**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT, STATE OF FLORIDA**

Case No. 1D23-0149
L.T. No. 2022-CA-1902

J. DOE,
Appellant,

v.

GOVERNOR RON DESANTIS,
Appellee.

ON REVIEW FROM THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

# BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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## IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

*Amici* include local and national news media and a state non-profit organization dedicated to preserving and defending free press rights and robust access to government records. Specifically, *amici* include: (1) The Associated Press, (2) Cable News Network, Inc., (3) CMG Media Corporation d/b/a *Cox Media Group*, (4) the First Amendment Foundation, (5) Gannett Co., Inc., (6) Graham Media Group, Inc., (8) The McClatchy Company LLC d/b/a the *Miami Herald*, (9) The New York Times Company, (10) Nexstar Media Group, Inc., (10) Orlando Sentinel Media Group, (11) The E.W. Scripps Company, (12) Sun Sentinel Media Group, (12) Times Publishing Company, and NBC Universal Media, LLC ("NBC").[1] *Amici* have long-standing expertise on Florida citizens' right of access to government records under Florida's Constitution and public records statutes. *See* Art. I § 24, Fla. Const.; § 119.01, *et seq.*, Fla. Stat.

## SUMMARY OF ARGUMENT

Public records are indispensable for conducting effective

[1] A description of all *amici* parties (except NBC) is set forth in *amici's* April 17, 2023, Unopposed Motion for Leave to File Amici Curiae Brief. A description of NBC is set forth in its July 6, 2023, Unopposed Motion to Join Amici Curiae Brief.

watchdog journalism because they document how governments administer public duties, reach decisions, and expend public funds. In this case, the trial court erred when it held that Governor DeSantis can wholly shield public records under the guise of a common law "executive privilege" that permits him to withhold key information necessary to identify and locate documents responsive to a public records request.

The central issue addressed by *amici* is whether Florida law permits the judicial creation of an "executive privilege" exemption to citizens' constitutional right of access to public records. It does not. The right to access public records is codified in Florida's statutes and enshrined in its constitution, which establishes the sole mechanism by which the legislature may carve out discrete and narrow exemptions—an exacting process ignored by the trial court.

If this Court does not reverse the trial court's recognition of an "executive privilege" exemption, the effect on government transparency would be dire. In addition to setting dangerous precedent by subverting the lawful process for creating new public records exemptions, the ill-defined, judge-made exemption also runs

the risk of increasing the public's financial burden associated with public records requests and lends itself to abuse. Accordingly, this Court should reverse the trial court's decision.

## ARGUMENT

### I. Florida is Uniquely Committed to Open Government.

For more than a century, Florida has stood at the vanguard of government transparency. *See, e.g.*, *Forsberg v. Hous. Auth. of City of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) ("Florida has been in the forefront of promoting open government") (Overton, J., concurring); *Bell v. Kendrick,* 6 So. 868, 869 (Fla. 1889) (recognizing right of access to public records). The State enacted its first public records statute in 1909. *See* Ch. 5942, § 1, Laws of Fla. (1909) ("records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.").

Though the tradition of open government is longstanding, Florida's current public records law—codified in Chapter 119, Florida Statutes ("Chapter 119")—was enacted in 1967. *See Marston v. Gainesville Sun Publ'g Co., Inc.,* 341 So. 2d 783, 784 (Fla. 1st DCA 1976. But because the right of access to public records was merely

statutory, the 25 years after the enactment of Chapter 119 saw a slow erosion of Floridians' rights to access information about their government. *See* Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine in!*, 18 NOVA L. REV. 973, 976 (1994) (describing how mounting exemptions led to a "growing dissatisfaction" among Floridians during the late 1980s). By the early 1990s, the legislature had enacted several hundred exemptions to Chapter 119; the wave of new exemptions, coupled with the discovery that many weighty legislative and executive decisions were occurring in secret, prompted calls for a constitutional amendment to restore governmental transparency. *Id.*

Public dissatisfaction culminated in 1991, when the Supreme Court held in *Locke v. Hawkes* that Chapter 119 was inapplicable to any constitutional officer, including the governor and members of the cabinet. 19 Media L. Rep. 1522 (Fla. Nov. 7, 1991).[2] The Court based its rationale on Chapter 119's "interference with the separation of

[2] The Supreme Court later withdrew and replaced the opinion. *See Locke v. Hawkes*, 595 So. 2d 32, 37 (Fla. 1992) (explaining Chapter 119 "appl[ies] to executive branch agencies and their officers").

powers," as described in Article II, Section 3 of the Constitution, and held that a legislative act—the enactment of Chapter 119—could not interfere with any entity whose function or title was established by the constitution. *Id* at *3.

