IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-82

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

Appellant/Petitioner,

vs.

NEWS-JOURNAL CORPORATION,

Appellee/Respondent.

ON REVIEW OF A CERTIFIED QUESTION
OF GREAT PUBLIC IMPORTANCE FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

AMENDED
BRIEF AMICUS CURIAE
OF THE FIRST AMENDMENT FOUNDATION, THE FLORIDA SOCIETY OF NEWSPAPER EDITORS, FLORIDA TODAY, THE PALM BEACH POST, THE PENSACOLA NEWS JOURNAL, THE ST. PETERSBURG TIMES, AND THE SUN-SENTINEL

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STATEMENT OF INTEREST OF THE AMICI

The First Amendment Foundation ("FAF") is a Florida non-profit foundation that acts as an advocate of the public's right to oversee and access its government. The FAF has about 200 members, most of whom are Florida newspapers, First Amendment attorneys, students, and private citizens. The FAF, in cooperation with the Attorney General's Office, publishes the annual Government-in-the-Sunshine Manual, the definitive guidebook on the public records and meetings laws. The FAF also sponsors seminars for the press, public and government employees on the public's rights of access to records and meetings.

The Florida Society of Newspaper Editors ("FSNE"), a non-profit Florida corporation, is an association of policy-making editors at Florida's daily newspapers. Its members include individual editors, daily newspapers, the Associated Press and seven universities. The FSNE fosters responsible journalism by sponsoring seminars and conducting an annual contest and convention, and seeks to promote public policies conducive to better journalism.

FLORIDA TODAY is a daily newspaper in the Space Coast region. *The Palm Beach Post* is a daily newspaper in Palm Beach County and the Lake Okeechobee and Treasure Coast regions. The *Pensacola News Journal* is a daily newspaper in the Panhandle of Florida. The *St. Petersburg Times* is a daily newspaper in the Tampa Bay region. The *Sun-Sentinel* is a daily newspaper in

Broward and Palm Beach counties.

These organizations and their members rely daily on the open government provisions of Florida law to carry out their mission of reporting on the conduct of the government. Because most members of the public cannot attend and scrutinize governmental operations themselves, the overwhelming majority of the people of Florida depend on news reporters to act as their surrogates. Consequently, in addition to their role as the public's watchdog over government, FAF, FSNE, *FLORIDA TODAY, The Palm Beach Post*, the *Pensacola News Journal*, the *St. Petersburg Times*, and the *Sun-Sentinel* also serve as the public's stand-in to defend openness in government.

SUMMARY OF THE ARGUMENT

In order to argue that Florida Statutes section 395.3036 may be applied retroactively, Memorial Hospital asserts that the public's right of access to government is a mere "common law" right, and so is "distinguished from a right deriving from the Constitution." Starting from that premise, ignoring, as it does, the words in the Constitution, Memorial Hospital proceeds to the conclusion that it is "entirely in legislative hands" whether to create an exemption from public access to government. The amici submit this brief solely to debunk this argument.

Since the 1991 enactment of article I, section 24 of the Florida Constitution's Declaration of Rights (the "Sunshine

Amendment"), the public's right of access to government meetings and records has been elevated to the status of a fundamental constitutional right. An exemption from open government is now subject to exacting judicial review to determine whether the exemption meets the requirements explicitly set forth in the Constitution. If the legislature did intend to make the revised section 395.3036 retroactive (an erroneous assumption, but one these amici do not address), the enactment is unconstitutional, for the legislature may not retroactively divest the News-Journal and the public of vested constitutional rights.

ARGUMENT

I. THIS COURT HAS ALREADY DECIDED AGAINST MEMORIAL HOSPITAL'S POSITION.

Memorial Hospital has come to this Court to reargue two issues that were fully decided by this Court's January 21, 1999 decisions in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999), and *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.* 729 So. 2d 373 (Fla. 1999) (*"Memorial I"*).

First, the question certified by the Fifth District in this case was already answered by this Court in *Memorial I*, holding that Florida Statutes section 395.3036 is not retroactive. The amici will not address that issue except to say there should be no need for this Court to reach the merits of the retroactivity question, having already done so. The amici urge the Court to

dismiss this appeal with a succinct statement that this Court's express rulings are not to be assumed to be inoperative.

