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IN THE SUPREME COURT
STATE OF FLORIDA

MEMORIAL HOSPITAL-WEST VOLUSIA, INC., a Florida corporation, not-for-profit,

Petitioner,

vs.

NEWS-JOURNAL CORPORATION, a Florida corporation,

Respondent.

CASE NO. 90,835

RESPONDENT NEWS-JOURNAL CORPORATION'S SUPPLEMENTAL ANSWER BRIEF ON THE MERITS

On Review of a Decision of the
Fifth District Court of Appeal

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PRELIMINARY DEFINITIONS

News-Journal. The respondent, News-Journal Corporation, will be referred to as "News-Journal."

Corporation. The petitioner, Memorial Hospital-West Volusia, Inc. will be referred to as "Corporation."

Cites to Briefs. References to the Corporation's Supplemental Brief on the Merits will be as follows *Br*, 1 where the number refers to the page number of the brief cited.

Cites to Appendix. The appendix to this brief is cited as "A1:1", where the first number indicates the item of the appendix and the second indicates the internal page number within the item.

Sunshine Amendment. The provisions of Article I, Section 24, of the Florida Constitution as ratified in November of 1992 and effective on July 1, 1993 are called the Sunshine Amendment of 1992 or Sunshine Amendment.

Public Right of Access. The rights of access to public records and public meetings reserved by the Sunshine Amendment sometimes are referred to collectively as the "public right of access" or the "right of access."

DEFINITIVE INDEX TO APPENDICES

1. The Act. Chapter 98-330 LAWS OF FLORIDA (1998) (creating FLA. STAT., § 395.3036 (Supp. 1998) is called the "Act." It is reproduced at Appendix 1.

2. Halifax Final Judgment. The Final Judgment in *News-Journal Corporation v. Halifax Hospital Medical Center, et al.*, No. 96-31937-CICI, Seventh Judicial Circuit, Volusia County, Florida, entered in chambers at DeLand on November 1, 1996, by the Honorable John J. Doyle, Circuit Judge, is reproduced as Appendix 2 and is referred to in this brief as "*Halifax Final Judgment.*"

3. Halifax Hosp. The decision of the Fifth District Court of Appeals reported as *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So. 2d 433 (Fla. 5th DCA 1997) *rev. granted* Supreme Court Case No. 92,047 is reproduced as Appendix 3 and is sometimes cited as "*Halifax Hosp.*"

4. Senate Staff Review. The report of the staff of the Senate Committee on Rules and Calendar, entitled FLORIDA SENATE, COMMITTEE ON RULES AND CALENDAR, REVIEW OF REQUIREMENTS FOR PUBLIC RECORDS AND PUBLIC MEETINGS BILLS (September 1997) is reproduced as Appendix 4 and referred to hereafter as "SENATE STAFF REVIEW."

5. HB 3585c1. The text of the House Committee on Governmental Operations' committee substitute for HB 3585 as passed by the House of Representatives is reproduced as Appendix 5 and referred to as HB 3585c1.

6. Legislative History of CS/HB 3585. The legislative history of CS/HB 3585 is reproduced as Appendix 6.

7. Senate Staff Analysis of April 3, 1998. The report of the Staff of the Senate Committee on Health Care entitled FLORIDA SENATE, COMMITTEE ON HEALTH CARE, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT of April 3, 1998 is reproduced as Appendix 7 and hereafter referred to as "Senate Staff Analysis of April 3, 1998."

8. House Staff Analysis of March 13, 1998. The report of the Staff of the House Committee on Governmental Operations dated March 13 entitled FLORIDA HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENTAL OPERATIONS, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT of March 13, 1998 is reproduced as Appendix 8 and hereafter referred to as "House Staff Analysis of March 13, 1998."

9. House Staff Analysis of March 6, 1998. The report of the Staff of the House Committee on Governmental Operations dated March 6, 1998, entitled FLORIDA HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENTAL OPERATIONS, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT of March 6,

1998, is reproduced as Appendix 9 and hereafter referred to as House Staff Analysis of March 6, 1998.

10. HB 3585. The text of HB 3585 as originally introduced in the House is reproduced as Appendix 10 and referred to as HB 3585.

STATEMENT OF THE CASE AND OF THE FACTS

News-Journal submits this Supplemental Answer Brief on the Merits pursuant to the Court's order of July 15, 1998, which called for supplemental briefs on the effect, if any, of the adoption of the Act on this case.

