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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1882

L.T. CASE NO. 1D12-2116

WALTER E. HEADLEY, JR., MIAMI LODGE NO. 20,
FRATERNAL ORDER OF POLICE, INC.,

Petitioner,

v.

CITY OF MIAMI, FLORIDA,

Respondent.

BRIEF OF AMICUS CURIAE, THE CITY OF HOLLYWOOD, IN SUPPORT OF RESPONDENT, THE CITY OF MIAMI

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STATEMENT OF INTEREST

The questions raised in this appeal are of the greatest concern to the City, which is party to *City of Hollywood v. IAFF,* Case No. SC14-0244, which the Court stayed pending its decision in this case. The City of Hollywood filed an amicus brief in this case in the District Court. Thus, the City of Hollywood has a vital interest in this appeal, the determination of which could have an important influence on the decision in its own case.

The City's Amicus will assist the Court in the disposition of the case by showing that the legal questions at issue are of broad application and interest to public employers throughout the State and by offering a high level examination of the legal foundations of certain of the Constitutional, statutory, and decisional law questions before the Court.

SUMMARY OF ARGUMENT

Petitioners and amici would have this Court adopt an interpretation of *Chiles v. United Faculty of Florida* that is more restrictive than that applied in either Florida or federal jurisprudence. While much of the briefing in this case has focused on contract impairment, it must be noted that the financial urgency statute, Florida Statutes 447.4095, was in effect at the time the contract at issue was created and, therefore, was incorporated in its terms. As such, there can be no impairment. Petitioners and amici assert that contract modification under Section

4095 can be constitutional only if the government is effectively insolvent. This position is insupportable on statutory grounds because is would render financial urgency the same as financial emergency. It is unjustified on public policy grounds because it conflicts with the strong public policy that local governments should be financially sound. It goes far beyond the constitutional strict scrutiny standard, in which the "least intrusive means" test does not require the exhaustion of the last alternative, but requires that the means be "reasonable and necessary."

Petitioners and amici also have attacked longstanding labor law relating to resolution of bargaining impasses and "impact bargaining." These questions are not central to this case and the Court need not address them. To the extent the Court does, however, the First District and PERC analyzed those issues correctly and in conformity with decades of precedent. Petitioner or amici assert that impasse resolutions arising from financial urgency should revert to the status quo ante upon "expiration" of the urgency; they assert that financial urgency bargaining is not impact bargaining at all; and some even assert that impact bargaining as it has been understood by PERC for decades is unconstitutional.

Leglislative body resolutions of impasse establish a new "status quo," which cannot be altered except by further bargaining, exigent circumstances, or a new impasse. There is nothing in Section 4095 that alters this scheme. Such a "spring back" would defeat the purpose of the statute by recreating the very circumstances

that caused the urgency in the first place. Section 4095's express language refers to "bargaining the impact," which amici insists is distinct from "impact bargaining," which contravenes plain language. Impact bargaining was adopted by PERC from decisions under the National Labor Relations Act. These decisions include the concept of implementation of the underlying decision before bargaining is complete. This concept goes back at least as far as 1982 in PERC law and 1982 and 1985 in NLRA decisions. Finally, the claim that this application of impact bargaining is unconstitutional is belied by its long history and the fact that one of the foundational cases – *First National Maintenance* – is a U.S. Supreme Court case.

The First District's decision should be affirmed.

ARGUMENT

POINT I

PETITIONERS AND SUPPORTING AMICI URGE THIS COURT TO ADOPT AN OVERLY RESTRICTIVE INTERPRETTION OF *CHILES*.

Petitioners and amici would have the Court apply the reasoning of *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1973), in a manner that would create a standard more stringent than that applied by the U.S. Supreme Court or this Court.

It must be noted that much of the briefing has focused on the law of contract impairment. The constitutional challenge in this case is as-applied. The contract at issue here was created when Florida Statutes Section 447.4095 – "Financial Urgency" – was on the books and, as such, it is incorporated into the contract by action of law. *See, e.g., Westside EKG Assocs. v. Foundation Health*, 932 So. 2d 214, 216 (Fla. 4th DCA 2005) (citing cases). *Chiles* is a focus of the argument because the First District in this case and the Fourth District in *Hollywood Fire Fighters v. City of Hollywood*, 133 So. 3d 1042 (Fla. 4th DCA 2014) have differed on its application to impasse resolution pursuant to Section 4095.