In this brief, instead, the amici will address another of the issues decided in the sister opinions of January 21, 1999, even as the amici hope this issue will not be reconsidered. By its holding in *Halifax*, this Court established that article I, section 24 of the Florida Constitution, the Sunshine Amendment of 1992 (hereinafter the "Sunshine Amendment"), created a fundamental constitutional right of public access to the meetings and records of Florida government. This conclusion was inherent in this Court's decision to strike the statute as unconstitutional for the legislature's failure to meet the "exacting constitutional standard," *Halifax* at 569, set forth in the Sunshine Amendment. In this case, Memorial Hospital now challenges the underpinning of the *Halifax* decision.

In its argument that the legislature is empowered to give retroactive application to section 395.3036, Memorial Hospital argues, as it must, that such a retroactive application would not divest the News-Journal of a "vested right of access." Initial Brief at 26. Memorial Hospital admits that a retroactive application of the statute would be "prohibited by constitutional due process considerations" if article I, section 24 of the Declaration of Rights were deemed to set forth actual constitutional rights. *Id*.

Accordingly, Memorial Hospital makes a tortured effort to argue that the constitutional rights set forth in article I, section 24 of the Florida Constitution are not, in fact, constitutional rights, but are mere "common law" rights, and so are "distinguished from a right deriving from the Constitution." Initial Brief at 27.

Memorial Hospital's argument in support of retroactivity flows from a flawed view of the separation of powers doctrine. Memorial Hospital asserts that because the Sunshine Amendment empowers the legislature to enact exemptions to open government, the Florida Constitution:

> does not confer a "vested" right of access to any records or meetings if the legislature says that access does not exist. Whether and to what extent a right exists is a choice that is entirely in legislative hands. The existence of a constitutionally-prescribed path for an *exercise* of the legislative prerogative to exempt public access to particular entities or subjects may provide a basis for scrutinizing its exercise of that policy-making, but it does not lessen its prerogative.

Initial Brief at 28. Therefore, the argument goes, this Court should assume that an exemption from open government must stand if the legislature says it must stand. That is exactly the opposite of what *Halifax* held.

The amici urge the Court to once again, as it did in *Halifax*, give the Sunshine Amendment the full breadth and significance the voters of Florida intended. The Sunshine Amendment imposed strict limitations on the once-plenary

prerogative of the legislature to enact exemptions from open government. Now, not only must an exemption "state with specificity the public necessity justifying the exemption" and be "no broader than necessary to accomplish the stated purpose of the law," but this Court has asserted its authority and obligation to enforce those standards.

The trouble with Memorial Hospital's position is that it would have this Court treat exemptions from open government after passage of the Sunshine Amendment in exactly the same manner as before passage of the Sunshine Amendment: Before, the legislature could create exemptions at will; in Memorial Hospital's view, the legislature can still create exemptions at will. The Sunshine Amendment would thus be given no more legal force than the previously existing open government statutes.

To the contrary, the voters intended for article I, section 24 to elevate open government to a constitutional status, subject to exacting review by the courts. The amici therefore ask that this Court reject Memorial Hospital's position and reaffirm its holding in *Halifax* that a legislative exemption from open government must meet the Sunshine Amendment's textually explicit standard or be stricken as facially unconstitutional. The judiciary is the final arbiter of constitutional interpretation, not, as Memorial Hospital argues, the legislature.

When this Court decided *Memorial I*, it decided that the

fundamental right of public access had vested in the News-Journal and the public back when the meetings in question were held and the documents were created or received. The *Memorial I* decision necessarily means that the public right of access was vested all along pursuant to the Constitution, not, as Memorial Hospital argues, as of January 21, 1999, the day of the *Memorial I* and *Halifax* decisions. The legislature did not have the retroactive power, on May 30, 1998, to withdraw these public rights of access.

