IN THE SUPREME COURT OF FLORIDA
CASE NO.SC03-520

SUNSET HARBOUR NORTH
CONDOMINIUM ASSOCIATION
and STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellants

vs.

JOEL W. ROBBINS, as Property
Appraiser of Dade County, Florida

Appellee.

_____/

**BRIEF OF AMICI CURIAE**
**FLORIDA ASSOCIATION OF COUNTIES,**
**FLORIDA ASSOCIATION OF COUNTY ATTORNEYS AND**
**FLORIDA LEAGUE OF CITIES**

On Appeal From the
Third District Court of Appeal
Case Nos. 3D02-2316 and 3D02-2258

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## STATEMENT OF THE CASE AND FACTS

Amici adopts the Statement of the Case and Facts of the Appellee, JOEL W. ROBBINS, in this appeal.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Third District Court of Appeal's decision below, declaring section 192.042(1), Florida Statutes, unconstitutional as violating Article VII, section 4, Florida Constitution (1968). Article VII, section 4 of the Florida Constitution, mandates that all property be assessed at its just value for ad valorem taxation purposes, with limited exceptions, such as agricultural land. Because this constitutional provision specifically mentions certain classifications of property that may be treated differently, the courts have held that the Legislature may not craft other classifications of property and accord them different tax treatment.

However, this differing treatment is precisely what the Legislature did when it adopted section 192.042(1), Florida Statutes, which provides that improvements to properties not substantially complete on January 1 must be assessed at no value. Such treatment is unconstitutional under the 1968 Florida Constitution.

While the Legislature is prohibited from creating classifications for taxation, under Article VII, section 4, Florida Constitution (1968), the Legislature is specifically empowered to prescribe regulations to secure just value. Although "just value" is not defined in the Florida Constitution, the Florida courts have long equated just value with fair market value. It has been asserted that section 192.042(1), Florida Statutes, is not a prohibited "classification," but is a regulation designed to secure just value. However, rather than securing just value, this statute mandates that improvements, with substantial value in the marketplace, be assessed at no value. This statute, whether deemed a classification or a regulation, shields a large amount of improved property from ad valorem taxation and shifts the burden of taxation from owners of not substantially complete structures to other property owners.

**STANDARD OF REVIEW**

The question of whether a state statute is constitutional is a question of law entitled to de novo review. See City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002).

## ARGUMENT

### I. SECTION 192.042(1), FLORIDA STATUTES, WHICH MANDATES THAT IMPROVEMENTS THAT ARE NOT SUBSTANTIALLY COMPLETE ON JANUARY 1 HAVE NO VALUE FOR AD VALOREM TAXATION PURPOSES IS UNCONSTITUTIONAL.

The Florida judiciary is charged with upholding the Florida Constitution. Although the courts should construe the acts of the Florida Legislature in harmony with the Florida Constitution whenever possible, the courts are likewise constrained to "strike down those acts of the legislature which violate our Constitution." See ITT Community Development Corp. v. Seay, 347 So. 2d 1024, 1029 (Fla. 1977). When the Legislature transcends its taxing power and violates a limitation placed by the Florida Constitution, the judiciary has a duty to declare the legislative act invalid.

The Third District Court of Appeal has now twice performed its duty by striking down section 192.042(1), Florida Statutes, as violating the just valuation provisions of Article VII, section 4 of the Florida Constitution (1968). See Sunset Harbour North Condominium Association v. Robbins, 837 So. 2d 1181 (Fla. 3rd DCA 2003); Fuchs v. Robbins, 738 So. 2d 338 (Fla. 3rd DCA 1999). These decisions were correct and the decision below should be affirmed by this Court.

### A. Separate Standards of Valuation May Only Be Established For Those Classifications Of Property Specifically Enumerated In Article VII, Section 4, Florida Constitution.

Prior to 1968, the Florida Legislature was accorded wide discretion in the valuation of property for ad valorem taxation purposes. Under the 1885 Florida Constitution, the Legislature's valuation authority was found in Article IX, section 1. This provision read, in part:

> The Legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purpose.

