IN THE SUPREME COURT OF FLORIDA

Case No. 77,850

FLORIDA ASSOCIATION OF COUNTIES, INC., a non-profit Florida corporation; FLORIDA LEAGUE OF CITIES, INC., a non-profit Florida corporation; and SANDRA GLENN and ROBERT ANDERSON, citizens and taxpayers of the State of Florida and respectively of Seminole County and Sarasota County, Florida,

Petitioners/Appellants,

vs.

DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT, an agency of the State of Florida; PROFESSIONAL FIRE FIGHTERS OF FLORIDA, a labor organization; and FLORIDA POLICE BENEVOLENT ASSOCIATION, a labor organization,

Respondents/Appellees.
_____/

ANSWER BRIEF OF RESPONDENT,

FLORIDA POLICE BENEVOLENT ASSOCIATION

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SUPPLEMENTAL STATEMENT OF THE FACTS[1]

In testing the accuracy of the trial court's decision, this court must interpret the record and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to sustaining the lower court's decision.[2] The Statement of Facts presented by the Counties and Cities is incomplete and will not adequately inform the court of the facts presented at trial and the conclusions drawn by the court. Accordingly, the PBA provides its own Statement of Facts which should be reviewed and construed with all reasonable inferences drawn in favor of upholding the lower court's decision.

The Florida Retirement System exists to provide a defined retirement benefit plan for all public employees that is funded on a sound actuarial basis. This ensures that the benefits promised public employees are available to them upon retirement. (T. 68).

When the Florida Retirement System came into existence in 1970, it inherited the assets and liabilities of previously existing systems whose liabilities exceeded assets; liabilities continue to exceed assets to this day. (T. 80) The Florida Retirement System went from 1970 to 1978 in an unfunded manner. (T. 80). The Legislature was continuing to provide additional benefits or otherwise amending or changing the Plan, without making

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[1] References to the trial transcript are designated by "T." with the appropriate page number; references to the Record on Appeal are designated by "R." with the appropriate page number.

[2] See 3 Fla.Jur.2d Appellate Review §313 (1978).

provision for adequate funding. Since the Constitutional amendment was adopted in 1978, the Florida Retirement System has been funded on a sound actuarial basis, even though the system's liabilities continue to exceed its assets. (T. 85-86, 126)

The State Retirement Director who testified for Petitioners stated that he believed that the enactment of Chapter 88-238 increased the Florida Retirement System's unfunded actuarial liability by $250 million. (T. 159) He also stated that the unfunded liability was the same as the "shortfall." (T. 159) The Division's in-house actuary who actually prepared the numbers testified that the shortfall (unfunded liability) between the level and phased in contribution schedules was $125 million for the initial five years, 1989 to 1993, but during the fifth and subsequent years the phased in method would produce more than the level method. (T.248-252). Thus, the actual magnitude of the effect of Chapter 88-238 on unfunded liability was never made clear in the record.

The Florida Retirement System has always had an unfunded actuarial liability. When the system was created in 1970, the unfunded actuarial liability was $1.5 billion. (T. 262-63, 268) By 1987 this unfunded actuarial liability had risen to $10 billion; in 1989, to $14 billion. (T. 157) Thus, any increase in unfunded actuarial liability that could be attributed to Chapter 88-238 represents only a very small percentage of the System's entire unfunded liability.

The unfunded liability is a derivative of the funding method followed, and a change in the funding method results in a change in the unfunded liability. (T. 298-299) The Florida Retirement System uses the entry age level funding method. (T. 238) A State actuary, Charles Slavin, explained that this funding method always results in an unfunded liability. (T. 298-299) Increases in the unfunded actuarial liability also result from changes in actuarial assumptions or experience factors. See, e.g. valuation report prepared by State's actuarial consultant Milliman & Robertson, R.238, Sections I, III, and Appendix A; R. 239, Sections I, III, and Appendix A. An unfunded liability does not signify actuarial unsoundness as long as satisfactory progress is being made toward amortizing the unfunded liability. (T. 126-127)

According to Mr. McMullian, contributions made by employers into the system at the present time are at a contribution rate which will amortize the unfunded liability of the Florida Retirement System over a period of 30 years. (T. 83, 84, 133, 269-270, R. 238-239) The State's in-house actuary, Mr. Gibney, testified that the current contribution rate and methodology are appropriate even though there is a disparity between what the employers of today are paying when compared with what employers in the past were paying. (T. 271)

The Legislature, the Division of Retirement and the Auditor General have all approved plans whereby benefits earned and accrued by earlier generations of taxpayers, are paid for by future generations of taxpayers. (T.211, 270-271). The Auditor General is

named as the overview agency for the Florida Retirement System; the Division of Retirement is the overview agency for local pension plans (T. 131).

In the report entitled "1987 Valuation of the Florida Retirement System," Milliman & Robertson, the consulting actuaries engaged by the Division of Retirement, recommended and proposed a five year phased-in amortization plan to pay for the unfunded liability which had built up in the system. (R. 238) The Division agreed with that recommendation and it was implemented. (T. 185-187) Mr. McMullian and the Division actuaries conceded that other funding methods, including non-level methods, may have been approved in the past if there was justification for the plan. (T. 189-190, 241, 319-320)

The Division of Retirement lobbied against the increase in special risk benefits which ultimately passed in Chapter 88-238, Laws of Florida, because its Director, Mr. Andrew McMullian, felt that one group of employees should not earn higher benefits than another group of employees. (T. 187) This belief was also communicated to the State's consulting actuary, Milliman & Robertson. (T. 188) Lawrence Gibney, an actuary employed by the State, testified that he also had a philosophical objection to giving special risk members an increase in retirement benefits from 2% to 3%. (T. 261)

An actuarial study was conducted by Milliman & Robertson on the effect of increasing special risk retirement benefits from 2% to 3%. Milliman & Robertson recommended a 7.64% level method of

funding for an immediate single step increase to 3%. (T. 135) Relying upon the actuarial report submitted, the Legislature then modified the bill by providing for a phased in method of funding with a coordinated phase in of benefits (Chapter 88-238). (R. 189-197) According to Mr. Daskais, the funding method adopted in Chapter 88-238 is actuarially appropriate assuming the underlying assumptions are accurate. (T. 484)

Before Milliman & Robertson rendered its opinion on the actuarial soundness of Chapter 88-238, it was informed by Mr. McMullian that the Governor was opposed to the bill and wanted justification to veto it without jeopardizing his political standing with the fire fighters and the PBA. (T. 188, 219)

The Governor obviously did not veto the bill and it became law. Chapter 88-238 increased the benefits and corresponding contribution levels to special risk members as of January 1, 1989. Under the Act, special risk members accrue benefits at 2.2% the first year, 2.4% the second year, 2.6% the third year, 2.8% the fourth year and 3% the fifth year and thereafter. The contributions to fund the increase in benefits are increased by 1.6% the first year, 3.2% the second year, 4.8% the third year, 6.4% the fourth year, and 8% the fifth year and thereafter. (R. 207, 208).

