

**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC20-1284

L.T. CASE NOS.

4D19-1537

15<sup>TH</sup> Jud. Cir. 502018CA015447XXXXMB

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CITY OF WEST PALM BEACH,

Petitioner,

v.

Peter and Galina Haver,

Respondents.

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**RESPONDENTS' SECOND AMENDED ANSWER BRIEF**

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## STATEMENT OF THE FACTS AND CASE

### I. Facts

1. Ms. Miriam Galan (“Ms. Galan”), who lives across the street from Respondents (Peter and Galina Haver) in a neighborhood zoned by Petitioner (the City of West Palm Beach) as single-family, low density residential (the “Single-Family Zoning Classification”), began in July, 2018, operating at her residence (the “Residence”) an Adult Family-Care Home consisting of at least two elderly women tenants and an approximately forty-year old male employee, bringing the total of unrelated occupants at the Residence to four, in violation of the Single-Family Zoning Classification. (Complaint ¶13, Trial Ct. R 11)

2. In preparing a civil complaint against both Petitioner and Ms. Galan to compel, respectively, enforcement and compliance with the Single-Family Zoning Classification, Respondents contacted by letter dated October 10, 2018, the State of Florida Agency for Health Care Administration (“Health Care Administration”) in order to determine if Ms. Galan had obtained a license to operate an Adult Family-Care Home,<sup>1</sup> the obtention of which license along with the fulfilment of other prerequisites, would entitle Ms. Galan to qualify for an exemption from the Single-Family Zoning Classification pursuant to Petitioner’s ordinance §278(d)(28)(a).

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<sup>1</sup> Florida Statute §429.67(8) imposes a licensure requirement on certain assisted care facilities providing room and board to frail elders within the context of a family home, referred to as “Adult Family-Care Homes.”

(Complaint ¶20, Trial Ct. R 15) In a follow-up telephone conversation, a representative of the Health Care Administration declared to Respondents that the respective agency had not issued a license to Ms. Galan to operate an Adult Family-Care Home. On the basis of Respondents' licensing inquiry, the Health Care Administration conducted on November 13, 2018, an on-site inspection of the Residence. On November 19, 2018, the respective inspector, Mr. Nick Friese, indicated by telephone to Respondent Peter Haver that Ms. Galan did operate an Adult Family-Care Home at the Residence, but that she need not obtain a license to do so provided that she had no more than two elderly tenants and none of those tenants received "Optional State Supplementation," conditions which, apparently, Ms. Galan satisfied at the time of the inspection, since at that point she provided room and board to only two elderly tenants, the third unrelated tenant paying for his room and board by way of assisting Ms. Galan with the care of the elderly tenants. (Complaint ¶ 21 and 22, Trial Ct. R 15-16.)

3. After an exchange of correspondence with Petitioner, Respondents filed on December 9, 2018, a complaint before the Circuit Court of the 15<sup>th</sup> Judicial Circuit against Ms. Galan, Respondent, Mr. Rick Green (Respondent's Development Services Director) and Mr. Alejandro Lopez (one of Respondent's Code Enforcement Officers) seeking, pursuant to *Boucher v. Novotny*, 102 So.2d 132 (Fla. 1958) ("*Boucher*") injunctive and declaratory relief in connection with the violation or

nonenforcement of the Single-Family Zoning Classification in regard to Ms. Galan’s operation of an Adult Family-Care Home at the Residence (the “Complaint”). (Trial Ct. R 8-74) With respect to Petitioner’s nonenforcement of the Single-Family Zoning Classification, the Complaint asserted the following five Counts against Petitioner:

Count I: “[A] cause of action for equitable relief as to ... [Petitioner’s] refusal to enforce the Single-Family Zoning Classification with respect to the Residence” (“Count I”);

Count II: “[A] cause of action for a declaratory judgment pursuant to Florida Statute 86.011-86.111 determining that [Petitioner’s] refusal to enforce the Single-Family Zoning Classification [as to the Residence] violates [Petitioner’s] Ordinance §94-34(b)(2)” (“Count II”);

Count III: “[A] cause of action for injunctive relief requiring ... [Petitioner] to enforce the Single-Family Zoning Classification with respect to the Residence by way of taking those enforcement measures provided for in [Petitioner’s] Ordinance §94-34(b)(2)” (“Count III”);

Count IV: [A petition for] “a writ of mandamus to compel [Petitioner] (i) to determine pursuant to [Petitioner’s] Ordinance §94-34(b)(1) whether [Ms. Galan’s] operation of her room-and-board operation [in the Residence] violates the Single-Family Zoning Classification and (ii) to comply with [Petitioner’s] Ordinance §94-34(b)(2), which requires [Petitioner’s] officials to take specified enforcement measures with respect to zoning ordinance violations” (“Count IV”); and

Count V: “[A] petition for a writ of certiorari to quash any quasi-judicial decisions or acts taken by [Petitioner] in connection with [its] refusal to enforce the Single-Family Zoning Classification” (“Count V”).

4. On March 13, 2019, Petitioner filed a motion to dismiss Respondents’ Counts I through V (“Petitioner’s Motion to Dismiss”), in part, on the grounds that

Respondents' action to enjoin Petitioner to enforce the Single-Family Zoning Classification as to Ms. Galan violated the Third District Court of Appeal's decision in *Detournay v. City of Coral Gables*, 127 So.3d 869 (2013) ("Detournay") holding that this Court's decision in *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (1985) ("*Trianon*"), had partially over-ridden the Court's prior decision in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (1979) ("*Commercial Carrier*"), so as to accord municipalities complete discretion under the separation-of-powers doctrine as to the enforcement of municipal laws and ordinances.

5. In an interim Order dated May 23, 2019, the trial court granted Petitioner's Motion to Dismiss all of Respondent's five Counts against Petitioner, in part, on the basis of *Detournay*, in which the Third District Court of Appeal, in reliance on this Court's decision in *Trianon*, dismissed equitable claims brought by local residents to enjoin the City of Coral Gables to enforce zoning ordinances.<sup>2</sup> (Trial Ct. R 186)

6. On May 25, 2019, Respondents notified their appeal as to the trial court's interim Order of May 23, 2019. (Appellate Ct. R 4) By a final and binding Order dated June 10, 2019, the trial court dismissed with prejudice all of

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<sup>2</sup> On the same date the trial court dismissed with prejudice Respondents' claims for declaratory and injunctive relief asserted against Petitioner's employees Messrs. Greene and Lopez. (Tr. Ct. Record 000186).

Respondents' five Counts against Petitioner. (Trial Ct. R 197) Pursuant to the Fourth District Court of Appeal's Order of May 29, 2019, Respondents filed on June 12, 2019, with the Fourth District Court of Appeal the trial court's final and binding Order of June 10, 2019, dismissing Appellants' five Counts with prejudice. (Appellate Ct. R 13-14)

7. By an Order dated August 6, 2019, the trial judge (Judge Howard Coates) recused himself with respect to Respondents' remaining claims asserted against Ms. Galan in the Complaint.

8. At a mediation session held on October 3, 2019, Respondents agreed to dismiss without prejudice the claims asserted in the Complaint against Ms. Galan in return for her representation that on that same date only one elderly person resided with Ms. Galan at the Residence. Respondents did not believe that Ms. Galan would comply with the Single-Family Zoning Classification, but they had given up any hope of compelling Ms. Galan to do so through civil proceedings, since civil discovery does not permit unannounced inspections of a party's home. (Appellate Ct. R 107-113). Thereafter, Ms. Galan continued the operation of her Adult Family-Care Home (Appellate Ct. R 107-113)

9. On October 25, 2019, the Second District Court of Appeal filed a decision in *Chapman v. Town of Redington Beach* affirming on separation-of-powers grounds the trial court's summary judgment against zoning-code-violation

victims who had commenced an action against the Town of Redington, pursuant to *Boucher*, to compel enforcement of the infringed zoning code provision (“*Chapman*”).

10. In a unanimous-panel opinion rendered on June 10, 2020 (the “4<sup>th</sup> DCA Opinion”), the Fourth District Court of Appeal held that since *Boucher* and its progeny permit individuals to sue in equity to compel municipalities to enforce zoning laws (the “*Boucher Cause of Action*”), the Fourth District Court of Appeal must follow and implement that Supreme Court precedent until such time as this Court expressly recedes from that precedent. Accordingly, the 4<sup>th</sup> DCA Opinion reversed the trial court’s dismissal of Respondents’ Count I, II and III as to Petitioner, while simultaneously reaffirming the trial court’s dismissal of Respondents’ Counts IV (petition for mandamus) and V (petition for certiorari). The 4<sup>th</sup> DCA Opinion certified conflict with the Third District’s opinion in *Detournay* and the Second District’s decision in *Chapman*.

