IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-791
L.T. No.: 07-10435

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida Not for Profit Corporation; SPEARMAN MANAGEMENT COMPANY, a Florida Corporation; GUY M. SPEARMAN, II, a Natural Person; RONALD L. BOOK, P.A., a Florida Professional Association; and RONALD L. BOOK, a Natural Person,

Appellants,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida State Agency; THE FLORIDA COMMISSION ON ETHICS, an Independent Constitutional Commission; TOM LEE, as President of the Florida Senate; and ALLAN BENSE, as Speaker of the Florida House of Representatives,

Appellees.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

I. Introduction.

Appellants are an association of lobbyists who represent principals before the legislative and executive branches of Florida state government, the firms which employ such lobbyists and individuals who engage in lobbying activities. Appellants challenged the facial validity of legislation passed by the Florida Legislature at a special session in December 2005. This legislation and the Appellants' challenge will be discussed in detail below.[1]

The instant appeal comes to this Court from the United States Court of Appeals for the Eleventh Circuit pursuant to Article V, Section 3(b)(6) of the Florida Constitution and Rule 9.030(a)(2)(C), Florida Rules of Appellate Procedure. In *Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Servs. of the Florida Office of Legislative Servs.,* 2008 WL 1808820 (11th Cir. Apr. 23, 2008), the Eleventh Circuit certified the following questions to this Court pursuant to Rule 9.150(a), Florida Rules of Appellate Procedure:

> (1) Whether the provisions of section 11.045 that authorize designated committees of the Legislature to issue advisory opinions,

[1] A separate group of plaintiffs/appellants challenged the legislation in state court. That challenge is currently pending before the First District Court of Appeal, in an appeal styled *Dickinson, et al. v. Division of Legislative Information, etc., et al.,* Case No. 1D07-3827. The parties have completed briefing, and the First District has scheduled oral argument for June 24, 2008.

> to investigate violations of the Act, and to recommend punishment for approval by the full Legislature violate Florida's separation of powers doctrine.
>
> (2) Whether the Florida House of Representatives validly passed the Act under Article 3, Section 7 of the Florida Constitution, notwithstanding that the bill was not read on three separate days after it was properly introduced.
>
> (3) Whether the Act violates the exclusive jurisdiction of the Florida Supreme Court under Article V, Section 15 of the Florida Constitution by regulating the lobbying activities of lawyers.

Florida Ass'n of Professional Lobbyists, 2008 WL 1808820 at *3. In an Order dated April 28, 2008, this Court acknowledged acceptance of the Eleventh Circuit's certified questions, and established, *inter alia*, a briefing schedule.

II. Facts.

The legislation that the Appellants challenged, Chapter 2005-359, Laws of Florida, codified at Sections 11.045 and 112.3215, Florida Statutes ("SB 6B" or the "Act"), regulates legislative and executive lobbying activities. One of the main features of the legislation requires lobbying firms to file quarterly reports that disclose the total compensation paid or owed to the lobbying firms from the principals represented before legislative and executive branch entities and officials. *See* Fla. Stat. §§ 11.045(3)(a)1.c., 112.3215(5)(a)1.c. In addition, lobbying firms must disclose the compensation owed by each principal. The compensation reports must include the full name, business address and telephone number of each principal represented, and the total compensation that each principal paid or owed

to the lobbying firm. *See* Fla. Stat. §§ 11.045(3)(a)2.b., 112.3215(5)(a)2.b. In addition, the legislation prohibits any lobbyist or principal from making an expenditure to legislative members, or employees, or to executive branch officials. *See* Fla. Stat. §§ 11.045(4)(a), 112.3215(6)(a)1.

The legislation provides for enforcement through audits of lobbying firms and through the filing of sworn complaints. *See* Fla. Stat. §§ 11.040(6), 11.045, 112.3215. With respect to legislative branch lobbying, sworn complaints or audit reports indicating a possible violation of the Act (except a late-filed compensation report) are subject to investigation by designated legislative committees of each house of the Legislature. *See* Fla. Stat. § 11.045(7). The legislative committee is empowered to investigate the alleged violation and to make a penalty recommendation to the President of the Senate or the Speaker of the House of Representatives, which is submitted to the appropriate house for determination and imposition. *See* Fla. Stat. § 11.045(7). Authorized penalties include a "fine of not more than $5,000, reprimand, censure, probation, or prohibition of lobbying for a period of time not to exceed 24 months." Fla. Stat. § 11.045(7).

