ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

HALIFAX HOSPITAL MEDICAL CENTER,
an independent taxing district
of the State of Florida

Petitioner,

CASE NO. 92,047

vs.

NEWS-JOURNAL CORPORATION,
a Florida corporation,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Appeal from the
Fifth District Court of Appeal

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PRELIMINARY DEFINITIONS

News-Journal. News-Journal Corporation was the plaintiff below and is the appellee here. It is the publisher of *The News-Journal*, a daily newspaper of general circulation in Volusia and Flagler Counties, as well as numerous other publications. It will be referred to as "News-Journal."

Halifax. Halifax Hospital Medical Center, an independent taxing district of the State of Florida, was a co-defendant below and is the appellant here. It will be referred to as "Halifax."

Southeast Volusia. South East Volusia Hospital District, also an independent taxing district of the State of Florida, was a co-defendant below. It did not appeal the final judgment and is not a party to this appeal. It will be referred to herein as "South East Volusia."

Cites to Briefs. Reference to the Appellant's Initial Brief of Halifax will be made in this form: *Hal. Br.* at 1, where the number refers to the page of the brief cited. The amicus brief of Florida Health Sciences Center, Inc. will be cited in this form: *FHSC Br.* at 1. The amicus brief of North Broward Hospital District will be cited in this form: *North Broward Br.* at 1.

Record and Appendix Cites. The record on appeal is cited as "R" except that references to the transcript of the trial, which is separately bound and paginated in the Index to Record on Appeal, will be made as follows: TR 1,

where the number refers to the internal page in the transcript to which citation is made. The Appendix to the Appellee's Answer Brief on the Merits 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. When the matter cited in the Appendix also appears in the record, the parallel citation to the record is given.

Sunshine Amendment. The provisions of Article I, Section 24 of the Florida Constitution (ratified in November of 1992 and effective July 1, 1993) are called the Sunshine Amendment of 1992, Sunshine Amendment, or the amendment. The rights of access to public records and public meetings reserved by the Sunshine Amendment are generally referred to as the "public right of access" or the "right of access" throughout this brief.

Exemption. The provisions of Section 395.3035(4), Florida Statutes, as amended by Chapter 95-199, LAWS OF FLORIDA (1995) are referred to generally as "the exemption." The exemption, which was held facially unconstitutional below, provides:

> Those portions of a governing board meeting at which the written strategic plans, including written plans for marketing its services, are discussed or reported on.

Ch. 95-199, LAWS OF FLORIDA, §1 (codified at FLA. STAT., § 395.3035(4)) (A6: 4).

Final Judgment. The Final Judgment under review is *News-Journal Corporation v. Halifax Hospital Medical Center*, No. 96-31937-CICI, Seventh Judicial Circuit, Volusia County, entered in chambers at DeLand on November 1, 1996, by the Honorable John J. Doyle, Circuit Judge. The judgment is reproduced in the Appendix as A1 and is cited in this brief as "Final Judgment." It is at R 422-R 436.

Halifax Hosp. The decision of the Fifth District Court of Appeals is reported as *Halifax Hospital Medical Center v. News-Journal Corporation*, 701 So. 2d 434 (Fla. 5th DCA 1997). The decision, by Judge Charles M. Harris for a panel that included Judge Warren H. Cobb and Associate Judge Don F. Briggs of Lake County, was rendered on November 14, 1997. It is reproduced in the Appendix as A2 and will be cited in this brief as *Halifax Hosp.*

Joint Meetings. That series of joint meetings between the boards of Halifax and Southeast Volusia and among members of a joint task force created by these boards and held in violation of the Sunshine law by the Final Judgment, is referred to as "joint meetings" in this brief. *See* TR 26-36 (testimony of Halifax CEO describing joint meetings).

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case as presented by Halifax is acceptable and sufficient as a statement of both case and facts right up to the point in the first full paragraph of page 6 where a sentence begins with "Apparently unwilling. . ." That sentence and what follows is argument with which News-Journal obviously disagrees. Similarly, the Statement of the Facts by Halifax is entirely devoted to argument regarding legislative history, has no relevance to the adjudicative facts of the case and is not accepted by News-Journal.

STANDARD OF REVIEW ON APPEAL

The Court here reviews the Final Judgment, which was rendered after a plenary bench trial, in which the court made relevant findings of fact and concluded that the exemption is unconstitutional on its face under the Sunshine Amendment. The conclusion is subject to review *de novo* whereas the findings of fact upon which the court relied to reach that conclusion are reviewable under the substantial and competent evidence standard. *Glendale Fed. Sav. & Loan Assn v. State Dept. of Ins.*, 485 So. 2d 1321 (Fla. 1st DCA) *rev. den.* 494 So. 2d 1150 (Fla. 1986). Ultimately, the burden falls on Halifax to show that the judgment of the lower court cannot be sustained on any ground. FLA. JUR. 2D, APPELLATE REVIEW, § 313.

SUMMARY OF ARGUMENT

The Sunshine Amendment elevated the traditional right of public access to constitutional stature to guarantee the right against the erosive effect of unjustified exemptions. To enact a valid exemption, the legislature "shall state with specificity the public necessity justifying the exemption and shall [tailor the exemption] no broader than necessary to meet the stated purpose of the law." FLA. CONST., art. I, § 24(c).

The legislature is thus required to follow a standard of constitutional balancing in the inception of exemptions, and the Court is called to enforce this standard by reviewing exemptions for facial compliance. In this case of first impression, the Court should adopt a doctrine of strict construction of the clear textual standard.

The exemption is facially unconstitutional as broader than necessary to meet its stated necessity. The stated public necessity is to protect public hospitals from the competitive harm that results from disclosure of critical confidential information regarding strategic plans, but the exemption allows categorical closure of all discussion of strategic plans. Because it is not tailored to exempt only the harmful discussion of critical confidential information regarding strategic plans, it is unnecessarily broad in scope. Because it arbitrarily suppresses the

records of closed discussions for three years even though any reason for confidentiality may sooner expire, it is unnecessarily broad in duration.

Although Halifax now wants to reconstruct the stated purpose to match the breadth of the exemption, the purpose absolutely cannot be construed as Halifax contends. And even if it were so construed, the statement of purpose itself would then be constitutionally infirm as lacking specificity and a justifying rationale.

The doctrine of judicial narrowing should not save an overly broad exemption. This would violate the express requirement that the legislature itself narrowly tailor the exemption in its inception, would frustrate the reform intended by the Sunshine Amendment, and would implicate serious doubts of institutional capacity to act. In any event, this exemption could not be judicially tailored because the Court cannot fashion from the act a substantive definition of what the legislature may have intended to treat as critical confidential information.

Because the case for a declaration as to the facial constitutional issue was properly tried to the court, the lower courts correctly reached and decided that issue. In any event, Halifax cannot show that on any ground the Final Judgment reached the wrong result.

ARGUMENT

I. THE COURT SHOULD ADOPT A DOCTRINE OF STRICT ENFORCEMENT OF THE CONSTITUTIONAL STANDARD FOR VALIDITY OF EXEMPTIONS FROM THE PUBLIC RIGHT OF ACCESS.

In the Sunshine Amendment of 1992, the people reserved an express right of access to public records and meetings and granted the legislature a limited power to balance this right against competing public necessities. The issue is whether the legislature exceeded the limits of this power when it adopted the exemption in question. Under the textual standard in the amendment, the Court must determine whether the act states with specificity a public necessity justifying the exemption and tailors the exemption no broader than necessary to meet that necessity. FLA. CONST., art. I, § 24(c).

This pragmatic standard requires the legislature to practice deliberate constitutional balancing in the inception of exemptions. In this case of first impression, the Court should establish a doctrine of strict enforcement of the plain language of the textual standard.[1]

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[1] *Compare Winfield v. Division of Pari-Mutuel Wagering,* 477 So. 2d 544, 547 (Fla. 1985) ("Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment").