II. IN LIGHT OF THE SUNSHINE AMENDMENT, EXEMPTIONS FROM OPEN GOVERNMENT ARE SUBJECT TO EXACTING JUDICIAL REVIEW.

The significance of the *Halifax* decision was that it breathed life into article 1, section 24, giving that provision the preeminence a constitutional provision carries with it. The Sunshine Amendment reflects the will of the ultimate sovereign — the people. In Florida, *Halifax* establishes that the public's right of access to government is a fundamental right, one which the courts are constitutionally obligated to vindicate if the other branches do not.

Article I, section 24(c) requires that an exemption from open government "state with specificity the public necessity justifying the exemption" and be "no broader than necessary to accomplish the stated purpose of the law." Yet Memorial Hospital argues that the

> Florida Constitution does not confer a 'vested' right of access to any records or meetings if the legislature says that access does not exist. Whether and to what extent a right exists is a choice that is entirely in legislative hands.

Initial Brief at 28. Thus, Memorial Hospital would have this Court surrender to the legislature the plenary authority to decide whether its own exemptions comport with the constitutional requirements. Memorial Hospital would have this Court apply the Sunshine Amendment's requirements in a manner resembling the deferential rational basis test, in which the legislature's stated "public necessity" would be irrebutably presumed to be sufficient. Further, the required "fit" between the exemption's narrow tailoring and its stated public purpose would be whatever the legislature says it is.

This case is not one for the application of the separation of powers principle that the judicial branch shows great deference to legislative findings and conclusions with respect to ordinary legislation. That principle, as expressed by this Court, is that "the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the Constitution." *McPherson v. Flynn*, 379 So. 2d 665, 667 (Fla. 1981). Article III, section 1 of the Florida Constitution confers the "legislative power" upon the legislature and thus reflects "a textually demonstrable

constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

But there is no longer a textually demonstrable constitutional commitment of the issue of open government to the legislative branch. When the voters of Florida approved the Sunshine Amendment by an overwhelming margin of 83.1 percent,[1] they engrafted its text into the Declaration of Rights, took the legislative function of enacting exemptions to open government out of the exclusive legislative domain, and placed the legislature's findings and conclusions in support of an exemption squarely within the scope of judicial review. Now, the Constitution of Florida reflects a textually demonstrable commitment that the legislative branch must maintain open government consistent with the requirements of the Sunshine Amendment.

Therefore, any exemption from open government must be analyzed by this Court for its compliance with the enforcement standard within the Sunshine Amendment. To hold otherwise would strike at the very concept of judicial review established in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). Only the

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[1]. *See* Patricia A. Gleason and Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(E) — Let the Sunshine In!*, 18 Nova L. Rev. 973, 979 note 32. (1994) (hereinafter *Let the Sunshine In!*). Ms. Gleason, General Counsel to the Attorney General, is primarily responsible for enforcement of open government matters.

judicial branch can decide whether the legislature has adhered to the requirements of the constitution in enacting a law.

Contrary to Memorial Hospital's pretense, it is no accident that article I, section 24 is contained in the Declaration of Rights, which contains the "rights so basic that the framers of our Constitution accorded them a place of special privilege." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). The people of Florida decided the Sunshine Amendment required greater dignity than the portions of the Constitution providing for the general framework of government. Placement of the amendment in article III (legislative branch), IV (executive) or V (judicial) might have implied that openness was only a structural component of government, subject to the separation of powers and enforceable by each branch according to that branch's view. Instead, the people have chosen, by amending the Declaration of Rights, to make open government a fundamental right.

III. WHEN FLORIDA VOTERS ADOPT AN AMENDMENT TO ENSURE THEIR SUBSTANTIVE CONSTITUTIONAL RIGHTS, THE COURTS OF THIS STATE ENFORCE THE PEOPLE'S WILL VIGOROUSLY, AND THIS COURT SHOULD DO LIKEWISE IN THIS CASE.

Twelve years before the people of Florida enacted the Sunshine Amendment, they similarly enacted article I, section 23, the Privacy Amendment. This Court has steadfastly safeguarded the people's rights as expressed in the Privacy Amendment. *See Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544

(Fla. 1985). The parallels between the Privacy Amendment and the Sunshine Amendment are manifest, and this Court should draw upon its Privacy Amendment jurisprudence as a model for the development of the law under the Sunshine Amendment.

