of education (Art. X, § 15(c)(1)); and (2) the judicial nominating process has been reshaped and essentially returned to a gubernatorial patronage committee process – something the original provision had sought to displace. Art. V, § 20(c)(5). When we consider these results, the wisdom of Article II, section 8(h), becomes even more apparent.

The case was *Williams v. Smith*, 360 So. 2d 417 (Fla. 1978), which announced a framework for determining whether another section of the Sunshine Amendment was self-executing: "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." *Id*. at 419 (citation omitted).

The *Williams* opinion – and the trial court Order here – went on to quote at length from Askew's supplementary message to the Legislature during the first regular session after passage of the Amendment,[11] calling the message "[p]erhaps the most obvious expression of framers' intent":

> The Sunshine Amendment is a strong ethics provision, but our efforts cannot be regarded as complete with its passage. Because a constitution must be a statement of broad principle capable of enduring and evolving with passage of time the Sunshine Amendment was not intended to address every ethics issue. The 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 further extend the Amendment. The Amendment leaves to the Legislature sufficient flexibility to carry out the will and intent of the voters. *However, we in government cannot accept a retreat from this constitutional mandate*.

Id. (emphasis added).

[11] *Williams v. Smith* mistakenly cites Askew's 1977 opening-day address to the Legislature as the source of the language cited in *Williams*. 360 So. 2d at 419. The words actually come from a supplementary gubernatorial message that follows the address in the House Journal of April 5, 1977.

But Askew's remarks, like the Sunshine Amendment itself, must be read together to understand his intentions. Yes, the Legislature has flexibility to enact implementing legislation, but only if it carries out the voters' will in passing the Sunshine Amendment; there is no flexibility to retreat from the mandate of full and public disclosure.

The speech is consistent with numerous other remarks and documents Askew used to explain the Amendment. Consider this letter he wrote to the Legislature the month before delivering the message cited above:

> . . . The 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) (emphasis added).

A briefing paper from Askew's files acknowledges that lawmakers may change the schedule, but "*in a manner consistent with the mandate*," and describes the purpose of legislative change as "*improvement* and refinement" or "*broaden[ing] and strengthen[ing]*" the Amendment. *An Explanation of the Sunshine Amend*. (undated) (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*. (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) More than a year 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).

This is the mandate: Statutes purporting to implement the Sunshine Amendment may require greater disclosure, but they may not allow less.[12] The trial court erred in focusing solely on the Legislature's power to implement legislation and ignoring the fact that the Legislature must never retreat from the mandate.

[12] The trial order itself notes that the Sunshine Amendment "leaves to the Legislature sufficient flexibility to carry out the will and intent of the voters, *but not to diminish it*." (R. 340) (emphasis added).

III. FLORIDA'S PEOPLE, NOT APPOINTED TRUSTEES OR ELECTED POLITICIANS, HAVE THE RIGHT TO DETERMINE IF THERE IS CONFLICT OF INTEREST.

Proponents of the blind trust statute claim that it will help prevent conflicts of interest by government officials by blinding them to their own financial holdings. This is a dubious assertion, as will be shown below. Proponents also claim that preventing conflicts of interest is the paramount goal of the Sunshine Amendment, but it is only one of four purposes. The Amendment's chief purpose is to empower the people of Florida, through full and public financial disclosure, to reach their own conclusions regarding conflicts of interest. *Plante v. Gonzalez*, 575 F. 2d 1119.

A. Full and Public Financial Disclosure Is the Cornerstone of the Sunshine Amendment.

The Sunshine Amendment opens with this declaration: "A public office is a public trust. *The people* shall have the right to secure and sustain that trust against abuse." Art. II, § 8, Fla. Const., emphasis added. It follows that the Amendment's key objective is for Floridians – as public citizens and voters – to have the information they need as guardians of the public trust.

1. <u>The Sunshine Amendment has more than one objective.</u>

Deterring conflicts is only one goal of the Sunshine Amendment. *Plante v. Smathers* found that the Amendment has four principle objectives: (1) the public's right to know an official's interests; (2) deterring corruption and conflicting

interests; (3) creating public confidence in Florida's public officials; and (4) helping with the detection and prosecution of officials who violate the law. 372 So. 2d at 937.

2. The Sunshine Amendment's primary objective is the public's right to know.

The briefing paper from Askew's files calls full and public financial disclosure "[t]he cornerstone of the amendment." *An Explanation of the Sunshine Amend*. It makes possible every other objective of the Amendment.

