IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1694

Second DCA Case No. 2D01-3055
(Times Publishing Company, Appellant, vs.
City of Clearwater, Florida, Appellee.)

STATE OF FLORIDA,

Petitioner,

vs.

CITY OF CLEARWATER, FLORIDA,

Respondent.
_____/

AMENDED
AMICUS CURIAE BRIEF OF PINELLAS COUNTY, FLORIDA
ON BEHALF OF
FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

CAROLE SANZERI
Senior Assistant County Attorney
FL Bar #0986770

MICHAEL A. ZAS
Senior Assistant County Attorney
FL Bar #0096120

Pinellas County Attorney's Office
315 Court Street
Clearwater, FL 33756
Telephone: (727) 464-3354
Fax: (727) 464-4147
Attorneys for Pinellas County on behalf of Florida Association of County Attorneys

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STATEMENT OF THE CASE AND FACTS

Amicus, the Florida Association of County Attorneys, Inc. (FACA), adopts the statement of the Case and Facts in Respondent's Answer Brief before the Second District Court of Appeal for the State of Florida.

SUMMARY OF ARGUMENT

Amicus adopts the brief of the Respondent, City of Clearwater, in its entirety. The Amicus urges this Court to uphold the District Court's ruling and answer the certified question in the negative.

Specifically the Amicus argues that requiring disclosure of non-public items merely by virtue of their location on a publicly owned computer system pursuant to the Public Records Act stretches that Act beyond the boundaries established for it by the Legislature. Furthermore, contrary to Petitioner's, State of Florida, argument, there is no logical legitimate or legal reason why an automatic feature placed on a computer program should convert what is not a public record under Florida law to a public record subject to disclosure under Chapter 119. The District Court properly interpreted the Public Records Act giving meaning to the clear, unambiguous terms of that Act adopted by the Legislature. Public policy requires that the Public Records Act not be expanded beyond its current boundaries by the Court but be given the interpretation intended by the Legislature. Accepting Petitioner's argument to the contrary is an encroachment of the Legislature's power to enact laws and is contrary to well established law and public policy. Therefore, the Amicus urges this Honorable Court to answer the certified question in the negative and uphold the District Court's ruling in its entirety.

ARGUMENT

I. ALL E-MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE NOT PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2001), AND ARTICLE I, SECTION 24(A) OF THE FLORIDA CONSTITUTION, MERELY BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT-OWNED COMPUTER SYSTEM, EVEN IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS THE EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E-MAILS.

Chapter 119, Florida Statutes (2001), defines a "public record." Specifically, §119.011(1) provides, "'Public records' mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."Fla. Stat. §119.011(1)(2001)(emphasis added). Section 119.011(2) further provides that, "'Agency' means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." Consequently, local Florida governmental entities and their employees are subject to Chapter 119.

As to the issue at bar, nothing in the statute suggests that every single item or bit of information within an agency's control is to be legally deemed a public record. In fact, in Chapter §119.011(1), the Legislature specifically states that to be a public record, the document, etc., must be "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

When the language of the statute is clear and unambiguous

and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. Rollins v. Pizzarelli, 761 So.2d 294, 297 (Fla. 2000). Amicus would submit that the language of §119.011(1) is clear and unambiguous and that language defining public record conveys a clear and definite meaning. Thus, this Court must give the statute its plain and obvious meaning: that unless related to official business or made or received pursuant to law or ordinance, a record merely in an agency's possession is not a "public record" under Fla. Stat. §119.011(1).

Furthermore, in interpreting §119.011(1), this Court must recognize that the Legislature not only defines and lists what materials constitute a public record but also includes specific limitations on the class of records which are public for purposes of that statute. Materials properly characterized as public records under §119.011(1) are limited only to those "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency". Fla. Stat. §119.011(1)(2001). This limiting verbiage cannot be ignored for convenience sake, but must be deemed to have some meaning. As this Court has stated "[i]n construing legislation, courts should not assume the Legislature acted pointlessly." City of North Miami v. Miami Herald Publishing Company, 468 So.2d 218 (Fla. 1985) at 220, citing, Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985). Additionally, in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., et al., 379 So.2d 633 (Fla. 1980), this Honorable Court stated that although the Legislature broadened existing law relating to public

records and access thereto in enacting the Public Records Act, it did not broaden it such that everything generated or received by a public agency is a public record.

