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IN THE SUPREME COURT OF FLORIDA

Case No. SC14-1639

L.T. Case No. 3D13-2437

FRATERNAL ORDER OF POLICE,
MIAMI LODGE 20,

Petitioners,

v.

CITY OF MIAMI and the STATE OF
FLORIDA,

Respondents.
_________________________________/

INITIAL BRIEF OF PETITIONER FRATERNAL ORDER OF POLICE MIAMI LODGE 20

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STATEMENT OF THE CASE AND FACTS

Petitioner, Fraternal Order of Police, Miami Lodge 20 ("FOP") brought this facial challenge to Section 447.4095, Florida Statutes, after Respondent, City of Miami (the "City"), repeatedly declared financial urgency in 2010, 2011, and 2012. After declaring financial urgency the City repudiated the parties' comprehensive collective bargaining agreement and unilaterally reduced wages and benefits. The FOP filed an action for declaratory relief alleging that Section 447.4095 is unconstitutional and that City Ordinance 10-0191, which substantially reduced retirement benefits, is invalid.

As this case is a *facial* challenge to Section 447.4095, the FOP presented only limited evidence to provide context and background. The only evidence presented at the summary judgment hearing was the affidavit provided by the FOP's former president, Armando Aguilar.[1] Both parties moved for summary judgment. [R. 522; R. 792]. The lower court granted summary judgment for the City, which was timely

[1] The FOP offered the Aguilar affidavit for the limited purpose of providing background and to support the FOP's standing, interest, and injury. The Court agreed, denying the City's motion in limine. [R.901, at lines 4-14]. In a declaratory judgment action, a plaintiff must show a real threat of immediate injury, "rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future." *State v. Florida Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002); *Yell v. Healthmark of Walton, Inc.,* 772 So. 2d 568, 570 (Fla. 1st DCA 2000)("Declaratory judgment is appropriate only when there is an actual controversy before the court; a court otherwise lacks jurisdiction.").

appealed by the FOP. [R. 952; R. 876]. The Third District affirmed. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami and State of Florida*, 143 So. 3d 953 (Fla. 3d DCA 2014).

This *facial* challenge is distinct from the FOP's unfair labor practice charge which ultimately resulted in this Court's decision in *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017).[2] Following the Third District's affirmance in the present case, the FOP sought certiorari jurisdiction in this Court on the basis of conflict with the holding of the Fourth District in *Hollywood Firefighters, Local 1375, IAFF, Inc. v. Hollywood*, 133 So. 3d 1042 (Fla. 4th DCA 2014). The proceedings in this case were stayed pending the decision in *Headley*. Following that decision, this Court issued an order to show cause why the Third District decision should not be summarily quashed in light of *Headley* and remanded to the Third District. Following briefing by the parties, this Court accepted jurisdiction.

Headley did not reach the question of facial invalidity. In light of the fundamental rights articulated in *Headley*, this Court should determine Section 447.4095 is facially invalid, quash the decision of the Third District, and remand to

[2] The facts that give rise to this appeal are essentially the same as those giving rise to the *Headley* decision. In sum, the City of Miami declared financial urgency three times, imposing significant reductions to FOP members' wages and benefits, while simultaneously reducing city property taxes. [See R.651-655] Rather than reciting the full procedural history and to save space in this brief, the FOP respectfully refers the Court to its *Headley* decision.

the District Court with instructions to order the Circuit Court to enter final judgment for the Petitioner.

SUMMARY OF THE ARGUMENT

This case implicates multiple provisions of the Declaration of Rights in Article I of the Florida Constitution. Each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. This Court has repeatedly recognized that any law impairing fundamental rights is subject to strict scrutiny. *Headley*, 215 So. 2d at 6. *See also Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017)(indicating that any law which intrudes on a fundamental right is presumptively unconstitutional and "must be justified by a 'compelling state interest' which the law serves or protects through the 'least restrictive means.' "); *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004)("A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution").