Just as the "citizens of Florida opted for more protection from governmental intrusion when they approved" the Privacy Amendment, *id.* at 547, so too they opted for more protection from closed government when they approved the Sunshine Amendment. Just as the Privacy Amendment "is an independent, freestanding constitutional provision which declares the fundamental right to privacy," *id.*, the Sunshine Amendment also is an independent, freestanding constitutional provision which declares the fundamental right to open government.

The *Winfield* court noted that the Privacy Amendment "was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible." *Winfield*, 477 So. 2d at 547. So it is with the Sunshine Amendment. As is demonstrated in section III, below, the drafters of the Sunshine Amendment intended to require open government in the strongest possible terms.

In *Winfield*, this Court said:

> Heretofore, we have not enunciated the appropriate standard of review in assessing a claim of

> unconstitutional governmental intrusion into one's privacy rights under article I, section 23. 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. The right of privacy is a fundamental right which we believe demands the compelling state interest standard.

Id. While the "compelling state interest standard" would require a statute to be "narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual," *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990), the Sunshine Amendment carries its own explicit standard: That an exemption from open government "state with specificity the public necessity justifying the exemption" and be "no broader than necessary to accomplish the stated purpose of the law." These two prongs need only be enforced with the same gloss as the two-prong "compelling state interest" standard applied under the Privacy Amendment — with a correspondingly heavy burden placed on the state.

There are other parallels between the issues of open government and privacy. Neither is explicit in the federal Constitution, yet they both are held to be implicit. Both are rights that the state governments are free to extend more generously than the federal Constitution does, and both are rights that the citizens of Florida have elected to enumerate explicitly, by constitutional amendment. In *Winfield*, this Court said:

> [T]he the states, not the federal government, are responsible for the protection of personal privacy. . . . This Court accepted that responsibility of protecting the privacy interests of Florida citizens when we stated that "the citizens of Florida, through their state [C]onstitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution." . . .
>
> Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the [f]ederal Constitution.

Winfield at 548. *See also In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) ("In other words, the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.").

There is likewise a recognized, but not explicit, right of access to government in the federal Constitution. The First Amendment "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw'." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-75 (1980) (citations omitted).

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. ... Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' ... but also the antecedent assumption that valuable public debate — as well as other civic behavior — must be informed.

Id. at 587 (citations omitted) (Brennan, J., concurring). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (by protecting the "free discussion of governmental affairs, ... the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (same). In *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court held:

> [T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us:
>
> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

Pico, 457 U.S. at 867.

Justice Brennan wrote that "central meaning" of the First Amendment is not only that it grants to the people a right of free speech; it is that the people, as the ultimate sovereign, have granted only limited rights to their government, their subordinate. In the First Amendment, the people have denied *their* government the ability to interfere in their free speech in order to preclude the government, ultimately, from usurping the right of the people to self-governance. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation Of the*

First Amendment, 79 Harv. L. Rev. 1, 10-20 (1965).[2] Seen in this light, the First Amendment's explicit protection of free speech also implies the right of the people to obtain access to information about their government. For how could they self-govern without being informed? The First Amendment "has a 'central meaning' — a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the [g]overnment over the people and not 'in the people over the government'." Kalven, *supra* note 2, at 208.

The people of Florida have adopted the views of James Madison, Alexander Meiklejohn and Justice Brennan. They have elected to provide in their Constitution greater security for the principles of open government than that provided in the federal Constitution and that provided in most other states. Because it is the duty of a Florida court to "give independent legal import to every phrase and clause" contained in the state constitution, *Traylor*, 596 So. 2d at 962, the Sunshine Amendment, like the Privacy Amendment, has embarked Florida on a unique experiment in

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[2]. Justice Brennan's commentary on "the Meiklejohn interpretation of the First Amendment" is significant because in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Justice Brennan, writing for a unanimous Court, "literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official." Harry Kalven, Jr., *The New York Times Case: A Note On 'The Central Meaning Of the First Amendment*,' 1964 Sup. Ct. Rev. 191, 209.

the terms upon which state government interacts with the people.

> To stay experimentation ... is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel ... experiments.

