IN THE SUPREME COURT OF FLORIDA

SILVIO MEMBRENO and
FLORIDA ASSOCIATION
OF VENDORS, INC.,

Petitioners,

Case No. SC16-616
DCA Case No. 3D14-2603

v.

THE CITY OF HIALEAH,
FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners, Silvio Membreno and the Florida Association of Vendors, Inc., (collectively the "**Street Vendors"**) challenged two provisions of Respondent City of Hialeah's street vending ordinance (**"Ordinance"**). Op. at 2.[1] The challenged provisions provide in pertinent part that no street vendor conducting sales on foot (**1**) may permanently stop or remain at any one location unless expressly allowed by zoning; or (**2**) may display more goods or merchandise, with the intent of soliciting sales, than the street vendor can carry on his or her person. *Id*.

In passing the Ordinance, the city commission found that local street vendors generally peddle their wares to occupants of motor vehicles on travelled portions of the roadways. Op. at 3. The vendors display their merchandise in public rights of way and private property even though the City's zoning code requires *in all commercial and industrial districts* that all merchandise be stored entirely within a building. *Id*. In the City's view, street vendors should be held to the same restrictions as local businesses when it comes to displaying merchandise, and the City's zoning code should be enforced. *Id*.

The Street Vendors challenged the Ordinance, and the trial court granted summary judgment for the City, finding the provisions are rationally related to a

[1] References to the Third District's opinion attached to Petitioner's jurisdictional brief are to the page number preceded by the letters "Op." References to the initial brief on jurisdiction are to the page number preceded by the letters "IB."

legitimate government interest. *Id*. at 4. The Third District Court of Appeal affirmed. In doing so, the district court issued a lengthy opinion to "clarify the scope of the rational basis test used to review whether laws violate the substantive due process provision of Florida's declaration of rights." Op. at 2. The court held that this Court's opinion in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), with its two distinct plurality opinions, did not overrule controlling precedent from the long-standing body of law governing the rational basis test. Op. at 6. In sum, it held that under a rational basis analysis, a law must be upheld if it bears a rational relationship to a legitimate government purpose. *Id*. It further emphasized an essential principle of rational basis analysis, that is, "legislative findings are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id*.

The Street Vendors now seek this Court's review of the district court's opinion in *Membreno and Florida Association of Vendors, Inc. v. City of Hialeah*, 3D14-2603, 2016 WL 889178 (Fla. 3d DCA Mar. 9, 2016), claiming it expressly and directly conflicts with (**1**) *Warren v. State Farm Mutual Automobile Insurance Co*., 899 So. 2d 1090, (Fla. 2005), and *Chicago Title Insurance Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000), over whether a court must evaluate whether laws are "discriminatory, arbitrary or oppressive" in rational basis cases; (**2**) *McCall*, 134 So. 3d at 819, and *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), over

whether courts can evaluate evidence to determine whether there is a reasonable relationship to a legitimate government interest; and (**3**) *McCall*, 134 So. 3d at 899, 901 and *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), over whether the Florida rational basis test is more stringent than the federal rational basis test or whether the tests are the same. *See* IB at 1.

SUMMARY OF THE ARGUMENT

Membreno summarizes decades of law from this Court to show that accepting Petitioner's argument "would herald a sea change in Florida Constitutional law." Op. at 4. No conflict exists between *Membreno* and any of the alleged conflicting opinions. *Membreno* simply holds that legitimate government interests support the challenged City Ordinance, and the Ordinance provisions are rationally related to the government's objective. That is the same test that has been applied by this and other Florida courts for decades.

Although one of this Court's two plurality opinions in *McCall* suggested a different rational basis test by conducting an independent analysis and engaging in evidentiary fact finding, only two justices joined in that opinion. *McCall* thus has no precedential value on that issue; it does not constitute a majority opinion which could potentially form the basis for conflict jurisdiction.

And even if the issue here is "important," this Court lacks jurisdiction. This Court may review "important" cases only if the district court certifies the issue is

one of great public importance. The district court did not certify great public importance here. Accordingly, this Court must deny review.

