IN THE SUPREME COURT OF FLORIDA

Case No.

THE FLORIDA SENATE; THE FLORIDA HOUSE OF REPRESENTATIVES; JOHN MCKAY, as President of the Florida Senate; TOM FEENEY, as Speaker of the Florida House of Representatives; STATE SENATOR RODOLFO GARCIA; and STATE REPRESENTATIVE FREDERICK C. BRUMMER,

Petitioners,

vs.

FLORIDA PUBLIC EMPLOYEES COUNCIL, AFSCME,

Respondent.

EMERGENCY PETITION FOR WRIT OF PROHIBITION

Petitioners, The Florida Senate; The Florida House Of Representatives; Honorable John McKay, as President Of The Florida Senate; Honorable Tom Feeney, as Speaker Of The Florida House Of Representatives; Honorable Rodolfo Garcia, State Senator; and Honorable Frederick C. Brummer, State Representative, file this emergency petition seeking issuance of a writ of prohibition against the Honorable L. Ralph Smith, judge of the Circuit Court for

the Second Judicial Circuit.[1]

Jurisdiction

This Court has jurisdiction pursuant to Article V, Section 3(b)(7). Any review of the order of the circuit court would necessarily construe the separation of powers provision of the Florida Constitution and would expressly affect a class of constitutional officers, thus providing this Court with ultimate appellate jurisdiction. *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984). The Court should accept jurisdiction. This case involves the fundamental relationship among the branches of government, and arises out of a judicial interference with the functioning of the Legislative Branch of a magnitude unprecedented in recorded Florida history.

Facts

In February, 2001, the Governor of Florida, acting as employer pursuant to Section 447.203(2), and Florida Public Employees Council 79 ["FPEC"], acting as certified bargaining agent for certain public employees bargaining units, engaged in collective bargaining negotiations pursuant to Section 447.309,

[1] Notwithstanding that the Legislature believes that its constitutional obligation to conduct the business of legislating deserves its full attention, the Petitioners have determined that the attempt by the court below to interfere with that duty raises such substantial issues as to require it to take time from the limited period of the regular session to invoke the jurisdiction of this Court.

Florida Statutes. When an impasse in the negotiations occurred, the dispute was submitted to a hearing before a special master pursuant to Section 447.403(3), Florida Statutes. [App. A]

On or about March 27, 2001, the Joint Select Committee on Collective Bargaining of the Florida Legislature scheduled a meeting on April 3, 2001. The purpose of the meeting was to hear testimony from the parties to the aforesaid collective bargaining negotiations and to make recommendations to the full House and Senate for such action as the Legislature deemed to be in the public interest. [App. B, pp. 3,4] FPEC filed a Complaint alleging that the Legislature was acting prematurely in violation of the procedural provisions of Section 447.403. On April 3, 2001, the day that the legislative hearing was to be held, the Honorable L. Ralph Smith, Circuit Judge, issued a "temporary restraining order" in which he ordered that the Florida Senate, the Florida House of Representatives, the co-chairmen of the Joint Select Committee on Collective Bargaining, Senator Rodolfo Garcia and Representative Frederick C. Brummer, and "their officers, agents, servants, employees, attorneys and other persons in active concert or participation with them" were directed to:

> * * * cancel any meeting, hearing, or conference now scheduled for April 3, 2001, or to be scheduled later on any matter implicated in a bargaining dispute or bargaining impasse between the Governor of the State of Florida and the Plaintiff until the parties invoke the

> jurisdiction of the Defendants in the time and in the manner and as provided by Section 447.403, Florida Statutes * * *

[App. C]

The Select Committee proceeded with the hearing as scheduled and, on April 10, 2001, Judge Smith ordered Senate President John McKay, House Speaker Tom Feeney, Senator Rodolfo Garcia and Representative Frederick C. Brummer to appear before him on April 19, 2001 to show cause why they should not be held in indirect criminal contempt for having proceeded with the aforesaid legislative hearing. [App. D]

Relief Sought

Petitioners seek a writ of prohibition against the Honorable L. Ralph Smith, judge of the Circuit Court for the Second Judicial Circuit, prohibiting the judge from proceeding with a hearing on an order to show cause why the petitioners should not be held in contempt of court for having attended a meeting of the Joint Select Committee on Collective Bargaining of the Florida Legislature, or otherwise ordering the members of such committee to refrain from meeting for the purpose of conducting any business of the Legislature.

Argument

I
THE ORDERS OF THE CIRCUIT COURT VIOLATE THE SEPARATION OF POWERS DOCTRINE EMBEDDED IN ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

This Court has recognized that the separation of powers doctrine as expressly set forth in the Florida Constitution operates to prohibit two forms of interference by one branch with the performance of constitutional functions by another:

> The doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. *See, e.g., Pepper v. Pepper*, 66 So. 2d 280 (Fla. 1953). The second is that no branch may delegate to another branch its constitutionally assigned power.

Chiles v. Children A, B, C, etc, 589 So. 2d 260 (Fla. 1991). The case at bar involves a compelling example of the first form of interference. The Select Committee, a duly authorized joint committee of the Florida Legislature, had scheduled a meeting for the purpose of fact-finding and making recommendations for appropriate action to the full Legislature. The power of legislative committees to conduct such fact-finding investigations "is a necessary adjunct to the exercise of the power to legislate." *T.W. Johnston v. Gallen*, 217 So. 2d 319 (Fla. 1969). The circuit court's initial order is striking in its

breadth, but the degree of interference is immaterial. The Legislature's right to conduct meetings as an integral part of the legislative process, unfettered by judicial interference, is not dependent upon the degree of interference. If a judge were empowered to enjoin the Select Committee from meeting, it would necessarily follow that the court could enjoin the Appropriations Committee, or indeed the full House or Senate from meeting.