16. By orders dated July 22 and 28, 2020, the Fourth District Court of Appeal, respectively, denied third-parties’ motions to file amicus curiae briefs and Petitioner’s motion for rehearing and rehearing en banc. (Appellate Ct. R 220-221)

17. By an order dated October 9, 2020, the Court accepted jurisdiction of this case.

II. The Legal Issues Presented and the Judicial Determinations Rendered Thus Far in this Litigation

A. The Trial Court Proceedings

Petitioner’s Motion to Dismiss argued pursuant to a two-part, sequential analysis that (i) the Court in *Trianon* partially receded from the Policy-Making/Planning-Versus-Operational-Acts test established in *Commercial Carrier* for determining when government acts qualify under the separation-of-powers doctrine for immunity from tort liability (the “*Commercial Carrier* Policy-Making/Planning-Versus-Operational-Acts Test”) and, in so doing, allegedly barred any judicial intervention in municipalities’ enforcement of their laws and ordinances and (ii) this partial “*recession*” from *Commercial Carrier* simultaneously overruled *sub silentio* this Court’s long-standing recognition of the *Boucher* Cause of Action permitting victims of zoning code violations to compel municipalities to enforce the violated zoning provision. (Trial Ct. R 101-106) In support of Petitioner’s interpretation of *Trianon* as barring on separation-of-powers grounds all judicial intervention in municipalities’ enforcement of their laws and ordinances, Petitioner quoted on numerous occasions language from the “taxonomy section” of *Trianon*:

How a governmental entity, though its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for

which there never has been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. This same discretionary power to enforce compliance with the law is given to regulatory officials such as building inspectors, fire department inspectors, health department inspectors, elevator inspectors, hotel inspectors, environmental inspectors and marine patrol officers. (the “Quoted *Trianon* Taxonomy Language”). (Trial Ct. R, 103)

Respondents argued that since the Court in *Trianon* did not reach its holding on the grounds of sovereign tort immunity, the Quoted *Trianon* Taxonomy Language qualifies as dictum with respect to sovereign tort immunity based on the separation-of-powers doctrine. (Trial Ct. R, 138-150)

The trial court dismissed with prejudice Respondents’ counts I, II and III on the basis of this two-part analysis subscribed to by the Third District Court of Appeal in *Detournay*. In the trial court’s view this binding Court-of-Appeal precedent precluded the trial court from entertaining the *Boucher* Cause of Action, despite the failure of this Court to overrule expressly such cause of action. (Trial Ct. R 197)

#### B. Fourth District Court of Appeal Proceedings

In the Fourth District Court of Appeal proceedings Respondents challenged Petitioner’s assertion that *Trianon* had partially replaced the *Commercial Carrier* Policy-Making/Planning-Versus-Operational-Acts Test with an absolute prohibition of judicial intervention as to municipalities’ enforcement of their zoning and

building codes and, in support of such challenge, referred to unambiguous language in both *Trianon* and subsequent Florida Supreme Court precedent expressly declaring that *Trianon* left the *Commercial Carrier* holding intact, thereby restricting sovereign tort immunity to policy-making and planning. (Appellate Ct. R 43-48) Respondents also quoted language in subsequent Florida Supreme Court precedent specifying that the Quoted *Trianon* Taxonomy Language addresses solely the issue of whether a municipality owed a duty of care under tort law and, consequently, does not support Petitioner's and the *Detournay* court's contention that municipalities' enforcement of ordinances necessarily constitutes discretionary governmental acts protected by the separation-of-powers doctrine from all types of judicial intervention. (Appellate Ct. R 43-48). Respondents pointed to Florida Supreme Court precedent permitting the judicial branch to review municipalities' enforcement of their zoning laws to the extent such enforcement activities qualified as "quasi-judicial" under the "functionality" test developed by this Court as to zoning matters. (Appellate R, 58)

Respondents argued, alternatively, that even if *Trianon* supported affording to municipalities' enforcement of zoning and building codes complete immunity from tort liability on separation-of-powers grounds (a premise which Respondents contested), such analysis did not compel abrogation of the *Boucher* Cause of Action, since injunctive relief has a lessor stifling effect than the imposition of monetary

damages based on tort theory and such injunctive relief serves to promote the consistent application of the zoning laws. (Appellate Ct. R, 49-54) Respondents opposed Petitioner’s Notice to Invoke Discretionary Jurisdiction on the grounds that no conflict existed between the 4<sup>th</sup> DCA Opinion and *Detournay*, since lower courts must follow Florida Supreme Court precedent, without regard for subsequent Florida Supreme Court *dictum*. *Puryear v. State*, 810 So.2d 901, 905-06 (Fla. 2002) (“Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this court recedes from the express holding.”)<sup>3</sup>

### C. Florida Supreme Court Proceedings

In this appeal the Court must decide whether the Third District Court of Appeal, in *Detornay*, ruled correctly in holding that an injunctive action to compel a municipality to enforce its zoning laws violates the separation-of-powers doctrine, a holding which conflicts not only with the *Boucher* Cause of Action, but also with the *Commercial Carrier* Policy-Making/Planning-Versus-Operational-Acts Test. (4th DCA Opinion at 8)

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<sup>3</sup> *Puryear v. State* designates “certification of a question of great public importance” as the appropriate discretionary jurisdictional basis for addressing Florida Supreme Court dictum which seemly challenges Florida Supreme Court precedent.

In certifying a conflict between the 4<sup>th</sup> DCA Opinion and *Detournay* the Fourth District Court of Appeal calls upon this Court to decide whether or not to recede expressly from both the *Boucher* Cause of Action and the *Commercial Carrier* Policy-Making/Planning-Versus-Operational-Acts Test in order to accommodate the Quoted *Trianon* Taxonomy Language, which, Petitioner argues, confers upon municipalities complete discretion under the separation-of-powers doctrine as to enforcement of their ordinances.

### **SUMMARY OF ARGUMENT**

The doctrine of the separation of powers has not evolved since this Court's most recent validation of the *Boucher* Cause of Action in *Skaggs-Albertson's v. ABC Liquors*<sup>4</sup> in 1978 so as to exclude judicial review as to municipalities' enforcement of their local laws. This absence of a fundamental change in the applicable law bars this Court from overruling the *Boucher* Cause of Action on grounds of "changes in circumstances." Petitioner portrays *Trianon* as a seminal case which pushed the protective boundaries of the separation-of-powers doctrine well beyond its traditional parameters so as to greatly expand the discretionary powers of municipalities to include virtually all government actions – hardly: "We caution trial and appellate courts who apply this decision [*Trianon*] that our holding does not

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<sup>4</sup> 363 So.2d 1082 (Fla. 1978).

have the broad ramifications characterized by the dissents, nor does it recede from Commercial Carrier,” caselaw which distinguishes between policy-making/planning and operational acts. *Trianon* at 923.

## ARGUMENT

### I. Standard of Review: *De Novo*

Appellate courts review *de novo* the dismissal of a complaint for failure to state a cause of action. *Fla. Dep’t of Corr. v. Abril*, 969 So.2d 201, 201 (Fla. 2007); *Steven v. State*, 226 So.3d 787, 790 (Fla. 2017). This Court applies a *de novo* standard of review to lower courts’ determination of constitutional issues. *City of Parker v. State*, 992 So.2d 171, 179 (Fla. 2008).

### II. Petitioner’s Argumentation that the *Boucher* Cause of Action Allegedly Violates the Separation-of-Powers Doctrine Fails to Overcome *Stare Decisis*’ Strong Presumption of Validity

Insofar as the Court, as the ultimate steward of the common-law in the State of Florida, acknowledged the *Boucher* Cause of Action, it necessarily has the authority to abrogate such common-law cause of action, either pursuant to such common-law stewardship or as the guardian of “law of a higher authority” embodied in statutes or the Florida and United States Constitutions. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 465 (2015) (“What we can decide, we can undecide.”) However, in exercising such right of abrogation the Court must adhere to the doctrine of *stare decisis*, which serves to distinguish the judicial branch from

the legislative and executive branches of government by subjecting courts to the discipline of precedent, a regime which removes the courts from the realm of pure political whim and binds the judiciary to the rigor of consistency and analysis in its role as the custodian of laws. *Id.* at 465 (“In this world, with great power there must also come – great responsibility”); *State v. Poole*, 297 So.3d 487, 506 (Fla. 2020) (“It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty.”); *Puryear v. State*, 810 So.2d 901, 904-05 (Fla. 2002) (“It is an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion.”).