A. The express language of the Sunshine Amendment strictly limits the legislative power to create exemptions from the self-executing right of access.

The Sunshine Amendment reserves to the people of Florida an express and self-executing right of access to public records and meetings. The amendment declares that "[e]very person has the right to inspect or copy any public record [and] all meetings of any collegial public body . . . shall be open and noticed to the public." FLA. CONST., art. I, § 24(a) & (b). The purpose of the amendment is to strengthen and protect the traditional right of access by raising it to constitutional stature.[2]

The amendment contains no exemptions. Instead it grants the legislature a limited power to create exemptions in general laws pertaining solely to the right of access. This power is qualified by the provision "that such law shall state with specificity the public necessity which justifies the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." FLA. CONST., art. I, § 24(c).

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[2]For the history and purpose of the Sunshine Amendment, see the Brief Amicus Curiae of the First Amendment Foundation, The Florida Society of Newspaper Editors, *The Palm Beach Post*, *Florida TODAY*, *The Orlando Sentinel* and *The Sun-Sentinel* (hereafter cited as *First Amendment Foundation Br.*). *See also* 96-32, *Op Fla. Atty Gen.* (Sunshine Amendment elevated the traditional right of access to the constitution).

This uniquely modern constitutional text thus performs two functions. It creates a constitutional right, and it defines the standard by which the right may be balanced against public necessity. Unlike any other right enumerated in the constitution, this text confronts the pragmatic reality that no right is absolute and forthrightly addresses the means and manner by which it may be subordinated to competing governmental interests. *Compare Shaktman v. State*, 553 So. 2d 148, 151 (Fla. 1989) ("Like all of our other fundamental rights, the fundamental right of privacy is not absolute").

The limited power to balance the right against competing public necessity takes nothing from the stature of this enumerated right. On the contrary, the right places a strong constraint on the formerly unhindered legislative power to override the right of access for any reason. The amendment abolished that inherent power and meted back in its stead an enumerated power restricted by the proviso attached to the grant. By force of the Sunshine Amendment, therefore, the only power of the legislature to restrict public access to records and meetings of government is this limited power to balance competing public necessities against the constitutional right.[3]

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[3]Florida's textural standard is unique. Although a few other states have constitutional provisions dealing with access to governmental records and meetings, most allow the legislature an unrestricted power to override. *E.g.* LA. CONST. art. XII, § 3 (meetings open "except in cases established by law"); N.H. CONST., part I, art. 8 (right to know "shall not be unreasonably restricted"); N.D.

B. The explicit limitations of legislative power must be enforced according to their terms.

The proviso uses strong words. To enact a valid exemption, the legislature *shall* state with *specificity* a *public necessity justifying* the exemption and *shall* tailor the exemption *no broader than necessary* to meet that necessity. These words are neither ambiguous nor deferential but clear, compelling, and constraining.

The Court should energetically enforce this strong standard because "each provision [of the constitution] must be given effect, according to its plain and ordinary meaning." *In re Advisory Opinion to the Governor,* 374 So. 2d 959, 964 (Fla. 1979). *Accord Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912) ("essential provisions of a Constitution are to be regarded as mandatory").

The Court's duty to enforce the standard derives from its fundamental duty to uphold the constitution. When the Court finds "that . . . an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary." *Holley v. Adams,* 238 So. 2d 401, 405 (Fla. 1970). *Accord State v. Butler,* 69 So.

CONST., art. XI, § 5 & 6 (meetings and records open "[u]nless otherwise provided by law"). *But see* MONT. CONST., art II, § 9 (meetings and records open "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure").

771, 776 (Fla. 1915) (Court must "'support, protect and defend the Constitution,' by giving effect to its provisions, even if in doing so [a] statute is held to be inoperative").

The forceful language of the constitution leaves no room to tolerate legislative acts that cannot withstand close scrutiny under the standard. The stringent language through which the people have expressed themselves "must be enforced as written." *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n,* 489 So. 2d 1118, 1119 (Fla. 1986). *Accord Florida League of Cities v. Smith,* 607 So. 2d 397, 400 (Fla. 1992) ("[w]hen constitutional language is precise, its exact letter must be enforced").

The Halifax argument that the Court should adopt a highly deferential standard based on the doctrine of separation of powers should be rejected. The Court must enforce constitutional limitations upon the powers of the other branches of the government. *Locke v. Hawkes,* 595 So. 2d 32, 36 (Fla. 1992) (Court does "not violate the separation of powers doctrine when [it] construe[s] a statute in a manner that adversely affects either the executive or the legislative branch"); *State v. Florida Police Benev. Ass'n, Inc.,* 580 So. 2d 619, 620 (Fla. 1st DCA 1991) ("No separation of powers concern precludes the judicial branch from addressing the constitutionality of the acts of the other branches").

Similarly, the Halifax argument that the power to create exemptions should be accorded "equal constitutional dignity" with the right of access because both are created in the same textual passage mistakes not only the essence but also the structure of the amendment. The amendment creates a self-executing right of access in absolute terms and then grants the legislature only a limited power to balance the right against competing public necessities. There is no equality between a basic constitutional right and the limited power of the state to balance the right against competing interests. The textual standard follows the structure of basic rights under American constitutional law.[4]

The power to create exemptions now deraigns exclusively from the express grant and is limited by the proviso attached directly to that grant. This proviso restrains the generality of the statement that the "legislature may provide by general law for the exemption [of records and meetings]." FLA. CONST., art. I,

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[4]*See Traylor v. State,* 596 So. 2d 957, 963 (Fla. 1992) *quoting Bizzell v. State,* 71 So. 2d 735, 737 (Fla. 1954) ("These rights [enumerated in the Declaration of Rights] curtail and restrain the power of the State.") *See also Krischer v. McIver,* 697 So. 2d 97, 112-13 (Fla. 1997) (Kogan, C.J., dissenting) (recounting historical development of the countermajoritarian structure of basic rights under American constitutional law; rights reserved in constitution are "put beyond the ordinary political process").

§ 24(c).[5] By enforcing the proviso, the Court will preserve and protect the right of access and fulfill the intent of the people.

An amicus urges that acts creating exemptions be tested under the rational basis standard, but the text sets a much higher standard.[6] Whereas the rational basis standard presumes the legislature has a valid objective, the textual standard requires the legislature to state a particular objective with specificity. Whereas the rational basis standard tolerates merely a reasonable relationship between the act and the objective, the textual standard requires narrow tailoring of the exemption to the stated necessity. *Compare Lane v. Chiles,* 698 So. 2d 260, 262 (Fla. 1997).

C. The structure and substance of the right is that of a fundamental right.

Although the textual standard of review is unique, the right enumerated in this new article of the Declaration of Rights must be respected as a fundamental right. The structure of the right makes this clear. The constitution reserves to the people a self-executing right against government, grants only a limited power

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[5]*See State ex rel. Florida Jai Alai, Inc. v. State Racing Commission,* 112 So. 2d 825, 829 (Fla. 1959) *citing Minis v. United States,* 40 U.S. 423, 445 (1841) ("[T]he purpose of a proviso is to either except something from the enacting clause or to qualify or restrain its generality. . . . ").