With respect to executive branch lobbying, sworn complaints or audit reports indicating a possible violation of the act (except a late-filed compensation report) are subject to investigation by the Commission on Ethics. *See* Fla. Stat. §§ 112.3215(8)(a), (c). If the Commission on Ethics finds probable cause that a

violation has occurred, it forwards its report to the Governor and the Cabinet for a determination and imposition of a penalty. *See* Fla. Stat. §§ 112.3215(9), (10). Authorized penalties include reprimand, censure, probation or a prohibition for a period of time not to exceed two years. *See* Fla. Stat. § 112.3215(9). If the violator is a lobbying firm, the Governor and the Cabinet may also assess a fine of not more than $5,000. *See* Fla. Stat. § 112.3215(10).

Appellants initially challenged the Act in the Circuit Court for the Second Judicial Circuit, in and for Leon County, Florida, on several grounds. Appellants alleged that provisions of the law providing for the interpretation, investigation, prosecution and enforcement of the disclosure requirements and the expenditure restrictions of the legislation solely by the Legislature and legislative committees violated provisions of the Florida Constitution mandating separation of powers. Appellants also challenged the Act because it failed to comply with state constitutional grounds for the enactment of legislation during a special session of the Legislature. Appellants also alleged that the Act intrudes on the authority of this Court to regulate the practice of law. Finally, Appellants challenged the Act as being violative of federal and state guarantees of free speech and petition, due process, equal protection and privacy.[2]

[2] This final issue is not directly before this Court because the Eleventh Circuit held that the Act was not vague or overbroad under the United States Constitution. *See Florida Ass'n of Professional Lobbyists,* 2008 WL 1808820 at *4-*6.

Appellees removed Appellants' lawsuit to federal court. Thereafter, Appellants sought an injunction to prevent enforcement of the legislation. The United States District Court for the Northern District of Florida denied Appellants' motion for preliminary injunction and motion for summary judgment. Subsequently, Appellees filed a motion for summary judgment, which the district court granted.

Appellants appealed the district court's decision to the Eleventh Circuit, contending that the district court erred in its determination of challenges to the legislation based exclusively on Florida constitutional grounds of separation of powers, compliance with Florida constitutional grounds for the enactment of legislation during a special session of the Legislature and whether the Act intrudes on the authority of the Florida Supreme Court to regulate the practice of law. Appellants requested that the Eleventh Circuit certify these issues to this Court, because these issues could only be determined by application of Florida state law. Appellants also contended that the Act was void for vagueness and overbreadth.

Regarding the issues that could only be determined by an application of Florida state law, the Eleventh Circuit stated:

> Having reviewed all the arguments and the case law, we conclude that the law in Florida is not sufficiently well-established for us to determine with confidence whether the Act is unconstitutional under the state's constitution. In particular, we are uncertain about whether the provisions of the Act authorizing designated committees of the Legislature to issue advisory opinions, to investigate violations of the

> Act, and to recommend penalties to the Legislature for violations of the Act contravene the Florida Constitution's separation of powers. We are also uncertain about whether the Florida House of Representatives properly waived the constitutional requirement that a proposed bill be read on three separate days after it has been introduced. In addition, we are uncertain about whether the Act, by regulating lawyer lobbyists, unconstitutionally infringes the Florida Supreme Court's exclusive jurisdiction to regulate the practice of law in the state.

Florida Ass'n of Professional Lobbyists, 2008 WL 1808820 at *3. The Eleventh Circuit certified the three previously-referenced questions to this Court pursuant to Rule 9.150, Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

SB 6B or the Act, which requires lobbying firms to file quarterly reports disclosing the total compensation paid or owed to the lobbying firms from the principals represented before legislative and executive branch entities and officials, and which prohibits all expenditures for lobbying, is unconstitutional under provisions of the Florida Constitution.

