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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1434
Lower Court Case Nos. 1D16-618; CA-2015-076

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL S-20, FLORIDA STATE FIRE SERVICE ASSOCIATION,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND OF THE FACTS

1. Statement of the Case

The Florida State Fire Service Association ("FSFSA") is the duly certified bargaining representative of personnel employed by the State of Florida. (RI.127) On November 25, 2015, the FSFSA filed an unfair labor practice charge with the Florida Public Employees Relations Commission ("PERC" or the "Commission") asserting that Governor Scott failed to bargain in good faith, in violation of §447.501 (1) (a) and (c), Florida Statutes, by vetoing a wage adjustment for FSFSA bargaining unit members included within the 2015 general appropriation act. (RI.1-126) The charge also asserted that the Governor's veto of the competitive wage adjustment violated §447.403 (4) and (5), Florida Statutes. (RI.1-126)

On December 9, 2015, and pursuant to his authority under §447.503 (2) (a) to determine the sufficiency of an unfair labor practice charge, the Commission's Designated Agent summarized the facts alleged in the charge, and then dismissed the charge as failing to establish a violation of the Public Employees Relations Act, §447.201 et seq. ("PERA").[1] (R.129-133) He opined that the Governor's veto power under Article III, Section 8(a) of the Florida Constitution "prevails over a statute purporting to limit that authority." (RI.129-133 at p. 4)

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[1] This role is normally played by the Commission's General Counsel.

On December 29, 2015, the FSFSA, pursuant to §447.503 (2) (a), appealed the summary dismissal to the Commission. (RI.134-140) The FSFSA argued that an executive agency, such as PERC, lacked the authority to determine whether the Governor's veto power prevailed over the power of the legislature under §447.403 to resolve bargaining issues at impasse. (RI.134-140 at pp. 2-4) It further argued that the Designated Agent failed to harmonize the Governor's constitutional veto power with the employees' fundamental constitutional right under Article I, Section 6 to bargain collectively. (RI.134-140 at pp. 4-6)

On February 1, 2016, the Commission issued an order reciting the factual allegations of the charge, as summarized by the Designated Agent, and then affirmed his summary dismissal. (RI.144-155) The Commission wrote that although both the Governor and FSFSA were bound by the manner in which the Legislature appropriated funds to carry on state government, the budget is not final until it is presented to the Governor for approval. (RI.144-155 at pp. 10-11) Only after the Governor has had an opportunity to veto specific appropriations in a general appropriations bill, and the Legislature has had the opportunity to override any veto, can the appropriation bill be considered a final agreement. (RI.144-145 at pp. 10-11) Because the FSFSA failed to show that the Legislature overrode the Governor's veto, the Commission concluded that "[t]he State's presentation of a proposed

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agreement to bargaining unit members without the special wage adjustment was lawful." (RI.144-145 at p. 11)

The FSFSA then appealed PERC's final order to the Florida First District Court of Appeal. On June 6, 2017, in a two-to-one decision, the majority held that the Governor possessed explicit constitutional authority to veto appropriations within the General Appropriations Act. Further, the court acknowledged that, although it was true that public employees possess important, constitutionally protected collective bargaining rights, the Legislature could not "force the Governor's hand" to approve and sign the general appropriations act, or specific appropriations therein. The majority further stated that the "[L]egislature here retained and exercised its ultimate authority to resolve the impasse *after* the Governor's veto, but chose not to override the veto and to maintain the status quo."

Thereafter, this Court accepted discretionary jurisdiction.

2. Statement of the Facts

The Designated Agent and Commission summarized the factual allegations of the charge as follows:

> According to the charge, Local S-20 is the certified bargaining agent for a unit of certified firefighting personnel employed by the State. The parties' last collective bargaining agreement ran from July 2009 through June 2012.

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> The parties bargained over wages, hours and conditions of employment for fiscal year 2015-2016. In response to the State's wage proposal, Local S-20 offered a counterproposal which provided, in part, that unit members would receive a competitive Pay adjustment of $1500.00. The parties then proceeded to impasse on these wage proposals and other disputed issues.
>
> On February 16, pursuant to Section 447.403(5), Florida Statues, the parties submitted their positions to the Florida Legislature via the Joint Select Committee on Collective Bargaining. Thereafter, the Legislature, acting as the ***legislative body,*** passed an act specifically resolving certain impasse issues, but not the wage issue. The Legislature indicated that impasse issues which were not specifically resolved in the act or in the 2015-2016 General Appropriations Act would be resolved in accordance with the State personnel rules and by maintaining the status quo.
>
> The Legislature, through Senate Bills 2504A and 2500A, then ***resolved the wage impasse by including a $2000.00 competitive wage adjustment for each unit member in the 2015-2016 General Appropriations Act.*** On June 23, Governor Scott vetoed the Legislatures appropriation of a competitive pay adjustment for unit members. On July 10, Governor Scott, through the Department of Management Services, presented a proposed collective bargaining agreement to Local S-20 for ratification which did not include the vetoed pay adjustment.

