No. 21-305

In The
Supreme Court of the United States

ANGELA DEBOSE,

Petitioner,

v.

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

A writ of certiorari is granted only for "compelling reasons." Supreme Court Rule 10. This is DeBose's third petition for writ of certiorari to this Court ("Third Petition"). Like her previous petitions, DeBose's Third Petition fails to satisfy the criteria for Supreme Court review. It is an attempt to seek review of a *per curiam* affirmance by an intermediate state appellate court that did not consider or decide any federal question. Consequently, no compelling basis for this Court's review is presented, and DeBose's Third Petition should be denied.

STATEMENT OF THE CASE AND FACTS

Pursuant to Supreme Court Rule 15(2), Respondent presents the following Statement of the Case and Facts:

DeBose initiated this action below by filing her Petition for Extraordinary Writ of Mandamus on June 22, 2015. [Respondent's App'x, R.A. 1-23].

On February 24, 2018, the trial court entered an Order Setting Evidentiary Hearing for Petition for Writ of Mandamus. [Respondent's App'x, R.A. 24-26].

On May 15, 2018, the trial court entered its Order Continuing Evidentiary Hearing on Amended Petition for Writ of Mandamus. The Order stated that the issues to be addressed in the evidentiary hearing were: "(a) whether the respondent has failed to produce

certain public records requested by petitioner and, as a subpart of this issue, whether any production of such records was untimely; and (b) whether the costs requested by respondent for production of certain requested public records are reasonable." [Respondent's App'x, R.A. 27-28].

On June 30, 2018, DeBose filed a Second Amended Petition for Writ of Mandamus and for Violation of the Florida Public Records Law and Relief Pursuant to Article 1, Section 24 of the Florida Constitution and Chapter 119 and Chapter 86. [Petitioner's Appendix G, Petition App. 36-61].

On August 16, 2018, the trial court entered an Order stating: "[T]he Court will conduct an evidentiary hearing to address the reasonableness of fees charged in response to Petitioner's Public Records Request Nos. 5-14 and 21, as delineated in Petitioner's Amended List of Public Records Requested but Not Provided by Respondent University of South Florida Board of Trustees, filed on April 9, 2018." The August 16, 2018 Order also provided: "[o]n November 2, 2018, commencing at 9:00 A.M., the Court will conduct an evidentiary hearing addressing the remaining disputed issues, specifically, Petitioner's Public Records Request Nos. 1-4, 15-20, and 22-23 as delineated in Petitioner's Amended List of Public Records Requested but Not Provided by Respondent University of South Florida Board of Trustees, filed on April 9, 2018." [Respondent's App'x, R.A. 31-37].

The trial court subsequently held evidentiary hearings on October 9, 2018, November 2, 2018, April 3, 2019, May 21, 2019, May 22, 2019, and November 15, 2019.

On January 11, 2019, the trial court entered its Order Denying Second Amended Petition, In Part ("January 11, 2019 Order"). [Petitioner's Appendix D, Petition App. 14-32]. Based upon the findings of fact it made, the trial court concluded:

> a. USF's policies and procedures regarding the manner in which it uses IT to perform searches for public records and it manually reviews public records for exemptions and manually redacts exempt information are both facially reasonable and reasonable in their application to the facts in this case;
>
> b. USF has exercised these policies and procedures consistently and uniformly and has handled DeBose's PRRs at issue in the same manner as it has handled others;
>
> c. the manner in which USF determines whether a search will require extensive use of IT resources, file retrieval, queries, etc. is reasonable;
>
> d. the manner in which USF determines whether a search will require extensive clerical and/or supervisory labor is reasonable;

> e. the number of emails reflected in each of the charge documents at issue – Charge Document #1, Charge Document #2, Charge Document #3, and Charge Document #4 – is reasonable;
>
> f. the manner in which USF calculates the IT cost for a public records request is reasonable and the IT costs reflected in Charge Document #1, Charge Document #2, Charge Document #3, and Charge Document #4 are reasonable;
>
> g. the manner in which USF calculates the labor cost involved for a public records request is reasonable and the labor costs reflected in Charge Document #1, Charge Document #2, Charge Document #3, and Charge Document #4 are reasonable; and
>
> h. the total estimated costs of duplication, processing, labor, and production reflected in Charge Document #1, Charge Document #2, Charge Document #3, and Charge Document #4 are reasonable.