Section 447.4095, on its face, deprives public employees, including the police officers represented by the FOP, of the meaningful exercise of those rights. Specifically, Section 447.4095 violates the fundamental rights to collectively bargain by public employees, deprives public employees of substantive due process, impairs the obligation of contract, denies equal protection and denies the right to be rewarded for industry. The constitutional violations were complete when the law was adopted.

There is no post-deprivation procedure which can save it. By failing to properly apply this Court's strict scrutiny analysis in *Chiles v. United Faculty of Florida,* 615 So. 2d 671 (Fla. 1993) and instead adopting the First District's disregard of that decision, the Third District erred in finding the law facially constitutional.

Section 447.4095 is devoid of definitions, standards, or limitations. The unfettered discretion and unilateral action permitted governments under the statute violates the void for vagueness doctrine. It effectively allows a municipality to restructure its collective bargaining agreement and pension plan in a manner which it could not do under the state Financial Emergency Law.[3] In addition, Section 447.4095 unconstitutionally favors all other classes of creditors or vendors who contract with government at the sole expense of union members - notwithstanding their fundamental rights.

Section 447.4095 allows an employer, with absolutely *no criteria* other than its self-determined (or even self-created) and undefined "financial urgency," to *unilaterally* reopen a completed collective bargaining agreement and arbitrarily impose a new result. Under Section 447.4095 collective bargaining agreements are

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[3] Given the statute's ability to allow a government to disregard its debts, it is akin to a municipal bankruptcy under Chapter 9 of the Bankruptcy Code. Such legislative efforts on the state level were deemed pre-empted to Congress by the U.S. Supreme Court's decision in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016) (no governmental body can provide for bankruptcy type relief other than Congress).

reduced to a wholly illusory expression and subject to revision at the employer's whim. Without the operation of Section 447.4095, a public employer would only be able to alter a collective bargaining agreement upon its expiration and the ratification of a successor contract.

The Legislature failed to provide a fully formed and narrowly tailored piece of legislation, with adequate guidance for public employers as to how to employ the statute, consistent with the fundamental constitutional rights of employees. This Court should declare Section 447.4095 invalid. If the Legislature believes that this extraordinary tool is necessary, its terms should be defined and standards set for its use, consistent with the strict scrutiny test articulated in *Headley*, much as the Legislature did with the financial emergency statute, Section 218.503.

STANDARD OF REVIEW AND PRESUMPTIONS APPLICABLE TO FUNDAMENTAL RIGHTS

Whether a statute is constitutional is a pure question of law which is reviewed de novo. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013); *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010).

ARGUMENT

I. SECTION 447.4095 IS FACIALLY UNCONSTITUTIONAL

A. The Standard for Facial Invalidity

As a threshold matter, a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid. *Florida Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla.2005). In a facial challenge, the Court considers only the text of the statute, not its specific application to a particular set of circumstances. *Abdool v. Bondi,* 141 So. 3d 529 (Fla. 2014). If a law impinges upon a fundamental right it is presumptively unconstitutional unless the contrary is proved by the State. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017); *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003). In the present case, as is required by Section 86.091, Fla. Stat., the Attorney General was given notice of the action, filed no response (R.4). To the extent the City seeks to stand in the shoes of the State, the burden falls upon the City to show that the statute effects a compelling state interest in the least intrusive means possible. *Chiles v. State Employees Attorneys Guild,* 734 So. 2d 1030 (Fla. 1999). The Third District wrongly placed that burden on the FOP.

B. Strict Scrutiny Analysis Must Apply in the Present Case

Each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right. *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004). When a statute impairs the exercise of a fundamental right, the law must pass strict scrutiny. *Id*. This Court has already determined that the right to collective bargaining and the right to be free from impairment of contract are fundamental rights. *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017).