Traylor at 962, *quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

> The federal Constitution secures a common degree of protection for the citizens of all fifty states, but the federal Court has wisely exercised restraint in construing the extent of this protection for several reasons. First, under our federalist system, many important decisions concerning basic freedoms have traditionally inhered in the states. Second, the federal Court's precedent is binding on all jurisdictions within the union; once it settles a matter, further experimentation with potentially rewarding alternative approaches in other jurisdictions is foreclosed. Third, federal precedent applies equally throughout fifty diverse and independent states; a ruling that may be suitable in one may be inappropriate in others. And fourth, the federal union embraces a multitude of localities; the Court oftentimes is simply unfamiliar with local problems, conditions and traditions.

Traylor, 596 So. 2d at 961. Florida is a unique locality. Its local "problems, conditions and traditions" have caused it to embark on a "potentially rewarding alternative approach" to open government, the people having struggled for decades in support of open government and against the forces of closed government. As a consequence, Florida enacted a "self-executing" amendment, Art. I., § 24(c), to extend a fundamental right to open government to "[e]very person." *Id*. As then-Chief Justice Shaw wrote:

> The state bills of rights . . . express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor at 962. Florida's unique state experience, the express language of the Sunshine Amendment, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes, and this state's history point toward rigorous judicial enforcement of the Sunshine Amendment.

The amendment says that *every person has the right* to inspect records and attend meetings. The people of this state are more powerful than any particular branch of its government. *See* Art. I, § 1, Fla. Const. This Court is but an arm of enforcement of the rights of the people. The people having spoken, this Court should hear their voice.

IV. THE HISTORY OF THE SUNSHINE AMENDMENT DEMONSTRATES THAT THE PEOPLE OF THIS STATE INTENDED FOR THEIR COURTS TO ENFORCE IT.

An amendment to the Florida Constitution "should be interpreted in accordance with the intent of its drafters." *Winfield*, 477 So. 2d at 548. The drafters of the Sunshine Amendment had spent years trying to create and enforce standards for the justification and tailoring of exemptions from open

government, and finally constitutionalized a set of clear standards with the intention that this Court enforce them.

The public right of open access to government has been a familiar element of Florida government for almost a century.[3] Though the tradition of open government began early in the century, the current Government-in-the-Sunshine Law and the Public Records Law were enacted as companion measures by the newly reapportioned legislature of 1967. *See Marston v. Gainesville Sun Publishing Co., Inc.*, 341 So. 2d 783 (Fla. 1st DCA 1976); Ch. 67-356, § 1, and Ch. 67-125, § 7, Laws of Fla. (1967).

At that time, open government was only a statutory right and therefore vulnerable to the pluralistic forces of the legislative process. For at least two decades before the Sunshine Amendment, supporters of public access had been concerned that the legislature too readily yields to special pleas for unjustifiable exemptions. The purpose of the Sunshine Amendment was to elevate the right to constitutional stature[4] in order to protect it

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[3]. *See, e.g.,* Ch. 5942, § 1, Laws of Fla. (1909) (records "shall at all times be open").

[4]. *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994) (Sunshine Amendment "expresses a recent public mandate reaffirming the Sunshine Law and extending its reach into every meeting at which public business is to be transacted or discussed"); *id.* at 862 (Cope, J., dissenting) ("The obvious intent of the electorate was to strengthen Florida's Government in the Sunshine laws. . . "). *See also* Fla. H. Rep. Comm. Governmental Operations, *Final Bill Analysis and Economic Impact Statement of CS/CS/HJR 1727, 863,*

against the erosion wrought by such unjustified exemptions.

A project to impose limiting standards on exemptions began when the Constitutional Revision Commission of 1978 ("CRC") proposed an amendment elevating the right of access to meetings to constitutional stature. The amendment would have provided: "The legislature may exempt meetings by general law when it is essential to accomplish an overriding governmental purpose or to protect privacy interests."[5]

The CRC was responding to "the concerns of those who worried that Florida's devotion to 'government in the sunshine' was slowly eroding, as well as to those who maintained that the public's right to know was a principle of such fundamental importance in a democracy that it ought to be included in the declaration of rights."[6] Among the concerns of the CRC was the

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and 2035 Nov. 9, 1992 at p.6 ("The joint resolution amends the State Constitution to *guarantee* that the public has access to records of the executive, legislative, and judicial branches of state government and to meetings of the executive branch of state government and local governments.") (emphasis supplied).

