IN THE SUPREME COURT OF FLORIDA

Case No. SC01-1562
Lower Tribunal Case No. 3D00-3132

THE CITY OF MIAMI, a municipal corporation,

Appellant,

vs.

PATRICK MCGRATH III, MIAMI-DADE COUNTY, a political subdivision of the State of Florida, and LAUREEN VARGA,

Appellees.

Appeal of a Decision of the Third District Court of Appeal

APPELLEES' JOINT SUPPLEMENTAL ANSWER BRIEF

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II. SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

After all briefs were filed in this Court, the Legislature enacted two bills relating to this case, *viz.* Senate Bill 64-C and Senate Bill 54-B. Senate Bill 64-C attempts to validate and ratify the City's parking tax, while Senate Bill 54-B prospectively amends the classification of municipalities eligible to impose a parking tax. For convenience, a copy of Senate Bill 64-C (hereinafter the "Ratification") and Senate Bill 54-B (hereinafter the "Amendment") are attached to this brief as supplemental appendices 1 and 2, respectively.

Enacted after the Amendment, the Ratification provides, in pertinent part, as follows:

> Section 1. Any ordinance of any municipality imposing a surcharge pursuant to section 132, chapter 99-251, Laws of Florida, is hereby ratified. All acts and proceedings, including enforcement procedures, taken in connection with a parking surcharge imposed by a municipality pursuant to section 132, chapter 99-251, Laws of Florida, are ratified, validated, and confirmed, and the surcharge is declared to be legal and valid in all respects from the date of enactment of chapter 99-251, Laws of Florida.[1]

§ 1, S. B. 64-C (underlining omitted).

Enacted before the Ratification, the Amendment revises Section 218.503(5)(a), Florida Statutes (2000), to read as follows:

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[1] Section 218.503(5), Florida Statutes (2000), as declared unconstitutional by the district court, was enacted by section 132, chapter 99-251, Laws of Florida.

> (5)(a) The governing authority of any municipality having ~~with~~ a resident population of 300,000 or more on or after April 1, 1999, ~~and~~ which has been declared in a state of financial emergency pursuant to this section ~~within the previous 2 fiscal years~~ may impose a discretionary per-vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at parking facilities within the municipality which ~~that~~ are open for use to the general public.

§ 1, S. B. 54-B (words ~~stricken~~ are deleted; words underlined are additions).

To analyze the effect (if any) of the Amendment on the City's parking tax, the Court must consider two additional facts. First, the Amendment does not apply retrospectively. Thus, section 2 of the Amendment states: "[t]his act shall take effect upon becoming law." Second, the City has not been declared in a state of financial emergency pursuant to the statute since 1998. In 1996, Governor Chiles, by Executive Order 96-391 (attached as supplemental appendix 3), created a Financial Emergency Oversight Board to monitor the financial affairs of the City. Pursuant to Executive Order 96-391, the State and the City entered into an Intergovernmental Cooperation Agreement (attached as supplemental appendix 4) that, among other things, specifies that the Oversight Board shall continue for a period of three years after the City has produced 2 successive years of balanced operations and has not met any of the conditions set forth in the statute pursuant to which the City could be declared in a state of financial emergency. Supp. A. 4, p. 13. By the end of 1998, the City had produced two successive years of balanced budgets and did not meet any of the

conditions to be declared in a state of financial emergency. In accordance with the Intergovernmental Cooperation Agreement, the Oversight Board was discontinued at the end of calendar year 2001. Accordingly, the City has not met any of the conditions set forth in, and thus has not been declared in a state of financial emergency pursuant to, the statute since 1998. The City consequently is ineligible to impose the parking tax under the Amendment.

III. SUMMARY OF SUPPLEMENTAL ARGUMENT

As discussed below, neither the Ratification nor the Amendment constitutionally validates or otherwise cures the City's unconstitutional parking tax. The Ratification violates the separation of powers doctrine. The Ratification merely declares valid, and thus effectively constitutional, any ordinance enacted by the closed class of municipalities eligible to impose a parking tax under the original unconstitutional special law. However, this Court, not the Legislature, is responsible for deciding whether the underlying statute is an unconstitutional special law. *See, e.g., Sebring Airport Authority v. McIntyre,* 783 So.2d 238, 245 (Fla. 2001). Any act by the Legislature simply declaring the validity of an unconstitutional law without curing the unconstitutional provision violates the separation of powers doctrine and thus is itself unconstitutional. *See id.* Accordingly, the Ratification is a meaningless legislative declaration of constitutionality.