Full and public financial disclosure holds a unique place in Florida.[13] Many other states have financial disclosure statutes, but no other state enshrines disclosure in its constitution. *State Const.*, Ballotpedia: An Interactive Almanac of U.S. Politics. Floridians have a constitutional right to receive such information, a

[13] The Sunshine Amendment is consistent with the Florida Constitution's strong commitment to open government and public records generally. Article I, Section 24(a), gives every person "the right to inspect or copy any public record made or received in connection with the official business of any public body. . . . " It also provides that government meetings shall be open to the public. Courts have held that "the public records law [Chapter 119, Fla. Stat.] is to be construed 'liberally in favor of the state's policy of open government.' If there is any doubt as to whether a matter is a public record subject to disclosure, *the doubt is to be resolved in favor of disclosure*." *Morris Pub. Grp., LLC v. Fla. Dept. of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013) (emphasis added), quoting *Natl. Collegiate Athletic Ass'n. v. Assoc'd Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009).

right that underpins the right to vote.[14] As the Askew briefing paper emphasized:

> 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.

Disclosure also "serves to remind officials of their obligation to put the public interest above personal considerations" while "help[ing] citizens to monitor the considerations of those who spend their tax dollars and participate in public policy decisions or administration." Fla. Comm'n. on Ethics, *Guide to the Sunshine Amend. & Code of Ethics for Pub. Officers & Employees*, 9 (2014).

The trial judge accepted the flawed reasoning that reporting blind trusts in financial disclosure statements means "[t]he public official and the public possess the same information and there is nothing more to disclose." (R. 341). This ignores the federal case that upheld the Sunshine Amendment soon after its passage. *Plante v. Gonzalez* included lengthy consideration of the financial privacy interests of officeholders, stating that the legislators who brought the case

[14] The nature of the amici who submitted briefs on the Appellant's behalf when the case was first filed – the Florida League of Women Voters and a coalition composed of the First Amendment Foundation and various media groups – underscores that significant rights concerning fair elections and open government are at stake.

> are not ordinary citizens, but . . . people who have chosen to run for office. That does not strip them of all constitutional protection. It does put some limits on the privacy they may reasonably expect. . . . Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger.

575 F. 2d at 1135-36 (citations omitted).

Applying that logic, the *Gonzalez* court denied the legislators' suggestion that they should be allowed to disclose only to the Commission on Ethics and that those disclosures would not be made public. Judge Wisdom wrote:

> This could deter some corruption, restore some public confidence, and detect some malfeasance. But the Florida voters have decided that it could not provide the voting public with the valuable information public disclosure creates; something more is needed. This educational feature of the Amendment serves one of the most legitimate of state interests: it improves the electoral process. That goal . . . can be met in no other way. That goal justifies public publication of the senators' financial statements.

Id. at 1137.

If it is not a sufficient safeguard for disclosure to be made only to the Ethics Commission, then a document that does not disclose even to that body is no safeguard at all.

B. Even as a Blind Trust Statute, Section 112.31425, Florida Statutes, Has Numerous Shortcomings.

This lawsuit is about full and public financial disclosure, not about the mechanics of qualified blind trusts[15]. Nevertheless it is worth considering whether Section 112.31425, Florida Statutes, creates a system which is truly blind.

The Final Order cites various provisions of the overall statute – the trustee has discretion to manage the trust (§ 112.31425(6)(c)(2)); the public official may not receive information about replacement assets except for "minimum" information necessary to complete tax returns (§ 112.31425(6)(c)(6)); the official may not attempt to influence or control trust management (§ 112.31425(3)); and the official may not communicate with the trustee except in limited circumstances and then only in writing (§ 112.31425(4)) – and concludes that they are "consistent with the Sunshine Amendment," specifically with the "purposes of requiring disclosures to avoid conflicts of interest." (R. 340-341).

A coalition of the First Amendment Foundation and various media groups sees the statute differently. In an amicus brief submitted when this case originally was filed in the Florida Supreme Court, the coalition wrote:

> [T]he 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

[15] The Appellant would have no quarrel with candidates and elected officials who – like Governor Scott in 2014 – keep assets in qualified blind trusts 364 days a year but reveal them fully and publicly in annual financial disclosure statements.

> is allowed to communicate with the trustee about maximizing trust assets (§ 112.31425(4)(b), Fla. Stat.), 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. §112.31425(4)(d).

(R. 93).

The trial court's Final Order goes on to say, "The intent of the Sunshine Amendment has been fulfilled by disclosing what assets are placed in the trust and the value of the trust at the applicable reporting time. The public official and the public possess the same information and there is nothing more to disclose." (R. 341).

But when the 2013 Legislature was debating the qualified blind trust provisions, former Ethics Commission Executive Director Philip Claypool provided this assessment in a memorandum widely circulated to the Governor and members of the Legislature:

> Unfortunately, the bill . . . takes the Ethics Commission's recommendations regarding blind trusts and eliminates most of the parts that would protect the public. . . . *Instead of protecting the public from conflicts of interest that a public official may have through "blinding" the official to what he or she owns, the proposed law would allow officials to use their positions for private gain while "blinding" the public to what's going on.* Safeguards that have been removed from the Commission's recommendations are:
>
> 1) The trustee should be prohibited from investing trust assets in business entities that the trustee knows are regulated by or do a

> significant amount of business with the official's agency;
>
> 2) The trust should contain only readily-marketable assets, so that the trustee is able to sell the assets originally put into the trust by the official. . . .
>
> 3) Does not require that the terms of the trust be reviewed and approved by the Commission, as meeting the requirements of the law;
>
> . . .
>
> 5) Does not require the trustee to provide any guarantee that he or she is aware of the requirements of the blind trust law and will comply with them (thus eliminating any possibility that the public could enforce the law against a trustee who passes information to the official).

