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.
_____/

REPLY BRIEF OF PETITIONER FRATERNAL ORDER OF POLICE MIAMI LODGE 20

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INTRODUCTION

The City's Answer Brief conclusively demonstrates why Section 447.4095 is an intolerable and facially unconstitutional impairment of fundamental rights. The City's view is that the statute is valid because employees, whose fundamental rights have been impaired, have the post-deprivation remedy of an unfair labor practice with the Public Employees Relations Commission (PERC) and ultimately, the courts. More than seven years after the City of Miami intentionally violated the fundamental constitutional rights of its employees, those rights have yet to be vindicated. As set forth below, Section 447.4095 is not narrowly tailored and there are no circumstances where it satisfies strict scrutiny.

The City's brief recites the same arguments this Court dismissed in *Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017). Taken as a whole, the City argues that the FOP bears the burden of proof that the statute is unconstitutional. However, that argument, like the City's argument in *Headley*, ignores this Court's clear jurisprudence when fundamental rights are at issue.

Each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1254 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004). Legislation intruding on a

fundamental right is "presumptively invalid." *Gainesville Woman Care* at 1254. Statutes interfering with fundamental rights are subject to strict scrutiny which "requires that the State prove that the legislation further a compelling governmental interest through the least intrusive means." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013). Contrary to the City's assertion that this only applies to privacy, the same standard applies to each of the rights and liberties enumerated in the Declaration of Rights (Article I, Florida Constitution), including collective bargaining. *See Chiles v. State Employees Attorneys Guild v. State*, 734 So. 2d 1030 (Fla. 1999). *See Headley* at 8.

I. THE PETITIONERS HAVE PRESERVED ALL CLAIMS RAISED BELOW

The City argues in footnote 1 at page 2 of its Answer Brief that the FOP abandoned claims raised below. This is incorrect. At page 3 of its Amended Initial Brief, the FOP states:

> 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, denied equal protection, and denies the right to be rewarded for industry.

This is precisely what was raised in the circuit court and in the Third District Court of Appeal. [R. 8, Third DCA Initial Brief]. While headings have been combined in the interest of judicial economy, each of these points is discussed in the Amended

Initial Brief as follows: bargaining and contract are discussed throughout; vagueness (pp. 10-18); substantive due process (pp. 18-21); equal protection (pp. 21-25); right to be rewarded for industry (pp. 21-22); under-inclusive and over-inclusive classifications (p. 23). Moreover, when this case commenced in the circuit court, the PERC proceeding that resulted in the *Headley* decision was still on appeal. The City's Answer Brief, however, simply fails to directly respond to any of the arguments raised in the Amended Initial Brief.

II. SECTION 447.4095 IS PRESUMPTIVELY INVALID

The City of Miami used Section 447.4095 to re-write its collective bargaining agreement over the objections of the FOP, reduce retirement benefits and cut employee wages by the tens of millions of dollars. In response, the City claims Section 447.4095 is valid because the FOP can always file an unfair labor practice under Section 447.501(1)(c). The remedy, however, is inadequate in every circumstance because in every case it places the burden of justifying the preservation of two fundamental rights (the right to bargain and the right to be free from impairment of contract) on the holder of that right, instead of properly placing that burden on the government that has impaired it.

The Declaration of Rights is a limitation on the power of government which the courts have a duty to protect. *State v. City of Stuart*, 97 Fla. 69, 123 So. 335

(1929). “It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying the things it may do.” *Id*. at 102. The fundamental rights enshrined in the Declaration of Rights “...say to arbitrary and autocratic power, from whatever quarter it may advance to invade these vital rights of personal liberty and private property, ‘Thus far shalt thou come and no farther.’” *Id*. at 103, cited with approval in *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).

The City contends that somehow the rights to collective bargaining and to contract are not accorded the same protection as the right of privacy. That statement is wrong. As this Court said in *Traylor*, “Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government.” *Id*. at 963.

