IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC00-82
L.T. Case No. 5D99-1483

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

Appellant/Petitioner,

v.

NEWS-JOURNAL CORPORATION,
a Florida corporation,

Appellee/Respondent.

CORRECTED ANSWER BRIEF ON THE MERITS OF NEWS-JOURNAL CORPORATION

On Review of a Certified Question of Great Public Importance
From the Fifth District Court of Appeal

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PRELIMINARY STATEMENT OF DEFINITIONS

Agreement. The Lease and Transfer Agreement Between and Among West Volusia Hospital Authority, Memorial Hospital--West Volusia, Inc., and Memorial Health Systems, made as of July 28, 1994, is referred to as "Agreement." R 95-228.

Cites to Brief. References to West Volusia, Inc.'s initial brief will be made as IB #, where # is the page of the brief to which reference is made.

Cites to Record. "R ____" refers to materials in the record on appeal and "SR ___" refers to materials in the supplemental record on appeal.

West Volusia, Inc.. Petitioner, Memorial Hospital-West Volusia, Inc., is referred to as "West Volusia, Inc."

West Volusia Suit. That certain suit for declaratory relief filed by Memorial Hospital--West Volusia, Inc., as plaintiff, against News-Journal Corporation, Tanner Andrews, and various "Does" in the Circuit Court, Seventh Judicial Circuit, Case No. 99-30725-CICI, Division 31 (Honorable Joseph G. Will) is referred to as "*West Volusia Suit*." The complaint seeks a declaratory decree that the act satisfies the section 24(c) standards, and the counterclaims seek the contrary declaration. The complaint and counterclaims are now pending on fully submitted cross motions for summary judgment. The complaint is at R 335.

News-Journal. Respondent News-Journal Corporation is referred to as "News-Journal."

News-Journal. The Fifth District decision in *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), is referred to as "*News-Journal*." A copy is attached as Appendix 1.

West Volusia. This Court's opinion approving *News-Journal* in *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999), is referred to as "*West Volusia*." A copy is attached as Appendix 2.

West Volusia II. The Fifth District decision in *Memorial Hospital--West Volusia, Inc. v. News-Journal Corp.*, 747 So. 2d 473 (Fla. 5th DCA 1999), is referred to as "*West Volusia II*." A copy is attached as Appendix 3.

Final Judgment. The Final Judgment entered on May 10, 1999, in this cause by the Honorable Joseph G. Will, Circuit Judge is referred to as "Final Judgment." R 354-356. A copy is attached as Appendix 4.

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

Section 24(c) standards. The phrase "section 24(c) standards" refers to the second sentence of article I, section 24(c) of the Florida Constitution.

Sunshine Amendment. The provisions of article I, section 24 of the Florida Constitution as ratified in November of 1992 and

effective on July 1, 1993, are called "section 24" or the "Sunshine Amendment."

The Act. Chapter 98-330, Laws of Florida (1998) (creating § 395.3036, Fla. Stat. (1999)) (which became a law without the governor's approval on May 30, 1998) is called the "act." R 348-353. A copy is attached as Appendix 5.

Halifax Cases. The following published reports of the decisions of the Circuit Court, District Court of Appeal and Supreme Court are reproduced as Appendices 6, 7, and 8 of this brief and referred to by the short names indicated:

Halifax Final Judgment. The final judgment entered by Judge John V. Doyle and published at 25 Med. L. Rptr. 1776. (Appendix 6).

Halifax DCA. The decision of the Fifth District Court of appeal in *Halifax Hosp. Medical Center v. News-Journal Corp.*, 701 So. 2d 434 (Fla. 5th DCA 1997) *approved* 724 So. 2d 567 (1999). (Appendix 7).

Halifax. The decision of the Florida Supreme Court *Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999), *approving Halifax Hosp. Medical Center v. News-Journal Corp.* 701 So. 2d 434 (Fla. 5th DCA 1997). (Appendix 8).

Citations to Florida Statutes. In this brief, a citation to Florida Statutes in the text of a sentence is made as follows: "section 395.3036." Such a reference without more is a reference

to Florida Statutes (1999). When earlier statutes are cited, the year of codification is specified.

STATEMENT OF THE CASE AND THE FACTS

The Nature of the Case

The Final Judgment was entered in proceedings to enforce the mandate of this Court in *Memorial Hospital-West Volusia v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999). The judgment construed the mandate to require that section 395.3036 shall not be applied retroactively and thus granted News-Journal access to those public records of West Volusia, Inc., which had been made or received before the effective date of May 30, 1998. R 354-356.

In *Memorial Hospital--West Volusia, Inc. v. News-Journal Corp.,* 747 So. 2d 473 (Fla. 5th DCA 1999), the district court affirmed the Final Judgment. Expressing doubt that the Court had correctly decided the retroactivity issue, however, the Court concluded that "it is only fair for the parties to be allowed to proceed in the supreme court to address this issue." *Id.* at 473. Thus the court certified the following question:

SHOULD SECTION 395.3036 BE APPLIED RETROACTIVELY?

The case is now before this Court on an order deferring jurisdiction.

Answer to Petitioner's Statement of the Case and Facts

The petitioner's statement of the Case and Facts is argumentative and selective. For these reasons and because of material differences in emphasis, News-Journal will restate and amplify the Statement of the Case and of the Facts as to the

matters relevant to the issues posed in this appeal. All of the "facts" of this case relate to supplemental proceedings in *West Volusia* and to construction of the act and of *West Volusia*.

Summary of the Relevant Facts and Circumstances

The Act

After oral argument in this Court in *West Volusia*, the legislature passed the act, which threatened to moot the case. The act created a blanket exemption of all records and all meetings of any not-for-profit corporation operating a public hospital under a lease authorized by section 155.40 or other statute, provided that the corporation met certain criteria specified in the act. When the act became law without the governor's approval on May 30, 1998, *West Volusia* was still under review in this Court.

If this act had been constitutional, retroactive, and applicable to West Volusia, Inc., the exemption it created would have applied to the facts of this case, and the Court would have been unable to grant effective relief in the pending case. The question of retroactivity was apparent because, as the Court observed, "By express provision, this act was made applicable to existing leases entered into pursuant to section 155.40, Florida Statutes." *West Volusia*, 729 So. 2d at 383-4.[1]

[1]*See* Act, § 4 at SR 264: "This act shall take effect upon becoming law and shall apply to existing leases and future leases of public hospitals and other health care facilities."

Indeed, West Volusia, Inc., now contends that the act applies retroactively to the facts of this case, exempts all of its records and meetings, and satisfies the section 24(c) standards. If West Volusia, Inc., is correct, then the mandate of the Supreme Court is, and always has been, unenforceable. Thus it would have been error for the trial court to enter the Final Judgment or any other judgment granting relief pursuant to the mandate.

Supplemental Proceedings in the Supreme Court

In light of this position of West Volusia, Inc., it is now obvious that on May 30, 1999, it had a duty in all candor to notify this Court that it contended the act rendered the pending case moot. *See Lifred v. State,* 643 So. 2d 94, n. 7 (Fla. 4th DCA 1994) (*en banc*) (counsel had duty to disclose supplemental authority affecting case). *Compare Board of License Commissioners of the Town of Tiverton v. Pastore,* 469 U.S. 238, 240 (1985) (counsel have "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation; dismissing case as moot).

West Volusia, Inc., never notified the Court of the passage of the act, never filed a suggestion of mootness, and never argued the case was moot when that issue was before this Court.