[6]*See North Broward* at 9 (legislature need only have "a reasonable basis to believe that the exemption . . . would achieve a legitimate legislative purpose"). This brief does not argue or cite the textual standard of the constitution.

to the legislature to balance this right against competing public necessities, places the onus of justifying such abridgement directly upon the legislature, and requires that the abridgement be no broader than necessary to meet the competing necessity. This is the structure of a fundamental right.[7]

In essence as well as structure, moreover, the right of access is a fundamental right. It is expressly enumerated in the Declaration of Rights and therefore "stand[s] on equal footing with every other [enumerated right]". *Traylor* at 964.[8] It protects Florida's longstanding devotion to open government and therefore, like the right of privacy, truly can be said to be "deeply rooted in our . . . political and philosophical heritage." *In re T.W.,* 551 So. 2d 1186, 1191 (Fla. 1989). It reserves to the people core political rights of republican self-

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[7]*See, e.g., Winfield* at 547 (burden rests with state to justify infringement against fundamental right and to limit infringement to what is justified). Indeed, the right of access is given even higher protection than other fundamental rights because the constitution limits the power to infringe this right solely to the legislature and dictates the process by which such acts may be adopted. FLA. CONST., art. I, § 24(c) (exemptions may be created only by legislature in a general act pertaining only to subject of the right of access). Other constitutional rights, including the right of privacy, may be subordinated by local acts, riders attached to bills, administrative acts, or local government action. *E.g. Winfield* (subordinating constitutional right to administrative subpoena).

[8]*Accord Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 866 (Fla. 3d DCA 1994) (Cope, J., dissenting) ("[T]he voters of Florida elevated the right to open meetings to the status of one of our fundamental rights set forth in the Declaration of Rights of the Florida Constitution").

government and therefore is instrumental to protecting the people "from the unjust encroachment of state authority." *Traylor.*[9]

D. The standard of review is the *sui generis* textual standard.

The standard of review is neither rational basis nor strict scrutiny but rather the express standard written into the constitution. Because it is explicit, the standard is *sui generis*. The Court should enforce it according to its terms.

Halifax argues that the Court should apply a strong presumption of constitutionality to acts creating exemptions. However, the textual standard lays the burden of justifying an exemption upon the legislature, and the Court should leave the burden where the constitution has placed it.[10]

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[9]*Compare Plante v. Smathers,* 372 So. 2d 933, 937 (Fla. 1979) (stringently enforcing Sunshine Amendment of 1976) ("Our form of government is based upon an enlightened choice by an informed electorate. . . "). The right of access is most fundamentally a "representation reinforcing right." *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) *and United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938).

[10]This placement is consistent with the fundamental stature of the right. The state always bears the burden of justifying the abridgement of a fundamental right. Though a law is generally presumed to be constitutional, the showing by a rightholder that a statute intrudes on a fundamental right "shifts the burden of proof to the state to justify [the] intrusion [on the fundamental right]." *Winfield* at 547 (right of privacy). *Compare Dade County Classroom Teachers Assn v. Legislature,* 269 So. 2d 684, 686 (Fla. 1972) ("[O]ne of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights").

This leaves no scope for a presumption of validity of the exemption. The act must show on its face that the legislature has complied with the standard. Any presumption must vanish in the face of this express showing, and the question then becomes not what the court might presume but whether the showing is sufficient to justify the exemption.[11] Therefore, the state always should bear the burden of persuasion that the act complies with the explicit conditions of validity established by the constitution.

Nevertheless, the Court must accord deference to the findings contained in a well-formed statement of public necessity. Such a statement will express specific legislative findings of fact, and the Court has said that such findings are to be reviewed under the clearly erroneous standard. *University of Miami v. Encharte*, 618 So. 2d 189, 196 (Fla. 1993).

E. The express constitutional standard establishes a practical and workable balancing standard.

Although the amendment reserves a fundamental right protected by a unique textual standard of review, the peculiar genius of this unique constitutional text lies in its practical workability. The standard affords ample latitude to accommodate competing interests within the legislative process.

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[11] *Compare, e.g., Leonetti v. Boone,* 74 So. 2d 551, 553 (Fla. 1954) (applying general and analogous doctrine that presumptions vanish when evidence of the presumed fact is introduced).

The particular evil targeted by the standard is the historical practice under which special pleas for exemptions were too generously granted without adequate consideration of the broader public interest in open government.[12] The amendment aims a three-pronged attack at that evil. It requires that the legislature clearly, candidly, and concretely articulate a justifying rationale for the exemption and then write an exemption suppressing only such information as is thereby justified. It outlaws the former practice of adopting amendments in riders on unrelated bills or in little-noticed special acts. And it subjects the exemption to judicial review. These reforms force the process into the open and compel the legislature to practice balancing in the inception of exemptions. When this reform is fully realized, Florida will approach the ideal to which the Sunset Review Act aspires--genuine constitutional balancing of the right of public access against competing public necessities within the legislature.[13]

The unique requirement that the legislature itself articulate the justification for the exemption compels the legislature to practice constitutional balancing

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[12]*See First Amendment Foundation Br.* (discussing the history and purpose of the Sunshine Amendment).

[13]*See* FLA. STAT., § 119.15(4)(b) (nonenforceable statutory provision for balancing public policy of open government against proposed exemptions); Chapter 91-219, LAWS OF FLORIDA (1991) (A4); and FLORIDA HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENTAL OPERATIONS, FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT, CHAPTER 91-219 (A7).

when it creates an exemption, and it affords ample latitude in which to work this balance. The framers defined the interest necessary to override the right of access as a *public necessity justifying the exemption* rather than as a compelling state interest. It is a contextual balancing standard. Not every justifying public necessity will be a compelling state interest, but every public necessity balanced against the right of access must justify the corresponding exemption in a practical, contextual, and logical sense. And the exemption must be no broader than the justification.

Thus the standard is flexible and pragmatic. The Court is called not primarily to substitute its own balancing judgment but to enforce the standards of deliberate constitutional balancing imposed upon the legislature. The Court must ask whether the legislative finding is specific and justificatory and whether the exemption is no broader than justified. These objective standards readily can be applied to the face of a challenged legislative exemption.[14]

Within this practical framework, heightened judicial scrutiny is essential to the success of the Sunshine Amendment. Otherwise, it can have no more effect than the aspirational standard of the Sunset Review Act.

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[14]In 1997, the staff of the Senate Committee on Rules and Calendar conducted a study of the constitutional standards and prepared a thoughtful report for the Committee. FLORIDA SENATE, COMMITTEE ON RULES AND CALENDAR, REVIEW OF REQUIREMENTS FOR PUBLIC RECORDS AND PUBLIC MEETINGS BILLS (September 1997) (hereafter cited as "SENATE STAFF REVIEW") (*See* A3).

II. THE EXEMPTION IS BROADER THAN NECESSARY TO ACCOMPLISH THE STATED PURPOSE TO PROTECT PUBLIC HOSPITALS FROM THE HARM THAT RESULTS FROM REVELATION TO COMPETITORS OF CRITICAL CONFIDENTIAL INFORMATION.

The district court affirmed the judgment that the exemption is substantially broader than necessary to accomplish its stated purpose and therefore unconstitutional on its face. *Halifax Hosp.* at 436. The court should be affirmed.

A. The stated purpose of the law is to protect hospitals from revelation of critical confidential information regarding strategic plans to competitors.

The allowable breadth of an exemption is bounded by the statement of public necessity. Thus there exists "[a] relationship . . . between the exemption and the stated public necessity." SENATE STAFF REVIEW, A3: 2. Consistent with this reasoning, the trial court began its "analysis with an examination of the statement of public necessity because this statement defines the boundaries within which the Exemption must be confined." Final Judgment, A1: 8, R 429.

The proper interpretation of the statement of public necessity

The lower courts agreed that the purpose of the exemption is to protect public hospitals from that harm which results from revelation of competitive secrets. During a searching colloquy with Halifax counsel, the trial court stated: "You see the motivation. [The legislators] don't want you to have to tell your secrets to competitors. But not all your secrets, only your secrets that render it

a possibility for you to compete. So its not just any old secret. It's the big ones." Halifax counsel conceded that the purpose was to protect "information about competitive moves by public hospitals that could empower the private sector competitors to either frustrate, circumvent, or accelerate action to explore the business opportunity which the public hospital is exploring." TR 163 (reading from House committee report). Halifax counsel summed up, "It's information about competitive moves." *Id.*

The court concluded that the statutory purpose was "to prevent the disclosure of critical, confidential information regarding strategic plans, making it exceptionally difficult, if not impossible, for a public hospital to effectively compete in the marketplace against private hospitals whose records and meetings are not required to be open to the public." TR 166-167; A1: 9; R 430. The district court expressly affirmed this conclusion. *Halifax Hosp.* at 436.