A. The *Boucher* Cause of Action Enjoys a Strong Presumption of Validity

The doctrine of *stare decisis* creates a strong presumption of validity as to courts’ holdings on points of law which relate directly to the resolution of the matter at hand, in part, to avoid the necessity for courts to re-visit repeatedly the same issues of law and, from the public’s perspective, to promote stability and reliability. *Robertson v. State*, 143 So.3d 907, 910 (Fla. 2014) (“The presumption in favor of *stare decisis* is strong.”). How strong? In a great effort at scholarship, the U.S. Supreme Court in entertaining the issue of whether to overturn prior precedent listed all of the cases in which it had receded from precedent during its prior twenty terms

as of 1991: thirty-three instances in total, including partial recessions, out of a total of approximately 2,500 cases, resulting in a “recession-success” rate of around 1.3 percent, a figure which, if not conclusive, gives a quantitative perspective as to the significant magnitude of the “validity” presumption under *stare decisis*. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). In this matter, the *Boucher* Cause of Action should enjoy an even stronger presumption of validity since the Court reconfirmed the validity of such action in at least three subsequent decisions following the original enunciation in *Boucher* in 1958. (Appellate Ct. R 65-66)

The doctrine of *stare decisis* takes on considerable complexity, in part, due to courts’ having varied the intensity of the “*stare decisis*” presumption, depending on multiple factors, including the source of the law serving as the basis for challenging the respect precedent (common-law, statutory and constitutional law constituting the principal sources of law) and that precedent’s particular subject matter. For example, the courts have set (not necessarily consistently) lower presumption levels for procedural,<sup>5</sup> evidential, competition<sup>6</sup> and constitutional<sup>7</sup> law, whereas imposed

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<sup>5</sup> *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (“[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced....”).

<sup>6</sup> *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 471 (2015) (Alito, J., dissenting): “We have been more willing to reexamine antitrust precedents because they have attributes of common-law decisions.”

<sup>7</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command.... This is particularly true in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’”); *City of Parker v.*

higher presumption levels for constitutional liberty rights,<sup>8</sup> property and contract law<sup>9</sup> and so-called “watershed” cases.<sup>10</sup> This cacophony of different presumption levels gets addressed further below in the discussion of specific rules and principles used by the courts in applying *stare decisis*.

B. As Binding Precedent, the *Boucher* Cause of Action Enjoys *Stare Decisis*’ Presumption of Validity, Whereas the Quoted *Trianon* Taxonomy Language, as mere Dictum, Does Not

The *stare decisis* presumption of validity applies solely to points of law decided pursuant to the resolution of the dispute before the court and not to commentary as to legal issues which, perhaps bearing some relevance to the dispute, the court must not necessarily resolve in order to reach or support its holding.

We have written that we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.... We are not bound to follow our dicta in a prior case in which the point now at

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*State*, 992 So.2d 171, 187 (2008) (“Moreover, the rationale for *stare decisis* may be ‘at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.’”).

<sup>8</sup> *State v. J.P.*, 907 So.2d 1101, 1109 (2004) (“When a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.”).

<sup>9</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights....”).

<sup>10</sup> *North Florida Women’s Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 638 (2003) (“[W]here the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith.”).

issue was not fully debated. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 549 (2013).

Courts have refused to afford the benefit of the *stare decisis* presumption of validity to *dicta* since such nonessential utterances, providing background but not essential to the holding, receive less rigorous scrutiny than do the actual holding and its legal axioms. *Humphrey's Executor v. United States*, 295 U.S. 602, 627-628 (1935) (rejecting, under *stare decisis*, dicta “which may be followed if sufficiently persuasive but which are not controlling.”) The Court can follow dictum if it finds the latter compelling, but only to the extent such dictum does not conflict with binding precedent. *Puryear v. State*, 810 So.2d 901, 905-06.

1. The *Boucher* Cause of Action Qualifies as Binding Precedent which Controls Respondents’ Declaratory and Injunctive Claims

In *Boucher* the Court recognized that victims of zoning-law violations had a valid cause of action in equity to enjoin municipalities to enforce the respective zoning laws, subject to such victims’ demonstrating they had suffered special damages unique to them.

We have on a number of occasions held that where municipal officials threaten or commit a violation of municipal ordinances which produces an injury to a particular citizen which is different in kind from the injury suffered by the people of the community as a whole then such injured

individual is entitled to injunctive relief in the absence of an adequate legal remedy. *Boucher* at 134.<sup>11</sup>

That acknowledgment of the *Boucher* Cause of Action constitutes binding precedent which gives rise to a presumption of validity under the doctrine of *stare decisis* as to subsequent equitable claims seeking to enjoin municipalities to enforce their zoning laws.<sup>12</sup> *Id.* at 137

2. The Quoted *Trianon* Taxonomy Language Does Not Qualify as Binding Precedent which Controls Respondents' Declaratory and Injunctive Claims

Petitioner's classification of the Quoted *Trianon* Taxonomy Language as binding precedent which controls the *Boucher* Cause of Action would, in effect, cancel out the *Boucher* Cause of Action's presumption of validity, since two conflicting precedents have equal footing. *Puryear v. State*, 810 So.2d 901, 905-06 (Fla. 2020). However, Petitioner faces a rude slog in its attempt to portray the Quoted *Trianon* Taxonomy Language / *Boucher* Cause of Action dichotomy as a battle of equals, since the Court has expressly rejected that proposition. *Kaisner v.*

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<sup>11</sup> In *Boucher*, as with all its progeny, the victims of zoning violations sued for injunctive relief against both the violator and the non-enforcing municipality. *Id.* at 133-34

<sup>12</sup> Petitioner contended in its Motion for Rehearing before the 4<sup>th</sup> DCA that the *Boucher* Cause of Action addresses solely a municipality's violation of its zoning ordinances through affirmative action, a highly restrictive interpretation of *Boucher*, which, if adopted, would arguably deprive individuals of equitable relief against a municipality's decision not to enforce a particular zoning ordinance. (Appellate Ct. R, 163 and 170). See Petitioner's reply quoting pertinent language from *Boucher* and its progeny. (Appellate Ct. R, 180-83)

*Kolb*, 543 So.2d 732, 734 (Fla. 1988). At best, the *Trianon* Taxonomy Language constitutes precedent with respect to the issue whether a municipality owes a duty of care in connection with inspections performed by municipal employees.

Where questions of duty arise in connection with potential governmental liability, we have provided a rough general guide concerning the type of activities that either support or fail to support the recognition of a duty of care between a governmental actor and an alleged tort victim [the *Trianon* Taxonomy]. See *Trianon*.... (providing the following list of governmental activities: “(I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operation; and (IV) providing professional, educational, and general services for the health and welfare of ... citizens.” *Wallace v. Dean*, 3 So.3d at 1047.

As precedent restricted to the question of municipalities’ duty of care under tort law the *Trianon* Taxonomy Language has no precedential effect as to the *Boucher* Cause of Action, which affords declaratory and injunctive relief as to municipalities’ failure to enforce zoning laws.<sup>13</sup> Petitioner counters that the Court in formulating the Quoted *Trianon* Taxonomy Language intended not only to opine as to municipalities’ duty of care under tort law, but also to render binding precedent as to sovereign tort immunity based on the separation of powers doctrine (Appellate Ct. R 90-94), a position specifically rejected by this Court.

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<sup>13</sup> Before precedent can control a subsequent dispute, it must relate directly to the determinative legal issue raised by such subsequent dispute. *Kirtsaeng v. John Wiley & Sons, Inc.*, 58 U.S. 519, 548 (2013).

*Trianon* was not intended to, and did not affect our prior pronouncements on the question of governmental immunity. It merely addressed, in that particular factual context the parallel question of the duty of care. While a duty certainly must exist for there to be liability, the question of governmental immunity does not itself depend upon this determination. *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1988).

The test for determining immunity, and for determining which category the activity falls into, is still *Commercial Carrier's* operational versus planning dichotomy. We have determined above that the activities here were operational and nothing in *Trianon* changes that result. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258, 261 (1988).