SUMMARY OF ARGUMENT

If it is constitutional, the Act may have a profound effect on this case because it was adopted to overrule the decision under review and moot this case. The Court cannot avoid the issues raised by the Act because it must decide this case under the law existing at the time of its decision. Jurisdiction to decide all questions raised by the Act is conferred by the jurisdiction to decide this case.

Though the Court has discretion to remand for reconsideration in light of the Act, News-Journal urges that it first consider whether the Act is facially constitutional under the Sunshine Amendment. It is not. It does not state with particularity any public necessity justifying the exemption, and it grants an exemption that is broader than necessary to meet any necessity that even may be implied in the Act.

Therefore, the Court should hold the Act unconstitutional on its face and set it aside in deciding the pending appeal. If the Court draws from this ineffective legislative action any inference bearing on the merits of the underlying appeal, it should infer that the legislature passed the exemption because it assumed the district court decision was correct and would be affirmed.

I. THE COURT HAS JURISDICTION TO DECIDE ANY ISSUE RAISED BY THE ACT THAT MIGHT AFFECT THE PENDING CASE OR TO REMAND THE CASE FOR CONSIDERATION OF SUCH ISSUES.

The Court must notice and consider the Act because it was adopted to overturn the decision under review and thwart the relief sought here. If the Act is valid and applicable to Corporation, this case is now moot in whole or in part. In order to decide this case, therefore, the Court must address those issues raised by the Act.[1]

This is not a new problem. The Court often finds it necessary to consider the effect of intervening legislation on a pending case. "[A]n appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate decision, and not according to the law prevailing at the time of rendition of the judgment appealed." *Florida East Coast*

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[1]The new law raises three basic questions bearing on its effect on the pending case. First, is the Act unconstitutional on its face for violating the standards of the Sunshine Amendment? This issue is argued below. Second, does Corporation qualify for exemption under the criteria stated in the Act? There is little question of this inasmuch as the Act is tailored to relieve Corporation of the effect of the decision and the record shows all criteria are met and is silent only as to how Corporation complies with Section 155.40(5), which was adopted after this case commenced. Third, is the Act to be given retroactive effect? Although the Act clearly should be confined to prospective effect, *e.g., State Farm Mutual Auto Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995), that alone would not negate its effect on the pending cause. This is a suit for a declaration that the Corporation is subject to the right of access and for supplemental injunctive relief. Even prospectively applied, the Act would interdict that relief as of May 30, 1998, its effective date.

Ry. Co. v. Rouse, 194 So. 2d 260, 262 (Fla. 1966). *Accord, Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783, 787 (Fla. 1985).

Jurisdiction to consider the Act is grounded in the jurisdiction over the case. "Once this Court has jurisdiction [of a case] it may, at its discretion, consider any issue affecting the case." *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986). *Accord, Trushin v. State,* 425 So. 2d 1126, 1129 (Fla. 1982). Therefore, the Court has both the jurisdiction and the duty to notice and consider new legislation that might affect a pending case. *Board of Public Instruction of Orange County v. Budget Commission of Orange County*, 167 So. 2d 305, 307 (Fla. 1964). *See also State v. Hospital District of Hardee County,* 201 So. 2d 69 (Fla. 1967) (withdrawing opinion on rehearing and remanding where, after the Court had decided the case, the legislature adopted new law); *Myers v. Board of Public Assistance of Hillsborough County*, 163 So. 2d 289, 291 (Fla. 1964) (remanding for reconsideration in light of new legislation); *Northeast Polk County Hospital District v. Snively*, 162 So. 2d 657 (Fla. 1964) (same).

These cases establish that the Court must consider the effect of new legislation that might affect the pending case. The Act admittedly has such potential effect because Corporation concedes "it may well seek the benefits of the new statute at some point in the future." *Br. 9.* If so, the exemption would negate any relief this Court might have granted irrespective of the Act, and if the Act were given its full intended effect, any further "[d]iscussion of the points

initially presented to [this Court] would be nothing more than *brutem fulmen.*" *Snively*, 162 So. 2d at 660.

Though the Corporation understandably does not wish to expose the Act to scrutiny, that wish has no bearing on the Court's jurisdiction or responsibility. In *Board of Public Instruction of Orange County*, 167 So. 2d at 307, the Court disregarded the stipulation of *both* parties that a new act be ignored. It said, "We cannot disregard the judicial knowledge which we have as well as the judicial responsibility to recognize the applicability of acts of the Legislature which are presumptively valid." *Id.* Thus it remanded for reconsideration in light of the new law, including consideration of the validity of the act.