(RI.129-133 at pp. 1-2; and RI.144-155 at p. 2)[2]

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[2] Under the PERA, the <u>legislative body</u> is the city council, school board, county commission or, in the case of state employees, the Florida Legislature. When the parties reach impasse in negotiations, the legislative body <u>resolves</u> the disputed items at impasse. The parties (here the Governor) and the union then "reduce to writing an agreement which includes those issues agreed to by the parties and those disputed impasse issues resolved by the legislative body's action . . . ." (Section 447.407(4)(e) Florida Statutes).

The FSFSA's charge alleged that the competitive wage adjustment was but one of many line items in the general appropriations act, totaling nearly $500 million in value, that the Governor vetoed. (RI pp. 1-126)

SUMMARY OF THE ARGUMENT

The veto power must be exercised by the Governor in a constitutional manner. Use of the veto to avoid a collective bargaining impasse resolution is an unconstitutional use of the veto and violated the right to bargain of workers represented by Petitioner. Moreover, by permitting unrestrained use of the veto against the constitutional right to bargain collectively violated the lower court's obligation to harmonize the two constitutional provisions, which it could have achieved by limiting use of the veto to the strict scrutiny standard outlined by this Court in *Chiles v. United Faculty of Fla.* 615 So.2d 671, 673 (Fla. 1993).

A. Bargaining Unit Members have a Fundamental Constitutional Right to Meaningful Collective Bargaining as Effectuated by Chapter 447, Part II, Florida Statutes, and the Decision Below Effectively Destroyed that Right

This case presents the court with the relationship between two state constitutional provisions: the Governor's veto authority under Article III, Section 8 and the fundamental constitutional right to collectively bargain under Article I, Section 6. This latter provision is not self-executing. *Dade County Classroom*

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Teachers Association. v. The Legislature, 269 So. 2d 684 (Fla. 1972). However, the constitutional right to bargain has been implemented by the PERA, which in turn is interpreted by the PERC. As a result, employees' assertion of the right to bargain under the PERA is the equivalent of the exercise of the constitutional rights to bargain.

Impasse resolution is a key component of the collective bargaining process. However, the Governor in this instance vetoed the Legislature's resolution of the bargaining impasse over wages. To be sure, "the Governor may exercise his veto power for any reason whatsoever." *Brown v. Firestone*, 382 So.2d 654, 668 (Fla. 1980). However, the governor must "exercise the veto power in a constitutional manner." *Id*. Here, the Governor exercised the veto power in a way that deprived employees of the fruits of the mandatory statutory impasse process that purports to give effect to the constitutional right to bargain collectively.

Specifically, the PERA – which effectuates the constitutional right of state employees to bargain[3] – provides that, in the event there is a bargaining impasse, the impasse is resolved by the Florida Legislature. Here, the lower court – via deference to the veto – rendered the detailed statutory impasse resolution mechanism utterly meaningless. This violated the plain language of the PERA which itself is an

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[3] *Dade County Classroom Teachers Association v. The Legislature,* 269 So.2d 684 (Fla. 1972),

expression of the fundamental right to bargain, is inconsistent with existing case law around the impasse resolution process and is otherwise at odds with the very logic of impasse resolution. Stated differently, the exercise of the veto in these circumstances violated the constitutional rights of the workers Petitioner represents.

B. Alternatively, the Lower Court failed to Harmonize Exercise of the Veto under Article III, Section 8 with the Right to Bargain Collectively under Article I, Section 6.

In the alternative, the lower court erred by failing to harmonize Article I, Section 6 and Article III, Section 8 of the Florida Constitution. The Court has an established jurisprudence whereby the constitutional right to bargain fails in the face of the demonstration of a compelling state interest. *Chiles v. United Faculty of Fla.* 615 So.2d 671, 673 (Fla. 1993). See also *Headley v. City of Miami*, 215 So.3d 1 (Fla. 2017). By the *Chiles* rule, the putative conflict between Articles 1 and III is easily harmonized: the exercise of the veto to the detriment of the right to bargain needs to be justified by a compelling state interest. Accordingly, the Governor should be required to demonstrate that a veto was warranted under the *Chiles* standard.

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ARGUMENT

The Governor's exercise of veto power in this instance violated Article I, Section 6 of the Florida Constitution and its enabling statute, §447.403, which

establishes a collective bargaining impasse resolution procedure culminating in a binding legislative resolution:

1. This Court should find that the lower court erred by failing to find that the Governor's veto violated the fundamental constitutional right of the employees represented by the FSFSA to bargain collectively. And,

2. This Court should find that the lower court erred by failing to harmonize the Governor's veto power with the fundamental constitutional right of employees represented by the FSFSA to bargain collectively.