When with the passage of time, it became apparent that West Volusia, Inc., did not intend to apprise the Court of the new statute and suggest mootness, News-Journal did so. It served on June 19, 1999, a Notice of Supplemental Authority, SR 250, and a

Motion for an Order Requiring Supplemental Briefs. SR 279. In its Notice of Supplemental Authority, News-Journal suggested the act may have the effect of mooting the case. SR 252. And, in the Motion for Order Requiring Supplemental Briefs, News-Journal asserted the possibility of mootness as the ground for its motion. SR 279. The motion stated, "If the act were constitutional and if [West Volusia, Inc.] were qualified for exemption thereunder, the act may render the ultimate issue moot." SR 280.

The Court granted this motion on July 15, 1999. It ordered supplemental briefs on the "effect, if any, the recent enactment by the Florida Legislature of [the act] has on this case, which is presently under review." SR 301.

The West Volusia, Inc., brief did not respond directly to the order. It argued only that the Supreme Court lacked jurisdiction to consider the effect of the act in any respect and declined to brief the merits of any issue raised by the act. SR 311 *et. seq.* It did not tell the Court that West Volusia, Inc., contended the act had mooted the case by creating a retroactive blanket exemption barring access to all records and meetings that were the subject of the pending case. Warily, it conceded only that West Volusia, Inc., "may well seek the benefits of the new statute at some point in the future." SR 315.

In its Supplemental Answer Brief on the Merits (SR 319-342), News-Journal again presented the issue of mootness. It argued that the Court "must notice and consider the act because it was adopted

to overturn the decision under review and thwart the relief sought here. If the act is valid and applicable to [West Volusia, Inc.], this case is now moot in whole or in part. In order to decide this case, the Court must address those issues raised by the act." SR 329. In a footnote, News-Journal submitted the act presented "three basic questions bearing on its effect on the pending case," one of which was retroactivity. News-Journal argued:

> Third, is the Act to be given retroactive effect? Although the Act clearly should be confined to prospective effect, *e.g., State Farm Mutual Auto Ins. Co. v. Laforet,* 658 So. 2d 55, 61 (Fla. 1995), that alone would not negate its effect on the pending cause. This is a suit for a declaration that [West Volusia, Inc.,] is subject to the right of access and for supplemental injunctive relief. Even prospectively applied, the Act would interdict that relief as of May 30, 1998, its effective date.

SR 329, note 1.

To address the issue of potential mootness, News-Journal suggested that the Court had two courses of action. It could remand the case for consideration of those constituent issues that go to mootness, or it could obviate mootness by holding the act facially unconstitutional under the section 24(c) standards. SR 331. Of course, News-Journal strongly urged the Court to adopt the latter course and hold the act unconstitutional under the section 24(c) standards. SR 332-333.

In reply, West Volusia, Inc., said it did not intend to "disavow[] possible future reliance on [the act]. However, . . . reliance will occur only in the event this Court affirms [*News-*

Journal]" SR 433. However, it still did not disclose that this "possible future reliance" would consist of a claim that the decision of the Court was without any effect because the act is retroactive. In fact, West Volusia, Inc., did not even take issue with News-Journal's contention the act was not retroactive. West Volusia, Inc., said the act had no effect on this case, denied the Court's jurisdiction to decide the facial constitutionality of the statute under the section 24(c) standards, SR 434-438, and defended the act on the merits of that question. SR 438-439.

At the close of the supplemental briefing, therefore, the question whether the act mooted the case squarely confronted the Court. Despite the efforts of West Volusia, Inc., to shield the act from judicial scrutiny, News-Journal had posed the question to the Court. If the act were valid, retroactive, and applicable, the exemption barred any effective relief in the case and rendered the case moot. SR 329. News-Journal had urged the Court to obviate mootness by striking the facially unconstitutional act under the section 24(c) standards, or in the alternative, by remanding for consideration of the effect of the act. West Volusia, Inc., simply had urged the Court to ignore the act and render a decision based on the state of the law at the inception of the complaint.

Decision of the Supreme Court Concerning the Act

This Court chose to obviate mootness through a course of its own choosing. First it concluded that it should not decide whether the act satisfied the section 24(c) standards. Then it stated, "In

any event, we reject the contention that the [act] shall apply retroactively." *West Volusia* at 384. Under this holding, the case was not moot because the Court could afford effective relief with respect to the "requests for records and access to meetings which were the basis for the declaratory action." *Id.* Thus the Court concluded by "approv[ing] the decision of the district court." *Id*.

Justice Overton dissented. He said, "I would not only find the statute to be constitutional; I would also find that the statute applies retroactively to the instant case." *Id*. at 388. He contended "the legislature clearly intended for the statute at issue to apply retrospectively. The statute was passed in direct response to the Fifth District's decision, and the statute itself says that it applies to all existing leases. Because this lease existed at the time the statute was implemented, I would find the statute must apply in this case." *Id.* Because it refused to apply the statute retrospectively, Justice Overton concluded that "this Court . . . has unjustifiably overruled a major legislative policy decision without considering the constitutionality of the legislative action. We should either uphold the statute or declare it to be unconstitutional." *Id.*

Belatedly, West Volusia, Inc., repeated Justice Overton's argument for retroactivity in a petition for rehearing that improperly sought to reargue that which the Court already had decided. SR 451 (motion); SR 458 (reply to motion). The Court

denied West Volusia, Inc.'s motion for rehearing and clarification on March 31, 1999. SR 472.

The West Volusia Suit

On the day the Court denied rehearing, West Volusia, Inc., filed the *West Volusia Suit* seeking a declaration that the act is constitutional on its face. R 335. In this second suit, West Volusia, Inc., sued not only News-Journal but also Tanner Andrews, a private citizen of DeLand who is not a party to this proceeding. It also sued unnamed Does. SR 335-341.

Public Records Request

On April 1, 1999, Dinah V. Pulver, a reporter for News-Journal submitted a request for access to certain records of West Volusia, Inc., made or received "during the period from December 1994 until May 30, 1998." R 343. West Volusia, Inc., denied the request through a letter dated and delivered on April 9, 1999, signed by Arthur J. England Jr., as attorney for West Volusia, Inc. R 345. This letter cited the act as the ground for refusing access, arguing that the "[t]he validity of the [Act], and its applicability to the records you requested, are issues for adjudication in [the *West Volusia Suit*]." *Id.*

Proceedings to Enforce the Mandate

After the mandate in this cause came down, News-Journal served its Emergency Motion to Enforce Mandate on April 20, 1999. R 302-312. The Honorable Joseph G. Will, Circuit Judge, heard the motion on May 3, 1999. Although West Volusia, Inc., had filed no written

response to this motion, it appeared and presented argument at the hearing. R 1-40.

West Volusia, Inc., argued below that "until the [act] is determined to be constitutional or not, the Supreme Court's decision at this point has no effect." R 8. It based this position on the contention that the issue of retroactivity had not been decided by the Supreme Court because its statement on that point was *obiter dictum*. West Volusia, Inc., cited *Spector v. Glisson*, 305 So. 2d 777, 784 (Fla. 1974), for "the well-known rule that where a question was neither presented, briefed, nor argued, any reference or decision is only *obiter dicta*, and should not be considered to be precedential, either in that case or in a subsequent case." R 5. Relying on *Spector,* West Volusia, Inc., argued that "a statement . . . that is not based upon anything that was briefed or argued, but simply is a statement, is nothing more than dicta . . . . I don't think anyone will dispute that the Supreme Court did not have any briefing on the issue of retroactivity. In fact, the statute was not really the subject of the Court's opinion, it came into effect during the pendency of the appeal. And the only mention of the constitutionality comes in a footnote of the News-Journal's supplemental brief. There is no discussion whatsoever of retroactivity at all." R 4-5.

