IN THE SUPREME COURT OF FLORIDA

Case No. SC2016-616

SILVIO MEMBRENO and
FLORIDA ASSOCIATION OF
VENDORS, INC.,

Petitioners,

L.T. Case No. 3D14-2603

vs.

THE CITY OF HIALEAH,
FLORIDA,

Respondent.

_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

This Court should exercise discretionary jurisdiction because the Third District's decision, *Membreno v. City of Hialeah* ("Opinion," cited Appendix; "A. #."), expressly and directly conflicts with the holdings of this Court, *see* Art. V, § 3(b)(3), Fla. Const., regarding Florida's rational-basis test as follows:

(1) Although this Court evaluates whether laws are "discriminatory, arbitrary or oppressive," in rational-basis cases, *see, e.g., Warren v. State Farm Mut. Auto. Ins. Co*., 899 So. 2d 1090, 1096 (Fla. 2005); *Chi. Title Ins. Co. v. Butler*, 770 So. 2d 1210,1215 (Fla. 2000), the Opinion deemed that standard mere "rhetorical flourish." App. 10–11, n.6.

(2) Although this Court requires review of facts in rational-basis cases, *see, e.g., Estate of McCall v. United States*, 134 So. 3d 894, 905, 919 (Fla. 2014); *Eskind v. City of Vero Beach*, 159 So. 2d 209, 211–12 (Fla. 1963), the Opinion held plaintiffs cannot use evidence to prove laws lack a reasonable relationship to a legitimate government interest, and that courts should eschew evidence and speculate whether there "might" be a reasonable relationship. App. 23–27.

(3) Although the Florida rational-basis test provides more searching review and individual protections than the federal test, *see, e.g., McCall*, 134 So. 3d at 899, 901; *Armstrong v. Harris*, 773 So. 2d 7, 17–18 (Fla. 2000), the Opinion held Florida and federal courts have "one, identical rational basis test." App. 9.

STATEMENT OF THE CASE AND FACTS

Petitioners (Plaintiffs and Appellants below) are mobile flower vendors challenging the constitutionality of two provisions in the City of Hialeah's street-vending laws: a prohibition against standing still and a prohibition against displaying more goods than vendors can carry on their person. *Id.* 3–4. It was undisputed that the restrictions, when enforced, make Petitioners' jobs *more* dangerous by forcing them into unknown traffic patterns and make Petitioners' livelihood practically impossible. *Id*. Petitioners sued on the basis that the restrictions denied them due process under the Florida Constitution's right to be "rewarded for industry, and to acquire, possess and protect property"—a claim governed by Florida's rational-basis test. *See* Art. I, §§ 2, 9 Fla. Const.; App. 4. The trial court granted summary judgment for Hialeah. App. 4.

Petitioners argued on appeal that the trial court did not apply the Florida rational-basis test, which is more searching than its federal counterpart and contains a second prong absent in the federal test.[1] *Id.* 5, 11 n.6. Petitioners did not argue, as the Opinion incorrectly states, that "the Florida test puts the burden squarely on the government." *Id*. 5. Rather, Petitioners argued that they "*met* their burden in negating the City's purported interests." Appellants' Initial Br., 2015 WL 10521646, at *28 (emphasis added). The District Court affirmed.

[1] Petitioners also challenged the city's *ultra vires* enforcement of a state law, which the District Court affirmed without opinion and Petitioners do not challenge here.

SUMMARY OF THE ARGUMENT

The Opinion expressly and directly conflicts with the holdings of this Court regarding Florida's rational-basis test. *First*, the Opinion threw down the gauntlet, holding that an entire prong of Florida's rational-basis test—under which "discriminatory, arbitrary, or oppressive" laws cannot stand—is "best understood as a rhetorical flourish." App. 10–11 n.6. *Second*, the Opinion conflicts with *McCall* and its forebears because it held that facts do not matter under the rational-basis test and plaintiffs are not allowed to prove that there is no reasonable relationship "by evidence admitted in a court of law." *Id.* 35. *Finally*, the Opinion held that the federal and Florida rational-basis tests are "[e]ssentially the same." *Id.* 6, 8. This conflicts with *McCall*, in which this Court struck down a statute rubber-stamped by the federal test. 134 So. 3d at 899 (plurality opinion), 916 (Pariente, J., concurring). It also conflicts with this Court's longstanding jurisprudence that "the federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling." *Armstrong*, 773 So. 2d at 17. These conflicts present issues of statewide and national importance and justify review to provide an accurate test for litigants and courts in Florida rational-basis cases.