Art. IX, § 1, Fla. Const. (1885). Under this provision of the 1885 Constitution, the Legislature had the power to create classifications of property that could be taxed on different bases so long as that classification was reasonable. See Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965).

However, during the 1968 constitutional revision, the Constitutional Revision Commission evaluated the 1885 Constitution and changed, among other provisions, Article IX, section 1 of the 1885 Constitution. The Revision Commission's change to this section

was then approved by the people of the State of Florida. The new valuation provision, Article VII, section 4, of the Florida Constitution of 1968, read:

> By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:
>
> (a) Agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.
>
> (b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value.

Art. VII, § 4, Fla. Const. (1968). Since its original enactment in 1968, Article VII, section 4 has been amended several times to provide for additional classifications of property that could be valued at less than just valuation for ad valorem taxation purposes. For example, the Legislature amended the just valuation provision to provide that "land producing high water recharge to Florida's aquifers" may be classified by general law and assessed solely on the basis of character or use. See Art. VII, § 4(a), Fla. Const. Additionally, a citizen's initiative petition added subsection (c), which modified just valuation for homestead property:

> (c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein . . . .

Art. VII, § 4(c), Fla. Const. Most recently, the historical property amendment was passed to provide a classification of property which may be assessed at less than just value. This provision was added to the Florida Constitution after being proposed by the Constitutional Revision Commission and approved by the voters in 1998:

> (d) The legislature may, by general law, for assessment purposes and subject to the provisions of this subsection, allow counties and municipalities to authorize by ordinance that historic property may be assessed solely on the basis of character or use. Such character or use assessment shall apply only to the jurisdiction adopting the ordinance. The requirements for eligible properties must be specified by general law.

Art. VII, § 4(d), Fla. Const.

As illustrated above, while both the 1885 and the 1968 provisions grant the Florida Legislature the power to prescribe regulations to secure just value, the 1968 revision specifically enumerated certain classifications of property -- for example, agricultural land -- that could be valued at less than just value for ad valorem taxation purposes. This additional language that specified the classifications of property that may be

treated differently for ad valorem taxation purposes has been interpreted by the Florida courts as limiting the Legislature's power to create classifications for taxation purposes. The maxim of statutory interpretation expressio unius est exclusio alterius -- the expression of one thing is the exclusion of another -- prevents the Legislature from enacting additional property classifications. Additionally, the fact that Article VII, section 4 has been amended several times since its original enactment in 1968 to include additional classifications is further recognition that the Legislature may not create classifications for taxation purposes unless accomplished by specific constitutional amendment.

For example, in Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1973), this Court struck a taxing statute as violating Article VII, section 4 of the Florida Constitution. The statute at issue provided that lands platted as lots would be valued for tax assessment purposes on the same basis as unplatted acreage of similar character until 60 percent of the individual lots had been sold. The Supreme Court determined that this statute violated the just valuation requirements and, in doing so, specifically remarked on the change in the 1968 revision.

> This section [Article VII, section 4, Florida Constitution (1968)] is different from the prior "just valuation clause" contained in Article IX, Section 1 of the 1885 Florida Constitution, in that the two subsections were added by the 1968 revisers. Apparently the revisers felt that the four classes of property mentioned in these two subsections should be valued according to different standards than all other property. The rule expressio unius est exclusio alterius applies, however, so that by clear implication no separate standards for valuation may be established for any other classes of property.

Id. at 434 (emphasis added). Thus, the new 1968 Constitution has removed from the Legislature the power to make classifications of property to be assessed under different valuation standards. Id. Accordingly, this Court found that the subject statute was an unconstitutional classification and rejected the argument that the statute was merely a regulation designed to secure just valuation.

> We find it impossible to consider Fla. Stat. s. 195.062(1), F.S.A., as establishing a proper valuation criterion. The statute does no more than establish a classification of property to be valued on a different standard than all other property. Under the 1968 Constitution, Article VII, Section 4, this is no longer within the prerogative of the legislature to do.