West Volusia, Inc., did not ask the court to decide the issue of retroactivity during the hearing on enforcement of the mandate. Rather, it contended that retroactivity was to be determined in the

West Volusia Suit. R 29 ("That argument [on the merits of retroactivity] is going to be made to you in connection with the case that has just been filed."). *See also* R 6-7 and R 30 (same).

Disposition in the Lower Court

At the conclusion of the hearing, the trial judge granted the motion to enforce the mandate. R 33-34. Pursuant to that ruling, the Final Judgment was entered on June 10, 1999. R 354-356. In addition, the trial court granted an *ore tenus* motion for stay pending review. R 37. An order on that motion also was entered on June 10, 1999. R 353. That stay remains in effect during the proceedings in this Court.

The Final Judgment grants the relief originally sought in the complaint by declaring that West Volusia, Inc., is subject to the Sunshine Amendment "in performing and carrying out the obligations of the Agreement" and enjoins West Volusia, Inc., to honor the public right of access. R 355. Though it holds the act is not retroactive and bars West Volusia, Inc., from claiming an exemption thereunder for records and meetings arising before the effective date, the Final Judgment allows West Volusia, Inc., to rely on the act's exemption with respect to records and meetings arising on and after May 30, 1998, unless and until that act may have been finally adjudicated unconstitutional. SR 356. Further the Final Judgment allows West Volusia, Inc., to claim the benefit of any other exemption applicable to state agencies that may apply to its prior records and meetings. *Id.*

The Decision of the Fifth District

West Volusia, Inc., appealed the Final Judgment to the Fifth District. In *West Volusia II*, the court affirmed the Final Judgment but certified the question of retroactivity for reconsideration.

It must be emphasized that the district court affirmed the Final Judgment because in its Initial Brief, West Volusia, Inc., confuses the holding and rationale of the district court and attempts to make much more of the decision of the Fifth District than is justified.

The opinion of the district court speaks for itself and actually says very little. The court stated at one point that it was "of the opinion that the legislature intended the statute to apply retroactively." *West Volusia II*. At another point, the court stated only that "it is at least arguable that the legislature intended the legislation to be remedial." *Id.*

It is therefore obvious that the district court did not reach the conclusion that the legislature had clearly manifested an intention that the act was retroactive and equally obvious that the court did not consider the constitutionality of retroactive operation. Thus the court did not reach a conclusion on the merits of the ultimate issue of retroactivity.

Nor did the district court conclude that this Court's previous rejection of retroactivity was dictum, an issue that was the subject of extensive briefing and argument in that court and which

was obviously decided in favor of News-Journal. The district court clearly considered itself bound by the rejection of retroactivity because it affirmed the Final Judgment, notwithstanding that it questioned the sufficiency of this Court's consideration of that issue.

Therefore, the Court should disregard the five instances in which West Volusia, Inc., claims that the district court reached the ultimate merits of the retroactivity issue and construed this Court's rejection of retroactivity as dictum. *See* IB 1, 6, 7, 10, and 13.[2]

Petition for Ancillary Certiorari

After the district court had affirmed the final judgment, it entered a form order denying News-Journal's motion for attorneys' fees on appeal. In light of the fact that News-Journal prevailed in the district court and section 119.12(2) provides that the court

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[2]The Initial Brief displays confusion in the treatment of the district court decision. *See, e.g.,* IB 13 where West Volusia, Inc., argues that "the district court quite properly determined that the Court's decision on retroactivity in [*West Volusia*] was not a determination on the merits or binding precedent. As it was obligated to do, however, the court certified the question . . . . (*citing Hoffman v. Jones,* 280 So. 2d 431, 434 (Fla. 1973)." It is in the nature of nonbinding dictum that it is not binding, and *Hoffman* holds that the district courts must follow "controlling precedent of this Court" but does not command obedience to dictum. *Id*. at 434. If the district court had believed the rejection of retroactivity was dictum, it would not have considered itself bound. In reality, the district court correctly decided it was bound by the rejection of retroactivity and did not consider rejection to be dictum.

shall allow attorneys fees in such a case, this order was patent error. News-Journal seeks reversal of that order.

Relief Sought on Appeal

News-Journal requests this Court to answer the certified question in the negative, affirm the Final Judgment, quash the district court's order denying fees, and remand with instructions to enter an order awarding News-Journal its reasonable attorney fees in the district court of appeals. In the alternative, if this Court denies review or dismisses the appeal, News-Journal requests that it grant relief on the petition for ancillary certiorari.

Standard of Review on Appeal

The question whether the statute is retroactive as well as all questions relating to the construction of this Court's prior decision are questions of law subject to plenary review.

SUMMARY OF ARGUMENT

The Court properly reached and decided the issue of retroactivity in its *West Volusia* decision. The issue was raised by the supplemental pleadings and briefings. Moreover, the Court has the inherent jurisdiction to notice any new development of law that has the potential to render a pending matter nonjusticiable as moot. As the retroactivity issue was essential to the decision, it is binding law of the case at this time.

On the merits, the Court properly rejected retroactivity. The legislature did not expressly command, nor clearly indicate an intention, that the act should apply retroactively. Even if it had

done so, the act could not constitutionally be applied retroactively because it abrogates the substantive right of access vested in every person in Florida under the Sunshine Amendment.

West Volusia, Inc., is wrong to suggest that the legislature holds the unfettered power to abrogate the right of access. On the contrary, section 24(c) explicitly states a standard of review under which the legislature is authorized to balance competing public necessities against the right of access subject to judicial review as necessary to enforce the express mandatory provisions of the declaration of rights.

ARGUMENT

I. THIS COURT PREVIOUSLY ANSWERED THE CERTIFIED QUESTION IN THE NEGATIVE.

This case comes to the Court in a curious posture. Scarcely more than a year after the Court stated in this case, "[W]e reject the contention that [section 395.3036] shall apply retrospectively," *West Volusia* at 384, the certified question asks "Should section 395.3036 be applied retroactively?" *West Volusia II* at 473. This is an elaborate and inappropriate request for reconsideration based on the district court's conclusion that it would be "only fair" to give West Volusia, Inc., another chance to argue this point here. In light of the fact that West Volusia, Inc., disdained its first chance to argue the issue when this Court properly rejected retroactivity, the Court would be justified in

summarily answering the question in the negative, dismissing the appeal, or denying review.

A. The Court's rejection of retroactivity is a decision on an essential point of law and is not dictum.

West Volusia, Inc., argues the issue has not been decided because the rejection of retroactivity was dictum. Since that would obviously render the entire *West Volusia* decision moot, West Volusia, Inc., argues further that the Court indeed harbored the unstated intention to render a moot decision. Through this tortured reasoning, West Volusia, Inc., would justify its continuing refusal to abide by the mandate of this Court.

