# IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 77,850
[District Court Case No. 90-2071]

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,

Plaintiffs/Appellants,

vs.

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

Defendant/Intervenors/Appellees.

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## ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

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# INITIAL BRIEF OF APPELLANTS
## FLORIDA ASSOCIATION OF COUNTIES, INC. and Individual Citizens and Taxpayers

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ISSUE PRESENTED:

**WHETHER CHAPTER 88-238, LAWS OF FLORIDA, WHICH PROVIDED FOR FIVE AUTOMATIC ANNUAL INCREASES BOTH IN PUBLIC EMPLOYEE RETIREMENT BENEFITS AND IN THE FUNDING OF THOSE INCREASED BENEFITS, FUNDED THE INCREASED BENEFITS CONTRARY TO THE SPIRIT AND INTENT OF ARTICLE X, SECTION 14, OF THE CONSTITUTION OF FLORIDA.**


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## STATEMENT OF THE CASE & OF THE FACTS

In presenting the Statement of the Case and of the Facts for review by this Court of the decisions below, these appellants[1] begin by quoting the pertinent statement of the case and of the facts as set forth by the First District Court of Appeal. The First District's opinion [see TAB at end of this Brief] reports:

> This is an appeal from a final judgment holding that chapter 88-238, Laws of Florida, which funded increases in retirement benefits of special risk members of the Florida Retirement System (FRS), does not violate article X, section 14 of the Florida Constitution (footnote quoting the constitutional provision is omitted). Appellants sought a declaration that would hold chapter 88-238 to be an improper exercise of the state's taxing and spending authority because it funded the costs of increased benefits to special risk members, composed of fire fighters and law enforcement officers, by assertedly shifting the burdens from current to future taxpayers in violation of article X, section 14 of the state constitution. They named the Department of Administration, Division of Retirement (DOA), as defendant. The Florida Police Benevolent Association (PBA) and Professional Fire Fighters of Florida (PFF) intervened as defendants, and cross appealed, raising issues of hearsay and standing. We affirm.
>
> Chapter 88-238 amended various sections of the Florida Retirement System Act[2] by increasing the retirement benefit of special risk members from two to three percent of average monthly compensation, and increasing the corresponding employer contribution effective January 1, 1989. The act provides for a phase-in of contributions and benefits over a five year period as follows:

| period | % Increase in Contributions[3] | % Increase in benefits[4] |
|---|---|---|
| 1989 | 1.6 | 2.2 |
| 1990 | 3.2 | 2.4 |
| 1991 | 4.8 | 2.6 |
| 1992 | 6.4 | 2.8 |
| 1993 | 8.0 | 3.0 |

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1. This brief is specifically identified as the Initial Brief of the Florida Association of Counties, Inc. and the Individual Taxpayers. The co-appellant Florida League of Cities, Inc. is filing its own separate initial brief.

2. Ch. 121, Fla. Stat. (Supp. 1988). [This is identical to the court's footnote in the original.]

3. Ch. 88-238, s. 1, Laws of Fla. (codified at s. 121.071(2)(a), Fla. Stat. (Supp. 1988). [Identical to court's footnote in original.]

4. Ch. 88-238, s. 2, Laws of Fla. (codified at s. 121.091(1)(a), Fla. Stat. (Supp. 1988). [Identical to court's footnote in original.]

Appellants contend that the legislative scheme facially places on future taxpayers a discriminatory and inequitable burden to pay the cost of increased benefits that assertedly should be borne by current taxpayers. They argue, for example, that the taxpayers in 1993, and after, must pay five times the rate of 1989 taxpayers, thus violating article X, section 14, which requires that the benefit increases must be funded "on a sound actuarial basis." Although the standard has significance in contexts not relevant here,[5] few courts have addressed Article X, section 14,[6] and we find no opinion which has definitively considered the meaning of the phrase "sound actuarial basis."

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.* [Emphasis, both bold and italics added by appellants, for reference below.]

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." The trial court found that the phase-in of benefits and contributions is reasonably coordinated, producing no significant disparity between the obligations of current and future taxpayers. The court concluded that the funding scheme used in chpater 88-238 is consistent with article X, section 14.[7]

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5. See, e.g., Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 819 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984). [Identical to court's footnote in original.]

6. The court's footnote citing five different opinions, is omitted here. There is some discussion of cited cases in the Argument.

7. The appellate court's own footnote reads:

7. *The phase-in scheme selected by the legislature to fund the benefit increases provided in chapter 88-238 is a clear departure from the plans used to fund benefit increases in the past.* Customarily, the state has paid for increases in FRS benefits by amortizing the associated costs at a single rate over a thirty-year period. *Appellants concede that article X, section 14 of the Florida Constitution does not dictate such a plan.* [Emphasis added by appellants.]

Appellants conceded *only* that the constitutional provision does not dictate

* * *

> Although the trial court orally indicated a belief that the statutory plan *may*[8] be "an unwise and imprudent basis" for departing from the "entry age normal cost concept" (level cost method) customarily used to fund increases in FRS benefits, it deferred to the policy choices of the coordinate legislative branch as a means of accomplishing legislative intent.

**More on the "Unwise and Imprudent" Character of the "Basis" for Funding Under Chapter 88-238**

In PBA's [Police Benevolent Association's] "Statement of the Case and Facts" in its Answer Brief on Jurisdiction, the PBA emphasized the above use of the word "may" by the District Court with respect to that court's understanding of what the trial court orally stated in explaining his decision.[9]

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the continued use of the traditional basis for funding increased benefits under any and all circumstances.

8. In PBA's own "Statement of the Case and Facts" to this Court in its Answer Brief on Jurisdiction [at 5], the PBA provided the emphasis on the word "may" - as to what the trial judge did or did not say in his very thorough oral explanation of his decision. PBA so emphasized the word "may" after having earlier said that "Petitioners' statement of the case and of the facts distorts the record by presenting only selected excerpts which the lower courts found unpersuasive." [See PBA Answer Brief on Jurisdiction at 2.]

Thus, these appellants urge this Court to read the full text (eleven pages) of the trial judge's oral "explication" (to use his word) of his decision in this case. [See Appellants' APPENDIX, TAB 3.]

[As fully presented in Argument, there is no question but that the trial judge determined, clearly, that the funding "basis" adopted by the 1988 Legislature through and in Chapter 88-238 was both "unwise" *and* "imprudent." There is no "maybe" about the matter. He just refused to go the next step: equate the "unwise and imprudent basis" for funding to unsound (to wit: unconstitutional) funding of the subject five annual changes in benefits.]

9. PBA not only emphasized the use of the word "may" by the appellate court (in its "Statement of the Case and Facts" to *this* Court), but also argued that the appellate court did "not adopt" that view as its own, but rather that it reported that view as "nothing more than a reminder that the judiciary cannot speculate on, much less judicially review, the wisdom of legislative funding schemes under established separation-of-powers principles." [PBA Answer Brief on Jurisdiction at 5.]

Appellants will present, in their Argument section, just how this attitude precisely redefines with much more clarity in *this* Court than in the courts below, the nature of appellants' challenge to the constitutionality of Chapter 88-238: the funding basis is "unsound."

What the trial judge actually said[10], is as follows:

> I think that it is apparent that the Florida Retirement System is *based on a firm foundation* of entry age normal cost concept. 88-238 is a *departure*, in my estimation, from that scheme. It is *inconsistent* with the scheme. It is *inconsistent* with prior language or language found in other parts of the statute or chapter. *But* it is my finding, *as a matter of law*, that the Legislature or the legislative branch has the *prerogative* to depart from that scheme or to be inconsistent therewith *as long as it is not violative of Article X, Section 14 of the Florida Constitution*.
>
> That is a reluctant conclusion, because my personal view of it is that *it was an unwise and imprudent basis*, but that it is not the function of the judicial branch to sit in judgment on the prudence or lack thereof of the legislative branch, but to determine whether the actions of that branch, when reviewed by the judicial branch, pass the constitutional test, in this instance, the measure set forth in Article X, section 14.
>
> [Appellants' APPENDIX Vol. I, TAB 3 at 6.]