Even assuming for argument sake that the Quoted *Trianon* Taxonomy Language constitutes binding precedent which controls sovereign tort immunity as derived from the separation-of-powers doctrine, such binding precedent would not control as to the *Boucher* Cause of Action, since that action also has nothing to do with sovereign tort liability. *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1988); *Wallace v. Dean*, 3 So.3d at 1047. Petitioner has implied that the Quoted *Trianon* Taxonomy Language does not even stop at the issue of sovereign tort immunity, but, instead, sets the parameters of that protection afforded to the executive branch by the separation-of-powers doctrine, parameters which (supposedly reserving unconditionally for municipalities total discretion as to the enforcement of laws and ordinances) apply to every area of law. (Appellate Ct. R 93-94) This all-encompassing argument derives from a single paragraph appearing in the *Trianon* decision under the rubric “To better clarify the concept of governmental tort

liability.”<sup>14</sup> *Trianon* at 919. As a matter of long-standing tradition, common-law courts refrain from such audacious proclamations which impose unsubstantiated legal doctrine on the vast universe of law. *Carter v. City of Stuart*, 468 So.2d 955, 958 (Fla. 1985) (“The legal adage that hard cases make bad law is never more true than when a court attempts, on a particular set of facts, to resolve all controversy in an entire field of law.”).

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<sup>14</sup> Such an interpretation actually contradicts the first sentence of the Quoted *Trianon* Taxonomy language: “How a governmental entity, through its officials and employees, exercises its ... power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, **for which there never has been a common law duty of care.**” *Trianon* at 920 [emphasis added]; see also, *Id.* at 928 (“[T]he four new categories of government functions and activities [*Trianon* Taxonomy] which the majority creates here can only add confusion to an already confused area of the law.... If the state cannot be liable in the first two categories because of an absence of common law duty, but may be liable in the last two categories because of the presence of a common law duty, then it logically follows that there is no sovereign immunity for any of the four categories. Duty or lack of duty appears to be the distinguishing feature. This raises the question of whether *Commercial Carrier* and its progeny survive. **Are the first two categories exclusively discretionary and planning level activities and the last two categories exclusively nondiscretionary and operation level activities? Obviously not.**” [Shaw, J., dissenting] [Emphasis added]).

C. Petitioner’s Argumentation Fails to Satisfy Either of the Two Grounds for Defeating *Stare Decisis*’ Strong Presumption of Validity

This Court in numerous decisions has held that “a change in circumstances” or “error in legal analysis” overcomes the *stare decisis* presumption-of-validity. *Brown v. Nagelhout*, 84 So.3d 304, 309 (2012). (“The doctrine of stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis.”); *State v. J.P.*, 907 So.2d 1101, 1109 (Fla. 2004); *Rotemi Realty, Inc. v. Act Realty Co., Inc.*, 911 So2d 1181, 1188 (2005). Those two grounds for overriding the *stare decisis* doctrine have over the years taken on considerable nuance as the Court charts a complex course which avoids interference with the important policy considerations underlying *stare decisis*, while still giving courts the requisite flexibility to correct erroneous precedent. *State v. Gray*, 654 So.2d 552, 554 (Fla. 1995) (“*Stare decisis* provides stability to the law and to the society governed by that law [citations omitted]. Yet *stare decisis* does not command blind allegiance to precedent. ‘Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.’”).

A difference of opinion as to the resolution of a point of law does not constitute error in legal analysis, so long as reasonable jurists employing rigorous legal analysis could arrive at the respective diverging outcomes. *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (“[T]here is room for honest disagreement, even

as we endeavor to find the correct answer.”); *State v. J.P.*, 907 So.2d 1101, 1109 (2004) (“As an institution cloaked with public legitimacy, this Court cannot recede from its own controlling precedent when the only change has been the membership of the Court.”) So, if “differences of opinion” as to a point of law do not qualify as error for purposes of receding from precedent which enjoys a presumption of validity under *stare decisis*, what does qualify as error for purposes of *stare decisis*? The caselaw does not provide much analysis for distinguishing between a difference of opinion and error in legal analysis, with courts generally applying a “I know it when I see” standard.

If there was ever a case that defied reason, it was [the challenged decision], imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991).

In this case we cannot escape the conclusion that, to the extent [this Court] went beyond what a correct interpretation of [prior precedent] required, our Court in [the challenged precedent] got it wrong. *State v. Poole*, 297 So.3d 487 (2020).<sup>15</sup>

The above quoted decisions appear to limit recession from precedent on the basis of error in legal analysis to instances where a court ignored binding precedent or interpreted such precedent in an unfaithful or illogical manner. Since courts, particularly those of last-instance, do not generally write decisions intentionally

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<sup>15</sup> Both of the above quoted decisions involved capital punishment sentences, a divisive subject matter which leads to intractable positions.

ignoring controlling precedent or interpreting such precedent unfaithfully, the error-in-legal-analysis override of the *stare decisis* doctrine should apply very seldomly with respect to Florida Supreme Court precedent.<sup>16</sup>

1. The Court did Not Err in Acknowledging and Re-Acknowledging the *Boucher* Cause of Action

In deciding *Boucher* in 1958, the Court necessarily reviewed whether the resulting *Boucher* Cause of Action conformed with the separation-of-powers doctrine, since that doctrine, then already entrenched in Florida law by way of case-precedent (including the separation-of-powers doctrine's applicability to sovereign tort liability), pre-existed the *Boucher* precedent. *Dalehite v. United States*, 346 U.S. 15, 57 (1953) ("Of course, it is not a tort for government to govern...." [Jackson, J., Dissenting]); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957). When reconfirming the *Boucher* Cause of Action in *Renard v. Dade County* and *Skaggs-Albertson's v. ABC Liquors, Inc.*,<sup>17</sup> the 1968 revision of the Florida Constitution had already enshrined in Article

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<sup>16</sup> The *Detournay* decision appears to satisfy this error-in-legal-analysis standard since it ruled as violative of the separation-of-powers doctrine the equitable claim brought in that case to enjoin the City of Coral Gables to enforce its zoning laws, without even mentioning the *Boucher* precedent, in which the Court expressly recognized such injunctive relief. (Appellate Tr. R, 67-68) The dissent in *Detournay* analyzed in detail *Boucher* and its progeny.

<sup>17</sup> *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082 (1978); *Renard v. Dade County*, 261 So.2d 832 (1972).

II, Section 3 language setting out the basic principles of the separation-of-powers doctrine.

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. Article II, Section 3, Florida Constitution.

Those circumstances make it unlikely the Court had “overlooked” the separation-of-powers doctrine in establishing and reviewing the *Boucher* Cause of Action.

Petitioner insists that even if this Court subjected the *Boucher* Cause of Action to separation-of-powers scrutiny, that injunctive cause of action clearly violates the precepts of “separation-of-powers” as reflected in the established practice of prosecutorial discretion, the latter practice, in Petitioner’s view, definitively expanding the separation-of-powers doctrine so as to bestow upon municipalities total discretion as to the enforcement of laws and ordinances.<sup>18</sup> (Appellate Ct. R 90-94). The Court in *Boucher* and its progeny clearly did not share Petitioner’s view as to the significance of prosecutorial discretion, since, otherwise, it would not have condoned an injunctive cause of action compelling enforcement of municipal laws. *Boucher* at 134-35. Petitioner has failed to cite explicit support for its thesis that

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<sup>18</sup> Prosecutorial discretion applies for the most part to criminal laws and benefits primarily state attorneys. *State v. J.M.*, 718 So.2d 316 (1998) (“The decision whether to charge and prosecute is an executive branch responsibility.... The state attorney possesses complete discretion in determining whether to prosecute....”).

general principles of separation-of-powers in conjunction with prosecutorial discretion somehow attribute total discretion to municipalities over the enforcement of their laws and ordinances, other than to repeatedly rely on the Quoted *Trianon* Taxonomy Language, which, both according to the terms of that language and as subsequently interpreted by this Court, applies solely to the issue of when municipalities owe a duty of care under tort law. See Section II B (1) hereof at 16. Respondents have cited (i) federal case law which rejects the contention that prosecutorial discretion affords the federal executive branch the authority to refrain from enforcing valid federal statutory law<sup>19</sup> (Appellate Ct. R 63) and (ii) Florida Supreme Court precedent which recognizes courts' ability to review quasi-judicial acts taken as to the enforcement of zoning ordinances. *Board of County Com'rs of Brevard County v. Snyder*, 627 So.2d 469, 474 (Fla. 1993). (Appellate Ct. R 56-59)

To the extent caselaw as to sovereign tort liability has any precedential value as to the issue of whether the *Boucher* Cause of Action violates the separation-of-powers doctrine, the Court should then apply the Policy-Making/Planning-Versus-Operational-Acts Test developed in *Commercial Carrier*. See Section II, C (2) hereof, at 27. In order to override the *Boucher* Cause of Action on grounds of error in legal analysis, Petitioner must demonstrate that a faithful application of the *Commercial Carrier* Policy-Making/Planning-Versus-Operational-Acts Test

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<sup>19</sup> *Texas v. U.S.*, 809 F.3d 134, 166 (2015).