II. ALTHOUGH THE COURT HAS DISCRETION TO REMAND FOR RECONSIDERATION IN LIGHT OF THE ACT, NEWS-JOURNAL URGES THAT IT FIRST DETERMINE THE FACIAL CONSTITUTIONALITY OF THE ACT.

Two courses of action are open to the Court under its past practices. It could address the facial constitutional issue at this stage of the proceeding, or it could remand for reconsideration of that and other issues in light of the new legislation. Although the Court would be within its discretion to adopt either course of action, News-Journal respectfully asks the Court to proceed directly to the facial constitutionality issue and remand only if the Act survives facial scrutiny.

There is no doubt that the Court properly may decide for itself the issue of facial constitutionality under the Sunshine Amendment. *Von Stetina*, 474 So. 2d

at 788 ("Having determined that we should apply [the new law] we will proceed to consider its constitutionality . . . ."). *Compare, e.g., Trushin*, 425 So. 2d at 1129 ("The facial validity of a statute, including an assertion that it is infirm because of overbreadth, can be raised for the first time on appeal . . . ."). An appellate decision on facial constitutionality is appropriate because this is a question of law that can be so determined "without benefit of a record or a specific factual scenario." *Department of Revenue v. Florida Home Builders Ass'n,* 564 So. 2d 173, 175 (Fla. 1st DCA 1990) *quoting In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301-2 (Fla. 1987). *Accord, State v. Johnson*, 616 So. 2d 1,3 (Fla. 1993). *Compare Cantor*, 489 So. 2d at 20 (holding new law was unconstitutionally *applied* in the district court).

Three compelling reasons suggest the Court should proceed directly to the facial issue. First, the facial issue is dispositive of all other issues raised by the Act. Unless the Act can withstand facial scrutiny, it could not form a proper jurisdictional basis for proceedings on remand. *Compare Taccariello v. State*, 425 So. 2d 1126 (Fla. 4th DCA 1995) (facially invalid criminal act confers no subject matter jurisdiction to convict of putative crime). To be sure, the Court should not unnecessarily reach a constitutional issue, *e.g., State v. Mozo,* 665 So. 2d 1115, 1117 (Fla. 1995), but the Court must traverse the facial question in reaching a decision to remand. *Taccariello.*

Second, the question of facial constitutionality of the Act is itself a question of great public importance that should be decided without unnecessary delay. This Court has not yet had the opportunity to construe and apply the new standard of the Sunshine Amendment. If the present question were remanded, the trial court still would have no guidance from this Court concerning the facial issue. And, when the case ultimately returns to this Court, the record for deciding the facial issue would be the same as the record before the Court today. Meanwhile, the public interest will have been affected as other hospital districts rely on the Act to their possible detriment. Also, remand would further postpone the time at which, under the guidance of a decision by this Court, the legislature might fashion a valid solution to the genuine problems raised by public access to records and meetings of public hospitals. *Compare, e.g., Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1995) (finding standing for declaratory decree arising from effect of act on "the lives of many Florida residents"); *Advisory Opinion to Governor*, 509 So. 2d at 301 (reaching facial issues due to great public interest involved).

Third, as will be shown, the facial defects of this Act are patent. In the face of a clear violation of the constitutional standard, the Court should be especially reluctant to subject the parties, the lower courts, and the public interest to the expense, inconvenience, and delay of a remand. *C.f. Cantor; Von Stetina.*

III. THE ACT IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT FAILS TO STATE WITH PARTICULARITY A PUBLIC NECESSITY JUSTIFYING THE EXEMPTION.

To be constitutional, an exemption must satisfy a two-pronged test. It must state with particularity a public necessity justifying the exemption, and it must be no broader than necessary to meet this stated necessity. FLA. CONST., art. I, § 24(c).[2] This exemption fails on both counts. It creates an unbounded exemption that could not be justified on any ground, *and* it fails to state a justification for an exemption of any scope whatsoever.

The Act allows any public hospital in Florida to defeat the public right of access by undergoing a simple change in its form of organization. To show the extent of the exemption, consider a hypothetical grounded in this record. Erehwon Hospital District is a special district operating a public hospital under a statutory charter identical to that of the Authority. Solely for the purpose of avoiding the public right of access to records and meetings, the board of Erehwon resolves to transfer the hospital to a nonprofit lessee under Section 155.40. After the board approves a draft charter, the chairman of its volunteer advisory committee acts as incorporator by signing and filing the charter. Then the district and the lessee enter into a lease otherwise meeting the requirements of Section

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[2] *See Halifax Hospital Medical Center v. News-Journal Corp.*, 701 So. 2d 434 (Fla. 5th DCA 1997) *rev. gr.* (Supreme Court Case No. 92,047) [Appendix 3] *affirming Halifax Final Judgment* [Appendix 2] *and* SENATE STAFF REVIEW [Appendix 4]. Oral argument in *Halifax Hosp.* is set for September 2, 1998.