One week after *Locke* dropped, the Florida attorney general decried the decision and announced a proposed constitutional amendment to shed light on what he called a "tremendous shadow on the Sunshine in Florida Government." Mark Silva, *Attorney General Urges 'Sunshine' Amendment,* MIAMI HERALD, Nov. 13, 1991, at A1. *Locke* galvanized public opinion and, one year later, Florida citizens voted 83.1 to 16.9 percent to constitutionalize access to public records via the "Sunshine Amendment." Gleason, 18 NOVA L. REV. at 979 n.32.

### A. Florida's constitutional commitment to government transparency.

Article I of the Florida Constitution, known as the Florida Declaration of Rights, affirms the freedoms of religion, speech, press, assembly, and petition, as well as other fundamental freedoms such as due process, the right to bear arms, and habeas corpus. Art. I, Fla. Const. The Sunshine Amendment, appearing in Article I, Section

24 ("Section 24"), enshrined the right of access to public records among these other, fundamental rights.[3] Section 24 states:

> [e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government.

Art. I, § 24, Fla. Const.

The practical effect of the Sunshine Amendment was to constitutionalize Chapter 119. *See Zorc v. City of Vero Beach,* 722 So.2d 891, 896 (Fla. 4th DCA 1998) (explaining that Section 24 "elevated the public's right to government in the sunshine to constitutional proportions"); *Times Publ'g Co. v. City of Clearwater*, 830 So. 2d 844, 846 (Fla. 2d DCA 2002) (defining "Chapter 119 [a]s a legislative codification of article I, section 24(a) of the Florida Constitution").

**B. Florida's process of creating new exemptions.**

Among the practical effects of constitutionalizing access to

[3] Any governmental attempt to curtail these fundamental Article I rights is held to a strict scrutiny standard. *See, e.g.*, *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999).

public records, two are of key importance here. First, unless records are "specifically made confidential by this Constitution," the power to modify or abridge the right of access rests solely with the legislature. Art. I § 24(c), Fla. Const. Second, any legislative attempt to modify the right of access must strictly abide by the procedure established in Section 24. *Id.*

As one court explained, the "Sunshine Amendment did not modify, adjust, or fine-tune the inherent legislative power to alter the right of access. It *abolished* the traditional legislative role, . . . [which] is now derived exclusively from the express grant of section 24(c)." *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 30 Media L. Rep. 1300 at *9 (Fla. 7th Jud. Cir. Jan. 16, 2002). Thus, creating new exemptions to public records is solely the legislature's province, not the judiciary or the executive branch. *See Bd. of Cty. Comm'rs of Palm Beach Cty. v. D.B.,* 784 So. 2d 585, 591 (Fla. 4th DCA 2001) ("Courts cannot judicially create any exceptions, or exclusions" to the public right of access).

Specifically, Section 24 itself establishes the sole means of recognizing a new exemption. Exemptions can only be passed by a

two-thirds vote from each congressional house, and the law must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." Art. I § 24(c), Fla. Const. Under this procedure, "the power to create [any] exemptions is hedged by careful safeguards," rendering unconstitutional any attempt to circumvent it. *See Mem'l Hosp.-W. Volusia, Inc.*, 30 Media L. Rep. 1300 at *9. *See also Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 380 (Fla. 1999) ("an exemption from public records access is available only after the legislature has followed the express procedure provided in [Section 24]"); *Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999) (striking down statute that failed to satisfy "the exacting constitutional standard of [Section 24]").

For this reason, courts cannot recognize any new exemption to the right of access, regardless of the putative policy reasons for the desired exemption. *See, e.g.*, *City of Gainesville v. Gainesville Sun Publishing Co.*, 25 Media L. Rep. 1157 at *1 (Fla. 8th Jud. Cir. Oct. 28, 1996 ("[I]n the absence of a specific, legislatively established

exemption, public records must remain open. The court cannot take over the legislature's role and create exemptions by judicial decree"); *State v. Bee Line Entm't Partners, Ltd.*, 28 Media L. Rep. 2592 at *3 (Fla. 9th Jud. Cir. Oct. 25, 2000) ("Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and damage to an individual or an institution resulting from such disclosure").