On the contrary, News-Journal submits there can be no intellectually honest doubt that this Court intended to reject retroactivity, decide the case on the merits, and grant effective relief as to preenactment records. There are numerous reasons. First, as the trial court concluded, this is the only possible interpretation of the statement "reject[ing] the contention that the act shall apply retroactively." *West Volusia* at 384. Second, Justice Overton emerged from conference certain that the Court's decision had "overruled a major legislative policy decision" by rejecting his contention that the act was retroactive. *Id.* at 388 (Overton, S.J., dissenting). Third, West Volusia, Inc., thus construed the opinion in its motion for rehearing when it said, "[T]he Court has stated [the act] shall **not** apply retroactively." SR 452 (emphasis in original). Fourth, West Volusia, Inc.,

conceded in the district court that "a majority of the Court . . . did not agree with Justice Overton that the statute should be applied retroactively." DCA IB 20. Fifth, the district court understood that the decision on retroactivity was a binding holding because it AFFIRMED the Final Judgment. *West Volusia II* at 473. Sixth, the Fourth District understood this Court to hold the statute nonretroactive. *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.*, 24 Fla. L. Weekly D320 (Fla. 4th DCA Feb. 2, 2000).

The argument that retroactivity has not been decided turns on whether the rejection of retroactivity was dictum. West Volusia, Inc., argues that it was dictum because it was not properly before the Court, was not properly briefed and argued, and was not essential to the decision because the Court silently invoked an exception to mootness.

This argument is infected with a logical fallacy because it begs the question. If the Court intended to render an efficacious decision granting relief as to preenactment records, then the rejection of retroactivity was essential to the holding and therefore not dictum. On the other hand, if the Court did not intend to reject retroactivity, then that rejection was dictum and the entire opinion rode silently on an exception to mootness. Thus the argument that the Court intended to decide a moot case depends on the contention that the rejection of retroactivity was dictum, but the argument that the rejection was dictum depends on the

contention that the Court intended to render a moot decision. It is an unbroken circle.

B. The issue of retroactivity was properly before the Court, and the Court had jurisdiction to decide the issue.

Just as there is no question that the Court intended to reject retroactivity on the merits, there can be no question that the Court had the power to decide that issue regardless of the form and content of the supplemental pleadings and briefs. The Court has the duty to notice new legislation affecting a pending case. *E.g., Board of Public Instruction of Orange County v. Budget Commission of Orange County*, 167 So. 2d 305, 307 (Fla. 1964) (remanding case in light of subsequent legislation notwithstanding stipulation of parties that act should be ignored). The Court further has the jurisdiction to determine any issue arising from the legislation and affecting its jurisdiction or the justiciability of the case. *Cantor v. Davis*, 489 So. 2d 18, 20 (Fla. 1986) (holding appellate court must decide case based on law in effect at time of decision and may decide any issue affecting the case); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783, 788 (Fla. 1985) (explaining that "[h]aving determined that we should apply the [subsequent act], we will proceed to consider its constitutionality . . . ."); *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982) (holding that "[o]nce an appellate court has jurisdiction, it may, if it finds it necessary to do so, consider any item that may affect the case").

When the Court notices and considers the effect of a new act, it must determine whether the act has rendered the pending case nonjusticiable as moot. *E.g., Polk County Hospital District v. Snively*, 162 So. 2d 657, 659 (Fla. 1964) (remanding case in light of new act despite legislative declaration of no intent to moot the case).

Even if on its own motion, it is always necessary and proper for a court to consider any question that goes to its jurisdiction or the justiciability of a pending case. *State v. Taylor*, 82 So. 604 (Fla. 1919) (dismissing appeal *sua sponte* on judicial notice that subsequent legal development deprived the Court of the ability to grant effective relief to a party). In *Montgomery v. Dept of HRS*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985), the court observed that "[m]ootness can be raised by the appellate court on its own motion." *Id., citing Dehoff v. Imeson*, 15 So. 2d 258, 259 (Fla. 1943) (holding case is moot "when the controversy has been so fully resolved that a judicial determination can have no actual effect" and dismissing *sua sponte*); *and Barrs v. Peacock*, 61 So. 118 (Fla. 1913) (dismissing *sua sponte* a primary election contest where general election occurred pending appeal). *Accord, Board of Public Instruction of Orange County,* 167 So. 2d at 307 (noting duty of court to notice intervening act notwithstanding stipulation it should be ignored).

To be sure, the Court need not necessarily dismiss an appeal as moot if it determines to invoke an exception to mootness.

Martinez v. Scanlon, 582 So. 2d 1167 (Fla. 1991). Although West Volusia, Inc., theorizes this Court did not intend to decide retroactivity and did intend to decide a moot case, that theory gets the express statements of the Court exactly backwards. The Court *did* reject retroactivity, and it *did not* invoke an exception to mootness.

Therefore, News-Journal submits that the certified question already has been answered, and there is no occasion for the Court to answer it again nor to further justify its decision to the losing party. It would be most appropriate for the Court to deny review, dismiss the appeal, or summarily answer the question in the negative.

C. West Volusia, Inc., has not shown that the initial rejection of retroactivity was improper or dictum.

In specific answer to the arguments in the first point of the initial brief, News-Journal submits as follows:

Footnotes. The cases holding that a footnote is insufficient to preserve a point on appeal are inapplicable to the supplemental proceedings in this case because the issue of retroactivity was presented in the notice of supplemental authority and motion for an order requiring supplemental briefs on the effect, if any, of the act on the case. Moreover, in light of the Court's power and duty to notice and consider new legislation, even if on its own motion,

the footnote argument is immaterial. The point of retroactivity is fundamental.[3]

Dictum. A point is not dictum if it is essential to the decision. *E.g., McGregor v. Provident Trust Co. of Philadelphia,* 162 So. 323 (Fla. 1935) (holding that questions of law decided on appeal govern the case through all subsequent proceedings); *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) (explaining that "the views and decisions on an appellate court on issues which are properly raised and decided in disposing of the case are . . . binding on the lower court as the law of the case"). The argument founded on *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), wholly confuses the doctrine of *obiter dictum*. A point of law that is essential to the decision of the case is holding, not dictum, whereas a nonessential point is dictum. *McGregor; Bunn.* The extent to which the point was briefed or argued is not determinative. *See, e.g., Miami Gardens, Inc. v. Conway,* 102 So.

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[3]West Volusia, Inc., did not argue the retroactivity issue before Judge Will in the hearing from which this appeal was taken. Only by arguing that the point of retroactivity falls within the doctrine of fundamental error could West Volusia, Inc., justify raising this issue for the first time in the appellate court. Fundamental error is error that is so substantial that it goes to the foundation of the case or to the merits of the cause of action. Monaco, Appellate Practice, Rule 9.210, Section 12 at 279 (citations omitted). The irony of West Volusia, Inc.'s dictum argument, of course, is that if the issue of retroactivity is so fundamental that it goes to the foundation of the case now, then it was equally as fundamental when this Court first rejected retroactivity. News-Journal asserts the issue was fundamental when this Court rejected retroactivity and further agrees that this fundamentality excuses West Volusia, Inc.'s argumentative shift in the district court.

2d 622, 626 (Fla. 1958) (deciding point "not directly presented to this Court on appeal [because it was] fundamental to [the] decision").

Rehearing. News-Journal does not rely on the disposition of the motion for rehearing as the decision of the Court but rather upon the Court's express statement rejecting retroactivity.

Exceptions to Mootness. News-Journal agrees that the Court may decide a moot case under a recognized exception to mootness. However, News-Journal does not understand this Court's decision in *West Volusia* as such a decision, and it submits that this Court would not decide a moot case without expressly invoking an appropriate exception. *See Godwin v. State,* 593 So. 2d 211 (Fla. 1992) (explaining exceptions to mootness).