Id. at 435.

This Court later restated and elaborated on this reasoning in Williams v. Jones, 326 So. 2d 425 (Fla. 1975). The question posed was whether the Legislature had the

constitutional power to treat leasehold interests in public lands as real property for ad valorem tax purposes. The Court upheld the leasehold classification because it forced the lessees to pay their fair share of the tax burden and resulted in just valuation for tax purposes. Id. at 430. The Court also directly acknowledged that Article VII, section 4 of the 1968 Florida Constitution, operated as a limitation on the Legislature.

> The limitation imposed by the foregoing section was clearly intended to be a check upon the Legislature so as to prohibit it from classifying property for ad valorem taxation in such a manner as to result in a valuation of any class of property at less than just value, subject to the provisos of subsections (a) and (b). In short, the clear intent of the revisers of the Constitution was to prohibit the Legislature from making only those classifications which would result in some property being taxed at less than its just value, except for the categories enumerated in subsections (a) and (b).

Id. (emphasis added).

Thus, under the provisions of Article VII, section 4 of the Florida Constitution of 1968, the Legislature is prohibited from creating any classifications of property for ad valorem taxation that would result in less than just valuation, except for those classifications specifically described in the accompanying subsections. Id. at 431. See also Valencia Center, Inc. v. Bystrom, 543 So. 2d 214 (Fla. 1989) (noting that

legislature cannot establish different classifications of property for tax purposes other than those enumerated in Article VII, section 4 of the Florida Constitution); ITT Community Development Corp., 347 So. 2d at 1026 (holding that alternative method of valuation whereby properties are auctioned 10 months after January 1 violates Article VII, section 4, Florida Constitution, because it does not arrive at just valuation on the taxing date).

In the present case, as in Interlachen, Williams, Bystrom and ITT Community Development, the Legislature created a classification of property – structures not substantially complete by January 1. The challenged statute, section 192.042(1), Florida Statutes, states:

> All property shall be assessed according to its just value as follows:
>
> (1) Real property, on January 1 of each year. Improvements or portions not substantially complete on January 1 shall have no value placed thereon. "Substantially completed" shall mean that the improvements or some self-sufficient unit within it can be used for the purpose for which it was constructed.

§ 192.042(1), Fla. Stat. Clearly, this statute has established a separate standard of value for a class of property – property not substantially complete on January 1. The

mandate that this class of property "shall have no value placed thereon," does not operate to secure just value. On the contrary, in some instances it directs the property appraisers of the state to disregard obviously valuable improvements, resulting in a valuation for ad valorem taxation purposes that is less than just value or fair market value. Accordingly, as in Interlachen, this statute violates Article VII, section 4 of the Florida Constitution (1968).

### B. Even If The Substantially Complete Statute Is A Regulation That The Legislature Is Empowered To Prescribe, It Does Not Secure Just Valuation And, Thus, Is Unconstitutional.

In Fuchs and as adopted in the case below, the Third District Court of Appeal correctly held that section 192.042(1), Florida Statutes, is unconstitutional, even if it is deemed a legislative regulation, because it fails to secure "just value." Article VII, section 4 of the Florida Constitution of 1968, provides that the Florida Legislature must prescribe regulations to secure a just valuation of all property for ad valorem taxation. See Art. VII, § 4, Fla. Const.; see also § 193.011, Fla. Stat. (factors to consider in deriving just valuation).

It is argued that section 192.042(1), Florida Statutes, is such a regulation. Appellant, Sunset Harbour North Condominium Association, asserted that while the Florida Legislature may be prevented from deriving new classifications for ad valorem taxation purposes, the Legislature is not prevented from prescribing regulations, such as the substantially complete provisions of section 192.042(1), Florida Statutes. The Third District Court of Appeal correctly dismissed this argument because section 192.042(1) does not secure just value and even authorized regulations, as opposed to prohibited classifications, must secure just value. This statute allows property with some value to completely escape taxation.

