

Preserving Constitutional and Statutory Challenges

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Facial Challenges

Facial Challenges

In a facial challenge, a plaintiff is claiming that a statute is unconstitutional at all times and under all circumstances. The goal is usually to have a court declare the law “facially invalid.”

As-Applied Challenges

An as-applied challenge alleges that a statute or regulation is unconstitutional in a specific context. A plaintiff in an as-applied challenge is not arguing that the entire statute is unconstitutional, but instead that it is being applied in an unconstitutional manner.

Facial Challenges

Must prove that “no set of circumstances exists under which the statute would be valid.”

- *Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)



Facial Challenges

“Court considers only the text of the statute, not its specific application to a particular set of circumstances.”

- *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1264 (Fla. 2017).



Facial Challenges

May be raised for the first time on appeal.

- *N.B. v. Fla. Dep't of Children & Families*, 183 So. 3d 1186, 1187 (Fla. 3d DCA 2016)

Difficult to succeed.



As- Applied Challenges



Must prove that application of the challenged statute is unconstitutional under the particular circumstances present in the case.

- *Miles v. City of Edgewater Police Dep't/Preferred Governmental Claims Solutions*, 190 So. 3d 171, 178 (Fla. 1st DCA 2016); *Fulmore v. Charlotte County*, 928 So. 2d 1281, 1290-91 (Fla. 2d DCA 2006)

As- Applied Challenges



Considers the facts.

- *Falco v. State*, 407 So. 2d 203, 207-09 (Fla. 1981); *J.A.S. v. State*, 705 So. 2d 1381, 1384-85 (Fla. 1998)

Must be preserved by argument in the trial court.

- *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 491 (Fla. 5th DCA 2004)

As- Applied Challenges



Less difficult to succeed.

- *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004)

Preserving Constitutional Challenges



“In order to properly preserve an as-applied constitutional challenge for appeal, a defendant must timely raise the issue for the trial court's consideration.”

- *Hughbanks v. State*, 190 So. 3d 1122, 1123 (Fla. 2d DCA 2016).

MUST also comply with the notice requirement of Rule 1.071 (which we'll cover later).

Preserving Constitutional Challenges

Examples of
what
NOT
to do
(i.e., waiver)



Defendant who plead no contest to unlawfully soliciting a person involved in an auto accident for law services waived the right to argue that he had engaged in commercial speech protected by the First Amendment. *Brady v. State*, 518 So. 2d 1305, 1308 (Fla. 3d DCA 1987)

Preserving Constitutional Challenges

Examples of
what
NOT
to do
(i.e., waiver)



Defendant waived right to challenge constitutionality of sex-offender registration statute by entering a plea of no contest to charge of failing to properly register as a sex offender without first raising the constitutionality argument. *Hughbanks v. State*, 190 So. 3d 1122 (Fla. 2d DCA 2016)

Standards guiding judicial review for equal protection arguments: Strict Scrutiny

STRICT SCRUTINY - If the issue at bar is the constitutionality of a statute abridging a fundamental right, courts must strictly scrutinize the statute to determine if it denies equal protection.

Examples of Fundamental Rights:

- Right to Vote
- Right to Marry
- Right of parents to make child rearing decisions