It is unconstitutional under the Florida Constitution because it violates the constitutional provision providing for a separation of powers found in Article II, Section 3, of the Florida Constitution. In SB 6B, the Legislature reserves unto itself all power to interpret the law, enforce the law and assess penalties for violation of the law. Further, in the enactment of SB 6B, the Legislature failed to comply with the constitutional requirements for passage of legislation in a special

session. SB 6B also intrudes upon the exclusive power of the Florida Supreme Court to regulate lawyers. In deciding these issues, the district court decided questions of state law. These issues can be determined solely by application of Florida state law and upon which Florida courts can only provide a definitive answer. As such, these issues are properly before this Court.

ARGUMENT

Under Article V, Section 3(b) of the Florida Constitution, this Court has discretionary jurisdiction to consider questions of state law certified by the United States Supreme Court or a United States Court of Appeal. In this matter, the Eleventh Circuit concluded that "the law in Florida is not sufficiently well-established for us to determine with confidence whether the Act is unconstitutional under the state's constitution." *Florida Ass'n of Professional Lobbyists,* 2008 WL 1808820 at *3. The Eleventh Circuit found that no controlling precedent exists for the three questions certified to this Court, and also that the answer to those questions would be determinative of the cause. For the reasons that follow, this Court should accept jurisdiction of this matter, and answer the first and third questions certified to this Court in the positive, and the second should be answered in the negative; accordingly, the Act should be held unconstitutional.

I. The provisions of Section 11.045, Florida Statutes that authorize designated committees of the Legislature to issue advisory opinions, to investigate violations of the Act, and to recommend punishment for approval by the full Legislature violate Florida's separation of powers doctrine.

SB 6B is unconstitutional because it violates the constitutional provision providing for a separation of powers found in Article II, Section 3, of the Florida Constitution. In SB 6B, the Legislature reserves unto itself all power to interpret the law, enforce the law and assess penalties for violation of the law. This is in direct contravention of the strict separation of powers doctrine adopted by the framers of the Florida Constitution. This Court has explained Florida's strict separation of powers doctrine as follows:

> The cornerstone of American democracy known as separation of powers recognizes three separate branches of government-the executive, the legislative, and the judicial-each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches:
>
> > Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.
>
> 'This Court . . . has traditionally applied a strict separation of powers doctrine' [citation omitted], and has explained that this doctrine 'encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that

> no branch may delegate to another branch its constitutionally assigned power' [citation omitted]. [Emphasis added.]

Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004); *see also Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006).

In enacting SB 6B, the Legislature directly encroaches on the powers of both the executive and judicial branches of government. SB 6B amends Section 11.045, Florida Statutes, to include a new subsection (4), which provides:

> (a) Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no member or employee of the Legislature shall knowingly accept, directly or indirectly, any expenditure, except floral arrangements or other celebratory items given to the legislators and displayed in chambers the opening day of a regular session.
>
> (b) No person shall provide compensation for lobbying to any individual or business entity that is not a lobbying firm.

Other provisions of Section 11.045, Florida Statutes, amended by SB 6B which are applicable to the interpretation, enforcement, and penalty assessment for violation of (4)(a) and (b) above include provisions that: (1) certain committees of the Legislature will provide advisory opinions as to the applicability and interpretation of "this section"; (2) a committee of each house investigate <u>any person</u> and/or lobbying firm for violation of "this section"; and (3) <u>the respective houses of the legislature will levy the penalty it deems applicable</u>. As amended by SB 6B, Section 11.045(7), Florida Statutes (2006), provides:

> Each house of the Legislature shall provide by rule that a committee of either house investigate any person upon receipt of a sworn complaint alleging a violation of this section, s. 112.3148, or s.112.3149 by such person; also, the rule shall provide that a committee of either house investigate any lobbying firm upon receipt of audit information indicating a possible violation other than a late-filed report. Such proceedings shall be conducted pursuant to the rules of the respective houses. If the committee finds that there has been a violation of this section, s. 112.3148, or s. 112.3149, it shall report its findings to the President of the Senate or the Speaker of the House of Representatives, as appropriate, together with a recommended penalty, to include a fine of not more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months. Upon the receipt of such report, the President of the Senate or the Speaker of the House of Representatives shall cause the committee report and recommendations to be brought before the respective house and a final determination shall be made by a majority of said house. [Emphasis added.]