requires classifying the enforcement of zoning laws as a policy-making/planning act rather than as operational. In doing so, Petitioner faces a steep hurdle since the jurisprudence applying of the Policy-Making/Planning-Versus-Operational-Acts Test adopts a flexible approach, rendering it difficult to make stick the accusation of “unfaithful application,”<sup>20</sup> all the more since the Court in applying its “functionality” test in the zoning-law field has determined that the application and enforcement of zoning laws constitute quasi-judicial acts subject to judicial review. *Board of County Com’rs of Brevard County v. Snyder*, 627 So.2d 469, 474 (1993) (“Generally speaking, legislative action results in the formulation of a general rule of policy, whereas [quasi] judicial action results in the application of a general rule of policy.”). (Appellate Ct. R 56-61)

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<sup>20</sup> *Carter v. City of Stuart*, 468 So.2d 955, 957-58 (1985) (Ehrlich, J., concurring) (“I write further to address judge Letts’s trenchantly expressed frustration with the lack of a bright line in the delineation of governmental operational and planning functions for purposes of determining sovereign immunity. We recognize that there is no one clear test, applicable to all fact patterns, by which a trial court, or even an appellate court, may separate immune planning-level functions from those areas of negligent operational procedure for which the state has accepted tort liability. This problem is inherent in the nature of the beast: torts come in all shapes and sizes....”). (Appellate Ct. R 36-40).

## 2. The Parameters of the Separation-of-Powers Doctrine Have Not Changed Significantly Since the Court’s Acknowledgement and Re-Acknowledgement of the *Boucher* Cause of Action

The “change in circumstances” ground for overriding *stare decisis* appears broad in scope, arising both where the applicable law has changed significantly since pronouncement of the challenged precedent and in situations where the overall societal circumstances which influenced the determination of the pertinent point of law in the challenged precedent have changed in a manner rendering the legal rule obsolete or inappropriate. In actuality, courts, for the most part, have restricted this “change in circumstances” ground to scenarios where the applicable law subsequent to the issuance of the challenged precedent has evolved to such an extent so as to render the precedent erroneous.<sup>21</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

According to Petitioner’s argumentation, the Quoted *Trianon* Taxonomy Language embodies a fundamental development in the separation-of-powers doctrine, through which the Court allegedly enhanced the protection afforded to the

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<sup>21</sup> In analyzing the effects of *stare decisis* courts do take into consideration changes in societal circumstances (generally known as changes in factual premises), but usually only after determining that the respective court committed legal-analysis error in deciding the challenged precedent or that the applicable law has changed since pronouncement of the challenged precedent. The “change-in-factual-premises” consideration comes into play in evaluating the existence of a “special justification” for recession from precedent. *North Florida Women’s Health and Counseling Services, Inc.*, 866 So.2d 612, 637 (Fla. 2003); *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455-56 (2015). See Section II, D at 30.

executive branches of state, county and municipal governments, in particular isolating the latter from any judicial intervention with respect to the enforcement of their laws. (Appellate Ct. R 91-94 and 164-170). Petitioner asserts this view despite the Court's limitation of the *Trianon* holding to the issue of municipalities' duty of care under tort law. See Section II B (2) hereof at 17. Whether or not the Court aspires to such an interpretation of the separation-of-powers doctrine, the law on the point has not yet reached such a conclusion, but instead, in the context of sovereign tort immunity, remains committed to the *Commercial Carrier Policy-Making/Planning-Versus-Operational-Acts* Test. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (1979) (“[W]e adopt the analysis of *Johnson v. State* [citation omitted] which distinguishes between the ‘planning’ and ‘operational’ levels of decision-making by governmental agencies.”); *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258, 261 (Fla. 1988). Over and above any doubts as to the relevance of sovereign-tort-immunity precedent with respect to the validity of the *Boucher* Cause of Action, the *Commercial Carrier Policy-Making/Planning-Versus-Operational-Acts* Test negates separation-of-powers protection in the case of “municipal acts” qualifying as operational in nature, thereby enabling courts to exercise review in connection with such operational acts. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d at 1022. In the likely event that the enforcement of zoning and building code ordinances qualifies as

operational, insofar as that activity involves the application rather than making of policy, courts' hearing injunctive claims to compel municipalities' enforcement of their zoning ordinances will not violate the separation-of-powers doctrine under the *Commercial Carrier Policy-Making/Planning-Versus-Operational-Acts Test*. *Henderson v. Bowden*, 737 So.2d 532, 539 (1999) (“We ... conclude ... that the alleged actions of the sheriff’s deputies during the roadside detention of the ... vehicle are not ... protected by the doctrine of sovereign immunity.”); *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So.2d 996, 1001 (Fla. 1993) (“Any meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision.”); *Kaisner v. Kolb*, 543 So.2d 732, 736-38 (Fla. 1989) (“An ‘operational’ function ... is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented..... ”); *Slemp v. City of North Miami*, 545 So.2d 256, 257 (Fla. 1989) (“In the instant case, the city’s alleged failure to maintain and operate its pumps properly is an operational level activity and is thus subject to traditional tort analysis.”); *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258, 260 (Fla. 1988) (“We agree with the district court that the actions of caseworkers investigating and responding to reports of child abuse simply cannot be elevated to the level of policy-making or planning....”).

Respondents’ review of the caselaw as to possible trespasses by the judicial branch into those areas of activities reserved to municipal government by the separation-of-powers doctrine has not turned up a single precedent affording total discretion to municipal government over the enforcement of their laws. Instead, “judicial” infringements into the protected municipal domain typically involve interference with local governments control over finances, budgetary matters and expenditures. *Willis v. Hathaway*, 95 Fla. 608, 628 (1928); *Department of Children and Families v. KR.*, 946 So.2d 106, 107 (Fla. 5<sup>th</sup> DCA 2017); *Office of State Attorney for Eleventh Judicial Circuit v. Politics*, 904 So.2d 527, 532 (Fla. 3d DCA 2005). Such caselaw suggests that absolute discretion as to municipalities’ enforcement of their laws would infringe on those law-making powers reserved to state and local legislatures under the separation-of-powers doctrine. *B.H. v. State*, 645 So.2d 987, 992 (Fla. 1994).

D. Petitioner’s Argumentation Falls Short of the Special-Justification Threshold

1. The *Boucher* Cause of Action’s Alleged Infringement of the Separation-of-Powers Doctrine Alone Would Not Constitute a Special Justification

Courts have long recognized that error alone should not suffice to overcome the presumption of validity under the *stare decisis* doctrine, since that ground involves a somewhat subjective judgment call, which leaves courts susceptible to

accusations of political or personal bias. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455-56 (2015) (“To reverse course, we require as well what we have termed a ‘special justification’ – over and above the belief ‘that the precedent was wrongly decided.’”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[W]e have held that ‘any departure from the doctrine of *stare decisis* demands special justification.’”); *Brown v. Nagelhout*, 84 So.3d 304, 309 (2012) (“*Stare decisis* does not yield based on a conclusion that a precedent is merely erroneous.”). In order to insulate courts from such reproach most jurisdictions have introduced a “special-justification” threshold, which requires aggravated circumstances of such a degree as to take recessions from precedent out of the discretionary realm. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) (“[An argument that we got something wrong – even a good argument to the effect – cannot by itself justify scrapping settled precedent.”); *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (“[This Court has never departed from precedent without ‘special justification.’” [Marshall, J., dissenting]). Fully aware that such a high bar would tolerate in certain instances erroneous precedent, courts preferred this eventuality to castigations of illegitimacy. *State v. Poole*, 287 So.3d 487, 507 (Fla. 2020) (“[S]tare decisis means sticking to some wrong decisions.”). However, complicating things even further, courts have introduced a degree of flexibility into this “special justification” prerequisite, apparently requiring a lesser degree of “special justification” where under the

circumstances a weaker presumption of validity adequately serves the objectives and rationale behind the *stare decisis* doctrine, such as stability, predictability, evenhandedness and reliance. *Payne v. Tennessee*, 901 U.S. 808, 828 (1991).