The Counties and Cities have made the contributions required by Chapter 88-238. (T. 50, 58, 67) The Counties and Cities also conceded at trial that ability to pay and whether sufficient funding was provided in the Act was not an issue in the case.

(T. 9-10) In determining whether a plan is funded on a sound actuarial basis, an employer's ability to pay is not considered. (T. 194, 199, 256)

Five actuaries testified at trial. They all agreed that there is no universally accepted definition of "sound actuarial basis". (T. 255, 301, 351, 437, 492) Lawrence Gibney, the State's retirement actuary, looks at actuarial equivalence and whether there is sufficient money available to pay for the benefits, among other factors such as fiscal stability, in attempting to define sound actuarial basis. (T. 274, 278-279). Charles Slavin, also an actuary for the State, defines the term sound actuarial basis as when liabilities are covered by assets or there is money available to pay for the benefits, either now or in the future. (T. 301, 304) Larry Mitchell, the expert witness for the Police Benevolent Association, testified that actuarial soundness is similar to solvency; i.e., whether money is available to pay current obligations. (T. 447) Richard Daskais, an actuary who testified for the Professional Fire Fighters of Florida, defines funding on a sound actuarial basis to mean funding under an actuarial cost method which would fund the normal cost and amortize the past service liability over a reasonable period of time, recognizing benefits as they occur or become effective. (T. 492-493)

Howard Winklevoss, an actuary who testified for the Counties and Cities, indicated that three elements were necessary in his opinion to have funding on a sound actuarial basis: an appropriate liability to fund towards is determined, a period over which the

assets will reach that liability benchmark is selected, and the contributions represent a level percentage of payroll. (T. 354). Mr. Winklevoss was the only actuary who testified that in order to fund something on a sound actuarial basis, a funding method using a level percentage of payroll was necessary.

Mr. Gibney specifically rejected this position, and testified that a level funding method is not necessary to have something funded on a sound actuarial basis. (T. 261) Mr. Slavin agreed, explaining that whether a plan uses a phased-in or non-level contribution rate to provide money for an increase in benefits has nothing whatsoever to do with whether something is funded on a sound actuarial basis. (T. 308) Mr. Slavin also testified there is no distinction between a non-level method of funding for normal costs and a non-level method of funding for unfunded liability, such as that recommended by the consulting actuaries and approved by the Division in 1987. (T. 300; R. 238)

Mr. Winklevoss declined to calculate the sufficiency of the statutory contribution schedule, stating it did not matter to him whether the contribution levels specified in the statute would be sufficient to pay for the increased benefits. (T. 379, 380) Mr. Winklevoss then testified that the reason he believes a level contribution rate is required to fund something on a sound actuarial basis is so that the liability burden is shared equally over successive years of taxpayers. Upon inquiry from Judge Hall, Mr. Winklevoss acknowledged that whether the funding method falls

equally on taxpayers is a political problem more than an actuarial one. (T. 360, 362)

Judge Hall did not accept the definition put forward by Mr. Winklevoss that funding on a sound actuarial basis required a level funding method. Judge Hall concluded that a consensus definition of funding on a sound actuarial basis is that a retirement program be funded in such a way that the fund is able to meet its continuing obligations as and when they mature. (T. 585, R. 108)

The Director of the Division of Retirement, the Division's actuaries and other expert witnesses were in agreement that there is nothing in Florida law that would specifically prohibit a non-level method of funding. (T.179, 189, 261) Actuarial testimony was presented that the non-level method of funding is one of many methods available to fund increases in benefits for a retirement system on a sound actuarial basis. (T. 430, 434) The unrebutted testimony at trial established that the contribution schedule set forth in the Act is at least equal to the level 7.04% suggested by Milliman & Robertson as necessary to fund the increase in benefits on a sound actuarial basis. (T. 442, 488, 494, 498, 490, 491) Mr. Slavin testified that <u>more</u> money would be paid into the system by the non-level method of funding adopted by the legislature, when compared with the level funding method suggested by Milliman & Robertson. (T. 304) Judge Hall specifically found that the funding method adopted in Chapter 88-238 will enable the fund to

meet its obligations, on a continuing basis, as and when they mature. (T. 585)

Any actuarial method, when amortizing past service liability over a period of years, will transfer some costs that could be considered by some to be appropriate for payment in the existing year, to future years. The degree to which this happens depends upon the specific actuarial cost method used, whether or not the assumptions are conservative, aggressive or reasonable, and the nature of the employee group, plan benefits and amendments. (T. 494, 495) This would include a level method of funding. (T. 495)

Using the level method of funding suggested by Milliman & Robertson, Mr. Daskais testified that employers would be paying more money than necessary to pay for the particular increase in benefits. He testified that the excess money collected under the level method proposed by Milliman & Robertson might then be allocated to amortize the unfunded liability already existing for past benefits. (T. 480, 488) In his view, level funding would result in current taxpayers paying more than needed for their share of the phased in increase in benefits, thereby unfairly assuming part of the burden that future generations of taxpayers should pay. (T. 490-491) The Circuit Court found the statutory allocation did not result in unfair or discriminatory treatment to current or future taxpayers. (T. 585-86, R. 108-09)

The consensus of actuarial testimony was that a non-level funding methodology such as that adopted in Chapter 88-238 is

permissible under Florida law. There is no requirement that a level funding method be used. (T. 179, 189, 261)

The Circuit Court concluded from all the evidence that the Petitioners had not proved the law was unconstitutional. (R. 110) The Judge's expression of his personal opinion about the wisdom of the legislation did not constitute a judicial ruling; the Court repeatedly observed that the wisdom of the legislation was an issue exclusively for the Legislature to determine. (T. 586-587) Accordingly, there was never any judicial ruling below on whether the legislation was "wise."[3]

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[3] Petitioners conceded that the wisdom of the law was not an issue in this case in their opening argument:

> MR. MOORE: Let me make clear what we are not trying to prove, and that is there was some suggestion that we were challenging the wisdom of the Act of the Legislature in increasing the benefits from two to three percent as far as the accrual rates for those benefits.
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> THE COURT: The Court system long ago gave up trying to the plumb that issue --
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> MR. MOORE: And so I wanted to make very clear --
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> THE COURT: -- abundant pragmatic evidence to the contrary.
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> MR. MOORE: So, as I say, we would just simply say that there are obviously those that think that was unwise, but that's not what this case is about. We are not here to argue about whether that was a good idea. We accept that. For those that think that that was not a good idea, that that was not wise, their remedy is at the ballot box.

(T. 6-7) The Judge may have taken some license to express a personal opinion knowing that Petitioners had conceded this would never be an issue.

SUMMARY OF THE ARGUMENT

The lower courts correctly held that Chapter 88-238 is constitutional based on the undisputed evidence that the law makes adequate provision for funding the increased benefit obligations as and when they mature. The purpose for Article X, Section 14, Florida Constitution, is to assure the adequacy of funding for benefit increases. Chapter 88-238 satisfies this standard as the lower courts held.

