IN THE SUPREME COURT
STATE OF FLORIDA

HALIFAX HOSPITAL MEDICAL CENTER,

Appellant,

vs.

NEWS-JOURNAL CORPORATION, etc.,

Appellees.

Case No.: 92,047

District Court of Appeal
Fifth District Case No. 96-3115

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE TIMES PUBLISHING COMPANY, d/b/a THE ST. PETERSBURG TIMES

George K. Rahdert
FBN: 213365
Patricia Fields Anderson
FBN: 352871
RAHDERT, ANDERSON, McGOWAN
& STEELE, P.A.
535 Central Avenue
St. Petersburg, FL 33701
Telephone. (813) 823-4191
Fax (813) 823-6189
Attorneys for Times Publishing Company

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Constitution

STATEMENT OF INTEREST OF THE AMICUS

Amicus Times Publishing Company publishes the *St. Petersburg Times*, a newspaper of general circulation on Florida's West Coast, and *Florida Trend*, a business magazine of state-wide circulation (collectively "the Times"). Both of these publications report on the health care industry, especially Florida's public hospitals. To that end, the Times relies heavily on access to records and meetings pursuant to Florida's Public Records Act, Ch. 119, *Fla. Stat.*, and the state's Sunshine Act, Ch. 286, *Fla. Stat.* Thus, any court rulings that expand or restrict the Times' general rights of access under those statutes or, as here, any statute that provides an exemption to such access, is of paramount and compelling concern to the Times.

Apart from that generalized interest, the Times has a very specific interest in this case, stemming from the lease of Tampa General Hospital, a public facility, to Florida Health Sciences Center, Inc., a private not-for-profit entity which has appeared in this case as an amicus in support of the Petitioner. The lease there was worked out in secret, pursuant to the statutory exemption to the Sunshine Act at issue in this case and despite rather sustained public opposition to both the secrecy and the wisdom of the lease arrangement.

STATEMENT OF THE CASE AND FACTS

The Times adopts the Statement of the Case and Facts set forth by the parties.

SUMMARY OF ARGUMENT

Assuming this Court rules the subject statutory exemption to public access to be unconstitutional, which is an issue addressed directly by the parties, the Court should find the statute to be void *ab initio*. Florida law has long held unconstitutional statutes to be nullities and, absent certain exceptional considerations not present here, a ruling of unconstitutionality has retroactive effect to the date of enactment This principle of constitutional law remains the general rule in Florida.

The exceptions fall roughly into two categories. If retroactivity would result in calculable great harm or confusion or hardship, a court's ruling of unconstitutionality may be permitted to be prospective in nature only. Likewise, if the statute is unconstitutional because of form, rather than an improper exercise of legislative power, the court may depart from the general rule.

Here, any harm flowing to the hospitals from their boards' meeting in secret is purely speculative. It is the public, not the boards, that has been harmed, as these boards shielded their negotiations from the public eye. Furthermore, as to at least one of the amici, secret meetings occurred even after the trial court and the Fifth DCA found the exemption to be unconstitutional. Similarly, because the Florida Constitution gives only limited power to the legislature to enact exemptions, this particular exemption on its face cannot be said to be unconstitutional merely in form.

This Court should adhere to the general rule and hold this exemption to be void *ab initio*.

ARGUMENT

THIS COURT SHOULD RULE THAT SECTION 395.3035(4) IS VOID *AB INITIO*

In its brief, amicus Florida Health Sciences Center, Inc. ("Hillsborough") urges this Court to make prospective any holding that section 395.3035(4) is unconstitutional. The relief Hillsborough seeks is not available. A Court's power to grant relief prospective in nature only is limited to cases where retrospective application of the Court's ruling either would cause an inequitable and harsh result, or when prospective relief would offend the principle that judicial decisions should be final. Neither of these exceptions applies here. Equally unavailing is the rule that when the deficiency of a statute is based on its form, as opposed to the legislature's power to enact a statute, the court may prospectively apply its ruling.