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Point One

IT WAS ERROR FOR THE COURT TO APPROVE EXERCISE OF THE VETO POWER TO DEPRIVE PUBLIC EMPLOYEES OF THEIR FUNDAMENTAL RIGHT TO BARGAIN COLLECTIVELY

A. Standard of Review

Questions of law are subject to de novo review. *Southern Baptist Hosp. of Florida, Inc. v. Welker*, 908 30.2d 317 (Fla. 2005).

B. Florida's State Public Employees' Fundamental State Constitutional Right to Bargain

Article I, Section 6 of the Florida Constitution provides that

> “Right to work. – The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.[4]

In *Dade County Classroom Teachers’ Association v. Ryan*, 225 So. 2d 903 (Fla. 1969), the Court unanimously opined that with the exception of the right to strike, this language meant that public employees have the same rights of collective bargaining as are granted private employees by Section 6. However, because labor relations was a “sensitive area,” the Court indicated that it was “requisite that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limit of Section 6.” *Id.*

The Legislature failed to promptly pass a statute implementing the right to bargain. So, in *Dade County Classroom Teachers Association v. The Legislature,* 269 So.2d 684 (Fla. 1972), a mandamus action, the Court recognized it had the constitutional duty to implement constitutional rights such as those established in Article I, Section 6 where the Legislature had refused to act. However, it dismissed the petition for mandamus after expressing confidence that the Legislature would

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[4] Prior to the Constitutional revision of 1968, Section 12 of the Declaration of Rights in the Florida constitution provided that “[t]he right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.”

address the matter, and after stating that it would be obliged to act in the appropriate case were the Legislature to fail to do so.

In 1974, in response to *Ryan* and *The Legislature*, the Legislature enacted the Florida Public Employees Relations Act. Section 447.403 of PERA addressed the resolution of impasses. It provided that, unless waived, the parties would present the positions on disputed impasse issues to a special magistrate, who would then issue recommendations for settling those issues. If one or both parties did not accept the special magistrate's recommendations, the parties would then present their recommendations for settling the disputed impasse issues to the legislative body at a public hearing. According to 447.403 (4) (d), Florida Statutes, "[t]hereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues."

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C. PERA Jurisprudence

Since enactment of the PERA, the courts have had several occasions to either strike down or interpret provisions of the statute in light of the requirements of Article I, Section 6. In some cases the issue before the court was whether a category of employees could be excluded from coverage under PERA where the exclusion served no compelling state interest. *United Faculty of Florida v. Bd. of Regents*, 417

So. 2d 1055 (Fla. 1st DCA 1982) (exclusion of graduate assistants from the definition of public employee in §447.203 (3) (g), (h) & (i) served no compelling state interest); *Chiles v. State Employees Attorneys Guild*, 734 So.2d 1030 (Fla. 1999) (no compelling state interest served in preventing any collective bargaining by state employed attorneys); *SEIU, Local 16 v. Public Employees Relations Commission*, 752 So.2d 569 (Fla. 2000) (exclusion of deputy clerks from collective bargaining exalts form over substance in contravention of the plain language and broad purpose of PERA); *Coastal Fla. Police Benevolent Association v. Williams*, 838 So.2d 543 (Fla. 2003) ("To the extent that any provisions of the Florida Statutes purport to prohibit deputy sheriffs from engaging in collective bargaining, they are contrary to the plain provisions of Florida's Constitution.")

On other occasions, courts have struck down statutory limitations upon the scope of collective bargaining. In *Tallahassee v. Public Employees Relations Commission*, 410 So.2d 487 (Fla. 1981), the court held unconstitutional portions of Chapter 447, Part II which removed from public employers the obligation to negotiate over pension plans to the extent that retirement matters were controlled by state statute or local ordinance. In *Hillsborough County Government Employees Association, supra,* the court utilized the compelling state interest test when it held that §447.309 (3), Florida statues was unconstitutional as applied to the extent its

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application would prevent implementation of provisions of a collective bargaining agreement in conflict with civil service rules.

On still other occasions, courts have denied Florida public employers the ability to impose waivers of bargaining rights guaranteed by PERC and Article I, Section 6. *Palm Beach Junior College Board of Trustees v. United Faculty of Palm Beach Junior College*, 475 So.2d 1221 (Fla. 1985) (blanket impact bargaining waiver constituted a drastic waiver of rights guaranteed by PERA and Article I, Section 6 of the Florida Constitution.); *Florida State Fire Service Association, IAFF, Local S-20 v. State*, 128 So.3d 160 (Fla. 1st DCA 2013) ("The Legislature may not remove the subject of pensions from the bargaining process, nor may the State reserve to the Legislature the exclusive authority to determine retirement benefits for public employees.")

