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

WILLIAM DELUCCIO, et al.,

Appellants,

vs.

ED HAVILL, etc., et al.,

Appellees.

Case No. 1D10-975
L. T. Case No. 2008-CA-001412

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES LEE COUNTY, LEE COUNTY SCHOOL BOARD, THE CITY OF GROVELAND, LAKE COUNTY, ED HAVILL AND BOB MCKEE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

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PRELIMINARY STATEMENT

William Deluccio, Stephen B. Miller, Terri Noyes, Clarence L. Spannuth, Jr., M.D. and Karen E. Spannuth will be collectively referred to as "Appellants."

Ed Havill, Bob McKee, Lake County, Lake County School Board, City of Groveland, Marcus Saiz De La Mora, Fernando Casamayor, Miami-Dade County, Miami-Dade County School Board, City of Miami, Charles Hackney, Ken Burton, Jr., Manatee County, Manatee County School Board, City of Longboat Key, Kenneth Wilkinson, Cathy Curtis, Lee County, Lee County School Board, City of Cape Coral, and Lisa Echeverri, in her official capacity as Executive Director of the Florida Department of Revenue, will be collectively referred to as "Appellees."

The Save Our Homes Amendment, as authorized by Article VII, section 4 of the Florida Constitution, shall be referred to as "Save Our Homes" or "SOHA."

Joint Resolution 2D of the Florida Legislature, approved by the voters of the State of Florida on January 29, 2008, shall be referred to as "Amendment 1."

Reference to materials in the record will be designated as "R." followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The Appellees to this Answer Brief, Lee County, Lee County School Board, the City of Groveland, Lake County, Lake County Property Appraiser Ed Havill, and Lake County Tax Collector Bob McKee, in their individual and official capacities, acknowledge the Statement of the Case and Facts filed by Appellants within the Initial Brief. However, as the statement is unduly argumentative, the above-named Appellees submit their own Statement of the Case and Facts, as permitted by Florida Rule of Appellate Procedure 9.210(c).

This is an appeal from a Final Judgment of Dismissal on Remand. In the original action before the trial court, the Appellants' complaint challenged the constitutionality of Article VII, section 4 of the Florida Constitution, more commonly known as the Save Our Homes Amendment, together with its implementing statute, section 193.155, Florida Statutes (R. Vol. 2 at 277-316). The SOHA provision constitutionally limits increases in the assessed taxable value of residences entitled to the homestead exemption to three percent of the assessment for the prior year, or the percent change in the Consumer Price Index, whichever is less. Art. VII, § 4(c), Fla. Const.[1] Appellants also challenged what is commonly referred to as the "portability" provision of Joint Resolution 2D of the

[1] Although this section has been renumbered as section 4(d), for purposes of this Answer Brief, and for consistency, it will be referenced by the old section number, 4(c).

Florida Legislature, which was approved by the voters of the State of Florida on January 29, 2008, as Amendment 1. The portability provision of Amendment 1 allows homestead property owners to transfer all or a portion of their SOHA benefits to another Florida homestead upon purchase. The benefits derived from the application of the SOHA and portability may vary from year to year based upon the market conditions.

Appellants, non-resident owners of Florida secondary and vacation residential property, brought a claim for declaratory relief alleging that SOHA and the portability provision of Amendment 1 are unconstitutional as a violation of (1) the "dormant" Commerce Clause of Article I, section 8 of the U.S. Constitution; and (2) the Privileges and Immunities Clause of Article IV, section 2, and the Fourteenth Amendment to the U.S. Constitution (R. Vol. 2 at 298-303). Appellants also sought retroactive and prospective relief, permanent injunctive relief under 42 U.S.C. section 1983, and permanent injunctive relief under state law (R. Vol. 2 at 303-311).

The Appellees below filed various separate motions to dismiss and strike directed to the Amended Complaint, and motions for judgment on the pleadings (collectively "Motions to Dismiss") (R. Vol. 2 at 317-400; R. Vol. 3 at 401-509).[2]

[2] Before the Motions to Dismiss were disposed of by the trial court, Appellants below filed a Motion for Partial Summary Judgment (R. Vol. 4 at 670-706).

A hearing was held on the Motions to Dismiss on October 28, 2008 (R. Vol. 6 at 1070). Subsequent to the hearing, the trial court entered its written Order of Dismissal with Prejudice. First the court ruled that Plaintiffs' failure to comply with the time requirements in section 194.171, Florida Statutes, deprives the court of jurisdiction to hear the case (R. Vol. 6 at 1032). The court also ruled that Plaintiffs had failed to state a cause of action under either the dormant Commerce Clause or the Privileges and Immunities Clause of the U.S. Constitution (R. Vol. 6 at 1032). The court also dismissed the claims brought pursuant to 42 U.S.C. section 1983 (R. Vol. 6 at 1032).

Appellants appealed the Order of Dismissal to this Court. At the time briefs were filed in this case, the related case of Lanning v. Pilcher, Case No. 1D07-6564, was pending before this Court. While the present case was pending, the Court issued its opinion in Lanning, upholding the constitutionality of the SOHA. Lanning v. Pilcher, 16 So. 3d 294 (Fla. 1st DCA 2009), review pending, Case No. SC09-1796 (filed September 24, 2009).