III. INJURY TO FUNDAMENTAL RIGHTS IS A DEPRIVATION OF SUBSTANTIVE DUE PROCESS

As the rights which have been impaired by 447.4095 are fundamental and that interference has been permitted with no constitutionally permissible standard, the question of substantive due process is directly implicated. *Jackson v. State*, 191 So. 3d 423 (Fla. 2016) (substantive due process protects fundamental rights).

The test under substantive due process "is whether the statute bears a rational relation to a permissible legislative objective that is not discriminatory, arbitrary, capricious or oppressive." *Id.* at 428. The City contends that the rights at issue are economic rights and somehow subjected to a lesser constitutional protection. This is directly contrary to this Court's holding in *Headley*. The City's brief here, like all of its submissions for the last seven years, whether before PERC, the Districts Courts of Appeal, the circuit courts, or this Court, fails to acknowledge the fundamental nature of the rights to contract and collective bargaining. This view promises an unending repeat of *Headley* deprivations of rights in every collective bargaining process with no meaningful control on the government's constitutionally prohibited intrusion.

Nothing in the language of Section 447.4095 prevented balancing a municipal budget on the backs of its unionized employees as did Miami, by lowering ad valorem taxes in an election year and making up the lost revenue by substantially reducing collectively bargained employee salary and pension benefits, despite their inclusion in a written contract. Nothing in the language of Section 447.4095 requires implementing the "least intrusive means" test established in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993) and reiterated most recently in *Headley*. Nothing in the language of 447.4095 shifts the burden of the

intrusion from the protected to the intruder. *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004); *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003). Nothing in the language of Section 447.4095 meets the test to legally justify a government's burdening of fundamental constitutional rights.

Section 447.4095 cannot satisfy strict scrutiny under any set of circumstances. For example, Section 447.4095 is not narrowly tailored and fails to use the least intrusive means where: (i) it permits *permanent impairment* of contract rights rather than requiring minimally necessary *temporary suspension* of contract rights; (ii) narrow tailoring would have required that *only certain provisions* in a CBA be re-negotiated, rather than allowing *an entire* CBA to be set aside; (iii) §447.4095 does not require *shared sacrifice* by other stakeholders/creditors/non-union employees but rather *exclusively targets union contracts*; (iv) §447.4095 fails to restrict the *number of times* it can be repeatedly invoked[1]; (v) §447.4095 lacks any limitations whatsoever on revenues or *other expenditures*, including contemporaneous raises for elected officials, management employees, or non-union employees; and (vi) *arbitrarily singles out a protected class* for the loss of rights in a manner that is not necessary to a compelling

[1] A city is permitted to repeatedly declare financial urgency on an annual basis. Likewise, nothing prevents a City from arbitrarily creating its own financial "urgency" by financial mismanagement, inaccurate projections, and/or yearly tax cuts.

governmental interest. The statute is also facially irrational where union employees have greater protections under the financial emergency statute. *See* §218.50, Fla.Stat.

The City's Answer Brief ignores the discussion of substantive due process at pages 18-21 of the Amended Initial Brief. In the interest of judicial economy, that argument will not be set forth again here. One point however warrants discussion. As this court held in *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004) substantive due process bars certain governmental actions regardless of the fairness of the procedures used to implement them. *Id.* at 1212-1213, relying on *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). Section 447.4095 allows unilateral action by government which destroys two fundamental constitutional rights without regard to any objective, now arbitrary standard. The post deprivation remedy pointed to by the City (which after more than 7 years of costly litigation still continues) is proof that where fundamental constitutional rights are impaired, an unfair labor practice is no remedy at all. As further proof, the City has appealed PERC's make whole remedy even though PERC has noted that it is not an appealable order. It is this type of legal war of attrition that has as its only goal continued avoidance of the consequences of its proven constitutional violations. *See*. Exhibit A, attached as an appendix.