This Court found in *Headley* that the City of Miami's use of Section 447.4095, Fla. Stat., deprived public employees of two fundamental rights under the Florida Constitution; the right to collectively bargain and the right to contract. *Id.* at 7. The question here is whether the plain language of 447.4095 renders the statute invalid in all circumstances. That question is answered in the affirmative because the sole purpose of the statute *is precisely* to impair the fundamental rights at issue. Yet the constitutional requirements demonstrating a compelling state interest, or the means of protecting those rights, are nowhere to be found in the statute's plain language.

This Court recognized in *Headley* that the two rights at issue, the right to collectively bargain and the right to contract, are fundamental rights. *Headley*, 215 So. 3d at 8. "A statute abridging the right of state employees to bargain collectively is consonant with the constitution only if it vindicates a compelling state interest by

minimally necessary means." *Chiles v. State Employees Attorneys Guild*, 734 So. 2d at 1033.

C. The Third District's Constitutional Analysis Was Flawed

The Third District relied on three cases in affirming the circuit court finding that 447.4095 was valid. One of those cases, the First District decision in *Headley*, has since been quashed by this Court's decision. A decision which is quashed is void. *Smith v. Avino*, 572 So. 2d 1 (Fla. 3d DCA 1990), *citing Holland v. Webster*, 43 Fla. 85, 29 So. 625 (1901).

The second case, *Florida Department of Revenue v. City of Gainesville,* 918 So. 2d 250 (Fla 2005), is factually and legally distinguishable. The *Gainesville* court settled a controversy between the state and a municipal government over the legislature's taxing power, as it applied to municipalities. *Id.* at 255. It was not a challenge to the limits imposed on government by the Florida Declaration of Rights. Firstly, a municipal corporation is not protected by the Declaration of Rights, which by its terms is designed to protect natural persons. *See North Florida Women's Health and Counseling Services, Inc. et al., v. Florida, et al.*, 866 So. 2d 612, 618-619 (Fla. 2003). Secondly, *Gainesville* involved the relationship between the state and municipal corporations, which are creations of the state, concerning exemptions from ad valorem taxes. The *Headley* plaintiffs, however, were exercising fundamental

rights when the City of Miami used an impermissibly vague statute to impair and diminish the rights of its unionized workers. A city's powers and responsibilities are conferred consistent with the Florida Constitution, but public employees have fundamental rights conferred upon them directly by the Constitution. The Third District misapplied the holding of *Gainesville* in affirming the trial court, in that the powers enjoyed by a municipal corporation are subordinate to, and derived from, the Legislature. But fundamental rights protect individuals "from the unjust encroachment of state authority," *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992), and under our Constitution cannot be "overlooked or excused for reasons of convenience." *City of Tallahassee v. Pub. Emp. Relations Comm'n*, 410 So. 2d 487, 490 (Fla. 1981).

The Third District's citation to the Fourth District's decision in *Hollywood Fire Fighters, supra,* provided the express conflict which lead to this Court's jurisdiction in *Headley*. The Third District failed to recognize the First District's error in *Headley*, and should have followed the Fourth District's adherence to Supreme Court precedent in *Hollywood Fire Fighters*, where it stated, "District courts cannot alter the holding of *Chiles* with respect to the authority of the government to impair a contract and violate the union's right to collectively bargain." *Hollywood Fire Fighter*s, 133 So. 3d at 1046, *citing Hoffman v. Jones*, 280 So. 2d 431 (Fla.1973).

The Third District simply failed to address the test for facial validity of a statute impairing fundamental constitution rights and wrongly deferred to PERC, an administrative agency, on a constitutional question which only an Article V court can answer. *See Gulf Pines Memorial Park, inc. v. Oaklawn Memorial Park, Inc.,* 361 So. 2d 695 (Fla. 1978).