155.40 and providing as follows: (i) district subsidies will be deposited from time to time to the account of the lessee and upon deposit will become the sole property of the lessee, with the requirements of Section 155.40(5) to be satisfied annually; (ii) the lessee may not participate in the decision making process of the district board; (iii) the lessee is not required to comply with open government laws; (iv) the lessor is not entitled to receive funds from the lessor and is not responsible for the lessee's debts.

Under these circumstances, the lessee would qualify for the exemption because "applying the standard codified in this act, the public entity does not retain control over the private entity." Act, § 1(3). But does this standard have any relationship to control?"

None whatsoever. The facts posited are sufficient to apply the exemption without revealing who controls the lessee. Erehwon's lessee would be exempt even if its corporate board served at the pleasure of the district board and even if the district board also reserved the power to approve or veto any motion or resolution approved by the corporate board. For that matter, the lessee would be exempt even if the district board itself served, *ex officio,* as the board of directors of the corporation. This gaping loophole was not an oversight because the

legislature rejected an earlier draft that would have addressed the composition of the governing board.[3]

In short, therefore, the exemption allows any public hospital in Florida to evade the public right of access solely by changing the entity through which it operates from that of a state agency to that of a corporation controlled by the state agency. The public hospital thereby gains exemption for *all* records and *all* meetings of the corporation regardless of the substantive content of the records or discussion in the meetings.

The decisive question is whether the Act justifies such a sweeping exemption. The constitution says the act "shall state with specificity the public necessity justifying the exemption." FLA. CONST., art. I, § 24(c). This Act does not justify *any* exemption.

The statement of public necessity in Section 2 of the Act is wholly devoted to justifying the *clarification* of the law.[4] After reciting that the decision of the Fifth District created uncertainty (Sentences 1-6) and explaining that public hospitals have entered into such leases in the past for the purpose of evading

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[3]As originally passed in the lower chamber, HB 3585c1 disqualified any corporation if a majority of its board overlapped with that of the district lessor. The Senate amended this bill to delete that condition. *See* HB 3585c1 (committee substitute for HB 3585 as adopted in House) [Appendix 5] and legislative history [Appendix 6].

[4]Please see Appendix 1 (enrolled act). For convenience of reference, News-Journal has numbered the sentences of Section 2 of the Act, which begins at the bottom of page 2 of Appendix 1.

several otherwise applicable statutory and constitutional requirements (Sentences 7-9), the statement finds there is a need for "*a defined and, therefore, predictable statewide standard.*" (Sentence 10) (e.s.). This is needed in order to attract "private corporation[s] willing to enter into a lease." Otherwise, the public entities may be forced to chose among the alternatives of closing the hospital, selling the hospital, or raising taxes. (Sentence 11). Thus, the statement continues, the legislature finds "*it is a public necessity . . . to clarify [the law].*" (Sentence 12) (e.s.).

This does not justify the substance of the exemption. It only justifies drawing a line without justifying where the line is drawn. The constitution requires more.

The act must articulate a specific statement of a *public necessity justifying the exemption.* The Sunshine Amendment requires the legislature to "justif[y the exemption] to the people who adopted the Constitution." *Halifax Hosp.*, 701 So. 2d at 436. A3:3. This affirms and is consistent with both the *Halifax Final Judgment* and the SENATE STAFF REVIEW, which agree that the stated "necessity must logically or rationally relate to the exemption in such manner as to justify the creation of an exception to the constitutional right." *Halifax Final Judgment* A2: 7-8; SENATE STAFF REVIEW A4: 2. The statement must "explain *why* the exemption is necessary." SENATE STAFF REVIEW A4: 2. The stated "necessity must logically or rationally relate to the exemption in such manner as to justify

the creation of an exception to the constitutional right." *Halifax Final Judgment* A2: 8-9, SENATE STAFF REVIEW A4: 2.

The Act fails this test. It does not explain why the public hospitals of the state should be granted a blanket exemption conditioned only on the mere change of form of organization. The finding that a bright line is needed does not justify drawing the line in any one place as opposed to any other place. Therefore, for failure to state with particularity a public necessity justifying the exemption, the act should be stricken as unconstitutional on its face.

IV. THE ACT IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS BROADER THAN NECESSARY TO MEET ANY PUBLIC NECESSITY CONCEIVABLY IMPLIED IN THE ACT.