Long-settled Florida law provides the general rule:

> Validity or invalidity relate to the enactment of a statute under the existing organic law and not to a subsequent date. The courts have no power to make a statute inoperative only from the date of an adjudicated invalidity, because the courts merely adjudge that a statute conflicts with organic law, and the Constitution then operates to make the statute void from its enactment, the courts having no power to control the operation of the Constitution.

State ex rel. Nuveen v. Greer, 88 Fla. 249, 264 102 So. 739, 745 (Fla. 1924)(on rehearing). Over the years, however, exceptions to this rule have been permitted when retroactivity would cause inequitable and harsh results. *See, e.g., Martinez v. Scanlan,*

592 So. 2d. 1167, 1174-75 (Fla. 1991) (recognizing substantial impact on workers' compensation system, if applied retroactively; citing *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897 (1969), for proposition that inequities must be substantial); *City of Miami v. Bell,* 634 So.2d 163 (Fla. 1994) ("[h]olding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations"); *ITT Community Development Corp. v. Seay*, 347 So. 2d 1024, 1029 (Fla. 1977) (not wanting to affect in any way title to any property previously sold or any valuation previously determined pursuant to unconstitutional statute); *Interlachen Lakes Estates, inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1973) (persons -- not government bodies -- relying on statute did so assuming it to be valid); *Gulesian v. Dade Cty. School Board*, 281 So. 2d 325, 326-327 (Fla. 1973) (imposing $7.3 million refund to county taxpayers would impose intolerable burden and complicate budgetary problems and cause immense administrative difficulties compared to modest refund each taxpayer would actually receive); *Deseret Ranches of Florida, Inc. v. St. Johns River Water Management Dist.*, 406 So.2d. 1132 (Fla. 5th DCA 1981), *aff'd in part and rev'd in part on other grounds,* 421 So.2d 1067 (Fla. 1982) (in taxpayer refund case, court applied ruling prospectively because district acted in good faith reliance on statute and merely did what statute *mandated*). *But see Sigmund v. Elder,* 631 So.2d 329 (Fla. 1st DCA 1994) (invalidating will executed in contravention of Constitution's homestead provisions).

Additionally, exceptions to the rule have been permitted if the court is concerned with the preservation of the finality of judgments. *See, e.g., Aldana v. Holub*, 381 So. 2d

231 (Fla. 1980) (reasoning implied); *State v. Barquest*, 262 2d 431 (Fla. 1972) (those previously convicted whose time for review by appeal from adjudication of guilt has passed have been *finally* determined); *Franklin v. State*, 257 So. 2d 21 (1971) (reasoning implied).

Here, no substantial hardship will occur, and no final judgment need be preserved.

Hillsborough claims that "if strategic plans must be discussed publicly..[s]uch disclosure would threaten the public hospitals' broad, long-term strategic plans, and it *could* result in the irretrievable loss of potential strategic options under consideration to the competition" and "*could* result in drastic financial consequences to public hospitals..." (Hills. Br. at 7)(emphasis supplied).

According to Hillsborough, such disclosures would enable the private competition either to usurp such strategic options for themselves or to take action to thwart the public hospital's ability to capitalize on those strategic opportunities. At the very least, the public hospitals' strategic plans and options would have been revealed to their private competitors, creating precisely the unfair advantage -- the unlevel playing field -- that the Legislature sought to eradicate when it granted the exemption. *Id.*

Hillsborough's mere speculation -- with no record before this Court to support such speculation -- does not militate in favor of prospective-only application of this Court's ruling, because speculation will not support a finding of substantial irreparable harm. In all cases cited above, substantial harm in fact was present. Harm was found where clear evidence showed that tremendous financial costs in fact would be incurred by

the government entity and, thereafter, the taxpayers, or property rights would be affected.

As the Second District explained in *New-Press Pub. Co. v. Gadd*, 388 So. 2d 276 (Fla. 2d DCA 1980), "a court is not free to consider public policy questions regarding the ... damage to an individual or institution resulting from such disclosure." Therefore, any *alleged* harm *potentially* caused by disclosure of what transpired during meetings held pursuant to section 395.3035(4) should be irrelevant to this Court's consideration of applying its ruling retroactively. Here, no final judgment is at risk; no money must be refunded by the government; no governmental services must be reallocated; no taxpayers will suffer future tax burdens, and no citizen has relied on the statute to his or her financial detriment.

