No. 18-1014

In The
SUPREME COURT of the UNITED STATES

In re
REX E. RUSSO,
Petitioner,

v.

MARY CAY BLANKS,
as the Clerk of the
THIRD DISTRICT COURT OF APPEAL,
IN AND FOR THE STATE OF FLORIDA,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Florida Cases:

Contest to Respondent's Statement of the Case

The underlying cases and proceedings for which the records were requested are wholly irrelevant to Petitioner's right to receipt of those records as guaranteed to him under the Florida Constitution. No doubt, Respondent's purpose in raising the outcome in those underlying actions is an attempt to bias this court's consideration of the merits presented by the petition. Proceeding further in that vein, Respondent incorrectly states that those underlying rulings were against the Petitioner. In fact, those rulings were against the Petitioner's clients.[1] Obviously, the Respondent wants this court to believe that Petitioner has taken the rulings as personal losses, as opposed to professional losses, and to thus undermine Petitioner's altruistic intentions.

The only responsive record provided to

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1. If Respondent were not comforted knowing that this court can not undertake an appellate review of those underlying proceedings, and would not likely analyze them from the record up, Respondent would have stayed mum for fear that a review would embarrass her court. If this court were to nevertheless analyze those cases, starting with the record and working up, the court would discover that the opinion in the first set of cases (i.e. consolidated cases) shows veiled disrespect for Florida's constitutionally guaranteed homestead exemption against forced sale. In the third case, a Federal Truth-in-Lending Act (TILA) case in which the homeowners' were defrauded by a forged disclosure document, the Florida court essentially refused to apply the TILA laws while misstating facts. Each of those cases required the Florida appellate court to apply and interpret the applicable laws broadly in favor of the homeowners, but neither of the opinions so much as mentioned that scope of review let alone applied it. Each opinion was written in a manner so as to not invoke the very limited jurisdiction of Florida's Supreme Court to conduct a further review.

Petitioner was a copy of the internal operating procedures of Florida's Third District Court of Appeal. No other record, responsive or otherwise, was provided by Respondent to Petitioner. Although, in her brief filed with the Florida Supreme Court Respondent provided website links to irrelevant non-requested records [see Respondent's Brief in Opposition at page 1 thereof]. None of those links, nor the records available thereunder, lead to the sought after records.

Introductory Argument in Reply to Opposition

Courts are occasionally called upon to interpret laws regulating that very court. When such issues are presented, a court ought to demonstrate that its analysis is purely objective, and it should do so in the most laudatory of ways by giving open consideration to all rational points of view. Failure to do so forsakes the very purpose of the judicial system, destroys the court's identity by arguably placing its interests above the will of the people, and invites questions as to the court's impartiality. Clearly, a decision that fails to acknowledge a right under a state's constitution, especially when that ignored right regulates that very court, is not a laudatory decision. Instead, such decision reeks of self-interest and violates every aspect of the due process and equal protection clauses of the Fourteenth Amendment. *U.S. Const. amend. XIV, § 1.*

While the Petitioner has primarily asserted a denial of equal protection, others may see a denial of

procedural due process, or even perhaps a denial of substantive due process, under the preceding clause of the Fourteenth Amendment. *U.S. Const. XIV, § 1.* It all comes down to either an arbitrary non-recognition of Petitioner's Florida constitutional right to the records, and/or to a procedurally improper denial of Petitioner's Florida constitutional right to the records, and/or to an improper taking of Petitioner's Florida constitutionally guaranteed liberty to receive the records.

Denial of Equal Protection

It was not the Respondent's refusal to produce the records that was necessarily arbitrary; it was the Florida Supreme Court's unacknowledged constitutional right that was exceptionally arbitrary. It was in that context that Petitioner cited to *Spradling v. Texas*, 455 U.S. 971 (1982). Respondent's presentation to the Florida Supreme Court, although incorrect and also unacknowledged by the court, was at least premised upon an apparent good faith argument (i.e. the contested exemption found in Rule 2.420(c)(1) of the Florida Rules of Judicial Administration).

Respondent fails to recognize that "equal protection" also requires non-arbitrary application of law especially when applied to an organic right. *Willowbrook v. Olech*, 528 U.S. 562, 566 (2000) ("a class of one . . . is of no consequence because . . . the number of individuals in a class is immaterial for equal protection analysis."); *but see Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 890–893 (7th Cir.

2012) (questioning *Olech* finding based solely on "irrational and wholly arbitrary" government action; suggesting constraints on class-of-one arguments but not limiting them to wrongs motivated by personal hostility or animosity; suggesting openness to a "showing merely that the defendant had acted without a reasonable basis"). There is nevertheless present here a dichotomy demonstrative of unequal treatment. While all others presumptively have the benefit of the Florida constitutional mandate allowing access to judicial branch public records, Petitioner's application of the right to those records is not even acknowledged by the court.