Although the Act offers no valid statement of particulars justifying the exemption, the statement implies certain rationales. Without conceding that such implication satisfies the requirement of particularity, it can be shown that the exemption is substantially broader than necessary to accomplish any such implied justification.

Competitive Disadvantage. In passing, the statement says that one reason that historically motivated public hospitals to reorganize under Section 155.40 was their desire to avoid "competitive disadvantage placed on these facilities vis a vis their private competitors resulting from their required compliance with the state's public records and public meetings laws." (Sentence 7, clause (b)).

If it were imagined that this were the statement of justification, the exemption would be substantially broader than necessary to meet that necessity because it creates a blanket exemption of *all* records and *all* meetings and is not limited to records and meetings whose content is competitively sensitive. The Senate staff noted this flaw when it stated that because the exemptions are not limited to competitively sensitive information, "it could be argued that the exemptions are overly broad and that more narrowly tailored exemptions would be appropriate." Senate Staff Analysis of April 3, 1998. A7:12. *Compare Halifax Hosp.*, 701 So. 2d at 436 [A3] *aff'ing Halifax Final Judgment* A2:11-12.

Reliance on Legislative "Encouragement". Without going so far as to claim that the legislature intended in 1982 to exempt all Section 155.40 lessees from the public right of access, the statement implies that by approving and encouraging such leases the legislature had induced the hospitals to rely on the nonexistent exemption. Sentence 8. This implies that the justification for the exemption rests vaguely on the desire to grandfather those corporations out of a sense of "fair play."

If this were assumed to be the justification, the exemption would be substantially broader than necessary because it applies not only to corporations that previously relied on legislative encouragement but also to those which did not. The exemption applies to both "existing leases and *future* leases of public

hospitals and other health care facilities." Act, § 4 (e.s). The concept of reliance does not justify the prospective grant of a blanket exemption.

Finding a Willing Private Corporation. The statement suggests that through Section 155.40 leases, public hospitals have attracted private capital investments (Sentence 9) and that in the absence of a bright line rule, "public entities may find it difficult, if not impossible, to find a private corporation that is willing to enter into a lease to operate the public hospital . . ." (Sentence 10). This implies that the purpose of the exemption is to facilitate arm's length transactions with independently capitalized private corporations.

Again, the exemption is broader than necessary to meet this implied necessity because it would apply to any not for profit corporation regardless of whether the corporation brought new capital to the transaction. In fact, as the Erehwon example shows, the exemption applies even if the lessee is a mere *alter ego* of the public body fully subsidized by, and wholly dependent on, public capital. The benefits of the exemption are not limited to transactions that supply new capital and are not related to the business terms or financial implications of the lease transaction. Therefore, the exemption sweeps more broadly than this implied purpose would require.

Cumulative. Because it exempts all records and all meetings without regard to the content of the information suppressed, the exemption is even

broader than necessary to meet these implied needs, whether considered separately or cumulatively.

V. THE COURT SHOULD INFER THAT THE LEGISLATURE ATTEMPTED TO CREATE THIS EXEMPTION BECAUSE IT CONCLUDED THAT SUCH ENTITIES WERE SUBJECT TO THE PUBLIC RIGHT OF ACCESS UNDER EXISTING LAW.

The Corporation asks this Court to infer from the adoption of this Act that public policy compels reversal in this case. That argument overlooks the cases holding this Court will not judicially create exemptions on policy grounds. *See* Respondent's Brief on the Merits, Point I.B., pp. 18-21. Moreover, it wholly misconstrues the action of the legislature.

The only valid inference to be drawn from the passage of this act is that drawn by the House staff that "**[t]he committee substitute apparently acknowledges the fact that private entities leasing public hospitals are subject to the public records and public meetings laws and creates an exemption . . .**" *See* House Staff Analysis of March 13, 1998 (e.s.). A8:10. *Compare* HB 3585 [A:10] *with* HB 3585c1 [A:5].

While it cannot be doubted that the present legislature wishes to adopt an exemption for these hospital corporations, it cannot be denied that *only* the legislature can create such an exemption. This is all the more reason for the Court to give early guidance concerning the constitutional standards under which the legislature may tailor a valid exemption and finally resolve this issue.

CONCLUSION

For the foregoing reasons, News-Journal respectfully requests that this Court reach and decide the issue of the facial constitutionality of the Act and that it hold the same to be facially unconstitutional and void. In the alternative, News-Journal requests that the Court remand this case for consideration of this and all other issues pertinent to this cause that are raised by the Act.

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the attached service list this 24th day of August, 1998.

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