2. Petitioner’s Argumentation Does Not Satisfy Any of the Three Special-Justifications Articulated in *North Florida Women’s Health*

In *North Florida Women’s Health and Counseling Services, Inc. v. State*, the Court developed an analytical test requiring in addition to error that at least one of the following three “special justifications” exist in order to warrant recession from precedent: i) the challenged precedent had “proved unworkable due to reliance on an impractical legal ‘fiction;” ii) “the rule of law announced in the decision [may] be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law;” and iii) “the factual premises underlying the decision changed so drastically as to leave the decision’s central holding utterly without legal justification.” 866 So.2d 612, 637-638 (Fla. 2003) (“*North Florida Women’s Health*”). The Court has since relied on the three-part “special justification” test articulated in *North Florida Women’s Health* or variations thereof in most instances involving the application of *stare decisis*. *Brown v. Nagelhout*, 84 So. 3d 304, 309-310 (Fla. 2012) (“We have recognized that the circumstance that ‘the prior decision proved unworkable due to reliance on an impractical legal fiction’ militates in favor of departing from precedent.... We have also recognized that the prospect of ‘serious injustice to those who have relied on’ a

precedent militates against departing from that precedent.”); *State v. Cable*, 51 So.3d 434, 442 (Fla. 2010); *Wallace v. Dean*, 3 So.3d 1036, 1039 fn 5 (2009); *City of Parker v. State*, 992 So.2d 171 187-88 (Fla. 2008) (Bell, J., concurring and dissenting); *Calabro v. State*, 995 So.2d 307, 324 (2008); *Deparvine v. State*, 995 So.2d 351, 393 (2008) (Lewis, J., dissenting). In applying the North Florida Women’s Health *stare decisis* test the Court has elaborated on the three individual “special justifications” set out therein and, in doing so, expanded somewhat their scope and recalibrated their respective weights.

a) Unworkability: *Boucher* Cause of Action has not Proven Unworkable

On its face, the original “unworkability” special-justification as set forth in North Florida Women’s Health had a narrow focus, limiting that ground for recession to unworkability caused by an impractical legal fiction adopted in the respective holding. *Brown v. Nagelhout*, 84 So.3d 304, 310 (2012) (“Under the reasoning of [the challenged precedent], for purposes of section 47.021 a corporate defendant may be deemed to reside in only one county, although under the unequivocal terms of section 47.051 the same corporate defendant may have more than one county of residence. [The challenged decision] thus relies on an unwarranted and ‘impractical legal fiction.’”); *Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So.3d 567, 574 (Fla. 2010); *McNeil v. Canty*, 12 So.3d 215, 218 (Fla. 2009). The Court has in the interim apparently enlarged the

“unworkability” special-justification to include virtually all precedent which, due to convolutedness or faulty rationale, the courts have struggled and failed to interpret and apply in a consistent and reliable manner so as to achieve the sought-after policy aim. *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1131 (Fla. 2005) (“[W]e believe that a portion of our decision in [the challenged precedent] is both legally and practically untenable, and that receding from the decision does not offend the principle of stare decisis.”); *State v. J.P.*, 907 So.2d 1101, 1109 (Fla. 2004) (“Intellectual honesty continues to demand that precedent be followed unless there has been a clear showing that the earlier decision ... has not proven acceptable in actual practice.”); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“[W]hen governing decisions are unworkable ..., this Court has never felt constrained to follow precedent.... [The challenged decision] has defied consistent application by the lower courts.”); *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015) (There, the Court refused to overrule the challenged precedent insofar as it set out an easily applicable rule of law: “[The challenged precedent] was “simplicity itself to apply.”). This expansion of the “unworkability” special-justification represents a full-circle return to the “unworkability” concept first conceived by the U.S. Supreme Court. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (“Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of

inherent confusion created by an unworkable decision [citations omitted] or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.”).

Nothing in *Boucher*'s progeny suggests the *Boucher* Cause of Action has proven unwieldy or “opened the floodgates” to excessive litigation. To the contrary, the Court in *Renard v. Dade* fashioned a “more lenient” standard for the showing of special damages, a liberalization which actually promotes the *Boucher* Cause of Action, something the Court would hesitate doing had the *Boucher* Cause of Action proven unworkable. 261 So.2d 832, 838-39.

b) Recession from the *Boucher* Cause of Action Will Cause Injustice and Disruption

The second “special justification” enumerated in North Florida Women’s Health requires a demonstration that recession from the challenged precedent will not result in injustice and disruption. 866 So.2d at 637. This “special justification” (referred to hereinafter as the “Absence-of-Injustice-and-Disruption Special Justification” addresses the public’s reliance on legal precedent to conduct their affairs, recession from which precedent may well cause the public considerable prejudice due to the respective change in legal doctrine.<sup>22</sup> *Brown v. Nagelhout*, 84

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<sup>22</sup> This concern over reliance has given cause to the oft quoted dictum, “more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting).

So.3d 304, 309-10 (Fla. 2012). With the expansion of this Absence-of-Injustice-and-Disruption Special Justification, the Court now reviews generally the consequences which may follow from recession of precedent, a review which considers not only reliance issues, but also looks at the possible impact on other legal precedents or established practices, some of which, due to knock-on effects, may lie far afield. *Brown v. Nagelhout*, 84 So.3d 304, 309 (2012) (“[T]he impact of departing from precedent must be carefully assessed.... ”); *Robertson v. State*, 143 So.3d at 910. The presence of any such extenuating effects leading to injustice or disruption will rule out a finding that the Absence-of-Injustice-and-Disruption Special Justification exists and, thereby, inhibit recession from precedent under *stare decisis*.

A recession from the *Boucher* Cause of Action will prevent land owners from suing to enjoin municipalities to enforce zoning law privileges, a change in the law which will greatly diminish such owners’ ability to protect, in particular, the Single-Family Zoning Classification, a neighborhood organizational model recognized by courts as essential to residential communities.<sup>23</sup> *Village of Euclid, Ohio v. Ambler*

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<sup>23</sup> Since *Boucher* also enables victims of zoning violations to sue directly the zoning-law violator to enjoin the violative conduct, Petitioner argues that recession from the *Boucher* Cause of Action, insofar as such action permits equitable claims against municipalities, will not harm property owners. However, as Respondents point out in their pleadings, a civil lawsuit against zoning-law violators lacks the sting which municipalities can bring to bear through an exercise of their police powers. The slow-moving civil-law discovery process lacks the ability to prove violations of the

*Realty Co.*, 272 U.S. 365, 392 (1926). Furthermore, a recession from the *Boucher* Cause of Action could fortify an increasingly prevalent trend by executive branches to abandon the enforcement of laws and regulations which they disfavor, such as gun control and immigration restrictions. Courts have shown a hesitancy to recede from precedent where doing so could have wide ranging effects well beyond the challenged precedent.

That view would have this Court not only recede from [the challenged decision] and our numerous decisions that have relied on its analysis and holding, but also would have us recede from the long established constitutional principles that were applied in [the challenged decision].... Such action would wreak havoc with our law. *North Florida Women's Health*, 866 U.S. at 643 (Anstead, J., specially concurring.).

[T]he decision's close relation to a whole web of precedents means that reversing it could threaten others.... We would prefer not to unsettle stable law." *Kimble v. Marvel Entertainment LLC* at 458.

If Petitioner wishes to abolish or limit the current practice of zoning large swaths of its community as single-family, then it should show the political courage to do so by amending the local zoning laws rather than achieving surreptitiously the same effect (with inconsistent results) through a non-enforcement pact entered into by largely unelected officials.

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Single-Family Zoning Classification, since tenacious violators will simply move out occupants temporarily in order to frustrate discovery. Only unannounced inspections of the respective property by police officials will succeed in establishing such zoning violations. Appellate Ct. R 105-114. In any event, putting the cost of law enforcement on the victim has no precedent.

c) The Factual Premises Existing at the Time of the Court's Acknowledgement and Re-Acknowledgement of the *Boucher* Cause of Action Have Not Changed so as to Leave the Decision Utterly Without Legal Justification

The third “special justification” set out in *North Florida Women’s Health* for recession from precedent consists of a drastic change in the factual premises underlying the challenged decision, which change leaves such decision’s central holding utterly without legal justification (the “Change-in-Factual-Premises Special Justification”). *North Florida Women’s Health* at 637. From Respondents’ reading of the caselaw, the Change-in-Factual Premises Special Justification serves a different function than the “change in circumstances” ground for recession from precedent discussed above in Section II C (2) hereof at 27, since the fulfillment of one of the three possible special justifications must occur in addition to the establishment of one of the two alternative grounds (error in legal analysis or change in circumstances) for recession from precedent, a kind of one-two punch symmetry: first a showing of a ground for recession from precedent, followed by a demonstration of one of the three special justifications. See Sections II C and II D(1) hereof, at 21 and 30. Furthermore, the “change-in-circumstances” ground for recession targets different subject matter than does the “Change-in-Factual-Premises Special-Justification, the former concerned with changes in the applicable law, whereas the latter focuses on changes in societal circumstances which impacted on the court’s fashioning the challenged precedent. One of *Boucher*’s progeny (*Renard*

*v. Dade County*) clearly illustrates the Change-in-Factual-Premises Special Justification. There, the Court receded from precedent established in *Boucher* as to the demonstration of special damages (a prerequisite for the *Boucher* Cause of Action) on the grounds of changed factual premises.

