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/Petitioners,

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/Respondents.

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

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE & OF THE FACTS

For purposes of demonstrating the basis for the discretionary jurisdiction of the Supreme Court and for persuading this Court to exercise that discretion to review the decision below, the petitioners add the following to the statement of the case and of the facts as presented in the opinion of the district court. A conformed copy of that opinion is attached hereto in the APPENDIX.

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.]

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.]

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.]

SUMMARY OF ARGUMENT

To the extent that the Government suggests that the justices should defer to the Legislature's conclusion about an issue of constitutional law, the answer is that while the Court will not ignore it, it is the task of the justices in the end to decide whether the Legislature has violated the Constitution.[1]

This litigation from the outset has involved and still involves as its primary focus, the construction of Article X, Section 14 of the Florida Constitution - a unique constitutional provision (specifically concerning legislated increases in public employee retirement benefits). There appears to be nothing like it in any other state constitution.

Petitioners invoke the discretionary jurisdiction of the Supreme Court to review the decision below, under Rule 9.030(a)(2)(A)(i) *and* (ii), Fla. R. App. P. There clearly are two grounds for the Court's discretionary jurisdiction. There also are substantial reasons for the Court to exercise that discretionary power to review the decision below.

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1. The bold text footnoted above paraphrases in a state judicial context the similar recent statement by the justices of the United States Supreme Court in *Sable Communications of California, Inc. v. Federal Communications Commission et al.*, 109 S.Ct. 2829, 2838 (1989):

> **"To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not igore it, it is our task in the end to decide whether Congress has violated the Constitution."** [bold emphasis added.]

In the waning moments of the 1988 regular legislative session, the Florida Senate considered and passed an 11th-hour amendment of the bill which became the Act challenged in this litigation. Former State Senator Dempsey Barron (D - Panama City) ruled from the chair on a point of order on the constitutional question now before the judiciary. The point of order challenged the propriety of a vote on the amended bill in light of the language of Article X, Section 14 of the Florida Constitution. Obviously, Senator Barron ruled that the point was not well taken. See *Journal of the Senate*, June 6, 1988, at 1083; Record below [R] at 191.

The "Government" here, by and through the Attorney General's office (as opposed to the defendant Department of Administration, Division of Retirement, whose staff has consistently opined that the challenged Act is unconstitutional), suggests that the courts should defer to the decision of the Legislature. Indeed, as noted herein, both the trial judge and the appellate court below, have expressly deferred to the "prerogative" of the Legislature on this matter.

ARGUMENT

The Subject Constitutional Provision

In 1976, the voters of Florida adopted what is now 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 original; italics added.]

Petitoners ask this Court to allow them to present to this Court, on the merits, why and how Article X, Section 14, properly construed (according to petitioners) operates to invalidate the particular Florida Retirement System benefit changes provided by the 1988 Legislature by and through Chapter 88-238, Laws of Florida. Petitioners assert that the "basis" for funding benefit increases must be "sound" *both* substantively and procedurally.

"Who" pays "how much" and "when" are important additional questions to the substantive question of whether a particular funding formula will eventually produce enough money to pay the cost of the benefits change. Further, all such questions should be asked and at least discussed *before* the vote on final passage, not after.[2]

In light of Article X, Section 14, both the legislative *process* followed here by the 1988 Legislature[3] and its questioned product,[4] deserve the scrutiny of the highest court of this state.

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2. Given the manner of passage of the final amended version of the bill, these questions obviously never were discussed in any legislative committee prior to final passage.

3. The 11th-hour amendment of the bill came in the face of Article X, Section 14. The district court also alluded to the "lack of actuarial input concerning the final version as enacted." See *e.g.*, TAB 1 at 7.

4. The technical defects on the face of the bill are conceded by all. They had to be corrected in the next legislative session.

The Decision Below

This Court clearly has the power to review the decision below as within the Court's discretionary jurisdiction.