D. The PERA's Impasse Resolution Construct

The pertinent parts of Section 447.403 relating to impasse resolution[5] presently read:

> (2)(a) If no mediator is appointed, or upon the request of either party, the commission shall appoint, and submit all unresolved issues to, a special magistrate acceptable to both parties. If the parties are unable to agree on the appointment of a special magistrate, the commission shall appoint, in its discretion, a qualified special magistrate. However, if the

[5] Pieces of the statute overlap with local government employees who, unlike state employees, do have the option to use the non-binding impasse resolution process.

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parties agree in writing to waive the appointment of a special magistrate, the parties may proceed directly to resolution of the impasse by the legislative body pursuant to paragraph (4)(d). Nothing in this section precludes the parties from using the services of a mediator at any time during the conduct of collective bargaining.

(b) If the Governor is the public employer, no special magistrate shall be appointed. The parties may proceed directly to the Legislature for resolution of the impasse pursuant to paragraph (4)(d).

. . .

(4) If either the public employer or the employee organization does not accept, in whole or in part, the recommended decision of the special magistrate:

(a) The chief executive officer of the governmental entity involved shall, within 10 days after rejection of a recommendation of the special magistrate, submit to the legislative body of the governmental entity involved a copy of the findings of fact and recommended decision of the special magistrate, together with the chief executive officer's recommendations for settling the disputed impasse issues. The chief executive officer shall also transmit his or her recommendations to the employee organization;

(b) The employee organization shall submit its recommendations for settling the disputed impasse issues to such legislative body and to the chief executive officer;

(c) The legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the rejected recommendations of the special magistrate;

(d) Thereafter, ***the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, <u>to resolve</u> all disputed impasse issues***; and

(e) Following the resolution of the disputed impasse issues by the legislative body, the parties shall reduce to writing an agreement which includes those issues agreed to by the parties and those disputed

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> impasse issues resolved by the legislative body's action taken pursuant to paragraph (d). The agreement shall be signed by the chief executive officer and the bargaining agent and shall be submitted to the public employer and to the public employees who are members of the bargaining unit for ratification. If such agreement is not ratified by all parties, pursuant to the provisions of s. 447.309, the legislative body's action taken pursuant to the provisions of paragraph (d) shall take effect as of the date of such legislative body's action for the remainder of the first fiscal year which was the subject of negotiations; however, the legislative body's action shall not take effect with respect to those disputed impasse issues which establish the language of contractual provisions which could have no effect in the absence of a ratified agreement, including, but not limited to, preambles, recognition clauses, and duration clauses.
>
> ***(5)(a) By the first day of the regular session of the Legislature, each party shall notify the President of the Senate and the Speaker of the House of Representatives as to all unresolved issues. Upon receipt of the notification, the presiding officers shall appoint a committee to review the position of the parties relating to all issues at impasse. No later than the 14th day of the regular session of the Legislature, the committee shall conduct a public hearing to take testimony regarding the issues at impasse. During the legislative session, the Legislature shall take action in accordance with this section.***
>
> ***(b) Any actions taken by the Legislature shall bind the parties in accordance with paragraph (4)(c).***

Id. (all emphasis supplied). To reiterate, Section 447.403 (4) (d) provides that: "Thereafter, ***the legislative body*** [i.e., the Legislature] ***shall take such action*** as it deems to be in the public interest, including the interest of the public employees involved, ***to resolve*** all disputed impasse issues; . . ."

So, when state employees reach impasse over wages, they are given the opportunity to present their argument to a committee appointed the President of the

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Senate and the Speaker of the House of Representatives. And, "[n]o later than the 14th day of the regular session of the Legislature, the committee shall conduct a public hearing to take testimony regarding the issues at impasse." Then, in the bowels of the legislative process, "the legislative body [i.e., the Legislature] shall take such action as it deems to be in the public interest, including the interest of the public employees involved, ***to resolve*** all disputed impasse issues;" *Id.*(emphasis supplied) That is the end of it: there is no provision for the Governor to veto the "action" taken to resolve the impasse. This, in short, is how the constitutional right to bargain has been implemented.

Where there is any doubt as to the meaning of a statute – and there really is no bona fide dispute as to how the process works in this case – the purpose for which the statute was enacted is of primary importance in the interpretation thereof. *Florida Industrial Commission v. Manpower, Inc. of Miam*i, 91 So. 2d 197 (Fla. 1956). A statute should be interpreted in the light of, and to effectuate the legislative intent, where the statute is a part of other legislation designed as a whole to establish an expressed state policy. According to §447.201, "[t]he public policy of this state, and the purpose of this part, is to provide statutory implementation of s. 6, Art. I of the State Constitution, with respect to public employees…." Plainly, the provisions of Chapter 447, Part II were enacted to effectuate public employees' fundamental constitutional right to bargain.