The *Boucher* rule requiring special damages still covers this type of suit. However, in the twenty years since the *Boucher* decision, changed conditions, including increased population growth and density, require a more lenient application of that rule. The facts of the *Boucher* case, if presented today, would probably be sufficient to show special damage. *Renard v. Dade County*, 261 So.2d 832, 837-38 (1972).

The Court in *North Florida Women's Health* explained that the “changed factual premises” must constitute a precipitous factual upheaval (in order to sustain recession) and not derive from a technological or gradual evolution. 866 So.2d 612, 638 (“Both those changes are of a technical or evolutionary nature and are not the type of precipitous factual upheaval that would be required in order to render a prior decision of this Court utterly without legal justification.”).

Since, as explained immediately above, the Court has already modified the *Boucher* Cause of Action to reflect changes in factual premises, Petitioner faces an uphill battle in asserting other changes in factual premises have occurred warranting complete abrogation of the *Boucher* Cause of Action. Respondents concede that the rate of Single-Family Zoning Classification violations have skyrocketed in Respondents' neighborhood, with more than a half-dozen “group houses” now operating within a hundred-yard radius of Respondents' home. However, the current

social predicament as to safe and affordable housing does not appear to constitute a drastic change in factual premises giving rise to a special justification for recession from the *Boucher* Cause of Action.

3. The Gravity of the Error Allegedly Committed by this Court When Acknowledging and Re-Acknowledging the *Boucher* Cause of Action Would Not Reach the Level of “Unsoundness in Principle”

Whereas *North Florida Women’s Health* identifies those prejudicial effects of error which warrant recession from precedent, the Court’s analysis in *Brown v. Nagelhout* interjects criteria for determining the degree of error which warrants recession from precedent. 84 So.3d 304, 309 (2012) (“Stare decisis does not yield based on a conclusion that precedent is merely erroneous. The gravity of the error ... must be carefully assessed.”); *Robertson v. State*, 143 So.3d 907, 910 (Fla. 2014).<sup>24</sup> In focusing on the “gravity of error,” the Court identifies “unsoundness in principle,” as an aggravated form of error which justifies on its own recession. *Brown v. Nagelhout*, 84 So.3d at 309 (“In deciding whether to depart from a prior decision, one relevant consideration is whether the decision is ‘unsound in principle.’”); *Robertson v. State*, 143 So.3d at 910 (Fla. 2014) (“We have recognized sufficient gravity [of error] where the prior decision is ‘unsound in principle....’”). Petitioner seems to characterize as “unsound” the Court’s apparent determination in

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<sup>24</sup> The Court in *Robertson v. State* finds sound precedent impeding counsel’s ability to withdraw in death penalty cases, since such restriction avoids disruption and delay. 143 So.3d at 910.

*Boucher* and its progeny that a municipality's enforcement of zoning laws constitutes an operational act, which, under *Commercial Carrier*, does not benefit from either sovereign tort immunity or a categorical prohibition from judicial intervention. (Appellate Ct. R 36-40) Petitioner's "unsoundness" accusation enters the realm of the daring, given the flexibility which *Commercial Carrier* accords courts in distinguishing between policy-making/planning and operational acts. See Section, C (1) hereof at 23).

4. The Recent Pushback Against the Special-Justification Prerequisite Has Little Relevance to the Application of *Stare Decisis* to the *Boucher* Cause of Action

Recently, the Court (among others) has pushed back against the "special justification" prerequisite, in general, and, in particular, against the Court's formulation of specific, requisite "special justifications" in *North Florida Women's Health*. In the recent matter of *State v. Poole*, the Court criticized the *North Florida Women's Health* "special justification" test, arguing, instead, that error alone sufficed for recession from precedent.

[W]e are wary of any invocation of multi-factor *stare decisis* tests or frameworks like the one set out in *North Florida Women's Health*. They are malleable and do not lend themselves to objective, consistent, and predictable application.... Multi-factor tests or frameworks like the one in *North Florida Women's Health* often serve as little more than a toolbox of excuses to justify a court's unwillingness to examine a

precedent's correctness on the merits. 297 So.3d 487, 507 (Fla. 2020) ("Poole").<sup>25</sup>

Poole tracks in many respects the "error-alone-suffices" approach to recession of precedent adopted by Justice Scalia's concurring opinion in *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) ("Justice Marshall demands of us some 'special justification' – beyond the mere conviction that the rule of [the challenged precedent] significantly harms our criminal justice system and is egregiously wrong – before we can be absolved of exercising 'power, not reason.'").<sup>26</sup> Despite the Poole decision's

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<sup>25</sup> In support of its disapproval of *North Florida Women's Health's* "special justification" test, the Court in *Poole* cited four cases which supposedly had refused to rely on that test. However, Respondents' review of those cases shows all four cases recognize the strong presumption of validity arising out of *stare decisis* and three actually invoke, at least in part, the respective test in applying *stare decisis* in those matters: i) *State v. Sturdivant*, 94 So.3d 434, 440 (Fla. 2012) ("Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice."); ii) *West Miami Beach, LTD. v. Newport Operating Corp.*, 55 So.3d 567, 576 (Fla. 2010) ("We conclude that [the challenged precedent] has proven to cause an injustice in practice because it rests on an impractical legal fiction [which] ... has resulted in the inadvertent waiver of the valuable right to prejudgment interest..."); and iii) *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1131 (Fla. 2005) ("This Court has departed from precedent to correct legally erroneous decisions [citation omitted] when such departure is 'necessary to vindicate other principles of law or to remedy continued injustice' and when an established rule of law has proven unacceptable or unworkable in practice.").

<sup>26</sup> Despite Justice Scalia's concurring opinion, the majority opinion in *Payne v. Tennessee* conditions recession from precedent upon a showing of "special justification" along the lines specified in *North Florida Women's Health*. 501 U.S. at 829-30 ("[The challenged precedents] have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts."). Justice Souter's concurrence in *Payne v. Tennessee* contains a cogent articulation of this "error-plus-special-justification" standard embodied in the *stare decisis* doctrine: "I do not, however, rest my decision to overrule wholly on the

apparent repudiation of the “special justification” prerequisite, that decision concedes that courts must go beyond a mere determination of error before receding from precedent.

But once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent. 297 So.3d at 507.

Presumably, the Poole Court, after determining “obvious error,” would then undertake the kind of multi-part analysis set out in *North Florida Women’s Health*. Although the Court in *Poole* focuses on the possibility of the public’s reliance on the challenged precedent as a principal ground for foregoing recession, the Court has on other occasions recognized additional important considerations, most of which received attention in *North Florida Women’s Health*. See footnote 27 herein.

E. The *Boucher* Cause of Action Qualifies for Enhanced *Stare Decisis* Protection

As mentioned in Section II D (2)(b) above (pg. 35), the Court reluctantly recedes from precedent upon which the public has most likely relied in structuring its economic, business and personal dealings, under the motto that law first and foremost should promote stability, an attribute indispensable to the sustained growth and development of society. *Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla. 2012);

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constitutional error that I see in the cases in question. I must rely as well on my further view that [the challenged decision] sets an unworkable standard of constitutional relevance....” 501 U.S. 808, 839 (1991).

*North Florida Women’s Health*, 866 So.2d at 637 (“The doctrine of stare decisis ... is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries....”).

To ensure that law meets this vital “stability” objective, courts have identified two legal functions which have great import for the promotion of stability: the application of property and contract rights and the interpretation of statutes. When courts assume either of those legal functions (applying property/contract rights or interpreting statutes) they take great care not to disturb established legal precedent which prior courts have devised in the exercise of those same legal functions, since doing so risks undermining the foreseeability and predictability for which those legal functions serve. In order to afford those legal functions and the ensuing legal precedent sufficient protection to achieve the requisite levels of stability and predictability, courts have developed an enhanced *stare decisis* which (referred to by Justice Alito, in tongue-in-cheek, as “superduper” *stare decisis*<sup>27</sup>) benefits exclusively that precedent applying property/contract rights and interpreting statutes. *Patterson v. Mc Lean Credit Union*, 491 U.S. 164, 172 (1989) (“We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction.”); *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458

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<sup>27</sup> *Kimble v. Marvel Entertainment*, 76 U.S. at 471 (Alito, J., dissenting).