This conclusion is based on the plain language of the statute and supported by the legislative history. As Halifax concedes, the legislature adopted Chapter 95-199 as a result of a comprehensive study of competitive interests of hospitals. The central concern reported in the legislative history and adopted findings is to protect public hospitals from the harm that results from revelation of "information

about competitive moves."[15] In both courts below, Halifax conceded that the stated purpose of the exemption was to protect only such competitively sensitive information within strategic plans and not to protect the plan in and of itself.[16]

The fallacy of the new Halifax reinterpretation

In this Court, Halifax has changed position on the meaning of the stated purpose. To escape the grip of the narrow tailoring standard, it now contends the stated purpose is to suppress discussions "in which strategic plans, not just critical confidential information regarding strategic plans, were discussed." *Hal. Br.* at 21. This reinterpretation absolutely cannot be supported in light of the structure and meaning of the sentence.

In order to present its reinterpretation, Halifax elides key language from the statement of public necessity. *See Hal. Br.* at 20 (quoting elided version of statutory phrase). In this way it presents the phrase *strategic plans* as if it were

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[15]*See Hal. Br.* at 12-18 (recounting legislative history focused on "purpose of enabling public hospitals to compete fairly and on an equal footing with private hospitals"). *Id.* at 12. Copies of the legislative acts in this sequence are reproduced as A4, A5, and A6, and legislative reports are reproduced in the appendix to this brief as A7, A9, A10, A11, and A12.

[16]At trial, Halifax said the purpose of the exemption was to protect information about competitive moves of public hospitals. TR 163. In the district court, it took the position that "the true purpose of the law is to . . . protect information which, if revealed, would impair a public hospital's ability to effectively and efficiently compete." Initial Brief of Appellant, Halifax Hospital Medical Center, page 10. *See Halifax Hosp.* at 436 ("The hospital contends that the exemption is limited only to strategic plans that might affect competition").

the subject of the operative sentence when in reality *strategic plans* is the object of a participle within an adjectival phrase modifying the subject, *information.* This elision not only violates the grammar of the sentence but fundamentally alters the meaning of the sentence. Careful review of the elided phrases shows this fallacy.

The statement of necessity is complex largely because it combines the justification for two distinct exemptions created by Chapter 95-199. The "other" exemption must be noticed to bring the language into clear focus. The relevant exemptions are set forth in successive subsections as follows:

> [Contract Discussion Exemption]
>
> Those portions of a governing board meeting at which negotiations for contracts with nongovernmental entities occur or reported on *when such negotiations or reports concern services that are or may reasonably be expected by the hospital's governing board to be provided by competitors.*
>
> [Strategic Plan Discussion Exemption]
>
> Those portions of a governing board meeting at which the written strategic plans, including written plans for marketing its services, are discussed or reported on.

Ch. 95-199, LAWS OF FLORIDA, §1 (codified at FLA. STAT., § 395.3035(3) & § 395.3035(4)) (e.s.) (A6: 4).

The statement of public necessity for both exemptions is combined in a set of two sentences contained in the uncodified provisions of Section 2 of Chapter

95-199 (A6: 6). In the following passages, these two sentences are quoted in full, and that language which Halifax elided from its new version is underlined:

First Sentence

> Furthermore, it is a public necessity that portions of a public hospital's governing board meetings be closed when confidential contracts, contract negotiations, or strategic plans are discussed.

As the district court rightly stated, this First Sentence is a general statement and not a specific statement. *Halifax Hosp.* at 436. It therefore serves only to supply a context within which to read the Second Sentence, which follows:

Second Sentence

> If such meetings are not closed, critical confidential information regarding contracts, contract negotiations, and strategic plans regarding, for example, growth opportunities, would be revealed, making it exceptionally difficult, if not impossible, for a public hospital to effectively compete in the marketplace against private hospitals, whose records and meetings are not required to be open to the public.

Compare Hal. Br. at 20.

This Second Sentence undertakes to explain specifically why the exemption is necessary. Although the meaning of the sentence is clear, it is concealed within a thicket of phrasal modifiers. The clearest path to understanding such a sentence is to cut through the underbrush and come down to the core structure.

The Second Sentence is a conditional sentence. It has two clauses: an if-clause, and a main clause. The if-clause simply states: IF SUCH MEETINGS ARE NOT CLOSED. It does not require further analysis.

The main clause of the sentence consists of all fifty-one words coming after the if-clause. However, the core sentence is simply four words, as follows:

INFORMATION WOULD BE REVEALED

The subject is *information,* and the predicate is *would be revealed.* Seen in this essential form, this sentence is logical and sensible. If the exemption were not adopted, it says, *information would be revealed.* That would be the central concern of any exemption.

Everything besides the core sentence of the main clause consists of modifiers. These add meaning to the core by modifying the subject, *information,* or modifying the predicate, *would be revealed.* This analysis concerns only the subject and its modifiers.

The modifiers of *information* provide the content of the sentence. What sort of information would be revealed? This is answered by the adjectives *critical* and *confidential* and by the adjectival phrase: *regarding contracts, contract negotiations, and strategic plans*. In this phrase, the present participle *regarding* has three objects: *contracts, negotiations, and plans*. The participle *regarding* relates these three objects to the modified headword *information.*

Within this adjectival phrase are further adjectives that modify the participial objects. The second appearance of *contract* is an adjective modifying *negotiations*; the term *strategic* is an adjective modifying *plans*; and the phrase *regarding, for example, growth opportunities*, is a second adjectival phrase also modifying *plans*.

Therefore, when the trial court and district court deciphered this sentence, they correctly read it to have the meaning shown in the following passage, in which the language that may be disregarded because it relates solely to the "other" exemption is underlined:

> If such meetings are not closed, critical confidential information regarding <u>contracts, contract negotiations, and</u> strategic plans regarding, for example, growth opportunities, would be revealed, making it exceptionally difficult, if not impossible, for a public hospital to effectively compete in the market place....

This construction is consistent with the structure of the sentence and allows the various modifiers in the subject to operate upon the simple subject *information*.

To achieve its argumentative purpose, Halifax wants to restructure the Second Sentence to break the phrase *strategic plans* free of the limiting modifiers *critical* and *confidential*. To do so, it first must explain why the immediately preceding phase, *contract negotiations*, is not limited by the same modifiers.

This forces Halifax to argue the patent fiction that the statement of purpose does not justify an exemption merely for *critical confidential information regarding . . . contract negotiations* but more broadly "all contract negotiations." *Hal. Br.* at 22 (emphasis in original). Imaging an exemption the legislature never wrote, Halifax theorizes that the legislature did not intend to justify closure of negotiations regarding only *confidential* contracts but rather "all contract negotiations . . . because negotiations are almost, by definition, confidential in nature." *Hal. Br.* p. 22. This is flatly contrary to the corresponding exemption, which creates only one exemption relating to contracts and their negotiation, allowing closure of meetings at which negotiations are conducted or reported on but only "*when such negotiations or reports concern services that are or may reasonably be expected by the hospital's governing board to be provided by competitors of the hospital.*" FLA. STAT., § 395.3035(3) (e.s.).