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Furthermore, that construction is favored which considers a statute and its language in all its parts when construing any of them and gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. *Lexecon Inc. v. Milberg Weiss Berhad Hynes & Lerach*, 523 U.S. 26 (1998). When the PERA is read as a whole, its provisions assign different roles to the Governor and the Legislature in collective bargaining and impasse resolution for the purpose of effectuating one of the fundamental rights declared in the Florida Constitution.[6]

Pursuant to §447.203 (2), the Governor is deemed to be the public employer with respect to all public employees determined by the Commission as properly belonging to a statewide bargaining unit of State Career Service System employees or Selected Professional Service employees. Pursuant to §447.203 (9), the Governor is also the "Chief executive officer" for the state, who is the person "[r]esponsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer." Pursuant to §447.203 (1), the "Legislative body" is the unit of government having authority to appropriate funds and establish policy governing the terms and conditions of employment. In the case of state employees, "Legislative body" means the State Legislature.

[6] It bears noting that Article I, Section 6 follows freedom of speech and the press, and the right to assemble, in the Florida Constitution's "Declaration of Rights."

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According to §447.309 (1), the chief executive officer is responsible for bargaining collectively with the bargaining agent of the employee organization. The Governor signs any negotiated collective bargaining agreement, and, according to §447.309 (2) (a), upon execution, requests the legislative body to appropriate such amounts as shall be sufficient to fund its provisions. However, pursuant to §447.309 (2) (b), the failure of the Legislature to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

According to §447.403 (c), the legislative body or a duly authorized committee shall conduct a public hearing at which the parties explain their positions on the rejected recommendations of the special magistrate. §447.403 (d), in the event of a bargaining impasse, the legislative body takes such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues.

Section 447.403 (5) (a) and (b) deals specifically with impasse resolution where the Governor is the employer. Pursuant to §447.403 (2) (b), no special magistrate may be appointed, if the employer is the Governor.

According to §447.403 (5) (a), a joint select committee of the legislature reviews the positions of the parties and renders a recommended resolution of all issues remaining at impasse, which is returned to the presiding officers not later than

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10 days before the date upon which the legislative session is scheduled to commence. According to §447.403 (b), "[a]ny actions taken by the Legislature shall bind the parties in accordance with paragraph (4) (c)."

These various provisions demonstrate that the Governor and Legislature have separate roles. The Governor bargains with the public employees.[7] The Legislature, as the legislative body, resolves any disputed issues at impasse. Section 447.403 does not authorize the chief executive officer, in this case, the Governor, to veto the legislative body's resolution. Likewise, the statute does not contemplate a veto, followed by the Governor simply doing what he wanted.[8]

The mechanics of impasse resolution are plain: the legislative body, in this case the Legislature, plays the role of the neutral in resolving impasses, and the Governor plays the role of employer and advocate. The Governor's serving as both advocate, and final arbiter, would subvert the impasse resolution process, and conflicts with the evident statutory objective of implementing Article I, Section 6.

More importantly, to have one party implementing his own proposal, without even the pretense of bona fide impasse resolution, is simply not permitted by the statute. The dissent below cited this court's decision in *United Faculty of Florida*

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[7] Although an exception to this would be the portion of the employees in the unit employed in the Department of Agriculture, and the Secretary of Agriculture.

[8] In that regard, the statute does not authorize any further action by either party.

for the following proposition: this "court noted that once the Legislature resolves an impasse and funds an agreement with public employees, a valid contract exists with the public employees that cannot be abrogated." 221 So.3d at 741(underscoring supplied). That is precisely how the statute works, and how the constitutional rights of the states' unionized employees is implemented.

E. The Veto Deprived Employees of the Constitutional Right to Bargain Collectively

Against this background, it is plain that the veto deprived the state employees represented by the FSFSA of their fundamental constitutional right to bargain. The argument proceeds in three parts. First, the impasse resolution process, as a matter of statutory construction, ended when the legislature resolved the impasse, and any veto necessarily deprived employees of their right to bargain. Second, a veto by its nature deprived the affected employees of meaningful and effective collective bargaining. And finally, exercise of the veto power does not permit this violation of constitutional rights.

1. The Plain Meaning of The Statute Ends Impasse Resolution With The Action of the Legislative Body

The impasse resolution process is part and parcel of the collective bargaining process.

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(a) Principles of Statutory Construction

The plain meaning of statutory language compels reversal of the lower court's decision. The text is first consideration of statutory construction and is its polestar. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898 (Fla. 1996*); Capers v. State*, 678 So. 2d 330 (Fla. 1996). Section 447.403 (5) (a), on its face provides that the legislature's resolution shall be binding, with no mention of the governor's veto power. Likewise, courts may not, in the process of construction, insert words or phrases in a statute, or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976). Where a statute is clear and unambiguous, the court is not free to add words to steer it to a meaning and a limitation which its plain wording does not supply. *Atlantic Coast Line R. Co. v. Boyd*, 102 So. 2d 709 (Fla. 1950).