Also on appeal, and traveling with this case, was the related case of Bruner v. Hartsfield, Case No. 1D08-5524. On November 17, 2009, this Court released its opinions in both the present case, and in Bruner. Bruner v. Hartsfield, 23 So. 3d 192 (Fla. 1st DCA 2009); Deluccio v. Havill, 25 So. 3d 31 (Fla. 1st DCA 2009)

However, as the trial court dismissed the Amended Complaint, this motion never became ripe for consideration.

(Deluccio I). In Bruner, this Court followed Reinish v. Clark, 765 So. 2d 197 (Fla. 1st DCA 2000), and Lanning, and upheld the constitutionality of the SOHA and Amendment 1. Although Appellants in Bruner sought review before the Florida Supreme Court, review was denied. Bruner v. Hartsfield, Case No. SC09-2292 (reviewed denied May 24, 2010).

In Deluccio I, this Court reversed and remanded on the basis that "the trial court erroneously concluded that it lacked subject matter jurisdiction when appellants did not comply with section 194.171(1), Florida Statutes..." 25 So. 3d at 33. The Court also noted that the case "has been consolidated with Bruner v. Hartsfield, 1D08-5524, and this case raises nearly identical constitutional challenges to section 4, Article VII, which have been raised and rejected by this court in Bruner. In Bruner, the plaintiffs were state residents, whereas the plaintiffs in the case before us are nonresidents, as were the plaintiffs in Reinish." Id.

On remand, the parties agreed that there was no need for another hearing regarding the defendants various Motions to Dismiss. (R. Vol. 6 at 1140). Accordingly, the trial court entered its Final Judgment of Dismissal on Remand on February 22, 2010 (R. Vol. 6 at 1120-28). The Court rejected Appellants' challenges, and ruled that the "Plaintiffs' challenge to SOHA is virtually identical to the challenge before the First District in Bruner. Bruner, 23 So. 3d at 192. In

that case, the First District rejected an indistinguishable constitutional challenge, citing particularly to Reinish v. Clark, 765 So. 2d 197 (Fla. 1st DCA 2000), and Lanning v. Pilcher, 16 So. 3d 294 (Fla. 1st DCA 2009)." The court also ruled that "Amendment 1 does not change the holdings in Reinish and Lanning." (R. Vol. 6 at 1122). This appeal has followed from the Final Judgment of Dismissal, dismissing the Complaint in its entirety.[3]

SUMMARY OF THE ARGUMENT

This Court has clearly and consistently rejected identical or nearly identical constitutional challenges as those brought by Appellants in this case. Appellants challenge the SOHA, which is part of Florida's comprehensive constitutional tax scheme for homestead property, enacted for the purpose of preserving the primary permanent home. The SOHA caps the annual assessment of homestead property at three percent above the prior year's assessment or the percentage change in the Consumer Price Index, whichever is less. The applicability of the SOHA is dependent on the classification or use of the property as homestead property and not the residency of the owner. A non-resident owner of a secondary or vacation home in Florida is treated identical to a Florida resident owner of a secondary or vacation home. Amendment 1, also challenged in this appeal, is an extension of

[3] Certain Defendants/Appellees also filed a Notice of Cross-Appeal. (R. Vol. 6 at 1168-1190; R. Vol. 7 at 1191-1220.) As Appellees in this Answer Brief did not join in the Cross-Appeal, it is not addressed in this Brief.

the SOHA, and therefore, also only applies to property used as a homestead, regardless of the residency of the owner.

Contrary to Appellants' arguments, the SOHA and Amendment 1 do not violate the dormant Commerce Clause or the Privileges and Immunities Clause. The trial court correctly dismissed Appellants' Amended Complaint on remand because, as a matter of law, the complaint failed to state a cause of action for a violation of any of these constitutional provisions. This Court's decisions in Reinish, Lanning, and Bruner, and the U.S. Supreme Court's decision in Nordlinger v. Hahn, 505 U.S. 1 (1992), all necessitate such a result.

The SOHA, along with Amendment 1, does not discriminate against interstate commerce. Rather, it is an even-handed provision that applies to both residents and non-residents of Florida. Owners of secondary and vacation homes in Florida are treated the same, regardless of residency.

Similarly, the SOHA and Amendment 1 do not violate a fundamental or essential right guaranteed by the Privileges and Immunities Clause and do not deny equal treatment to non-residents or discriminate against them. The exemptions are based on the use of the property, and not the user. Accordingly, the trial court's order of dismissal should be affirmed in its entirety.

STANDARD OF REVIEW

The Appellees agree that the standard of review for the issues involved in this appeal is de novo. See, e.g., Fullerton v. Fla. Med. Ass'n, Inc., 938 So. 2d 587, 590 (Fla. 1st DCA 2006) ("This court's review standard of a trial court's grant of a motion to dismiss is *de novo*."); Reinish v. Clark, 765 So. 2d 197, 203 (Fla. 1st DCA 2000) (providing that where the trial court dismissed the plaintiff's complaint based on the conclusion that the Florida homestead tax exemption does not violate the United States Constitution, "the lower tribunal's rulings are strictly questions of law to which a *de novo* standard of review applies").