Equally immaterial is the purpose of the meeting. If a judge's opinion that prospective legislative action would be a violation of law were sufficient justification to enjoin legislative action, the impact upon the Legislature's ability to perform its function would be immeasurable. Such a principle would, of course, apply equally to the power of the Legislative Branch over the Judicial Branch. Does the Legislature have the power to pass an act prohibiting a court from holding a hearing because of the Legislature's collective belief that the court is acting in violation of the Constitution? The suggestion that either branch possesses such power over the other would render the separation of powers doctrine meaningless and unravel the very fabric of democratic government.

The court is not without a remedy in the event that the Legislature does act in excess of its authority. Any illegal enactment is always subject to judicial review once it becomes law.

[2] This Court has recognized the essential distinction between reviewing the validity of an act after passage and interfering with the process of enactment:

> It is the final product of the legislature that is subject to review by the courts, not the internal procedures. As we stated in *General Motors Acceptance Corp. v. State,* 152 Fla. 297, 303, 11 So.2d 482, 485 (1943), the legislature has the power to enact measures, while the judiciary is restricted to the construction or interpretation thereof.

Moffitt v. Willis, *supra* at 459 So. 2d 1021.

II

THE ORDERS OF THE CIRCUIT COURT VIOLATE THE RIGHT OF THE STATE TO A REPUBLICAN FORM OF GOVERNMENT AS GUARANTEED BY ARTICLE IV, SECTION 4 OF THE UNITED STATES CONSTITUTION.

Article IV, Section 4 of the United States Constitution guarantees to every state a republican form of government. A study of the debate surrounding the adoption of the provision, and of the comments of the country's founders shortly afterwards, leaves no doubt that separation of powers was considered an essential element of such a form of government. In *Van Sickle v. Shanahan,* 511 P. 2d 223 (Kan. 1973), the Kansas Supreme Court, in holding that Article IV, Section 4

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[2] It is questionable whether an act of the Legislature, even if passed without compliance with the procedural provisions of Section 447.403, would be invalid. A legislature cannot bind the hands of future legislatures. *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821 (Fla. 1985), and each house is the sole judge of the interpretation, implementation and enforcement of its rules. Article III, §4(e), Florida Constitution.

required that states adhere to the separation of powers doctrine, quotes at length from the notes of James Madison during the constitutional convention and in The Federalist Papers following the convention. The court includes the following statements made in the context of discussions of the requirement of a republican form of government:

> 'MR. MADISON: If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a reappointment. Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner . . .'

Id. at 511 P. 2d 237 (notes of James Madison, July, 1787).

> Montesquieu discusses the doctrine of separation of powers in The Spirit of Law (7, Thatcher Editor, The Ideas that Have influenced Civilization, p. 35) and looking to that treatise as instrumental to the inquiry at bar, he concludes separation of powers to be the cornerstone to free republican government:
>
> > 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

> 'Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> 'There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of inacting laws, that of executing the public resolutions, and of trying the causes of individuals.' (p. 37.)

Id. at 511 P. 2d 239. [last paragraph quoted in *Chiles v. Children A, B, etc.*, *supra*].

Having reviewed the historical context of adoption of Article IV, Section 4, the Kansas Supreme Court concluded:

> The concept of a republican form of government and by implication the doctrine of separation of powers were the underlying assumption upon which the framework of the new government was developed. In reaching this conclusion, this court holds that the doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States.

Id. at 511 P. 2d 240.

The orders of the court below are so fundamentally inconsistent with the concept of separation of powers, and separation of powers is so integral to a

republican form of government as conceived by the drafters of the United States Constitution, as to compel the conclusion that the orders below violate Article IV, Section 4.

III
THE ORDERS OF THE CIRCUIT COURT INFRINGE UPON THE RIGHTS OF THE INDIVIDUAL DEFENDANTS TO FREE SPEECH AND PEACEABLE ASSEMBLY IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The initial circuit court order is a content-based absolute prohibition on political speech in a public forum.[3] As such, it "must be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988). The burden is upon the state to demonstrate that the restriction is necessary to serve a compelling state interest and that it is the least restrictive means available to serve that interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Even if one were to conclude that a substantial state interest was involved, a proposition that would be subject to dispute, prohibition upon the exercise of free speech and assembly by the Select Committee members was surely not the least restrictive

[3] A prohibition that does not favor either side of an issue is still considered "content-based" and impermissible if it prohibits discussion of an entire topic. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

means to serve that interest. As noted, the court retained the authority to review any legislative enactments for validity after they became law.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to take up this petition on an expedited basis and to issue its writ of prohibition as requested.

GREENBERG TRAURIG, P.A.

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CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by fax upon Ben R. Patterson, Patterson and Traynham, 315 Beard Street, Tallahassee, Florida, attorneys for the Respondent, and by hand upon the Honorable L. Ralph Smith, Circuit Judge, this 12th day of April, 2001.

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BARRY RICHARD