Furthermore, §447.403, Florida Statutes provides for the imposition of contractual terms when the parties cannot reach agreement. As such, it is in derogation of both the right to contract and the constitutional right to collectively bargain. [S]tatutes implicating constitutional rights must be 'narrowly limited in

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their application according to the statutory language." *B.C. v. Fla. Dep't. of Children & Families,* 887 So. 2d 1046, 1052 (Fla. 2004) (quoting *State v. Jackson*, 650 So. 2d 24, 26-27 (Fla. 1995))

In *Amalgamated Transit Union Local 1593 v. Hillsborough Area Regional Transit*, 139 So.3d 345 (Fla. 2nd DCA 2014), the Court held that §447.403, Florida Statues, should be construed narrowly – "[n]ot only because it embodied an exception to the collective bargaining rights recognized in Chapter 447, but also because it implicates public employees' rights to collectively bargain as set forth in the Florida Constitution. The *Local 1593* Court noted that PERC itself, in *Amalgamated Transit Union, Local 1701 v. Sarasota County Board of County Commissioners,* 36 FPER ¶453 (2010), *aff'd,* 88 So.3d 945 (Fla. 2d DCA 2012) (table decision), because the impasse resolution statute ultimately allows a legislative body to unilaterally impose terms, must be strictly construed.

PERA does not state that the Governor's veto may follow such "binding" action. Further, to hold such would contravene the clear language of the statute, which must be read narrowly in light of Article I, Section 6.

The FSFSA also filed its charge after this court's decision in *Dade County Police Benevolent Association v. Miami-Dade County Board of County Commissioners*, 160 So.3d 482 (Fla. 1st DCA 2015). There, the Court of Appeals for the First District held that the Miami-Dade County Mayor could not veto the

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Legislative Body's resolution of an impasse. The Court based its holding upon a plain reading of the unambiguous language of §447.403. According to the Court, §447.403 (4) (d) contemplated that the legislative body would resolve the impasse and the mayor would play no role in the impasse resolution process beyond that of an advocate for the public employer.

The court wrote that:

> The language in paragraph (4) (d) clearly and unambiguously contemplates that the impasse will be resolved exclusively by the legislative body, and as observed by PERC Commissioner Delgado in his dissent below, "[t]here is nothing in the impasse resolution proceeding that allows a chief executive officer to reject the resolution of the impasse issues by the legislative body." Indeed, it is clear from subsection (4) as a whole that the chief executive officer's role in the impasse process is limited to that of an advocate for the governmental entity's position on the impasse issue. Accordingly, where, as here, the chief executive officer is not a member of the legislative body, it would be inconsistent with the statue and general principles of due process to allow the executive to participate in the legislative body's decision-making process beyond his or her role as an advocate.

Id at 486.

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(b) The Impasse Process Plainly Ends With Legislative Action

As observed, the impasse resolution process ends with legislative action. Although Article III, Section 8 provides that the legislature can override a veto, this ability to override – even had it occurred – would not remedy the harm from a veto, undo the statutory violation nor effectuate Article I, Section 6. In *Dade County PBA*, the Commission actually met subsequent to the mayor's veto to

reconsider their prior legislative resolution. This Court first observed that the Commission's meeting only after the veto could not cure or "moot" the unfair labor practice that occurred when the Mayor exercised his veto power.

Further, §447.403 (5) does not provide any procedure whereby the legislature may rehear an impasse resolution, either before or after a veto. In *Port Orange Professional Firefighters Association v. City of Port Orange*, 37 FPER ¶99 (2010), PERC concluded that the city committed an unfair labor practice when, at the request of the City Manager, the City Commission held a second impasse resolution hearing five months after the first hearing on an issue that was then the subject of an unfair labor practice claim at PERC. The statute should be strictly construed to effectuate the constitutional rights of the employees. See *ATU v Hillsborough County, supra.*

Section 447.403 contemplates a process whereby the bargaining agent is afforded notice and an opportunity to be heard before the legislative body resolves the disputed issues at impasse, and only those issues. By contrast, the bargaining agent at the state level is largely shut out of any process by which the legislature discusses the possible override the governor's veto of dozens of separate line items.

In the end, the FSFSA was shut out of the Legislature's decision-making process regarding whether to override. Aside from there being no mechanism allowing FSFSA participation, the decision not to override involved many other matters that were dependent upon political considerations in which the FSFSA

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played no meaningful part. The employees represented by the FSFSA were denied their right under the statute which purports to implement the fundamental constitutional right to bargain.

2. Employees Are Entitled to Meaningful and "Effective" Collective Bargaining

This Court has on different occasions stated that courts must be mindful of the "real impact or practical effect" of legislation upon rights guaranteed by Article I, Section 6. *United Teachers of Dade, etc., Local 1974 v. Dade County School Bd.*, 500 So.2d 508 (Fla. 1986), (citing *Plante v. Smathers*, 372 So.2d 933 (Fla. 1979)), the Court stated that constitutional provisions are to be construed so as to make them meaningful. In *Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority*, 522 So.2d 358 (Fla. 1988), the Court wrote that:

> The Florida Constitution guarantees public employees the right of effective collective bargaining. This is not an empty or hollow right subject to unilateral denial. Rather it is one which may not be abridged except upon the showing of a compelling state interest.