Likewise, the Amendment fails to cure the City's unconstitutional parking tax for at least three reasons. First, and most fundamentally, Section 218.503(5) as amended remains an unconstitutional special law. The Amendment continues to anchor the population classification to a particular date, *viz.* "on" April 1, 1999. Specifically, the amended statute applies to municipalities having a resident population of 300,000 or more "on or after April 1, 1999." Even if its population subsequently falls below the minimum population size set by the Amendment for so-called large municipalities, the City will ***always*** meet that population classification because the City had a resident population of 300,000 or more "on" April 1, 1999. Thus, the amended statute continues to identify the City as surely as if the amended statute identified the City by name. As a result, the Amendment fails to cure the underlying constitutional deficiency in the statute.

Second, even if the Amendment were constitutional, the City is ineligible to impose a parking tax under the amended statute. The Amendment authorizes the imposition of a parking tax only by a municipality "which has been declared **in** a state of financial emergency pursuant to this section," § 1, S. B. 54-B (emphasis added). By deleting the phrase "within the previous 2 fiscal years" from the statutory

classification of eligible municipalities,[2] the Legislature has clearly and unequivocally prohibited a municipality from looking back even 2 fiscal years, much less indefinitely, to determine whether the municipality has been declared in a state of financial emergency for purposes of the parking tax. Because the City has **not** been declared in a state of financial emergency since 1998, the City cannot rely on the Amendment to authorize the City's parking tax. The Amendment, quite simply, does not cure the City's illegal parking tax.

Third, the Amendment is expressly effective only upon becoming law and contains no retroactive provision. Accordingly, the Amendment does not apply to cure the City's unconstitutional parking tax prior to the effective date of the Amendment, which is November 30, 2001.

Finally, contrary to the City's misguided belief, the City cannot keep its illegal parking tax collections. There is no "good faith" exception to the Florida Constitution. A municipality cannot impose an unconstitutional tax pursuant to an unconstitutional statute and, after the tax is declared unconstitutional, still keep the illegal taxes. *See, e.g., Dept. of Rev. v. Kuhnlein,* 646 So.2d 717 (Fla. 1994). Any

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[2] Prior to the Amendment, the statute defined an eligible municipality, in pertinent part, to be any municipality "which has been declared in a state of financial emergency pursuant to this section **within the previous 2 fiscal years**." § 218.503.5(a), Fla. Stat. (2000) (emphasis added).

other rule ". . . self-evidently would make constitutional law subservient to the State's will." *Id.* at 721. Moreover, the City cannot in equity refuse to refund the illegal tax when the burden of the tax is shifted disproportionately to nonresidents and the tax proceeds by law cannot be used to provide the taxpayers with a commensurate benefit. Accordingly, if the City's parking tax continues to be held unconstitutional, the City *must* refund the illegal taxes.

IV. SUPPLEMENTAL ARGUMENT

A. The Ratification Violates the Separation of Powers Doctrine

The Ratification violates the separation of powers doctrine under Article II, Section 3, Florida Constitution, and thus is unconstitutional, because it fails to cure the unconstitutional population classification. Instead, the Ratification merely ratifies the unconstitutional parking tax as imposed pursuant to the *unconstitutional* statute prior to its amendment. As a result, the Legislature has effectively declared the unconstitutional statute to be constitutional for the City.[3] The Legislature's declaration of validity of the City's ordinance does not change its true nature as an

[3] Indeed, as a law that expressly validates, and thus authorizes, any ordinance enacted *only* by the closed class of municipalities eligible to enact a parking tax pursuant to the original unconstitutional special law, the Ratification is itself an unconstitutional special law. *See* Art. VII, §§ 1(a) and 9(a), Fla. Const.

invalid ordinance enacted pursuant to an unconstitutional statute. Thus, the Ratification is a meaningless legislative declaration of constitutionality.