In Shevin, this Court specifically stressed that "public records" under Chapter 119 are "those materials which constitute [r]ecords that is, materials that have been prepared with the intent of perpetuating or formalizing knowledge". Id. at 640. Clearly the knowledge perpetuated or formalized must be read to be that which is related to an agency's official business. Any broader reading would result in absurd consequences by granting public record status to all items in an agency's possession. This was noted by the trial court in its order and was reviewed and relied upon by the Second District Court of Appeal in its ruling. Giving this statute its plain and logical meaning must, therefore, result in a determination that an employee's "personal" materials, such as an e-mail not made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency, are not public records.

Obviously, the Legislature recognized that by sheer necessity, a public employee would, in limited instances, utilize a government-owned computer or other resources, such as their assigned desks, for personal reasons. Thus, in drafting the statute, the Legislature has in effect carved out a *de facto* exception as to what is and what is not a public record which exempts the subject personal materials. This is evidenced by the qualifying statutory language that to be a public record, a record must be "made or received pursuant to law or ordinance or in connection with the transaction of official business by any

agency". Again, this language was included to recognize the fact that just because something is made, transmitted, received or stored on a publicly owned computer or the creation, receipt or storage of it utilizes government resources, it does not automatically become a public record.

Contrary to what Petitioner would have this Court believe, ownership of the computer system on which an e-mail is transmitted or received is neither determinative nor relevant to the issue before this Court. Conversely, under Petitioners' rationale if an employee is allowed to work at home or another remote location while on business on his or her personal computer, then any work product, transactions, or documents created or resulting therefrom which relate to an agency's official business would have to be excluded from the definition of public record, since the computer used to create them is the employee's personal computer and is not publicly owned. Thus, ownership of the computer from which a document is generated or received is clearly not dispositive of this issue, nor should it even be a factor in this Court's analysis.

Additionally, the Respondent's, City of Clearwater, policy regarding its right, as an employer, to custody, control and inspection of e-mails is similarly irrelevant to the issue at hand. Whether records are public records under the statute is a purely legal determination which, pursuant to well-accepted rules of statutory interpretation must be based on the wording of the statute in question and not on any self-adopted local policy. See Rollins v. Pizzarelli, 761 So.2d 294 (Fla. 2000).

As this Court has recognized, the policies of agencies with regard to the records they maintain can neither affect nor trump the State law vis-à-vis public records. The law in the area of public records has clearly and correctly been preempted by the Legislature. Just as this Court struck down as unenforceable a city's policy limiting release of public records under Fla. Stat. Chapter 119 because the Legislature of the State has preempted regulation in the area of public records, it must disallow a policy of Appellee's from being used to alter existing law on the issue. Tribune Company v. Cannella, 458 So.2d 1075 (Fla. 1984).

Furthermore, since an agency has no power to keep that which is a public record from disclosure, it clearly follows that any policy it adopts cannot create public records from items that are not. Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977). While the City may choose to disclose the requested records, it is under no legal obligation to do so in response to a public records request, regardless of its internal policies.

Thus, Petitioner's argument that the location of a record or the policy of an agency is irrelevant to the determination under §119.011(1) of a record as a "public record", and it must fail.

Therefore, this Court should defer to the Legislature, which in its wisdom, created a clear definition of public record short of that which Petitioners would prefer and answer the certified question in the negative.

ARGUMENT

II. CHARACTERIZING E-MAILS AS PUBLIC RECORDS MERELY BY VIRTUE OF THE INCLUSION OF INFORMATION AUTOMATICALLY ATTACHED THERETO, BUT IN NO WAY USED BY THE AGENCY, IS CONTRARY TO LAW AND PUBLIC POLICY.

