IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-910

BYRON H. KEESLER and LEROY BOYD,

Petitioners,

v.

COMMUNITY MARITIME PARK ASSOCIATES, INC.,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Community Maritime Park Associates, Inc. is a non-profit corporation created to undertake the development, improvement, and operation of a choice, 31-acre parcel of Pensacola property on the City's waterfront. As such, the CMPA's board is subject to the requirements of article 1, section 24(b) of the Florida Constitution (the "Sunshine Amendment") and section 286.011 of Florida Statutes (the "Sunshine Law"). The petitioners are Florida citizens who sought to exercise their rights under the Sunshine provisions before the CMPA board, which is overseeing the expenditure of $40 million in public funds in connection with the design and development of the waterfront. App.-1.

The petitioners encountered a firm, clear and invariable policy of prohibiting public input at meetings. They sued the CMPA, seeking a declaratory judgment of the scope of the Sunshine Amendment's provision that such meetings be "open and noticed to the public," art. I, sec. 24(b); and the Sunshine Law's provision that such meetings be "open to the public," §286.011(1). App.-2.

It was undisputed that the respondent's meetings are governed by the Sunshine provisions and that the respondent totally denied members of the public the right to speak or be heard at its meetings for almost two years. It is also undisputed that the respondent thereafter denied members of the public the right to

participate in any meaningful manner.

The trial court granted the respondent's motion for summary judgment and dismissed the petitioners' complaint with prejudice. The First District Court of Appeal affirmed the judgment. *Keesler v. Comm. Maritime Park Assoc., Inc.*, No. 1D09-1659, 35 Fla. L. Weekly D538 (March 10, 2010) (2010 WL 786216). App.-1. By an order dated April 16, 2010, the district court denied the petitioners' timely filed motions for rehearing, rehearing en banc, clarification, and certification to this Court of a question of great public importance. Petitioners timely sought discretionary review.

SUMMARY OF THE ARGUMENT

This Court has subject matter jurisdiction to review this case on two bases under article V, section 3(b)(3) of the Florida Constitution ― conflict and construction of the state constitution.

The district court's opinion expressly and directly conflicts with language in *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969) ("these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present

and to be heard at all deliberations wherein decisions affecting the public are being made") (emphasis added), and *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 475 (Fla.1974) ("Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient *input from the citizens* who are going to be affected by the subsequent action of the municipality.) (emphasis added).

The district court's decision also "expressly construes" the Sunshine Amendment. Although the district court's decision cites only to the Sunshine Law, and not the Sunshine Amendment, its decision, as a matter of law, constitutes an express interpretation of the Sunshine Amendment inasmuch as the constitutional and statutory provisions are substantively identical and are interpreted as such. *See Monroe County v. Pigeon Key Historical Park, Inc*., 647 So. 2d 857, 868 (Fla. 3d DCA 1994).

The district court's opinion fundamentally changes how Floridians will be governed, extinguishing the long-observed right of Floridians to be heard at public meetings and making new law that radically affects their constitutional and statutory right to open government.

ARGUMENT

I. The District Court's Decision is in Conflict With this Court's Decisions in *Doran* and *Gradison*.

The district court's decision is in conflict with *Doran*, where this Court said:

> The right of the public to be present *and to be heard* during all phases of enactments by boards and commissions is a source of strength in our country. . . . Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present *and to be heard* at all deliberations wherein decisions affecting the public are being made.

Doran, 224 So. 2d at 699 (emphasis added). The district court's opinion purports to abolish the public's right "to be heard."

Moreover, the district court's decision achieved this result by construing the law in a manner that is directly and expressly contrary to this Court's instructions on how to interpret the Sunshine Law. The district court said it was "not inclined to broadly construe the phrase ['open to the public']," App.-4, though this Court, in *Doran*, said the Sunshine Law was "enacted for the public benefit," and therefore "should be interpreted most favorably to the public." *Doran*, 224 So. 2d at 699. *See also Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 825-826 (Fla. 1985) ("*Doran* was rendered fifteen years ago and placed the legislature and all concerned on notice of our broad reading of section 286.011."). The first district has applied

its narrow construction rule in another recent case, *Grapski v. City of Alachua*, __So. 3d___, 35 Fla. L. Weekly D205 (Fla. 1st DCA Jan. 21, 2010) (2010 WL 183998) (now pending discretionary review in this Court).

Likewise, the district court's decision is in conflict with *Gradison*, where this Court said:

> Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient *input from the citizens* who are going to be affected by the subsequent action of the municipality. . . . Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.
>
> Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decisionmaking process.