II. IN ANY EVENT, THIS COURT SHOULD REJECT THE CONTENTION THAT THE ACT SHALL APPLY RETROACTIVELY.

In *West Volusia*, this Court correctly rejected the contention that the act should be given retroactive effect. Under the controlling standards, this act could neither be properly construed as retroactive nor constitutionally applied as retroactive. For either or both reasons, the claim of retroactivity should be rejected.

A. There is no clear legislative expression of intent that the act is to be applied retroactively.

It is well settled that substantive statutes are presumed to apply prospectively. *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983). *See also Metropolitan Dade County v. Chase Federal Housing*

Corporation, 737 So. 2d 494, 499 (Fla. 1999) (explaining presumption is based on policy that "retroactive operation of statutes can be harsh and implicate due process concerns"); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (explaining that substantive statute is prospective "absent clear legislative intent to the contrary").

When faced with a question of retroactive operation, a court should first look to see whether there is "an express command that the statute is retroactive." *Chase Federal*, 737 So. 2d at 499. Where there is no express command, a court must look to "both the terms of the statute and the purpose of the enactment" to determine whether there is a clear expression of legislative intent as to retroactivity. *Id.* In this case, retroactivity is not indicated by either express command or clear expression in the words and purpose.

There is no express command of retroactivity.

The statute does not expressly command retroactive application. The only statement in the act arguably concerning retroactivity is found in Section 4 where the legislature stated, "This act shall take effect upon becoming law and shall apply to *existing leases* and future leases of public hospitals and other health care facilities." (e.s.). It is readily apparent that this is not an expression of "clear legislative intent" that the act shall apply retroactively. *Chase Federal* at 499.

Section 4 states only that the exemption created by the act applies to leases entered into before the date of enactment. Act, § 4. On the face of the statute, this is not a clear mandate for retroactivity. Literally, the statute purports to make the lease itself exempt rather than records made or received by the lessee or meetings conducted by the lessee. Certainly, section 4 does not expressly state that it applies to preenactment records and meetings (or either) created or conducted by the lessees under *existing leases*.

Some meaning must be supplied to this patently vague effective date clause. If it means anything more than that the lease document is exempt, what does it mean? Two ideas suggest themselves. It could mean that preenactment records (and meetings?) of the *existing lessees* are exempt, but it does not literally say this and there is a presumption against that construction.

On the other hand, it could have been included to make clear that existing lessees are eligible to come within the exemption notwithstanding they previously were under open government laws. Some *existing leases* specifically require compliance with the open government laws, and the legislature intended that such a clause would not *per se* disqualify a lessee from the exemption. *See* section 395.3036(4) (providing that a contractual clause is only one of the factors); *Indian River* (approving holding that a lessee under an existing lease requiring open government compliance is

prospectively exempt under the act). In that event, the clause means that postenactment records and meetings of *existing lessees* are included within the exemption, as it was construed by the *Indian River* trial court.

Presumptively, this would create an exemption for records and meetings of West Volusia, Inc., but only as to records and meetings arising on and after the effective date of the act on May 30, 1998. In any event, the act on its face does not go so far as to extend the exemption backward in time to records and meetings arising before May 30, 1998.

West Volusia, Inc., says that this argument is "manufactured out of whole cloth." IB 24. It goes through an exercise in which it presumes the statute is intended to apply retroactively and then asserts that the prospective reading requires a "rewrite" of the statute. IB 25. This twists the analysis of *Chase Federal*, and erroneously proceeds from a presumption that the reference to *existing leases* shows intent for the act is retroactive. That gets the statute and the *Chase Federal* analysis backward.

Even considered in its best light from West Volusia, Inc.'s perspective, the Section 4 statement does not overcome the presumption against retroactivity. On its face, it yields two equally competitive readings. On the one hand, the statement could mean that the act applies, as News-Journal suggests, to records and meetings arising on and after the effective date of the act on May 30, 1998, including those of existing lessees. On the other

hand, it could mean that the statute was intended to apply, as West Volusia, Inc., suggests, retrospectively to records made or received, and meetings conducted, during that period of time accruing between the inception of its lease responsibilities and the effective date of the act on May 30, 1998. A statement that is susceptible of more than one interpretation is ambiguous, and at its best the section 4 effective date is ambiguous. As such, it does not form the basis of a clear legislative expression of retroactive operation.

There is no clear intent in the words and purpose of the act.

West Volusia, Inc., effectively concedes there is no express command because it relies on the alternative test which looks to the "words and purpose" to determine retroactive intent in the absence of an express command. IB 21-22. It contends that the requisite legislative intent is to be found in the stated purpose of the act. The thrust of this argument is the inference that the legislature intended the new statute as a clarification of the law and therefore intended it to apply retroactively. IB 21-25. West Volusia, Inc., draws this inference from the legislative declarations that the Fifth District wrongly decided *News-Journal* and thereby created a need for the legislature to clarify the law. IB 23. West Volusia, Inc., says that the legislature's passage of the new statute "is a clear indication of disagreement with the effect of the *News-Journal* decision." IB 23. In support, West

Volusia, Inc., points to the legislative declarations found in Section 2 of the act. IB 23-24.

When it is recalled that these declarations were adopted at a time when this case was pending in this Court, it becomes apparent that these declarations are at best ambiguous on the issue of whether the act was intended to reach backward in time.

West Volusia, Inc.'s argument hangs on a dilemma. On the one hand, if the legislative declarations regarding the state of the law prior to this Court's decision had been accurate, this Court would have reversed *News-Journal*, thereby eliminating any need to apply the statute retroactively. On the other hand, if (as was the case) the legislative declarations that the Fifth District erred proved to be inaccurate, then the legislature was inaccurately expressing the state of existing or prior law in its declarations. In that event, these declarations would be simply wrong and wholly inadequate to effect retroactivity. *See Laforet,* 658 So. 2d at 62, *citing Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989) (holding that subsequent legislatures in the guise of clarification cannot nullify retroactively what a prior legislature intended). In either event, the legislative declarations are not conclusive indication of legislative intent that the act apply to records and meetings arising before May 30, 1998.

Ultimately, the argument that the intention to overturn the result in *News-Journal* evidences an intent to apply the act retroactively is another instance of question-begging. Given that

the legislature wanted to overturn *News-Journal*, the question remains: did it evidence a clear intent to reverse it retroactively?

The very idea of giving retroactive application to the act is itself problematic. In one sentence, the act provides both a public records exemption and a public meetings exemption. Nothing in the act (or its history) differentiates between these exemptions, and Section 4 merely refers to the effective date of the act without distinguishing between the effective date of the respective exemptions for records and meetings. It is impossible to give the pair of exemptions retroactive effect.

Absent the ability to travel back in time, it is metaphysically impossible to give retroactive effect to the meetings exemption because an open meeting once held cannot subsequently be closed. In the absence of any express provision in the act or expression of intent in the legislative history, upon what basis could the two exemptions be parsed so that one is given retroactive effect and the other not given retroactive effect? If there is no clear legislative intent to distinguish the effective dates of the exemptions, then are they not bound together and operative prospectively only?

On the other hand, if the meetings exemption were arbitrarily construed to be retroactive, what would that mean? Would preenactment civil violations be forgiven? Would the prevailing party in *Indian River* be required to reimburse attorney fees

assessed there? Assuming that officials of a surrogate board had been convicted of a preenactment criminal violation of Section 286.011, would the retroactive exemption absolve them?

