IN THE SUPREME COURT OF FLORIDA

Case No. SC01-1562
Lower Tribunal Case No. 3D00-3132

THE CITY OF MIAMI, a municipal corporation,

Appellant,

vs.

PATRICK MCGRATH III, MIAMI-DADE COUNTY, a political subdivision of the State of Florida, and LAUREEN VARGA,

Appellees.

Appeal of a Decision of the Third District Court of Appeal

ANSWER BRIEF OF APPELLEE PATRICK MCGRATH III

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II. STATEMENT OF THE CASE AND FACTS

The initial brief of the appellant, the City of Miami (the "City"), contains an incomplete statement of the case and of the facts. Plaintiff Patrick McGrath III filed an amended class action complaint against the City of Miami (the "City") challenging the constitutionality of a parking tax imposed by the City's Ordinance No. 11813 (the "Ordinance"). The Ordinance was enacted under authority granted to the City by Section 218.503(5), Florida Statutes (2000). Mr. McGrath contends that Section 218.503(5) is a special law enacted under the guise of a general law, and thus is unconstitutional under Article VII, Sections 1(a) and 9(a), Florida Constitution.[1]

Miami-Dade County (the "County") and one of its employees, Laureen Varga, have also challenged the constitutionality of Section 218.503(5) and the Ordinance in another case and have intervened as plaintiffs in this case. (The plaintiffs, including the intervenors, are referred to collectively as the "taxpayers.") The City and Mr. McGrath filed cross-motions for summary judgment, and the County and Ms. Varga joined in support of Mr. McGrath's motion. The trial court

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[1] The City Commission approved the Ordinance on July 13, 1999, with an effective date of September 1, 1999. Mr. McGrath filed his complaint on September 13, 1999.

entered its final declaratory judgment upholding the Ordinance. A. 1.[2] On appeal by the taxpayers, the district court *per curiam* held the statute to be an unconstitutional special law and accordingly reversed and remanded to grant summary judgment in favor of the taxpayers. *McGrath v. City of Miami,* 26 Fla. L. Weekly D1682C (Fla. 3d DCA July 11, 2001). A. 2.

In its summary judgment motion, the City asserted that the statute could never apply, now or in the future, to any municipality other than the City, Jacksonville, and Tampa. A. 3, pp. 3-4; A. 5, pp. 4-6. By contrast, the taxpayers have asserted that the statute could never apply, now or in the future, to any municipality other than the City.[3] Thus, in deciding whether the trial court erred in denying the *taxpayers'* motion, the district court assumed, and this Court may assume, as an undisputed fact that the statute may be applicable, now or in the future, only to the City, Jacksonville, and Tampa.

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[2] The taxpayers have filed a joint appendix. All references to the taxpayers' joint appendix are cited as "A." followed by the item (*i.e,* tab) number and, if applicable, page or paragraph number of the item.

[3] Tampa had a resident population of 297,505 on April 1, 1999; A. 5, pp. 4-6; *see* A.5, Exh. A, p. 11; and Jacksonville is not a municipality within the meaning of the statute. *See and compare* Art. VIII, § 6(e), Fla. Const.; Art. VIII, § 9, Fla. Const. of 1885 (Jacksonville is a consolidated government treated as if it were a county), *with* § 218.503(5), Fla. Stat. (2000) (the parking tax may be imposed only by a "municipality") *and* § 218.502 and § 218.503(3), Fla. Stat. (2000) (distinguishing municipalities from counties).

At page 3 of its initial brief, the City mistakenly suggests that the taxpayers conceded that Section 218.503(5) is potentially applicable in the future to Tampa and Jacksonville. However, the taxpayers did **not** concede these disputed "facts." The taxpayers had accepted the City's assertion of these disputed "facts" solely for purposes of the *taxpayers'* cross-motion. *See* A. 5, pp. 4-5; A. 5, Exh. A, p. 11. If, and to the extent that, the constitutionality of the statute depends on whether Tampa and Jacksonville may become eligible to impose the parking tax in the future, the City has failed to prove these disputed "facts."[4]

As the authorities cited in the argument below make clear, however, the statute is an unconstitutional special law regardless of whether the statute could never apply, now or in the future, to any municipality other than the City, on the one hand, or the City, Jacksonville, and Tampa, on the other hand. In either circumstance, the statute "freezes" the population classification on April 1, 1999, and by its terms cannot be applicable to municipalities that may grow into the population classification after that date. Accordingly, the district court correctly

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[4] The Florida Estimates of Population for April 1, 1999, unequivocally finds that Tampa had a resident population of less than 300,000 (*viz.* 297,505) on April 1, 1999. A. 5, Exh. A, p. 11. Indeed, the affidavit submitted by the City in support of its motion states that Tampa's resident population on April 1, 1999, equaled 297,505. A. 4. Further, the taxpayers did **not** admit that Jacksonville is a municipality within the meaning of the statute. A. 5, p. 4.

remanded to grant the taxpayers' summary judgment motion since Section 218.503(5) is *on its face* an unconstitutional special law.

III. SUMMARY OF ARGUMENT

This appeal presents the narrow legal question of whether Section 218.503(5) is a general law or an unconstitutional special law.[5] As discussed below, the resolution of this question is fairly straightforward: Section 218.503(5) is an unconstitutional special law because it classifies municipalities by population size fixed or frozen on a specified date and thus fails to apply uniformly to all identically situated municipalities. Section 218.503(5) does not apply uniformly to ***every*** municipality that ***may in the future have*** the same population size and other attributes as the City had when the statute was enacted. In particular, the statute expressly limits its application to "any municipality with a resident population of 300,000 or more **on April 1, 1999**." § 218.503(5)(a), Fla. Stat. (2000) (emphasis added). As such, it is a "population act" limited to a particularly designated date and thus an unconstitutional special law.