"For purposes of ruling on the motion to dismiss, the trial court was obliged to treat as true all of the [second] amended complaint's well-pleaded allegations, including those that incorporate attachments, and to look no further than the [second] amended complaint and its attachments." Rudloe v. Karl, 899 So. 2d 1161 (Fla. 1st DCA 2005) (alteration in original). "A reviewing court operates under the same constraints." Id.; see also Gladstone v. Smith, 729 So. 2d 1002 (Fla. 4th DCA 1999) ("When considering the merits of a motion to dismiss, a court's gaze is limited to the four corners of the complaint.").

ARGUMENT

I. INTRODUCTION

Appellants challenge the validity of Article VII, section 4, of the Florida Constitution, more commonly known as the Save Our Homes Amendment, together with its implementing statute, section 193.155, Florida Statutes. The SOHA is part of the State's comprehensive ad valorem tax structure for homestead property consisting of two separate components. First, all persons having legal or equitable title to real estate and maintaining thereon a permanent residence are exempt from ad valorem taxation for the first $25,000 of the assessed value. Art. VII, § 6, Fla. Const. This exemption amount was increased under Amendment 1, on assessed valuation greater than $50,000 for all levies other than school district levies.[4] Under its provisions, individuals are only allowed one homestead exemption; however, a property owner need not be a citizen of the United States to be eligible for the exemption, nor is there a durational residency requirement.

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[4] This provision was implemented by the Legislature in 2008 by adding a new section 196.031(1)(b), Florida Statutes:

> Every person who qualifies to receive the exemption provided in paragraph (a) is entitled to an additional exemption of up to $25,000 on the assessed valuation greater than $50,000 for all levies other than school district levies.

Reinish v. Clark, 765 So. 2d 197, 205 (Fla. 1st DCA 2000), review denied, 790 So. 2d 1107 (2001), cert. denied, 534 U.S. 993 (2001).

Second, under SOHA, individuals who have claimed a Florida residence as their homestead are also entitled to a "cap" on the assessed value of their homestead property. Once homestead is established, the owner is assessed taxes based on its just value as of January 1 of the following year and each subsequent year. Art. VII, § 4(c)(3), Fla. Const. However, SOHA limits the annual increases in assessments of homestead property to three percent of the prior year's assessment or the percent change in the Consumer Price Index, whichever is less. Only homeowners who have claimed a homestead exemption are entitled to the benefits of the SOHA. This type of tax structure is referred to as acquisition-value property taxation, because property is generally reassessed at fair market value at the time the property is acquired.

Both the tax exemption and the SOHA "are parts of a coordinated constitutional scheme relating to taxation and have as their underlying purpose the protection and preservation of homestead property." Zingale v. Powell, 885 So. 2d 277, 285 (Fla. 2004). The extent of the benefit provided by the SOHA and portability is not linked to the length of Florida residency, but rather, is tied to the market conditions. As the market conditions change, that benefit may increase or even decrease from year to year. There is no durational residency requirement or

waiting period for those who have moved from out of state prior to the establishment of homestead, and entitlement is not dependent on whether the property owner came from in state or out of state.

With the passage of Amendment 1 by the voters on January 29, 2008, owners of homestead property in Florida can now transfer all or a portion of their SOHA benefits that may exist based upon market conditions in any given year to another homestead. This is commonly referred to as "portability." As the portability provision of Amendment 1 is an extension of the SOHA, there is also no durational residency requirement or waiting period tied to this benefit.

II. PURSUANT TO THE CONSISTENT RULINGS OF THIS COURT, AS WELL AS OTHER COURTS, THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' COMPLAINT ON REMAND

The line of cases emanating from this Court addressing the same or substantially similar issues as raised in the present case all reach the same result—the SOHA is constitutional. As a mere extension of the SOHA, Amendment 1 is also constitutional. Under the rulings of this Court in Reinish, Lanning, and Bruner, as well as the United States Supreme Court ruling in Nordlinger, the dismissal of the complaint should be upheld.

Before the specific issue of the constitutionality of Florida's SOHA was ever addressed by the Florida courts, the United States Supreme Court considered California's similar acquisition-value tax system set in place by Proposition 13, a

constitutional amendment which capped real property taxes at one percent of a property's full cash value. Nordlinger v. Hahn, 505 U.S. 1 (1992). In addition, there was a two percent cap on annual increases in the assessed valuations. Id. at 5. The Court considered the "dramatic disparities" in the taxes paid by persons owning similar pieces of property, which continue to grow over time, noting that the petitioner, a recent purchaser of residential property, paid about five times more in taxes than some of her neighbors, who had owned comparable homes for a number of years. Id. at 6.

The Court determined that Proposition 13 passed a rational basis, equal protection review and identified two legitimate state interests which were rationally furthered by the law. First, "the State has a legitimate interest in local neighborhood preservation, continuity, and stability." Second, "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." Id. at 12. This same reasoning is applicable in the present case -- the State of Florida has a legitimate interest in the preservation of the primary permanent home which is rationally furthered through the SOHA.