This Court also should reject any argument that the "form over power" principle supports this Court's prospective application of its ruling. This principle provides that an "enactment of a statute is void ab initio if it violates a command or prohibition express or implied of the Constitution, while if deficiency because of form as distinguished from the power there may be de facto jurisdiction to protect an organic right created 'before the illegality of enactment is adjudged.'" *McCormick v. Bounetheau*, 190 So. 882, 884 (Fla. 1939). De facto authority to apply a ruling prospectively is a creature of the courts, *id.* at 884, and it arises when the form of enactment, not the power to enact, is violated.

Here there was no violation of form; it was a violation of power. The *power* to enact an exemption to the guarantee of Article I, Section 24, is narrowly circumscribed by the Constitution. The legislature must articulate the public necessity for the exemption

and then must narrowly tailor the exemption to meet this necessity. Unlike any other right granted under Florida's Constitution, Article I, Section 24 articulates not only what the right is but also the limited power to infringe upon the right.

Furthermore, in the two cases where a "form over power" principle was applied, the courts also considered the inequities that would arise from in retroactive application. *See Martinez v. Scanlan*, 582 So. 2d at 1174-75 and cases cited therein for the proposition that "substantial inequitable results" would occur if applied retroactively. Inequities, in order to be considered, must be real and substantial. Substantial inequities are not present in the circumstance speculated upon by Hillsborough. *See also Florida Elks Children's Hospital, v. Stanley*, 610 So.2d 538 (Fla. 5th DCA 1993), *citing Shriners Hospitals for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990)(state's mortmain statute void *ab initio* as unconstitutional exercise of legislative power).

Finally, Hillsborough requests this Court to bear in mind the principle that legislative acts are presumed constitutional until invalidated by a final appellate court. Although this principle may be true, government entities stand forewarned. Once a court, any court, finds a statute unconstitutional, government entities continuing to act pursuant to the statute do so at their own risk. *Scanlan,* 582 So. 2d at 1175 n.7 (noting distinction made by united States Supreme Court in government actions taken after lower court's declaration of statutory unconstitutionality).

Hillsborough argues that good faith reliance alone on the validity of the subject statute should save those hospital boards that have been meeting in secret. "Any meetings

that might have been conducted by the governing boards of other public hospitals in Florida in reliance on the exemption were conducted in good faith, based upon the Legislature's presumptively constitutional grant of an exemption specifically for that purpose." (Hillsborough Br. at 5).

As to Hillsborough itself, no such claim can be made, *at least* from the date of the trial court's opinion, of which Hillsborough was aware. See Exh. A. Having been on notice of the doubtful constitutionality of the exemption and having chosen to proceed in secret anyway even in the face of the Fifth DCA's ruling -- as Hillsborough did -- strips Hillsborough and any other similarly-situated hospitals from claiming good faith reliance before this Court.

The venerable *Nuveen* case offers some wisdom on this very point. In answering the argument that bondholders relied in good faith on the validity of the bonds, this Court said:

> ...[B]ecause all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the Constitution, and also that should a conflict between a statute and any express or implied provision of the Constitution be duly adjudged, the Constitution by its own superior force and authority would render the statute invalid *from its enactment*, and further, that the courts have no power to control the effect of the Constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the Constitution.