Upon that patent fallacy, the Halifax reinterpretation fails. The intended purpose of the exemption is clear from the history, words, and structure of the statement. In order to practice constitutional balancing, the legislature should have followed that succinct finding with an exemption tailored to suppress only critical confidential information. When it chose to sweep the exemption broadly across the boundless category of information in strategic plans, it breached its

duty of constitutional balancing. That excessive breadth cannot be cured by this last ditch effort to conform the stated purpose to the exemption.

B. The exemption is broader than necessary to accomplish the stated purpose of protecting public hospitals from revealing critical confidential information regarding strategic plans to competitors.

The constitution mandates that an exemption "shall be no broader than necessary to accomplish the stated purpose of the law." FLA. CONST. art. I, § 24(c). The lower courts correctly interpreted this standard to require a close fit between the purpose of the law and the corresponding exemption.

The trial court held that this standard "permits an exemption to carve out of the constitution only so much of the public right of access as is necessary to achieve the stated public necessity." Final Judgment, A1: 8, R 429. It said "[t]his establishes a meaningful requirement of narrow tailoring because the standard is one of *necessity*." *Id.*[17]

The trial court and district court agreed that the exemption is unconstitutional on its face because it creates a virtually unlimited exemption for

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[17]The Senate Staff Report concurs that the "relationship [between the stated public necessity and the exemption] dictates that the Legislature may close only those records or meetings as are necessary to achieve the stated purpose of the law." SENATE STAFF REVIEW A3: 2. *Compare State v. Globe Communications Corporation*, 622 So. 2d 1066, 1077 (Fla. 4th DCA) *aff'd* 648 So. 2d 117 (Fla. 1994) (explaining closely analogous standard of narrow tailoring of speech restrictions).

board discussion of hospital business. The hospital is a state agency governed by persons selected in the political arena, exercising powers of taxation, eminent domain, and sovereign immunity, vested with control of substantial public assets and funds, and charged with the high public responsibility of providing for public health and caring for the indigent sick at public expense. TR 110-112, 116-117.

Without material disagreement from hospital counsel, the court established that the "board is responsible for the overall operation of the hospital," TR 130, and that virtually any aspect of board business could be included in the strategic plan and made the subject of a closed discussion. TR 140-144. This could include taxes, broad financial planning, planning concerning professional and other staff, and other matters. TR 124-130, 140-144.[18]

Thus the court correctly concluded that the effect of the exemption is to allow hospital boards to discuss any aspect of their public business in a private setting so long as the discussion is framed in terms of planning. TR 161. The public portion of the meeting could be relegated to nothing more than the

[18]Halifax stoutly maintains that strategic planning has a common industry meaning. That may be, but the definition is all-encompassing. Consider the startling breadth of the closure of discussion of the so-called "SWOT analysis" where the "W" stands for "weaknesses." TR 122. The Halifax CEO testified that one of the secret weaknesses listed in the strategic plan of Halifax is "negative media coverage." This should be a secret, he maintained, because "I would not want our competitors to know we listed it as a weakness." TR 62.

operational implementation of plans.[19] This would amount to practical equivalent of a closed agenda conference because the exemption could relate to "virtually any aspect of hospital management, [t]o any subject of concern to the management and direction of the hospital." Final Judgment, A1: 12, R 433.[20]

Based on these findings, the Court concluded that the exemption is broader than necessary to accomplish the stated purpose of the act. Whereas the stated purpose is to protect critical confidential information, the exemption suppresses access to all strategic planning discussions without regard to competitive sensitivity. Thus the act sweeps more broadly than the stated public necessity justifies.

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[19]*See* TR 140. ("The Court: [A]s long as its a planning function, then you can pretty much reduce it to writing and keep the public out. But if its an operational function, then the public has a right to attend your functions. Mr. Hubka: I would agree with that with the qualification that not all planning rises to the level that it would and should be protected. The Court: But how do we know when it has not risen to that level. That's the problem.").

[20]The court's findings on the factual issues of the nature of the public hospital business, the industry meaning and practice concerning strategic planning, the span of hospital management concerns, and the unbounded scope of hospital strategic plans are supported by substantial, competent, and uncontroverted evidence, including evidence and admissions in testimony by hospital executives and an expert on strategic planning, a stipulation of undisputed facts and exhibits, and a searching inquiry of defendants' counsel (TR 112-171) concerning the public hospital business and the ramifications of the exemption. *Compare Glendale Fed. Sav. & Loan Assn* (facial constitutionality may implicate mixed issues of law and fact which should be established at trial).

This conclusion was neither speculation nor nitpicking, as Halifax contends. *Hal. Br.* at 25. The trial court found the statute unconstitutional on its face because it enacts an exemption that is substantially broader than necessary to accomplish its stated purpose.

The district court affirmed the trial court in all respects and added that "in determining whether the exemption is so limited that it is 'no broader than necessary to accomplish the stated purpose of the law,' we should look at both the scope of the exemption and the duration of the exemption." *Halifax Hosp.* at 436. It concluded that the exemption is facially overbroad in its entirety because it suppresses the information for an arbitrary three year period unrelated to the competitive interests upon which the exemption is predicated. The court stated "[t]here appears no justification for an arbitrary three year duration for the secrecy to continue. . . Why should the law presume that every aspect of a strategic plan should be confidential for three years? The legislature has not told us nor has it justified it to the people who adopted the constitution." *Halifax Hosp.* at 436.

Halifax concedes, as it must, that "most information contained with a written strategic plan will become stale or will, in some way, become public information long before the end of the three year period." *Hal. Br.* at 27. To justify the three year period notwithstanding this concession and without blinking

the inconsistency with its new reinterpretation, Halifax argues that the purpose of the exemption is to protect against revelation of "confidential proprietary and trade secret information," and thus the constitutionality of the time period should be measured by the standards applicable to private covenants not to compete and to protect trade secrets. *Id.*

This analogy to restraint of trade law misses the mark. The test for enforcement of such restrictive covenants is reasonableness. *See* FLA. STAT., § 542.335(1) (authorizing enforcement of restrictive covenants if "reasonable in time, area, and line of business"). In contrast, the constitution sets a standard of narrow tailoring. An exemption *shall be no broader than necessary.* This constitutional standard cannot be compared to the rule of reason applicable to contracts restricting competition.

Halifax seeks to refute the conclusion that the exemption is broader than necessary by pointing to safeguards incorporated into the statute.[21] While these safeguards perform the important function of helping to prevent illegal and

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[21]*See Hal. Br.* at 28 (plans must be written; only relevant portions of meeting closed; transcript required and ultimately public). *N.B.* in the trial court, Halifax argued that this exemption authorized two competing boards to meet for the purpose of *creating* a new written strategic plan and in fact availed of the exemption for the purpose of negotiating a new bilateral agreement having an effect similar to a merger of these entities. *See* TR 26-36 (describing joint meetings). The transcript was released only after the trial court struck down the exemption, but Halifax now points to it as a device to police such an abuse!

unauthorized discussions, they do not curtail the unnecessarily broad scope or duration of the exemption. In any event the safeguards are themselves inadequate because the district court concluded that the exemption does not limit the subject matter of discussion to the confidential subject matter. *Halifax Hosp.* at 436 (noting the subject matter of the permitted discussion does not limit what can be raised in a closed meeting).

To illustrate the unnecessary breadth of the exemption, the district court observed that "[a]lmost any discussion by the Board, whether it relates to director or officer benefits or salaries or severance plans" could be closed under this exemption. *Halifax Hosp.* at 436. Halifax correctly notes that certain documents relating to this information become public in other board business, but it cannot deny that the record of the board's discussion and decision-making process regarding these items would remain under seal within the transcript of the strategic planning meeting for three years. *See Hal. Br.* at 24-25. Indeed, the continued secrecy of these discussions long after the contract or budget document has been revealed only underscores the district court's point that the exemption is unnecessarily broad in duration.