In addition, Nordlinger also addressed a provision in the California law similar to the portability provision of Amendment 1. Under the California tax scheme, persons aged 55 and older who exchange principal residences and children

who acquire property from their parents were exempt from reassessment. The Petitioner in Nordlinger, just as the Appellants have in the present matter, claimed these exemptions made the unfairness of the tax structure worse. However, the Court rejected this argument, ruling that such exemptions from the tax scheme did not "necessarily render the overall scheme invidiously discriminatory." Nordlinger, 505 U.S. at 16-17.

This constitutionality of Florida's current homestead ad valorem tax scheme was not addressed by Florida courts until the last decade, when it was upheld by this Court in Reinish. 765 So. 2d 197. The Reinishes, like Appellants, were non-residents who had purchased a part-time residence in Florida. Id. at 201. The Reinishes primarily challenged the homestead tax exemption provision, arguing that the homestead tax exemption violated the federal Equal Protection Clause, the Privileges and Immunities Clause, including the Right in Travel, and the "dormant" Commerce Clause. Id. Additionally, as a component of homestead exemption, they also contested the three percent cap under the SOHA. As in the present matter, the trial court in Reinish dismissed the complaint, concluding that the various theories of unconstitutionality were all without legal merit. Id.

Though the Appellants attempt to ignore the breadth of the claim in Reinish, the application of SOHA was clearly raised. In Reinish, the appellants asserted in

their briefs a specific argument regarding the SOHA, identical to the primary argument on appeal in the present case:

> [T]he "Save Our Homes" provisions significantly leverage these benefits for Floridians, by capping the reassessments of their "homestead property." *See* Art. VII, § 4, Fla. Const., as amended; § 193.155, Fla. Stat. Under these provisions, reassessments of property which qualifies as a Homestead (i.e. that owned by permanent residents) may not increase yearly by more than 3% of the prior year's assessment or the percentage change in the Consumer Price Index, whichever is less. Persons who are not eligible for the Homestead Tax Exemption, i.e. nonresident homeowners such as Plaintiffs, have no protection against the annual reassessments of their property. As a result, the gap between the lower real estate taxes paid by a Florida resident (with both the homestead exemption and the reassessment cap) and the higher taxes paid by a nonresident (without either benefit) on identical pieces of property will simply grow over time.
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> * * * *
>
> In addition to the annual benefit provided by the Homestead Tax Exemption, the "Save Our Homes" provision, by capping future tax increases for residents only, exacerbates the property tax differential between residents and nonresidents who own identical pieces of property. Thus, the Homestead Tax Exemption, coupled with the Save Our Homes provision, produce a significant economic benefit exclusively for permanent Florida residents, which is never available to Plaintiffs and the class they seek to represent.

(Reinish v. Clark, Case No. 98-03973, (Fla. 1st DCA), Appellants' Reply Brief and Cross-Appellees' Answer Brief at 9-10) (first emphasis added)).[5]

In its written opinion in Reinish, this Court acknowledged the Reinishes' argument that both the tax exemption and the SOHA cap afford those who establish a permanent Florida residence a clear and continuing economic advantage over non-residents. Reinish, 765 So. 2d at 213. However, this Court rejected all of the Reinishes' constitutional arguments, determining that there was no discrimination because the underlying classification was based on the use of the property rather than on residency of the owner:

> Whether the person is a Florida resident or not, only one homestead exemption is allowed irrespective of how many other residences the persons owns. . . .[T]he Florida exemption treats the Reinishes no differently from either Florida residents who rent, rather than own, a particular Florida real-estate parcel, or Florida residents who use Florida real property as a secondary, seasonal, or vacation residence.

Id. at 205. The reasoning in Reinish is fully applicable to the present case.

Additionally, during the pendency of this case, this Court has issued two separate decisions following Reinish, specifically addressing the SOHA. In Lanning, non-resident owners of Florida secondary and vacation homes challenged the SOHA on constitutional grounds, including alleged violations of the dormant

[5] The Court may take judicial notice of its own records. § 90.202(6), Fla. Stat. (2009).

Commerce Clause, Privileges and Immunities, Equal Protection, Right to Travel, and Due Process. The various defendants filed Motions to Dismiss, which were granted by the trial court. Relying on its earlier decision of Reinish, and the United States Supreme Court decision in Nordlinger, this Court affirmed on appeal by written opinion. Lanning v. Pilcher, 16 So. 3d 294 (Fla. 1st DCA 2009), review pending, Case No. SC09-1796 (filed September 24, 2009). The Court concluded that:

> A Florida resident who owns vacation property or business property in the state will not be entitled to claim any tax benefit under article VII, section 4(c) and will be in the same position with respect to that property as a nonresident. The plaintiffs argue that the existence of a benefit for homestead property, when combined with the tax treatment of non-homestead property, gives Florida residents a tax advantage, but this is essentially an argument that the homestead exemption is itself unconstitutional, a point rejected in Reinish.

Id. at 297-98.