II. SECTION 447.4095 IS VOID FOR VAGUENESS.

A statute is void for vagueness when persons of common intelligence must guess as to its meaning and differ as to its application. *Samples v. Florida Borth-Related Neurological Injury Comp. Ass'n,* 114 So. 3d 912 (Fla. 2013). A statute is also void for vagueness if it lends itself to arbitrary enforcement at an officer's discretion. *D'Alemberte v. Anderson,* 349 So. 2d 164 (Fla. 1977); *Reaves v. State*, 979 So. 2d 1066 (Fla. 1st DCA 2008); *see also Shevin v. Int'l Inventors, Inc.*, 353 So. 2d 89, 92 (Fla. 1977). Additionally, vague language in a statute can invoke substantive due process rights, which protect against the "mere arbitrary and irrational exercise of power having no substantial relation" to public health, safety or welfare. *See Sears Roebuck & Co. v. Forbes/Cohen Florida Properties*, 223 So. 3d 292, 301 (Fla. 3d DCA 2017)(rejecting standards, criteria or requirements which are subject to "whimsical or capricious application or unbridled discretion").[4] Furthermore, the

[4] A more detailed discussion of substantive due process is set forth in Section III, *infra*.

test on the issue of vagueness is more compelling when the rights at issue, such as those rights at issue in this case, are fundamental rights. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

The origin of 447.4095 is important to appreciating its purpose. In response to this Court's decision in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), the Florida Legislature enacted Senate Bill 888 in 1995. *See* Ch. 95-218 (S.B. 888); *see also* Jennifer L. Rosinski, Note, *Labor Relations in Florida's Public Sector: Visiting the State's Past and Present to Find A Future Solution to the Fight over the Public Purse Under Florida's Financial Urgency Statute*, 35 Nova L. Rev. 227, 258 (2010). Senate Bill 888 had several objectives. First, it amended Section 447.309, Fla. Stat., to provide that collective bargaining agreements entered into by the state are subject to the appropriations power of the Legislature (a matter not at issue here). Secondly, it created Section 447.4095, the financial urgency statute. *Id.* at 262.

The purpose of the financial urgency statue was to provide local governments the ability to make unilateral changes to collective bargaining agreements during fiscal challenges, but the language of the statute was left vague. The staff analysis of the Senate Committee on Governmental Operations considered the term "financial urgency" so vague that it couldn't tell "whether it applied to employers, employees, the Florida Legislature, legislative bodies – or to them all." *Id.* at 263. Although the

Committee identified this and other flaws in the statute, the Legislature passed S.B. 888, and "explicitly left the interpretation of the statute 'to practice.'" *Id.* at 264.

After a series of inconsistent lower court attempts at deciphering the financial urgency statute, this Court construed Section 447.4095 in *Headley*, in the context of an unfair labor practice proceeding. In short, the Court reversed the First District and PERC in their erroneous interpretations of the financial urgency statute, and applied the standards articulated in *Chiles v. United Faculty of Florida* to financial urgency. Notwithstanding the direction the *Headley* Court provided, municipalities are still free to engage in unrelenting efforts to avoid their constitutional and contractual obligations towards employees. The Legislature failed to draft Section 447.4095 in a manner that narrowly tailors its effect on fundamental rights, and this failure continues to encourage the City of Miami to assert, after this Court's decision in *Headley*, that its unilateral imposition of collective bargaining terms was nothing more than a reasonable interpretation of the financial urgency statute, and not an unfair labor practice.[5]

[5] The pleadings from the *Headley* remand proceedings described here were attached as an exhibit to the FOP's Reply to the City of Miami's Response to Order to Show Cause in this case. Section 90.202(6), Fla. Stat., permits this court to take judicial notice of the records of any court of this state. *See also State v. Livingston*, 139 So. 360, 362-63 (Fla.1932) ("This court will take judicial notice of its own opinions and also of its own records, so far as they pertain to the case before it for consideration, but will not take judicial notice in deciding one case of what may be contained in the record of pleading of another distinct case, unless such record of pleadings of the

Section 447.4095 impaired the right to collectively bargain from its inception. The statute was crafted for the specific purpose of providing municipalities the ability to repudiate and rewrite a collective bargaining agreement, thus rendering collective bargaining illusory. This intent was expressed through the vagaries of the language used in the statute, which the Senate staff itself could not fathom in its analysis.

