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**IN THE SUPREME COURT OF FLORIDA**

Case No. SC04-1825

Lower Tribunal No. 4D03-3268

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McKENZIE CHECK ADVANCE OF FLORIDA, LLC,d/b/a NATIONAL CASH  
ADVANCE,STEVE A. MCKENZIE and BRENDA G. MCKENZIE,

Petitioners,

vs.

WENDY BETTS, on behalf of herself and all others, similarly situated,

Respondent.

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**AMENDED BRIEF OF AMICUS CURIAE,  
THE FINANCIAL SERVICE CENTERS OF FLORIDA, INC.,  
IN SUPPORT OF PETITIONERS**

**FILED BY THE CONSENT OF ALL PARTIES**

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**SUMMARY OF ARGUMENT**

In 1994, the Florida Legislature adopted the state's Money Transmitters Code, Ch. 560, Fla. Stat. (Supp. 1994) (the Code). The Code required every business that provided currency in exchange for a check to register as a check casher, § 560.303(1), Fla. Stat. (Supp. 1994). Among other constraints, the Code expressly capped the fees that check cashers could charge for their services, e.g., the fee for cashing a personal check was capped at the greater of 10 percent of the face amount of the check or \$5. § 560.309(4)(c), Fla. Stat. (Supp. 1994).

Nothing in the Code limited the definition of check casher or cashing so as to exclude deferred presentment transactions or any other variant of check-cashing. The Code did not require the check casher to deposit the check. The Code did not prohibit a check casher from holding the check and allowing the customer to later redeem it for cash or redeem it with another check.

In early 1995, amicus curiae in this case asked the agency charged with applying and interpreting the Code, the Department of Banking and Finance, to advise whether

deferred presentment transactions were authorized under that law. The Department issued an advisory letter concluding that such transactions were authorized if conducted pursuant to the same Code requirements applicable to all other check-cashing transactions, including the Code's cap on fees.

This 1995 Department advisory letter was followed by Department rulemaking under the Code in 1997. These rules clearly provided for deferred presentment check-cashing. The Code's authorization of deferred presentment check-cashing was confirmed yet again by the Department in a 1998 advisory letter, as well as by the Florida Attorney General in 2000. In 2001, the Department's rules providing for deferred presentments were held valid and reasonable interpretations of the Code by an Administrative Law Judge. In 2002, Florida's Fifth District Court of Appeal also held that the Code authorized deferred presentment check-cashing.

For 10 years now, hundreds of Florida check cashing outlets have operated under the Code and the Department's advisory letters and rules, entering into thousands of deferred presentment transactions and providing huge sums of immediate cash to their customers. Now, after all of this has occurred, the Fourth District Court of Appeal has thrown the long established history under the Code into chaos and declared all of these transactions violative of Florida's usury laws.

As a result, Florida check cashers, who wanted nothing more than to operate within the confines of the law and the Department's regulations, will be subjected to

potentially ruinous civil damages and possible criminal sanctions. The Fourth District's decision in this case must be reversed, both as a matter of law and as a matter of fundamental fairness.

## **ARGUMENT**

### **I. Amicus Curiae, The Financial Service Centers of Florida, And Its Interest In This Case.**

The Financial Service Centers of Florida, Inc. (the AFSCF@), was founded in March 1990 as the Florida Check Cashers Association, Inc. (the AFCCA@).<sup>1</sup> The FSCF was formed to educate members, legislators, and the community on the check cashing industry and to foster industry communication and compliance with government regulations.

Today, the FSCF has about 60 owner members, with over 450 member stores and 4,000 employees throughout the state of Florida. Although there are a few larger chain operations in the state, most FSCF members are smaller local businesses who operate between one and three neighborhood check-cashing facilities.

The neighborhood financial service centers represented by the FSCF provide services such as check cashing, deferred presentment check cashing, money orders,

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<sup>1</sup> The name of the organization was changed to the Financial Service Centers of Florida, Inc., in late 1999.

money wire transfers, bill payments, cellular and internet service, and pre-paid credit cards to 2.5 million Florida customers monthly.<sup>2</sup>

According to statistics compiled by the FSCF in 2000, customers of our neighborhood financial service centers have an annual household income of \$33,187, have worked in the same job for 4 years or more, and have an active checking account. Although most customers have at least one bank account, the increasing cost of fees and minimum balance requirements in checking and savings accounts makes the use of traditional banks expensive for many consumers. Financial service centers provide consumers with an alternative, convenient and affordable way to manage their financial resources.