Then, upon questioning by counsel as to the court's statement concerning the funding under Chapter 88-238 being on "an unwise and imprudent basis" the trial judge added:

> I think one of the witnesses said you have to determine what is your target benefit that you've got to anticipate being paid and over what period of time, and then determine *an appropriate rate* to apply to payroll *over that period of time* that will generate the necessary funds for the system to meet those retirement obligations, as and when they occur.
>
> *I viewed the testimony of the witnesses Mr. McMullian*[11] *and Mr. Gibney*[12] *specifically to articulate that very clearly*; that *they deemed that*

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10. These appellants here present in the next subsequent text, in considerable detail, the very clear voluntary "explication" by the trial judge of his decision.

As presented by appellants more fully in their Argument section, they welcome and urge this Court to closely scutinize both the expressed findings and conclusions of the trial court (and district court), and its (their) deference to the expressed "prerogative" of the 1988 Legislature to increase retirement benefits in the way that it did.

11. Director of the Division of Retirement of the defendant Department of Administration.

12. State Actuary, employed by the Division of Retirement to oversee the Florida Retirement System.

*approach to be way that the system should be run*; that that's the way they had designed the system or carried out the implementation of the design of the system, and that *they viewed, in their opinion, the phase-in of benefits and the phase-in of contributions from two to three percent over a five-year period to be inconsistent with that; and not only inconsistent, but not a wise and prudent way to do it.*

*I concur with that*, but it is not their function nor is it my function to concur with it or not concur with it based on how I think the little machine ought to operate. I have to look at it from the constitutional measure. And it was in that context that I think that if I had been a lever puller in the Legislature *I probably would have voted no because of its inconsistency, but I'm not a lever puller in the Legislature.*

* * *

I think it is *inconsistent* with the system, but I don't think that the system runs the Legislature. I think *the Legislature* in that branch of government has the *prerogative* to *depart from the established way* that it has been done, and *even in an inconsistent way* with which it is being done, *so long as it meets the standard in Article X, section 14 of a sound actuarial basis*, and that is, will this produce the necessary - - not the desired - - the necessary results of funding those retirement obligations as and when they mature? And based on what I heard, I came to the conclusion, yes, it will do that.

* * *

And doubtless this is going up, so if there are any other areas in which there is desired to some explication, I will be happy to do it.

**Additional Facts from the Record**

The appellants presented the following as their statement of the case and of the facts when presenting their petitioners' Brief on Jurisdiction. Additions to that statement are indicated by an aesterisk [*] before each paragraph or sentence which consists of facts (without the argument) that the intervenor PBA added (when presenting its Answer Brief on Jurisdiction) "to present a more fair and complete picture of the record".

The Florida Retirement System [FRS] is a consolidated system that encompasses public employees at all levels of government in Florida, presently covering over 500,000 active members and approximately 800 different public employers at all levels of government. [Transcript of Trial Testimony (hereinafter

"T") at 64 - 65.] The counties are compulsory members. [T at 64.] The Defendant DEPARTMENT is receiving contributions from counties and cities as a result of the Act challenged in this litigation. [T at 67.]

The FRS had "unfunded liability" or debt (liabilities exceeding assets) from its beginning, which continued to grow each year. [T at 85.] The debt or unfunded liability started at about $1.5-billion in 1970. [T at 80.] It grew and grew, because simply put, the legislature did not direct enough money into the system to properly fund the promised benefits. [T at 85.] This led to the adoption of the constitutional amendment in 1976 which is Article X, Section 14 of the Florida Constitution. [T at 85.]

Specifically as to the phasing-in of contribution rates and benefit accrual rates by the challenged Act [Chapter 88-238, Laws of Florida], the DEPARTMENT's consulting actuaries noted that "phasing in future costs of benefit increases represents a serious erosion in the System's financial integrity and should be avoided" and that the phasing-in of the "certain" costs of increases in future benefits would be a "dangerous precedent for the System." [See Record below, letter to the DEPARTMENT from the consulting actuaries, Exhibit #5 in evidence, included at TAB 5 of Appellants' APPENDIX filed in the district court.]

[*] Five actuaries testified at trial. The evidence showed that the multi-step or non-level basis for funding (with automatic annual increases in contribution rates), as enacted in Chapter 88-238, would produce (certainly "eventually") the same or greater funding to cover the scheduled benefit increases in comparison with the single-step or level funding method (same contribution rate over 30 years) which was preferred by the State's consulting actuary and traditionally used to fund increased benefits under the FRS. [T at 304, 442, 483-93.] The trial judge expressly determined that the multi-step funding schedule in Chapter 88-238 produced sufficient funds to enable the system to meet its increased obligations, on a continuing basis, as and

when they mature.

Appellants conceded that fact.

[*] The gist of the appellants' challenge is and has been that the automatic annual increases burden future taxpayers with the cost of funding the increased benefits on an unconstitutional basis (*i.e.* not "on a sound actuarial basis"). Appellants' actuarial witness declined even to calculate the sufficiency of the funding schedule under Chapter 88-238 to determine if the funds would meet the system's increased benefit obligations. [T at 379-380.] In his view the automatic annual increases (non-level contribution rate schedule) did not constitute funding on a sound actuarial basis regardless of whether the funding through those increases produced sufficient funds to meet the increased benefit obligations.

[*] The intervenors presented actuarial testimony that the non-level or multi-step funding approach was coordinated with the phased-in increase in benefits and was a more fair allocation of the burden than the single-step increase would have been had it been effected. The intervenors' witnesses testified that this approach (multi-step increases) would even avoid an overpayment by current taxpayers. [T at 442, 480-491.]

[*] The trial judge agreed with intervenors that the Chapter 88-238 funding basis did not discriminate in favor of current taxpayers and against future taxpayers. [T at 585-86, R 108-109.]

Because it was the last day of the regular session when the 1988 Legislature acted on the bill, the DEPARTMENT furnished no figures to the legislature on the effects or impacts of the proposed amendment of that day, which amendment phased-in the benefit and contribution rates over a five-year period. [T at 141 - 142.] The bill was passed, as amended with the phasing-in of rates, with technical flaws on the face of the bill. [T at 143.] There were three time periods in the bill in which the time frame actually measured zero. [T at 144.]

The overall unfunded liability of the FRS had risen to more than $10-billion by July 1987 [T at 157] and to more than $14-billion by July 1989. [R in 1989 Report in evidence.] [*] Chapter 88-238, Laws of Florida, created an unfunded liability of $250 million. [T at 159.]

The defendant DEPARTMENT held steadfastly through trial to the proposition that the reason the DEPARTMENT has always used the same contribution rate over the entire amortization period to fund any particular increase in benefits (phased or not) is to spread the cost equally and equitably and in an orderly fashion among all taxpayers over the period. [T at 163-164, 166.] Through trial the DEPARTMENT's position did not change, that the funding provision of Chapter 88-238 is unconstitutional, not on a sound basis, and not in accordance with the Division of Retirement's past ways of assuring the proper funding of the FRS. [T at 147.] The DEPARTMENT's actuary for its local pension plans (outside the FRS) emphatically stated that, as a matter of fact and departmental policy, he and the department would not approve a phasing-in of contribution rates to fund the cost of any benefit increase submitted by any city government to the department for its approval. [T at 150, 291 -292.]

[*] All required contributions pursuant to Chapter 88-238 have been made by public employers. [t at 50, 58 and 67.] The State Retirement Director testified that the public employer's fiscal hardship is not a factor used by the defendant Department in determining whether a plan is funded on a sound actuarial basis. [T at 194, 199 and 256.]

# SUMMARY OF ARGUMENT

**In construing provisions of the Florida Constitution, we (the justices) are obliged to ascertain and effectuate the intent of the framers and the people.[1]**

Respectfully, appellants call on this Court to assure the people of Florida that the judicial branch will construe Article X, Section 14, as being constitutionally meaningful as a constraint on the legislative branch. Quite simply put, the explicit and implicit intent of the people by their adoption of that provision was to prevent and preclude legislative action just such as that challenged here.

This appeal brings to this Court a clear example of how and why it is that Article X, section 14, requires *more* of a legislature than just that it provide enough money as and when needed to pay for particular legislatively-increased retirement benefits.

The constitutional construction strongly urged and sought here is that no legislature may constitutionally postpone to future years and to future taxpayers (considerably beyond that legislature's own tenure in office) the substantial fiscal impact of its current enactment of changes (increases) in public employee retirement benefits. That is so regardless of whether the funding covers the costs of the increased benefits. Who pays how much and when, is also constitutionally important.