The constitutional language requiring that pension benefit increases be funded on a "sound actuarial basis" has no fixed meaning in actuarial terminology. The consensus definition found by the trial court, based on expert opinion testimony, was that this language means that provision for funding must be adequate to meet obligations as and when they mature. The language does not otherwise adopt any specific actuarial philosophy or accounting technique concerning the allocation of the burden of the contribution rate increases between present and future taxpayers.

The Legislature retains its plenary power to allocate the fiscal burden for pension benefit increases, just as it has plenary power to allocate the fiscal burden of all other government undertakings. The allocation must be upheld as long as it is "actuarially sound," that is, as long as sufficient funding to meet the increases in benefit obligations is provided. Article X, Section 14, therefore does not adopt as an inflexible or arbitrary subjective standard whatever allocation formula a particular court

(or an individual judge) or a particular actuary considers to be wise or prudent.

Thus, the provision creates no requirement for a so-called "level" (single step) increase in the contribution rate, and no prohibition against a phased-in (multistep) increase coordinated with a phased-in benefit increase. Indeed, such a requirement would be more one of form than substance, since the Legislature could always comply by enacting each graduated contribution/benefit increase as a separate bill.

The history of Article X, Section 14, confirms that its sole purpose was to assure that benefit increases were adequately funded. The issue of single step versus multistep contribution rate increases was never considered. Subsequent legislation construing the constitutional requirement, to the extent relevant at all, does not prohibit the Legislature from adopting alternative funding techniques, and even approves the technique later adopted in Chapter 88-238 as an actuarial funding method authorized by federal law under ERISA and Treasury regulations.

Petitioners' claims of fiscal hardship are immaterial because Article X, Section 14 creates no standard for fiscal hardship as a reason to invalidate legislation, and the lower courts never ruled on whether fiscal hardship was even shown. The Legislature is the proper forum to investigate and determine the severity of claimed fiscal hardship and the proper remedy, if any. The incidence of fiscal hardship, even if it had been demonstrated below, is not proper grounds for relief under Article X, Section 14.

The Petitioners' argument challenging the adequacy of the Legislature's review of Chapter 88-238 raises a purely political issue because Article X, Section 14 provides no justiciable standard to invalidate legislation based on the challenges to preenactment legislative procedures. The Legislature actually did review an actuarial study before enacting Chapter 88-238. It simply modified the bill and related actuarial recommendations by phasing in the contribution/benefit increases over five years, rather than adopting the full increase in one year. The Constitution did not require a second actuarial study under these circumstances.

Even if Petitioners are entitled to prevail, the Court should exercise its equitable powers to apply the ruling prospectively only. The widespread reliance by law enforcement officers and fire fighters upon the assurance of increased pension benefits has created vested rights which should not be retrospectively abolished. This does no injustice to Petitioners who do not seek a refund of past contributions under Chapter 88-238, and is consistent with this Court's previous exercises of equitable powers to act prospectively so as to preserve reliance-backed and justifiable expectations.

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THAT THE ALLOCATION OF FISCAL BURDENS IN CHAPTER 88-238 BY A COORDINATED PHASE-IN OF CONTRIBUTION AND BENEFIT RATE INCREASES DOES NOT VIOLATE THE REQUIREMENT IN ARTICLE X, SECTION 14, FLORIDA CONSTITUTION, FOR FUNDING BENEFIT INCREASES ON A "SOUND ACTUARIAL BASIS."

A. The term "sound actuarial basis" has no fixed meaning in actuarial terminology and does not specify any particular actuarial technique to govern the allocation of contribution burdens, nor delegate the Legislature's duties to determine the appropriate allocation to the courts or to any selected individual actuary.

Expert actuarial testimony revealed that the constitutional terminology "sound actuarial basis" has no fixed meaning as respects the allocation of fiscal burdens of funding increased benefits. The Legislature must therefore be given reasonable leeway in interpreting this language. Petitioners have a heavy burden to show that the Legislature's allocation violated this provision.

The applicable standard of proof is summarized in ABA Industries, Inc. v. City of Pinellas Park, 366 So.2d 761, 762 (Fla. 1979):

> When construing statutes, the courts must assume that the Legislature intended to enact an effective law. Statutes are presumptively valid and constitutional, and will be given effect if possible. All doubts will be resolved in favor of constitutionality. Acts of the Legislature are presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. (citations omitted, emphasis added)

Petitioners, having already failed to persuade the lower courts that their evidence met this burden of proof, now have the greater burden to show that the Legislature and the lower courts have erred.

The presumption of constitutionality is particularly strong in this case because of the Legislature's plenary and exclusive power over public fiscal affairs, including the proper allocation of the fiscal burdens of government. Once the issue is recognized as one involving the allocation of fiscal burdens between current and future taxpayers, the lower courts' deference to the Legislature's policy choice becomes a familiar concept. The Courts have no authority to invalidate a legislative allocation of such burdens unless such allocation clearly violates some specific constitutional standard. See Dominion Land & Title Corp. v. Dept. of Revenue, 320 So.2d 815, 818 (Fla. 1975) ("unfairness alone [in allocating fiscal burdens] does not render a law unconstitutional"). See also Eastern Air Lines, Inc. v. Dept. of Revenue, 455 So.2d 311, 314 (Fla. 1984) ("In the field of taxation particularly, the Legislature possesses great freedom in classification.... A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy.") Deference to the Legislature's policy choices in determining the

proper allocation of fiscal burdens is required under separation of powers principles.[4]

Accordingly, Petitioners' claim that Chapter 88-238 allocates the fiscal burden of increased benefits in favor of "present taxpayers" and against "future taxpayers" (who are for the most part the same persons), even if correct, does not furnish an appropriate basis to hold the law invalid unless such an allocation is specifically prohibited by the Constitution.

Article X, Section 14 does not create any express standard to govern the allocation of fiscal burdens, nor impose any allocation standard whatsoever other than what is necessary to fund increased benefits as and when they mature.

When faced with this ultimate question, Petitioners' expert actuarial witness admitted the allocation of fiscal burdens was a

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[4] See also State ex rel. Harrell v. Cone, 130 Fla. 158, 177 So. 854 (1938) (Legislature's fiscal power is "plenary"); Dominion Land & Title Co. v. Dept. of Revenue, 320 So.2d 815, 818 (Fla. 1975) ("plenary"). See also Miller v. Higgs, 468 So.2d 371, 3752 (Fla. 1st DCA 1985) (Legislature's power and discretion in regards to taxation is "broad, plenary, unlimited and supreme"), review denied, 479 So.2d 117 (Fla. 1985). See generally Chiles v. Children A, B, C, D, E and F, 16 FLW S708 (Fla. 1991) (recognizing legislative authority over the purse passim).

Judicial deference to legislative allocation of fiscal burdens is shown in cases rejecting equal protection-based challenges to the allocation of burdens of supporting general government operations and public utility operations, e.g., Dominion Land & Title, above; Eastern Air Lines, above; Just Valuation & Taxation League v. Simpson, 209 So.2d 229 (Fla. 1968) (taxation issues); and Int'l Min. & Chem. Co. v. Mayo, 336 So.2d 548 (Fla. 1976) (upholding Public Service Commission's legislative determination of rate structure in public utility rate making).