With respect to the provisions of SB 6B, the Legislature not only enacted the law; but serves as the final interpreter of the applicability of the law; and serves as the final enforcer in levying fines, with no specified rights of review by a circuit court, appellate rights, or other administrative review rights, such as a hearing under the Administrative Procedure Act. Further, the provisions of SB 6B extend beyond those registered as lobbyists, and include any person who violates Section 11.045, Florida Statutes.

Generally, the legislative branch enacts the law, the executive branch implements and enforces the law, and the judicial branch interprets and enforces

law validly enacted by the Legislature.[3] *See generally, Kelly v. State*, 795 So. 2d 135, 137 (Fla. 5th DCA 2001). However,

> '[t]he powers of the government' that are 'divided into three departments' are not defined or enumerated in the Constitution or by statute. They are to be determined, as occasion requires, by a consideration of the language and intent of the Constitution, as well as of the history, the nature, and the powers, limitations, and purposes of the republican form of government established and maintained under the Federal and State Constitutions.

See Florida Motor Lines, Inc. v. Railroad Commissioners, 129 So. 876, 881 (Fla. 1930); *see also Simms v. Dep't of Health and Rehabilitative Services*, 641 So. 2d 957 (Fla. 3d DCA 1994); *Kelly*, 795 So. 2d at 137. To determine whether a certain power belongs to a particular branch of government, it is the "essential nature and effect of the governmental function to be performed" which determines whether a certain power is legislative, executive or judicial in nature." *Id.; Commission on Ethics v. Sullivan*, 489 So. 2d 10, 12 (Fla. 1986); *Simms, supra*.

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[3] This fundamental constitutional principle is reflected in Section 20.02(1), Florida Statutes (2006):

> The State Constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.

"The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws." *Commission on Ethics*, 489 So. 2d at 13. In *Bush*, this Court explains the important function of the judiciary:

> The framers of the Constitution of Florida, doubtless, had in mind the omnipotent power often exercised by the British Parliament, the exercise of judicial power by the Legislature in those States where there are no written Constitutions restraining them, when they wisely prohibited the exercise of such powers in our State.
>
> That Convention was composed of men of the best legal minds in the country-men of experience and skilled in the law-who had witnessed the breaking down by unrestrained legislation all the security of property derived from contract, the divesting of vested rights by doing away the force of the law as decided, the overturning of solemn decisions of the Courts of the last resort, by, under the pretence of remedial acts, enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government.
>
> *Trustees Internal Improvement Trust Fund v. Bailey*, 10 Fla. 238, 250 (1863).
>
> * * *
>
> Under the express separation of powers provision in our state constitution, "the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power," and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches."

Bush, 885 So. 2d at 329-30 (citing *Chiles v. Children A, B, C, D, E & F*, 589 So. 2d 260, 264 (Fla. 1991)) (emphasis added).

Here, the function of interpreting the law with respect to violations of Section 11.045, Florida Statutes, is a judicial function. As such, the Legislature is essentially setting itself up as the "judge, jury and executioner" as to violations of Section 11.045, Florida Statutes. *See, e.g., Broward County v. La Rosa*, 505 So. 2d 422, 423 (Fla. 1987) (holding that the Legislature cannot "exercise powers that are fundamentally judicial in nature"); *Florida National Bank of Jacksonville v. Simpson*, 59 So. 2d 751 (Fla. 1952) ("No division, be it executive, legislative or judicial, may usurp the powers of the other arms."). The available fines defined by the Legislature are not simply monetary penalties but, in the case of someone who does lobby, possible prohibition from lobbying for a period of time not to exceed twenty-four (24) months. Such a penalty interferes with that person's right to work and implicates a loss of livelihood, without any judicial review available, thus violating that person's due process rights.

The wisdom of prohibiting one branch of government from exercising the powers of the other two is underscored by a brief review of the implementation of SB 6B. Shortly after the legislation was enacted the presiding officers of the Florida Senate and the House of Representatives issued a document entitled Interim Lobbying Guidelines ("Guidelines") for the House and Senate, dated January 20, 2006. The purpose of the Guidelines, as stated by the then Senate President and Speaker of the House, was to provide "interim assistance to persons

seeking to comply with the letter and spirit of the new law as it applies in the legislative context …."[4] A review of several of the "exceptions" to the prohibition on expenditures is instructive.