The cut-off date of "April 1, 1999" for measuring the resident population is not constitutionally reasonable and in fact serves no constitutionally valid purpose

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[5] For this purpose, the term "special law" means a special or local law. Art. X, § 12(g), Fla. Const.

whatsoever. *See, e.g., Forte v. Dekle,* 190 So. 542 (Fla. 1939)*; Walker v. Pendarvis,* 132 So.2d 186, 195 (Fla. 1961). By prohibiting the potential future application of the statute to other municipalities, identically situated to the City, whose resident population equals or exceeds 300,000 **after** "April 1, 1999," the statute *on its face* effectively "freezes" the population of otherwise eligible municipalities and thus closes the class so that no municipality may eventually grow into the population classification designated by the statute. As a result, Section 218.503(5) does not operate uniformly within the class of municipalities with a resident population of 300,000 or more and which have been declared in a state of financial emergency within the previous two fiscal years, and thus is an unconstitutional special law. *See also In re Advisory Opinion to the Governor,* 132 So.2d 163, 168 (Fla. 1961) (per curiam) (a statute that "undertook to 'freeze' all population brackets so that no county could grow into a population classification previously enacted" was an unconstitutional local law). The statute is no different than if it had expressly limited its application to the affected municipalities by name.

Although seemingly technical, this legal conclusion must be considered in its constitutional context. To prevent the Legislature from undermining non-ad valorem tax sources needed to support state government by enacting special laws

for local purposes, the Florida Constitution unequivocally prohibits the imposition of non-ad valorem taxes by local governments except as authorized by *general* law. Art. VII, §§ 1(a) and 9(a), Fla. Const.; *Alachua County v. Adams,* 702 So.2d 1253, 1254 (Fla. 1997). The Constitution does **not** provide any exception for municipalities declared in a state of financial emergency or for any other compelling reason. Regardless of whether the City needs the revenues from its parking tax to improve its financial condition or merely wants the revenues to reduce the tax burden for the City's residents,[6] the Constitution absolutely and unconditionally requires that the Legislature enact a *general* law authorizing the tax. The Florida Constitution cannot be suspended by the Legislature or ignored by the courts on a emergency basis simply because the City has been declared in a state of financial emergency. Accordingly, the district court correctly held that Section 218.503(5) is an unconstitutional special law.

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[6] The City must use between 60 and 80 percent of the revenues to reduce or eliminate other City taxes. *See* § 218.503(5)(b)1., Fla. Stat. (2000).

IV. ARGUMENT

A. *De Novo* Standard of Review and Presumption of Constitutionality

The trial court rendered its final declaratory judgment that Section 218.503(5) is a general law and thus is constitutional. The district court *per curiam* reversed, held the statute to be an unconstitutional special law, and directed the trial court to grant summary judgment for the taxpayers. The standard for review of the district court's decision is *de novo.* First, viewing the evidence in a light most favorable to the *taxpayers*, this Court must determine whether there is a genuine issue of material fact. If there is a genuine issue of material fact, then the district court properly reversed the summary judgment in favor of the City.[7] *E.g., Virginia Insurance Reciprocal v. Walker,* 765 So.2d 229, 230 (Fla. 1st DCA 2000). Second, viewing the evidence in a light most favorable to the *City*, the Court must then determine whether the district court was correct in holding that the taxpayers are entitled to summary judgment as a matter of law. *See Ocala Breeders' v. Florida Gaming Centers,* 731 So.2d 21, 24 (Fla. 1st DCA 1999). Again, the standard of review is

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[7] As stated, Tampa did **not** have a resident population of 300,000 or more on April 1, 1999. A. 5, p. 4. Indeed, the evidence conclusively establishes that on April 1, 1999, Tampa had a resident population of 297,505. A. 5, Exh. A, p. 11; *see* A. 4, ¶8. Thus, the City's contrary assertion created a genuine issue of material fact and, for that reason alone, required reversal of the trial court's decision.

de novo and thus requires the Court to conduct its review as if the issue were being initially decided by the Court.

In addition, like all laws enacted by the Legislature, Section 218.503(5) comes before the courts with a presumption of constitutionality and must be upheld unless the statute cannot be reasonably interpreted in a manner that renders it constitutional. *See Dept. of Legal Affairs v. Sanford-Orlando Kennel,* 434 So.2d 879 (Fla. 1983). However, the courts are also charged with upholding and enforcing the Constitution and cannot ignore the existing precedent or rewrite the statute to correct a constitutional infirmity. *See also State v. Globe Communications Corp.,* 648 So.2d 110, 113-114 (Fla. 1994) (declining to rewrite a statute to correct constitutional infirmities). Thus, if the courts find no reasonable relationship between the express class characteristics enumerated in the statute and the purpose of the legislation, the statute will be declared an unconstitutional special law. *See, e.g., Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d 1155 (Fla. 1989). In this regard, this Court has held that legislation classifying local government by population size (*i.e.,* a so-called population act) will not be sustainable as a general law unless "other [local governments] than the ones immediately involved with the population bracket shall, by virtue of growing into such population bracket, become subjected to such population acts." *Walker v.*

Pendarvis, 132 So.2d at 195. As discussed below, Section 218.503(5) is not a general law because the population classification for municipalities used in that statute is fixed or frozen on April 1, 1999, such that other municipalities than the ones immediately involved in the population classification cannot and will not, by virtue of growing into the population classification, become subject to the statute.