Petitioners and/or amici assert that contract modification under Section 4095 can be lawful only if the employer's financial situation is "catastrophic" or equates to financial emergency under Florida Statutes Section 218.503, which essentially equates to insolvency. The version of *Chiles* advocated by Petitioner and amici is that a labor contract may not be modified unless there is no possible reasonable alternative means to fund it. *See Chiles,* 651 So. 2d at 673. The City of Miami points out in its brief that this statement in *Chiles* is dictum, not the holding. Petitioner and amici equate this standard to the inclusion of language in Section 4095 that the financial urgency be such that contract modification is "required." Put succinctly, Petitioner and amici would permit modification only when the city is bankrupt.

Putting constitutional analysis aside for a moment, equating financial urgency with financial emergency makes no sense from a statutory perspective. Statutes must be interpreted in pari materia and so as not to render any provision meaningless. Petitioner and amicis' interpretation essentially renders the financial urgency and financial emergency statutes redundant, which could not be the legislative intent. If Section 4095 were interpreted in this manner, its "obvious purpose" of promptly averting impending financial crisis would be thwarted. *See Manatee Educ. Ass'n v. School Dist. of Manatee County*, 62 So. 3d 1176, 1181 (Fla. 1st DCA 2011).

Likewise, it is counter to strongly expressed public policy to deny public employers the means of avoiding insolvency until they are trembling on the brink. The State's public policy in favor of financial stability is expressed in a variety of statutes. For example, Florida Statutes Sections 218.12 and 218.125 provide for state appropriations for certain counties whose finances are adversely affected by certain constitutional provisions. While Section 218.01 permits local governments to take advantage of federal bankruptcy law, the conditions that could lead to bankruptcy also trigger the provisions of Chapter 218, Part V, which provide for state oversight and review of financial matters. A stated purpose of Part V is "to promote fiscal responsibility ... ." Fla. Stat. § 218.501(1) (2014). The thrust of the entire body of statutes dealing with governmental finances is to encourage and

ensure proper, accountable, and fiscally responsible husbanding of the public purse. Section 447.4095 is squarely within this public policy that compels the rejection of the radical interpretation preferred by Petitioner and its supporting amici.

Constitutionally, this overly stringent interpretation goes far beyond that required under either Florida or federal jurisprudence. The "no possible reasonable alternative" language goes, of course, to the "least intrusive means" prong of the analysis set forth in numerous cases. *E.g., Chiles v. SEAG,* 734 So. 2d 1030, 1033 (Fla. 1999) (addressing the right of collective bargaining). Under contract impairment analysis, if the court concludes a contract has been substantially impaired, it then must determine whether the means used were "reasonable and necessary." *Pomponio v. Claridge of Pompano*, 378 So. 2d 770, 778-80 (Fla. 1980) (citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977) and adopting similar standard). In *Baltimore Teachers Union v. Baltimore*, 6 F.3d 1012, 1019-20 (4th Cir. 1993) (emphasis in original) (citations omitted), the court stated:

> It is not enough to reason, as did the district court, that "[t]he City *could have* shifted the burden from another governmental program," or that "it *could have* raised taxes." Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be. Our task is rather to ensure through the "necessity and reasonableness" inquiry that states neither "consider impairing the obligations of [their] own contracts on a

> par with other policy alternatives" or "impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," nor act unreasonably "in light of the surrounding circumstances." ... .

Petitioner and supporting amici demand that the public employer sacrifice every other public interest to maintain the labor contract. What they urge on this Court is extreme and unsupported by law, public policy, or common sense.

POINT II

THE THEORIES RELATING TO IMPASSE AND IMPACT BARGAINING ESPOUSED BY PETITIONER AND SUPPORTING AMICI ARE COUNTER TO DECADES OF SETTLED LABOR LAW.

Petitioners and amici variously assert theories relating to impasse resolution and impact bargaining that are counter to settled law. They can be dealt with briefly and dismissed. As an initial matter, the interpretation of impasse resolution under Florida Statutes Sections 447.4095 and 447.403 and impact bargaining under decisional law are not central questions in this case and need not be addressed by this Court. The facts in this case with regard to these questions are somewhat anomalous and do not present a good basis for a policy-setting decision.