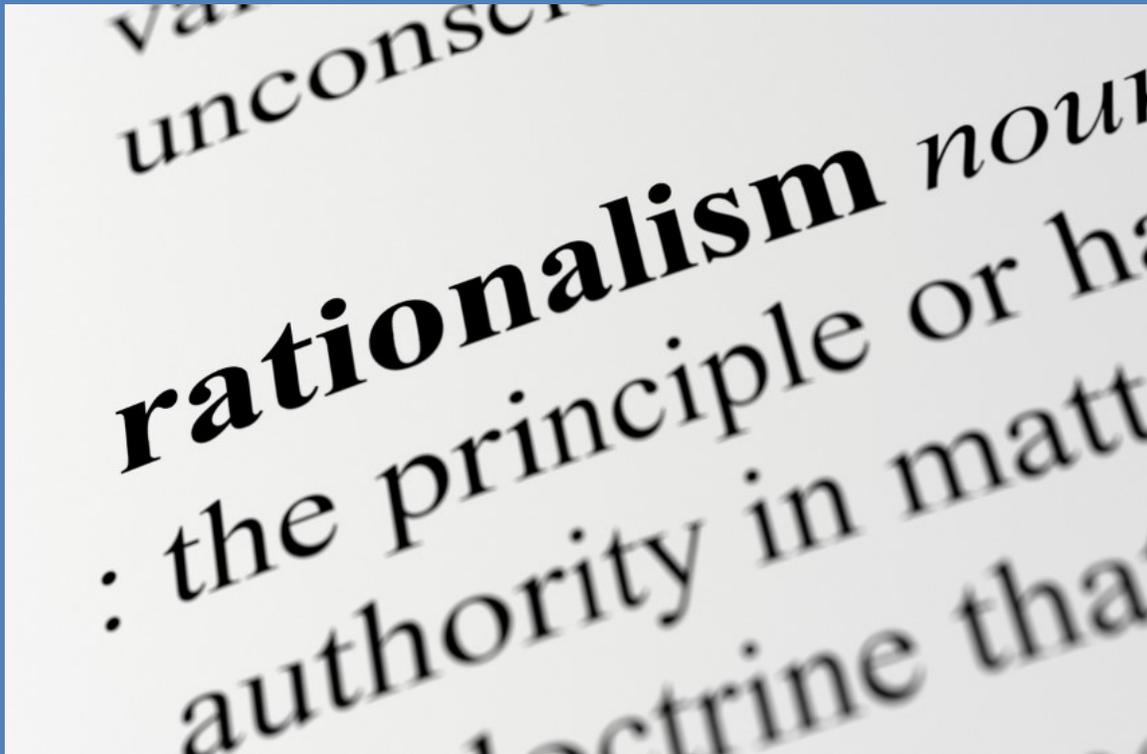


Standards guiding judicial review for equal protection arguments: Strict Scrutiny



The State has the burden to prove that (1) “the legislation serves a compelling state interest;” (2) “the legislation substantially furthers that interest;” and (3) “the legislation does so through the least restrictive means.” *N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 645 (Fla. 2003) (Anstead, J., specially concurring).