"Just value" is not defined in the Florida Constitution, however, the Florida courts have provided much guidance on just valuation. Just value has been equated with fair market value. See Bystrom v. Valencia Center, Inc., 432 So. 2d 108, 110 (Fla. 3rd DCA 1983). The Supreme Court of Florida has defined "just value" to be that price which a willing buyer, who is not obliged to buy, would pay a willing seller, who is not under duress to make a sale. See Southern Bell Telephone and Telegraph Co. v. County of Dade, 275 So. 2d 4 (Fla. 1973).

Based on these definitions, section 192.042(1), Florida Statutes, does not secure just valuation. An improvement under construction will have some value. Merely because a structure is under construction does not make it worthless. A willing buyer and a willing seller would undoubtedly both place at least some value on the structure, and the property appraisers of the State of Florida are more than able to determine the value of a building that is being constructed or renovated. Further, as was discussed in the Fuchs proceedings, there is a market for not substantially complete property; in Fuchs, the Miami Beach Ocean Resort purchased the challenged property when it was not substantially complete in order to renovate the structure. See Fuchs, 738 So. 2d at 342-43.

As a practical matter, the substantially complete statute shields a large amount of property from the payment of ad valorem taxes. By allowing property that is not substantially complete to escape taxation until the next January 1 when it may be

completed, the Legislature has created an unconstitutional tax break and unfairly shifted the costs of providing governmental services to other tax payers.[1]

A fair approximation of the dollar amount of this lost tax revenue can be calculated by referring to the official state estimates from a legislative proposal that would have removed the assessment limitation on properties not substantially complete as of January 1. See Fla. SB 1356, § 2 (2003) (proposed amendment to Fla. Stat. § 192.042(1)). According to official state estimates, the removal of the January 1 substantially complete provision would subject an additional $5 billion in new construction to ad valorem taxation each year. Further, it was estimated that the passage of proposed Senate Bill 1356 would have generated additional ad valorem tax revenue at current millage rates of $44.5 million annually for counties, $13.7 million annually for municipalities and $53.4 million annually for school districts. See Fla. S. Comm. on

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[1]See Collier County v. State, 733 So. 2d 1012 (Fla. 1999). In this case, Collier County attempted to compensate for the substantial loss of revenue due to section 192.042(1), Florida Statues, by enacting the "interim governmental services fee," which was deemed unconstitutional by this Court. The constitutionality of section 192.042(1) was not at issue in that case and this Court did not rule on it. Id. at 1015.

Comprehensive Planning, SB 1356 (2003) Staff Analysis, 5-6 (April 7, 2003). A copy of the Staff Analysis for proposed Senate Bill 1356 is attached hereto as Appendix A.

Due to these lost revenues, the substantially complete statute has the effect of shifting the burden of ad valorem taxation from owners of structures under construction to owners of other property. When adopting a budget, local governments produce ad valorem tax revenue by applying a millage rate against the aggregate taxable value of all the properties in the ad valorem tax base. See § 200.069, Fla. Stat. By operation of the substantially complete statute, the aggregate taxable value does not include the value of property not substantially complete. Consequently, for those local governments that are not at their millage caps, the millage rates applied against the other property must be increased to produce the same amount of ad valorem tax revenue as may be produced from an ad valorem tax base that includes property not substantially complete.[2] Thus, the burden of ad valorem taxation falls more heavily upon the owners of other property

[2]County, municipal and school millage rates are capped by the Florida Constitution at 10 mills each, unless otherwise set by the Legislature. Special districts may levy millage at a rate authorized by law and approved by the voters. See Art. VII, § 9(b), Fla. Const.

to pay for the relief granted by the statute to the owners of not substantially complete structures.

Accordingly, rather than securing just valuation, section 192.042(1), Florida Statutes, allows valuable improvements to escape taxation and shifts the burden of government from the owners of not substantially complete structures to the other property owners. "Democratic philosophy mandates that every taxpayer be treated consistently, and that everyone contribute his fair share, no more and no less, to the tax revenues." ITT Community Development Corp., 347 So. 2d at 1028. The owners of not substantially complete property are getting a free ride on the backs of other property owners.