The decision below [conformed copy in APPENDIX] speaks for itself in "expressly" construing Article X, Section 14, of the Florida Constitution. Additionally, based upon that construction, the decision below also clearly and "expressly" declares and upholds the validity of the challenged Act [Chapter 88-238, Laws of Florida].

Thus, two avenues for the exercise of the power of discretionary review exist here.[5]

Substantial Reasons Exist Why This Court Should Review the Decision Below

As expressly noted by the district court in its decision:

> . . . few courts have addressed Article X, Section 14, and we find no opinion which has definitively considered the meaning of the phrase "sound actuarial basis." [TAB 1 at 3-4.]

While the district court concluded that the trial judge had acted "properly" when he "*deferred* to the policy choices of the coordinate legislative branch" - it also acknowledged without quarreling with the determination, that the trial judge had so acted after having determined that the unorthodox funding method adopted by the 1988 Legislature did constitute a provision for funding on "an unwise and imprudent basis."[6]

Petitioners submit that it is the job of the courts, not the legislature, to construe the constitution, and that both of the lower courts erred when they deferred to the legislature's determination of the constitutionality of Chapter 88-238, Laws of

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5. Both of the referenced divisions (i) and (ii) of Rule 9.030(a)(2)(A), Fla. R. App. P., draw from the language in Article V, Section 3(b)(3), Constitution of Florida.

6. See TAB 1 at 8 (emphasis added).

Florida. Article X, Section 14 exists as part of the Florida Constitution for just such a reason: to serve as a constraint on the legislature in its enactment of retirement benefit changes.

Because the stakes are so high here, not only in dollar amounts (involving hundreds of millions of dollars in public funds), but also in terms of the precedential value of the decision here,[7] Petitioners respectfully submit that this Court should exercise its power to review the decision below, including the judicial deference to the legislative branch as announced by both of the lower courts.[8]

CONCLUSION

The decision below quite clearly "expressly" construes Article X, Section 14 of the Florida Constitution. Such construction also is the critical factor in the decision below in "expressly" upholding the validity of the 1988 Act challenged in this litigation by the petitioners.

Obviously, petitioners assert that both of the lower courts erred in the construction given to this unique constitutional provision in deference to the legislative branch. Both courts, it is respectfully submitted, have erroneously allowed the prerogative of the 1988 Legislature, in particular, to carry over into the arena (construction of the constitution) reserved to the courts.

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7. Petitioners submit that this decision is critical to the future of the state's public retirement systems and to all of the people of the State of Florida (including both the beneficiaries of the retirement systems and the taxpayers who must foot the bill for future benefit changes). The financial future of Florida's cities and counties also is directly affected. All 67 Florida counties are compulsory members of the FRS; so, each must contribute to the FRS as decreed by the legislature (even if at its 10-mill cap).

8. As former Justice Arthur England and his co-authors noted in their law review article on *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147, 185 (1980):

> By reclassifying review of constitutional constructions as discretionary, the need for any discussion of substantiality has been wholly eliminated. The court, however, can certainly consider the insubstantiality of the issue as a basis to exercise its discretion to deny a request to review a constitutional construction.

As to the particular legislative increases in public employee retirement benefits provided by Chapter 88-238, *both lower courts recognized that the challenged Act funded the cost of the package of increased benefits on an "unwise and imprudent basis."* Neither lower court, however, equated the manner in which the 1988 Legislature provided an altered basis for funding, with funding on an "unsound" basis in the constitutional sense.

Because of the funding approach used in Chapter 88-238, the full and significant implications for taxpayers of the Act and of such judicial deference to it, will not be realized until 1993 and thereafter. Both the integrity of the funding of the Florida Retirement System, and the future construction of the constitutional constraints on the process by which the FRS is funded, are very much at stake here.

Such circumstances warrant the exercise by this Court of its discretionary jurisdiction and its review of the decision below.

Respectfully submitted this 8th day of May, 1991.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing PETITIONERS' BRIEF ON JURISDICTION has been furnished this 8th day of May, 1991, by U.S. mail to each of the persons named below:

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