Memo from Philip Claypool to Dan Krassner & Ben Wilcox, Integrity Fla. (Mar. 9, 2013) (emphasis added).[16]

Florida's blind trust law also falls short when compared with provisions in federal law. Among the differences:

(1) Florida lacks the explicit federal prohibition against former employees administering a qualified blind trust for a former employer (5 C.F.R. §2634.405(c) (2014));

(2) The head of the federal Office of Government Ethics ("OGE") may

[16] The analysis also was presented at a press conference, which is available at http://www.integrityflorida.org/nsf-video-coalition-for-stronger-ethics-reformpress-conference. The Claypool segment on blind trusts begins at 8:43.

disqualify a trustee for violating trust restrictions (5 C.F.R. § 2634, App. C (2014)), but there is no similar provision under the Florida statute;

(3) In the federal system, qualified blind trust agreements and amendments to them are public records (5 C.F.R. § 2634.413 (2014)), but this is not true under the challenged statute;

(4) Federal trustees must report regularly to the OGE and allow OGE inspection of the trust's records, (5 C.F.R. § 2634.403(b)(11) (2014)), but the challenged statute does not put Florida trustees under such scrutiny; and

(5) Under federal law, none of the assets initially placed in a qualified blind trust may be holdings that would be prohibited under conflict-of-interest or other laws. 5 C.F.R. § 2634.406(a) (2014). Again, this prohibition is not part of the Florida statute.[17]

Additionally, a federal blind trust, though more strictly regulated than one in Florida, may not be used by federal judges or magistrates because it does not provide disclosure. Thomas R. White III, *To Have or Not to Have – Conflicts of*

[17] The challenged statute flatly declares that any official with a blind trust "does not have a conflict of interest . . . or a voting conflict of interest." § 112.31425(2). In other words, a blind trust allows investments that are considered improper conflicts of interest under other portions of state law. Because the challenged statute is not effective to blind the public official, this is very dangerous.

Int. and Fin. Planning for Judges, 35 L. & Contemp. Probs. 212-13 (1970).[18]

If Florida's qualified blind trust law is flawed as a mechanism to prevent conflicts of interest, it is fatally flawed when judged by the standards of full and public financial disclosure. There is no requirement that, after disclosure of the initial assets and their values, the public will be informed about the trust holdings because the statute does not require that the trust instrument be filed for public review. While the public official is required to place instructions to the trustee in writing, there is no requirement that those writings be available to the public.

Most troubling, the trustee is allowed to certify "that the trust meets all the requirements" of the statute; this gives a private person – someone selected by and paid by the public official – power to make a judgment that the Sunshine Amendment bestows upon the citizens of Florida. § 112.31425(6)(d)(4).[19]

The Appellant is challenging only the subsection of the statute which allows using qualified blind trusts in financial disclosure statements. But the foregoing

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[18] *See* Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 Kan. L. Rev. 43, 48 (2007): "[B]lind trusts undermine the transparency essential to democratic governance." *See also* Freedberg & Smith, concerning Sink's blind trust ("There is less public disclosure about her finances than [about those of] other officials.").

[19] The federal system also provides for certification by a trustee, but its provisions include more comprehensive safeguards than those in Florida. Further, federal officials are not subject to a constitutional requirement of full and public financial disclosure, as Florida officials are.

review of the overall statute indicates that much would be hidden – including conflicts of interest – if such filings are allowed.

C. The Challenged Statute Is Facially Unconstitutional.

In a facial challenge, a court "determine[s] only whether there is any set of circumstances under which the challenged enactment might be upheld." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010). As demonstrated herein, use of a blind trust in financial disclosure *never* can satisfy the Constitution's requirement of full and public disclosure. It would not matter if the blind trust conceals millions of dollars or pennies, if it is filed by a Democrat or a Republican, if it actually prevents conflicts of interest or merely conceals them. It matters only that lump-sum reporting of a blind trust on financial disclosure statements hides information that Florida citizens and voters have a right to know. The statute is in fatal conflict with the Florida Constitution.

CONCLUSION

The Sunshine Amendment begins with a sacred pledge: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse." Art. II, § 8, Fla. Const. Full and public financial disclosure guarantees Floridians the power to exercise that right and sustain that trust. Any statute undermining the constitutional right cannot stand. Section 112.31425(5) is facially unconstitutional and should be struck down.

Respectfully submitted,

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CERTIFICATES OF FONT SIZE AND SERVICE

I hereby certify that this Brief has been prepared using Times New Roman 14-point type.

I also certify that the Brief was served electronically on the following persons this 6th day of October 2014:

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