ARGUMENT

I. The Opinion Conflicts with This Court's Holdings on the Second Prong of Florida's Rational-Basis Test.

Florida's rational-basis test, in addition to having a "reasonableness"

requirement as its first prong, has a second prong under which a court must determine whether the law under review is "discriminatory, arbitrary, or oppressive." The District Court's Opinion jettisoned this second prong from the test, stating that it has "no meaning" and amounts to "rhetorical flourish." App. 10–11 n.6. The District Court's statement that no case has ever treated the second prong "as reflecting any meaning other than that the law must bear a rational basis to a legitimate government purpose," *id.*, is in direct conflict with this Court's cases separately analyzing the law's oppressiveness. *See, e.g.*, *Warren*, 899 So. 2d at 1096 ("We *also* agree that the statute is not discriminatory, arbitrary, or oppressive. . . . [T]he *potentially oppressive aspect* of the statute . . . [was] an inability to recover payment") (emphasis added); *Sult v. State*, 906 So. 2d 1013, 1022–23 (Fla. 2005) (striking down law because it was *both* not "reasonably related to the harm sought to be avoided" *and* "invite[d] *arbitrary and discriminatory* enforcement") (emphasis added); *Chi. Title*, 770 So. 2d at 1220 ("The anti-rebate statutes . . . do not achieve the Legislature's avowed purposes *and* instead simply deprive the consuming public of a choice[—]the cornerstone of a competitive, free-market economy.") (emphasis added); *City of Miami v. Shell's Super Store*, 50 So. 2d 883, 884 (Fla. 1951) (using oppressiveness-type analysis in striking down a law as "an unreasonable deterrent to appellee in the conduct of its business" that "would destroy much of" it).

The Opinion's express and direct conflict with these holdings warrants review.

II. The Opinion Conflicts with This Court's Holdings that Facts Matter Under the First Prong of Florida's Rational-Basis Test.

Not only did the District Court eliminate the second prong of Florida's rational-basis test, it also hollowed out the first prong, under which a law is unconstitutional if it has no reasonable relationship to a legitimate government interest. Even when (as Petitioners have conceded here) the government's health-and-safety interest is legitimate, plaintiffs can still prevail if they show that the law has no reasonable relationship to that interest. *See, e.g.*, *Chi. Title*, 770 So. 2d at 1220. The District Court held otherwise, stating that plaintiffs cannot prove the lack of a reasonable relationship with "evidence admitted in . . . court" about a law's actual effects. App. 35. Accordingly, the District Court ignored all of the undisputed evidence establishing that the restrictions made vending more dangerous and instead speculated that "[r]easonable people *might* believe that limiting the vendors to selling in the lanes of traffic only the inventory that they can carry will lessen the accidents." App. 34 (emphasis added).

This analysis conflicts with *McCall*, in which five justices recently struck down a cap on non-economic damages, agreeing that Florida courts must look at reality—not what people "might" believe—to determine whether there is a reasonable relationship between a law and its purported purpose. 134 So. 3d at 912

(plurality opinion) (holding that "the record and available data fail to establish a legitimate relationship"); *id.* at 919 (Pariente, J., concurring) (reviewing facts and concluding the cap "provides no commensurate benefit to the victims of medical malpractice, . . . only the insurance companies"). Here, the District Court adopted the position of the two *dissenting* justices. *Compare id*. at 932 (Polston, C.J., dissenting) (employing federal test described as "'*based on rational speculation* unsupported by evidence'") (quoting *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 315 (1993) (emphasis added)), *with* App. 25–26, 34–35 (quoting identical *Beach Communications* language and using same speculative federal test).

McCall is only one instance of this Court's longstanding refusal to substitute judicial speculation for factual review when employing Florida's rational-basis test. In *Eskind*, for example, this Court reviewed record evidence in striking down a ban on hotels advertising rates. 159 So. 2d at 211–12. This Court held that "[a]lthough the argument advanced by the City *appears plausible*, we fear that it is not *supportable* on constitutional grounds." *Id*. at 212 (emphasis added); *see also id.* (considering "the effect of the ordinance on the rights of the citizen from the aspect of its *practical impact*") (emphasis added); *see also Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958) ("Search as we have done *in this record*, we fail to find any reasonable basis whatever") (emphasis added). Because the Opinion rejected facts in favor of speculation, it created conflict with this Court's precedent.