This Court, not the Legislature, is responsible for interpreting the Florida Constitution. *See Sebring Airport Authority v. McIntyre,* 783 So.2d 238 (Fla. 2001); *see also and compare* Art. V, § 1(b)(3), Fla. Const. (the Florida Supreme Court shall hear appeals from any decision of a district court declaring a state statute invalid), *with* Art. II, § 3, Fla. Const. ("[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein"). In *Sebring Airport Authority v. McIntyre, supra,* this Court overturned a statute declaring that a private enterprise lease of governmental property used for profit-making endeavors, such as convention and visitor centers, sports facilities, and concert halls, serves a public purpose and thus is eligible for a tax exemption under Article VII, Section 3(a), Florida Constitution. Like the Ratification, the statute in *Sebring Airport Authority* had been enacted in response to a prior court decision prohibiting the exemption because such leases do not serve a public purpose. In declaring the curative statute unconstitutional under Article VII, Section 3(a), the Court held that under the separation of powers doctrine, the Court, not Legislature, is responsible for interpreting the Constitution. In particular, this Court observed:

> . . . although 'this Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment with that for another coordinate branch of government,' pursuant to that same constitutional doctrine, the Court is responsible for measuring legislative acts 'with the yardstick of the Constitution.'

Id. at 245 (citation omitted).

Here, the Legislature has adopted a law attempting to validate an ordinance enacted pursuant to a statute declared by the district court to be an unconstitutional special law. The Legislature did not retrospectively amend the unconstitutional statute as applied to the ordinance. Rather, the Legislature merely declared the ordinance to be valid. Specifically, the Ratification attempts to ratify "[a]ny ordinance of any municipality imposing a surcharge pursuant to section 132, chapter 99-251, Laws of Florida" and declares the parking tax "to be legal and valid in all respects from the date of enactment of chapter 99-251." §1, S. B. 64-C. In substance, therefore, the Legislature has declared the unconstitutional statute to be a constitutional general law.

However, just as the Legislature alone has the power to enact and amend the statute, only the courts may determine the constitutionality of a statute so enacted or amended. Accordingly, under the separation of powers doctrine, this Court cannot defer to the Legislature, but must independently measure the constitutionality of Section 218.503(5) "with the yardstick of the Constitution." *Sebring Airport*

Authority v. McIntyre, supra. As the district court held *per curiam*, and as fully explained in the appellees' answer briefs, Section 218.503(5) is without doubt an unconstitutional special law. The Legislature's contrary declaration of validity is wholly meaningless.

B. The Amendment Does *Not* Cure the City's Unconstitutional Parking Tax

The Amendment also fails to cure the City's unconstitutional parking tax for three reasons. First, and most fundamentally, the Amendment continues to employ a closed population classification for certain municipalities and thus remains an unconstitutional special law. Second, even if the Amendment were constitutional, it does **not** validate the *City's* parking tax because, at all pertinent times, the City has been ineligible to impose a parking tax under the Amendment. Third, and most obviously, the Amendment does not apply retrospectively, but only takes effect upon becoming law.

The Amendment fails to cure the unconstitutional population classification set forth in Section 218.503(5). Like Section 218.503(5) prior to its amendment, the Amendment remains an unconstitutional special law due to the continued use of a closed population classification. The Amendment authorizes the imposition of a parking tax by certain municipalities that have "a resident population of 300,000 or more **on** or after **April 1, 1999**." Because the Amendment continues to authorize the

imposition of a parking tax by any municipality that had a resident population of 300,000 or more "on" April 1, 1999, the statute will ***always*** include in the class of so-called large municipalities potentially eligible to use the statute the City and (according to the City) Tampa and Jacksonville regardless of whether the municipality fails to meet the minimum population size after April 1, 1999. As worded, therefore, the Amendment is no different than if it had expressly identified the City and (according to the City) Tampa and Jacksonville by name.

As explained in the appellees' initial briefs, there is no constitutionally valid reason for always including the City among the largest municipalities potentially eligible to impose a parking tax should the City's resident population fall below the minimum population size employed by the statute to classify eligible municipalities. If, for example, the City's population falls below the population of Hialeah or St. Peterburg, the City would continue to be classified as a large municipality under the statute even though Hialeah or St. Peterburg fails to qualify because its population size is *less than* 300,000 on or after April 1, 1999. This frozen classification for the City is arbitrary on its face.[4] Accordingly, for the reasons more fully discussed in the

[4] Despite the clear and unequivocal opinion of the district court that Section 218.505(5), Florida Statutes (2000), is an unconstitutional special law because the population classification was anchored to a particular date, *viz.* "on" April 1, 1999, the Legislature chose to re-enact this unconstitutional classification.

appellees' initial briefs, the Amendment remains an unconstitutional special law. *Cf. Alachua County v. Adams,* 702 So.2d 1253, 1254 (Fla. 1997) (an act relating to the use of certain non-ad valorem tax revenues that expressly applied to "Alachua County and the municipalities of Alachua County" was an unconstitutional special act under Article VII, Sections 1(a) and 9(a), Florida Constitution).