It would be a "dangerous precedent" to allow the 1988 legislature to postpone the major fiscal impacts of its package of increased benefits well past the two next subsequent legislative bienniums. Under the challenged legislation, the people of Florida will not fully realize and experience the full financial impact and brunt of the economic burdens automatically and increasingly heaped upon them by the 1988 Legislature over a five-year period, until 1993 and thereafter.

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1. *Gallant v. Stephens*, 358 So. 2d 536, 539 (Fla. 1978), citing *State ex rel. Dade County v. Dickinson*, 230 So.2d 130 (Fla. 1969) and *Gray v. Bryant*, 125 So.2d 846 (Fla. 1960).

The constitutional mandate of Article X, section 14, is that there must be a legislative provision for funding of any particular increases in benefits, which funding must be on a "sound" basis. To these appellants, that means that any new, different and untried "basis" for the funding of any particular increased benefits, must itself (the basis) be a wise funding basis, a prudent funding basis, to wit: a "sound" funding basis.

In terms of the methodology adopted by the 1988 Legislature for funding the particular increased public employee retirement benefits approved by Chapter 88-238, Laws of Florida, the "basis" for the funding was quite plainly and simply, both "unwise" and "imprudent." The trial judge expressly so determined, and emphatically and clearly so stated.

Even so, the trial court deferred to the "prerogative" of the legislative branch to constitutionally adopt such "an unwise and imprudent basis" for funding the particular increase in benefits. The trial court did not equate such "unwise and imprudent basis" for funding with "unsound" funding in the constitutional sense. The district court affirmed, approving such judicial deference.

It is that deference to legislative prerogative which is the judicial error below.

Respectfully, this Court should reverse, confirming that Article X, section 14, means what it says as a constraint on the legislative branch.

Chapter 88-238 should be declared to be unconstitutional.

## ARGUMENT

**CHAPTER 88-238, LAWS OF FLORIDA, PROVIDED FOR FIVE AUTOMATIC ANNUAL INCREASES IN PUBLIC EMPLOYEE RETIREMENT BENEFITS AND IN THE FUNDING OF THOSE INCREASED BENEFITS, CONTRARY TO THE SPIRIT AND INTENT OF ARTICLE X, SECTION 14, OF THE STATE CONSTITUTION**

### Introduction

According to the State's own consulting actuaries, and the State through its own officials, the challenged legislation (Chapter 88-238, Laws of Florida) exists as a "dangerous precedent" for the Florida Retirement System.[2]

In spite of Florida's leadership in the Nation in the adoption of the pertinent constitutional limitation on the ability of legislative bodies to grant retirement benefits to public employees without properly funding them at the same time, the 1988 Legislature has attempted an end-run around those limitations (and a successful one thus far).

Appellants strongly assert that Article X, section 14 (consistent with contemporaneous legislation construing the meaning of the pertinent constitutional language) precludes the Legislature from further endangering the Florida Retirement System [FRS] through passage of that act and any others like it.

Chapter 88-238, Laws of Florida, enacted by the 1988 Legislature, facially postpones to future years the payment of the substantial bill for the particular increased benefits, which will automatically increase each year for five years. It is possible (but not conceded by appellants) that even this court may agree with the district court and the trial judge that the Act's treatment of future taxpayers may not be significantly discriminatory (in terms of degree) and may not impose upon them

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2. See May 31, 1988, letter from consulting actuaries to the Department of Administration, particularly the last sentence of third paragraph. Exhibit #5, Appendix Documents TAB 5.

an impressively inequitable burden of paying for the cost of the particular increased benefits, when viewed in light of the successful argument thus far advanced by the other side, that the benefits themselves, as well as the costs, also are "phased-in" over a period of years.

Even in such event, however, there is no escaping the obvious: that Chapter 88-238, Laws of Florida, nevertheless is little more than a clever legislative manuever by the 1988 Legislature a) to satisfy the legislative goals of a specific group of public employees (to increase their benefits to a certain level); b) to immediately reap whatever political benefits could be gained from such a legislative enactment, in an election year; and c) to postpone to the future (five years hence) the inevitable substantial financial and fiscal consequences (and any political repercussions therefrom).[3]

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3. The district court recognized that Chapter 88-238 provides the funding for the said automatic annual increases in retirement benefits, by requiring five separate, annual, incremental changes (1.60% each year), in the contribution rate which is required to be used by public employers in calculating the amounts to be paid into the FRS by them:

| For Year | Cumulative increase in Contribution rate as % of Applicable Payroll |
|---|---|
| 1989 | 1.60% |
| 1990 | 3.20% |
| 1991 | 4.80% |
| 1992 | 6.40% |
| 1993 and after | 8.00% |

The trial judge saw these same contribution rates. He says there is no discrimination between taxpayers in the written Final Judgment, pages 2-3, paragraph 6, in Appendix Vol. I, TAB 1. This statement must be attributed to the obfuscation of the obvious by the intervenors in their discussion of the impact of the phase-in of the *benefits* portion of the Act. However, that is an "apples and oranges" comparison.

The fact that the Act phased-in the increases in benefits cannot change the actual major fiscal impact on later taxpayers, as opposed to current taxpayers, of the phase-in of the increase in amounts to be contributed. Whether or not that difference in impact is deemed to be discriminatory, it certainly is *substantially greater* on future taxpayers.

For evidence that the difference is discriminatory, see *e.g.*, Exhibit #5,

This Act (Chapter 88-238) is exactly the kind of legislative action that the people of the State of Florida can rightfully expect to be struck down as a result of their adoption of Article X, section 14, of the Florida Constitution.[4]

**A Quick Recap of the Trial Court's Decision**

The trial judge expressly stated that his decision in upholding the challenged Act was a "reluctant" one. He found that the "funding method employed by Chapter 88-238 is a departure from that method (historically and continuously utilized by the FRS)."[5] He clearly found that the provision in the Act for funding the cost of the increased benefits was on an "unwise" *and* "imprudent" basis (and the trial judge himself used the word "basis").[6] He further found that the Act also was

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Appendix Vol. I, TAB 5 and Exhibit #9, Appendix Vol. I, TAB 9, particularly the language in paragraph numbered 3 on page 2 of the letter from the State's consulting actuaries. That letter includes the following:

> "Actuarial funding of the FRS does not equate to funding in each particular year the value of benefits earned in that same year. *Sound actuarial funding requires* a determination of the value of all <u>future</u> benefits to be paid to the current workforce and then spreads this value evenly over future payrolls. Since an ultimate 3% accrual rate for Special Risk members would be a future certainty, the actuarial process requires that funding of these benefits commence immediately." [Underlining in original; italics added.]
>
> * * *
>
> " . . . *To do otherwise would result in transferring current costs to future taxpayers.*"
> [emphasis added.]

*See also*, Winklevoss testimony, Transcript Vol. III at 370 -371; Appendix Excerpts at 85 -86.

4. Article X, section 14 must protect taxpayers from politically expedient automatic future increases in retirement benefits made by one Legislature, such as here, where the burden of paying the cost of those automatic increases in benefits is conveniently shifted to future generations of taxpayers who will become the angry constituents of tomorrow of legislators (and a later Legislature) not yet elected to office.

5. Final Judgment, page 4, paragraph 7, Appendix Vol. 1, TAB 1 (parenthetcial added, referring to the "entry age normal cost method" - historically and continuously utilized by the FRS).

"inconsistent" with the then-existing legislative construction of the meaning of the constitutional language.[7]

Nevertheless, the trial judge deferred to the "prerogative of the Legislature" rather than invalidate the Act.[8] During the trial itself, he indicated that he believed actuarial soundness hinged simply on whether legislative funding provisions would produce enough funds to meet the FRS's liability to pay the particular benefits.[9]

## Article X, Section 14 -
### A Restriction on All Florida Legislative Bodies, *Including* the Legislature of Florida

In 1976, the voters of Florida adopted Article X, Section 14, of the Florida Constitution. That provision reads:

> SECTION 14. **State retirement systems benefit changes.** - A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis. [bold emphasis in title in original]

As noted in the testimony of the longtime director of the Division of

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6. See the oral comments by Judge Hall in making his ruling, prior to entry of the formal Final Judgment, and in response to questions about his ruling. Transcript, Vol. IV at 586; Appendix Vol I, TAB 2 [Excerpts of Trial Judge's Oral Announcement of Ruling] at 6.