More problematically, if the exemptions were split so that the records exemption were retroactive and the meetings exemption were not, what about records of preenactment meetings? Do tapes and minutes of such meetings become exempt even though the meeting was both legally and practically open to the public? Would a citizen who attended such a meeting be denied access to the records of his or her public participation in the meeting?

There is no clear indication of legislative intent concerning the resolution of these problems of retroactive application of the meetings exemption. In order to resolve these problems, the courts would be required to apply a heavy coat of gloss to the statute, either by splitting the retroactivity of the two exemptions or by crafting solutions to the metaphysical problem of the meetings exemption. In light of the presumption against retroactivity, the application of such gloss would be improper. *Chase Federal; LaForet.* It is obvious that the legislature gave no consideration to these questions, and therefore the legislature has evidenced no clear intent of retroactivity.

Moreover, a review of the legislative history shows that it is most reasonable to infer that the legislature specifically did not intend to extend either exemption backward in time. It did not address the obvious problems that arise in the retroactive

application of the act, and it did not state the act was retroactive even though it dealt explicitly with the question of effectiveness in Section 4. No doubt, the legislature went no further because its staff had advised that it lacked constitutional authority to effect such retroactivity. The Senate Staff had noted this constitutional issue and advised that "[r]etroactive legislation, however, is invalid if it impairs a substantive, vested right." *See* SR 400 (SENATE STAFF ANALYSIS OF APRIL 3, 1998 at 13, *citing Serna v. Milanese, Inc.,* 643 So. 2d 36 (Fla. 3d DCA 1994) *and L. Ross, Inc. v. R. W. Roberts Constr. Co.*, 466 So. 2d 1096 (Fla. 5th DCA), *approved* 481 So. 2d 484 (Fla. 1985)).

West Volusia, Inc.'s argument that the act should apply retroactively because such application would better effectuate its purpose (IB 12-13) is not sufficient to rebut the presumption against retroactivity. Indeed, West Volusia, Inc.'s position in this regard is expressly refuted by the very case upon which it most heavily relies. *See Chase Federal* (holding that "the mere fact that `retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.'") (*citation omitted*); *see also Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994). Moreover, the only "problem" facing public hospitals identified in the act that the act purportedly alleviates is the "competitive disadvantage" problem. *See* Act, § 2. Given this, it is reasonable to assume the legislature only intended a prospective application,

even for existing lessees, because there is no competitive disadvantage in allowing access to out-dated, preenactment records. *Compare Halifax Hospital Medical Center v. News-Journal Corp.,* 701 So. 2d 434, 436 (Fla. 5th DCA) *approved* 724 So. 2d 567 (Fla. 1999). ("If the negotiations for a contract must be kept secret, why should the secrecy continue after the contract is executed?")

West Volusia, Inc., also relies on *Chase Federal* as involving "[e]xpressions of legislative intent similar to those attending the 1998 statute [which] were held to express a `retroactivity' intent." IB 10. This reliance on *Chase Federal* is further misplaced. *See, e.g.*, IB 15. In *Chase Federal*, the Court was faced with the question of whether the legislature intended retroactive operation of an act which provided to dry cleaning businesses conditional immunity from contamination suits. Because the act stated that it applied not only to existing dry cleaning businesses, but also to existing contamination caused by those entities, the court held that the legislature intended the act to apply retroactively to preenactment contamination. In light of this express statement, the Court said it would have to "rewrite the express terms of the statute and add phrases that do not appear within the text" in order to hold that the act did not apply to preenactment contamination.

Dissimilarly, there is no language in the act saying that it applies to preenactment records and meetings. Instead, the act merely states that it applies to existing leases. As discussed

above, this statement is ambiguous at best. Thus, while in *Chase Federal* the law expressly applied to existing businesses *and* preenactment conduct of those businesses, here, the act expressly applies to existing businesses, *but not* to preenactment conduct of those businesses. Unlike the statute at issue in *Chase Federal*, there is no "clear expression of legislative intent" that the act applies retroactively, nor is there a need to "rewrite" the act to preclude application to preenactment records and meetings. *Chase Federal* is therefore inapposite.

West Volusia, Inc., further relies on *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275 (Fla. 1978), as involving "[e]xpressions of legislative intent similar to those attending the 1998 statute [which] were held to express a `retroactivity' intent." IB 10. First, the legislative expressions discussed in *El Portal* are not similar to those present here. Second, the discussion of legislative intent in *El Portal* solely concerned whether the subject statute applied to municipalities. Specifically, the court there was concerned with whether the term "persons" as used in the subject statute encompassed municipalities. There was no discussion of legislative intent to apply the statute retroactively. This question was answered by an express command within the language of the statute itself. *Accord Chase Federal*. The only discussion of retroactivity in *El Portal* concerned whether retroactive application of the statute

unconstitutionally affected vested substantial rights. On this analysis, *El Portal* is inapposite.[4]

An open government exemption must be construed narrowly.

Adding to the force of the presumption of nonretroactivity, the foremost precept of open government law in Florida is the doctrine under which the law's command is construed liberally and its exceptions are confined narrowly. The history of the open government laws clearly requires narrow construction of their exemptions. *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 673, 699 (Fla. 1969); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987); *rev. den.*, 520 So. 2d 586 (Fla. 1988); *City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th DCA 1995). To construe the ambiguous words and purpose of the act broadly so as to apply it retrospectively would fight against the rigorous standard of interpretation of open government exemptions and would trench on the constitutional right of access.

B. Retroactive operation of the act would impair the vested substantive right of access to records and meetings.

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[4]The act at issue in *El Portal* provided for the right of contribution among joint tortfeasors. The defendant in that case, which was a suit for contribution, argued that act should not be applied retroactively and thereby create the cause of action against him. The Court held that the act did not affect any vested substantive rights since even prior to the act all joint tortfeasors were liable in full until judgment was satisfied. Because it was a "matter of chance" as to whom the plaintiff chose to sue, there was no substantive vested right involved.

This act could not be given retroactive effect even if the legislature had expressed a clear legislative intent. The act abrogates the vested substantive right of access to public records and meetings, and it is well settled that the due process clause bars retroactive application of such a law.

A law abrogating a vested right may not be applied retroactively.

The constitution forbids the retroactive abrogation of vested rights. Therefore, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *Laforet,* 658 So. 2d at 6 *citing Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *Lavazzoli*; and *Seaboard Sys. R.R. v. Clemente,* 467 So. 2d 348 (Fla. 3d DCA 1985).

The Court has explained that such abrogation violates the due process clause. "[D]ue process considerations . . . prohibit retroactive abolition of vested rights." *Rupp v. Bryant*, 417 So. 2d 658, 661 (Fla. 1982) (holding statute expanding public officer immunity could not retroactively abolish "right to seek recovery" asserted in preenactment suit). *See also State Dept. of Transportation v. Knowles,* 402 So. 2d 1155 (Fla. 1981) (holding same statute could not constitutionally diminish a preenactment non-final jury award against newly immunized officer). *See generally Chase Federal,* 737 So. 2d at 503 *citing Knowles* and *Rupp*

(explaining in dictum that "retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations").

The right of access is a vested constitutional right.

In applying this constitutional doctrine, the "first step, and the heart of [the] issue, is to determine what legal rights [existed] prior to the [new law]." *Rupp* at 661. Here the right is a self-executing substantive right vested in every person in Florida under the declaration of rights.