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350 (1918)) and quoted again in *Willowbrook* supra at 564. Here, the "duly constituted agent" arbitrarily discriminating against the Petitioner is none other than the Florida Supreme Court which possesses a self-serving interest in avoiding public access to judicial branch records.[2]

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2. Respondent's counsel is a sitting judge on Florida's Third District Court of Appeal and was a panel judge in the underlying TILA case mentioned in the footnote above. The Respondent is directly under the control of Florida's Third District Court of

Contrary to Respondent's argument, Florida's Supreme Court did not merely "misapply a properly stated rule of law" — that court did much worse — it refused the application of a clearly stated Florida constitutional right. In doing so, the Florida Supreme Court did not reach erroneous factual findings; it did not reach any factual findings. The manner in which the Florida Supreme Court avoided recognition of Petitioner's organic right is a classic example of arbitrariness.

Denial of Procedural Due Process

Respondent mistakenly believes that the petition is primarily premised upon a failure of procedural due process as guaranteed under the Fourteenth Amendment of the United States Constitution. While many elemental characteristics of procedural due process are absent from the decision making process employed by the Florida Supreme Court, the real wrong was the court's arbitrary non-

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Appeals. *Fla. Const. art. V, § 4(c).* The Clerk of the Florida Supreme Court is likewise under the control of the Florida Supreme Court. *Fla. Const. art. V, § 3(c).* The Florida Supreme Court created the limited exemption which the Respondent sought to apply. Florida's Supreme Court denied the petition for mandamus without recognition of the constitutional right thus avoiding an interpretation of the limited exemption. Petitioner's constitutional right is applicable against the Florida Supreme Court, and any interpretation of the limited exemption – had there been one – would have been equally applicable as against the Clerk of the Florida Supreme Court, and thus against the court itself.

recognition of Petitioner's Florida constitutional right to the records.

To some extent, Respondent's mistaken belief is understandable. Had the Florida Supreme Court first acknowledged Petitioner's constitutional right to the records and then made some attempt at rationally applying the exemption raised by Respondent to deny mandamus, a very differently worded petition would have been presented. An open and complete analysis of the issues presented would have removed Petitioner's argument that his constitutional right went unacknowledged, although an arbitrarily reached decision might have still come about; it would have lessened Petitioner's argument that he was placed in "a class of one" because *stare decisis* would have extended a reasoned opinion to all; and, it would have added a considerable number of the missing procedural due process elements. However, the question as to whether Florida's Supreme Court constituted a fair tribunal without interest in the outcome would have remained. *See Bracy v. Gramley*, 520 U.S. 899 (1997) (due process requires a fair tribunal with no actual bias or interest in the outcome).

Denial of Substantive Due Process

Respondent also muddles Petitioner's Florida constitutional claim to the records, and Petitioner's rights to due process under the Fourteenth Amendment, with a substantive loss (i.e. the lost liberty to acquire the records, which might also be

characterized as a property right); although, Respondent argues that the loss is not sufficiently grievous [see Respondent's Brief in Opposition, page 6]. Respondent's concept of the substantive loss is not far fetched, but Petitioner continues to assert that an unexplained denial of a state's organic law is very grievous and quite extraordinary. *See Buchanan v. Little Rock Sch. Dist. of Pulaski Cty.*, 84 F.3d 1035, 1038 (8th Cir. 1996) ("A protected property interest must be derived from a source independent of the Constitution, such as state law.").

The Exemption Was Never Tested

A right must first be recognized before reason exists to contemplate whether an asserted exemption to that right is applicable. Contrary to Respondent's repetitive argument, Florida's Supreme Court never got to the point of contemplating whether Respondent's asserted exemption was applicable. Without so much as a nod of acknowledgment to Florida's constitutional right to judicial branch records (or even that judicial branch records were being demanded) the Florida Supreme Court irrationally concluded that Petitioner showed no clear legal right to the records. Accordingly, the primary issue before this court is whether or not Florida's Constitution at Article I, Section 24, provides the Petitioner with a clear right to the records requested. The inescapable answer is that it does.

Only following this court's determination that Petitioner has a right to the requested records would

this court turn to the dependent issue of whether the exemption raised by the Respondent is applicable. Absent Respondent abandoning her argument, answering that dependent inquiry is a necessary hurdle to jump before granting Petitioner his sought after mandamus relief.