7. See comments of Judge Hall in Transcript, Vol. IV at 586, lines 14-17; Appendix Vol. I, TAB 2 at 6, lines 7-10. The reference is rather apparently to section 112.61, Florida Statutes (1988), though not expressly so.
The intervenors may argue that the judge's comments are not so clear. If so, then such argument will be dealt with in the appellants' Reply Brief.

8. Final Judgment, page 4, paragraph 11. See Appendix Vol. I, TAB 1.

9. See *e.g.*, Judge Hall's statement during the testimony of actuary Dr. Howard Winklevoss, in Vol. III at 358, line 13, where he (the judge) discounted efforts to "extol the virtues of level funding." He shortly added that if the funds provided by the Act meet the liabilities, then the funding "passes constitutional muster." See Vol. III at 360, lines 2 - 10; Appendix Vol. II, Excerpts at 81.
As noted, appellants never suggested that the Act would not produce sufficient funds.

Retirement, the background to the enactment of that constitutional amendment included an unpleasant recognition of Florida history. This concerned the ever-growing "unfunded liability" or debt of the state's various public employee retirement systems. The Florida Retirement System has experienced a continued growth in that unfunded liability, which went from about $1-billion when established in 1970, to $3.5-billion by the time of the enactment of Article X, section 14.

Even thereafter, the unfunded liability continued to grow, to more than $10-billion by July 1987, and then to over $14-billion by July 1989. It is undisputed that the enactment of this challenged legislation, *alone*, caused an immediate increase in the "unfunded liability" of $250,000,000.

It might seem elementary that the restrictions as to what any Florida legislative body must provide (in the way of provision for funding of particular increased benefits on a sound actuarial basis), would be the same both for the Florida Legislature and for Florida's city governments which administer and operate their own retirement systems (separate and apart from the FRS). Indeed, the pertinent statute (in Part VII of Chapter 112, Florida Statutes) purports by its own terms to apply its provisions to the state as well as to local governments.[10] Further, according to the administrative rules promulgated by the defendant Florida Division

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10. Section 112.62, Florida Statutes, reads:

> **112.62 Application.** - *The provisions of this part are applicable to any and all units, agencies, branches, departments, boards, and institutions of state, county, special district, and municipal governments* which participate in, operate, or administer a retirement system or plan for public employee, funded in whole or in part by public funds. The provisions of this part supplement, and to the extent there are conflicts, prevail over the provisions of existing laws and local ordinances relating to such retirement systems or plans. [emphasis added.]

Nonetheless, the decisions below defer to the "prerogative" of the Legislature, effectively exempting the Legislature from such construction of Article X, section 14.

of Retirement as the state agency responsible for administration of the FRS, "governmental entity" means "the state" with respect to the Florida Retirement System.[11]

The testimony at trial was clear that if any Florida city attempted to pass to future taxpayers the cost of particular increased benefits in the way in which the Florida Legislature did it through Chapter 88-238 (automatic annual increases in contribution rates), that effort would be rebuffed by the Division of Retirement.[12]

**Prior Legislative Construction of Article X, Section 14:**
**The Overly Narrow & Erroneous View of the District Court**

Between the date of adoption of Article X, Section 14 and 1983, the Florida Legislature enacted specific provisions clarifying the meaning from the legislative perspective.[13] That legislation, known as Part VII to Chapter 112 of the Florida Statutes, is aptly titled "Actuarial Soundness of Retirement Systems."

That legislation, as discussed herein, clearly embraced the concept that funding "on a sound actuarial basis" requires *more* than just legislative provision for contributions to a retirement plan now and in the future which contributions will provide sufficient funds to pay for particular increases in benefits.

The Legislative Intent section, set forth below, clearly answered in the affirmative any question as to whether provision for funding of the costs of particular increased benefits on a "sound" basis, also concerns *who pays how much and when.* The Legislative Intent section, section 112.61, Florida Statutes, reads as follows:

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11. See Fla. Admin. Code, Title 22D-1, section 22D-1.002 [Definitions], paragraph (f).

12. See *e.g.*, testimony both of the State Retirement Director (McMullian) and state actuary of the local pension plans (Slavin) respectively in Transcript Vol. I at 150 and Vol. II, at 291-292; or respectively in Appendix Excerpts at 33 - 34 and 70 -71.

13. See Chapter 78-170, Laws of Florida, and Chapter 83-37, Laws of Florida.

> 112.61 **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. *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 assumptions 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 the minimum standards for the operation and funding of public employee retirement systems and plans.
>
> [emphasis added.]

Regretably, the district court rejected in cursory fashion the 1983 addition to the legislative construction, which is the italicized portion of the quote above. (This is the portion with which Chapter 88-238 is in direct conflict, as discussed below.)

As discussed here, the two different legislative acts in 1978 and 1983, which respectively originally created and then amended the "Legislative Intent" section, received notably different treatment from the district court. This treatment was in apparent response to arguments of appellants that this prior legislative construction (looking at the entire section, but focusing on the language of the 1983 Act) is compelling and persuasive, if not conclusive and binding on the 1988 Legislature (and its enactment of Chapter 88-238, which is inconsistent with that prior legislative construction).

The district court correctly reported that appellants argued that this Court in *Brown v. Firestone*[14] announced the proposition that "relatively contemporaneous construction of the constitution by the legislature is strongly presumed to be correct."[15] But, appellants also argued more, to wit: that according to repeated decisions of this Court, such as in *Iglesia v. Floran*:[16]

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14. 382 So.2d 654, 671 (Fla. 1980).

15. 580 So.2d at 644-645.

> "Where a constitutional provision is susceptible to more than one meaning, the meaning adopted by the Legislature is conclusive."

The district court dealt with the legislative construction issue (as to the language in the 1983 Act) in two ways:

(1) first, by simply rejecting the meaning of the language of the 1983 legislation as being less contemporaneous than the 1978 legislation (and therefore constituting language that the court was not required to examine)[17]; and

(2) secondly, by inaccurately stating that "chapter 83-37 does not prohibit taxing future taxpayers, but (merely) requires that whatever costs associated with chapter 88-238 (which) are passed on to future taxpayers *must be reasonable*."[18] [Emphasis and parenthetical added.]

As to the first of these comments by the district court: there is no reason given by the district court for its acceptance of the 1978 Legislature's construction and its rejection of the 1983 Legislature's construction, other than that the former has "*greater* contemporaneity" than the latter. [Emphasis added.] The court did *not* say that 1983 was too distant in time from the adoption of the constitutional provision to allow the 1983 legislation to also constitute "contemporaneous" construction.

Certainly, the two prior acts (prior to the challenged legislation) are *not* inconsistent with each other in their expressions of legislative intent. Nor did the

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16. *Iglesia v. Floran*, 394 So.2d 994, 996 (Fla. 1981); *Greater Loretta Improvement Association v. State ex rel. Boone*, 234 So.2d 665 (Fla. 1970). The *Greater Loretta* opinion on this proposition reads:

> "(W)here a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling."
> *Id.* at 669.

17. See footnote 9 of the district court's opinion. 580 So.2d at 645-646.

18. 580 So. 2d at 645.

district court suggest that they were. As the district court itself noted, the former (1978 Act) concerns protection of public employee retirement benefits; the latter (1983 Act), the relative burdens of different generations of taxpayers.

The two prior acts certainly can be read together, harmonized, and blended, into a complete statement of legislative intent concerning the implementation of Article X, section 14.

The district court's rationale for rejection of the *Brown v. Firestone* proposition concerning a "relatively contemporaneous construction"[19] as it relates specifically to the 1983 legislation on the meaning of Article X, section 14, also is silent as to the above-quoted and related *Iglesia* proposition. Appellants thus also question the district court's failure to examine the "meaning adopted by the Legislature" (see *Iglesia* quote) as a *combination* of legislative enactments, *both* of which properly work together to fully establish "legislative intent."