B. Section 218.503(5) Is an Unconstitutional Special Law

The City's parking tax is imposed and collected by the City under the Ordinance, which implements Section 218.503(5), Florida Statutes (2000). Under the Florida Constitution, municipalities cannot impose any non-ad valorem tax except as authorized by general law. *See* Art. VII, §§ 1(a) and 9(a), Fla. Const. "This provision is designed to prevent the legislature from undermining non-ad valorem tax sources needed to support state government by the enactment of special laws authorizing local governments to enact non-ad valorem taxes for local purposes." *Alachua County v. Adams,* 702 So.2d 1253, 1254 (Fla. 1997). Thus, for the parking tax to be constitutional, Section 218.503(5) must be a general law. It is not. It is, as amply demonstrated below, an unconstitutional special law.

Section 218.503(5) states, in pertinent part, as follows:

> The governing authority of any municipality with a resident population of 300,000 or more **on April 1, 1999,** and which has been declared in a state of financial

> emergency pursuant to this section within the previous 2 fiscal years may impose a discretionary per vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at parking facilities within the municipality that are open for use to the general public.

(emphasis added). The City asserts that the City, Jacksonville, and Tampa are the only municipalities "with a resident population of 300,000 or more on April 1, 1999." Because the statute can never apply, ***now or in the future,*** to any municipality with a resident population of 300,000 or more other than the City, Jacksonville, and Tampa, the statute is not a general law, but is inherently a special law. The statute, as worded, is no different than if it had specifically identified the City, Jacksonville, and Tampa by name. As a result, the statute is an unconstitutional special law.

This Court has consistently held that a statute or act classifying local governments by population in a fashion similar to the method of classification used by Section 218.503(5) (*i.e.,* population measured on a fixed date) is an unconstitutional special or local law. For example, in *Fort v. Dekle,* 190 So. 542 (Fla. 1939), the Court overturned, as an unconstitutional special or local law, a population act that required the re-registration of voters in counties having "a population of more than 150,000 according to the State census of 1935." *Id.* at

543. The Court expressly rejected the argument that because the act was applicable to three counties in the State, the act was not a special or local act.

> It is contended that because the Act is applicable to three counties in the State it is not a special or local Act. The Act is just as much a special and local Act as if the Counties of Hillborough, Duval and Dade had been named in the Act because **those are the only three counties in the State to which the Act could ever be applicable, as no other counties in the State had a population of more than 150,000 *according to the State census of 1935*.**

190 So. at 542-43 (emphasis added).

Similarly, in *In re Advisory Opinion to the Governor,* 132 So.2d 163, 168 (Fla. 1961) (per curiam), this Court found another statute to be an unconstitutional special or local law because the statute classified counties by a population size that was "frozen" on a particularly designated date. The applicable statute in that case also classified counties by population as measured by a particularly designated census (as opposed to the most recent census). This Court found that the statute "undertook to 'freeze' all population brackets so that no county could grow into a population classification previously enacted." *Id.* As a result, the statute catalogued counties just as effectively as if they had been specifically named in the statute and therefore constituted an unconstitutional local law. In so holding, this Court explained as follows:

> We have for many years held that any legislative effort to classify by population in a fashion which in effect closes the class on the basis of a particularly designated census is unconstitutional unless passed in accordance with the requirements governing local laws.

Id. Accord Walker v. Pendarvis, 132 So.2d 186, 195 (Fla. 1961) (overturning, as unconstitutional special laws, two acts that classified counties having a stipulated population size on the date of enactment of the acts because "the acts become tied down to certain specific counties as surely as though the names of the counties were spelled out").

On its face, Section 218.503(5) does not apply in a uniform fashion to *every* municipality meeting the classification used by the statute. Due to the arbitrary cut-off date of April 1, 1999, used by the statute for measuring resident population, *no* municipality other than the City (and, according to the City, Jacksonville and Tampa) can ***ever*** acquire one of the characteristics for classification, *viz.* "a resident population of 300,000 or more." § 218.503(5), Fla. Stat. (2000). By so classifying resident population in a fashion which in effect closes the class on the basis of the statutorily prescribed date, the statute does not apply uniformly to all identically situated municipalities and thus is an unconstitutional special law.

This distinction between a closed and open population classification is critical. Certainly, population may serve as a legitimate basis for classification

under general law. *See State v. Dade County,* 27 So.2d 283, 284 (Fla. 1946); *City of Coral Gables v. Crandon,* 25 So.2d 1 (Fla. 1946). However, a classification based on population must bear a reasonable relationship to the purpose of the statute. *Id.*; *see also* § 11(b), Art. III, Fla. Const. (". . . political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law"). Accordingly, in *State v. Dade County, supra,* this Court upheld as a constitutional general law an act authorizing counties having a population of 260,000 or more according to the latest federal census to purchase, own, and operate, and to issue bonds for, ports, harbors, airfields, and other similar projects. Although at the time of enactment only Dade County was within the class governed by the act, other counties could potentially grow into the class since the population classification was tested according to the "latest" federal census and not on a fixed date.

Similarly, in *City of Coral Gables v. Crandon, supra,* this Court held that a water conservation act was not a special act where the act limited its application to counties having a population of more than 260,000. This Court found a reasonable relationship between the subject regulated by the act, *viz.* water conservation, and population size. However, the Court also found that even though at the time of enactment the act applied solely to Dade County, the act could potentially apply in

the future to other counties when they reached the same population size as Dade County.

> The subject regulated by the act is water conservation. It may be admitted that Dade County is at present the only county within the classification, but it certainly would not be contended that the act was not potentially applicable to other counties in the state. This court takes judicial knowledge of the latest federal census, that it gives Dade County a population of more than 300,000 people and that other counties are rapidly approaching the classification designated in the act.