At the same time this Court considered the first appeal in the present case, Deluccio I, the Court was also considering a similar case. In Bruner, recently relocated from out of state owners of Florida homestead property challenged both the SOHA and Amendment 1 on constitutional grounds, including alleged violations of Equal Protection and Right to Travel. As in Lanning and the present case, the various defendants filed Motions to Dismiss, which were granted by the trial court, and appealed to this Court. In Bruner, released the same day as the

opinion in Deluccio I, this Court affirmed the trial court's order, relying on its earlier decisions in Reinish and Lanning, 23 So. 3d at 194. The Court concluded that "[t]he holdings in Reinish and Lanning that section 4, Article VII is not unconstitutional for the reasons claimed are not changed by the passage of Amendment 1." Id. Although Appellants in Bruner sought review before the Florida Supreme Court, the Court denied review. Case No. SC09-2292 (review denied May 24, 2010).

Unlike Bruner, the Deluccio I Court reversed and remanded the decision of the trial court, but did so only on the basis that the "trial court erroneously concluded it lacked subject matter jurisdiction." 25 So. 3d at 33. The opinion also noted that the case had been consolidated with Bruner, and that this case "raises nearly identical constitutional challenges to section 4, Article VII, which have been raised and rejected by this court in Bruner." Id.

Appellants assert on appeal that this was error because the parties in Bruner raised somewhat different constitutional issues; specifically Bruner did not raise the dormant Commerce Clause issue raised in the present case. However, this argument is without merit. Bruner ruled in line with all other case law on this issue in determining that the SOHA and Amendment 1 are constitutional. Although the parties in Bruner did not raise a dormant Commerce Clause violation, this issue was raised and addressed in both Reinish and Lanning.

The validity of both the SOHA and Amendment 1 is supported by clear and consistent precedent from this Court. Accordingly, Appellees respectfully request that this Court uphold the order of the trial court in all respects. N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612, 637 (Fla. 2003) ("The doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenant of Anglo-American jurisprudence for centuries"); Gessler v. Dep't of Bus. & Prof'l Reg., 627 So. 2d 501, 504 (Fla. 4th DCA 1993) ("The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice.").

III. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CLAIM THAT THE SOHA VIOLATES THE DORMANT COMMERCE CLAUSE

A. Neither the SOHA or Amendment 1 Discriminate Against Interstate Commerce

In their Amended Complaint, Appellants challenged the SOHA on the basis that, among other things, it violates the dormant Commerce Clause. The Commerce Clause of the federal Constitution states, in part: "The Congress shall have power to . . .regulate Commerce with foreign Nations, and among the several States." Art. I, § 8, cl. 3, U.S. Const. In addition to the affirmative grant of power to Congress, the Clause "also has a negative or dormant aspect, which severely limits the extent to which the States or local governments can discriminate against, unduly burden,

tax, or otherwise interfere with interstate commerce. . ." Reinish, 765 So. 2d at 210 n. 8. In general, the dormant Commerce Clause prevents states from enacting provisions which interfere with, discriminate against, or unduly burden interstate commerce. General Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).

The applicable test for evaluating a tax provision alleged to be discriminatory under the Commerce Clause is contained in the case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Pursuant to the four prong test of Complete Auto Transit, a tax will be sustained against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing state; is fairly apportioned; does not discriminate against interstate commerce; and is fairly related to the services provided by the State." 430 U.S. at 279. Appellants' argument addresses only the third prong of the test, which prohibits a state tax from discriminating against interstate commerce.[6] Similar to the traditional Commerce Clause standard, a tax may not facially discriminate against interstate commerce, nor may it discriminate in purpose or effect. See Bacchus Imps., LTD v. Dias, 468 U.S. 263, 271-73 (1984). Discrimination "refers to differential treatment . . . such as where a regulation places a greater economic

[6] Although Appellants make the blanket assertion that "there are substantial questions about violations of the second and fourth factors as well" (Initial Brief at 17), Appellants provide no support for, or argument on, this point.

burden on those outside the state, with an attendant economic advantage to those within the state." Reinish, 765 So. 2d at 211.

The SOHA is not discriminatory, but rather, is an even-handed provision that applies equally to both residents and non-residents of the State of Florida. Any difference in treatment is based on the use of property. As the Court concluded in Reinish, under the homestead exemption tax scheme, including the SOHA, there is neither a discriminatory purpose nor an improper discriminatory effect on non-residents. 765 So. 2d at 214; cf. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617-19 (1981) (ruling a Montana severance tax imposed on each ton of coal mined in the state did not violate the discrimination prong of the dormant Commerce Clause analysis; stating "there is no real discrimination . . . the tax is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers"). Nor is that conclusion altered by the passage of Amendment 1. As Amendment 1 is an extension of the SOHA, it likewise has no discriminatory purpose or effect on non-residents. See Bruner, 23 So. 3d at 194.

This case does not present the type of differential or protectionist tax treatment at issue in other discrimination cases. For example, in Camps Newfound/Owatonna, Inc. v. Town of Harrison, the petitioner challenged a real estate tax exemption for charitable institutions which applied more favorably to

charities which served residents of Maine. 520 U.S. 564 (1997). The Court ruled the disparate tax treatment was unconstitutional under the dormant commerce clause because it was facially discriminatory based on the residence of the consumers served. The Reinish Court discussed Camps Newfound/Owatonna at length, and found that decision distinguishable. Instead, Reinish ruled that the Florida homestead tax scheme "neither distinguishes between Florida residents and non-residents nor disparately treats identically situated persons. The focus of the exemption is on the use of the property itself, and not the user. Entitlement to the exemption hinges upon whether the property is used as the 'permanent residence.'" 765 So. 2d at 214.