An April 2000 ASurvey of Non-Bank Financial Institutions@ conducted for the United States Department of the Treasury concluded that the hours of operation, convenient locations near public transportation, and bilingual staff capabilities allow financial service centers to cater to the needs of their consumers, filling a niche that traditional banks generally have chosen not to fill.

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<sup>2</sup> The Financial Service Centers of America (AFSCA@) reports that there are over 10,000 neighborhood financial service centers nationwide, processing 180 million checks annually at a face value of over \$60 billion.



Shortly after enactment of the Florida Money Transmitters Code in 1994 (the Code),<sup>3</sup> the FSCF (then FCCA) requested guidance from the Florida Department of Banking and Finance (the Department) regarding the Code's regulation of deferred presentment check-cashing transactions.<sup>4</sup> In February 1995, the Department confirmed in an advisory letter to the FSCF that deferred presentment check cashing was authorized under the Code.

The FSCF and Florida check cashers have relied upon this confirmation since that time, as well as the Department's subsequent 1997 rulemaking in which the FSCF was involved, in entering into thousands of deferred presentment transactions. If the decision of the Fourth District Court of Appeal in this case declaring such transactions unlawful and usurious under Florida law is upheld, it will have dire consequences for FSCF members and Florida check cashers in general, exposing them to exorbitant civil damages, attorney's fees, and possible criminal penalties. As such, the FSCF feels compelled to share its industry perspective on the issue to hopefully assist the Court in its disposition of this case.

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<sup>3</sup> Chapter 560, Florida Statutes (Supp. 1994).

<sup>4</sup> The nature of deferred presentment check cashing is discussed immediately below.

## **II. ADeferred Presentment@ or ADeferred Deposit@ Check-Cashing Transactions**

A deferred presentment transaction (also known as a deferred deposit transaction) is like any other check-cashing service in that the customer generally writes a personal check to the check-casher and receives immediate cash in exchange. In a deferred presentment check-cashing transaction, however, the financial service center agrees to Adefer@ the deposit of the customer's check for a specified period of time, usually two weeks. At the end of that period, the customer may redeem the check so that it is never deposited. If the customer does not redeem the check, the check-casher submits the check for payment by the customer's bank.

Of course, the check-casher assumes the risk that the customer will not redeem the check or that the bank will refuse to honor the check due to insufficient funds in the customer's account. In exchange for taking on this risk, the customer agrees to pay the check-casher a service fee. Consumers willingly pay this fee because it is generally much less than the average \$22 fee levied by a bank for a bounced check.

A deferred presentment transaction is a short-term cash flow decision for the customer, not a long-term credit decision. Deferred presentment transactions, if used as intended, are a safe and convenient way to respond to a short-term cash emergency, such as a car repair or a medical need. Deferred presentments fill a void left unfilled by traditional banks, who do not, as a matter of course, offer consumers access to relatively small amounts of money over very short periods of time.

### **III. Deferred Presentment Check Cashing Is Authorized Under Florida Law.**

#### **A. Florida's 1994 Money Transmitter's Code**

In 1994, the Florida Legislature adopted the state's Money Transmitters Code.<sup>5</sup> Ch. 560, Fla. Stat. (Supp. 1994).<sup>5</sup> The Code defined a money transmitter as any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, check casher, or funds transmitter.<sup>5</sup> § 560.103(10), Fla. Stat. (Supp. 1994). A check casher was defined as a person who, for compensation, sells currency in exchange for payment instruments received.<sup>5</sup> § 560.103(3), Fla. Stat. (Supp. 1994). A payment instrument under the Code was a check, draft, warrant, money order, whether or not negotiable.<sup>5</sup> § 560.103(14), Fla. Stat. (Supp. 1994). A sell was defined to mean to sell, provide or deliver.<sup>5</sup> § 560.103(19), Fla. Stat. (Supp. 1994).