Both prior acts are expressly directed to Article X, section 14; yet the district court rejected the latter act without finding any fault with the construction given by the 1983 Legislature, and without criticizing either its language or content.[20]

19. The district court's explanatory footnote (footnote 9) to its treatment of this proposition makes clear that the district court found the 1978 legislation to have "greater contemporaneity" than the 1983 legislation. 580 So. 2d at 644-645.

20. The district court states that the 1983 Act is *not* entitled to a presumption of correctness because it was *not required* to look at the construction given by the 1983 Legislature (it being less contemporaneous than the 1978 Act).

Appellants respectfully suggest that this refusal to examine the merits of the construction given by the 1983 Legislature is simply part of, and consistent with, the district court's reluctance to challenge the "prerogative" of the 1988 Legislature. If the district court had examined that legislative intent, and expressed its agreement with the trial judge that the 1988 Legislation was "inconsistent" with the language of the 1983 Act, then its own deference to the 1988 Legislature would have been made more difficult.

After all, a judicial decision to uphold the action of the 1988 legislature reflects deference only to that more recent legislature, NOT deference to the legislature as an institution. The institutional intent evidenced by the collective wisdom of *two* legislatures (both "more contemporaneous" than the 1988 Legislature with the adoption of Article X, section 14), quite arguably is much more deserving of judicial recognition, and deference, than the intent expressed by the challenged 1988 Act.

It also is noteworthy that the 1988 Legislature offered nothing within Chapter 88-238 to account for its running headlong into an "inconsistent" position (to use the trial judge's own word) *vis a vis* the 1983 language added to section 112.61, Florida Statutes. The 1988 Legislature made no express attempt whatsoever (*e.g.* to amend the s. 112.61 legislative intent language[21]) to indicate or even hint that the 1983 legislative construction was in error or undeserving of being followed - other than, of course, the implicit rejection by the 1988 Legislature of that prior legislative construction by its enactment of an "inconsistent" act.

In upholding the challenged legislation, it was the trial judge himself who simultaneously dodged the intent and force of the 1983 legislative construction while stating (in his oral explanation of his ruling on Chapter 88-238) that the challenged Act was indeed "inconsistent" with the earlier legislative construction.[22]

As to the second way in which the district court both affirmed the trial judge and sidestepped the legislative construction issue (by incorrectly stating what the 1983 language actually says and means), suffice it to summarize here that the statutory language is not difficult to understand, specifically in the context of the particular automatic annual increases in benefits enacted by Chapter 88-238.

The question of inequitable treatment of future taxpayers is measured, by s.

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21. This is consistent with the League's separate brief and proposition that the manner in which the 1988 Legislature enacted Chapter 88-238, demonstrates that the 1988 Legislature acted unwittingly.

22. A reading of the transcript of the trial judge's statements as to his decision, prior to entry of his written Final Judgment, is truly instructive. See Transcript Vol. IV at 586, or Appendix Vol I, TAB 2 at 6, where the trial judge stated, among other things:

> "I think it is apparent that the Florida Retirement System is based on a firm foundation of entry age normal cost concept. 88-238 is a departure, in my estimation, from that scheme. It is inconsistent with the scheme. *It is inconsistent with prior language or language found in other parts of the statute or chapter.*"
>
> [emphasis added.]

112.61 legislative construction of Article X, Section 14, by whether the "portion of the cost" transferred to future taxpayers (who *always* contribute something) could "reasonably have been expected" to be paid by current taxpayers.

That is not so tricky. Especially in the instant case.

Appellants proved at trial that the normal and customary way to fund the payment of the cost of particular increased benefits under the FRS is for the state's consulting actuaries to determine a percentage of payroll to be applied at the same fixed rate over a 30-year period. In this case, that fixed percentage rate would have been 7.04% of payroll (to amortize the calculable cost of this package of increased benefits). However, the 1988 Florida Legislature did not take the time (or have the time upon the 11th hour of the session) to find out what the rate needed to be, prior to passing the Act as amended. From the perspective of the 1988 Legislature, it rather apparently simply did not matter, so long as they hedged (guessed) in favor of having plenty of money coming into the system, eventually.

Nonetheless, the amount that 1989 taxpayers could "reasonably have been expected" to pay, as their portion of the cost of the defined benefits in Chapter 88-238, worked out (after the session ended) to be 7.04% of the payroll during 1989. That figure also would apply to 1990 taxpayers. And, of course, to 1991 and 1992 taxpayers as well.

Instead, 1989 taxpayers paid only 1.60% of payroll. Instead, 1990 taxpayers paid only 3.2% of payroll. Instead, 1991 taxpayers are currently paying 4.8% of payroll toward this package of increased benefits. 1992 taxpayers similarly will pay less than their traditionally "fair" (to wit: equal) share. All taxpayers prior to 1993 will most certainly pay less than the portion of the costs that they could "reasonably have been expected" to pay (to wit: the 7.04% of payroll).

PBA and the Firefighters successfully suggested to the district court that the question might be phrased as whether a reasonable amount of the costs were

transferred to future taxpayers. Then, they say the appellants as plaintiffs failed to meet their heavy burden to show the unreasonableness of that transfer.

Again, that suggestion simply obfuscates the matter and is a legal red herring (albeit a successful one for the intervenors, thus far).

The statutory language of s. 112.61 is not difficult to apply here. The transfer here was unquestionably of a portion of the cost which "reasonably could have been expected" to be paid by current taxpayers. That is all that plaintiffs (appellants) should have been required to demonstate here, *so long as* (assuming) the courts followed the 1983 legislative construction of the meaning of Article X, Section 14.

That latter proviso, however, is the real problem with the courts below (as to applying the s. 112.61 language to these facts). Neither the district court nor the trial court was willing to do so, instead prefering to defer to the prerogative of the legislature to inconsistently adopt a new and different methodology or basis for funding this package of automatic annual increases in benefits.

Even if the test were a different one (based strictly on Article X, section 14, without reference to the s. 112.61 construction), appellants submit to this Court that on its face, Chapter 88-238, Laws of Florida, nevertheless clearly imposes a future financial burden upon future taxpayers that is unwise, imprudent *and* constitutionally unsound. It seems all too obvious that the contribution rate of 1.6% of payroll in 1989 versus a contribution rate of 8% of payroll in 1993 and thereafter, demonstates the significantly different burden on future taxpayers that will result from the automatic annual increases in benefits. The argument by the other side that taxpayers will receive more in return for their money (which is not conceded as accurate) is virtually irrelevant.

The language of the 1983 amendment to s. 112.61 does NOT simply require that whatever costs are transferred to future taxpayers "must be reasonable" (as

opined by the district court).[23] The statutory language does *not* say, as the district court says that it does, that if the degree of the transfer of the burden is reasonable, then it therefore is permissible.[24] Rather, the language of s. 112.61 expressly forbids the legislatively imposed transfer to future taxpayers of "any portion of the costs which *may reasonably have been expected to be paid by the current taxpayers*" - which forbidden transfer is precisely what the 1988 Legislature mandated will occur (and effectively will begin to occur on January 1, 1993).

Unless reversed by this Court, among other things the practical effect of the judicial deference to the Act of the 1988 Legislature, is to render meaningless, *except as to city government pension plans*, the 1983 legislative construction of Article X, Section 14.

**The "Unwise and Imprudent Basis" for Funding of the Particular Increases in Benefits under Chapter 88-238: The Trial Court's Finding Was Emphatic and Unambiguous**

As set forth in the Statement of the Case and of the Facts, the trial court's finding was emphatic and unambiguous that the funding basis provided by the 1988 Legislature in Chapter 88-238 was "on an unwise and imprudent basis."

There is no maybe about it.

Nevertheless, as emphasized by the PBA in its Brief on Jurisdiction in this Court (in PBA's own presentation of its view of the case and facts), the district court used the word "may" in describing the trial judge's view of the matter. PBA argued in its presentation of the facts, as follows (with all emphasis, quotation marks, omissions, parentheticals and citations as in PBA's original):

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23. 580 So. 2d at 645.

24. The PBA and firefighters rather obviously convinced both of the lower courts that this is all that is constitutionally necessary. But, that is not what s. 112.61 says. Nor is it "sound" to establish a methodology or basis for funding which allows the legislative branch to postpone and transfer the fiscal impact of its actions so obviously into the future, as it did here.