City of Coral Gables v. Crandon, 25 So.2d at 2.

Despite this overwhelming authority demonstrating that Section 218.503(5) is an unconstitutional special law, the City contends that the statute is a general law because its purpose is to assist governments to emerge from a financial emergency and the population classification used by the statute bears a direct and reasonable relationship to that purpose. City's Initial Brief, p. 13. However, the population classification used by the statute bears no reasonable relationship to that purpose since the statute expressly excludes any and all identically situated municipalities with a resident population of 300,000 or more other than Miami and, arguably, Jacksonville and Tampa. Section 218.503(5) can *never* apply to St. Petersburg or Hialeah, for example, even if the resident population of St. Petersburg or Hialeah increases to more than 300,000 **after** April 1, 1999. The statute on its face thus

excludes, by reference to the municipality's resident population **on** April 1, 1999, every other municipality that may be declared in a state of financial emergency regardless of its population size *at the time of* the financial emergency. The classification scheme of Section 218.503(5) therefore bears no reasonable relationship to its purported purpose and accordingly is an unconstitutional special law.

The City also seeks to rationalize the statute by asserting that the statute creates ". . . a class consisting of the State's three largest cities." City's Initial Brief, p. 13. Because the statute could potentially apply to three municipalities, the City argues, the statute is not an unconstitutional special law. The City's argument misses the point: The statute is unconstitutional not because it applies only to the City, but because it does not apply uniformly to *every* municipality that may be identically situated to the City in the future. The Legislature cannot avoid the constitutional prohibition against enactment of a special law to authorize the parking tax simply by using a cut-off date to preclude the uniform application of the statute in the future to all other identically situated municipalities. As this Court held in *Dept. of Legal Affairs v. Sanford-Orlando Kennel,* 434 So.2d 879, 881 (Fla. 1983):

A general law operates uniformly, not because it

> operates upon every person in the state, but because every person brought under the law is affected by it in a uniform fashion. Uniformity of treatment within the class is not dependent upon the number of persons in the class.

If the statute had limited its application to the City, Jacksonville, and Tampa by specifically naming them as the only "municipalities" that could impose a parking tax when declared in a state of financial emergency within the previous two fiscal years, the statute would of course be an unconstitutional special law since it would not operate uniformly within the class of large municipalities declared in a state of financial emergency. *See also Alachua County v. Adams,* 702 So.2d 1253, 1254 (an act relating to the use of certain non-ad valorem tax revenues that expressly limited its application to "Alachua County and the municipalities of Alachua County" was an unconstitutional special act under Article VII, Sections 1(a) and 9(a), Florida Constitution). The use of a cut-off date to limit the application of the statute to the City, Jacksonville, and Tampa is substantively no different. *E.g., Fort v. Dekle, supra.* If, as asserted by the City, resident population is a reasonable basis for classification under Section 218.503(5), then uniformity of treatment requires that the statute potentially operate upon *every* municipality with a resident population of 300,000 or more and which has been declared in a state of financial emergency within the previous two fiscal years, not

just those municipalities with such a resident population "on April 1, 1999."

It is undisputed that the population classification set forth in Section 218.503(5) is expressly limited to a particularly designated date, *viz.* April 1, 1999, just like the unconstitutional special laws in *Fort v. Dekle*, *In re Advisory Opinion to the Governor*, and *Walker v. Pendarvis*. Thus, those cases cannot be genuinely distinguished from this case. Indeed, the facts of *Fort v. Dekle* are virtually identical to the facts of this case. In this case, the City contends that Section 218.503(5) is a general law simply because it is applicable to three municipalities "with a resident population of 300,000 or more on April 1, 1999." Yet, in *Fort v. Dekle*, the unconstitutional special law was also applicable to three counties with "a population of more than 150,000 according to the State census of 1935." 190 So. at 543. Again, *Fort v. Dekle* and these other Florida Supreme Court cases unequivocally prohibit any legislative effort to close the population class on a particularly designated date. Thus, those cases cannot be distinguished from this case.

Nothing could be clearer: Section 218.503(5) is *on its face* an unconstitutional special law because it closes the population classification on April 1, 1999, and thus does not apply uniformly to every municipality that may grow into the population size set forth in the statute. For this reason, the statute cannot

be reasonably construed as a general law, but is inherently a special law.

C. The Population Classification Is *Inherently* Arbitrary and Unreasonable

The City alleges that the purpose of Section 218.503(5) is to preserve and protect the financial solvency of the three largest cities in the State of Florida:

> The classification created by the Statute is to permit the three largest cities in the State of Florida to emerge from a financial emergency by imposing a parking surcharge for a limited period of time. The population classification of 300,000 as of April 1, 1999 permits the largest city in the north, Jacksonville; the largest city in central Florida, Tampa; and the largest city in the southern part of the State, Miami, to take advantage of the opportunity. The purpose of the Statute is 'to preserve and protect the fiscal solvency of local governmental entities.' There can be no doubt that the classification used here bears a substantial relationship to the Statute's purpose.

City's Initial Brief, pp. 17-18.