This Court admonished the Legislature four decades ago in *Dade County Classroom Teachers* that, "appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6" was required. *Dade County Classroom Teachers' Association v. Ryan,* 225 So. 2d 903, 906 (Fla. 1969). The admonition was again reinforced when this Court proclaimed that it is the "the duty of the legislative body to provide the ways and means of enforcing" the right to collectively bargain. *Dade County Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972). With Section 447.4095, the Legislature failed to fulfill its Constitutional duty to protect the fundamental rights of an entire class of Florida citizens, those engaged in public service.

Unless the lesson of *Headley* is extended to invalidating 447.4095, local government will retain unfettered discretion to determine, on an *ad hoc* basis, what

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other case be brought to the attention of this court by being made a part of the pleadings or record of the case under consideration."). The FOP requests this Court take judicial notice of the pleadings filed in the First District after the *Headley* mandate.

conditions it considers economically "dire," no matter the cause. This permits government to single out a specific class of contractual obligation it wishes to adjust, and then, based upon its own identification of what constitutes the absence of "all reasonable alternative sources," to repudiate its contracts with its employees. The burden falls on employees, the holders of the fundamental right, to enforce their agreement with the government. The Declaration of Rights is a limit on the power of the state to invade a series of rights and privileges which the people have reserved to themselves. *Dade County Classroom Teachers Association v. Legislature,* 269 So. 2d at 686, *citing McCulloch v. Maryland,* 4 Wheat (17 U.S.) 316, 4 L.Ed. 579 (1819). This is directly contrary to Florida jurisprudence on fundamental rights; the burden falls upon the State to justify its infringement and not upon the citizens whose fundamental rights have been impaired. *N. Fla. Women's Health & Counseling Services,* 866 So. 2d at 626.

Because the Legislature has not defined the parameters of what constitutes a "dire" financial situation, or a "reasonable source" for the availability of funds, administrative bodies, the courts and ultimately public employees, will endure years of trial and error trying to figure out what facts constitute those terms. In the meantime, the constitutional rights of public employees will suffer repeated violations. The financial urgency statute thus places arbitrary and undefined limits on

the exercise of fundamental rights and this Court should strike down this invalid legislation. The fact that the Legislature could have articulated constitutionally appropriate standards for mid-term modification of collective bargaining agreements, but instead chose to use vague language whose meaning is left to "practice" to decipher, further underscores the need to return 447.4095 to the Legislature. The statute contains no legislatively crafted definition of the term "financial urgency," and sets forth no standards to determine when it may be used. It sets forth no standard for measuring the availability of "all other reasonable sources of revenue."

Some historical perspective will underscore the reason for the requested remedy. In 1974, when the Legislature promulgated Chapter 447, Part II, the Public Employees Relations Act (PERA), it adopted a state-level equivalent to the National Labor Relations Act (NLRA). *United Faculty of Florida v. Pub. Employees Relations Comm'n*, 898 So. 2d 96 (Fla. 1st DCA 2005)[6]. The complex statutory scheme in Chapter 447, Part II, operated for two decades before the adoption of Section 447.4095, and during this time Florida courts and PERC operated under the guidance of the federal cases interpreting the NLRA. *Id.* Had the Legislature wanted to draft a constitutional regulatory framework for municipalities seeking assistance during

[6] "PERA is in large measure patterned after the NLRA. Therefore, in construing the provisions of PERA, the Commission, particularly in cases of first impression, will generally seek guidance from federal precedent interpreting similar provisions of the NLRA." *United Faculty of Florida, supra,* at 101–02

dire financial circumstances, it would not have needed to look further than Section 8(d) of the NLRA,[7] which provides detailed guidelines for the mid-term modification of a collective bargaining agreement. The United States Supreme Court has "recognized that Congress' central purpose in enacting Section 8(d) was to regulate the modification of collective bargaining agreements and to facilitate agreement in place of economic warfare." *N.L.R.B v. Bildisco and Bildisco*, 465 U.S. 513, 533 (1984).