First, the Guidelines state that expenditures are not prohibited "when equal or greater value is given contemporaneously by the recipient to the donor." Under this interpretation, if the fair market value of the function can be readily determined and the legislator or legislative employee contemporaneously provides equal or greater consideration, there is no "expenditure" under the law. This interpretation essentially authorizes a barter system in which a legislator or legislative employee can attend a dinner, for example, at the home of a registered lobbyist so long as he or she brings something of equal value to the event. The irony of this is that with the passage of SB 6B, since there is a prohibition on all expenditures for the purpose of lobbying, the expenditure reporting requirements all were repealed and lobbyists' expenditures are no longer reported. These "barter" transactions are not reported or verified in any way. Even assuming that this barter system interpretation has support in the statutory language, which is doubtful, under the guise of strengthening the lobbying regulation the Legislature

[4] The Guidelines have been codified by the Senate in Senate Rule 9, adopted by the Florida Senate on November 21, 2006. The Florida House of Representatives has not similarly codified the Guidelines.

has interpreted the legislation in a way that provides less information to the public and no system to check the "equal value" calculation.

A second interpretation contained in the Guidelines would allow certain government to government expenditures even where the government entity making the expenditure is a lobbying principal. The Guidelines state that real property or a facility owned or operated by such an entity, and the transportation to, from, and at the location provided by the entity may be used without payment for a legislative purpose so long as prior approval of the state legislative presiding officer or designee is obtained. There are no standards for providing such an approval. This interpretation does not appear to have support in the language of the prohibition.

One final example is in the area in which the value of an item is "truly impossible" to quantify at the time an expenditure is made. Among the examples provided of things not prohibited is being able to cut into a line at a crowded restaurant or an event where there is an established queue, and excluding from a "value calculation" the prorated portion of membership dues in an exclusive supper club (i.e. The Governors Club). The preferential seating is apparently a "perk" without an ascertainable value, so it is acceptable under these Guidelines. The dues would not have to be included in determining the value, according to the Guidelines, notwithstanding the fact that the supper club, for example, is available for use only by members or their guests and their is an ascertainable fee for

membership. Numerous other examples of interpretations which have been made exist. The point here is simply that the Legislature should not be permitted to make these determinations using an ad hoc process that could leave the public with the impression that these decisions are being made in their own self interest.

It is fundamental to the separation of powers doctrine that the judiciary is the operative check on possible arbitrary action by legislative and executive officers. *See Seminole County Bd. of County Comm'rs v. Long*, 422 So. 2d 938, 941-942 (Fla. 5th DCA 1982). However, SB 6B does not provide for any judicial review, and the Interim Guidelines and Senate Rule 9.8 state that courts "lack jurisdiction to interpret these internal matters of the Legislature."

Respectfully, the matters contained in SB 6B are not "internal matters." The Constitution authorizes the Legislature to enact rules relative to procedures as follows:

> The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree on formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to

> protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

Art. III, §4, Fla. Const. Surely this provision, which is clearly aimed at ensuring adequate notice is provided, meetings are conducted appropriately, and security is available for witnesses when necessary cannot be read to authorize a system of legislating lobbyists. The Constitution is not a source of power for the Legislature, but a limitation on the Legislature's power. *Notami Hosp. of Florida, Inc. v. Bowen*, 927 So. 2d 139 (Fla. 1st DCA 2006); *Peters v. Meeks*, 163 So. 2d 753 (Fla. 1964). The above limitation restricts the subject matter on which the Legislature may enact procedural rules.

"The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. Inherent in the nature of this executive power is the ability to take authoritative action to fulfill the charge of faithfully enforcing the laws." *See Commission on Ethics*, 489 So. 2d at 12. With SB 6B, the Legislature has amassed the power of the executive to enforce the laws of Florida as to persons who lobby the Legislature, and all other persons who may be covered by the provisions of Section 11.045, Florida Statutes.

The Appellees argued below that the functions granted to the Legislature by SB 6B are "quasi-judicial" in nature and that the Legislature is authorized by

Article V, Section 1 of the State Constitution to grant itself quasi-judicial powers. A quasi-judicial power is defined as:

> [T]he action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them as a basis for their official action, and to exercise discretion of a judicial nature. [Emphasis added.]