The City's reasoning is fundamentally flawed. First, Section 218.503(5) does not even suggest, much less state, that the population classification was intended to permit only "the three largest cities in the State of Florida" to take advantage of the statute. Indeed, the City's assertion that the population classification was intended to apply to the largest city in north Florida (*i.e.,* Jacksonville), central Florida (*i.e.,* Tampa), and south Florida (*i.e.,* the City), is

sheer speculation, especially considering that the Florida Estimates of Population for April 1, 1999, unequivocally shows that Tampa had a resident population of less than 300,000 (*viz.* 297,505) on April 1, 1999. A. 5, Exh. A, p. 11. If the Legislature had truly intended for the statute to be applicable to the three largest cities in the State of Florida or to the largest city in north, central, and south Florida, respectively, as measured by population size, the statute would have expressly stated its application accordingly. It does not. Rather, the statute is potentially applicable only to municipalities "with a resident population of 300,000 or more **on April 1, 1999**." As such, the statute is forever fixed to the ***particular*** municipalities that had such a population on that date. The language of Section 218.503(5) does not express the purpose asserted by the City in its brief.[8]

Second, the classification of municipalities "with a resident population of 300,000 or more **on April 1, 1999**" is *inherently* arbitrary and unreasonable. The

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[8] In fact, throughout its initial brief, the City refers to the municipalities classified under the statute as the State's "three largest cities" or the State's "largest municipalities." City's Initial Brief, pp. 5, 7, 11, 13, 17, 18, and 23. These repeated references to the statutory classification, of course, ignore the actual language of the statute, which identifies municipalities by population size fixed on "April 1, 1999." Notwithstanding the City's repeated efforts to recharacterize the terms of the statute as if it applies only to the State's "three largest cities" or the State's "largest municipalities," the statute expressly applies only to three particular municipalities, *viz.* the City and, according to the City, Tampa and Jacksonville. This frozen population classification makes the statute an unconstitutional special law.

City fails to give any reason whatsoever, much less a constitutionally acceptable reason, for measuring the resident population **on** "April 1, 1999." In fact, the date of April 1, 1999, is a descriptive technique used merely for identification rather than classification. This is constitutionally unacceptable. *See, e.g., Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d 1155, 1159 (Fla. 1989).

Third, even assuming for the sake of argument that Section 218.503(5) is intended (as alleged by the City) to permit the three largest municipalities in Florida to implement the parking tax if the municipality has been declared in a state of financial emergency within the previous two fiscal years,[9] the population classification used by the statute bears no reasonable relationship to that alleged purpose. Because the statute freezes the population class on April 1, 1999, the statute will not apply to the three largest municipalities in Florida, but instead will apply at all times only to the City (and, according to the City, Tampa and Jacksonville) even though the population of another municipality may subsequently exceed the population of the City, Tampa, or Jacksonville. If, for example, the population of St. Petersburg or Orlando should subsequently exceed the population of Tampa, the statute would nevertheless continue to apply to Tampa

[9] To be perfectly clear, the taxpayers do **not** concede that this is the purpose of the statute, but have merely assumed the City's version of statutory purpose to illustrate that the population classification does not bear a reasonable relationship to that purpose.

(according to the City) and remain inapplicable to St. Petersburg or Orlando. The City does not and cannot explain why St. Petersburg or Orlando would be excluded from the population classification under these circumstances while Tampa would not. As a result, the population classification used by Section 218.503(5) is arbitrary *on its face* and accordingly does not bear a reasonable relationship to its purported purpose to preserve and protect the financial solvency of, as the City argues, the three largest municipalities in Florida (or the single largest municipality in each of north, central, and south Florida).

In the final analysis, Section 218.503(5) is an unconstitutional special law precisely because population is **not** employed for the purpose alleged by the City, but is a descriptive technique employed merely for identification rather than classification. *See, e.g., Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d 1155, 1159 (Fla. 1989). An honest reading and analysis of the statute reveal that by freezing the population class on April 1, 1999, the Legislature in fact *intended* to enact a special law under the guise of a general law to confer taxing authority on a particularly identified municipality (or municipalities) and not on a class of municipalities. As such, Section 218.503(5) is unconstitutional.

D. Section 218.503(5) Unconstitutionally Closes the Population Class

The City does not and cannot deny that Section 218.503(5) closes the population class and thus eliminates the potential application of the statute to any municipality that grows into the population class after April 1, 1999. Instead, the City seeks to distinguish the existing cases holding such population acts to be unconstitutional special laws by arguing as follows:

> According to the Florida Constitution, Art. III, Section 11(b), and an unbroken line of Florida Supreme Court cases since 1970, the 'reasonable relationship test' instead of the 'closed-class open-class' analysis has prevailed. The limitation of potential users of the Statute does not render it unconstitutional.

City's Initial Brief, p. 6. In other words, the City contends that the adoption of Article III, Section 11(b), in the 1968 revision to the Constitution effectively changed the constitutional guidelines for determining what constitutes a special law. As a result, the City concludes, this Court should not rely on its longstanding precedent holding population acts that are *substantively identical* to Section 218.503(5) to be unconstitutional special laws. This conclusion is clearly erroneous both because the 1968 revision did not change the constitutional guidelines for determining what constitutes a special law and because the population classification used in Section 218.503(5) is *inherently* arbitrary and unreasonable and therefore

bears no reasonable relationship to the purported purpose of the statute.

Article III, Section 11(b), Florida Constitution, provides that "[i]n the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law." Prior to its revision in 1968, the Florida Constitution did not express any constitutional guidelines for determining what constitutes special or local laws, including population acts. Instead, this Court developed those guidelines in a variety of cases. As explained above, those cases consistently held statutes or acts classifying local governments by population measured on a particularly designated date (*i.e.,* in the same manner as Section 218.503(5)) to be unconstitutional special or local laws. *E.g., Fort v. Dekle, supra*; Walker *v. Pendarvis, supra*; *In re Advisory Opinion to the Governor, supra.*

Article III, Section 11(b), Florida Constitution, did not change the guidelines established by these cases. Indeed, in 1969 the Florida Attorney General rendered an opinion to the chairman of the Local Government Committee of the Florida House of Representatives concerning this very issue. 069-17, Fla. Atty. Gen. 23 (March 25, 1969). The Florida Attorney General opined that Article III, Section 11(b), Florida Constitution, imposes no new requirement.