The conclusion that the exemption sweeps more broadly than necessary to protect the critical competitive information of the hospital is therefore sound. Under the cover of this exemption, the board can effectively manage a public

hospital in closed sessions and ceremonially disclose only the sanitized results of the deliberations as operations occur over the course of time. This is a substantial and unjustified infringement of the public right of access.[22]

III. THE ACT DOES NOT STATE WITH SPECIFICITY A JUSTIFYING PUBLIC NECESSITY FOR THE CATEGORICAL CLOSURE OF ALL DISCUSSION OF STRATEGIC PLANS.

A law creating an exemption "shall state with specificity the public necessity justifying the exemption." FLA. CONST., art. I, § 24(c). This establishes a mandatory standard concerning the form and content of any act purporting to create an exemption from the right of access. *Crawford.* It imposes the distinct requirements that the statement be made with *specificity* and that it constitute a statement *justifying* the exemption. Both concepts are relevant to the formal sufficiency of the required statutory statement.

Halifax now argues that the reinterpreted stated purpose is "to exempt from the right of public access those portions of public hospital board meetings in which strategic plans, not just critical confidential information regarding strategic plans, were discussed." *Hal. Br.* at 21. This reinterpretation would bear no

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[22]*Compare Town of Palm Beach v. Gradison,* 296 So. 2d 473, 477 (Fla. 1974) ("One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors").

relationship to the purpose of securing critical confidential information and therefore would not be justified by the need to protect competitive secrets. Accepting the reinterpretation, *arguendo*, the statement is defective as a matter of form because it is neither a *specific* statement of the grounds for the exemption nor a statement *justifying* the exemption.[23]

Halifax argues that simple verbal correspondence between the statement of purpose and the terms of the exemption is sufficient in itself to satisfy the standard. It reiterates that "this Court must recognize that the Legislature intended nothing less than the protection of written strategic plans." *Hal. Br.* at 23. Since the stated purpose is to exempt *discussion of strategic plans*, Halifax argues, it is readily apparent that an exemption for *discussion of strategic plans* is not broader than necessary to meet the stated purpose.[24]

This reduces the statement of necessity and corresponding exemption to a vacuous tautology: strategic plan discussions should be secret because strategic

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[23]Halifax argues that the lower courts "did not question the specificity" of the statement. *Hal. Br.* at 10 & 20. However, the lower courts did not consider, much less approve, the new interpretation proposed in this Court by Halifax. Assuming the Court will hear Halifax to change its position, the question of sufficiency of the new interpretation under the first prong of the textual standard is a new question. See Final Judgment, A-1:9; R 430 (construing statement of necessity and finding it sufficient as so construed).

[24]*See also Hal. Br.* at 21 (arguing legislature need only recite a finding of "public necessity" in order to invoke power to "regulate the public right of access").

plan discussions should be secret. As such, the Halifax reinterpretation does not comply as a matter of form with the constitutional standard because this standard requires the act to articulate a specific statement of a *public necessity justifying the exemption.* To justify an exemption the legislature must do more than merely reiterate the scope of the exemption in the justifying statement or denominate the exemption as a "public necessity." It must state in concrete terms a justification.

To justify is "to prove or show to be just, right, or reasonable." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY at 656 or to "show sufficient reason in court for that which one is called to answer for." OXFORD ENGLISH DICTIONARY, 644. A justification therefore must take the form of a reason or rationalization, and therefore a statement of public necessity justifying an exemption must explain rationally that because certain facts and circumstances exist, it is necessary to effect a certain closure. The trial court and the Senate Staff Report agree that the "necessity must logically or rationally relate to the exemption in such manner as to justify the creation of an exception to the constitutional right." Final Judgment, A1: 7-8, R 428-429; SENATE STAFF REVIEW, A3: 2. The statement must "explain *why* the exemption is necessary." *Id*, A3: 2.[25]

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[25]Because there is no dispute that the need to protect critical confidential business secrets of public hospitals justifies a corresponding narrowly tailored exemption, this case does not raise the starkly distinct and substantive issue of

This formal requirement is distinct from the question whether a stated necessity is in substance a sufficient reason for the exemption. In order for the constitutional balancing requirement to operate, the legislature must explain its own rationale. Thus the statement must be in form justificatory. Neither a tautological circle nor an edict would suffice. The statement must explain the need for the exemption because such a reasoning process is intrinsic to the process of constitutional balancing. Because a circular repetition of purpose and effect does not explain why the exemption is necessary, it has no rationalizing force. In short, a tautology does not justify.[26]

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what constitutes a *public necessity justifying [an] exemption.* The Court should reserve for a proper case the question of the scope of review over this ultimate question of constitutional law. For example, could an exemption be justified on grounds or reasons repugnant to the Sunshine Amendment, such as an exemption for all school board meetings based on a finding of public necessity to eliminate "politics" from education? *Cf., e.g.,* SB 2160, 1977 Regular Session (A14) (proposing exemption for lay advisory committees because they do not have the time to give public notice).

[26]If the tautological form were tolerated the legislature could posit the effect of the statute as its purpose and thereby defeat judicial review of the narrow tailoring requirement. Justice O'Connor exposed this fallacy when she said that "[i]f accepted this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105, 120 (1991) (because not narrowly tailored, Son-of-Sam law unconstitutional). *Compare* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2D ED. 1988), §16-2 at 1440 (Referring to rationality standard in equal protection law, "Without . . . a requirement of a legitimate public purpose, it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable--and indeed tautological--fit . . .").

Halifax also argues that the legislature justified the exemption when it stated that "disclosure of discussions by public hospital boards of their written plans would make it 'exceptionally difficult, if not impossible' for such hospitals to effectively compete against private hospitals." *Hal. Br.* at 21. In form and content, this statement fails the constitutional standard because it does not *state with specificity* a justifying rationale.

A justifying statement must be grounded on definite factual findings. The constitution states that a law enacting an exemption "*shall state with specificity* the public necessity justifying the exemption." FLA. CONST., art. I, § 24(c). The phrase *state with specificity* is used to describe that quality of finding which is susceptible to meaningful review on appeal. *See, e.g., Dupree v. Cochran,* 698 So. 2d 945, 946 (Fla. 4th DCA 1997) (revocation of bond reversed for failure of trial court to state with specificity the reasons therefor). Findings required to be stated with specificity may not be made in conclusory terms that merely repeat the applicable standard. *See, e.g., Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994) (construing requirement of "specific findings of fact on the record" in FLA. STAT., § 92.53(1)). Specific findings must express the facts upon which a decision is based. *Id.*

This Court has defined the plain meaning of the key term in this clause as follows:

> "Specify" means "[t]o mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another." BLACK'S LAW DICTIONARY 1399 (6th ed. 1991). "Specify" means a "statement explicit, detailed, and specific so that misunderstanding is impossible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1412 (1981).

Florida League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992). This same plain and ordinary meaning of *specific* should be accorded to the same term in the present text. *In re Advisory Opinion to Governor*, at 964.

These provisions dictate that the statement must clearly articulate in concrete detail a rationale that justifies and explains the purpose of the exemption. The trial court and Senate Staff Report concur that the "necessity must logically or rationally relate to the exemption in such manner as to justify the creation of an exception to the constitutional right." Final Judgment, A1: 8-9, R 428-429; SENATE STAFF REVIEW, A3: 2.

A conclusory statement is the antithesis of that which is required by this standard. Thus the district court correctly dismissed the First Sentence of the statutory statement as "a statement of *general* necessity." *Halifax Hosp.* at 436 (e.s.).