(2015) (“[W]e have often recognized that in just those contexts – ‘cases involving property and contract rights’ – considerations favoring *stare decisis* are ‘at their acme.’)). This “super-duper” protection comes over and above the “special-justification” requirement and applies even if property/contract rights and the interpretation of statutes play an ancillary role in the principal holding.

To reverse course, we require as well what we have termed a “special justification” – over and above the belief “that the precedent was wrongly decided.” ... What is more, *stare decisis* carries enhanced force when a decision [like the one at issue] interprets a statute ... [r]egardless whether our decision focused only on the statutory text or also ... on the policies and purposes animating the law.... Nor yet are we done, for the subject matter of the [challenged precedent, namely property and contracts] adds to the case for adhering to precedent.... So long as we see a reasonable possibility that parties have structured their business transactions in light of [the challenged precedent], we have one more reason to let it stand.... As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing [the challenged precedent]. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456-459 (2015).

1. The *Boucher* Cause of Action Enjoys Enhanced *Stare Decisis* Protection Since that Precedent Involves Property and Contract Rights

The enhanced *stare decisis* protection for precedent involving property and contract rights applies to the *Boucher* Cause of Action, despite Petitioner’s challenging that precedent on grounds of an alleged violation of the separation-of-powers doctrine, since a recession from the *Boucher* Cause of Action will deprive property owners of their principal avenue of defense against violations of zoning

laws, violations which often will considerably diminish the value of their property. Respondents concede that the separation-of-powers doctrine insulates municipalities' formulation of zoning policy from most forms of judicial intervention, but maintain that the separation-of-powers doctrine does not prohibit judicial review with respect to municipalities' refusal to enforce validly enacted zoning laws, review which, under the circumstances of this litigation, serves to protect property and contract rights. (Appellate Ct. R 56-59)

2. The *Boucher* Cause of Action Enjoys Enhanced *Stare Decisis* Protection Since that Precedent Involves the Interpretation of a Statute

Similarly, enhanced *stare decisis* protection for precedent interpreting statutes<sup>28</sup> also applies to Petitioner's challenge of the *Boucher* Cause of Action, since a decision to recede from the *Boucher* Cause of Action turns, in part, on the interpretation and application of the zoning laws, in particular, in this appeal, the

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<sup>28</sup> Courts show a particular willingness to grant enhanced *stare decisis* to the function of statutory interpretation since, not only does that function engender reliance, but also, presents a reduced risk of a lasting erroneous decision, insofar as the legislative branch can correct an erroneous statutory interpretation by appropriately amending the respective statute. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”); *Kimble v. Marvel Entertainment, LLC*, 576 U.S. at 457 (“*Stare decisis* carries enhanced force when a decision, like [here], interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees....”).

interpretation and application of Petitioner’s Ordinance §94-34(b)(2), which sets out the modalities for enforcing Petitioner’s zoning laws:

Where it is determined that a violation of this chapter [Chapter 94 – Zoning and Land Development Regulations] exists, the planning and zoning administrator or his designee shall notify the violator in writing and order compliance. The planning and zoning administrator or his designee shall order discontinuance of an illegal use of land, buildings, or structures; removal of illegal buildings or structures, or additions, alterations, or structural changes thereof; or discontinuance of any illegal work being done. If a violation of these regulations continues, the planning and zoning administrator or his designee shall commence appropriate legal action. Ordinance §94-34(b)(2).

Ordinance §94-34(b)(2) expressly rules out any discretion in connection with the application and enforcement of Petitioner’s zoning laws, a position which the Petitioner’s legislature apparently adopted in order to curtail municipalities’ application of local zoning laws in an inconsistent and arbitrary manner.<sup>29</sup> Where the respective legislative body expressly denies the executive branch any discretion in the application and enforcement of particular laws, courts should heed caution

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<sup>29</sup> Respondents’ research indicates that Ordinance §94-34(b)(2) came from a model zoning law drafted to reflect the concerns articulated by the Florida State legislature and this Court about municipalities’ arbitrary use of the zoning laws for personal and political gain. *Board of County Com’rs of Brevard County v. Synder*, 627 So.2d 469, 472-73 (1993) (“Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners have been critical of the local zoning system ... stat[ing] that ‘zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits.’”).

before overriding precedent which enables the public to compel the executive branch's enforcement of such laws. (Appellate Ct. R 36, 48-49)

In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, ... or where the later law has rendered the decision irreconcilable with the competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision. Our decision in [the challenged precedent] has not been undermined by subsequent changes or development in the law. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Kimble v. Marvel Entertainment, LLC*, 576 U.S. at 458.

Petitioner's attempt to paint the *Trianon Taxonomy* Language as "an intervening development of law" which has "removed or weakened the conceptual underpinnings from the" Boucher Cause of Action lacks merit, since *Trianon* and the *Trianon Taxonomy Language* have no impact on such cause of action limited to the realm of zoning laws. As explained above, the Court has in at least two decisions limited *Trianon's* effect (and, more specifically, the consequences of the *Trianon Taxonomy Language*) to the issue of the duty of care owed by municipalities under tort law, an issue which has no bearing on the separation-of-powers doctrine, sovereign tort immunity or the field of zoning laws. *Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla. 1988); *Wallace v. Dean*, 3 So.3d 1035, 1044 (Fla. 2009) ("As an initial point of departure, brief clarification is necessary concerning the differences between a lack of liability under established tort law and the presence of sovereign

immunity. When addressing the issue of governmental liability under Florida law, we have repeatedly recognized that a duty analysis is conceptually distinct from any later inquiry regarding whether the governmental entity remains sovereignly immune from suit notwithstanding the legislative waiver present in section 768.28....”). See Sections II B(2) and C(1) at 17 and 23.

Far from imposing an ad hoc, inflexible Single-Family Zoning Classification on a substantial proportion of the city, Petitioner’s zoning code provides for numerous exceptions to the Single-Family Zoning Classification, thereby permitting individual properties in single-family zoned sectors to adopt multi-family living arrangements without the need to obtain a one-off variance. In particular, Petitioner’s Ordinance §94-274 (28) permits the operation of Type I Group Homes (which category includes Adult Family-Care Homes) in single-family or multi-family districts without prior approval, provided the group home meets four requirements. (Trial Ct. R 26-38) The violator of the Single-Family Zoning Classification in this litigation (Ms. Miriam Galan) chose not to fulfill two of those four requirements and, in doing so, rendered herself ineligible for the respective exoneration from the Single-Family Zoning Classification pursuant to Ordinance §94-274 (28). (Trial Ct. R 26-38)

## CONCLUSION

Plaintiffs respectfully ask the Court to confirm the Fourth DCA Opinion reversing the trial court's Final Judgment dismissing as against Petitioner Counts I, II and III set out in the Complaint and remanding those three respective Counts for further proceedings in accordance with the view that *Trianon* does not prohibit on the grounds of the separation-of-powers doctrine courts from exercising subject matter jurisdiction over actions brought by private persons to enjoin municipalities to enforce zoning ordinances pursuant to *Boucher* and its progeny.

## CERTIFICATE OF SERVICE

RESPONDENTS HEREBY CERTIFY that a true and correct copy of the foregoing was served on December 2, 2020, by e-mail (via the Court's e-filing portal) upon Petitioner's counsel of record, Assistant City Attorney, Ms. K. Denise Haire, Office of the City Attorney, City of West Palm Beach, 401 Clematis Street, 5<sup>th</sup> Floor, West Palm Beach, FL 33401, upon counsel of record for the City of West Palm Beach, Mr. Joseph W. Jacquot, Gunster, Yoakley, Stewart, P.A. ([jjacquot@gunster.com](mailto:jjacquot@gunster.com)), upon counsel of record for the City of Miami, Mr. John A. Greco, Deputy City Attorney ([jagreco@miamigov.com](mailto:jagreco@miamigov.com)), upon counsel of record for the City of Coral Gables, Ms. Frances G. De La Guardia, Holland & Knight LLP ([frances.guasch@hklaw.com](mailto:frances.guasch@hklaw.com)), upon counsel of record for Florida League of Cities, Edward G. Guedes, Weis, Serota, Helfman ([eguedes@wsh-law.com](mailto:eguedes@wsh-law.com)) and upon counsel of record for the Miami Dade League of Cities, Sonja Dickens ([sdickens@miamigardens-fl.gov](mailto:sdickens@miamigardens-fl.gov)).

## CERTIFICATE OF COMPLIANCE

APPELLANTS HEREBY CERTIFY that the foregoing complies with the font requirements set out in Florida Rule of Appellate Procedure 9-210(a)(2). The text conforms with the fifty page limit pursuant to Florida Rule of Appellate Procedure 9-210(a)(5)(B).

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