Even if the Amendment were constitutional, it does **not** validate the *City's* parking tax. At all pertinent times, the City has been ineligible to impose a parking tax under the Amendment. The Amendment authorizes the imposition of a parking tax only by a municipality "which has been declared in a state of financial emergency pursuant to this section," § 1, S. B. 54-B; and not, as provided in the original statute, by a municipality "which has been declared in a state of financial emergency pursuant to this section **within the previous 2 fiscal years**." § 218.503(5), Fla. Stat. (2000) (emphasis added). By deleting the phrase "within the previous 2 fiscal years" from the statute, the Amendment clearly and unequivocally prohibits a municipality from looking back even 2 fiscal years, much less indefinitely, to determine whether the municipality has been declared in a state of financial emergency for purposes of the parking tax. Thus, a municipality cannot impose a parking tax under the Amendment for any period during which the municipality has not been declared in a state of

financial emergency, even though the municipality has been declared in a state of financial emergency for a previous fiscal year.

The City has not been declared in a state of financial emergency pursuant to the statute since 1998. In fact, the Financial Emergency Oversight Board, which was appointed to monitor the financial affairs of the City, was discontinued at the end of calendar year 2001 because, among other things, the City had not met any of the conditions set forth in the statute pursuant to which the City could be declared in a state of financial emergency for the prior 3 years, *i.e.* for 1999, 2000, and 2001. Because the City has not been declared in a state of financial emergency during any of those years, the City cannot impose its parking tax under the Amendment during any of those years. Since the City first imposed its parking tax in September of 1999, the Amendment, quite simply, does not cure the City's illegal parking tax.

Third, and most obviously, the Amendment expressly applies only upon becoming law and does not provide for a retroactive application. § 2, S. B. 54-B. Clearly, therefore, the Amendment does not apply retrospectively. *See Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So.2d 494, 499-500 (Fla. 1999). Indeed, as explained above, the City is ineligible to impose a parking tax under the Amendment even if applied retrospectively. Consequently, the Amendment cannot cure the City's unconstitutional parking tax under any circumstances.

C. The City Must Refund Its Illegal Parking Tax

The City argues that even if the Court finds the original statute unconstitutional, the City need not refund its unconstitutional parking tax revenues because the City has "acted in good-faith reliance on a presumptively valid statute and equitable considerations do not require a refund." City's Supplemental Brief, at p. 6, n. 2. In *Dept. of Rev. v. Kuhnlein,* 646 So.2d 717 (Fla. 1994), however, this Court upheld the trial court's order to refund an illegal tax collected by the State of Florida. The Court expressly rejected the State's arguments that the cause of action was barred by the State's sovereign immunity, by an alleged common law rule that no one is entitled to a refund of an illegal tax, and by the requirements of Florida's refund statutes.

> Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns. Sovereign immunity does not exempt the State from a challenge based on violation of the state or federal constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. **Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.**

Id. at 721 (italics in original; bold face added). *See also Bill Stroop Roofing, Inc. v. Metropolitan Dade County,* 788 So.2d 365, 366(Fla. 3d DCA 2001) (rejecting a claim that the County "can improperly demand and extract monies from its citizens, then, when caught with its hand in the citizen's pocket, simply decline to return the funds"),

as well as numerous cases cited therein upholding the refund of illegal or invalid taxes and fees imposed by local government.

The City mistakenly relies on *Gulesian v. Dade County School Board,* 281 So.2d 325 (Fla. 1973), and *Dryden v. Madison County,* 696 So.2d 728 (Fla. 1997), *aff'd* 727 So.2d 245 (Fla. 1999), for their "good faith" exception to the constitution. Those cases hold that where an invalid tax scheme applies across the board ***and confers a commensurate benefit***, equitable considerations may preclude a refund. Stated differently, a taxpayer who has not been taxed unequally and who also receives a benefit commensurate with the illegal charge cannot in equity claim a refund of the charge while retaining the commensurate benefit that the government has provided with proceeds derived from the illegal charge.

In this case, however, the illegal taxes cannot lawfully be used to provide a commensurate benefit to the taxpayers. Section 218.503(5)(b), Florida Statutes (2000), requires the City to use between 60 percent and 80 percent of its parking tax proceeds to reduce its real property taxes or to reduce or eliminate its non-ad valorem taxes, and to use the balance to increase reserves and, when a 15 percent budget reserve is achieved, to meet certain debt service obligations. Indeed, the City's illegal parking tax is specifically designed to shift the City's tax burden from City residents to nonresidents who commute by car into the City, but cannot vote in City elections,

without providing the commuters with a commensurate benefit. To maximize this inequitable shift in tax burden, residential parking is also exempt from taxation. Thus, contrary to the City's unsubstantiated assertions, the City's illegal parking tax proceeds have been used as required by the statute not to provide a commensurate benefit to the taxpayers, but to provide special tax and debt relief for City residents.