Petitioner, State of Florida, argues that every e-mail regardless of content and characterization under the law as a public or non-public record contains a public record: the “header”. Petitioner's

argument that the existence of such a "header" somehow changes the character of the underlying record into a public record or is itself a public record merely by virtue of its existence is fatally flawed. Petitioner fails to establish that this "header" meets the definition of a public record set forth in Chapter 119. Petitioner also fails to establish any logical, legitimate or legal reason why an automatic feature placed on a computer program should be read as converting what is not a public record under the legal statutory definition, to a public record subject to disclosure under Chapter 119.

While it may be true that the e-mail system employed by the City contains automatic features that capture information, for example, the "headers", this fact alone is not dispositive of the issue in the instant case. The "header" or any other piece of information that is automatically gathered or captured by a computer program does not in turn automatically become a public record just as writing on a piece of government stationary or letterhead or dictation onto a governmental furnished audiotape does not. It is only if an e-mail, other document or tape, etc. is "made or received pursuant to a law or ordinance or in connection with the transaction of official business by any agency" that such document is properly characterized and defined statutorily as a public record under Florida law. Fla. Stat. §119.011(1)(2001).

In support of its argument, Petitioner, State of Florida, attempts to equate the e-mail "headers" to phone logs or mail logs of agencies which are covered by the public records law. If phone logs are used to audit bills and make payments for telephone services, they are without doubt public records. However, they are not public records by virtue of their compilation or retention. They are public records in the example

above because they are being used “in connection with the transaction of official business of the agency”; in the payment of its bills. Besides, a phone log utilized to audit bills or confirm proper payment thereof contains no substantive record, personal or otherwise, of the ensuing conversation or who engaged in the conversation, but merely serves to track phone usage.

Petitioner further analogizes e-mail to a traditional mail log. However, e-mail is not like a traditional mail log in that the mail log does nothing more than track incoming or outgoing "traditional" mail. Second, the traditional mail log does not exist automatically as a feature of a software program. If it exists, it is because an employee created it, in the course of and execution of his public duties, "in connection with the transaction of official business", which would then make it a public record. Third, while a mail log is a device for tracking which could include the names of the senders' recipients, times and dates, etc., it and of itself does not contain content. Conversely, while an e-mail's automatic "header" by its very nature can track all of the above, if attached physically to the e-mail, it also contains content some of which could be personal in nature and thus, not a public record subject to disclosure.

Petitioner attempts to characterize the "headers" as a record of the use of government equipment. However, there is nothing in the record to establish, or even suggest, that the “headers” on the e-mails in question are used as a record of use of government equipment in connection with the transaction of

official business by the City. In fact, the record is completely devoid of any evidence which establishes or suggests that these “headers” the State is ready to label public records are used in any way at all by the City. For example, the record fails to contain any suggestion that the City of Clearwater utilized these "headers" as a log, as suggested, or to audit, track or retrieve information regarding computer usage or anything else. Merely because there is the potential to create a log out of the information is not enough to bring the information into the definition of public record. Likewise, there is nothing in the record suggesting that the “headers” are made or received pursuant to law or ordinance. Therefore, the "headers" do not fall within the definition of public record nor do they cause the substantive remainder of the e-mails in question to do so.

Petitioner also attempts to include the e-mails in the definition of public record by arguing that the City failed to cite an exemption to keep them from public disclosure under §119.011(1). However, this argument is inapplicable to the instant case. The City correctly did not argue an exemption as a "personal" e-mail does not fall within the definition of a public record. Thus, there is no reason to address whether they are properly exempted from a class to which they do not belong. Shevin v. Byron, 379 So.2d 633 (Fla. 1980). Absent a determination that the subject e-mails or other personal material is a public record, there is no need to look for an exemption to prevent their disclosure. Thus, in accordance with

the Second District Court of Appeal, this Court need not address the exemption issue.