"political question." (T. 362) Petitioners now struggle to disclaim this admission.

Petitioners cite two dictionaries to define the term "sound." In the context of fiscal affairs, the most logical dictionary definitions concern the adequacy of funding. The Funk and Wagnalls Dictionary defines "sound" to mean "solvent." The Webster's Dictionary defines "sound" to mean "secure, especially financially." The pension benefit increases in Chapter 88-238 are funded on a solvent and financially secure basis because the lower courts found (and Petitioners admit) that adequate funding is provided to meet increased benefit obligations as they mature. The funding of these benefit increases is therefore "sound" within the dictionary definitions.

Petitioners propose to define "sound" to mean "wise" or "orthodox." These terms must mean the same as solvent and financially secure in this context, because if they meant something else, then they do not articulate a sufficient standard to guide the courts in reviewing legislation. The constitutional amendment does not purport to delegate the Legislature's power to determine the proper allocation of fiscal burdens to the courts (or to an individual circuit court judge sitting as factfinder as Petitioners seem to contend), with no more guidance than the subjective and standardless concept of what appears to be "wise."

Petitioners conceded at trial that the "wisdom" of Chapter 88-238 was not an issue. (T. 6-7). They cannot responsibly argue that the Circuit Judge's offhand personal comment upon this

admitted non-issue, which was not part of his ruling, is somehow dispositive on appeal.

Petitioners argue that the Courts can be guided by "actuarial" opinion, but this term supplies no fixed standard for allocating the burden of contributions for phased-in benefit increases.[5]

The lower courts recognized that, just as they could not invalidate legislation based solely upon their own subjective standard of "wisdom," likewise they could not arbitrarily select

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[5] There are six approved methods of actuarial funding in the Employee Retirement Income Security Act (ERISA) (see Argument IB, infra), of which the entry age - normal cost method preferred by Petitioners is only one. See 29 U.S.C. § 1002(31) and 26 C.F.R. § 1.412(c)(1) - 1(a). (T. 307-308, 424, 473) Some of these methods, by their very nature, are non-level funding methods. (T. 302, 318).

ERISA was intended to introduce a measure of uniformity and limit actuarial variation in pension funding. Before ERISA, an employer's annual pension expense and the liability for past service costs could vary dramatically depending on the method of funding and the actuarial assumptions selected. The unfunded pension liability is itself a function of two variables -- the valuation of pension fund assets and the present value of pension benefits -- both of which can be strongly affected by the decisions of an actuary. On the assets side, the actuary must determine and appropriately amortize "experience" gains and losses in the pension fund portfolio. On the liability side, the actuary must estimate the present value of benefits owed based on variables such as employee turnover, disability and mortality, normal retirement age, the impact of inflation on salary scales, length of service and income level at retirement. Under ERISA, the experience factors and assumptions must be updated periodically. The unfunded liability thus reflects the unfunded past service costs (i.e., costs assigned to prior years of service) plus any deficiencies resulting from changes in benefits, changes in experience factors and changes in actuarial assumptions used to estimate plan liabilities. See generally Treynor et al., The Financial Reality of Pension Funding under ERISA (Dow Jones - Irwin 1976) (available at Florida State University College of Law Library) at pp. 9-11. This explains why the FRS unfunded liability has increased independent of the benefit changes in Chapter 88-238.

one actuarial accounting technique over another as establishing a constitutional standard. The District Court of Appeal summarized the Circuit Court's reasoning with approval:

> The diversity of expert opinions at trial would indicate that the phrase "sound actuarial basis" is not precisely defined in actuarial science. In one instance, actuarial soundness of a plan to increase benefits of a particular class may require the plan to prefund benefits of the class such that the assets on hand are sufficient to meet current obligations. In another, a plan to increase benefits of a particular class must first provide for the funding of the unfunded liability of the entire system. An intermediate position would permit a phase-in plan that funds the normal cost and amortizes past liability over a reasonable period, and funds each benefit increase as it becomes due rather than when it is enacted.
>
> Faced with the absence of clear agreement among the experts who testified at trial on the meaning of "sound actuarial basis," the trial court accepted a "consensus" definition, and held that "a retirement program must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature."

580 So.2d at 644.

Given the disagreement of professional actuaries over what "sound actuarial basis" means in relation to allocating the fiscal burdens, the lower courts reasonably concluded that the constitutional amendment was not intended to adopt either an unclear standard or a controversial standard reflecting the techniques preferred by one actuarial school over those preferred by other schools, or to delegate the sole authority to determine these issues to any particular actuary whom the State Retirement Director or an individual Circuit Judge considered persuasive.

The lower courts found, however, that there was a consensus of expert opinion that "sound actuarial basis" means that the benefits

must be funded in a manner sufficient to meet obligations as and when they mature, and concluded that this is what the constitutional provision was intended to accomplish. 580 So.2d at 644-645. This comports with the provision's common sense meaning and the dictionary definitions cited above.

The Petitioners' construction of Article X, Section 14 to require a single step contribution rate increase and prohibit phased in or multistep increases would create an inflexible standard reflecting the philosophy of one actuarial school rather than the common meaning or the consensus of expert actuarial testimony in the record.

Moreover, Petitioners' construction is ultimately one of form over substance. The Legislature could have enacted this same funding scheme by passing five separate acts, each providing for a single step increase in the contributions and benefits for that particular year, thus arguably equalizing the contribution burden within each annual act. The League of Cities concedes that this would be permissible. See League's Initial Brief at 13.

The Legislature's consolidation of five coordinated contribution/benefit increases into one act, rather than five acts, does not furnish a rational occasion for invalidating the act as actuarially unsound under Article X, Section 14. Petitioners' construction of the constitutional provision accomplishes no useful purpose, but rather simply creates an irrational technical requirement that Chapter 88-238 be enacted as five separate laws.

The Court should avoid any construction that produces such an absurd and inflexible result.[6]

B. The history of Article X, Section 14 confirms that the amendment's sole purpose was to assure sufficient funding of benefit increases. Subsequent legislative enactments do not restrict the Legislature's authority to prospectively allocate fiscal burdens of increased benefits within the constraint of the sufficient funding requirement.

Article X, Section 14 does not expressly purport to prohibit phased-in contribution rate increases, or require single step or level increases. Thus, in determining whether the pension benefit increases in Chapter 88-238 were funded on a "sound actuarial basis," some interpretation may be required, since actuarial testimony at trial indicated the term has no fixed meaning. The Court may fairly consider the history of this amendment in determining its meaning.

The Legislature itself proposed this amendment in H.J.R. 291 during the 1975 legislative session. The resolution on its face contains no indication that single step contribution rate increases were required, or other approaches were prohibited in every case regardless of the adequacy of the resulting funding.

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[6] Petitioners' argument that Article X, Section 14 prohibits all phased-in (multistep) contribution rate increases would also produce absurd results if, for example, the increase were phased in in very small increments, e.g., from 7.1 percent to 7.5 percent over five years. Presumably Petitioners would contend that <u>any</u> variation from level funding would <u>per se</u> violate the requirement for a sound actuarial basis, but there is no textual basis or consensus of actuarial opinion to support such position.