IV. SECTION 447.4095 DOES NOT PROPERLY VINDICATE A COMPELLING STATE INTEREST

The City's Answer Brief fails to demonstrate that Section 447.4095 satisfies a compelling state interest and does so by the least possible intrusive means. When a city enters into an express written contract, like its collective bargaining agreement with the FOP, it exercises no element of sovereignty. *City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10 (Fla. 2017). Yet, the City's entire argument is predicated on the mistaken belief that Section 447.4095 accords the City some extraordinary right to disregard its contracts with the police officers who keep its citizens safe. Section 447.4095 does more than permit a breach of contract. It allows a public employer, in the midst of a contract term, to use its legislative power to re-write that contract. This is precisely what *Headley* makes clear is impermissible. The misuse of municipal legislative power is not only a violation of the right to collectively bargain, but also is an impairment of contract. *Headley*, *supra* at p. 8; *Yamaha Parts Distribs., Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975).

The City, true to its steadfast refusal to address this Court's controlling jurisprudence, simply argues that contract rights are not "absolute." This Court

held in *Headley* and *Chiles v. United Faculty of Florida* that impairment would be permitted but only for the protection of compelling state interests, using the least intrusive means and exhausting all other reasonable sources of revenue. The City offers no justification for the absence in Section 447.4095 of those requirements and continues to argue the burden, in all respects, is on the FOP and its members. No more compelling argument for the facial invalidity of 447.4095 exists. As James Madison observed in *The Federalist* No. 44, laws which impair the obligation of contract are "contrary to the first principles of the social contract and to every principle of sound legislation" in part because such measures invited the "influential" to "speculate on public measures" to the detriment of "the more industrious and less informed part of the community." *The Federalist No. 44*, p. 301 (J. Cooke ed. 1961).

V. THE ANSWER BRIEF MISAPPLIES THE TEST FOR EQUAL PROTECTION WHERE FUNDAMENTAL RIGHTS ARE AT ISSUE

The City fails to address the central equal protection question before this Court – besides a labor agreement subjected to Section 447.4095, what other contract may a municipal government use its legislative power to avoid? The answer is none. The City of Miami has needed judicial reminders on prior occasions that it must observe its contracts like any other party. *City of Miami v.*

Bus Benches, 174 So. 2d 49 (Fla. 3d DCA 1965); *City of Miami v. Miami Dolphins, Ltd.*, 374 So. 2d 1156 (Fla. 3d DCA 1979). Yet, Section 447.4095 permits a municipal government to do to its public employees what it is constitutionally forbidden to do with any other contract party. The apparent justification, says the City, is that public employee contracts are entitled to less protection than a commercial contract between a government and any other party. This argument was expressly and unambiguously rejected in *Headley*.

The right to equal protection of the law is also enshrined in Florida's Declaration of Rights. Article I, Section 2. Fla. Const. Where an abridgment of a fundamental right occurs, the equal protection analysis requires heightened scrutiny. *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013); *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014) (rational basis analysis for equal protection is not used when fundamental right at issue). Section 447.4095 cannot withstand even a rational basis test, much less the heightened constitutional analysis required here. See generally, discussion of classifications in *Shriners' Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990) and *Palm Harbor Special Fire Control District v. Kelly*, 516 So. 2d 249 (Fla. 1987) (classification may not be over inclusive or under inclusive).

Section 447.4095 uniquely classifies the bargaining and contract rights of public employees and places those fundamental rights on a lower plane than all others who contract with government. That is the essence of an unconstitutional classification because it is arbitrary on its face. The people of Florida, in whom all political power resides, chose to include collective bargaining and protection of contract in their Constitution to prevent government from invading those rights. To permit those same rights to be arbitrarily singled out for impairment, with no objective standard, is counterintuitive to their status in the Declaration of Rights. As this Court most recently held in *Weaver v. Myers*, ___So. 3d___, 2017 WL 5185189 (Fla. Nov. 9, 2017), "We must be ever vigilant as we consider invasions into the fundamental rights of our citizens, particularly when faced with flawed legal arguments." *Id* at *9.