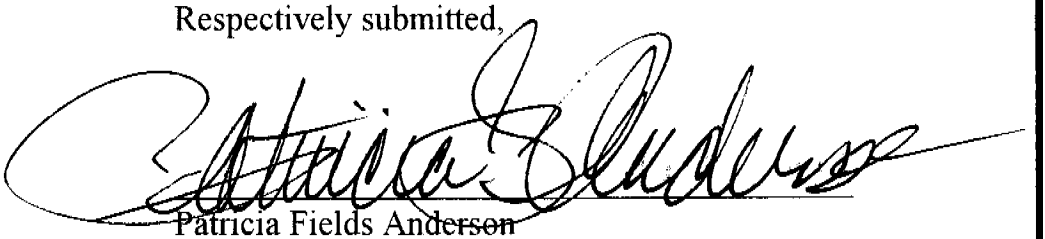
Noveen, supra, 88 Fla. at 264-65, 102 So. at 745 (emphasis supplied).[1]/

[1]/ The *Nuveen* Court did not leave the bondholders without remedy and held they could sue the City for the return of the price of the bonds plus interest. They simply could not compel the City to pay off the invalid bonds themselves.

CONCLUSION

This Court for the reasons above stated should affirm the Fifth DCA and rule that section 395.3035(4) is void *ab initio*.

Respectively submitted,



Patricia Fields Anderson
FBN: 352871
George K. Rahdert
FBN: 213365
RAHDERT, ANDERSON, McGOWAN
& STEELE, P.A.
535 Central Avenue
St. Petersburg, FL 33701
(813) 823-4191
Attorneys for Times publishing Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by regular U.S. Mail this 10th day of March, 1998, to the following:

William A. Bell, Esquire
Attorneys for Florida
Hospital Association
120 South Monroe Street
Tallahassee, FL 32302

Neil H. Butler, Esquire
Butler & Long
322 Beard Street
Tallahassee, FL 32303

G. Robertson Dilg, Esquire
Co-Counsel for Appellant
Gray, Harrison & Robinson, P.A.
1200 Southeast Bank Building,
Suite 1200 Street
201 East Pine Street
Orlando, FL 32802

Richard A. Harrison, Esquire
Tabatha A. Liebert, Esquire
Allen, Dell, Frank 7 Trinkle, P.A.
101 E. Kennedy Boulevard, Suite 1240
Post Office Box 2111
Tampa, FL 33602

Harold C. Hubka, Esquire
Attorneys for Appellant
Black, Crotty, Sims, Hubka
Burnett, Birsch & Samuels
501 North Grandview Avenue
Post Office Drawer 265669
Daytona Beach, FL 32126-5669

Harry A. Jones, Esquire
Attorneys for North Brevard
County Hospital District
(d/b/a Parrish Medical Center)
Post Office Box 6447
Titusville, FL 32782-6447

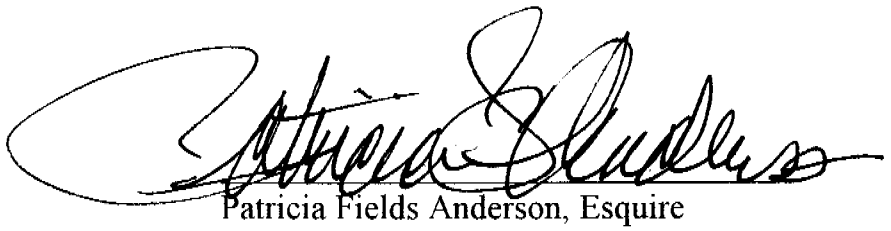
Jonathan D. Kaney, Jr., Esquire
Jonathan D. Kaney, III, Esquire
Attorneys for Appellee
Cob, Cole & Bell
Post Office Box 2491
Daytona Beach, FL 32115-2491

Jack A. Kirschenbaum, Esquire
Co-Counsel for Appellant
Gray, Harrison, Robinson
Kirschenbaum & Peeples
1800 West Hibiscus Boulevard
Suite 138
Melbourne, FL 32901

George N. Meros, Jr., Esquire
Rumberger, Kirk & Caldwell, P.A.
106 East College Avenue
Suite 700
Post Office Box 10507
Tallahassee, FL 32302

Robert Rivas, Esquire
Rivas & Rivas
Post Office Box 2177
Boca Raton, FL 33427-2177

David J. Davidson, Esquire
Halifax Community Health System
30 N. Clyde Morris Boulevard
Daytona Beach, FL 32114



Patricia Fields Anderson, Esquire