> Under § 11(b), Art. III, population acts on subjects not

> listed in § 11(a) may, ***as in the past,*** be enacted if there exists a reasonable relationship between the subject of the law and the population classification made by such law.

Id. at 24 (emphasis added). Nothing could be clearer: The 1968 revision did not change the guidelines for determining what constitutes a special law.

Moreover, recognizing that the 1968 constitutional revision increased the availability of home rule in all subject matters other than taxation and correspondingly reduced the need for the Legislature to delegate home rule powers by the enactment of general laws of local application, the Legislature in 1971 repealed literally thousands of population acts, each listed by number. Chp. 71-29, Laws of Florida. In doing so, the Legislature acknowledged the questionable constitutionality of such legislation:

> Section 1. The constitution and general laws of Florida have provided home rule powers to municipalities and counties, except as limited by law. General laws of local application do not add to these home rule powers. In particular, general laws of local application present significant problems to local government ***because of the questionable constitutionality of such legislation, as frequently reflected in court decisions on this subject.*** It is, therefore, declared to be the legislative intent to eliminate such legislation and ***thereby to remove from the laws of this state any legislation which cannot stand the test of constitutionality.*** It is, further, declared to be the legislative intent, by the repeal of such legislation, to restore the regulation of local government to constitutionally recognized modes of enactment. It is

> also the intent of the legislature to enact additional general legislation to expand the home rule powers of local government.

Chp. 71-29, § 1, at 97, Laws of Florida (emphasis added). After repealing the population acts, the Legislature reenacted the acts relating to the courts under Article V, Section 1, Florida Constitution, and declared the other population acts to be local ordinances or school district regulations. *Id.* § 3. Obviously, the Legislature understood that population acts posed continuing constitutional problems after the 1968 constitutional revision "as frequently reflected in court decisions on this subject." Bearing in mind the post-1968 opinions of both the Florida Attorney General and the Legislature, the City's assertion that the 1968 constitutional revision effectively changed the guidelines for special laws simply has no merit.

Likewise, a careful reading of the cases decided under the 1968 Constitution similarly reveals that the 1968 revision did not substantively change the pre-1968 constitutional guidelines for determining what constitutes a special law. Notwithstanding the City's assertions to the contrary, this Court continues to hold that the determination of whether a law is special or general depends in part on whether the class it creates is open. In *Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.,* 434 So.2d 879 (Fla. 1983), for example, this Court upheld

parimutuel legislation that was generically applicable to a class of race tracks even though only one race track actually benefitted from the legislation. As the Court explained:

> ***The controlling point*** is that even though this class did in fact apply to only one track, ***it is open*** and has the potential of applying to other tracks.

Id. at 882 (emphasis added).

In *Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d 1155 (Fla. 1989), this Court overturned a statute relating to parimutuel wagering as an unconstitutional special law under Article III, Section 11(b). The statute employed a closed class to identify the county to which the statute would apply. The Court found no reasonable relationship between the statutory classification scheme and the subject of the statute because the statute closed the class:

> In determining if a reasonable relationship exists '[t]he fact that matters is the classification is potentially ***open*** to other tracks. *Sanford-Orlando,* 434 So.2d at 882.'

Classic Mile, Inc., supra at 1159 (emphasis added); *see also Ocala Breeders' v. Florida Gaming Centers, Inc.,* 731 So.2d 21 (Fla. 1st DCA 1999) (emphasis added) ("[w]hether a law is special or general depends in part on whether the class it creates is ***open***").

The City erroneously relies on *State v. City of Miami Beach,* 234 So.2d 103

(Fla. 1970), and *Golden Nugget Group v. Metropolitan Dade County,* 464 So.2d 535 (Fla. 1985), to support the City's position that a general law may classify by population fixed on a particularly designated date. In fact, *City of Miami Beach* holds to the contrary, and the statute at issue in *Golden Nugget Group* did not even use a population classification, much less a closed population classification.

In *City of Miami Beach,* the Court sustained the validity of an act authorizing a municipal resort tax by cities and towns located in counties having a specified population size according to the **latest** official decennial census, if the city or town charter currently provided, or was amended by January 1, 1968, to provide, for the levy of the tax. The Court emphasized that a population class may not be closed by measuring the population on a particularly designated date. Indeed, as observed by the trial court in its final declaratory judgment here, this Court in *City of Miami Beach* "held that the population bracket was open-ended since other counties could move into or out of the coverage of the Act as determined by their census every ten years." A. 1, p. 5. Accordingly, in *City of Miami Beach,* this Court explained as follows:

> The State has failed to show that other cities or towns, located in counties within or potentially within the prescribed population brackets, were not on the effective date of [the act], **or subsequent thereto**, authorized to collect a resort tax. Thus, we cannot say that the

> classification as to the cities and towns of the subject act is unreasonable. **Moreover, *said act is not limited to a particularly-designated census* as was the act which was invalidated in Walker v. Pendarvis, Fla.1931, 132 So.2d 186.**

234 So.2d at 106 (emphasis added). In other words, the act in *City of Miami Beach* was upheld as a general law precisely because, unlike the population classifications that were invalidated in *Walker v. Pendarvis* and this case, the population classification under the act in *City of Miami Beach* was "**not** limited to a particularly-designated census" or other particularly designated date. *Id.* (emphasis added). As a result, the population classification used by the act in *City of Miami Beach* was not closed, unlike the statute at issue here.