Standards guiding judicial review for equal protection arguments: Rational Basis



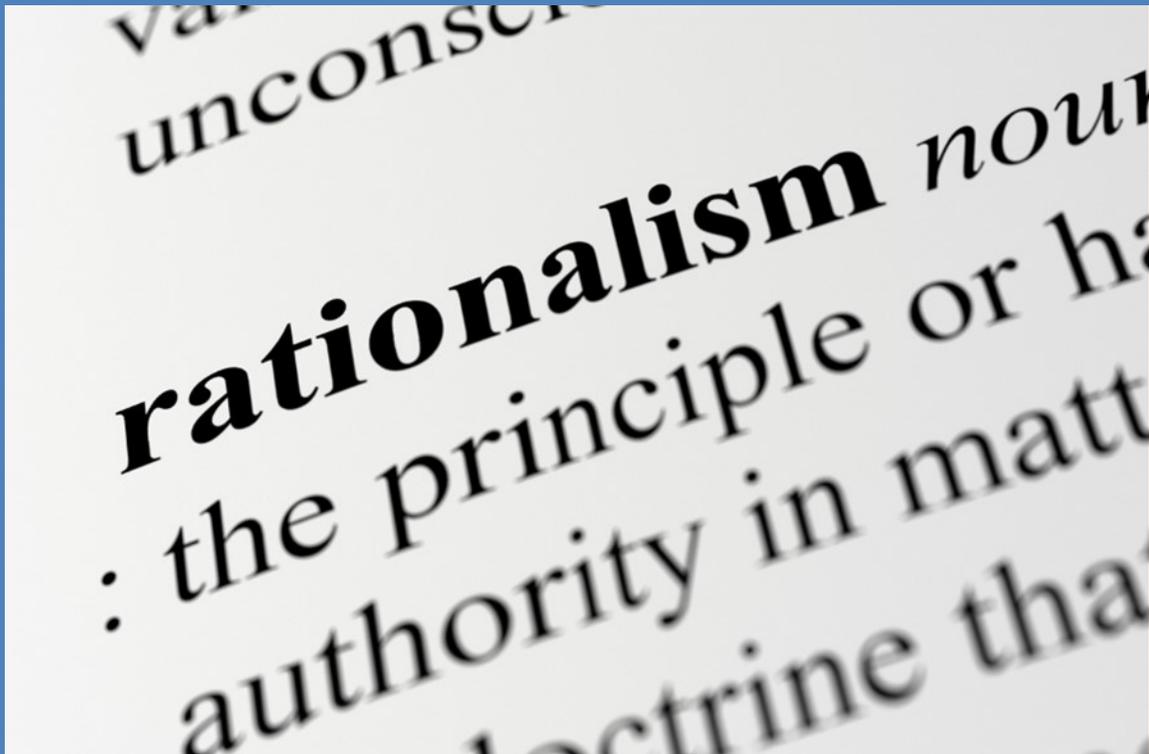
RATIONAL BASIS –

If a fundamental right is not at stake, courts apply a “rational basis” test.

Examples of non-fundamental rights:

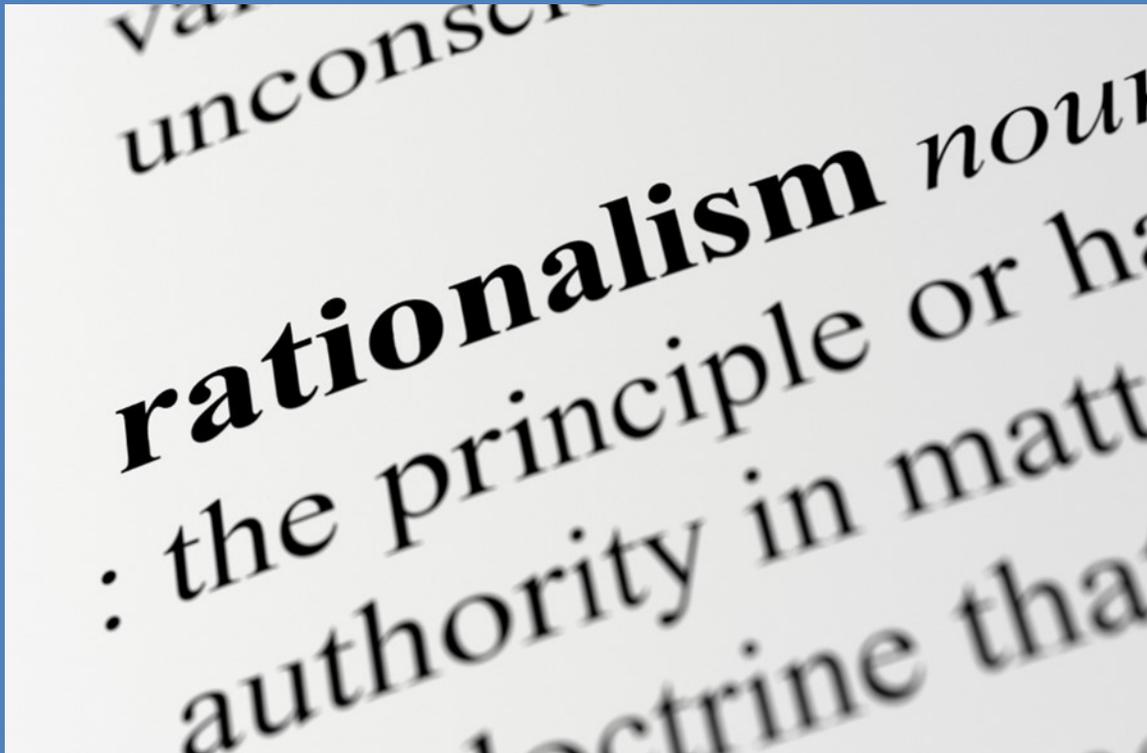
- Right to drive.
- Right to be free from statutory cap on noneconomic damages.