There are legitimate state interests that distinguish residential property used as vacation or second homes from the use of residential property for primary permanent homes. "A secondary or vacation home does not implicate the same acute public policy concerns relating to the establishment and protection of a stable, financially secure primary residence." Reinish, 765 So. 2d at 210. Appellants simply are not similarly situated to owners of Florida homestead property; owners of secondary and vacation homes in Florida are treated exactly the same, regardless of residency. Accordingly, there can be no discrimination between these two groups. See Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801,

1811 (2008) (providing "any notion of discrimination assumes a comparison of substantially similar entities").

To the extent Appellants argue that the SOHA is discriminatory because it diminishes interstate relocations, this argument was also addressed and rejected by Reinish. In Reinish, the Court discussed in detail the "well-reasoned analysis" set forth by an Illinois decision, Stahl v. The Village of Hoffman Estates, 694 N.E.2d 1102 (Ill. App. Ct. 1998), which the Court found "instructive and useful." Reinish, 765 So. 2d at 214. In Stahl, a real estate transfer tax exemption applied only to residents who lived on their property in the Village for a year and then bought another residence in the Village within a certain period of time. The appellants in that case argued that this exemption per se discriminated against interstate and intrastate commerce. Stahl, 694 N.E. 2d at 1104.

The Illinois appellate court rejected this argument and ruled that the property tax exemption was not per se discriminatory. In rendering its decision, the court stated:

> The ordinance, with its exemption, does not impose a tax on people who leave the Village. It rewards the people who stay. In that way the Village promotes stability and continuity. That is a legitimate local purpose. People make decisions about where they want to live. We do not see how the decision to leave Hoffman Estates, foregoing a tax exemption, can be said to offend the Commerce Clause.

Id. at 1107. Likewise, in the present case, the SOHA limits tax increases for those who remain in their homestead property, with a purpose of preserving the primary permanent home. That preservation serves a legitimate local purpose, and the decision of a homeowner to sell his or her primary residence and forego any built-up SOHA benefits, or not, cannot be said to offend the Commerce Clause.[7]

B. Pike v. Bruce Church, Inc. Does Not Lead to a Different Result

Appellants argument in this case centers in large part on the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), arguing that the trial court failed to apply this test in its analysis of the dormant Commerce Clause claim, and that at a minimum, the case should be remanded. There was no error of the trial court on this point. Pike sets forth a two-tiered test that is applied to challenges to state regulations under the dormant Commerce Clause. Under the first tier, if the state regulation per se discriminates against interstate commerce, it will be struck down as a violation of the dormant Commerce Clause. However, if

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[7] Appellants cite Am. Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266 (1987) for the proposition that under the commerce clause a tax discriminates against interstate commerce when, if adopted by all states, commerce among the states would be deterred. This is commonly referred to as the internal consistency test. Id. However, this test is typically applied under circumstances where a taxpayer is subjected to multiple tax burdens because of his out-of-state activities, and therefore would not be applicable here. See, e.g., Am. Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005). See also Ford Motor Credit Co. v. Dep't of Revenue, 537 So. 2d 1011 (Fla. 1st DCA 1988) (refusing to apply the internal consistency test in a property tax context).

the regulation is not per se discriminatory, the court must decide whether the regulation places a burden on interstate commerce that clearly outweighs its possible benefit:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Reinish, 765 So. 2d at 212-13 (quoting Pike, 397 U.S. at 142).

Pike generally applies in cases challenging state regulatory provisions, not in cases such as this one involving state taxation. See Complete Auto Transit, 430 U.S. 274 (applying a separate four prong test in the case of a state tax); Dep't of Banking & Finance v. Credicorp, Inc., 684 So. 2d 746 (Fla. 1996) (outlining the two separate legal standards that apply to (1) a general revenue tax or (2) a regulatory measure enacted pursuant to the state's police powers). In fact, the authority relied upon by Appellants for their argument that the matter should be remanded to conduct a Pike analysis all involve challenges to regulatory measures, not tax provisions.

Additionally, since Reinish, the U.S. Supreme Court has criticized certain applications of the Pike balancing analysis. See Dep't of Revenue of Ky., 128 S. Ct. at 1818-19 (citing cases for the proposition that "[C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods

of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes").