See Commission on Ethics, 489 So. 2d at 13 (citing *Black's Law Dictionary*, 5th ed. 1979). Article V, Section 1, of the Florida Constitution provides, in pertinent part:

> The legislature shall, by general law, divide the state into appellate court districts and judicial circuits following county lines. Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices. [Emphasis added.]

Article V, Section 1, of the Florida Constitution limits the Legislature's authority to grant quasi-judicial powers; the Constitution does not provide for the Legislature to exercise quasi-judicial powers. Neither the Legislature, nor the committees referenced in Section 11.045, Florida Statutes, are "commissions established by law, or administrative officers or bodies."

The powers authorized in SB 6B cannot be clearly classified as quasi-judicial powers. "Whether a function is judicial or quasi-judicial must be determined from its essential nature and attributes . . . ." *Florida Motor Lines*, 129 So. at 882. As stated above, quasi-judicial powers include the investigation of

facts, the holding of hearings, and drawing conclusions from them as a basis for official action. *See Commission on Ethics*, 489 So. 2d at 13 (citing *Black's Law Dictionary*, 5th ed. 1979). Here, the Legislature goes farther than simply holding hearings and fact finding as a basis for its official action. The Legislature is granting itself power to impose penalties which implicate a loss of livelihood. *See generally*, *id*. at 13 (implying that a determination which contains an adjudication of rights is a function of the judiciary). Unlike the Legislature and/or committees referenced in Section 11.045, Florida Statutes, actions taken by quasi-judicial bodies are generally subject to review pursuant to the Administrative Procedure Act, or other judicial review, which includes appellate rights. *See e.g.*, *Commission on Ethics*, 489 So. 2d at 14, n.3 ("The PSC has been required to adhere to the Administrative Procedure Act."); *see generally*, Chapter 120, Florida Statutes. The legislative scheme established in Section 11.045, Florida Statutes, for the determination of a violation of that section and the levy of penalties, is not subject to judicial review, leaving the Legislature itself as the final enforcer of the law in violation of the due process rights of all those falling within the parameters of Section 11.045, Florida Statutes. As a consequence, SB 6B violates the separation of powers doctrine of the Florida Constitution.

Although a court is required to uphold the constitutionality of a legislative enactment, where only the unconstitutional provisions may be stricken, with

respect to SB 6B, it is not possible to strike only the unconstitutional portions with respect to those provisions pertaining to lobbying before the legislative branch. *See generally, Department of State v. Martin*, 916 So. 2d 763, 773 (Fla. 2005). "The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *City of Temple Terrace v. Tozier*, 903 So. 2d 970, 974 (Fla. 2d DCA 2005) (*citing E. Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 311, 317 (Fla. 1984)); *see Martin*, 916 So. 2d at 773. Here, it is clear from the face of the legislation that if the unconstitutional provisions are severed, the intent behind SB 6B cannot be accomplished.

II. The Florida House of Representatives did not validly pass the Act under Article III, Section 7 of the Florida Constitution, because the bill was not read on three separate days after it was properly introduced.

Article III, Section 3 (c)(1) of the Florida Constitution[5] provides that the Governor, by proclamation stating the purpose, may convene the legislature in special session during which only such legislative business may be transacted as is

[5] Article III, Section 3 (c)(1) of the Florida Constitution provides:

> The governor, by proclamation stating the purpose, may convene the legislature in special session during which only such legislative business may be transacted as is within the purview of the proclamation, or of a communication from the governor, or is introduced by consent of the two-thirds of the membership of each house.

within the purview of the proclamation, or of a communication from the Governor, or is introduced by consent of two-thirds of the membership of each house. The proclamation convening the Legislature in a special legislative session commencing on Monday, December 5, 2005 through Friday, December 9, 2005 stated that the Legislature "is convened for the sole and exclusive purpose of considering . . . [l]egislation implementing reform of Florida's Medicaid system . . . and . . . legislation authorizing, regulating and taxing the operation of slot machines." Proclamation of Governor Jeb Bush, Nov. 4, 2005. As a consequence, any legislation considered outside of the purview of the Governor's proclamation would require "consent of two-thirds of the membership of each house." *Fla. Const.*, Art. III, § 3 (c)(3).