For example, in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979), the Florida Supreme Court refused to recognize attorney-client and work product privileges as exceptions to Florida's right of access. The Court emphasized that "[i]f the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute." *Id.* It also rejected the argument that public policy considerations compelled recognition of the judicially created privileges, opining that "[c]ourts deal with the construction and constitutionality of legislative determinations, not with their wisdom." *Id.*

Nor are separation of powers concerns sufficient to justify the judicial creation of an exemption. Indeed, the very purpose of

constitutionalizing access rights was, in large part, a reaction to the judicial recognition of new, policy-based exemptions: *i.e.*, the initial *Locke* decision immunizing the Governor from public records requests on separation of powers grounds. *See Locke*, 19 Media L. Rep. at *3.

Put simply, Florida's black-letter law holds that courts may not judicially create exemptions to Florida's constitutional right of access to public records.

## II. The Trial Court Created an Exemption.

In denying the petition below, the trial court determined that an executive privilege shielded the Executive Office of the Governor's ("EOG") public records from disclosure. (R. at 261 ¶ 17). Of course, there is no statutory or constitutional provision that creates an "executive privilege" exemption. To justify this outcome, the trial court stitched together a patchwork of cases from other jurisdictions—which do not share Florida's constitutional framework—with Florida cases discussing various common law privileges outside the context of Section 24. The court then declared a new "executive privilege" exemption *ex nihilo*. In the face of

unbroken, controlling precedent forbidding such judge-made exemptions, the trial court's ostensible support is not persuasive, as each cited case is wholly distinguishable or inapposite.

The court cited three out-of-state cases that recognized an executive privilege regarding public records. *See Guy v. Judicial Nominating Com'n*, 659 A.2d 777 (Del. Super. Ct. 1995); *Freedom Found. v. Gregoire*, 310 P.3d 1252 (Wash. 2013); *Killington, Ltd. v. Lash*, 572 A.2d 1368 (Vt. 1990). Beside the fact that these cases are not binding, the holdings are unpersuasive for the simple reason that the citizens of Vermont, Delaware, and Washington—unlike Florida—do not enjoy a *constitutional* right of access to public records. What's more—unlike Chapter 119—the public records statutes of both Vermont and Delaware feature specific carve-outs for common law exemptions. *See* Vt. Stat. 1, § 317(c)(4); Del. Code 29, § 10002(o)(6).[4]

The federal cases cited by the trial court are likewise unpersuasive because no explicit right of access to federal agency

[4] Other states have expressly declined to acknowledge executive privilege exemptions to their public records statutes. *See Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E.2d 1261, 1263 (Mass. 1988) (rejecting adoption of executive privilege on separation of powers grounds).

records exists in the U.S. Constitution, and the right of access to such records, codified at 5 U.S.C. § 552, is purely a creature of statute. *See U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989). Unlike Florida, which mandates that any exemption be discrete, specific, and narrowly tailored, the federal Freedom of Information Act features nine broad exemptions, including a deliberative process privilege, applicable to a limitless number of record types. *See* 5 U.S.C. § 552(b); *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.* 141 S.Ct. 777, 785 (2021).

The Florida cases cited in the trial court opinion are similarly unpersuasive. For example, in *Parole Commission v. Lockett*, the Supreme Court applied the pre-amendment paradigm to the confidentiality of clemency records and expressly noted the newly enacted constitutional amendment was not yet in effect, thus grandfathering in the exemption at issue. 620 So. 2d 153, 154 n.2 (Fla. 1993). Relatedly, *Chavez v. State*, merely cites to *Lockett* and affirms a public records exemption that was already reflected in a pre-amendment recognition of the confidentiality of clemency records. 132 So. 3d 826, 830 (Fla. 2014).

The trial court cited *Times Publishing Company v. Ake*, 660 So. 2d 255, 257 (Fla. 1995), for the proposition that clerks of court "are not subject to oversight and control of the legislature under Florida's public records laws." (R. at 263 ¶ 21). *Ake*, however, does not create any unique privilege to the constitutional right of access to public records or even construe any exemptions to such right of access. Rather, the decision reinforces the unremarkable proposition that Chapter 119 applies to government agencies and, as a co-equal branch of government, the judiciary is not an agency.[5] *Ake*, 660 So. 2d at 257. In contrast, Chapter 119 is the statutory vehicle that provides access to the executive branch records that are at issue