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"Article I, Section 6 prohibits not only an explicit denial of the right to collective bargaining, but also an action by a public employer that results in a denial of the right. The *constitution guarantees* public employees the right of *effective* collective bargaining." *Fla. State Fire Serv. Ass'n, IAFF, Local S-20 v. State*, 128 So.3d 160 (Fla. 1st DCA 2013)(emphasis supplied).

Here, the wage increase resolved by the legislature was vetoed. And, the mandatory impasse resolution procedure was never resumed, nor could it have resumed. The complex statutory construct created to resolve impasses and otherwise implement the fundamental constitutional right to bargain was never used to address the issue of wages.[9] The Legislature had considered, as required, the impasse issue of wages, but their decision – which was not a mere recommendation but the actual "resolution" of wages – was ultimately ignored as the impasse fell by the wayside; it ended in a way not contemplated by the statute, and in plain derogation of employees' right to bargain.

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3. The Veto Power Was Not Appropriately Exercised

To be sure, "the Governor may exercise his veto power for any reason whatsoever." *Brown v. Firestone*, 382 So.2d 654, 668 (Fla. 1980). However, the governor must "exercise the veto power in a constitutional manner." *Id.* Here, the Governor exercised the veto power in a way that abrogated the very statute that purported to implement the constitutional right to bargain, and otherwise deprived

[9] To be sure, aside from wages, the Legislature resolved the Governor's proposals in his favor. The Legislature, however, never resolved wages as the Governor wanted. The Governor essentially ignored the PERA by virtue of the veto and did what he wanted by ignoring the statutory process.

the very state employees he was negotiating with of their right to *meaningful*[10] and effective collective bargaining.

The instant veto effectively eliminated the constitutionally mandated impasse resolution process. Because impasse resolution is a subset of bargaining, the veto likewise operated to destroy collective bargaining. Using the veto to render a constitutional right inoperative is surely impermissible, just as it is impermissible for a court to "constru[e] one constitutional provision in a manner which would render another provision superfluous, meaningless or inoperative." *Chiles v. Phelps*, 714 So.2d 453, 459 (Fla. 1998).

Here, the Governor's veto has left PERA's structured impasse resolution mechanism meaningless and inoperative.[11] In *Ryan*, this Court observed that

> In the sensitive area of labor relations between public employees and public employer[s], 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. A delicate balance must be struck in order that there be no denial of the guaranteed rights of public employees to bargain collectively . . . .

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[10] See, e.g., *United Teachers of Dade, etc., Local 1974 v. Dade County School Board*, 500 So.2d 508 (Fla. 1986); *Hillsborough County Government Employees Association v. Hillsborough County Aviation Authority*, 522 So.2d 358 (Fla. 1988).

[11] Petitioner here has fewer courses of action for potential relief than petitioners in in *Bogorff v. Scott*, 223 So.2d 1000 (Fla. 2017).

225 So.2d at 906. The conduct at issue in this case trampled upon that "delicate balance" and denied the very guaranteed rights to bargain collectively the *Ryan* Court sought to protect.

Point Two

THE COURT ERRED IN FAILING TO HARMONIZE EXERCISE OF THE VETO POWER UNDER ARTICLE III, SECTION 8 WITH THE RIGHT TO BARGAIN COLLECTIVELY UNDER ARTICLE 1, SECTION 6

A. The Standard of Review

Questions of law are subject to de novo review. *Southern Baptist Hosp. of Florida, Inc. v. Welker*, 908 30.2d 317 (Fla. 2005).

B. Harmonizing Conflicting Provisions

There are various approaches to harmonizing apparently conflicting provisions. "Where an amendment contains no express repeal or modification of existing provisions of law the old and the new provisions should stand and operate together if it can be done without contravening the intent of the lawmaking power as duly and fairly expressed in the later provision; but to the extent that a fair construction or interpretation of the new provision discloses inconsistency with, or repugnancy to an older provision, the later provision controls to effectuate the law

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making intent." *Wilson v. Crews*, 160 Fla. 169 (Fla. 1948); *Jackson v. Consolidated Government of Jacksonvill*e, 225 So.2d 497 (Fla. 1969) ("every reasonable effort will be made to give effect to both provisions, unless the clear intent of the later provision is thereby defeated).

When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions. *Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So. 2d 337 (Fla. 1978).

C. The Lower Court's Failure to Harmonize Conflicting Provisions

In *Dade County Police Benevolent Association*, the Court did not need to address whether the Mayor's purported veto power over a §447.403 legislative impasse resolution conflicted with Article I, Section 6. This was the case because §447.403, as any other general law, superseded any conflicting portions of a home rule charter. Here, however, the Governor's veto power is located in the Florida Constitution. Therefore, the Court cannot avoid the question of whether the Governor's exercise of the veto power in this case conflicted with the constitutional right of FSFSA bargaining unit members to collectively bargain.