In any event, to the extent Pike applies, this Court, in Reinish, already conducted the balancing test and determined that the provisions of the homestead tax exemption scheme, including the SOHA, did not discriminate against interstate commerce and did not violate the dormant Commerce Clause. In applying the second step of the test, this Court specifically concluded that "the Florida exemption is an even-handed regulation that promotes the legitimate, strong public interest in promoting the stability and continuity of the primary permanent home." Reinish, 765 So. 2d at 214. This Court further concluded that the Reinishes had not shown the effects on interstate commerce were anything more than incidental, "or that the burden imposed on such commerce is clearly excessive when compared to the asserted local benefits." Id. As the Court in Reinish has previously determined, the State has rational and reasonable considerations to justify the difference in benefits based on use of the property, and Appellants cannot show that the Florida homestead tax scheme is *clearly* excessive when compared to the asserted local benefit. See Locke v. Shore, 682 F.Supp.2d 1283 (N.D. Fla. 2010) (noting "Pike's balancing test is deferential, and state statutes are rarely invalidated under it.").

C. Legislative History and Other Documents Filed Below on Which Appellants Rely are Irrelevant to Whether Appellants Stated a Claim for Which Relief May be Granted on the Constitutional Issues

Appellants in large part rely on the legislative history regarding Amendment 1 in order to argue a violation of the dormant Commerce Clause. However, this legislative history is irrelevant to this cause. The issue is properly whether Appellants stated a cause of action for which relief could be granted on the constitutional issues they raised below, not whether the legislative policy behind SOHA or Amendment 1 is preferable to other methods of taxation.

Courts generally defer to the Legislature on matters of policy decisions. In Nordlinger, for example, the petitioner and amici in that case argued that the acquisition-value tax structure frustrated the "American dream" of home ownership for younger and poorer families. 505 U.S. at 17. In response, the Court noted that, in the rational basis context:

> [The] Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Id. See also, Reinish, 765 So. 2d at 206 ("States are not required to convince the courts of the correctness of their legislative judgments.") Similarly, in this case, the courts should defer to the Legislature on matters of whether the SOHA and the related portability provision of Amendment 1 are prudent policy decisions.

In addition, Appellants rely heavily on the report by Walter Hellerstein, et. al, entitled "Legal Analysis of Proposed Alternatives to Florida's Homestead Property Tax Limitations: Federal Constitutional and Related Issues," which was commissioned by the Legislature. However, the Hellerstein Report is obviously not an authority on the legal issues relevant in this case. This report, although in the record, was filed with relation to Appellants' Motion for Partial Summary Judgment, which was never ripe for review, as the trial court disposed of the complaint on the Motions to Dismiss (R. Vol. 4 at 670-713, 748-800; R. Vol. 5 at 801-43). This report is largely irrelevant, as existing case law, primarily the Reinish, Lanning, Bruner and Nordlinger decisions, dispose of the constitutional claims brought by Appellants.

Further, Appellants also rely on the factual "inferences" allegedly established by the affidavit of James T. McClave and supporting material filed to support the Motion for Partial Summary Judgment (R. Vol. 3 at 510-600; R. Vol. 4 at 601-706, 845-62). Apart from this material not being properly before the Court on the Motions to Dismiss, it is not pertinent to the discussion. The information seeks to show the difference between homestead, as compared to non-homestead property. However, these properties are dissimilar for purposes of a Commerce Clause analysis; the appropriate comparison is between resident and non-resident

owners of non-homestead residential property. Under this comparison, all similar properties are treated identically.

IV. THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CLAIMS THAT THE SOHA VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE[8]

Appellants' claim that the SOHA violates the Privileges and Immunities Clause was also properly dismissed. The Privileges and Immunities Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Amend. XIV, § 1, U.S. Const. The Privileges and Immunities Clause of the Fourteenth Amendment "protects those rights which are attributes of national citizenship or are implicit in the concept of national citizenship." Defeo v. Sill, 810 F. Supp. 648, 655 n.6 (E.D. Pa. 1993).

The Fourteenth Amendment Privileges and Immunities Clause is modeled on the Constitution's Article IV, Section 2, clause, which seeks to ensure that rights granted by a state to its citizens are not withheld from citizens of other states. Saenz v. Roe, 526 U.S. 489, 502 (1999). Article IV, section 2, prevents discrimination by states against nonresidents, while the Fourteenth Amendment, section 1, protects the attributes of U.S. citizenship, "such as the right to vote for national officials, the right to petition Congress for redress of grievances and the

[8] To the extent Appellants raised a constitutional Right to Travel argument below, any such argument has been abandoned on appeal.

right to enter public lands." Salla v. County of Monroe, 399 N.E.2d 909, 910 n.1 (N.Y. 1979). It bridges the gap left by Article IV, section 2, in order to protect U.S. citizens from legislation of their own states having the effect of denying equal treatment in the exercise of their privileges of national citizenship in other states.

The Privileges and Immunities Clause governs only those rights or activities which are fundamental in the sense that interference would "hinder the formation, the purpose, or the development of a single Union. . ." Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 383 (1978). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." Id.

Although the right "to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state" is protected by the Privileges and Immunities Clause, the claim in this case is more in the nature of a denial of equal taxation, than on an alleged infringement upon the right to acquire, hold, or dispose of property. Reinish, 765 So. 2d at 209. The application of the SOHA, along with Amendment 1, does not deny equal treatment to non-residents, nor does it discriminate against them. The application of the SOHA is based upon the use that a party makes of its residential property, regardless of whether the property is owned by residents of

Florida or residents of other states. This point was clearly made in Reinish. 765 So. 2d at 209.