H.J.R. 291 provided that the referendum ballot on the proposed amendment would read as follows:

> Proposing to add Section 14 to Article X of the State Constitution to provide that increases in the benefits payable under any governmental supported retirement system after January 1, 1977, be fully funded by the governmental unit.

The History of Legislation 1975 Regular Session Florida Legislature describes H.J.R. 291 as follows:

> Amends State Constitution to Provide Increases in Benefits Payable Under Any Governmental Supported Retirement System After 1/1/77 Be Fully Funded By Governmental Unit

Thus the only purpose indicated in the ballot provision and legislative history was to assure the full funding of pension benefit increases. The allocation question presented in this case was apparently never considered.

Following the amendment's adoption in 1976, the Attorney General rendered a formal opinion on the following questions in Atty. Gen. Op. 78-34:

> [1.] [omitted]
>
> 2. ...[w]hat is the meaning of the phrase "fully funded" in the ballot provision?
>
> 3. What is the meaning of the phrase "sound actuarial basis" in the constitutional provision?
>
> * * *
>
> Your second and third questions concern the meaning of the phrases "fully funded" in the ballot provision and "sound actuarial basis" in the constitutional provision. These questions may be considered together. Florida law does not require the ballot provision to reflect the exact text of the proposed amendment so long as it reflects the substance of the amendment. Section

101.161, F.S.; AGO 076-189. Presumably the Legislature, which drafted the ballot provision, intended it to reflect the substance of the proposed amendment.

The purpose of this constitutional amendment was to assure that public employee retirement pay or pension increases are adequately funded. Retirement or pension systems by their nature are subject to future claims which are potentially almost infinite, and which cannot be presently determined with mathematical certainty. For this reason, the phrase "fully funded" appearing on the ballot provision cannot mean that a system is required to maintain reserves sufficient to cover *all* potential claims, to a mathematical certainty. That result would be impractical, if not impossible. Rather, the phrase must mean that a system is required to maintain reserves sufficient to cover its probable claims, as prudently determined with reference to risk based on statistical and demographic computations. The term "fully" means abundantly provided or sufficient or ample. *See* City of Orlando v. Evans, 182 So. 264, 268 (Fla. 1938).

The phrase "sound actuarial basis" appearing in the Constitution has substantially the same meaning. The phrase requires retirement and pension systems to accumulate and administer their reserves in accordance with the principles of the actuarial profession so as to cover probable claims resulting from benefit increases.

* * *

I conclude that the ballot provision is not substantially different in meaning from the constitutional provision. (underlined emphasis supplied).

This Attorney General's Opinion is a persuasive contemporary executive branch construction of the constitutional provision. The Attorney General recognized that the amendment's purpose was to assure adequate funding for increases in pension benefits. So long as the benefit increases are adequately funded, this purpose is met. The Legislature's authority to determine the preferable

allocation of the fiscal burden by single-step or multi-step rate increases was not restricted.[7]

Petitioners do not discuss the amendment's history but instead rely on subsequent legislative enactments purporting to interpret the amendment. To the extent they are relevant, a full review of these laws shows that the Legislature has never enacted any policy prohibiting the actuarial method adopted in Chapter 88-238.

The Legislature's first enactment was Chapter 78-170, Laws of Florida, which created Part VII of Chapter 112, Florida Statutes, entitled Actuarial Soundness of Retirement Systems. Section 1 of the act provided a legislative intent provision which stated:

> Legislative intent.--It is the intent of the Legislature in implementing the provisions of s. 14 of Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.

This initial legislative intent statute, codified as Section 112.61, Florida Statutes, simply recognized the amendment's limited purpose to protect benefits, and did not purport to adopt any inflexible rule concerning the allocation of contribution burdens.

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[7] The Attorney General's Opinion observed that the courts will probably not refer to the ballot language unless the amendment itself is unclear. Since Article X, Section 14 contains no reference to the single step versus multistep contribution rate issue, the ballot language can be considered to eliminate any doubt as to the provision's meaning. The ballot title and summary are supposed to state the amendment's chief purpose in clear and unambiguous language. See Askew v. Firestone, 421 So.2d 151 (Fla. 1982).

Five years later, and seven years after the constitutional amendment was adopted, the Legislature enacted Chapter 83-37 which inserted the following additional language into the above-quoted legislative intent statute:

> ... Inherent in this intent is the recognition that the pension liabilities attributable to the benefits promised public employees be fairly, orderly, and equitably funded by the current, as well as future, taxpayers. Accordingly, except as herein provided, it is the intent of this act to prohibit the use of any procedure, methodology, or assumption the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.

Chapter 83-37 was intended by its plain language to express only the contemporary legislative intent in enacting that specific statute. It could not possibly have been intended to enact a permanent rule of constitutional interpretation. Legislative enactments cannot prospectively bind subsequent legislatures except when vested rights are created. See generally Florida Sheriffs' Association v. Dept. of Administration, 408 So.2d 1034 (Fla. 1981). Moreover, as the District Court of Appeal pointed out, the original enactment in Chapter 78-170 had greater contemporaneity with the constitutional amendment than did Chapter 83-37, so the 1983 law is not entitled to any special weight in construing the constitution. See 580 So.2d 641, n. 9 at pp. 644-45.

Moreover, Chapter 83-37 does not prohibit all multistep or phased in contribution rate increases. Rather, the act only expresses legislative intent to use procedures, methodologies or

assumptions that allocate to current taxpayers that portion of the costs "which may reasonably have been expected to be paid by current taxpayers," except as otherwise provided in the law. In sum, the quoted language expresses only an intention that taxpayers' "reasonable expectations" should be followed, except where otherwise provided by law.

This legislative policy statement does not assist Petitioners' argument because taxpayers' "reasonable expectations" provides no clear standard for the issue under consideration here.[8]

The amended intent provision in Chapter 83-37 requires the reader to look at the whole act to find what is authorized or prohibited. The Legislature provided more explicit guidance for the present issue in Section 3 of the act, which amended Section 112.63(1), Florida Statutes, to clarify the standards for actuarial reports which are periodically required to assist the determination

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[8] If current (1988) taxpayers' expectations have any relevance at all as a standard for this dispute, the 1988 Legislature was in the best position to determine those expectations, and to express those expectations through its legislation, including Chapter 88-238. The Legislature could reasonably have determined that taxpayers expected, and even preferred, that a multistep (phased-in) benefit rate increase would be funded by a multistep (phased-in) contribution rate increase.

Petitioners did not prove anywhere in the record what taxpayers reasonably expected. Even if some expectations had been proved, Chapter 83-37 recognizes that such expectations do not supersede other legislative enactments, including the remainder of Chapter 83-37 or any subsequent enactments such as Chapter 88-238. Chapter 88-238 both expressly and prospectively determined the taxpayers' reasonable expectations with respect to funding the increased special risk benefits.

of the proper funding level to assure continued actuarial soundness. Section 3 of the act enacted this language:

> The actuarial cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved in the Employee Retirement Income Security Act of 1974, and as permitted under regulations prescribed by the Secretary of the Treasury.