Petitioner correctly points out that Florida Courts have consistently held that e-mail *may* be a public record, e.g. In re Amendments to Rule of Judicial Administration 2.051, 651 So.2d 1185 (Fla. 1995) (emphasis added). However, this of course is conditioned on whether the e-mail meets the statutory definition of a public record. Simply allowing the existence of automatically captured information to turn something that is not within the definition of a public record into a public record is adverse to public policy.

The public clearly has an interest in, and a right of access to, public records as defined by law. The public policy of the State supports open government whereby taxpayers are able to inspect records made or received in connection with the official business of any public body, officer or employee of the State. FLA. CONST. art. I, § 24. However, the public policy of the State cannot be extended or enlarged as Petitioner argues.

As this Honorable Court stated in a case involving the disclosure of personal items kept in public personnel records, "the right of access to personnel records is not the right to rummage freely through public employees lives". Michel v. Douglas, 464 So.2d 545 (Fla. 1985). Although this Court ruled that the records in question in that case were public records, the reason for that holding was not based on the agency's possession of the records, but on their inclusion as part of the public personnel records maintained for public business purposes. Any similar use is glaringly absent from the instant case. Following this same reasoning, it is clear that the District Court properly denied the Times the right to "rummage freely" through personal records merely held and not used by the City. The existing public records law, as written, protects the public's interest in maintaining the availability of information and access to records concerning the way the government is being run. It does not need to be expanded beyond its current borders in order to protect the public's interest. Moreover, as will be discussed infra, the judiciary does not have the right nor the power to rewrite the legislation.

The e-mails the Times seeks in the instant case would be public records under the purview of the

public records law if they were being used for any official business of the agency, such as compiling, tracking or auditing either the content or source of the e-mails received by the City's employees. If, however, as in the instant case, an agency merely maintains records or information on its server due to an automatic feature of software it has purchased, but in no way uses this information for official business or otherwise, it would be contrary to law to require its disclosure. In fact, requiring its disclosure would contravene clearly established legislative intent set forth in the public records statute.

Although, it is public policy of the State of Florida that all "public records" are open to the public, that policy cannot be extended to argue that all items in the possession of agency regardless of their use and regardless of whether they fit the definition of public record adopted by the legislature become public records merely by virtue of their location. In fact, the public will be hindered, not helped, if such a reading is supported. If this Court accepts the Times' argument that the location of information is dispositive on the definition of whether it is a public record, agencies will be required to spend more of their limited resources to avoid destroying items unconnected to the agency's official business which by virtue of their location have been deemed public. Such a determination would also require agencies to maintain these personal e-mails in such a way that they may be accessed if later requested. All of this will be required to be done at an unreasonable cost to the taxpayers.

III. THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE TO PREVENT THE COURT FROM ENCROACHING ON THE LEGISLATURE'S POWER TO ENACT LAWS.

This Court cannot, and should not do what the Legislature has not chosen to do. Gadd v. News Press Publishing Co., Inc., 412 So.2d 894 (Fla. 2nd DCA, 1982). Article II, Section 3, Florida Constitution states: "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 one of the branches unless expressly provided herein." As stated in State v. Barquet, 262 So.2d 431 (Fla.

1972), it is a general principle that the courts are law-interpreting and not lawmaking bodies, and thus they have no power to make the law. Consequently, lawmaking is a legislative function and not a function of the judiciary. Moreover, the courts have no power to amend, change, modify, rewrite, enlarge or overrule valid laws, even if they do not meet with the court's approval. See e.g., Sarasota Herald-Tribune v. Sarasota County, 632 So.2d 606 (Fla. 2nd DCA 1993); State v. Globe Communications Corp., 622 So.2d 1066 (Fla. 4th DCA 1993). When faced with an unambiguous statute, the courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or its reasonable and obvious implications; to do so would be an abrogation of legislative power. State v. Rife, 789 So.2d 288 (Fla. 2001).