Relying on the *dissenting* opinion in *City of Miami Beach,* the City nevertheless concludes that this Court permits the use of a closed population classification under the 1968 revision to the Constitution. See City's Initial Brief, p. 9 and p. 17, note 6. In fact, the statute at issue in *City of Miami Beach,* was enacted in 1967 and thus was subject to the Florida Constitution of 1885. *See City of Miami Beach,* 234 So.2d at 105. Accordingly, the Court stated, "[t]he organic demands of the Constitution of 1885 did not forbid the enactment of general laws containing reasonable classification as to population or otherwise." *Id.*

More important, both the majority of the Court in *City of Miami Beach* and

dissenting Justice Drew agreed that a closed population classification was constitutionally unacceptable. The majority's opinion on this point is quoted above; the dissenting Justice's opinion on this point follows:

> Any legislative effort to classify by population, in a fashion which in effect closes the class on a basis of a particularly designated census, is unconstitutional unless passed in accordance with the requirements governing the passage of local laws. The act, from the date of its effect until January 1, 1968, only allows those cities and towns located in a county having the required population as of the last decennial census, to amend their charters allowing them to enact a Municipal Resort Tax.
>
> The Legislature has effectively limited and closed the class of cities and towns that may enact a Municipal Resort Tax by setting a cut-off date of January 1, 1968, which is coupled directly to a particular decennial census, therefore violating the prohibition of closing the class on the basis of a particularly designated census.

City of Miami Beach, 234 So.2d 108 (footnote omitted).

Apparently, Justice Drew dissented because he read the act to prohibit the enactment of charter amendments between the effective date of the act and January 1, 1968, by cities and towns located in a county that failed to meet the population requirement by January 1, 1968. The majority of the Court, however, interpreted the act to permit the enactment of charter amendments between the effective date of the act and January 1, 1968, by cities and towns located in **all** counties, regardless

of whether the county met the population requirement by January 1, 1968. As a result, the Court concluded that the act did not effectively limit the population classification to a particularly designated census since cities and towns located in counties that failed to meet the population requirement by January 1, 1968, were not on the effective date of the act, or subsequent thereto, prohibited from collecting the resort tax once the county met the population classification according to the latest census.[10]

As stated, the City also relies on *Golden Nugget Group v. Metropolitan Dade County,* 464 So.2d 535 (Fla. 1985), to support the City's position that a general law may classify by population fixed on a particularly designated date. The City's reliance on *Golden Nugget Group* is wholly misplaced. First, and most important, the statute in *Golden Nugget Group* did not use a population classification at all, much less a closed population classification. Rather, the statute authorized a class of counties which operate under a constitutional home rule charter to impose a bed tax, and required that the tax revenues must be used to improve the largest existing publicly-owned convention center in the county and to

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[10] Thus, the Court stated, "[t]he State has failed to show that other cities or towns, located in counties within or **potentially within the prescribed population brackets**, were not on the effective date of [the act], **or subsequent thereto**, authorized to collect a resort tax." *City of Miami Beach,*234 So.2d 106 (emphasis added).

construct a convention center in the county's most populous municipality. This Court upheld the district court's finding that the classification of counties operating under a constitutional home rule charter was reasonable and bore a substantial relationship to the statute's purpose to promote tourism since the three counties potentially eligible to implement the tax have substantial tourist-oriented economies and have concentrated on developing convention facilities to improve their tourist industries. This analysis of a constitutional home rule charter classification simply has no bearing on the reasonableness of a closed population classification.

Golden Nugget is also inapposite here because the constitutional home rule charter classification was an open, not a closed, class. The statute could apply in the future to **all** counties meeting that particular classification even though, at the time of enactment, only one such county, Dade County, had in fact adopted a constitutional home rule charter. The statute at issue in *Golden Nugget* was not a special law because it applied uniformly to *every* county that may be identically situated to Dade County in the future, *i.e.* to every county that subsequently adopted a constitutional home rule charter. Thus, every county brought under the classification would be affected by the statute in a uniform fashion. *See also Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., supra* at 881 ("[u]niformity of treatment is not dependent upon the number of persons in the

class"). For this reason, the classification used by the statute was open, not closed.

By contrast, as explained above, the population classification in Section 218.503(5) is *inherently* arbitrary and unreasonable and bears no reasonable relationship to the purpose of the statute precisely because it closes the population class on a particularly designated date, *viz.* April 1, 1999. Again, the City has given no reasonable explanation for closing the population class to municipalities that may grow into a resident population of 300,000 or more **after** April 1, 1999, because there is no reasonable explanation. The cut-off date of April 1, 1999, bears no relationship whatsoever to the purpose of the statute as articulated by the City. If the purpose of the statute is to provide taxing authority to municipalities with a resident population of 300,000 or more that have been declared in a state of financial emergency within the previous 2 fiscal years, then it is patently arbitrary and unreasonable to exclude identically situated municipalities simply because their population first exceeded 300,000 after April 1, 1999.[11] Because the population class is closed to identically situated municipalities in the future, it is *inherently*

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[11] Similarly, if the purpose is to provide taxing authority to the three largest municipalities in Florida, then it is patently arbitrary and unreasonable to exclude any of the three largest municipalities simply because that municipality *becomes* one of the three largest **after** April 1, 1999, or to continue to include a municipality, though *not currently* one of the three largest, simply because it *was* one of the three largest **on** April 1, 1999.

arbitrary and unreasonable. This is an inescapable fact and cannot be cured by the City's explanation of the statutory purpose. Accordingly, Section 218.503(5) is an unconstitutional special law. *See also Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d at 1157 ("[s]tatutes that employ arbitrary classification schemes are not valid as general laws").