As explained above, the FOP is not alone in asserting that the phrase "financial urgency" is unreasonably vague. The Senate staff analysis found the absence of a definition of "financial urgency" to be deficient since impairment of constitutional rights could be based simply on "the volitional desire of an employer to change policy." (R.639). Such a slender thread is not adequate to permit a government to impair fundamental rights. A comparison of Section 447.4095 to Section 218.503, "Determination of financial emergencies," demonstrates the vagueness of Section 447.4095. Section 218.503, unlike Section 447.4095, contains precise criteria for the determination of a financial emergency, and provides an example of adequate criteria that properly allow a government, and a reviewing court, to make a determination of

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[7] 29 U.S.C. § 158(d) It is important to note that collective bargaining rights under the NLRA are purely statutory. Florida public employees' rights at issue here are fundamental constitutional rights and occupy an elevated status.

whether a financial emergency exists.[8] Section 447.4095, on the other hand, fails to provide any criteria, and leaves these determinations to administrative trial and error.

Perhaps even more surprising is the fact that if the City of Miami had sought bankruptcy protection under Chapter 9 of the Bankruptcy Code, it would have had to engage in a far more rigorous judicial process to extricate itself from the terms of a collective bargaining agreement. In contrast, the lack of rigor under financial urgency is perverse. *See In re City of Vallejo,* 432 B.R. 262 (Bank. E.D. Cal. 2010)(City must establish standards approved in *Bildisco, supra,* in order to avoid its obligations under a labor agreement). To the extent 447.4095 permits cities to restructure their debts akin to a municipal bankruptcy, the subject is pre-empted by federal bankruptcy law. *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016).[9]

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[8] When Section 218.503 is triggered by the criteria in Section 218.503(1), the Governor has an array of financial emergency tools. If a financial emergency board is established, the resulting financial emergency plan is required to protect all obligations set forth in Section 218.503, which are designated as "priority items." Employee wages and pension benefits have explicit protection under the "financial emergency" statute, but such protections are absent from Section 447.4095. Furthermore, defining what constitutes a "dire" financial condition should also take into account events leading to the "dire" conditions, i.e, whether irresponsible financial decisions and poor government leadership led to the urgency. The financial emergency provisions of Section 218.503, Fla. Stat., give guidance when such issues arise. Although this Court was clear in adopting PERC's formulation that dire financial conditions are something less than a financial emergency, the Legislature must still provide meaning and statutory guidance to this subsection of Chapter 447, Part II for the statute to survive constitutional scrutiny.

[9] The Puerto Rico Corporation Debt Enforcement and Recovery Act was adopted in 2014. It was struck down by the U.S. Supreme Court two years later, during the

When drafting law, a legislature must "articulate its aims with a reasonable degree of clarity" to "reduce the danger of caprice and discrimination in the administration of the laws." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984). By failing to contain any specific or objective criteria, Section 447.4095 is void on its face for vagueness and must be returned to the Legislature for clarification.

III. SECTION 447.4095 DEPRIVES PUBLIC EMPLOYEES OF SUBSTANTIVE DUE PROCESS RIGHTS

Substantive Due Process protects those rights that are fundamental, that is, those rights that are "implicit in the concept of ordered liberty." *McKinney v. Pate*, 20 F. 3d 1550 (11th Cir. 1994), *citing Palko v. Connecticut*, 302 U.S. 319 (1937). A finding that a right merits substantive due process protection means that the right is protected against certain government actions regardless of the fairness of the procedures used to implement them. *Id.* at 1556; *State v. Robinson*, 873 So. 2d 1205, 1212 (Fla. 2004); *Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644, 646 (Fla. 2d DCA 2015). If, in the enactment of a statute, constitutional restraints have been disregarded, then the statute must fall. *Delmonico v. State*, 155 So. 2d 368 (Fla. 1963).

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pendency of the present appeal. The case re-affirms the proposition that the bankruptcy code preempts states from enacting their own municipal bankruptcy schemes outside of Chapter 9.