[5] Each governmental branch has a mechanism that implements the right of access to public records, as mandated by Section 24. Rule of Judicial Administration 2.420 provides for access to court records. *See Ake*, 660 So. 2d at 257 (noting the Court implemented Section 24 in Rule 2.051 (now Rule 2.420) by establishing the openness of court records, the standards for exemptions, and an explanation of the rule's application). Section 11.0431, Florida Statutes, provides for access to Legislative records. § 11.0431(1), Fla. Stat. ("[E]very person has the right to inspect and copy records of the Senate and the House of Representatives received in connection with the official business of the Legislature as provided for by the constitution of this state."). Chapter 119 applies to the executive branch. *See Locke,* 595 So. 2d at 37 (explaining Chapter 119 "appl[ies] to executive branch agencies and their officers").

here. *See* § 119.01, Fla. Stat. ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.").

The remaining Florida cases discussed by the trial court relate to *testimonial* privileges divorced from the requirements of Section 24 and the constitutional obligation of each branch of government to provide access to their records. For example, in *State v. Brooke*, this Court noted that judges presiding over dependency hearings lacked jurisdiction to require the Secretary of the Department of Health and Rehabilitative Services to testify regarding his budgetary decisions. 573 So. 2d 363, 370 (Fla. 1st DCA 1991). In *State v. Lewis*, the Supreme Court outlined the parameters for deposing a trial court judge in post-conviction proceedings and noted that a judge's thought process should not be violated. 656 So. 2d 1248, 1250 (Fla. 1994).

Similarly, *League of Women Voters of Florida v. Florida House of Representatives*, and *Florida House of Representatives v. Expedia, Inc.* concerned the circumstances under which legislators and their staff could be compelled to sit for depositions in civil cases. *See*

*League of Women Voters,* 132 So. 3d 135, 146 (Fla. 2013) (explaining that legislators and their staff are justified in "refusing to provide compelled testimony in a judicial action.");[6] *Expedia*, 85 So. 3d 517 (Fla. 1st DCA 2012) (noting that the legislative testimonial privilege had not been abrogated by law). And in *Girardeau v. State*, noting the absence of any express constitutional or statutory provision, this Court rejected a legislator's claim of privilege of non-disclosure for information received during the discharge of legislative duties when the information was sought by a grand jury. 403 So. 2d 513, 516 (Fla. 1st DCA 1981).

Significantly, lost among the nearly 20 citations to purported supporting authority, the trial court mentioned Section 24 only once. (R. at 265 ¶ 24). The court opined that "the Florida Constitution recognizes that some records are made 'confidential by this

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[6] The Court noted a difference regarding document requests. In this context, the Court agreed "that the first issue to be decided is whether the draft plans fall within the scope of the public records exemption in section 110.431(2)(e) . . . and that this exemption should be strictly construed in favor of disclosure." *League of Women Voters,* 132 So. 3d at 153. Even if documents were exempt, the trial court could order their disclosure under appropriate litigation discovery rules. *Id.* At this latter point, litigation privileges are certainly relevant to disclosure requirements.

Constitution,' and the separation of powers principle that underlies the privilege is firmly grounded within constitutional text." *Id.* This sole reference demonstrates a concerning and thorough misapprehension of Section 24. Except for the detailed legislative process outlined in Section 24(c), the Constitution provides that no abridgment to the right of access can occur except for that which is "specifically made confidential by this Constitution." Art. I § 24(c), Fla. Const. And, of course, nowhere in Florida's Constitution is there a provision regarding the confidentiality of information subject to an "executive privilege."

In short, the trial court did precisely what the Florida Supreme Court in *Wait* instructed courts not to do: create an exemption to the constitutional right of access based on a purported common law privilege. *Compare Wait*, 372 So. 2d at 424 (rejecting policy considerations as a basis to exempt privileged material from disclosure requirements) *with* (R. at 265 ¶ 26) ("This Court also finds that the purpose underlying the executive privilege supports its recognition here.").

## III. Defendants are Compelled to Disclose the Requested Records.

Without a valid basis to withhold the records, EOG was required to disclose the requested records. Chapter 119 requires agencies to "respond to . . . requests in good faith," which includes "making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." *See* § 119.07(1)(c), Fla. Stat.