[5]. *See* Thomas R. McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 Fla. St. U. L. Rev. 307, 322 (1991).

[6]. Patricia A. Dore, *Of Rights Lost and Gained*, 6 Fla. St. U. L. Rev. 610, 664-665 (1978). Professor Dore, who taught at the Florida State University College of Law from 1970 until her death in 1992, served on the staff of the CRC in 1978. *Cf*. *Stall v. State*, 570 So. 2d 257, 265 (Fla. 1990) (Kogan, J., dissenting) ("[W]e have previously resorted to the history of the 1977-78 Constitutional Revision Commission, which Professor Dore and Judge [Gerald] Cope have extensively analyzed, to determine the intent underlying the privacy amendment.").

fact that “the number of bills introduced in the Legislature to weaken [open government] laws had increased, evidencing a retreat in the Legislature's posture on its own openness.”[7] This led the CRC to propose the amendment in order to establish “a statement of standards against which exceptions to the principle of openness was to be tested.”[8]

The proposals submitted by the CRC in 1978 failed to win approval of the electorate at the general election.[9] Nevertheless, several of these proposals have since been adopted as individual amendments, including not only the public right of access but also the right of privacy.[10] See Fla. Const., art. I, §§ 23, 24.

The flow of exemptions continued unabated after 1978. When the Florida Supreme Court held in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), that exemptions could be created only by the legislature, there ensued "a virtual flood of bills seeking to create new loopholes in the law. By 1983, estimates of the number of statutory exceptions to the open government laws

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[7]. McSwain, *supra* note 5, at 322.

[8]. Dore, *supra* note 6, at 665.

[9]. *See* Steven J. Uhlfelder and Billy Buzzett, *Constitution Revision Commission: A Retrospective and Prospective Sketch*, 71 Fla B.J. 22, 24 (Apr. 1997).

[10]. Steven J. Uhlfelder and Robert A. McNeely, *The 1978 Constitution Revision Commission: Florida's Blueprint for Change*, 18 Nova L. Rev. 1489 (1994). Uhlfelder was the staff director of CRC.

ranged between 200 and 800."[11]

In response to "the haphazard proliferation of exemptions," the legislature adopted the Open Government Sunset Review Act of 1984.[12] *See* Ch. 84-298, § 8, Laws of Fla. (1984) (now codified at § 119.15, Fla. Stat. (1995)). As amended in 1985, this act attempted to impose self-discipline on the process of creating exemptions by establishing a schedule for periodic and automatic repeal of exemptions and setting standards by which exemptions should be justified. These standards, however, were not enforceable.

Despite the aspirations of its legislative supporters, the Open Government Sunset Review Act did little to slow the flow of exemptions. By 1992 there were more than 500 exemptions to the open government laws, of which nearly 300 had been adopted since 1986 while only 12 had been repealed.[13] By 1991, the Government-in-the-Sunshine Manual, updated annually by the Office of the Attorney General and published by the amicus First Amendment Foundation, contained 83 pages of fine print listing exemptions scattered throughout the Florida Statutes; the previous year's

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[11]. Barry Richard and Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 Fla. St. Univ. L. Rev. 705, 706 (1985). Author Richard represented the Florida Press Association in the legislative process of adopting the act.

[12]. Richard and Grosso, *supra* note 11, at 708.

[13]. Kara M. Tollet, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 Fla. St. U. Law Rev. 525, 529 (1992).

edition contained 26 fewer pages.[14]

The Sunshine Amendment was connected to the project of imposing standards to limit legislative exemptions to the open government laws. The language of the amendment "closely parallels that [proposed earlier by the] CRC, especially in defining a standard by which the Legislature could exempt records."[15] Nonetheless, the immediate provocation of the Sunshine Amendment was a decision of the Supreme Court of Florida suggesting the judicial branch's inability to enforce open government against the other branches. On November 7, 1992, this Court released its decision in *Locke v. Hawkes*, 16 Fla. L. Weekly S716, 16 Media L. Rptr. 1522 (Fla. Nov. 7, 1991), *vacated on rehearing*, 595 So. 2d 32 (1992).