In essence, Petitioners are asking this Honorable Court to impermissibly enlarge, extend and/or rewrite the public records law. Specifically, Petitioners argue that a public employees' personal e-mails meet the definition of a public record as defined in §119.011(1) despite the fact that it is neither made or received pursuant to law or ordinance nor in connection with the transaction of official business by any agency as statutorily required. In accepting Petitioner's argument, this Court would be encroaching on the legislative branch in violation of the Florida Constitution. Additionally, accepting Petitioner's argument would further result in a violation of the separation of powers doctrine. Thus, this Court should refrain from impermissibly enlarging, extending or rewriting the current law. Finally, any such substantive statutory changes properly lies within the province of the Legislature and the judiciary should refrain from usurping legislative power.

IV. ANSWERING THE CERTIFIED QUESTION IN THE NEGATIVE WOULD ENSURE THAT PUBLIC EMPLOYERS WERE NOT DIVESTED OF THEIR MANAGEMENT DUTIES AND THAT THE AUTHORITY OF THE COMMISSION ON ETHICS UNDER FLA. STAT. CHAPTER 112, ET. SEQ. IS NOT COMPROMISED.

Respondent, City of Clearwater maintains its employees pursuant to Section 2.282 of the City code which vests the authority and the duty of appointments, dismissals, suspensions or demotions of employees in the City Manager. CLEARWATER, FLA., Code § 2.282 (1980). Consequently it is solely the City Manager or his or her designee who is vested with the authority to apply the personnel rules and ensure that employees are properly appointed, disciplined or dismissed. Inherent in this duty is the authority to

determine when investigations into employee's performance or behavior are appropriate and the responsibility to conduct the same. Allowing the public records law to be read as suggested by the Petitioner and used as attempted in the instant case to ferret out employee misconduct would serve to vest the power of management over public employees in persons other than that to whom it is given in the law. Such a result would clearly be contrary to public policy.

Clearly, both management and public employees have a duty to answer to the citizenry of Florida at large. However, the duty to manage and monitor those employees is vested in public managers who answer directly or indirectly to either appointed or elected officials. Any misdeeds or misuse of governmental property by public employees is indeed a serious issue deserving of recognition. However, it would be inappropriate, and violate current law, to identify and correct such behavior by allowing citizens' investigations to be conducted under the auspices of public records law into non-public records. Upholding the District Court's opinion and answering the certified question in the negative does not, however, as Petitioner suggests leave the public at large without recourse in the event that there is a question about the improper or excessive misuse of public property.

The Legislature appropriately saw fit in Section 8(f) Article II of the Fla. Constitution and Chapter 112, Fla. Stat. to establish ethical constraints for public officers and employees and create a Commission on Ethics to enforce them. Fla. Stat. §112.313 (2001), et. seq. and §112.320 (2001) As specifically set forth in Fla. Stat. §112.311, the Legislature intended that the code "serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part." Moreover, the Commission on Ethics is charged by the Legislature with the enforcement of this code. The Commission on Ethics is vested with investigatory powers and, as part of its duties has authority to investigate alleged misuse of public property or other misdeeds by public employees. Fla. Stat. §112.322(1) (2001). These investigatory powers are even greater than the right to disclosure provided to the public as a whole in Chapter 119.

Consequently, the public is not without recourse in the event of suspected misuse of governmental resources as the Petitioners suggest. While the public is not legally authorized to go on a fishing expedition through non-public records automatically held in computer databases by public agencies under the guise

of a public records request, there is still a statutory mechanism available to remedy the misuse of public property. Any citizen may, and arguably has, the duty to report suspected misuse of public property to the Commission on Ethics, who the legislature has deemed the appropriate body to conduct more in-depth investigations than that which might be possible under the public records law.

Therefore, this Court should answer the certified question in the negative, refusing to extend, enlarge or rewrite §119.011(1). To do so would properly leave the duty of public employee management and discipline in the City of Clearwater, and the duty of investigations into alleged misuse of public property in those in whom the law vests it.

V. PUBLIC POLICY SUPPORTS A FINDING THAT RECORDS GENERATED BY PUBLIC EMPLOYEES' LIMITED INCIDENTAL PERSONAL USE OF THEIR AGENCIES' COMPUTER SYSTEMS ARE NOT PUBLIC RECORDS UNDER FLORIDA STATUTES, CHAPTER 119.