As the Supreme Court has recognized, Section 119.07(1)(c) was "meant to strengthen the responsibilities of records custodians by imposing an explicit requirement on public agencies that they act in good faith in responding to public records requests." *See Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee,* 189 So. 3d 120, 128 (Fla. 2016) (noting that an agency's failure to respond to a public records request in good faith may constitute an unlawful refusal to comply justifying the award of attorneys' fees against the agency). *See also Raydient LLC v. Nassau Cty., Fla.*, Case No. 2019-CA-000054, 2021 WL 4208764, at *7 (Fla. 4th Cir. Ct. Aug. 24, 2021) (finding that a county violated Chapter 119 by failing to conduct reasonable search: "Once an agency receives a request to inspect

public records, records custodians must respond promptly and in good faith by determining if they possess the requested records, retrieving those records, assessing if any exemptions apply, and making non-exempt records available."). Moreover, courts recognize that the public's right to access public records is broad and cannot be avoided because agency effort for compliance is required. *See, e.g.*, *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) ("The breadth of such right [of access] is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability to maintain secrecy in the public interest.").

Indeed, the EOG's own records policy contemplates the need to track down additional information when required to process a request. *See Executive Office of Governor Rick Scott Public Records Policy* (July 1, 2015), available at https://www.flgov.com/wp-content/uploads/update/20150713_Public_Records_Policy.pdf. The policy acknowledges that one of the EOG's possible "initial responses" to a records request is "[a]n inquiry to clarify the scope of the request when more information is necessary to initiate a search."

*Id.* While such clarifying information may sometimes come from the requestor, the fact that such information might only reside within the minds of public officials does not alter the agency's constitutional duty to fulfill requests in good faith.

## IV. Recognition of Executive Privilege Exemption Would Threaten Government Transparency.

Given the backdrop of Florida's commitment to government transparency, the trial court's decision to create an executive privilege was not only constitutionally improper, but, if left undisturbed, will significantly erode the public's ability to monitor and report on the actions of all levels of government.

### A. An increased fee burden on the public.

The practical ramifications of an executive privilege exemption would include increased costs associated with public records requests. This is because the privilege would lend itself to a reflexive reliance and abuse by EOG (and beyond) to withhold records it simply wishes to keep secret—a hurdle to public access that, as explained here, could be cleared only by tendering broader, more generalized public records requests to avoid any asserted privilege. This leads to higher fees and longer delays for requesters.

Here, for instance, the trial court was convinced that the privilege justified EOG's refusal to respond to a records request seeking communications between the Governor's office and the "six or seven pretty big legal conservative heavyweights" with whom the Governor publicly claimed to have consulted. (R. at 254). Remarkably, during oral argument below, the EOG's counsel pivoted away from claiming that the records themselves contain material properly withheld as privileged, and argued instead that the privilege applied to the process by which the records would have to be identified. (R. at 233 (18:12-18:18)). In other words, the EOG appears to concede that – if Doe had made a less-targeted request requiring no process of identification (say, for *all* of the Governor's correspondence during 2022) – the privilege would no longer apply, because no identification process would be required.

The bizarre notion of a "privileged selection process" distorts the concept of privilege beyond recognition, and certainly beyond how any state or federal authority has interpreted executive privilege. A great many public records requests require a government executive to apply some discretion in responding. For instance, a requester

might ask a school superintendent for all correspondence regarding the forthcoming bond issue, or might ask the mayor for all studies and reports concerning the municipal transit system. In each instance, the executive would have to apply some judgment to sort responsive from unresponsive messages. But privilege does not protect the thought process involved in responding to records requests. This notion of a privilege that arises *only after* a request for records is made is simply fanciful, and if validated by this court, would effectively hand a get-out-of-compliance-free card to every government executive in Florida.

Further, in attempts to circumvent the issue, the public's natural response will likely be to submit broader records requests requiring no identification process. This, of course, leads to each request being further delayed and requiring additional resources to fulfill, thereby shifting a higher fee burden on the requesting public. *See* § 119.07(4)(d), Fla Stat (authorizing special service charges if responding to the request requires extensive resources). This forced increased fee burden "could well serve to inhibit the pursuit of rights conferred by the Public Records Act." *See Carden v. Chief of Police*,

696 So. 2d 772, 773 (Fla. 2d DCA 1996. *See also Bd. of Trs., Jacksonville Police & Fire Pension Fund*, 189 So. 3d at 129 (noting that "excessive, unwarranted special service charges deter individuals seeking public records from gaining access to the records to which they are entitled"). And if a person's right to access is chilled by hindering costs, government transparency—and as a result, accountability—is lost.