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PERC erroneously held that the affected employees' rights under Article I, Section 6 to bargain collectively are subordinate to the governor's constitutional veto power, no matter the harm inflicted upon the employees' constitutional right to collectively bargain. In doing so, the Commission failed to harmonize the veto power with the constitutional right to bargain. PERC should have read Article I, Section 6 as impliedly limiting the veto power in instances where the legislative has resolved a disputed issue at impasse; it instead adopted an interpretation of §447.403 that effectively eviscerates the right of state employees to collectively bargain. In short, the veto power of the public employer (the governor) entirely displaces the impasse resolution authority of the legislature rendering collective bargaining meaningless.

In applying this case law, the governor's veto power in Article III, Section 8, should be deemed the earlier provision. The governor's veto power existed as early as the Constitution of 1838. Article III, Section 16 of that Constitution provided that the Governor shall return any bill to which he objects to the House in which the bill originated, in which case that house should reconsider the bill. If the bill was then approved by a majority in both houses, it would become law.

Article III, Section 28 of the 1885 Constitution contained a similar provision, which, among other changes, required that two-thirds of the members of both Houses had to approve any bill that the governor had returned with objections. And, in cases

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where the legislature's final adjournment prevented the Governor from returning a bill with his objection, the Constitution provided that the bill had to be passed by two-third majorities at the next legislative session before it became law.

In 1968, the Constitutional Revision Commission revised Article III, Section 28. Article III, Section 8 of the 1968 Constitution for the first time employed the word "veto" in place of "objections." It further established the governor's right to veto any specific appropriation in a general appropriation bill, enlarged the period to veto from five days to seven consecutive days and allowed the governor fifteen days to act on any bill in cases where the legislature had adjourned or recessed during the seven day period.

Although the mechanisms for vetoing bills and overriding those vetoes have changed from constitution to constitution, constitutional provisions affording the governor power to "object" or veto legislation have existed since 1838. By contrast, the Florida Constitution did not afford public employees the right to bargain collectively until 1968. And, the legislature did not adopt the Public Employees Relations Act until 1974. Therefore, in applying the case law, Article I, Section 6 should be deemed the "new provision" which should control in the event of any inconsistency with Article III, Section 8.

To be sure, Article I, Section 6 does not supersede Article III, Section 8 with respect to *any* exercise of the veto power. For the most part, the two constitutional

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articles address entirely separate matters. Whereas here, there is a conflict, the veto power must accommodate the purposes of the later adopted amendment, Article I, Section 6. A limit on the Governor's veto power in this instance would affect only a small number of the items in a general appropriations bill that are subject to the governor's veto. However, the Article I, Section 6 rights of the bargaining unit employees would be severely abridged if the veto power were not limited.

Section 447.203 (14) states that "collective bargaining means the performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment…." Whereas PERC would have it, one party can ultimately dictate terms, there can be no good faith negotiation. A process culminating in the Governor's simply vetoing impasse resolution is not meaningful collective bargaining.

To harmonize the two constitutional provisions, the Governor should veto an impasse resolution only where doing so serves a compelling state interest. Instead, Governor Scott provided the following written explanation when he vetoed the competitive pay adjustment: "The following is vetoed because this issue should be addressed at a statewide level for all employees." (R.I, 1-126 at p. 2; R. 1-126 at last page of Ex. F) Thus, the Governor did not veto the competitive pay adjustment over

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any constitutional principle. Nor did he veto the adjustment to avoid a financial emergency or for any economic rationale. He simply desired to address FSFSA's pay issue in a different manner at a later time.

D. Application of the *Chiles* Standard Would Harmonize the Veto Power With The Fundamental Constitutional Right to Bargain

In *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla. 1993), the Court determined whether the rescission of a pay increase for which funds had already been appropriated served a compelling state interest. Here, the issue is whether a pay increase for which funds had already been resolved and appropriated may be vetoed. The compelling state interest test applies with equal force in the present case. See also *Headley v. City of Miami*, 215 So.3d 1 (Fla. 2017) secti(applying the *Chiles* test in applying the PERA's financial urgency provision). It is respectfully submitted that the Court employ the *Chiles* standard as a way harmonize the veto power with the fundamental constitutional right to bargain.

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CONCLUSION

The Court should reverse the Public Employees Relations Commissions and direct it to issue an order determining that the Governor unlawfully vetoed the legislative resolution resolving the disputed issues at impasse and further directing

the Governor to restore to the bargaining unit members the special wage adjustments previously appropriated by the legislature. In the alternative, the Court should remand the case to the Public Employees Relations Commission for application of the *Chiles* standard.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail on February 28, 2018 to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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