Further, the City's assertion of "good-faith reliance on a presumptively valid statute" is disingenuous. Mr. McGrath filed his class action complaint in September 1999, *the first month in which the parking tax was imposed*. The complaint alleged that Section 218.503(5) is an unconstitutional special law under Article VII, Sections 1(a) and 9(a), Florida Constitution, and that the parking tax was illegal and must therefore be refunded. As should be obvious from the district court's *per curiam* opinion, the statute is unconstitutional *on its face*. *McGrath v. City of Miami,* 789 So.2d 1168 (Fla. 3d DCA 2001); *see also In Advisory Opinion to the Governor,* 132 So.2d 163, 168 (Fla. 1961) (per curiam) ("[w]e have for many years held that any legislative effort to classify by population in a fashion which in effect closes the class on the basis of a particularly designated census is unconstitutional unless passed in accordance with the requirements governing local laws"). The City could not in good faith rely on such a statute. Worse, the City has provided no predeprivation remedy

to taxpayers. A commuter cannot park in the City without paying the tax since the City's ordinance imposes severe sanctions, including penalties and the loss of occupational license, on any parking lot operator who fails to collect and remit the tax. To satisfy the requirements of due process, the taxpayers must be provided with not only a fair opportunity to challenge the accuracy and legality of their tax obligation, but also a clear and certain remedy for the unlawful tax collection to ensure that the opportunity to contest the tax is meaningful. *McKesson v. Div. of Alcoholic Beverages,* 110 S.Ct. 2238, 2251 (1990). The City would give the taxpayers no such remedy other than to stay out of the City.

Finally, the City suggests that a refund of the parking tax would be impossible, presumably because of the difficulty in locating taxpayers, and would also impose an intolerable burden on the City. However, as a class action, this case strives not for perfect justice, but only for a fair and reasonable outcome. Monthly parkers pay a substantial portion of the parking tax and should be easily notified by the parking lot operators who have been required by the City to collect and remit the tax and to maintain adequate records for compliance. As in most class actions, taxpayers might also be notified by various means, such as publication in local papers, and the court could require reasonable proof of employment and parking in the City for a tax refund.

The City's claim that it would suffer an intolerable burden upon a refund of its illegal taxes also rings hollow. The City has not been declared in a state of financial emergency for the past three years and, until recently, sought to provide public financing for a new baseball stadium. In any event, the City cannot reasonably claim financial hardship as a bona fide excuse to collect and keep an illegal tax imposed pursuant to a statute that is unconstitutional on its face and was duly challenged by a class action complaint filed in the very first month of taxation. The City should have reserved for this liability at that time and apparently has been so reserving since the district court released its decision in July of 2001. Accordingly, equity does not support the City's "good faith" exception to the constitution.

V. CONCLUSION: THE CITY'S PARKING TAX REMAINS UNCONSTITUTIONAL AND MUST BE REFUNDED

Section 218.503(5) has been and remains an unconstitutional special law. The Ratification is nothing more than a meaningless declaration by the Legislature that the statute authorizing the City's parking tax is constitutional despite the district court's contrary opinion. Likewise, the Amendment fails to cure the unconstitutional population classification of the statute, and in any event, the City is ineligible to impose a parking tax under the Amendment. The only clear and certain remedy is for the City to stop collecting and to start refunding its illegal tax.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 8, 2002, a true and correct copy of the foregoing and attached appendices were sent by Federal Express to: Joseph H. Serota, Esq., Weiss Serota Helfman Pastoriza & Guedes, P.A., Co-Counsel for The City of Miami, Suite 420, 2655 South Bayshore Drive, Miami, Florida 33133, Maria J. Chairo, Esq., Assistant City Attorney, The City of Miami, 444 Southwest Second Avenue, Miami, Florida 33130-1910, and by U.S. mail to: Katherine Fernandez-Rundle, Esq., State Attorney for the Eleventh Judicial Circuit of Florida, 1350 N.W. 12th Avenue, Miami, Florida 33136.

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THOMAS J. KORGE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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THOMAS J. KORGE

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