This provision expressly approves the actuarial cost methods authorized in the federal Employee Retirement Income Security Act (ERISA) of 1974 and the Treasury regulations.[9]

The applicable ERISA provision, 29 U.S.C. § 1002(31), approves six different actuarial cost methods:

> The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

The entry age normal cost method, which is the Petitioners' preferred choice of funding methods, was therefore <u>not</u> enacted as the sole approved method in Chapter 83-37. To the contrary, all six different methods were approved.

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[9] Although the specific methods approved by ERISA were not specified in the statute, the six approved methods were set forth in the Senate Staff Analysis and Economic Impact Statement and Bill Summary prepared by the Florida House of Representatives Committee on Retirement, Personnel and Collective Bargaining. (R. 180-185)

Chapter 88-238 adopts the attained entry normal cost method, one of the methods specifically approved in the ERISA and therefore approved under Chapter 83-37. (T. 434)

Section 3 of Chapter 83-37 also refers to the Treasury regulations.[10] The Treasury has approved the six ERISA actuarial cost methods in 26 CFR §1.412(c)(1)-1(a). This is not an all-inclusive list and other reasonable methods are also eligible for approval. See 60A Am. Jur. 2d Pensions and Retirement Funds §552 (1988).

The Secretary of the Treasury has also issued Revenue Ruling 77-2 which governs the computation of charges and credits to be made to the funding standard account to reflect benefits that become effective after the valuation date:

> In case of a change in the benefit structure that becomes effective during a plan year subsequent to a given plan year for which the charges and credits to the funding standard account are being computed, such change in benefit shall not be considered in determining the charges or credits to the funding standard account for such given plan year.

The ruling provides the following examples:

> Example 1. An employer adopts an amendment on the first day of year 1 that provides benefit structures b_1, b_2, and b_3 which become effective on the first day of standard account for years 1, 2, and 3, respectively. In computing the charges and credits to the funding standard account for years 1, 2 and 3, benefit structures b_1, b_2, and b_3 would be reflected in the respective plan years during which they become effective.

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[10] The ERISA provision governing minimum funding standards for retirement plans parallels the Internal Revenue Code minimum funding standards provisions. See 26 U.S.C. §412 and 29 U.S.C. §1082 through 1085.

> Example 2. A collectively-bargained plan provides for a single benefit structure for years 1, 2, and 3 under an arrangement in which the employer contributions to fund such structure are increased in each of three years. The charges and credits to the funding standard account must be computed on the basis of such single benefit structure using a funding method not designed to reflect such negotiated phase-in of contribution increases. If the contributions in year 1 (determined without regard to the contributions negotiated for years 2 and 3) are insufficient to prevent an accumulated funding deficiency, the minimum funding requirements are not satisfied.

Under the ruling (R. 196-197), changes in a plan's contribution and benefit structure in a future plan year should not be considered in determining the charges and credits to the funding standard account for the given year. See 60A Am. Jur. 2d Pensions and Retirement Funds §547 (1988). Chapter 88-238 is consistent with the standard embodied in this Treasury ruling.

Because the funding method used in Chapter 88-238 is authorized by ERISA and the Secretary of the Treasury, it is necessarily approved by Chapter 83-37. To the extent Chapter 83-37 constitutes a relevant authority in interpreting Article X, Section 14, it supports the validity of Chapter 88-238.

More important, the ERISA funding standards are designed for private pension plans, which are more risky than public employer pension plans because public employers are not likely to go out of business. The fact that Chapter 88-238's funding method meets the

high federal standard for private pension plans under ERISA signifies its actuarial soundness.[11]

In summary, nothing in the history of Article X, Section 14, or the subsequent implementing legislation to the extent relevant, supports Petitioners' contentions that the amendment was intended to prohibit the coordinated phase-in of benefits and contribution rate increases in Chapter 88-238.

C. Petitioners' references to fiscal hardship are immaterial and should be disregarded.

Petitioners' Briefs attempt to justify their construction of Article X, Section 14 by making numerous references to fiscal hardship. These arguments should be disregarded as immaterial.

Article X, Section 14 contains no standard for determining what fiscal hardship is and does not make fiscal hardship the basis for invalidating legislation. The issue was never litigated or ruled on in the lower courts. Petitioners specifically conceded that the Legislature had made provision for funding and that the counties and cities had been making the requisite contributions under the Act. (T. 9, 50, 58) The State Retirement Director and the Division actuaries agreed that ability to pay was not a factor

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[11] Both the Senate Staff Analysis and House Bill Summary recognized the soundness of the six specified ERISA cost methods approved in Chapter 83-37. The summaries stated: "This provision will require that all pension systems will be funded in accordance with one of these actuarially approved, responsible plans and will prohibit the use of pay-as-you-go funding, terminal funding or any other creative funding schemes which would be inconsistent with the intent of the law." (R. 181, 183, 185)

used in determining actuarial soundness. (T. 194, 199, 256) Fiscal hardship is a matter of degree and not a fixed legal standard susceptible of determination in the appellate courts.

In summary, Petitioners must continue to present their fiscal hardship arguments to the Legislature. The courts can never determine what fiscal or policy issues were compromised or other concessions conferred in connection with enactment of Chapter 88-238. Chapter 88-238 cannot be considered in isolation since the Legislature may have addressed local fiscal concerns in other ways. The Legislature should continue to determine whether Petitioners' claim of fiscal hardship merits relief since it is in the best position to investigate and resolve such claims.

II. ARTICLE X, SECTION 14 IMPOSES NO EXTRAORDINARY PROCEDURAL REQUIREMENT FOR ENACTING PENSION BENEFIT INCREASES, AND THE LEGISLATURE'S PROCESS FOR DETERMINING ACTUARIAL ISSUES IN ENACTING CHAPTER 88-238 PRESENTS NO JUSTICIABLE ISSUE OF CONSTITUTIONAL LAW.

Petitioners argue that even if the lower courts correctly determined that the Chapter 88-238 increases in contribution and benefit rates are actuarially sound, this Court may still declare this law invalid because the Legislature enacted it without studying the actuarial issues to the extent that Appellants would prefer.

Petitioners' argument is contrary to well-established principles for determining the validity of legislative enactments, as summarized in Cilento v. State, 377 So.2d 663 (Fla. 1979):

> Acts of the legislature are presumed to be constitutional.... State v. Bales, 343 So.2d 9 (Fla. 1977). Where a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the legislature. As we stated in Bales:
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> > If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends.... Questions as to wisdom, need or appropriateness are for the Legislature....
>
> 343 So.2d at 11. Thus, the constitution does not limit the legislature to particular methods for acquiring knowledge. This being so, we find no constitutional inadequacy in the procedure used by the legislature in this instance.