The declaration of rights provides that "[e]very person has the right to inspect or copy any public record [and to attend] all meetings of any collegial public body of [state and local government]. Art. I, § 24(a) and (b), FLA. CONST. Through the Sunshine Amendment, the people of Florida "elevated the public's right to government in the sunshine to constitutional proportions." *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) *citing Monroe County v. Pigeon Key Historical Park, Inc.,* 647 So. 2d 857 (Fla. 3d DCA 1967).

It is therefore true that the public records law "grants a substantive right to Florida citizens." *Allen v. Butterworth*, 2000 WL 381484*13 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"). *See also Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

The right of access is a self-executing right vested in every person in Florida. *See* Art. I, § 24(c), FLA. CONST. ("This section shall be self-executing"). The Court has explained that a self-executing right "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). In *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999), this Court applied section 24(a) as a self-executing right and held that section 24(c) establishes "an exacting constitutional standard" for validity of exemptions from this constitutional right.

The Court has held that such self-executing constitutional rights are vested and substantive rights. In *Lavazzoli*, 434 So. 2d at 323, the Court held that the "right of a citizen of the State of Florida to be free from unreasonable searches and seizures was guaranteed independently [by Art. I, § 12, FLA. CONST.] as it existed prior to [the 1982] amendment." As such, the Court held the right was a vested substantive right that could not be abrogated retroactively. Thus even though the people had amended the constitutional guarantee, that amendment could only apply prospectively. *See also Pomponio v. Claridge of Pompano Condominium,* 378 So. 2d 774 (Fla. 1980) (holding that art. I, § 10 prohibition against laws impairing obligations of contracts vested substantive right for purposes of retroactivity); and *State Farm*

Mut. Auto. Ins. Co. v. Hassen, 650 So. 2d 128 (Fla. 2d DCA 1995), *approved on other grounds* 674 So. 2d 106 (Fla. 1996) (holding rights under Art. I, § 10 (contract clause); Art. I, § 9 (due process clause); and Art. I, § 21 (access to courts) are vested substantive rights for purposes of retroactivity).

The preenactment right of access to records and meetings in this case is the same as the pre-amendment right to be free of unreasonable searches and seizures in *Lavazzoli*. The right was vested in the every person in Florida at the time that the 1998 act became effective. Retrospective application of the exemption to records and meetings arising before May 30, 1998, would therefore impair the public's vested, fundamental, constitutional rights of access to such records and meetings. Thus the act cannot be retroactively applied under the due process doctrine of *Laforet, Rupp, Knowles,* and *Lavazolli.*

The right of access is not an inchoate common law right.

In an effort to avoid the due process doctrine, West Volusia, Inc., argues that the right of access is merely a common law right that is not vested until reduced to final judgment. IB at 27. This argument should be rejected because the right in question is a vested substantive right derived from the declaration of rights and not a common law cause of action. *See Zorc* (explaining "the public's right to government in the sunshine [has] constitutional proportions").

In support of the common law argument, West Volusia, Inc., cites only *Division of Workers Comp. Bureau of Crimes Comp. v. Brevda*, 420 So. 2d 887 (Fla. 1st DCA 1982). This case is wholly inapposite because it holds simply that a statutory right to recover attorneys fees is not vested until the right has been reduced to contract or judgment because the right is merely an inchoate procedural right. The right in question is neither statutory nor procedural. *See Allen*; *Zorc*.

It is oddly inappropriate to argue this right is a common law right. The self-executing provisions of section 24 are constitutional law and not common law. In fact, the common law recognized no right of access to meetings, *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971), and only a limited right of access to records. *State v. McMillan*, 38 So. 666, 669 (Fla. 1905). In respect to both records and meetings, the common law was entirely supplanted by the statutory precursors of the Sunshine Amendment. *E.g., Berns* (public meetings); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 423-24 (Fla. 1979) (public records); *Wisher v. News-Press Pub. Co.*, 310 So. 2d 345, 346 (Fla. 2d DCA 1975) (same). Thus the argument that the right of access is a common law right confuses not only the nature of the right but also the nature of the common law. *See Clayton v. Board of Regents,* 635 So. 2d 937 (Fla. 1994) (holding that common law must be derived from common and statutory law of England in effect on July 4, 1776, and not inconsistent with current Federal or state law).

In its common law argument, West Volusia, Inc., confuses its defiance of the law for the law itself. It argues that its (wrongful) denial of public access converted the right of access into an inchoate cause of action. On the contrary, a vested right does not become inchoate merely because the rightholder is forced to litigate to enforce the right. This Court already has held that the right of access was vested in *News-Journal* before the enactment of the new statute because West Volusia, Inc., was "subject to article I, section 24(a) and (b) of the Florida Constitution at the time of the requests for records and access to meetings which were the basis for the declaratory action." *West Volusia,* at 384 (*construing* Art. I, § 24, FLA. CONST.). On more than one occasion, the Court has made clear that private entities must comply with the right of access. They must "look to the factors announced in [*News and Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992)] to determine their possible agency status under chapter 119, Florida Statutes (1997), and under article I, section 24(a) of the Florida Constitution." *Id.* at 380, *citing New York Times Co. v. PHH Mental Health Services, Inc.,* 616 So. 2d 27 (Fla. 1993).

The limited power to provide exemptions does not nullify the vested substantive right of access.

West Volusia, Inc., nevertheless argues that under the Sunshine Amendment, the legislature holds unfettered power to abrogate the right of access. As it construes the provisions of

section 24(c), the existence and continuance of the right of access "is a choice that is entirely in legislative hands." IB 28.

This argument is based on "the structure of the applicable constitutional provisions." IB 28. It contends the express power to provide exemptions under section 24(c) grants the legislature an unfettered prerogative to abrogate the right of access. Therefore, West Volusia, Inc., reasons that the right of access is a "conditional" right and unlike the "unconditional" rights enumerated in the declaration. IB 28, note 17.

In the first place, this argument is illogical and unsupportable. Like other arguments in the Initial Brief, it begs the question. If the legislature did not have the power to abrogate the right at least prospectively, the issue of retroactivity would never arise. Those cases which have found rights to be vested nevertheless have recognized that the rights may be curtailed prospectively. It was obvious in *Rupp* and *Knowles* that the legislature could abrogate the right of action prospectively. The question was whether this could be done retroactively. That is the question here.

More fundamentally, the argument grossly misconstrues the constitutional right of public access and the limited power of the legislature to balance competing public necessities against the right. West Volusia, Inc., would give the amendment no effect whatever.

Before the Sunshine Amendment was adopted, the legislature possessed the inherent power to control access to meetings and records of government, including the power to repeal these statutes for any reason whatever. The Sunshine Amendment abolished that inherent legislative power and meted back in its stead a specific and limited power. Thus the power to provide exemptions now deraigns exclusively from the express grant of section 24(c) and is limited by the proviso attached directly to that grant.[5]

This proviso uses strong words to create an exacting constitutional standard. 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. Consistent with settled standards of interpreting constitutional text, the courts must 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*

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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. . . . "). *Cf., Taylor v. Dorsey*, 19 So. 2d 876, 881 (Fla. 1944) (explaining that because the state constitution is a limiting document, the legislature is empowered to do anything not prohibited). The Sunshine Amendment reverses that general rule.

Opinion to the Governor, 374 So. 2d 959, 964 (Fla. 1979).[6] Therefore, "the power to create . . . exemptions is hedged by careful safeguards." *Halifax Final Judgment* at 7.