[Petitioner's Appendix D, Petition App. 31-32].

On January 17, 2020, the trial court entered its Final Order Denying Second Amended Petition for Writ of Mandamus ("Final Order"). [Petitioner's Appendix A, Petition App. 1-11]. In pertinent part, the Final Order stated:

> Petitioner has failed to meet her burden of proving that she made specific requests for public records, that USF received each of

> those requests, that each of those requested records actually exist, and that USF improperly refused to produce such records in a timely manner. As outlined above, the evidence established that the requested public records either did not exist, or where such did exist, that they were provided in a timely manner under the circumstances . . . This is particularly true where, as here, some of the requests became moving targets, morphing over the course of this litigation. Having considered all of the testimony and evidence presented at each of the evidentiary hearings in this matter, the Court concludes that Petitioner has failed to establish entitlement to a writ of mandamus.

[Petitioner's Appendix A, Petition App. 10].

On February 16, 2020, DeBose noticed an appeal to the Florida Second District Court of Appeal. [Respondent's App'x, R.A. 38-141].

On March 10, 2021, the Second District Court of Appeal issued a *per curiam* affirmance of the January 11, 2019 and January 17, 2020 Orders. [Petitioner's Appendix B, Petition App. 12].

On May 13, 2021, the Florida Supreme Court dismissed DeBose's attempt to invoke that court's discretionary jurisdiction, stating, in part: "This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that

is not a case pending review in, or reversed or quashed by, this Court." [Respondent's App'x, R.A. 142-143].

REASONS FOR DENYING CERTIORARI

In her Statement of Jurisdiction, DeBose asserts that she is invoking the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). However, since that statutory provision applies to certiorari review of cases pending in the federal circuit courts of appeal, it is inapplicable to DeBose's request for review of a decision by a state intermediate appellate court.

Under 28 U.S.C. § 1257(a), this Court can review final judgments rendered by "the highest court of a State," where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." The issue must be properly raised in the state court proceedings. This Court will not consider a federal challenge unless the issue was presented to or passed upon by the highest state court. *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (dismissing writ of certiorari as improvidently granted where the federal challenge to the state rule was never presented to the state supreme court).

DeBose is asking this Court to review an intermediate state appellate court's *per curiam* affirmance of a

state trial court's judgment. The arguments raised by DeBose in her Third Petition were never presented to or passed upon by the Florida Supreme Court. Moreover, DeBose did not raise any federal question before the state immediate appellate court and that court did not decide a federal question. Therefore, there is simply no jurisdiction to consider the arguments raised in DeBose's Third Petition.

Even where there is jurisdiction, "[r]eview on a writ of certiorari is not a matter of right." U.S. Sup. Ct. Rule 10. A petitioner must provide a compelling reason to justify relief. *Id*

Here, DeBose asks this Court to address whether the public records at issue in this case are exempt from disclosure under any of the nine exemptions under the Freedom of Information Act, 5 U.S.C. § 551, *et seq.* ("FOIA"), and whether records may be withheld when no FOIA fee is assessed or the fee has been waived or paid. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a property stated rule of law." U.S. Sup. Ct. Rule 10.

More importantly, FOIA applies to federal agencies. *See* 5 U.S.C. § 551(1). USFBOT is not a federal agency, but instead is part of the executive branch of Florida state government. *See Univ. of South Fla. Bd. of Trs. v. CoMentis, Inc.*, 861 F.3d 1234, 1235 (11th Cir. 2017). Therefore, FOIA does not apply to USFBOT and no FOIA issues were decided below.

DeBose also asks this Court to address whether the Florida Public Records Act ("FPRA") violates the Privileges and Immunities Clause of Article IV of the Constitution. However, DeBose does not contend that the FPRA discriminates on the basis of out of state residency. *See Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907). Moreover, DeBose cannot demonstrate that access to Florida public records is "sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause" or that the FPRA was "enacted for [a] protectionist purpose of burdening out-of-state citizens." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988); *McBurney v. Young*, 569 U.S. 221, 227 (2013).

Finally, as discussed above, because DeBose's Privileges and Immunities Clause argument was never raised or addressed below, it is not appropriate for certiorari review. *See*, *e.g. Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) ("[b]ecause these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first review, we do not consider them here").

CONCLUSION

Petitioner has not presented any compelling reason for this Court to grant certiorari. Therefore, Respondent respectfully requests that the Third Petition be denied.

Respectfully submitted,

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