Petitioners' brief suggests that the lower courts considered chapter 88-238 to be "unwise and imprudent." The district court of appeal simply observed as follows:

> Although the trial court orally indicated a belief that the statutory plan may be an unwise or imprudent basis for departing from the . . . (level cost method) . . . . (e.s.)

Slip Opinion at 8. This comment was not the ruling of the Circuit Court, and was not adopted by the District Court of Appeal as reflecting its own views. Rather, it was nothing more than a reminder that the judiciary cannot speculate on, much less judicially review, the wisdom of legislative funding schemes under established separation of powers principles.

This effort of PBA, in trying to persuade this Court to decline to hear this appeal, is remarkable for several reasons.

First, the facts speak for themselves as to what the trial judge said or did not say. The eleven-page excerpt, setting forth in full the trial judge's oral statements to the parties upon making his decision in this case, is available to this Court.[25] To the extent that the Statement of the Case and of the Facts only summarizes that full statement, these appellants welcome and urge this court to examine the full statement by the trial judge.

The fact is, the trial judge emphatically determined that the "basis" for the funding of these particular increased benefits was both "unwise" and "imprudent." (The trial judge then deferred to the prerogative of the Legislature to do so, anyway.)

Second, PBA errs in saying that appellants have suggested that it is the legislation itself (Chapter 88-238) which is "unwise and imprudent." That is not so.

What appellants have long stated and argued (and failed to present in an understandable and convincing way to the district court) is that it is the very "basis" or foundation for the funding of these particular increased benefits that the trial judge clearly determined and found to be "unwise and imprudent."

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25. Appendix Vol. I, TAB 2.

Appellants intend to do better in argument on this point before this Court. The distinction is critical.

The intervenors (PBA and Firefighters) successfully argued to the district court that the judiciary should not question the "wisdom" of the legislative decisions here, or as the district court stated it: of the "policy choices of the coordinate legislative branch."

What appellants failed to do in argument before the district court was successfully make the distinction between: (A) a legislative policy choice *to increase retirement benefits* of fire fighters and law enforcement personnel; and (B) a policy choice *to adopt a new and different "basis" for the funding* of those particular increased benefits.

This case is NOT a challenge as to the wisdom of raising retirement benefits of special risk members of the FRS. If the Florida legislature sees fit to do so, *i.e.* raise benefits (the annual accrual rate) from 2% to 3% of salary, then such decision properly is a legislative one. Appellants have no quarrel with the courts deferring to the wisdom of the legislative branch on that matter.

However, it is quite a different matter for the judiciary (including both lower courts) to defer to the 1988 Legislature's "policy choice" of funding these particular increased retirement benefits on "an unwise and imprudent basis" (which also is unorthodox and untested within the experience of the administrators of the FRS). Such deference, it is respectfully submitted, lamely ducks the vital constitutional issue precisely and properly before the judiciary.

It seems all too obvious that it is the function of the judiciary to decide whether the provision for funding in any particular legislation increasing public employee retirement benefits, is on a "sound" actuarial basis. Yet, both lower courts "deferred" to the legislative branch on the very question of the soundness of the new and different basis for funding which the 1988 Legislature virtually unwittingly

shaped in Chapted 88-238.

Granted, when all of the actuaries calculated the amounts that the provision for funding will produce, in present dollars over a period of thirty years, the monies produced will cover the costs as and when the need to pay the benefits accrue. But, that is only the "actuarial" aspect of the overall question of whether particular funding is "sound." [If the money had been insufficient, then this case would have been "no contest" with a probable summary judgment invalidating the Act. But, that simply is NOT the issue here, and never has been.]

These appellants remain frustrated at this point in this case by the success of the intervenors in obfuscating the simple facts as to the "actuarial" aspects of this case. Both the trial judge and district court emphasized that costs paid by employers would cover liabilities, which appellants had conceded before trial. The question remains, still, as to whether Article X, section 14, requires more than that, to satisfy its mandate that funding be "on a sound actuarial basis."

A last minor point to be made about the quoted language from the district court's opinion as set forth and emphasized by PBA, is that PBA misquoted the district court. While appellants appreciate PBA helping note that the district court missed appellants' point that the trial judge was firm (no "maybe") about his finding concerning the "basis" for funding under Chapter 88-238, the district court correctly quoted the trial judge for finding "an unwise *and* imprudent basis for departing from the . . . (level cost method) customarily used to fund increases in FRS benefits." [Emphasis added.] PBA's misquote of the court's quote erroneously toned down that quote, saying "unwise *or* imprudent basis."

Precisely contrary to PBA's expressly asserted position, these appellants submit that Article X, section 14 calls upon this Court to "judicially review the wisdom of the legislative funding scheme" of Chapter 88-238.

**The District Court's Error in Deferring to the "Policy Choices" of the 1988 Legislature**

The district court stated that the trial court:

> " . . . deferred to the policy choices of the coordinate legislative branch as a means of accomplishing legislative intent. Under the circumstances, the trial court acted properly."

The district court thereupon cited its own decision in *Fulford v. Graham*[26] for such deference to the legislature. That decision, however, had nothing whatsoever to do with construction of a constitutional provision, such as here.[27]

While the *Fulford* opinion does state a general proposition of law that a legislative enactment carries with it a strong presumption of constitutionality,[28] it only weakly stands for the suggested proposition that the trial judge properly deferred to the policy choices of the legislative branch under the circumstances here.

What the *Fulford* opinion actually says is more to the point here. That opinion quotes[29] the 1947 decision of this Court in *Price v. City of St. Petersburg*,[30] as follows:

> The determination of facts upon which the validity or constitutionality of statutes may depend is primarily for the legislature; the general rule being the court will acquiesce in the legislative decision *unless it is clearly erroneous, arbitrary, or wholly unwarranted.*
> [Emphasis added.]

These appellants have no quarrel with such a proposition of law, especially when viewed in the context of the facts here and the related time-honored

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26. 418 So. 2d 1204, 1205 (Fla. 1st DCA 1982).

27. In fact, the district court in that case merely affirmed a trial court's decision upholding the constitutionality of a legislative act making it unlawful to possess a fishing net in any county where its use was prohibited. The constitutional challenge was that the act impermissibly hindered interstate commerce.

28. The *Fulford* opinion so states the proposition, citing the decision of this Court in *State v. Bales*, 343 So.2d 9 (Fla. 1977).

29. 418 So.2d at 1206.

30. 29 So.2d 753 (Fla. 1947).

pronouncements of this Court in cases such as *State ex rel. West v. Gray,*[31] *State ex rel. West v. Butler*[32] and the more recent opinion of this Court in *Iglesia v. Floran.*[33]

In *State ex rel. West v. Butler,* this Court stated:

> (W)hile all fair intendments should be indulged in favor of the constitutionality of a duly enacted statute, yet the provisions *expressed and implied* of the constitution are superior to legislative enactments, and the Constitution must prevail where a statute conflicts therewith; * * * In construing and applying provisions of a constitution the leading purpose should be to ascertain and effectuate the intent and object designed to be accomplished.[34]
>
> [Emphasis added.]

Appellants submit that the critical and essential facts here are not in dispute, or are indisputable.[35] The judicial deference to the 1988 Legislature by the

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31. 74 So.2d 114 (Fla. 1954). In *Gray*, the justices collectively wrote 27 pages of opinions on the constitutional issue before the court. In the *per curiam* opinion of the court, there is a wealth of citations to older Florida cases on construction of the constitution, as well as considerable discussion of principles of interpretation. For example:

> The first and fundamental rule in the interpretation of a constitution is to construe it according to the sense of the terms and the intention of the framer of such constitution and the people who adopted it. Where the words are plain and clear and the *sense distinct and perfect* arising on them, there is generally no necessity to have recourse to other means of interpretation.
> [Emphasis in original.] *Id.* at 116.

The *Gray* court also continued to discuss the rules and principles of construction when the constitutional language was not so distinct and perfect. The court mentioned reference to "antecedent mischiefs" and "other sources almost innumerable, which may justly affect the judgment in drawing a fit conclusion in the particular case." *Ibid.*

32. 70 Fla. 102, 69 So. 771 (1915).

33. 394 So.2d 994 (Fla. 1981). In *Iglesia*, this Court announced a proposition of law that supports appellants' insistence here that judicial review of Chapter 88-238 must include deference <u>NOT</u> to the 1988 legislature, but to the language of the constitution itself and to the construction given Article X, section 14, by the 1983 Legislature. [That 1983 legislation (Chapter 83-37, Laws of Florida) was discussed *supra*.]