III. The Opinion Conflicts with This Court's Holdings that the Federal and Florida Rational-Basis Tests Are Different.

The holding that the Florida and federal tests are virtually identical directly conflicts with *McCall*, where this Court struck down a statute that readily survived the Eleventh Circuit's application of the federal rational-basis test. Even the District Court acknowledged this conflict. App. 32 ("Admittedly, *McCall*'s holding conflicts with the decision of the Eleventh Circuit Court of Appeals involving the same parties"). The District Court chalked the conflict up "to the reality that judges can disagree over the application of a legal test." App. 33. This Court, however, provides "greater freedom from government intrusion into the lives of citizens than [its] federal counterparts. *[T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling*." *Armstrong*, 773 So. 2d at 17 (internal citation omitted) (emphasis added); *see also Liquor Store v. Cont'l Distilling*, 40 So. 2d 371, 375 (Fla. 1949) (rejecting federal rational basis in favor of this Court's test because this Court is the "final arbiter" of its own constitution).

The conflict with *McCall* is clear: The Eleventh Circuit upheld a law under federal rational basis and *specifically asked this Court* if the outcome would be different under this Court's test. 134 So. 3d at 897, 899. The 5–2 answer was yes.

IV. This Case Presents Issues of Statewide and National Importance.

a. Statewide Importance. The District Court has added to confusion among lower courts. Both the Third and Fourth Districts, for example, are inconsistent in

properly applying Florida's rational-basis test. Sometimes, they treat it as no more than a carbon copy of the federal test. *See* Opinion at 6; *WCI Cmtys. Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004) (applying federal rational-basis test). But, other times, they have done the opposite and treated this Court's test as independent and reliant on facts—not speculation. *See Fla. DCF v. Adoption of X.X.G.*, 45 So. 3d 79, 87–91 (Fla. 3d DCA 2010) (striking down same-sex-parent adoption ban under rational basis and finding evidentiary review was proper and *required*); *City of Fort Lauderdale v. Dhar*, 154 So. 3d 366, 367–68 (Fla. 4th DCA 2014), *aff'd*, 41 Fla. L. Weekly S61 (Fla. Feb. 25, 2016) (striking down a red-light-camera law based on facts, not speculation, proving the law had no relationship to its aims). This Court can resolve this confusion to ensure statewide uniformity.

b. National Importance. A growing number of state high courts have begun to grapple with articulating their own, more searching rational-basis tests. The Texas Supreme Court recently reversed an intermediate court for omitting Texas's second prong—whether a law is "unreasonably burdensome" and "oppressive." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *see also, e.g.*, *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 460 (Wis. 2005) (requiring "*more than a speculative* tendency as the means for furthering a valid legislative purpose") (emphasis added); *Alaska Civil Liberties Union v. State*, 122

P.3d 781, 791 n.48 (Alaska 2005) (using "*less speculative*, less deferential, more intensified *means-to-end inquiry* for traditional rational basis") (quotation marks omitted; emphasis added). Florida's greater protection of liberty is thus in keeping with the historic prerogative of state supreme courts. William J. Brennan, Jr., *State Constitutions & the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977) (lauding state courts for "guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased"); *see also State v. Kelly*, 999 So. 2d 1029, 1042 (Fla. 2008) (stating federal decisions "are not mechanically applicable to state law issues, and state court judges . . . seriously err if they so treat them") (quoting Brennan, 90 Harv. L. Rev. at 502).

Here, this Court can articulate the broader protections of its jurisprudence, which have been praised as "[h]ead and shoulders above the rest," by "continuously protect[ing] economic liberty through . . . economic substantive due process." Anthony B. Sanders, *The "New Judicial Federalism,"* 55 Am. U. L. Rev. 457, 489 (2005). The District Court eliminated a prong of the rational-basis test and rejected factual review. This holding conflicts with this Court's scrupulous approach to rational basis and broad view of constitutional protections.

CONCLUSION

Petitioners respectfully request that this Court accept jurisdiction and resolve the aforementioned conflicts.

DATED this 18th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2016, a true and correct copy of the foregoing Petitioners' Brief on Jurisdiction was filed and served electronically on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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