Section 447.4095 is the antithesis of bargaining and contract rights of public employees. Like any statute which destroys private property, substantive due process is implicated. *Haire v. Fla. Dept. Of Agriculture and Consumer Services,* 870 So. 2d 774 (Fla. 2004), *citing Chiles v. State Employees Attorneys Guild, supra,* at 1033. A violation of substantive due process rights is complete when it occurs, and thus "availability vel non of an adequate post deprivation state remedy is irrelevant." *McKinney*, 20 F. 3d at 1556-1557. Because the right is fundamental, no amount of process can justify its infringement. *Id*. at 1557

Although this Court's *Headley* decision addressed the facts of a single unfair labor practice, local governments still retain unconstrained discretion in how often they can declare financial urgency and allow government to arbitrarily place the consequences and penalties on its employees after declaration. This unfettered power over fundamental rights deprives public employees of substantive due process under the law. While it is true that Section 447.4095 requires impact bargaining, the abbreviated 14 day bargaining period *follows* the declaration of financial urgency, rendering unilateral contract impairment a *fait accompli.* The 14 day delay serves merely as a brief but futile stay of execution, since the City has *already* declared financial urgency under a statute which fails to employ narrowly tailored, minimally necessary means.

Section 447.4095 unconstitutionally deprives FOP members of their substantive due process right to effective collective bargaining when the product of that bargaining can be unilaterally reopened and set aside. In fact, this process would not survive even the lowest level of constitutional review - rational basis. The Florida Supreme Court has repeatedly held unconstitutional statutes and regulations which interfere with a consumer's substantive due process right to bargain for services. *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000); *Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032 (Fla. 1986). A statute is invalid if it does not achieve the Legislature's avowed purpose and instead simply deprives the public of their economic liberty to bargain. *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1220 (Fla. 2000).

Essentially, Section 447.4095 serves no purpose other than to eviscerate the fundamental constitutional rights of public employees, such as the police officers represented by the FOP. It reduces contract, bargaining, property, and due process rights to a nullity based on an arbitrary standard of behavior as to when and how often this government taking can occur. No other class of person, natural or corporate, is subjected to such a process. No set of facts can sustain this unconstitutional statute. It must be struck down.

IV. SECTION 447.4095 UNCONSTITUTIONALLY DENIES EQUAL PROTECTION UNDER THE LAW

The Legislature in Section 447.4095 has chosen to allow the City to single out a particular category of contract and unilaterally rewrite it. Collective bargaining agreements are reached as a result of parties exercising that fundamental right. The preamble to the Florida Constitution sets forth a variety of reasons why it was ordained and established. Among those reasons was to "guarantee equal civil and political rights to all." Section 447.4095 undermines this guarantee of equal rights for unionized employees, who are treated as a second class of citizens. No other class of creditors is arbitrarily disadvantaged in that manner.

Florida's Equal Protection clause is contained in Art. I, § 2 of the Florida Constitution, which enumerates "basic rights" and provides that all persons "are equal before the law and have inalienable rights." Article I, § 2 also protects the "inalienable right" to "to be rewarded for industry." Yet, Section 447.4095, on its face, singles out union contracts as illusory agreements that can unilaterally be set aside to the benefit of all other classes of creditors. *Shevin v. Int'l Inventors, Inc.*, 353 So. 2d 89, 94 (Fla. 1977) held that a statute intended to regulate invention development service contracts "constitutes an onerous and oppressive regulation of a legitimate business within this state." The Court explained that Art. I, § 2

"guarantees to everyone in this state the inalienable right to be rewarded for industry and to acquire, possess and protect property. Inherent in that protection is the right to do business and to contract free from unreasonable government regulation." *Id.* As was the case in *Shevin*, Section 447.4095 establishes "arbitrary and unreasonably discriminatory classifications" which are not "based on some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed." *Id.* at 93.