> [T]his is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by Section 1, Article IX of the Constitution. Courts have no more important function than to direct the current of the law in harmony with sound democratic theory.

Williams, 326 So. 2d at 429 (quoting Bancroft Inv. v. City of Jacksonville et al., 27 So. 2d 162 (Fla. 1946)). Whether it is dubbed a "regulation" or a "classification," section 192.042(1), Florida Statutes, not only violates the just valuation provisions of the Florida Constitution, but it also does injustice to our democratic theory of government.

Accordingly, because the Florida Legislature has transcended its taxing authority, this Court must uphold the Third District Court of Appeal's decision to strike section 192.042(1), Florida Statutes, as unconstitutional. .

### C. The Seacoast Towers Case And Its Progeny Are Not Controlling Here.

Despite the clear direction of the Supreme Court of Florida in Interlachen, it has been argued that Culbertson v. Seacoast Towers East, Inc., 212 So. 2d 646 (Fla. 1968) and its progeny, Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), are controlling on the constitutionality of section 192.042, Florida Statutes. However, in the present matter the Third District Court of Appeal correctly adopted its previous reasoning in Fuchs v. Robbins, declaring that the Seacoast Towers decision was no longer viable because the "legal logic behind Seacoast, and L. Maxcy[3] as well, was ousted in 1968 when a new state constitution was adopted by the people." Fuchs v. Robbins, 738 So. 2d 338 (Fla. 3rd DCA 1999) (en banc). As recognized by the Third District Court in Fuchs

[3]L. Maxcy, Inc. v. Federal Land Bank of Columbia, 111 Fla. 116, 150 So. 248 (Fla. 1933) (Supreme Court concluded under the provisions of the 1885 Florida Constitution that the legislature could free immature fruit trees from taxation pursuant to its reasonable tax classification powers).

and adopted in the case below, the Seacoast Towers case was decided under the 1885 Florida Constitution and its drastically different taxation provisions; therefore, it is not applicable after the 1968 constitutional revision.

The Seacoast Towers case involved a challenge to the constitutionality of the substantially complete statute, section 193.11(4), Florida Statutes, under the 1885 Florida Constitution. This section is an earlier version of the current section 192.042, Florida Statutes, and provided as follows:

> All taxable lands upon which active construction of improvements is in progress and upon which such improvements are not substantially completed on January 1, of any year shall be assessed for such year, as unimproved lands. Provided, however, the provisions hereof shall not apply in cases of alternation or improvement of existing structures.

Seacoast Towers, 212 So. 2d at 647 (citing section 193.11(4), Fla. Stat.). Without much discussion, the court found the separate classification of property was constitutional because, under the 1885 Florida Constitution, the Legislature was given the authority to tax different classes of property differently so long as the classification was reasonable. See Lanier, 175 So. 2d at 521. In the Seacoast Towers case the court found there was a reasonable relationship between the classification and the Legislature's

power to prescribe regulations to secure just valuation. Id. at 647. Thus, the Seacoast Towers decision may have been correctly decided under the 1885 Florida Constitution. However, given the drastic changes in the Legislature's power to classify property for just valuation purposes under the 1968 Constitution, the reasonable relationship test in Seacoast Towers is no longer viable.

Given the Seacoast Towers case is no longer viable under the 1968 Florida Constitution, any reliance on the Yankee Clipper case in support of section 192.042(1), Florida Statutes, is equally unpersuasive because Yankee Clipper expressly relied on the reasoning of the Seacoast Towers case. In the Yankee Clipper case the Broward County Property Appraiser challenged section 192.042, Florida Statutes, as violating the just valuation provisions of the Florida Constitution. The Fourth District Court of Appeal rejected this argument and relied on two cases for support: Seacoast Towers and Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).[4]