Whether or not the Florida Supreme Court's created exemption found in Rule 2.420(c)(1) of the Florida Rules of Judicial Administration is applicable to the Petitioner's records request remains unanswered by any court. There was no "considered denial of [that] rule" [see Respondent's Brief in Opposition at page 6]. The rule was not considered at all, and accordingly that rule was not the reason for the Florida Supreme Court's denial of Petitioner's request for mandamus. Therefore, Respondent continues to bear the burden of proving to this court that the exemption is applicable. *See Clemente Javierre v. Central Altagracia*, 217 U.S. 502 (1910). Yet, Respondent failed to present any analysis of the exemption in support of her argument.

Cases Are Assigned to Panels, Not Panels To Cases

"Public policy favoring open records must be given the broadest expression. It is the exception which must be narrowly construed." *Tribune Co. v. Public Records, P.C.S.O.*, 493 So.2d 480, 484 (Fla. 2nd DCA 1986) (request made under analogous Fla. Stat. § 119.01); *Times Pub. Co., Inc. v. City of St. Petersburg*, 558 So.2d 487, 492 (Fla. 2nd DCA 1990)

("the right to access public documents is virtually unfettered" except for stated exemptions – also reached under analogous Fla. Stat. § 119.01); *NCAA v. Associated Press*, 18 So.3d 1201, 1206 (Fla. 1st DCA 2009) (public records laws are construed liberally in favor of the state's policy of open government). In apparent recognition of the state's policy, the chief judge of the Third District Court, replying on behalf of the Respondent to Petitioner's request for records, iterated that her non-forthcoming response concerned both the "assignment of judges and cases" [see Appendix, page 17 of the Petition]. Conflating the assignment of cases to preestablished sets of judges with that of "decision making" insults the bedrock principal of due process and the right to an impartial panel just as certainly as that process in reverse (i.e. assigning a panel to a case). *See Bracy v. Gramley*, 520 U.S. 899 (1997).

Respondent's random creation of three-judge appellate panels in advance of the assignment of specific cases to those panels discloses nothing of substantial importance, especially since the judges originally assigned the cases did not ultimately decide the cases. The records sought by the Petitioner, to which he has a Florida constitutional right, would disclose:

- the person or persons who announced to the judges of that court the assignment of the subject cases,
- whether the assignment of cases was done randomly or was someone's choice,
- whether the assignment of the cases adhered to a

process in the court's internal operating procedures,

- when the assignments of the cases were made,
- whether either case had been assigned to a prior panel of judges before public disclosure, and if so, why the case was reassigned (n.b. the judges first publically assigned the cases were changed before the ultimate panel of judges decided the cases),
- why the consolidation of the first set of cases led to reassignment before a new panel of judges when the first panel had already gone past the point where they were expected to have read the briefs, to have read the memorandum prepared by the primary judge, and to have prepared for oral argument,
- whether the Respondent, the chief judge, or another reassigned the first set of cases to the ultimate panel,
- whether any judge, in either case, specifically requested that the case be assigned to a panel on which that judge was scheduled to sit,
- whether the judge who substituted for another judge in the third case approached the judge who substituted out, or was approached by the judge who substituted out, or was assigned by the chief judge because of the inability of the preassigned judge to attend to the case,
- why there was a necessity for the originally assigned judge in the third case to be substituted,
- whether the judge who substituted in for the originally assigned judge in the third case expressed an interest or desire to sit in judgment of that case.

Respondent asserts that Petitioner provided no

clarity regarding the records sought [see Respondent's Brief in Opposition, page 7]. Obviously, the Petitioner has no knowledge of the form, title, or other references given to the sought after records by the Respondent. A reasonable methodology would be for Respondent to identify the records that broadly fall under the request, state the category under which each record falls, and state any exemption that she asserts to specific records. *See Jacobs Keeley, PLLC v. Chief Judge of the Seventeenth Judicial Circuit*, 169 So.3d 192 (Fla. 4th DCA 2015) (mandamus granted compelling chief judge of circuit to comply with request for public records regarding reassignment of cases to trial court judges).

Conclusion

"The Constitution does no more than assure the public . . . equal access once government has opened its doors." *Houchins v. KQED*, 438 U.S. 1, 16 (1978). Article I, section 24, of the Florida Constitution opened Florida's doors to public access of non-exempt government records, including those of the judicial branch. However, in violation of Petitioner's individual guarantees under the Fourteenth Amendment of the United States Constitution, the Florida Supreme Court arbitrarily locked that door shut on Petitioner while masking the sign which read:

"THIS WAY TO FLORIDA'S CONSTITUTION."

WHEREFORE, this court should take jurisdiction and grant the petition, enter a writ of mandamus compelling Respondent to produce the requested public records redacted of any exemptible matter, and require that a non-redacted copy of the records be provided so that this court may ascertain whether only exemptible matter was redacted.

Signature of Petitioner

Respectfully Submitted by —

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Rex E. Russo
Pro Se Petitioner, is an attorney licensed in the State of Florida (Lic. #331597) and a member of the Bar of this Court.