Part III of the Code addressed Check Cashing and Foreign Currency Exchange.<sup>5</sup> § 560.301-.310, Fla. Stat. (Supp. 1994). This portion of the Code required registration of all persons who engage in, or in any manner advertise engagement in, the business of cashing payment instruments.<sup>5</sup> § 560.303(1), Fla. Stat. (Supp. 1994).

Part III of the Code also defined cashing as providing currency for payment instruments.<sup>5</sup> § 560.302(1), Fla. Stat. (Supp. 1994). The Code thus required every business that provided currency in exchange for a payment instrument to register as a

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<sup>5</sup> The 1994 version of the Money Transmitter's Code, Chapter 560, Florida Statutes (Supp. 1994), was the controlling law during the transactions at issue in this

check casher pursuant to Part III. ' 560.303(1), Fla. Stat. (Supp. 1994). Any exchange of currency for a payment instrument was the cashing of a check, regulated by the Code.

Finally, Part III capped the fees that check cashers could charge for their services. For example, beyond the actual direct costs of verifying the customer's identity, residence, employment and the like (which was to be established by rule), a check casher's fee with respect to cashing personal checks or money orders was capped at 10 percent of the face amount of those payment instruments, or \$5, whichever is greater. ' 560.309(4)(c), Fla. Stat. (Supp. 1994).

Nothing in Part III of the Code limited the definition of a check casher or a cashier so as to exclude deferred presentment transactions or any other variant of check-cashing. In fact, the plain language of section 560.303, requiring registration of any person engaged in the business of exchanging currency for payment instruments, signaled legislative intent for the Code to have broad regulatory effect over all forms of check-cashing.

#### B. The Department's 1995 Advisory Letter

The Code had vested in the Department of Banking and Finance the specific authority to issue and publish rules, orders, and declaratory statements, disseminate information, and otherwise exercise its discretion to effectuate the purposes, policies and

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case. It will be referred to herein as the Code.

provisions of the code and to interpret and implement the provisions of the code.®

' 560.105, Fla. Stat. (Supp. 1994).

Based upon the Code's terms, as detailed above, the FSCF and its members understood the Code to permit deferred presentment check-cashing transactions, so long as the fees charged for this service did not exceed the general fee caps for check-cashing provided in the Code. Nonetheless, in order to ensure that such transactions were conducted in a lawful manner and in compliance with whatever regulatory constraints the Department might wish to impose, the FSCF asked the Department shortly after the Code's enactment to confirm the new law's authorization of deferred presentment transactions.

In response, the Department issued an advisory letter dated February 24, 1995 (the A1995 Advisory Letter®), stating that the Code did indeed authorize deferred presentment transactions:

It is the position of the FCCA that member stores may cash checks for customers and defer the deposit of those checks for a reasonable period of time, mutually agreed upon between the store and the customer, provided that the fee charged for cashing these checks shall not exceed the statutory fee allowable for the specific type of check cashed. The service will be referred to as deferred deposit.

. . . . .

Since Chapter 560, Florida Statutes, does not explicitly prohibit the concept of deferred deposits and since all other

provisions of Chapter 560, Florida Statutes, would be adhered to, I see no reason to object to your offering of the above described services. Again, this analysis is based upon the fact that the deferred deposit service will be offered and managed pursuant to the provisions of Chapter 560, Florida Statutes, and specifically within the fee caps contained within Section 560.309(4), Florida Statutes.

1995 Advisory Letter at 1 (attached hereto as Appendix A).<sup>6</sup>

The Department's interpretation was consistent with the plain language of the Code. Part III of the Code imposed only one statutory limitation on the cashing of a check **B** it limited the fees the check casher could charge. ' 560.309, Fla. Stat. (Supp. 1994). The Code did not require the check casher to deposit the check. The Code did not prohibit a check casher from holding the check and allowing the customer to later redeem it for cash or redeem it with another check.

From February 1995 forward, the FSCF and its members, as well as other Florida check cashers, reasonably relied upon the Department's 1995 Advisory Letter in conducting their business affairs, entering into thousands of deferred presentment transactions and providing their customers with large amounts of short-term-cash.

### C. Department Rulemaking

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<sup>6</sup> For reasons that are unclear, the letter incorrectly stated the name of the requesting organization as the Florida Check Cashiers Association, when it was in fact the FSCF (then the Florida Check Cashers Association).