ARGUMENT

I. *Membreno* Does Not Conflict With This Court's Precedent Stating A Court Must Consider Whether A Law Is Discriminatory, Arbitrary, Or Oppressive Under the Rational Basis Test.

In *Membreno*, *Warren*, and *Butler*, the courts uniformly applied the rational basis test. While *Warren* and *Butler* may reference additional terms describing the test that *Membreno* does not expressly include, the embellishment is a distinction without a difference because the fundamental analysis conducted in all three cases is the same.

The district court acknowledged here that the phrase "discriminatory, arbitrary, or oppressive" is sometimes linked with the rational basis test, but, consistent with the above cases, it explained the language is redundant because "[a] law bearing a rational basis to a legitimate legislative purpose is, by definition, not discriminatory, arbitrary, or oppressive, as those words are used in the test [and] a law that is discriminatory, arbitrary, or oppressive cannot, by definition, bear a rational basis to a legitimate legislative purpose." Op. at 11, n. 6. The additional phrase is not substantive but a superfluity.

In *Butler*, this Court stated "[t]he test to be applied in determining whether a statute violates due process is whether the statute bears a rational relation to a

legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." 770 So. 2d at 1214-15. Applying the standard to the facts in *Butler*, this Court invalidated a statute prohibiting title insurers from issuing rebates to customers. This Court did not discuss in *Butler* whether the statute was, in fact, discriminatory, arbitrary, or oppressive. It also did not conduct any independent evaluation or reweigh any legislative reports or research. This Court instead based its decision on an earlier opinion it found indistinguishable in holding the prohibition on rebates bore no rational relationship to the legislature's interest in protecting title insurers from insolvency but instead interfered with competitive pricing. *Id*. at 1220.

In *Warren*, this Court also reiterated the rational basis test as "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." 899 So. 2d at 1096. In upholding a statute requiring certain medical service providers to bill insurers within 30 days, the Court concluded the law was reasonably related to the legislature's goal of reducing bulk billing inherent in certain medical providers. *Id*. Although it went on to state the law was not discriminatory, arbitrary or oppressive because (**1**) the legislation was enacted to relieve a specific problem, and (**2**) any oppression may be avoided by complying with the 30-day requirement, *id*. at 1096, that does not add any additional prong or analysis to the rational basis test. It is just a different

way of stating that the law bears a reasonable relation to the government's purpose.

Likewise in *Membreno*, the district court did not reweigh or reevaluate the City's conclusions under the rational basis test. It instead affirmed the trial court's conclusion "there are legitimate interests supporting the challenged Ordinance provisions and that the challenged Ordinance provisions are rationally related to such legitimate government interests." Op. at 4, 36. Although the district court did not expressly recite the "discriminatory, arbitrary, or oppressive" language when it stated the elements of the rational basis test, it applied the identical test utilized in *Butler* and *Warren*. As in those cases, the district court did not reweigh or reevaluate any findings or conduct any independent research. It simply held that the ordinance was reasonably related to the legitimate government interest in complying with the City's established zoning laws.

Petitioner also argues *Membreno* conflicts with *Sult v. State*, 906 So. 2d 1013, 1022-23 (Fla. 2005), and *City of Miami v. Shell's Super Store*, 50 So. 2d 883, 884 (Fla. 1951). But this Court did not engage in an independent evidentiary analysis to second-guess a law-making authority's legitimate interest in either of those cases. Further, this Court did not discuss the elements of a rational basis analysis in either case.

In sum, the identical rational basis analysis was performed in *Membreno*, *Butler*, and *Warren*, regardless of the terminology employed. The prongs of the

rational basis test were not even stated in either *Sult* or *City of Miami*. Accordingly, these cases do not conflict.

II. *Membreno* does not conflict with *McCall* or *Eskind.*

Membreno cannot conflict with *McCall* because there is no majority opinion in *McCall* explaining the analysis under the rational basis test. *See* 134 So. 3d 894. While it is true the first plurality opinion in *McCall* engages in an extensive independent evaluation by reweighing legislative reports and information from committee meetings and floor debates, and it consults a newspaper article to determine whether there was an actual medical malpractice crisis in Florida, *only two justices fully concur in that analysis*. *Id*. at 897-16. Three justices concurred in the result only, but they expressly disagreed with the other two justices' independent evidentiary evaluation *because it is not permitted under the rational basis analysis*. *Id*. at 916. The remaining two justices dissented. *Id*. at 922-38.