34. 70 Fla. at 123-124.

35. Contrary to the argument made by PBA in its Answer Brief on Jurisdiction (at 2-3), to the effect that appellants have acknowledged "the fact-

district court and by the trial judge, in light of those facts, and in light of the language of Article X, section 14, is "wholly unwarranted."

**A Closer Examination of the Language of Article X, Section 14 - A Common Sense Approach**

Appellants view the constitutional provision as quite straightforward and clear. It certainly is not ambiguous about what it sets out to accomplish. This case simply affords this Court its first real opportunity to expound on the appropriately broad principles enunciated by the constitutional provision - to give it meaning in a practical setting.

The language found in the Florida Constitution must be presumed to have been deliberately used for the purpose of accomplishing some objective.[36] One should examine whether it matters that the phrase concerning funding - "on a sound actuarial basis" - is not the same arrangement of words as the phrase frequently used as a synonymous expression: "actuarially sound" funding.

In that light, Dr. Winklevoss (appellants' expert actuary at trial) made the distinctive point that, while actuaries had many good reasons for avoiding efforts to define the term "actuarially sound" (in part because of the many different contexts within which interested persons then might attempt to inappropriately utilize such definition), the same handicap does *not* exist as to the constitutional phrase -

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intensive nature of the actuarial issues" - the appellants counter that they have focused on what are only a few essential undisputed or indisputable facts. It is the intervenors who "add" what appellants submit has become a considerable volume of nonessential facts and which appellants view as offered by PBA to obfuscate the obvious and critical facts.

The essential undisputed and indisputable facts which support the appellants' position, demonstrate that when the district court did "acquiesce in the legislative decision" (the language from *Price*), that acquiescence was "wholly unwarranted" (also from *Price*). The major indisputable fact (which PBA continues to attempt to avoid or confuse) is that the trial judge clearly determined that the funding of Chapter 88-238 was on "an unwise and imprudent basis."

36. *Halle v. Einstein*, 34 Fla. 589, 16 So. 554 (1894); *Ervin v. Collins*, 85 So.2d 852 (Fla. 1956).

"funding on a sound actuarial basis" - in the specific context of examining a provision in a legislative act dealing with funding of increased retirement benefits.[37]

There are good common sense reasons for the distinction, with word by word analysis of the common everyday meanings of the word "basis" and its modifiers: "sound" and "actuarial" - all placed in context with the overall objective and purpose of Article X, Section 14. But first, it should be noted that by mid-trial it appeared that the lower court had accepted PBA's and the Firefighters' position that "actuarially sound" funding embraces merely the question of whether the funding provisions (of legislation increasing benefits) will generate enough money to cover the costs of benefits as and when they come due.[38]

Appellants continued with presentation of their case, which never depended on answering in the negative any question about whether Chapter 88-238 would generate the funds to pay for the benefits. Appellants never set out to present any evidence to suggest that the funding was inadequate in a "total dollars" sense.[39]

The key words in the critical constitutional phrase are "basis" and "sound." The word "actuarial" - as discussed in the current dispute - is more intriguing and no doubt important, but less so than the other words within the phrase, in light of the facts on which the instant case focuses. The dictionary definitions are revealing. They are photocopied herein in full both from Webster's and Funk and Wagnall's dictionaries:

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37. Winklevoss, Vol. III at 351, 361; Appendix Excerpts at 79, 82 - 83.

38. See Judge Hall's statements during the Winklevoss testimony at Transcript Vol. III at 360, lines 2 - 10; Appendix Excerpts at 81.

39. Judge Hall made a finding on the point in the Final Judgment, page 3, paragraph 5, Appendix TAB 1.

Funk & Wagnalls

# NEW COMPREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE

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**sound**[2] (sound) *adj.* 1 Having all the organs or faculties complete and in normal action and relation; healthy. 2 Free from injury, flaw, mutilation, defect, or decay: *sound* timber. 3 Founded in truth; right; substantial; valid; legal. 4 Correct in views or processes of thought. 5 Solvent. 6 Profound, as rest; deep; unbroken; also, resting profoundly. 7 Complete and effectual; thorough. 8 Solid; stable; firm; safe; hence, trustworthy. 9 Based on good judgment. See synonyms under HEALTHY, SANE[1], STAUNCH, WISE[1]. [OE *gesund*] — **sound'ly** *adv.* — **sound'ness** *n.*

**ba·sis** (bā'sis) *n. pl.* **ba·ses** (bā'sēz) 1 That on which anything rests; support; foundation. 2 Fundamental principle. 3 The chief component or ingredient of a thing. [<L <Gk., base, pedestal]

**ac·tu·ar·y** (ak'chōō·er'ē) *n. pl.* **·ar·ies** One who specializes in the mathematics of insurance, mortality rates, and the like; especially, the official statistician of an insurance company, who calculates and states risks, premiums, etc. [<L *actuarius* clerk <*actus*. See ACT.] — **ac·tu·ar·i·al** (ak'chōō·âr'ē·əl) *adj.* — **ac'tu·ar'i·al·ly** *adv.*

# WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE

UNABRIDGED

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**sound,** *a.*; *comp.* sounder; *superl.* soundest. [AS. *sund*, *gesund*, sound, healthy; akin to Dan. *sund*, G. *gesund*, etc.]

1. whole; unimpaired; unhurt; unmutilated; not weak, diseased, or damaged; as, of *sound* mind and body.

2. free from imperfection, defect, or decay; whole and in good condition; undecayed; as, *sound* timber.

3. firm; safe; stable; secure, especially financially; as, only *sound* banks withstood the crash.

4. founded on truth; strong; valid; reliable; sensible; as, a *sound* argument.

Under the guidance of *sound* moral principles. —Morse.

5. founded on right or law; valid; legal; not defective; indisputable; as, a *sound* title.

6. orthodox; conservative.

7. morally strong; honest, honorable, upupright, virtuous, etc.

8. thorough; complete; as, a *sound* investigation.

9. deep; profound; unbroken; undisturbed; heavy; said of sleep.

10. heavy; lusty; laid on with force; severe; as, a *sound* thrashing.

*Syn.*—healthy, whole, unimpaired, hearty, hale, vigorous, entire, undecayed, sensible, rational.

**bā'sis,** *n.*; *pl.* **bā'sēs,** [L. *basis*; Gr. *basis*, a base or pedestal, from *bainein*, to go.]

1. the base or foundation of anything; that on which a thing stands or lies; the bottom or foot of a thing.

2. the groundwork or first principle; that which supports; foundation; as, the charge is without *basis*.

The *basis* of public credit is good faith. —Hamilton.

3. the chief ingredient or component; as, oil constitutes the *basis* of the preparation.

4. in prosody, (a) an introductory foot preceding a logaoedic verse; (b) the portion of a metrical foot receiving the stress.

5. in military science, a starting point; a base.

*Syn.*—foundation, ground, support, footing, base.

**aç·tū·ā'ri·ăl,** *a.* 1. relating to an actuary or the business of an actuary.

2. calculated by actuaries.

**aç'tū·ā·ry,** *n.*; *pl.* **aç'tū·ā·rieş.** [L. *actuarius*, clerk, from *actus*, pp. of *agere*, to do.]

1. a registrar or clerk: a term of the civil law, and used originally in courts of civil law jurisdiction.

2. an official statistician and computer of an insurance company; one who calculates insurance risks and premiums.

**The "Basis" for Funding**

The noun in the subject phrase deserves treatment first. The legislation providing for increased benefits must establish the "foundation" or "chief ingredient" for the funding of the cost of those benefits. Funk & Wagnall's says basis means "fundamental principle." Webster's says "basis" means "that on which a thing stands."

In short, the funding "basis" is the starting point for determining whether a funding provision is on a sound actuarial basis. Then, one examines the modifiers.

**"Sound" as Meaning "Wise" Etc.**

Funk & Wagnalls' includes "wise" among the synonyms for "sound." Webster's includes "unimpaired" and "sensible."