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[4]Lehnhausen v. Lake Shore, is equally inapplicable to the determination of whether Article VII, section 4, Florida Constitution (1968), has been violated. The Lehnhausen case merely found that all taxation classifications must be reasonable in order to comport with the strictures of the Equal Protection Clause of the United States Constitution. The case did not involve the Florida Constitution, it contains no discussion of the limitations placed upon the Florida Legislature's ability to create

Neither of these cases was decided under Article VII, section 4 of the 1968 Florida Constitution. Rather than analyzing the new just valuation provision of the 1968 Constitution, the Fourth District Court of Appeal merely declared, "The constitutional change in 1968 is insignificant." Yankee Clipper, 427 So. 2d at 384 n. 3. As acknowledged in Talbot "Sandy" D'Alemberte's official comment on Article VII, section 4, Florida Constitution (1968), "The new section dealing with assessment of property contains numerous changes from the old provision which directed the Legislature to prescribe regulations to secure a just valuation of all property . . ." Art. VII, § 4, Fla. Const. commentary (1968). In fact, the Fourth District Court's conclusion that the 1968 revision is "insignificant" is directly contrary to binding precedent from this Court. See Interlachen, 304 So. 2d at 434; Williams, 326 So. 2d at 430. That the Yankee Clipper decision is in error is especially apparent given that the Supreme Court of Florida had already held in both Interlachen and Williams that the Legislature was prohibited from crafting new classifications of property for ad valorem tax purposes under the 1968

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taxation classifications by Article VII, section 4, Florida Constitution (1968), and, in fact, the Lehnhausen case did not even originate in Florida.

Florida Constitution. Interestingly, the Yankee Clipper Court did not cite or attempt to distinguish either of these binding precedents.

Because the Seacoast Towers case was decided under the 1885 Florida Constitution and the Yankee Clipper case was based on outdated and inapplicable law, the reasoning in both cases should not be followed. The Third District Court in the present case was correct in not relying on this line of cases. Rather, the new interpretation of Article VII, section 4 of the 1968 Florida Constitution, which was announced in Interlachen and Williams, should control the determination that section 192.042(1), Florida Statutes, is unconstitutional.

## CONCLUSION

The Florida courts are obligated to "strike down those acts of the legislature which violate our Constitution." ITT Community Development Corp., 347 So. 2d at 1029. The substantially complete statute, section 192.042(1), Florida Statutes, does just that. By mandating that real property improvements that are not substantially complete as of January 1 to have no value placed on them, this statute violates the just valuation requirements of Article VII, section 4, Florida Constitution (1968). The Third District Court of Appeal performed its duty by striking this statute as unconstitutional. Accordingly, this Court should affirm that decision in its entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was sent by U.S. Mail to MARK T. ALIFF, ESQ., Assistant Attorney General and ERIC J. TAYLOR, ESQ., Senior Assistant Attorney General, Office of the Attorney General, The Capitol - Tax Section, Tallahassee, Florida 32399-1050; THOMAS W. LOGUE, ESQ., Assistant County Attorney, Stephen P. Clark Center, Suite 2810, 111 Northwest First Street, Miami, Florida 33128-1993; ARNALDO VELEZ, ESQ., 35 Almeria Avenue, Coral Gables, Florida 33134; MITCHELL A. FELDMAN, ESQ., 1021 Ives Dairy Road, Suite 111, Miami, Florida 33179; DAVID L. POWELL, ESQ., and VICTORIA L. WEBER, ESQ., Hopping, Green and Sams, Post Office Box 6526, Tallahassee, Florida 32314-6526; and JOSEPH C. MELLICHAMP, III, ESQ., Carlton Fields, 215 South Monroe Street, Suite 500, Tallahassee, Florida 32301, this 24th day of June, 2003.

Heather J. Encinosa

## CERTIFICATION OF TYPE SIZE AND STYLE

The undersigned hereby certifies that this brief of The Florida Association of Counties, the Florida Association of County Attorneys and the Florida League of Cities as amici curiae is submitted in 12 point Courier New.

Heather J. Encinosa

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