E. The Closed Class Defeats the Constitutional Limits on Special Laws

The Florida Constitution expressly distinguishes between general and special laws in a variety of different provisions. Some provisions prohibit or restrict the enactment of special laws while others limit the Legislature to the enactment of general laws (as opposed to special laws). *See, e.g.,* Art. I, §§ 24(c) and 25, Fla. Const.; Art. III, §§ 10, 11, and 19, Fla. Const.; Art. IV, §§ 4(c), 9, and 10, Fla. Const.; Art. V, §§ 1 through 8, 11(d), 12, 14, 17, 18, and 20, Fla. Const.; Art. VII, §§ 1(a) and (e), 3, 4, 6, 8, 9(a), and 10(e) and (f), Fla. Const.; Art. VIII, §§ 1(b), (d), (f), (i), and (k), 5, and 6(f), Fla. Const.; Art. IX, § 5, Fla. Const.; Art. X, §§ 13 and 15, Fla. Const.; Art. XII, § 9(d), Fla. Const. In its attempt to preserve its parking tax, the City seeks to overturn longstanding Florida Supreme Court precedent that distinguishes general laws from special laws. As stated, this precedent categorically prohibits the use of a closed population classification for a

general law. If the Court accepts the City's re-interpretation of the cases, these important constitutional prohibitions and restrictions on the enactment of special laws would be dramatically eroded – almost to the point of extinction. If permitted to classify local governments by population frozen on a particular date, the Legislature could readily avoid the constitutional prohibitions and limits on special laws. It is undeniably easy to manipulate population classifications anchored to a particular date to confer benefits on one or more particularly identified local governments without identifying them by name in the statute, while excluding all identically situated local governments from obtaining the same benefits in the future. For this reason, the Court regards statutes or laws that use a closed classification to be special, not general, laws. *See, e.g., Dept. of Bus. Regulation v. Classic Mile, Inc.,* 541 So.2d 1155 (Fla. 1989).

This case represents a classic example of the legislative pretense prohibited by this longstanding precedent. The closed population classification used in Section 218.503(5) effectively defeats the constitutional limits placed on the Legislature by Article VII, Sections 1(a) and 9(a), Florida Constitution. The City obviously wants to be able to shift its tax burden to commuters with its parking tax. Presumably, the City believes this tax is fair and beneficial; others disagree. Regardless of the merits of this tax policy, however, the Florida Constitution

unequivocally mandates that the Legislature must authorize the City to implement the parking tax by enactment of a general, not a special, law. As the courts have consistently held, the Constitution precludes the enactment of a special law under the guise of a general law, and any legislative effort to classify by population in a manner that in effect closes the class on the basis of a particularly designated date is inherently a special law. ***The City fails to cite, and we have been unable to find, even one case in Florida ever upholding a population act with a closed population class.***

The courts are, and should be, very reluctant to overturn a statute as unconstitutional. But if these constitutional limits on special laws are to continue to have any genuine meaning, a general law must, at a minimum, classify municipalities on a reasonable basis that will be potentially applicable to all identically situated municipalities. Otherwise, the Legislature can readily avoid the constitutional limits on special laws simply by closing the class of eligible municipalities. A closed population class simply does not pass muster as a general law by any reasonably meaningful standard. Here, the Legislature chose arbitrarily to close the population class on April 1, 1999, thus enacting an unconstitutional special law under the guise of a general law. It is unclear why the Legislature chose to ignore a well known, clearly defined, and long held constitutional prohibition on the use of a closed

population classification. One possible explanation for this choice is that an open population classification for a parking tax could not command a majority vote where the tax could apply to *all* large municipalities declared in a state of financial emergency. Indeed, a legislative delegation from a particular county (such as Miami Dade County) might find a parking tax (or any other tax) much easier to enact if, due to a closed population classification, the members of delegations from other counties do not have to concern themselves with the potential effect of the statute on their constituents. *Cf. Alachua County v. Adams,* 702 So.2d 1253, 1254 (Fla. 1997) ("This provision is designed to prevent the legislature from undermining non-ad valorem tax sources needed to support state government by the enactment of special laws authorizing local governments to enact non-ad valorem taxes for local purposes"). Regardless of the Legislature's reason for using a closed population class, however, Section 218.503(5) is *on its face* an unconstitutional special law.

V. CONCLUSION: THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION

The district court was clearly correct in holding Section 218.503(5) to be an unconstitutional special law. Because it classifies municipalities by a population size frozen on April 1, 1999, the statute does not apply uniformly to all identically situated municipalities, and thus is *on its face* an unconstitutional special law. The

Legislature and local governments cannot ignore the clear and unequivocal constitutional limits placed on the enactment of special laws simply because the City has been declared in a state of financial emergency. Accordingly, this Court should affirm the district court's decision and remand to the trial court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 24, 2001, a true and correct copy of the foregoing was hand delivered to: Joseph H. Serota, Esq., Weiss Serota Helfman Pastoriza & Guedes, P.A., Co-Counsel for the City of Miami, Suite 420, 2665 South Bayshore Drive, Miami, Florida 33133, Maria J. Chairo, Esq., Assistant City Attorney, City of Miami, Co-Counsel for the City of Miami, 444 Southwest Second Avenue, Miami, Florida 33130-1910, and sent by U.S. mail to: Katherine Fernandez-Rundle, Esq., State Attorney for the Eleventh Judicial Circuit of Florida,

1350 N.W. 12th Avenue, Miami, Florida 33136, and Jess M. McCarty, Assistant County Attorney, Office of Miami-Dade County Attorney, Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128.

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CERTIFICATE OF COMPLIANCE

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

By: ____________________________
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