To the extent such questions are addressed, the First District and PERC properly applied established precedent and their rulings should not be disturbed. Petitioners or amici assert (a) that changes to terms of employment in impasse

resolutions arising from declarations of financial urgency should automatically revert to the status quo ante when the urgency ends; (b) that "bargaining the impact" of the financial urgency as mandated by the statute does not mean "impact bargaining" as used in labor law parlance; and (c) that PERC's longstanding interpretation of impact bargaining to permit implementation of the employer's proposed changes after meaningful bargaining but before agreement or impasse resolution is unconstitutional.

The question of whether changes in terms of employment made pursuant to impasse expire after one fiscal year is settled law – they do not. It is bedrock collective bargaining law that an employer may not modify the employment terms of employees represented by a union absent agreement, impasse, or exigent circumstances. *E.g., IAFF Local 2886 v. Village of Royal Palm Beach*, 14 FPER ¶ 19304 (PERC 1988). Absent these, the employer is required to maintain all terms as they exist, a condition called the "status quo."

Modifications imposed through the impasse process found at Florida Statutes Section 447.403 become the new status quo and remain in place until they are changed through bargaining. *See, e.g., CWA v. City of Gainesville*, 20 FPER ¶ 25226 (PERC 1994); *Hillsborough PBA v. City of New Port Richey*, 10 FPER ¶ 15191 (PERC 1984). In other words, when terms and conditions of employment are changed through impasse and imposition, those changes are permanent until

they are modified through later bargaining. This has been the law of Florida for more than 30 years.

Amici would have employers declare financial urgency and go through the impasse process annually in order to maintain the measures that relieved the financial urgency. The alternative would be the resurrection of the unaffordable labor costs that contributed to the urgency in the first place. There is no requirement in Section 4095 to declare financial urgency for every year that a modification may persist, nor is there a requirement that modifications made under Section 4095 must be limited to a single fiscal year. *Manatee Educ. Ass'n v. Sch. Dist. of Manatee County*, 62 So. 3d 1176, 1181 (stating that there are no temporal requirements on financial urgency). Modifications to terms and conditions of employment made through the impasse process become status quo and must remain in place until changed by further bargaining to agreement or another, later impasse proceeding.

The meaning and application of "bargaining the impact" is also settled law and existed in its present form at the time Section 4095 was enacted. As early as the case of *Leon County PBA v. City of Tallahassee*, 8 FPER ¶ 13400 (1982), PERC stated:

> With respect to "effects" bargaining the union must be afforded a "significant opportunity" to bargain. In this regard early notification of the decision is essential because obviously, it is during the period

> between notification and effectuation of a decision that the union can have a "significant opportunity" to engage in meaningful collective discussions with the employer to deliberately consider the impact of the decision on the involved unit employees.

This passage plainly contemplates the possibility of the employer implementing its decision before bargaining or impasse is complete. Moreover, PERC in *Leon County PBA* relied upon National Labor Relations Act ("NLRA") precedent in interpreting and applying impact bargaining. PERC cited *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Court therein recognized that the employer may need flexibility and speed in making the types of decisions that are subject only to effects (i.e., "impact") bargaining. *Id.* at 682-83. Other decisions under the NLRA going back at least to 1985 and discussing effects bargaining also recognize that implementation may occur before bargaining is complete and merely require that bargaining – not agreement – occur a "meaningful" time before implementation. *See, e.g., NLRB v. Oklahoma Fixtures Co.*, 79 F.3d 1030, 1035-36 (10th Cir. 1996) (observing that "the window for meaningful effects bargaining ... does not automatically close upon ... implementation ... ."); *Creasy Co.*, 268 NLRB 1425, 1425-26 (1985) (effects bargaining was meaningful even though bargaining continued after decision to close plant was implemented).

There is no space here, nor is this a proper case, to delve into the overreaching claim that impact bargaining as it has been understood and applied by both PERC and the NLRB, not to mention the U.S. Supreme Court in *First National Maintenance*, is unconstitutional. The decades-long and consistent interpretation of impact bargaining in this way should speak for itself.

CONCLUSION

Petitioner and amici are overreaching. They urge this Court to go beyond its well-established jurisprudence on the basis of 30-year-old dictum and create a standard of analysis that would require governments to go bankrupt rather than take steps to avert it. The Court should not accept this invitation to radical decision-making, but should remain within its mainstream – as did the First District – and affirm the District Court decision.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this brief is in Times New Roman 14 Point Font and is in compliance with Rule 9.210, Fla. R. App. P.

By: /s/David C. Miller
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 22th day of December, 2014 to:

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