As the district court recognized in this case, *McCall* has no precedential value. There is no majority opinion consisting of four justices in *McCall*, and it thus cannot form the basis for any conflict of decisions. *See* Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 460 (2005) ("[T]he Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed. … A 'concurring in result only' opinion indicates … a refusal to join in the

majority's opinion. … [T]he effect of such as case is that there is no 'opinion' of the Court and this no precedent" beyond that specific case.).

Eskind is also not in conflict with *Membreno* because the Court in *Eskind* does not conduct any independent evidentiary finding or analysis. *See* 159 So. 2d 209. *Eskind* instead addressed two conflicting opinions from the First and Second Districts analyzing identical city ordinances prohibiting hotels from using outdoor signs to advertise rates. *Id*. at 210. The First District held the city ordinance invalid; the Second District upheld the ordinance as a valid exercise of the city's police power. *Id*. In resolving the conflict, this Court did not engage in evidentiary fact finding or independent research or even discuss the rational basis analysis. It held only that there was no justification for allowing every type of outdoor advertising sign except for rate signs. The result was to restrict competition between favored and unfavored segments of the same business activity. *Id*. at 212.

To the extent Petitioner also asserts conflict with *Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958), no conflict exists. That the Court in *Larson* noted it searched the record for a reasonable basis for the legislation does not create any conflict with *Membreno*. *Contra* IB at 6. It simply means the Court was not presented with any rational basis by the proponent of the legislation and it could not envision any basis on its own. The *Larson* Court did not hold courts should

conduct an independent evidentiary analysis of the reasonableness of legislation under the rational basis test.

Accordingly, there is no conflict on the extent of rational basis review.

III. *Membreno* Does Not Conflict With *McCall* On The Issue Of Whether The Florida And Federal Rational Basis Tests Are Different.

This Court has jurisdiction to review cases only when a conflict appears within the four corners of the majority opinion. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.").

There is no conflict within the four corners of *Membreno* and *McCall* here because *McCall* does not "hold" that the Florida and federal rational basis tests are different. In fact, whether the federal and Florida rational basis tests are the same is not even addressed in *McCall*. *McCall's* narrow holding is that the cap on wrongful death noneconomic damages violates the Florida Constitution. That question was never answered by the federal court and was actually an entirely different question than the question the Eleventh Circuit initially posed. *See McCall*, 134 So. 3d at 897 (rephrasing certified question); *see also Estate of McCall v. United States*, 577 Fed. Appx. 744, 745 n. 2 (11th Cir. 2014) (noting "the legal analysis for personal injury damages and wrongful death damages under Florida law are not the same [prompting] the Florida Supreme Court [to limit] its analysis to the wrongful death damages at issue").

Even if the Eleventh Circuit and this Court had answered the same question differently, it would not create a conflict between *McCall* and *Membreno*. *McCall* addresses only the very narrow question of wrongful death noneconomic damages. It does not address the similarities or lack thereof between the Florida and federal rational basis tests.

To the extent Petitioner implies *Membreno* conflicts with *Armstrong*, 773 So 2d at 17, it does not. *Armstrong* does not even mention the rational basis test.

Accordingly, these cases do not conflict.

IV. Even If This Case Presents An Important Issue, This Court Lacks Jurisdiction To Resolve It.

This Court's discretionary review of "important" issues is limited to questions certified by the district courts to be of great public importance. *See* Art. 5, § 3(4), Fla. Const. (The Supreme Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance."). The district court in *Membreno* did not certify that this case presents a question of great public importance. Accordingly, this Court lacks any basis for discretionary review.

CONCLUSION

Because there is no conflict with any of the cases cited by Petitioner and because this case is not certified to be of great public importance, this Court lacks jurisdiction and must deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2016 a true and correct copy of the foregoing was furnished by email to all parties listed below.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of section 9.210(a)(2), Florida Rule of Appellate Procedure.

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