Article III, Section 7 of the Florida Constitution[6] states that a bill "shall be read in each house on three separate days, unless this rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the

[6] Article III, Section 7 of the Florida Constitution provides:

> Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless the rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the requirement for first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full.

requirement for the first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full."

The Legislature did not comply with these constitutional requirements in passing SB 6B. The December 8, 2005 *Journal of the House of Representatives* reflects at pages 48 and 49 that SB 6B was determined by the Speaker to be outside the purview of the Governor's call of the special session and that SB 6B was taken up and read a first and second time by title *prior* to consent being given by two-thirds membership in the House to introduce the bill outside the Governor's call of the special session. Without reverting to the first reading following the introduction of the bill and without waiving the three separate days, three readings requirement of Article III, Section 7 of the Florida Constitution, the House proceeded to read the bill a third time and approved its passage.

The legislative journal of the Florida House of Representatives furnishes conclusive evidence that SB 6B was not enacted consistent with the requirements for passage of legislation in a special session of the Legislature. The incongruity of this procedure is evidenced on the summary page of the December 8, 2005 *Journal of the House of Representatives* when the entry for SB 6B is compared to SB 8B and SB 40B, both of which likewise were introduced outside the purview of the call:

> SB 6B – Read 1st time; Read 2nd time; Considered outside purview of the Call; Introduction allowed; Read 3rd time; Passed; YEAS 116, NAYS 6.
>
> SB 8B – Considered outside purview of the Call; Introduction allowed; Read 1st time; Read 2nd time; Read 3rd time; Passed; YEAS 116, NAYS 2.
>
> * * *
>
> SB 40B – Considered outside purview of the Call; Introduction allowed; Read 1st time; Read 2nd time; Read 3rd time; Passed; YEAS 16, NAYS 9.

SB 6B should have been re-read a first and second time after introduction as were SB 8B and 40B. The failure to do so violates the State Constitution and renders SB 6B invalid. The final adoption does not cure the infirmity that the Legislature created when it did not follow the correct rules.

A bill does not become a law if legislative journals furnish conclusive evidence that a bill was not passed in a constitutional manner. *See State ex rel. Henderson v. Foley*, 160 So. 522 (Fla. 1935) (holding that a bill never became a law due to noncompliance with constitutional procedure); *State v. Helseth*, 140 So. 655 (Fla. 1932) (holding a special law unenforceable because it was not constitutionally passed); *State v. City of Palmetto*, 126 So. 781 (Fla. 1930); *Wood v. State*, 124 So. 44 (Fla. 1929) (holding that a law relating to robbery was invalid because it was not passed as required by the State Constitution).

As a consequence, SB 6B was not enacted in accordance with the requirements of the Florida Constitution.

III. The Act violates the exclusive jurisdiction of the Florida Supreme Court under Article V, Section 15 of the Florida Constitution by regulating the lobbying activies of lawyers.

Article V, Section 15 of the Florida Constitution states: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." This provision gives the Florida Supreme Court exclusive plenary jurisdiction to regulate the practice of law.[7]

For lawyers who are lobbyists, including Ron Book and lawyer members of FAPL, lobbying takes the form of practicing law. When principals seek to propose legislation, Book not only provides legal analysis to his clients regarding legislation; he also drafts legislation; determines legal procedures to pass

[7] *See Zeller v. The Florida. Bar*, 909 F. Supp. 1518, 1520 (N.D. Fla. 1995). The Florida Supreme Court repeatedly has declined to apply legislation to lawyers that would impede the Court's exclusive jurisdiction to regulate the practice of law. *See In re Florida Board of Bar Examiners*, 353 So. 2d 98 (Fla. 1977) (declining to apply a statue requiring administration of exams to the blind and deaf to the Board of Bar Examiners because there was no legislative power in this area of the court's exclusive jurisdiction); *The Florida. Bar v. Massfeller*, 170 So. 2d 834, 838 (Fla. 1964) (an act grating immunity for certain conduct could not bind the courts in attorney discipline proceedings). *See also Harrington, et al. v. Guitierrez, et al.*, No. SC01-1814 (Fla. Apr. 19, 2002) (granting petition under the Court's all writs power and holding that circuit judge's prohibitions on attorney disclosures in his courtroom encroached upon the Court's ultimate jurisdiction to adopt rules for courts, including Rules Regulating The Florida Bar).

legislation; and appears before legislative committees and executive agencies to analyze the legislation.