Gradison, 296 So. 2d at 475. The district courts of appeal have acknowledged Florida's historic application of the rule that the public has a right to give input at government meetings. *See Zorc v. City of Vero Beach*, 722 So. 2d 891, 902 (Fla. 4th DCA 1998) ("Courts have recognized the importance of public *participation* in open meetings," quoting *Doran*), *rev. denied*, 735 So. 2d 1284 (Fla. 1999); *News-Press Publishing Co., v. Carlson*, 410 So. 2d 546, 548 (Fla. 2d DCA 1982)

(referring to the "preponderant interest of allowing the public to *participate* in the conception of a complex multimillion dollar budget") (emphasis added).

The conflict created by the district court's opinion is not avoided, or diminished, by its reliance on *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983), where this Court noted that noting in its decision "gives the public the right to be more than spectators." This dictum only confirms that the Court was making no determination about the public's right to be heard, which was not raised by the parties or at issue in that case. Further, the *Marston* dictum pertained to meetings of an ad hoc committee advising an administrative official. Florida's Attorneys' General have found that this circumstance limits any application of the dictum to certain types of executive decision-making traditionally conducted without public input. Office of the Attorney General, *Government-in-the-Sunshine Manual* (2009), §4(b)(1).

II. The District Court's Decision is the Legal Equivalent of an Express Construction of a Provision of the Florida Constitution.

The district court's decision cites only to the Sunshine Law, but, as a matter of law, the decision effectively construes the Sunshine Amendment. They are identical in language and substance. As the third district has said,

> the new Constitutional amendment does not create a new legal

> standard by which to judge Sunshine Law cases. In fact, although the amendment has elevated Sunshine Law protection to constitutional proportions, the language of Article I, Section 24(b), of the Florida Constitution, is virtually identical to that of the Sunshine Law statute, section 286.011(1) . . . Therefore, we find no reason to construe the amendment differently than the Supreme Court has construed the statute.

Monroe Couinty, 647 So. 2d at 868. *See also Zorc*, 722 So. 2d at 896 (noting that the constitutional and statutory provisions are "virtually identical"); *Law & Information Services, Inc., v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) (describing the Sunshine Amendment as "making the [S]unshine [L]aw part of the constitution").

In this case the district court of appeal simply chose not to make any reference to the fact that the entire case below, at all stages, was argued on the equal basis of the Sunshine Amendment and the Sunshine Law. In this manner, the district court of appeal may have intended to preclude this Court from reviewing and construing the Sunshine Amendment merely by adhering "to the settled principle of constitutional law that courts should endeavor to implement the legislative intent of statutes and avoid constitutional issues." *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995). In the unique case of the Sunshine Law, under this rule, they would not really avoid the construction of the Sunshine Amendment

at all. This Court need not "search into the 'record proper' to determine" whether the district court's decision has construed the state constitution. It has done so, expressly, as a matter of law.

III. The Court Should Accept Jurisdiction of this Case Because It Created New Constitutional Law That Affects the Fundamental Rights of All Floridians.

For four decades the people of Florida have relied upon this Court's *Doran* decision to afford them a right to participate in public meetings. The *Doran* decision became a matter of constitutional law when the people of Florida enacted the Sunshine Amendment in 1992. Throughout these years, in giving legal advice to the attorneys who represent state and local government agencies, the attorneys general of Florida have advised them that the public has a right to participate in the meetings of boards and commissions. *E.g.*, Op. Att'y Gen. Fla. 2005-07, *3, n.4 (2005 WL 389118); Op. Att'y Gen. Fla. 2004-32, *6, n.17 (2004 WL 1452405); Op. Att'y Gen. Fla. 2000-08, *3, n.2 (2000 WL 146959).

It is a matter of great public importance for this issue to be addressed by the Supreme Court. In its argument, the respondent erroneously characterizes the issue absurdly, pretending the petitioners are contending that local government

leaders should be forced to sit through countless hours of commentary by speakers. Nothing could be further from the truth.

The petitioners always contended that the public's right to be heard was subject to reasonable rules. Once that principle is established, the reasonable scope of the right would be subject to the usual case-by-case adjudication. In the trial court, the petitioners sought only a declaration of their right to participate in the government's decision making process under the Sunshine Amendment and the Sunshine Law. The trial court denied them any declaration at all on grounds that there is nothing to declare — there is no such right. This case is before this Court because the respondent takes the position that the Sunshine Amendment and the Sunshine Law do not contain any component, none in the slightest, of a public right to be heard at public meetings. At this point in history, most Floridians would be shocked to be told that they have no right to address their city and county commissions.

The Court should grant review because the principle at stake in this case matters to millions of people.

CONCLUSION

For the foregoing reasons, the Court has subject matter jurisdiction over this case and should exercise its discretion to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I served a copy of this brief by U.S. Mail on Edward P. Fleming and Matthew A. Bush of McDonald Fleming et al., 25 W. Government St., Pensacola, FL 32502-5813.

_____

Robert Rivas

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this brief, which is printed in 14-point Times New Roman type, complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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Robert Rivas