In its first review of an exemption under the Sunshine Amendment, the Court adopted a standard of strict enforcement of the textual standard. *Halifax*, 724 So. 2d at 569. It held that section 24(c) creates an "exacting constitutional standard . . . of specificity as to stated public necessity and limited breadth to accomplish that purpose." *Id*. Strictly scrutinizing the exemption under this standard, the Court found it unconstitutional.

Judging by the position taken in the *West Volusia Suit*, however, West Volusia, Inc., will argue that the first prong of the constitutional proviso requires nothing more of the legislature than an unreviewable exposition of the perceived necessity. By that view, the only limit on the legislative power to enact an exemption is that it recite a public necessity for the exemption which is at least as broad as the correlative exemption.

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[6] *Accord*, *Florida League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) (holding that "[w]hen constitutional language is precise, its exact letter must be enforced"); *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n,* 489 So. 2d 1118, 1119 (Fla. 1986) (holding that language of constitution "must be enforced as written"); *State v. Butler,* 69 So. 771, 776 (Fla. 1915) (holding that the courts 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"); *Crawford v. Gilchrist,* 59 So. 963, 968 (Fla. 1912) (holding that "essential provisions of a Constitution are to be regarded as mandatory").

On the contrary, the legislature must "justif[y an exemption] to the people who adopted the constitution." *Halifax DCA* at 436. Whether the act justifies the exemption is an ultimate question of constitutional law which only the court can determine.[7] In *Halifax*, this Court struck a categorical exemption as overbroad and held that a the legislature had not justified the breadth of the exemption. *Id.* at 569-570.

Section 24(c) allows the legislature to balance competing public necessities against the right of access under a standard comparable to the standards by which other fundamental rights are balanced. The unique requirement that the legislature itself articulate the justification for the exemption compels the legislature to practice constitutional balancing 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. This creates a contextual balancing standard. Not every justifying public necessity will be a compelling state interest, but every public

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[7] *Compare Department of Transportation v. Fortune Federal Savings and Loan Assoc.*, 532 So. 2d 1267, 1269 (Fla. 1988) (explaining that "the ultimate question of the validity of a public purpose is a judicial question . . ."); *State Farm Mutual Automobile Ins. Co. v. Hassen,* 650 So. 2d 128 (Fla. 2d DCA) *aff'd on other grounds* 674 So. 2d 106 (Fla. 1996) (*citing State v. Cotney*, 104 So. 2d 346 (Fla. 1958) (applying *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) and holding "a declaration [of public necessity], although not binding would have been very persuasive in determining the need for such a restriction").

necessity balanced against the right of access must justify the corresponding exemption in a practical, contextual, and logical sense. *See Allen* (explaining that legislature has the power "to place reasonable restrictions" on the substantive right of access to public records). *Accord, Halifax Final Judgment* at 7-8 (explaining that "[s]uch a [public] necessity must logically or rationally relate to the exemption in such manner as to justify the creation of an exemption to the constitutional right of access").

The amendment further provides that the exemption may be no broader than necessary to meet the stated necessity. If the Sunshine Amendment were construed to grant presumptive validity to any exemption for which there is in form a recital of public necessity, any exemption could be made to look narrowly tailored under West Volusia, Inc.'s view. *See Simon & Shuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 120 (1991). That would defy the people who adopted the amendment. Whereas open government was formerly a public policy within the dominion of the legislature, it is now a fundamental right reserved to the people. The legislature can alter public policy, but only the people can alter fundamental rights.[8]

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[8]*Compare Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 843-844 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake (citations omitted). A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with

Thus the right of access is not merely substantive but actually fundamental. The Court has held that rights guaranteed in the declaration of rights are fundamental rights. *See, e.g., Hillsborough County Governmental Employees Assn. v. Hillsborough County Aviation Authority,* 522 So. 2d 358, 362 (Fla. 1988) (holding that "[t]he right to bargain collectively is, as a part of the state constitution's declaration of rights, a fundamental right"). It has also held that each right enumerated in the Declaration of Rights "[s]tands on equal footing with every other [enumerated right and that] each [such] right is a distinct freedom guaranteed to each Floridian against government intrusion." *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992).[9]

Like the other rights in the declaration, the public right of access "operates in favor of the individual, against government." *Id.* It reserves to the people a self-executing right against government, grants only a limited power 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

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the Constitution. Were it otherwise, the scope of freedom of speech would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified").

[9]*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").

meet the competing necessity. This is the structure of a fundamental right.[10]

To be sure, the textual standard of review is unique in that no other textual right set forth in the declaration includes such a standard.[11] It is, however, a *standard*. In clear and mandatory language, the constitution sets forth a standard which any exemption must satisfy, and this Court has held this is an "exacting constitutional standard." *Halifax* at 569.

Insofar as the right of access may be subordinated to competing public necessities according to a judicially enforceable standard, it is not at all unique. This Court has frequently observed that no right is absolute. *See Shaktman v. State*, 553 So.

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[10]*See, e.g., Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985) (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. Art. I, § 24(c), FLA. CONST. Other constitutional rights, including the right of privacy, may be subordinated by local acts, riders to attached bills, administrative acts, or local government action. *E.g., Winfield* (subordinating right of privacy to administrative subpoena).

[11]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. 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").

2d 148, 151 (Fla. 1989) (explaining that "[l]ike all of our other fundamental rights, the fundamental right of privacy is not absolute"); *Pomponio* at 776 (explaining that "[a]s with other seemingly absolute constitutional provisions, however, it soon became evident that some degree of flexibility would have to read into the [contract] clause to ameliorate the harshness of such rigid application"). Therefore, the mere fact that the legislature holds the power to subordinate the right to competing public necessities does not in itself distinguish this right from any other fundamental right enumerated in the declaration of rights.

The textual standard differs from the strict scrutiny standard in that it specifies that the right of access may be subordinated to a "public necessity justifying the exemption." Art. I, § 24(c), FLA. CONST. This distinction does not detract from the fundamentality of the right nor from its vested substantive character because state action abridging a fundamental right under the declaration of rights is not invariably reviewed by the strict scrutiny standard. For example, the fundamental right of access to courts is enforced by a unique judicial standard. *See Kluger,* 281 So. 2d at 4 (holding that without providing a reasonable alternative, legislature may not "abolish a [right of access to the courts] unless the Legislature can show an overpowering public necessity . . . and no alternative method of meeting such public necessity can be shown"eclaration of rights is not invariably reviewed by the strict scrutiny standard. For example, the

fundamental right of access to courts is enforced by a unique judicial standard. *See Kluger,* 281 So. 2d at 4 (holding that without prSUBSTDATA(AQPRINT 47 EAPRINT PROMPT(KEYBOARD()PRINT 0 47KEYBOARD()PRINT 0 ENDRECORD DATE 0 KEYBOARD()PRINT 47 %eE474747%4747E474747M47ENDRECORD 4747e474747%474747U474747 NESTFORM(47DATE 47"E4747)474747%47DATE 4747%DATE 4747ENDRECORD 47 E47#e47%47E47ENDRECORD 47E4747gMKEYBOARD()47A47NESTFORM(47%%DATE 4747D@@EE@-KEYBOARD()ED@@"@-Eee-e4747M CMKEYBOARD()M-@m e@m@ %@ KEYBOARD()47FIELD(KEYBOARD()KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD()KEYBOARD() KEYBOARD(KEYBOARD()KEYBOARD()KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD( )KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD() KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD() KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD()KEYBOARD()KEYBOARD(KEYBOARD()KEYBOARD()KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD()KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD()KEYBOARD(KEYBOARD(KEYBOARD(KEYBOARD(

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