In the initial *Locke* decision, the Court said that the issue was "the authority of the courts to apply chapter 119, Florida Statutes (1987) (Public Records Law), to members of the Florida Legislature." The Court determined that chapter 119, by its terms, did not apply to the records of the "the governor, the members of the cabinet, the justices of the supreme court, judges of the district courts of appeal, the circuit courts or the county courts, or members of the house or senate" because none of

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[14]. Robert Rivas, *Access to 'Private' Documents Under the Public Records Act*, 15 Nova L. Rev. 1229, 1232 n.19 (1992).

[15]. Uhlfelder & McNeely, *supra* note 10, at 1496.

them was an "agency" as defined in section 119.011(2).

Yet the Court also said:

> We find that chapter 119 clearly was intended to apply to all of those entities that the legislature was authorized to create or establish by statute and that it necessarily follows that, if the legislature has the authority to create or abolish an agency, it may set forth certain operating criteria for those agencies.
>
> To construe chapter 119 [to authorize the Court to enforce its provisions against individual members of the legislature] would result in a direct confrontation with the separation of powers doctrine set forth in article II. . . .
>
> We find that we do not need to address the constitutional question because we interpret the term "agency," as used in the statute, to not include members of the legislature.

Locke, 16 Fla. L. Weekly at ____, 16 Media L. Rptr. 1524-25. Thus, the Supreme Court of Florida suggested, in dicta, that it had no prerogative enforce the Public Records Law against the legislature — and probably not on any other constitutionally created body.

Reaction to the original decision was swift and severe. Across Florida, property appraisers, tax collectors, state attorneys and school districts began to question whether their records were no longer subject to mandatory public inspection. *Let the Sunshine In!* at 978; Tollet, *supra* note 13, at 528 n.27. The Attorney General and numerous amici petitioned the Supreme Court for rehearing. *Let the Sunshine In!* at 978.

Almost immediately, some members of the legislature tried unsuccessfully to pass a joint resolution in December 1991 to place an Open Government Constitutional Amendment on the fall

1992 statewide election ballot. Tollet, *supra* note 13, at 529. The Attorney General announced his proposal for an "Open Government Constitutional Amendment," *Let the Sunshine In!* at 978, and vowed to force the proposal onto an election ballot by petition if the legislature did not place the proposal on the ballot by a two-thirds vote of both chambers. *See* Tollet, *supra* note 13, at 529. As it happened, the legislature passed a joint resolution in January 1992, before the original *Locke* decision was vacated and superseded on rehearing, to place the constitutional amendment on the ballot.

It is thus clear that the drafters of the Sunshine Amendment intended to rectify this Court's suggestion in the original *Locke* decision that the separation of powers doctrine prohibited this Court from enforcing open government standards. Ironically, this Court later reversed itself on rehearing as to the dicta that provoked the Sunshine Amendment to be placed on the ballot.

While the separation of powers problem brought the proposed amendment to the floor of the legislature, the amendment went beyond what would have been necessary to overrule that aspect of the original *Locke* decision. The Senate Staff Analysis [16] of the Sunshine Amendment resolution said, "The amendment would

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[16]. Fla. Sen. Staff Analysis and Economic Impact Statement, SJR 1288 by Sen. Margolis, Jan. 28, 1992 (available Florida State Archives Series 18, Carton 1940) (hereinafter "Senate Staff Analysis").

constitutionally grant specified rights of access to specified public records and meetings. ... This would have the effect of providing in the Constitution the requirements of the Public Records Law . . . [and the] Public Meetings Law." Senate Staff Analysis at 3-4.

The House and Senate considered different drafts of the joint resolution putting the amendment on the ballot.[17] The first Senate version applied to records and meetings,[18] while the first House version applied only to records.[19] The first drafts in both chambers required that any exemption be enacted in a law containing only the exemption, in order to prohibit exemptions from being sneaked into a larger bill or enacted as riders to other, perhaps more important or popular bills. *See* Tollet, *supra* note 13, at 538. The single-subject provision remained in place through all drafts of the resolution.[20] Likewise, all drafts required any exemption to be contained in a general law, thus forbidding exemptions from being written into special acts. "Burying a public record exemption in a special act is misleading, if not secretive," because "special acts are

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[17]. Journal of the Senate, Jan. 30, 1992, at 156 (hereinafter "Senate Journal"); Journal of the House, Jan. 30, 1992, at 178 (hereinafter "House Journal").