Collective bargaining agreements have the same protections from impairment as any other contracts. Art I, §10, Fla. Const.; *Chiles*, 615 So. 2d at 673 ("The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law."). Yet, Section 447.4095 selectively targets union members for disparate treatment in violation of their equal protection rights. Well before the adoption of Section 447.4095, the Florida Courts had a proud history of using the equal protection clause to strike down laws which unfairly and disproportionally burden a single class. "The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Caldwell v. Mann*, 157 Fla. 633, 26 So. 2d 788 (1946).

Section 447.4095 unconstitutionally elevates all other classes of governmental creditors to preferential treatment at the expense of union members who serve and protect their fellow citizens and are the human engine that enables government to function. This is the essence of an equal protection violation. "Equal protection analysis requires that classifications be neither too narrow nor too broad to achieve the desired end. Such underinclusive or overinclusive classifications fail to meet even the minimal standards of the rational basis test." *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64, 69-70 (Fla. 1990). Section 447.4095 is both under-inclusive and over-inclusive. Nothing opens the door to arbitrary action so effectively as to allow officials to "pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

This Court's holding in *Headley* mandates that strict scrutiny be applied under both equal protection and the right to be rewarded for industry clauses. *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989)(Art. I, § 2's right to be rewarded for industry necessitated the use of "strict judicial scrutiny"). The deprivations effected by 447.4095 also result in substantial reductions in vested retirement benefits, which runs afoul of this Court's decisions requiring pension legislation to be liberally construed. *Greene v. Gray*, 87 So. 2d 504 (Fla.

1956)(establishing that pension rights should be "liberally construed in favor of the grantee"). Additionally, Section 447.4095 results in the forfeiture of contract and collective bargaining rights. *See, e.g., In re Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G*, 592 So. 2d 233, 236 (Fla. 1992)

While strict scrutiny is clearly required in the consideration of this case, Section 447.4095 cannot pass constitutional muster under even mere rational basis review. *See e.g. North Broward Hospital v. Kalitan*, 219 So. 3d 49 (Fla. 2017)(striking down irrational caps on non-economic damages); *Florida Dept. of Children and Families v. Adoption of X.X.G.*, 45 So. 3d 79, 91 (Fla. 3d DCA 2010)(classifications must be based on a “real difference which is reasonably related to the subject and purpose of the regulation.”). There is no rational basis to justify granting a municipality the power to excuse a single creditor, itself, from labor contract agreements when it determines under its own criteria that it is in a “dire” financial situation. Even less rational is the fact that the Legislature has singled out as the one and only contract worthy of abrogation, to be the single municipal contract protected by the Constitution’s Declaration of Rights. To be clear, strict scrutiny is the proper test in determining the constitutionality of Section 447.4095. The above discussion is placed before this Court simply as a measure of how the statute is utterly

devoid of constitutional standards. Simply put, Section 447.4095 violates Art. I, § 2.

CONCLUSION

The citizens of Florida set social policy on the basic right to collectively bargain forty years ago with Article I, Section VI of the 1968 Florida Constitution. The Constitution set public servants aside for this very special right to ensure that our society and its local and state governments run efficiently, and our lives are not disrupted by a labor/management strife in the public workforce. The mission of government is too vital to be left to the whims of those whose personal principles on collective bargaining conflict with the will of society, as expressed in the Florida Constitution. There is an "absence of appropriate legislative action" in Section 447.4095, *Dade County Classroom Teachers Ass'n, Inc.*, 269 So. 2d at 686, and since the electors of Florida have limited the ability of government to legislate in conflict with the Declaration of Rights, Section 447.4095 must fail. Nothing in such a holding would prevent the Legislature from drafting legislation that appropriately protects, rather than violates, fundamental rights.

WHEREFORE, the FOP respectfully prays this Honorable Court to quash the decision of Third District Court of Appeal and hold 447.4095 facially unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Supreme Court via Florida E-Portal and furnished via e-mail, this 13th of October, 2017, to:

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CERTIFICATE OF COMPLIANCE

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

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