Accordingly, the statement that disclosure of written strategic plans would make it "exceptionally difficult, if not impossible" for the hospitals to compete is not a specific statement of particular reasons for the exemption. It is only a

conclusory generalization. The unanswered question is: Why would revelation of strategic plans hamper competition? What is it about the public discussion of strategic plans that would have this dire consequence? In order for the legislature to *state with specificity the public necessity justifying the exemption*, the statement at a minimum must answer this question. SENATE STAFF REVIEW, A3: 2. To say only that the reason the discussion must be closed is that harm would result from disclosure of its contents only begs the question.[27]

Even if the record were searched for an implicit answer to the question why it is necessary to close all discussion of strategic plans, there is none. The factual determinations articulated in the act and legislative history relate solely to competitive issues, which is but a small subcategory of strategic plans. No findings support a broader exemption for all strategic plan discussions regardless of competitive sensitivity; nor do any findings establish that revelation of any element of the strategic plan, *per se*, materially harms the competitive position

[27]An exemption which defined the exempt discussion solely in terms of its effect would be fatally imprecise. It would delegate to the administrators undefined discretion in deciding when to close meetings. The lower court was on target when it said that such imprecision would in itself be an unconstitutional default by the legislature of its exclusive power to define exemptions. Final Judgment, A1: 13, R 434. Halifax overlooks this point when it imagines an exemption that would require case by case determination of what is critical. *Hal. Br.* at 33. *Cf.* A13 and A15.

of the hospital. Thus there are no articulated findings of specific reasons that would support a closure unrelated to competitive secrecy.[28]

If the conclusory statement is understood to mean that revelation of all information within a strategic plan would entail the revelation of that subset of the information which is competitively sensitive, then the statement would not justify the categorical exemption of discussion of all strategic plans. While it would justify a more narrowly tailored exemption focused on such confidential material, this only brings the analysis back to the central defect of the legislation--it creates an unnecessarily broad exemption.

On the face of the finding proposed by Halifax, therefore, the rationale is not explained. Separated from any need for competitive security it neither specifies nor justifies as required by the textural standard.[29]

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[28]The constitution requires the act to state its justification with specificity, and therefore legislative history can play only a limited role in construing the statement. It may provide an interpretive context, but it could not supply missing substance or specificity. Thus the statement that "[m]arketing plans is a bit narrow" as quoted in the Halifax Brief at page 17, whatever it means, cannot expand the stated public necessity in the act. If anything, it shows the exemption is overly broad because it covers matters such as employee morale related to downsizing, which is not a critical competitive secret but another problem entirely.

[29]*State v. Knight,* 661 So. 2d 344 (Fla. 4th DCA 1995) is readily distinguished. *Knight* approved a statement of public necessity for an exemption of grand jury records as necessary to preserve the secrecy of grand jury deliberations. The distinction is that the secrecy of the grand jury meetings is a constitutional "given" because the grand jury is part of the judicial branch, which

In the broadest sense, Halifax argues that the reinterpretation is sufficient because the legislature can justify an exemption merely by reciting there is a public necessity for it.[30] This argument must fail because it claims for the legislature a power to nullify the constitutional right. The people of Florida could not have intended to create a *guaranteed* constitutional right and at the same time to create a purely legislative prerogative to set it aside on the basis of such a formalistic recital as Halifax presupposes. That was the system under the Sunset Review Act, which the Sunshine Amendment was adopted to reform. Today, in light of the Sunshine Amendment an exemption must be justified by a specific statement of public necessity.

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is not subject to open meetings under Section 24(b) but is subject to open records under Section 24(a). Given that the grand jury meeting is secret, the reason why the exemption is necessary is rationally articulated and not a tautology.

[30]*Hal. Br.* at 21 ("[legislature is given the] express power to regulate the public right of access based on the Legislature's finding of 'public necessity'. [The standard] does not say [this] power is dependent on the finding of a compelling state interest or the finding of an overriding public necessity. If there is a public necessity for the exemption, the Legislature is constitutionally empowered to enact as broad an exemption as needed to meet the necessity.").

IV. UNDER THE EXPRESS CONSTITUTIONAL STANDARD OF NARROW TAILORING, THE COURT SHOULD NOT JUDICIALLY NARROW AN INVALID EXEMPTION.

Halifax invites the Court to save the present statute by judicially narrowing its excessive breadth. The Court should decline. Judicial narrowing would nullify the specific constitutional mandate that the legislature itself narrowly tailor the exemption. And, even if the Court were so inclined, this exemption could not be narrowed consistently with established standards.

A. The Court should not salvage an unnecessarily broad exemption which violates the express constitutional prohibition against unnecessary breadth.

In an appropriate case, to be sure, the Court in its discretion may save a constitutionally infirm statute by paring excessive breadth, excising constitutionally infirm language, or interpolating necessary provisions. *Gilreath v. State*, 650 So. 2d 10, 13 (Fla. 1995) (excising vague terms). This discretion is exercisable only "[w]hen the statute as so limited is complete in itself and consistent with the stated or obvious legislative intent." *Id.*

Chief Justice Kogan has explained that "the decision to adopt a narrowing construction is one that lies within the Court's discretion." *State v. Stalder*, 630 So. 2d 1072, 1077 (Fla. 1994) (Kogan, J., concurring). *Accord Gilreath* at 13 (exercising "court's *discretion* to limit a statute to what is constitutional") (e.s.).

Although this discretion should be exercised in a proper case, "[it] should [be] exercise[d] with great restraint." *Stalder* at 1079 (Kogan, J., concurring).

In reviewing exemptions under the Sunshine Amendment, the Court should abstain from exercising its discretion to narrow. Three strong reasons compel this conclusion.

First, it is necessary to *respect the plain meaning of the text.* The Court's highest duty is to enforce the plain language of the constitution. If the Court were to judicially narrow and salvage an invalid exemption, it would render a nullity of the express constitutional duty of the legislature to tailor the exemption no broader than necessary. "Constructions which . . . render another provision nugatory must be avoided." *Gray v. Bryant,* 125 So. 2d 846 (Fla. 1960). *Accord State ex rel. McKay v. Keller,* 191 So. 542, 545 (Fla. 1939) ("A construction that nullifies a clause will not be given to a Constitution unless absolutely required by the context.").

Second, it is necessary to *uphold the strong constitutional values* underlying the public right of access. A key purpose of the Sunshine Amendment is to reform the process by which the legislature enacts exemptions. The purpose of the proviso is to impose on the legislature a duty to practice constitutional balancing in the first place, and strict enforcement of the narrow

tailoring standard is essential to that purpose. The Court should not relieve the legislature of its duty because this will frustrate the intended reform.[31]

Third, it is necessary to *respect doubts concerning the institutional capacities* of the Court in these premises. When it contemplates the vast province of legislative exemptions from the public right of access, the Court should give careful consideration to the limits of "judicial competence to authoritatively construe legislation." *Brown v. State,* 358 So. 2d 16, 20 (Fla. 1978). One reason for restraint is that "often a court has neither the legislative fact-finding machinery nor the experience with the particular statutory subject matter to enable it to authoritatively construe a statute." *Id.* In the pluralistic arena of legislative exemptions from the right of public access, this limitation is especially relevant. By placing on the legislature the duty to balance narrowly tailored exemptions against the right of access, the constitution expressly recognizes that the legislative branch is institutionally better suited to perform this function. Therefore, when the legislature has failed to perform this duty and

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[31]*Compare Reno v. American Civil Liberties Union,* 117 S.Ct. 2329 (1997), 2351, note 49 *quoting United States v. Reese,* 92 U.S. 214, 221 (1875) (declining to narrow certain parts of the Communications Decency Act) ("It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large"); *Massachusetts v. Oakes*, 491 U.S. 576, 586-7 (1989) (liberal approach to judicial narrowing diminishes the protection of affected rights because it creates "a significantly reduced incentive to stay within constitutional bounds in the first place").

adopted a statute which is overly broad, the Courts are ill-equipped to reform this legislation through narrow construction, excision, or interpolation.[32]

For these reasons, the Court should refrain from judicial narrowing of exemptions. If the exemption is overly broad, the Court should require the legislature itself to narrow and cure the defect.