### B. Recognition of the exemption will catalyze widespread abuse.

In the same vein, the adoption of an ill-defined executive privilege exemption would also lend itself to rampant abuse throughout Florida agencies, putting them in direct conflict with well-settled Florida law. For instance, the "deliberative process privilege" recognized by the trial court reaches much further than merely "chief executive" records. (R. at 261 ¶ 19). Indeed, the privilege is federally recognized as a FOIA exemption, which protects documents that are both predecisional and deliberative in nature and has been extended to documents from *any* federal agency (not just the president), including draft documents, proposals, suggestions, instructions to revise drafts, instructions to conduct an investigation, documents

reflecting personal and advisory opinions, and rejections of recommendations. *See*, *e.g.*, *Com. of Pa., Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Srvs.*, 623 F. Supp. 301, 306 (M.D. Penn. 1985) ("The coverage of the exemption . . . extends to recommendations, draft documents, proposals, suggestions, and other subjective documents . . ." maintained by the U.S. Department of Health and Human Services.) (internal quotations omitted); *Burke Energy Corp. v. Dep't of Energy*, 583 F. Supp. 507, 513-14 (D. Kan. 1984 (exempting Department of Energy records, including drafts of consent orders and the results, recommendations, and conclusions of an audit); *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) ("Draft documents, by their very nature, are typically predecisional and deliberative," and are thus "a proper subject of the deliberative process privilege").

In Florida, however, there is no "unfinished business" exception to Chapter 119. As the Supreme Court stated in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), agency material is a "public record" regardless of whether it is in final form or the ultimate product of an agency. Thus,

> Interoffice memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records in as much as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

*Id*. The breadth of Florida's public records law encompasses records held even by private entities acting in an advisory capacity to a public agency. *See* Op. Att'y Gen. 96-32 (1996); Inf. Op. to Nicoletti, (Nov. 18, 1987). It is easy to envision how the recognition of the executive privilege exemption could clog the court system with public records lawsuits, as agencies and the public must grapple with reconciling precedent like *Shevin* with an elusive privilege exemption.

Moreover, even if the exemption were limited to communications with "chief executives" like the governor, the exemption would remain vulnerable to abuse by local chief executives who could fashion claims to a "mayoral" communications privilege. In New Jersey, for instance, a group of parents in Newark filed a request for correspondence between then-Mayor Cory Booker and Facebook's Mark Zuckerberg after the pair appeared on the Oprah Winfrey Show to announce that Zuckerberg was donating $100

million to Newark's public schools. *See* Dale Russakoff, *Schooled*, NEW YORKER (May 12, 2014), https://www.newyorker.com/magazine/2014/05/19/schooled. The parents sought communications describing how the money had been spent. *See* Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss at 1–2, 7–8, *Secondary Parent Council v. City of Newark, No. L-6937-11 (N.J. Super. Ct., Dec. 6, 2011).*[7] Booker's office denied the request on various grounds, claiming that the emails were protected by executive privilege. *See* Letter from Anna P. Pereira, Corporation Counsel, City of Newark, to Laura Baker, Secondary Parent Council (July 19, 2011).[8]

The mayor of Anchorage, Alaska, too, has claimed a mayoral communications privilege to shield an economic report generated by an executive committee. *City of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 593 (Alaska 1990). And in Maryland, a county executive invoked the privilege to quash a deposition in a civil lawsuit concerning a fatal shooting by a police officer. *Johnson v. Clark*, 21 A.3d 199, 212 (Md. 2011.

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[7] *Available at* https://www.aclu-nj.org/sites/default/files/20122011206P.pdf.

[8] *Available at* https://perma.cc/3ENS-AH4D.

The courts in Alaska, New Jersey, and Maryland all rejected these specific privilege claims, but they all left open the question of whether a mayor enjoys an executive privilege under state law. *See Anchorage Daily News*, 794 P.2d at 593 n.16; *Johnson*, 21 A.3d at 213 n.8; Trial Order at 5, *Secondary Parent Council v. City of Newark*, No. ESX-L-6937-11, 2012 WL 6695041 (N.J. Super. Ct. Law Div. Dec. 19, 2011). Given the chance, it would be only a matter of time for Florida mayors and other local executives to jump on the opportunity to maintain secrecy in their offices and attempt to avail themselves of the executive privilege.

## CONCLUSION

For the foregoing reasons, the Court should reverse the trial court and hold that no "executive privilege" exemption to the public's right to access records exists.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to all counsel and parties of record using the Florida Courts E-Filing portal system.

## CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief complies with the form requirements of Rules 9.045, 9.210 and 9.370, Florida Rules of Appellate Procedure.

Dated: July 10, 2023

Respectfully submitted,


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