Residents of Florida, like non-residents, are not entitled to application of the SOHA to their secondary or vacation residential properties. Appellants and other non-residents have no right to any preferential treatment on the taxation of their secondary or vacation homes inside the state of Florida. See Shaffer v. Carter, 252 U.S. 37, 53 (1920) ("Section 2 of Art. IV of the Constitution entitles [a non-resident] to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption.").

The difference in treatment in this case arises not from discrimination of similarly situated property owners, but from the application of the provision to two separate classes of properties. Florida legitimately may lessen the tax burden for owners of primary homes within Florida, as compared with that of owners of residential property utilized as secondary or vacation homes. Because Appellants do not maintain their primary residences in Florida, they, like all other owners of secondary or vacation homes in the State, will not be afforded the same tax benefit as those with homesteads in Florida. Because Amendment 1 is merely an extension of benefits provided under the SOHA, its portability provision likewise does not

treat non-resident owners of secondary homes any differently from resident owners of secondary homes.

Rubin v. Glaser, 416 A.2d 382 (N.J. 1980), is instructive on this issue. The Supreme Court of New Jersey considered a constitutional challenge to a homestead tax rebate. Appellants were non-resident owners of a second or vacation home in New Jersey. The court concluded that the homestead rebate act satisfied the requirements of the Privileges and Immunities Clause because it bore a close relationship to a proper purpose irrespective of the impact upon nonresidents. Id. at 386. First, the court found that the rebate was closely related to the beneficial purpose of alleviating the heavy realty tax burden, and that the Legislature did not intend to foster the ownership of vacation homes or other homes not maintained as principal residences. Second, the statutory aim was not directed against non-residents. The court found that New Jersey residents who own vacation homes in New Jersey were treated the same as non-residents with respect to the rebates. Id. at 386-87. This case was cited with approval by Reinish. 765 So. 2d at 210. The Florida homestead tax scheme, including the SOHA, like the homestead rebate, "provides no greater, or lesser, benefit to Florida owners of secondary homes than it does to . . . non-residents." Id.

The Appellants cite extensively from Austin v. New Hampshire, 420 U.S. 656 (1975). However, that case is clearly distinguishable from the present case. In

Austin, the Supreme Court invalidated a New Hampshire income tax law, the practical effect of which was that "the State taxes only the incomes of nonresidents working in New Hampshire. . . ." Id. at 659. Residents of Maine challenged the law on the basis of "this disparate treatment of residents and nonresidents." Id. In the present case, there is no similar disparate treatment. Non-resident owners of secondary or vacation homes are treated exactly the same as resident owners of property used in the same manner. It is the use of property that controls whether the SOHA and Amendment 1 apply, not the residency of the owner.[9]

Appellants' claim that the cause should be remanded for reconsideration is without merit. In Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003), cited by Appellants in support of this argument, the Court remanded the case because it agreed "with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim." Id. at 67. In this case, clearly the trial court did not reject Appellants' argument because of the absence of an express statement of discrimination in the SOHA. The court rejected Appellants' argument on the basis that this issue had already been decided adversely to Appellants' position by Reinish and Nordlinger.

[9] Austin was cited and considered in Reinish. 765 So. 2d at 207-210.

In addition, Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) does not mandate an evidentiary review in this case. Piper provides that the "conclusion that [a State law] deprives nonresidents of a protected privilege does not end our inquiry. . . .The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." Id. at 284. In this case there is no deprivation of a protected privilege, and no discrimination against non-residents. Additionally, in Reinish, the Court ruled that the homestead tax exemption "is reasonable in effect. It is closely and substantially related to the State's valid objective to promote and protect taxpayers' financial ability to purchase and maintain the primary shelter. This purpose constitutes a substantial justification totally unrelated to state residency." 765 So. 2d at 210.

Further, contrary to Appellants' argument that an evidentiary review is mandated, Reinish, Lanning, Bruner, and Nordlinger were all disposed of on motions to dismiss, without any factual review of the underlying claim. Where the complaint fails to state a claim on which relief can be granted, there is no need for an evidentiary review of the underlying facts.

As any resulting inequality based on the SOHA and Amendment 1 is only incidental to the application of the tax system, and does not reflect hostile

discrimination, Appellants have failed to state a claim under the Privileges and Immunities Clause. Reinish, 765 So. 2d at 209.

CONCLUSION

As a matter of law, the trial court on remand properly dismissed the Amended Complaint for failure to state a cause of action as to the constitutional issues. Appellants have failed to demonstrate any reversible error on appeal. Therefore, Appellees Lee County, Lee County School Board, The City of Groveland, Lake County, Ed Havill, and Bob McKee respectfully request that the Court affirm the final judgment of the lower court in all respects.

Respectfully submitted,

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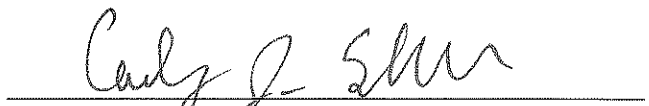
I HEREBY CERTIFY that the foregoing Answer Brief of Appellees, Lee County, Lee County School Board, the City of Groveland, Lake County, Ed Havill and Bob McKee, complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).



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