[18]. Senate Journal, Jan. 30, 1992, at 156-57.

[19]. House Journal, Jan. 30, 1992, at 178-79.

[20]. Senate Journal, Jan. 30, 1992, at 156 and Feb. 18, 1992, at 422; House Journal, Jan. 30, 1992, at 178, and Feb. 13, 1992, at 463.

difficult to research because they are never codified or published by subject or date of enactment." Tollet, *supra* note 13, at 536.

The first Senate version empowered the legislature to "provide for the exemption of records or meetings from the requirements of this section, provided that the law creating such an exemption states with specificity the public necessity that justifies the exemption and provided that the exemption is no broader than necessary to meet such necessity."[21] At this time, the House version said that the legislature "may provide by general law for the exemption of records . . . provided that such law shall state with specificity the public necessity justifying the exemption."[22] The House version was stronger in that it said an exemption *shall* state the public necessity with specificity, but was weaker in that it did not contain the Senate-approved *no-broader-than-necessary* provision.

The House took up the Senate resolution and approved a substitute.[23] In the substitute, the House concurred with extending the amendment to cover meetings as well as records, and modified the Senate language on exemptions to put the stronger word *shall* in both the public necessity and no-broader-than-

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[21]. Senate Journal at 157.

[22]. House Journal at 179.

[23]. House Journal at 463-64.

necessary clauses. Thus, the pertinent language after the House amended the Senate proposal allowed exemptions, "provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."[24]

The House passed this resolution placing the Sunshine Amendment on the election ballot in 1992 by a margin of 118 to 0.[25] A week later, on February 18, 1992, the Senate approved the resolution by a 40-0 vote[26] eight days before the Supreme Court of Florida released the final *Locke* decision, 595 So. 2d at 32.

Accordingly, it is clear that the legislature, through each successive amendment, strengthened — and at no time weakened — the public necessity language and the narrow tailoring requirement.

This history shows that (1) the Sunshine Amendment was a reaction to the failure of the judicial branch to enforce open government; (2) the voters sought to mandate that the judicial branch take up such enforcement, and (3) the amendment was intended to install enforceable standards that no branch could violate. It follows that separation of powers principles are not

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[24]. House Journal at 463.

[25]. House Journal at 464.

[26]. Senate Journal at 422-23. To be more precise, on February 25, 1992, the Senate reconsidered its approval of the resolution, only to change the effective date from January 1993 to July 1993, and the House approved the change on the same day.

violated when the judicial branch exercises its obligation of judicial review to enforce the Sunshine Amendment against a legislative act that facially fails to meet the standards imposed by the voters on an exemption from open government. The people of Florida enacted the Sunshine Amendment in order to ensure their courts could and would enforce open government, even in the face of opposition from the temporary occupants of the executive, legislative, or judicial branches of government.

All of these undeniable observations are at war with Memorial Hospitals insistence that "a 'constitutional' or a 'vested right' analysis is not apt," Initial Brief at 28, in reviewing whether section 395.3036 is retroactive. They cannot be squared with Memorial Hospital's assertion that "the right of access to records and meeting minutes . . . is in a domain where the *legislature* has final say in setting Florida's policy." Initial Brief at 30 (emphasis in original). And they completely refute Memorial Hospital's statement that "[a]ccess to public records through the Sunshine laws stands in no unique or higher footing than other substantive rights which may be curtailed retroactively." Initial Brief at 30.

CONCLUSION

For the foregoing reasons, if this Court elects to reach the merits of the decision of the Fifth District Court of Appeal, that decision should be affirmed.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in 12 point non-proportionately spaced Courier New type.

Florence Snyder Rivas

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amended Amicus Brief was provided by U.S. Mail on May 1, 2000, to counsel listed below.

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