Webster's definition of the adjective "sound" includes "free from imperfection, defect" - "firm; safe; stable; secure, especially financially" - "orthodox; conservative" - as well as "thorough; complete." Funk & Wagnalls' is similar: "free from injury, flaw, . . . defect" - "correct in views or processes of thought" - "complete and effectual; thorough" - "based on good judgment."

For starters, it is undisputed that Chapter 88-238 was flawed and defective.[40] Its technical errors required correction in the 1989 session, as Mr. Daskais so nicely clarified[41] even better than had Mr. McMullian.[42] The funding provisions were hardly "free from defect" and were not "complete and effectual."

Throughout this litigation, the battle focused on the "methodology" employed by the 1988 Legislature in the subject act. After testimony ended, it was clear that the "entry age normal cost method" [the method used under the FRS] is an actuarial cost method that uses the same percentage rate for contributions over the entire amortization period. While Mr. Mitchell [the actuary for PBA] opined that the

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40. See the schedule of contribution rates in the Act itself. Exhibit #4, Appendix, TAB 4.
41. Daskais testimony, Vol. III at 476.
42. McMullian testimony, Vol. I at 143 - 144; Appendix Excerpts at 31.

Legislature could establish a "non-level" contribution rate structure for the FRS consistent with its historical approach to funding,[43] Dr. Winklevoss summarized that "level contribution rates" - in the sense of the application of the same percentage rate over the amortization period - was fundamental to the "entry age normal cost" method.[44] Further, according to Mr. Gibney [the FRS in-house actuary], the "level" contribution rate - in that same sense - was and is the standard for the FRS.[45]

As noted, the trial judge concluded that the funding of Chapter 88-238 was not the orthodox one for the FRS, though he did not use that exact word (which is one of the synonyms for "sound").[46]

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43. See *e.g.*, Mitchell, Vol. IV at 433 - 435.
44. Winklevoss, Vol. III at 368; Appendix Excerpts at 84.
45. Gibney, Vol. II at 266; Appendix Excerpts at 62.

46. Judge Hall, in explaining his decision, said:

" . . . from everything that I heard in this case, that the foundation concept upon which the Florida Retirement System is based, even though it has to go backwards and look at some of the unfunded liability that in a sense was inherited in a consolidation of programs, but apparently *the consistent approach to funding and the contributions has been to have a constant percentage factor applied to payroll, and that's the way those have been over a period of time.*

* * *

"I viewed the testimony of Mr. McMullian and Mr. Gibney to articulate that very clearly; that *they deemed that approach to be the way the system should be run; that that's the way they had designed the system or carried out the implementation of the design of the system*, and that *they viewed, in their opinion, the phase-in of benefits and the phase-in of contributions* from two to three percent over a five-year period *to be inconsistent with that; and not only inconsistent, but not a wise and prudent way to do it.*

" *I concur with that*, but it is not their function nor is it my function to concur with it or not concur with it based on how I think the little machine ought to operate. I have to look at it from the constitutional measure. And it was in that context that I think if had been a lever puller in the Legislature I probably would have voted no because of its inconsistency, but I'm not a lever puller in the Legislature."

Transcript of Comments of Judge Hall, Appendix TAB 2, at 8 - 9; Trial Transcript, Vol. IV at 588 - 589.

The evidence demonstrated that the 1988 Legislature acted without the benefit of an actuarial or fiscal study or report, on the impact of dividing the numbers in the original bill by the same number (5), to postpone the otherwise immediate substantial financial impacts of the Act. In any event, with no proper study, the basis for the funding was neither "thorough" nor thoughtful.

Lastly, the use of automatic annual increases in contribution rates hardly promotes "stability." Every county and city in the FRS must readjust each year to another substantial increase in its budget. Nor can the incremental changes in the contribution rates, with a greater burden being placed on later taxpayers, be called "conservative."

**Relief Sought**

This case is a simple matter of judcial confirmation for the people of Florida that they do have more control over increases in public employee retirement benefits than just complaining about politics. The relief sought here clearly will help citizens meet their tax bills, help cities and counties meet their obligations to contribute to the FRS, and help assure the financial integrity of the FRS.

Even though the 1988 Legislature unwittingly ignored the prospect of economic recession when it imposed automatic annual increases in retirement benefits and annual increases in contributions (taxes) on the people of this state, through the governmental employers who must contribute to the FRS, this Court is not unaware of those economic consequences, including how recession affects government.[47]

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47. It is clear that this Court is well aware of the current economic recession. The Court certainly does not operate in a vacuum.

Justice Stephen Grimes recently served as Chairman of the Florida Judicial Council. On June 27, 1991, under his chairmanship, the Council approved the Report of the Judicial Council of Florida, July 1991, prepared by the Article V Subcommittee of the Council.

Among other things, that Report recognized that:

As plaintiff Robert Anderson [appellant/taxpayer] indicated at trial, the counties (and cities) seek here only to have a credit for the funds paid into the FRS by the contributing employers during the course of this litigation. No immediate refund is sought. Therefore, the FRS would suffer no adverse financial consequences from invalidation of Chapter 88-238.

The invalidation of Chapter 88-238 would void both the increases in the rates for accrual of benefits and the increases in the rates for employer contributions. Thus, the need for the money already contributed (to fund those benefits) would no longer exist. Yet, by appellants seeking no immediate refund, the FRS in effect would have in hand advance contributions from employers.

Appellants ask for a credit toward future required contributions from cities and counties, for each contributing governmental unit, for all of those sums paid into the FRS as a direct result of the passage of the challenged Act. As monies become due from employers, such amounts would be deducted from the credit of each employer until the credit is exhausted.

## CONCLUSION

Sadly, it is not only possible, but probable, that postponement of payment of costs to the future can and does appeal to the worst in politicians. The prospect of angry constituents, burdened with paying for increased public employee retirement benefits, too easily can be avoided by current legislators (such as in 1988) by their postponing of the substantial fiscal impacts of the increase in benefits to payment by the constituents of some future politician (in this case to 1993 and thereafter).

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> "Falling state revenues have caused the state to lean heavily on county governments to fund more and more functions of the State Court System. To say there is a funding crisis is an understatement. The state's shifting of state court costs has placed such additional burdens on counties that serious questions are now being raised over the state coercing counties into using real estate ad valorem tax revenues to fund the state courts . . . ." See Introduction (page 1).

Chapter 88-238, Laws of Florida, provided for increases in public employee retirement benefits and the funding for that package of increases, scheduling the increases to take place in the future - in automatic annual increases for five years. The 1988 Legislature effectively immediately gained whatever political benefits come from the passage of such legislation and simultaneously circumvented taking the political heat from taxpaying constituents for what they had done.

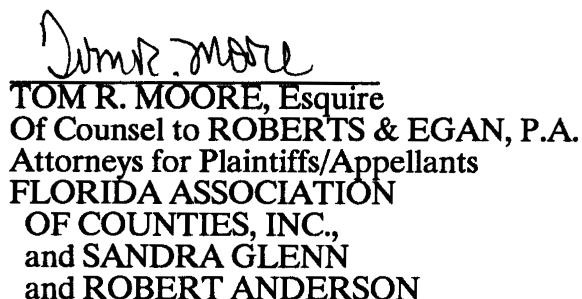
Article X, section 14, exists to preclude just such legislative gamesmanship.

Rather than defer to the legislative prerogative to adopt what the trial judge acknowledged to be a new and different basis for funding of the increased benefits, which he deemed to be funding on "an unwise and imprudent basis," this Court should reverse such deference by the lower courts and hold that Chapter 88-238 is invalid and unconstitutional.

Upon such invalidation, the appellants ask that public employers receive a credit, not a refund, for the substantial funds paid into the FRS during the course of this litigation to pay for this particular package of increased benefits.

To do anything else would fail the people and their expectations upon their adoption of Article X, section 14.

The above and foregoing Initial Brief of Appellants FLORIDA ASSOCIATION OF COUNTIES, INC. and SANDRA GLENN and ROBERT ANDERSON, is respectfully submitted this 15th day of November, 1991.



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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing INITIAL BRIEF OF APPELLANTS has been furnished this 15th day of November, 1991, by U.S. mail to each of the persons named below:

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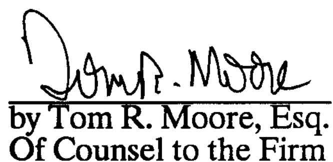

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