B. The present exemption could not be judicially narrowed because the record lacks findings to define that information which is critical and confidential.

Even if the Court were so inclined, it could not effectively narrow the present exemption. An exemption must be defined in terms of the information that it covers and not in terms of the effect of revealing that information.[33] That cannot be done on the record the legislature has created because the court lacks the material out of which to fashion a narrower construction. The missing component is the substantive definition of the scope of the exemption.

The trial court was concerned with how to define the content of this category. From the bench during argument by Halifax, the court asked how the

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[32]As noted above, however, the Court should reserve discretion to review exemptions on the ultimate issue of whether an exemption is repugnant to constitutional value of open government.

[33]An exemption relates to information. It denies public access to specific information contained in public records or expressed in public meetings solely because of its content. Any exemption necessarily will be justified by reference to the substance of the exempted content, and therefore must be defined by reference to the excluded information.

exemption could be narrowed. Counsel suggested, "It's information about competitive moves." *Id.* The court replied that "[t]he question gets to be how do we define it?" Counsel replied that "we have to wrestle with that." *Id. See also* TR 148-152.

Therefore, the trial court properly concluded that it lacked the resources to define that which would fall within the stated purpose of protecting competitive secrecy. It held that:

> [m]erely narrowing the exemption will not cure the defect. Instead it would be necessary to rewrite the statute and supply additional substantive content. This is so because the legislature has not provided any guidance concerning the definitional content of that information which would have the drastic effect of making competition difficult if not impossible. In order to create such a definition, economic and business [findings] far beyond the scope of the judicial power must be made.

Final Judgment, A1: 13, R 434. *See State v. Globe Communications Corp.*, 648 So. 2d 110, 114 (Fla. 1994); *Brown* at 20.

The court is surely correct that nothing in the record showed what would be a "big secret." Halifax is not helpful, since the narrowing construction it suggests does not even narrow the statute. *Hal. Br.* at 37.

The cases on which Halifax relies are inapposite. In *Firestone v. News-Press Pub. Co, Inc.*, 538 So. 2d 457 (Fla. 1989), the court was able to discern

that the inner boundary of an overbroad statute should be fixed at the walls of the polling place. In *Stalder,* the Court construed Florida's Hate Crimes Statute enhancing penalties for those who "evidence prejudice while committing [an] offense" as limited to crimes motivated by bias rather than all crimes in which bias is demonstrated in the commission. *Id* at 1076. In *State v. Elder*, 382 So. 2d 687 (Fla. 1980), the Court construed a statute to proscribe conduct, not pure speech, by reference to the closely related provisions of the act itself.[34]

The present case is distinguishable from these cases and analogous to *Globe* because the Court cannot find within the act or the legislative history a substantive definition of that information the disclosure of which would be sufficiently harmful to the business interests of the hospital to justify an

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[34]Although the doctrine of judicial narrowing is usually discussed in terms of the doctrine of avoidance of constitutional issues, in reality the doctrine now under consideration is not a doctrine of avoidance. When the Court narrows, excises, or interpolates to save a statute, as was done in *Firestone*, *Stalder*, *Elder,* and other such cases, it directly confronts the constitutional issue and determines that the act would otherwise be unconstitutional. When the Court invokes that doctrine, therefore, it already has overcome the presumption of constitutionality. It is that post-presumption doctrine which is implicated in this case. Cases that articulate the well-settled preference for a saving construction where the statute is merely vague or susceptible of more than one interpretation as written are not relevant. This point distinguishes the following cases cited by Halifax: *Falco v. State*, 407 So. 2d 203 (Fla. 1981); *Miami Dolphins Ltd. v. Metropolitan Dade Co.*, 394 So. 2d 981 (Fla. 1981); *Leeman v. State*, 357 So. 2d 703, 705 (1978); *Village of North Palm Beach v. Mason,* 167 So. 2d 721 (Fla. 1964); *State ex rel. Watson v. Bigger*, 200 So. 224 (Fla. 1941); and *State v. Hodges*, 506 So. 2d 437 (Fla. 1st DCA 1987) *rev. den.*, 515 So. 2d 229 (Fla. 1987).

exemption from the right of access. The legislature itself has not yet performed its duty of constitutional balancing, and the Court lacks the necessary information with which to substitute its judgment.[35]

V. THE LOWER COURTS CORRECTLY REACHED AND DECIDED THE CONSTITUTIONAL ISSUE.

Although an amicus contends that the court unnecessarily reached the constitutional issue when it could have resolved the case on statutory grounds, it is appropriate that Halifax does not assign this as an error or point on appeal. *See FHSC Br.* at 3. The constitutional issue was properly reached and decided.

The News-Journal sought not only a declaration that the joint meetings were illegal but also a declaration that the exemption was facially unconstitutional. *See* Pre-Trial Stipulation R 24-39 (Issue 3). It has standing to press this claim apart from its standing to demand access to the particular records of the unlawful joint meetings. *Silver Express Company v. Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997) (any citizen has standing to vindicate the public interest in open government). *See also*

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[35]In the present and immediately past session, bills have been proposed that would ferret out and define with far greater specificity the types of information that should be kept from competitors. *See* A13 & A15. Without conceding that these proposals pass scrutiny, it can be said that these drafts more nearly approach the goal of defining an exemption by reference to the content of the exempted information. At the same time, they show the intensively (and legislatively) factual context of defining competitive confidences within strategic plans.

Department of Revenue v. Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994). News-Journal proved that Halifax had availed of the exemption to discuss in its entirety the written strategic plan of the hospital. Thus there is no doubt of "bona fide, actual, present practical need for a declaration." *Id., quoting May v. Holley,* 59 So. 2d 636, 639 (Fla. 1952).

The evidence showed that, apart from the joint meetings, Halifax had relied on the statute for general strategic planning discussions. TR 57. The Halifax chief executive testified that "[w]ith the change in the law, I'm able to sit down and talk to the entire board about [the written strategic plan] out of the Sunshine . . . And I specifically presented it to them and discussed it with them in detail and made any changes based on their input and had an agreement that this is our strategic plan." *Id.*

Thus Halifax counsel pleaded more than once for a constitutional ruling. There was a present practical need "[b]ecause not only us, but other hospitals are relying in good faith on an exemption to the Sunshine Law. . . . And if we're going offtrack, if we're acting improperly and our actions are going to be avoided, we have to go back and do them [over]. I mean, I think you should rule." TR 178. *See also* TR 169 (same).

Therefore, even though the joint meetings were illegal under any stretch of the exemption, the constitutional issue was not avoidable. That issue was properly decided on this record.

VI. THE LOWER COURT SHOULD BE SUSTAINED IN ANY EVENT BECAUSE THE CLOSED MEETINGS EXCEEDED THE PURVIEW OF THE STATUTORY EXEMPTION.

In any event, the Final Judgment should be sustained if the judgment reached the right result on any analysis. *Home Depot U.S.A. Company, Inc. v Taylor*, 676 So. 2d 479, 480 (Fla. 5th DCA 1996). The issue of whether the closed meetings came within the purview of the exemption was fully tried and briefed in the trial court, and the record is complete on this issue.[36]

Upon review of that record, the district court concluded that "[j]oint meetings between competitors simply do not qualify under any reading of the exemption." *Halifax Hosp.* at 437. Halifax cannot show that the trial court reached the wrong result on any analysis. At the least, the Court should sustain the lower courts on the statutory ground.

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[36]See News-Journal's Trial Memorandum. R 40-92.

CONCLUSION

Accordingly, News-Journal respectfully requests that the Court affirm the district court and award News-Journal its reasonable attorneys fees on appeal under FLA. STAT., § 119.12(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to all persons on the following service schedule this 10th day of March, 1998.

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