Id. at 665 (numerous citations omitted). Thus it is ordinarily presumed that the Legislature acted on the basis of sufficient information in enacting laws. Petitioners cite no language in Article X, Section 14, that would purport to impose extraordinary procedural requirements for enacting pension benefit laws, thereby overruling the limitation on judicial inquiry into the sufficiency of legislative information recognized in Cilento.

Indeed, if extraordinary procedural requirements had been intended, Article X, Section 14 would have spelled out these requirements with specificity. Compare the specific provisions in Article III which govern procedures for all kinds of legislation. In the absence of any clear and specific extraordinary procedural requirements in Article X, Section 14, it must be presumed that no extraordinary procedural requirements were intended.[12]

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[12] See Turlington v. Dept. of Administration, 462 So.2d 65, 67 (Fla. 1st DCA 1984) ("The absence of an actuarial study does not per se render the statute invalid.") If an extraordinary procedural requirement had been intended, this requirement would

This Court has been extremely reluctant to invalidate legislation based on alleged insufficiency of legislative consideration, even where the constitution arguably creates a justiciable standard. See, e.g., State v. Kaufman, 430 So.2d 904 (Fla. 1983); see also State v. City of Palmetto, 99 Fla. 401, 126 So. 781 (1930) (legislation passed in one day was valid).

Here, Article X, Section 14 does not even arguably create any justiciable standard. Petitioners ask this Court to fabricate a standard out of the constitution's silence. Petitioners' argument would give the courts the unfettered authority to nullify a particular class of fiscal legislation based solely on subjective personal feelings as to what pre-enactment procedure might have been "wise" or "prudent" under the circumstances of the moment.

Petitioners' Briefs do not even suggest any justiciable standard by which the adequacy of the legislative process might be determined. The League of Cities suggests that a "properly performed actuarial study" is sufficient. League's Initial Brief at p. 23. But even the Brief offers no guidance as to what is a "properly performed" study.

If Article X, Section 14 were construed as Petitioners prefer, any pension increase legislation could be challenged based on claims that the Legislature's preenactment procedures were insufficient. For example, challenges could be asserted because

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also be discussed in the history of the constitutional provisions. However, Appellants do not cite any historical materials to support their argument for extraordinary procedural requirements.

there was only one actuarial opinion, or only two opinions, or because an unqualified actuary was used, or because his/her methodology was questionable, or because he/she was paid too little or too much, or because the issue should have been studied longer, or because a quasi-judicial hearing should have been held in which all interested lobbyists and other persons are afforded an opportunity to participate under judicial rules of evidence and procedure. Such a construction would further Petitioners' political and economic interest to defeat or indefinitely delay any bill that proposes increased pension benefits. If any bill ever survived such a process, then Petitioners could always allege some procedural shortcoming to creatively challenge it in the courts.

Petitioners' argument is specious because there is no justiciable standard in Article X, Section 14 by which a court can review the Legislature's process for determining the actuarial soundness of a proposed increase to benefits and contributions. The Constitution's silence on this point evidences the intent that the Legislature alone remains the sole determiner of the adequacy of the information on which it bases these enactments. The sole purpose of Article X, Section 14 is to assure that money will be available to pay for the pension benefit increases; Petitioners concede that purpose has been achieved in Chapter 88-238.

The Petitioners complain that Chapter 88-238 was enacted in haste without any actuarial study. The full extent of legislative deliberation is only summarized in the legislative journals. The bill was certainly not enacted by a single senator on the last day

of the session, but had been in consideration throughout the session in one form or another, and was reviewed by the Division of Retirement and both Houses, as well as the Governor, to the extent they thought necessary. (T. 134-135, 141-142)

The Legislature did commission an actuarial study to determine the cost of the proposed benefit rate increase from 2.0 to 3.0 percent. The consulting actuary engaged by the State Division of Retirement prepared a study indicating that the level (single-step) contribution rate increase needed to fund this proposed single step benefit increase would be 7.64 percent. 1988 Senate Journal at 1083 (June 6, 1988). (R. 189-197, T. 135) When the Legislature finally decided to phase in the benefit rate increase incrementally over a five year period, it also decided to phase in the contribution rate increase over the same period. (T. 135) Because an initial study had already been done to determine the cost of a single step increase, that amount was rounded up to 8 percent and prorated over the five year phase-in period to arrive at the phased-in contribution increase. Assuming the underlying assumptions and conditions made in the initial actuarial study were accurate,[13] dividing the increase in benefits and contributions

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[13] The range of variation in actuarial opinion is numerically illustrated by an article in Forbes Magazine which discusses actuarial estimates of the amount needed to assure an identical fund. The variety of actuarial assumptions causes the estimates to vary from $3.7 million to $19.6 million, a range of over 500 percent. Forbes Magazine, Vol. 109, No. 6, p. 53 (March 15, 1972). One might reasonably conclude that actuarial work is like property appraisal, that is, "more an art than a science." See Powell v. Kelly, 223 So.2d 305, 309 (Fla. 1969).

into five equal parts was an appropriate way to calculate the required actuarial contribution rate. (T. 484) Thus, the Legislature did have appropriate actuarial data in its possession when it determined the necessary contribution rate increases.

It was reasonable for the Legislature to perceive that the gradual increase in contributions would be less fiscally disruptive and actually more fair to all taxpayers than a single step contribution rate increase would be.[14] Minimization of disruption in the budgeting process was a factor considered by Milliman and Robertson in choosing to adopt a phased-in method of funding the accrued unfunded liability. (R. 238 at pgs. 17-18)

The Petitioners' argument boils down to the fact that there was no second actuarial study of the proposed phased-in contribution/benefit package. If the Constitution requires a new

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[14] Obviously the Legislature remained free to prospectively modify the benefits and contribution obligations in the years after 1988. In fact, the Legislature has modified the contribution rates in response to actuarial reports required by Section 112.63, Florida Statutes, which include changes in actuarial assumptions and experience factors which affect contribution rates. See Section 12 of Chapter 90-274, Laws of Florida, which substantially modifies the Chapter 88-238 contribution rate provisions for 1991, 1992 and 1993 in favor of a more gradual phased in increase.

Given the Legislature's authority to periodically review and prospectively modify contribution rates, the 1989 taxpayers actually bore a proportionate burden of the benefits increase. It is difficult to understand how Article X, Section 14 could possibly be construed to require a single step 7.64 percent contribution rate increase in the first year (1989) when a subsequent Legislature would in all probability prospectively modify the contribution rates and could even prospectively modify the phase-in of benefits. Petitioners' inflexible construction of the constitutional amendment could create an unjust enrichment of future taxpayers at the expense of current taxpayers in these circumstances. (T. 488, 490)

actuarial study for every technical change in a bill increasing pension benefits, then such bills could hardly ever be amended in a 60 day session to achieve the political consensus necessary to pass them. Bills proposing increased pension benefits would stand little practical chance of passing with such a procedural obstacle.

However, Petitioners are not without a remedy if they think the Legislature was ill advised. Petitioners have the right to return to the Legislature every year with any new actuarial data that might be relevant and to persuade the Legislature that the phased-in funding was an unwise policy. Having failed to persuade the Legislature, however, they cannot fairly demand that the act be held unconstitutional simply because the legislative record does not indicate that the Legislature studied the issue to the extent they preferred.