In its challenge to the City's policy of allowing incidental personal use of its computers, Petitioner argues that any use of the government provided computers by City employees is a violation of the proscription against the use of public resources for personal gain under Fla. Stat. 112.313(6). This argument is too simplistic. While it is true that misuse of public property is prohibited by Fla. Stat. §112.313(6), that prohibition cannot be read to support the proposition that any private use, even ancillary use, must violate the law. In fact, ancillary use may not only be permissible under the Code of Ethics, but may also be appropriate for public policy reasons.

In specific instances, public employers may not only wish to allow ancillary private use of public computer systems, but may actually wish to encourage it in limited instances. For example, employers offer benefit plans which they may wish employees to have the permission to access on-line. Pharmacy benefits are oftentimes included in benefit plans and, some benefit plans offer pharmacy by mail programs by which employees may obtain certain drugs at a reduced cost through the mail, or over the internet. These programs typically contain savings not only for the employee participant, but also for the employer. Therefore, it might be the decision of a public employer to allow and encourage use of computers provided at work for similar purposes. Clearly in such cases the information sent via e-mail, which might be both medical in nature (exempted specifically under the law from disclosure) and payment related (for which

there is no exemption) should not become a public record subject to disclosure merely because it was sent via public computer. Prohibiting or curtailing such use not only undermines the public employer's ability to provide benefits to their employees but possibly increases the cost of providing such benefits unnecessarily.

The same argument may be made with regard to deferred compensation benefits and retirement benefits available to public employees. Often there are websites that employees can access to make changes to their contributions and seek information. It is in the best interests of not only the employees, but also the public employers, to allow use of public resources for these types of use. Informed and proactive retirement planning provides a benefit to employees as well as to society as a whole. Thus, incidental use of government telephones or computers to access such benefit information should be encouraged and permitted. Without creating a new class of public records, any true misuse of public property can still be addressed, either through discipline by public employers, or through the investigation procedures of Florida Statutes, Chapter 112.

CONCLUSION

For the foregoing reasons, Amicus urges this Honorable Court to answer the certified question in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of September, 2002, the original and seven copies of the foregoing were served on Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, by regular

U.S. mail; and copies served by regular U.S. mail upon Thomas E. Warner, Solicitor General, and Louis F. Hubener, Deputy Solicitor General, on behalf of Robert A. Butterworth, Attorney General, Office of the Attorney General, The Capitol – PL01, Tallahassee, FL 32399-1050; AND George K. Rahdert, Esq., Alison M. Steele, Esq., and Penelope T. Bryan, Esq., of Rahdert, Steele & Bryan, P.A., 535 Central Avenue, St. Petersburg, FL 33701; AND Pamela K. Akin, City Attorney, and Leslie K. Dougall-Sides, Assistant City Attorney, City of Clearwater, P.O. Box 4748, Clearwater, FL 33758; AND Honorable James Birkhold, Clerk, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802-0327; AND Laura Jo O. Thacker, Esq., President, Florida Association of County Attorneys, P.O. Box 549, Tallahassee, FL 32302.

_____
CAROLE SANZERI
Senior Assistant County Attorney
FL Bar #0986770

_____
MICHAEL A. ZAS
Senior Assistant County Attorney
FL Bar #0096120

PINELLAS COUNTY ATTORNEY'S OFFICE
315 Court Street
Clearwater, FL 33756
727) 464-3354
Attorneys for Amicus Curiae

CERTIFICATE OF TYPE AND STYLE

The undersigned do hereby certify that this Brief used Courier New 12-point font, and does hereby comply with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as recently amended.

_____
CAROLE SANZERI
Senior Assistant County Attorney
FL Bar #0986770

_____
MICHAEL A. ZAS
Senior Assistant County Attorney
FL Bar #0096120

PINELLAS COUNTY ATTORNEY'S OFFICE
315 Court Street
Clearwater, FL 33756
(727) 464-3354

Attorneys for Amicus Curiae