VI. THIS COURT CANNOT SUPPLY WORDS THE LEGISLATURE NEGLECTED TO INCLUDE

In *Headley*, this Court, reiterating its holding in *Chiles v. United Faculty of Florida*, explained the strict scrutiny standard which must be established by the state to justify impairment of fundamental constitutional rights. None of the elements of that strict scrutiny, compelling state interest standard is found in the text of Section 447.4095. In a facial challenge, the text of the statute is the focus.

Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014). However, courts may not supply words not used by the Legislature to express what might or might not have been intended. *Villanueva v. State*, 200 So. 3d 47, 52 (Fla. 2016). In order for 447.4095 to survive the heightened scrutiny required, it would need specific language requiring a public employer to establish that it has no other reasonable source of revenue available to it and that the impairment be for the shortest period of time and in the least intrusive fashion. The Legislature failed to include that constitutionally mandated language. The vagueness created has proven to be a ready source of unconstitutional erosion of fundamental rights. We simply cannot pretend the standards required in *Headley* are embodied in Section 447.4095.

While the discussion of vagueness set forth at pp. 10-18 in the Amended Initial Brief need not be restated here, the City's failure to directly address the FOP's cases and arguments warrants highlighting. When the constitutional right of collective bargaining was added to the Florida Constitution in 1968, this Court expressly stated: "In the sensitive area of labor relations between public employees and public employer, it is requisite that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6." *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903, 906 (Fla. 1969). When the Legislature failed to act, this

Court reminded the Legislature of its constitutional duty to "provide the ways and means of enforcing" the right to bargain. *Dade County Classroom Teachers' Ass'n v. Legislature*, 269 So. 2d 684, 686 (Fla. 1972). Section 447.4095 is an impermissible deviation from that duty and impairs fundamental rights. As a result, it should be declared invalid. The FOP is not requesting this Court to legislate. Instead it is asking the Court to eliminate an incomplete and constitutionally infirm statute, leaving future legislatures free to constitutionally regulate this question should they so choose.

VII. THE THIRD DISTRICT COURT OF APPEAL APPLIED THE WRONG STANDARD AND THE DECISION SHOULD BE QUASHED

The decision of Third District suffers from the same analytical infirmities as did the decision of the First District in *Headley*. The Third District failed to consider the nature of the rights at issue, fundamental constitutional rights under Article I of the Constitution. In doing so, the Third District stood the legal analysis on its head. Instead of requiring the government to justify its impairment of those fundamental rights through the least intrusive means, the burden was placed on the FOP. This is a direct failure to apply this Court's decisions in *Chiles* and *Ehrman*. Instead of following the clear jurisprudence from this Court that a statute impairing a fundamental constitutional right was presumptively invalid; the Third District

applied the test used for non-fundamental rights. The resulting decision conflicts with this Court's holding in *North Florida Women* and its progeny.

The Third District simply adopted the now rejected decision of the First District in *Headley* in which that appeals court incorrectly modified the *Chiles v. United Faculty of Florida* test and ignored the Fourth District's correct application of *Chiles v. United Faculty of Florida* in *Hollywood Firefighters Local 1375 v. City of Hollywood*, 133 So. 3d 1043 (Fla. 4th DCA 2014). As this Court stated in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), overruling a decision of the Florida Supreme Court is a prerogative which the District Courts do not enjoy. *Id*. at 433-434. The Third District's decision below should be quashed to eliminate the type of "chaos and uncertainty in the judicial forum" which led to this Court's decision in *Hoffman*.

CONCLUSION

Wherefore, for the foregoing grounds and reasons, the FOP respectfully prays this Court to declare Section 447.4095 facially unconstitutional and quash the decision of Third District Court of Appeal with instructions to remand the matter to the Circuit Court of the 11th Judicial Circuit to enter final judgment for the FOP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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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