III. EVEN IF THE COURT SHOULD HOLD THAT ARTICLE X, SECTION 14 PROHIBITS PHASED-IN (MULTISTEP) PENSION CONTRIBUTION RATE INCREASES, THE COURT SHOULD IN FAIRNESS GRANT PROSPECTIVE RELIEF ONLY.

The Constitutional provision clearly does not, on its face, prohibit phased-in contribution rate increases. However, should this Court determine that Article X, Section 14 somehow impliedly prohibits all phased-in (multistep) contribution rate increases, regardless of the sufficiency of contributions provided to fund the increased benefit obligations as and when they mature, then the Court must determine what relief is fair in the circumstances of this case. To simply declare Chapter 88-238 invalid without

considering the consequences would be unfair because of widespread reliance upon the funded availability of the increased benefits.

Special risk pension benefits are a part of the compensation earned by law enforcement officers and fire fighters to compensate for the abnormal stress and risks of their jobs. See Section 121.0515(1), Florida Statutes:

> LEGISLATIVE INTENT.-- ... it is the intent and purpose of the Legislature to recognize that persons employed in certain categories of law enforcement, firefighting, and criminal detention positions are required as one of the essential functions of their positions to perform work that is physically demanding or arduous, or work that requires extraordinary agility and mental acuity, and that such persons, because of diminishing physical and mental faculties, may find that they are not able, without risk to the health and safety of themselves, the public, or their coworkers, to continue performing such duties and thus enjoy the full career and retirement benefits enjoyed by persons employed in other positions and that, if they find it necessary, due to the physical and mental limitations of their age, to retire at an earlier age and usually with less service, they will suffer an economic deprivation therefrom. Therefore, as a means of recognizing the peculiar and special problems of this class of employees, it is the intent and purpose of the Legislature to establish a class of retirement membership that awards more retirement credit per year of service than that awarded to other employees....

The purpose for increasing the special risk pension benefits is to attract and retain well qualified persons in these essential hazardous occupations for the benefit of the public. Individual officers and fire fighters and their families have made irreversible career and financial decisions based on the public's solemn promise in Chapter 88-238 that higher pension benefits were assured. The lower courts' decisions confirmed this commitment by

determining that sufficient revenue would be provided under the law to fund these increased benefits.

It is reasonable to assume that some law enforcement officers and fire fighters accepted lower present wages from the Cities and Counties than they might otherwise have collectively bargained for, or individually gave up opportunities for higher wages from other employers, because this assurance of increased pension benefits compensated for the lower wages.

Now, having received the benefit of these employees' continued service in hazardous occupations over the course of four years (from 1988 to 1992), the Cities and Counties are asking the Court to relieve them of the obligation to pay the increased pension benefits, on which the law enforcement officers and fire fighters have justifiably relied. This is a deplorable position for the government to take against its own employees.

This Court has previously held that a statute that is not patently unconstitutional is prima facie valid, and contract and property rights acquired under such a statute are entitled to constitutional protection, even if the statute itself is later declared invalid. See City of Winter Haven v. A.M. Klemm & Son, 132 Fla. 334, 181 So. 153, rehearing denied, 133 Fla. 525, 182 So. 841 (1938). Chapter 88-238 is certainly not patently unconstitutional, having been upheld by both the trial court and a unanimous panel of the District Court of Appeal in a case of first impression. The Klemm principle therefore requires that the increased pension rights promised to and earned by the law

enforcement officers and fire fighters of this state be honored. A vested pension right is a contract or property right which must be protected. See §121.011(3)(d), Florida Statutes; Florida Sheriffs Ass'n v. Dept. of Administration, 408 So.2d 1033 (Fla. 1981); see also City of Jacksonville Beach v. State ex rel. O'Donald, 151 So.2d 430 (Fla. 1963), in which the Court observed:

> We said in the Greene case, supra, that these retirement systems were sustained on the theory that "they contribute to efficiency in government; that they offer an added inducement to those with special skills and techniques to remain in government employment"; that they "tend to raise the standard of government personnel and make government service a career rather than a passing interlude." This is the latest expression of this court on the subject. It is not difficult to conceive how this theory would be exploded if prospective employees were told that, after a short service or a long one, the legislature could, nevertheless, disturb the arrangement anytime it saw fit since all employees in a given category were required to be members of a standard plan.
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> * * *
>
> We conclude that the security for the widow, relator, was an inseparable part of the right vested in the pensioner when he retired, was as valuable a consideration for his entering the service to the City as the provisions for payment of pension to himself, and was important to the City as an inducement to the long, faithful, loyal service that ended when retirement time came and years had passed which he could not recapture. That such a plan would accomplish its purpose if after the right vested, the legislature could force the husband to take a lesser amount and upon his failure to accept the reduction leave his widow without the income anticipated at the beginning of the relationship of employer and employee is unthinkable.

Id., 151 So.2d at 431-32 and 432-33.

Accordingly, it is appropriate that any ruling that adversely affects the vested pension rights of law enforcement officers, fire

fighters, and their dependents, should be applied prospectively only, and the fully funded pension benefits of Chapter 88-238 be permitted to remain intact in view of these persons' widespread and justified reliance on the public's commitment to fund and performance in funding the pension benefits established therein.

A prospective ruling is all the more appropriate because the Petitioners are not seeking any retrospective relief in the form of a refund of contributions paid in. There is no reason to unjustly enrich FRS generally with the funds promised to special risk employees for their benefits.

If the Chapter 88-238 contribution scheme were held prospectively unconstitutional, that law's provisions have been superseded by the new contribution rates enacted in Chapter 90-274. Accordingly, if this Court should hold that the Chapter 88-238 phased-in contribution rate is invalid, it should set forth its reasoning for the future guidance of the public, but leave the funded special risk benefit increases intact so that the individual

law enforcement officers' and fire fighters' legitimate reliance-backed expectations will not be retroactively abolished.[15]

CONCLUSION

For the foregoing reasons, the decisions of the lower courts should be affirmed.

Respectfully submitted this 10th day of December, 1991.

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[15] This Court often exercises its equitable power to apply its constitutional rulings prospectively in cases where widespread justifiable reliance has been placed upon the law or action ruled invalid. This is particularly true in cases involving public finance because of the hardship and disruption that would arise from retrospective application. See, e.g., cases involving liability or valuation in tax cases, such as City of Winter Haven v. A.M. Klemm & Son, above. See also National Dist. Co. Inc. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988); ITT Community Dev. Corp v. Seay, 347 So.2d 1024 (Fla. 1977); Deltona Corp. v. Bailey, 336 So.2d 1163 (Fla. 1976); Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973); State ex rel. Butscher v. Dickenson, 196 So.2d 105 (Fla. 1966). The law enforcement officers and fire fighters in this case are no less deserving of this Court's equitable protection for their vested pension rights than the taxpayers and taxing authorities in the cited cases.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the following by U.S. mail this 10th day of December, 1991.

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