Standards guiding judicial review for equal protection arguments: Rational Basis



The court must inquire only “whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose.” *Estate of McCall v. United States*, 134 So. 3d 894, 927 (Fla. 2014) (Polston, C.J., dissenting) (quoting *Fla. High Sch. Activities Ass'n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983)).

Standards guiding judicial review for equal protection arguments: Rational Basis



Unlike strict scrutiny, the burden of proof is not on the State, but on the party challenging the statute or regulation.

Appellate Review of Constitutional Challenges

“The constitutionality of a statute is a pure question of law subject to de novo review.”

- *City of Ft. Lauderdale v. Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016).



Appellate Review of Constitutional Challenges

However, even while applying this standard, appellate courts must “defer[] to the trial court on questions of historical fact” where relevant and necessary to determine constitutional rights.

- *Id.* (quoting *Davis v. State*, 142 So. 3d 867, 871 (Fla. 2014)).



Appellate Review of Constitutional Challenges

Further, “the statute comes to the Court clothed with the presumption of correctness and all reasonable doubts about the statute's validity must be resolved in favor of constitutionality.

- Id. (quoting *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010)).
- * Except when strict scrutiny applies



Appellate Review of Constitutional Challenges

Thus, even when the order on review has struck a statute, the appellate court in its de novo review must still “accord legislative acts a presumption of constitutionality” and “construe challenged legislation to effect a constitutional outcome whenever possible.”

- Id. (quoting *Crist*, 56 So. 3d at 747).



Notice Requirements

Section 86.091, Florida Statutes (2020)

Where a “statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.”

Fla. R. Civ. P. 1.071

A party that files a pleading, written motion, or other document drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise must promptly

- a) file a notice of constitutional question stating the question and identifying the document that raises it; and
- b) serve the notice and the pleading, written motion, or other document drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise on the Attorney General or the state attorney of the judicial circuit in which the action is pending, by either certified or registered mail.

What constitutes compliance with rule 1.071?



Note: Not applicable in Dependency Proceedings.

B.S. v. Dep't of Child. & Families, 246 So. 3d 479 (Fla. 1st DCA 2018)

What constitutes compliance with rule 1.071?



Notice must be filed “promptly.”

- Late notice, or late attempted amendment to notice, will not suffice.
 - Example: Notice raising new constitutional ground after hearing and oral ruling on constitutional issues was not “prompt” to allow consideration.

What constitutes compliance with rule 1.071?



Notice must be complete and expressly identify each constitutional ground for the challenge.

- Constitutional grounds not specifically identified in the notice may not be considered.
 - Example: Appellate court's review limited to grounds included in timely notice, even where parties argued additional grounds at a hearing.

What constitutes compliance with rule 1.071?



“Failure to comply with rule 1.071 bars consideration of a claim that would result in the striking of a state statute as unconstitutional.”

Lee Mem'l Health Sys. v. Progressive Select Ins. Co., 260 So. 3d 1038, 1042 (Fla. 2018).



Form 1.975 – Notice of Compliance When Constitutional Challenge is Brought

NOTICE OF COMPLIANCE WITH SECTION 86.091, FLORIDA STATUTES

The undersigned hereby gives notice of compliance with Fla. R. Civ. P. 1.071, with respect to the constitutional challenge brought pursuant to(Florida statute, charter, ordinance, or franchise challenged)..... The undersigned complied by serving the(Attorney General for the state of Florida or State Attorney for the Judicial Circuit)..... with a copy of the pleading or motion challenging(Florida statute, charter, ordinance, or franchise challenged)....., by(certified or registered mail)..... on(date).....

Attorney for

Florida Bar No.

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Q & A



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Initiatives

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