The "practice of law" is defined as "legal work performed primarily for purposes of rendering legal advice or representation." Fla. Bar Rule 6-3.5(c)(1). It is "difficult to define exactly what constitutes the practice of law in all instances." *The Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1191-92 (Fla. 1978) (citations omitted). As a general rule, if the giving of such advice and performance of such services "affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen," then the course of conduct constitutes the practice of law. *Id.*

The current Rules Regulating the Florida Bar contemplate that lobbying is part of the general "practice of law" in several respects. For instance, Rule 4-3.9 requires that a lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding disclose that the appearance is in a representative capacity and conform with the rules of professional conduct regulating lawyers.[8]

[8] *See also* Rule 6-24.2 (including lobbying in definition of "construction law").

The Pennsylvania Supreme Court held in *Gmerek v. State Ethics Commission*, 569 Pa. 579, 807 A.2d 812 (Pa. 2002), that the Pennsylvania Lobbying Disclosure Act invaded its exclusive jurisdiction to regulate lawyers under article V, section 10 of the Pennsylvania Constitution.[9] The Court carefully considered and rejected an argument that the law was constitutional because it applied to both non-lawyer lobbyists and lawyer lobbyists: "Although purportedly aimed at lobbying activities, [the law] in effect regulate[s] Appellees' conduct while servicing clients in the realm of lobbying." *Id.* The proper focus was not whether the provisions regulate the conduct of both attorneys and non-attorneys, but rather whether the Act purports to control the conduct of attorneys when engaged in the rendering of legal services to clients. *Id.* The Pennsylvania statute, like SB 6B, defined lobbying as "an effort to influence legislative or administrative action," including any direct or indirect communication. 65 Pa. C.S. § 1303. The Chief Justice observed that:

> This definition of 'lobbying,' under the facts of this case, clearly encompasses the practice of law as previously defined by this Court." In addition, "not only do Appellees provide legal analysis to their clients regarding proposed legislation that is either communicated to state officials by Appellees themselves or their clients, but they also appear before executive departments during the legislative process and discuss, inter alia, the

[9] Chief Justice Zappala wrote an opinion supporting affirmance, joined by Justice Castille who filed a separate opinion in support of affirmance. Justice Saylor filed an opinion in support of reversal in which two other justices joined.

> applicability of certain regulations to particular situations. Such activities clearly constitute 'direct' an/or 'indirect communications' with state officials as those terms are defined in the Act.

807 A.2d at 819. Justice Castille, concurring, expressed concern that the statute required lobbyist attorneys to violate the attorney-client confidentialities required by the Pennsylvania Bar rules. *See id.* at 821.

The Rules Regulating the Florida Bar similarly provide that "A lawyer shall not reveal information relating to representation of a client, except as stated in certain exceptions not applicable here, unless the client consents after disclosure. (Rule 4-1.6) The Florida Bar has affirmed that the compensation paid by a client to an attorney is confidential information that may not be disclosed voluntarily pursuant to Rule 4-1.6. *See The Fla. Bar News*, Vol. 33, No. 4, Feb. 15, 2006, at 19. According to the Bar, a lawyer-lobbyist must either obtain the consent of the client to disclose the amount of compensation paid by the client, or the attorney must withdraw from representing that client in lobbying activities. The Legislature may not force an attorney to choose between violating a statute or violating an ethical rule.[10] Yet, that is what SB 6B does; it mandates disclosures by a lawyer-lobbyist that would violate Rule 4-1.6. Indeed, it requires a lawyer to disclose one of the most private aspects of an attorney-client relationship, the amount of fees the

[10] *See Times Publ'g Co. v. Williams*, 222, So. 2d 470, 475 (Fla. 2d DCA 1969), *overruled in part on other grounds, Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821 (Fla. 1985).

lawyer receives for representing that client. Plainly, SB 6B invades the exclusive jurisdiction of the Florida Supreme Court.

CONCLUSION

Based on the foregoing, the Act is unconstitutional. Accordingly, this Court should answer the first question that the Eleventh Circuit certified in the positive, the second in the negative and the third in the positive.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 2nd day of June, 2008 to:

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I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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