The Department formalized its interpretation of the Code by promulgating Rule 3C-560.803, Florida Administrative Code, (the **ARule**) in 1997. The Rule provided that a check casher could, but was not required to, accept a postdated check and charge the fees permitted under the Code. *See Betts v. Department of Banking & Finance*, DOAH Case No. 01-1445RX, Final Order at 15 (&36) (Sept. 7, 2001) (**ARule Challenge Order**) (attached hereto as Appendix B). The Department thus recognized that a check casher could accept a check and agree with the consumer to hold it for a period of time, allowing the consumer time to redeem the check before it was deposited.<sup>7</sup>

D. The Department's 1998 Advisory Letter

In early May 1998, the Department issued a further advisory letter (the **A1998 Advisory Letter**) to all registered check cashers in Florida, continuing to acknowledge that deferred presentment transactions were authorized under the Code: Some companies accept personal checks and agree in writing or otherwise to wait a predetermined amount of time before collecting the checks. These transactions are referred to as **Adeferred deposits**, **Apayday loans**, **Acash advances**, **Apayroll advances**, **Acheck discounts**, or a variety of other names.

(b) Pursuant to Section 687.02, Florida Statutes, it is illegal to charge a higher rate of interest than 18 percent per annum simple interest. Any **Arollover**, **Aextension** or **Arenewal** of a deferred deposit check for an additional fee may constitute interest. Any extension of this type may be an extension of

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<sup>7</sup> For a detailed account of the development of the Rule, *see* Appendix B at 11-15 (&&23-36).

credit requiring licensure of your business under the Florida Consumer Finance Act, and subject to the interest rate limits established in that act.

1998 Advisory Letter at 1 (attached hereto as Appendix C).

The Department thus expanded upon its interpretation of Part III of the Code, advising that check-cashing customers should be required to terminate each deferred presentment transaction by deposit of the check in question or redeeming the check for cash. The FSCF immediately publicized this information to its members so that they could ensure full compliance with the Department's interpretation of the Code.

E. The Attorney General Concurs With the Department's Interpretation of the Code.

In 2000, Robert F. Milligan, Comptroller of Florida and head of the Department, requested an advisory opinion from the Florida Attorney General on the subject of deferred presentment transactions. The question posed was, "Are so-called 'payday loans' or like transactions subject to the state laws prohibiting usurious rates of interest?" Op. Att'y Gen. Fla. 00-26 at 1 (2000) (attached hereto as Appendix D).

Agreeing with the Department on the initial proposition that deferred presentments were authorized under the Code, the Attorney General determined that deferred presentments were not subject to Florida usury laws, so long as each deferred presentment transaction was properly terminated without rollover, extension or renewal:

Accordingly, Chapter 560, Florida Statutes, as implemented by rule of the Department of Banking and Finance, authorizes the acceptance of a postdated check to be cashed at the end



of a specified period of time. . . .The fees authorized by Part III of Chapter 560, Florida Statutes, and by the administrative rules would apply regardless of whether the personal check received in the transaction is deposited immediately or deposit is deferred until a later date. Nothing in Chapter 560, Florida Statutes, however, recognizes that such arrangements may be deferred from presentment in order to be extended, renewed, or continued in any manner with the imposition of additional fees. . . .

Thus, to the extent that a transaction comports with the provisions of this act, it would not violate the usury provisions in Chapter 687, Florida Statutes. . . .

Appendix D at 3 (footnotes omitted).

F. The Department's Rules Are Upheld as Valid Interpretations of the Code.

In 2001, Wendy Betts, one of the plaintiffs in the pending case before this Court, sought to invalidate the Rule, claiming that it went beyond the scope of the Department's delegated legislative authority and that it enlarged, modified or contravened the specific provisions of the Code.<sup>8</sup>

The Administrative Law Judge (AALJ) tested these contentions against the plain language of the Code, as detailed above, and held that the Rule was within the powers

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<sup>8</sup> See *Betts v. Department of Banking & Finance*, DOAH Case No. 01-1445RX, Final Order (Sept. 7, 2001) (ARule Challenge Order) (attached hereto as Appendix B).

and duties expressly delegated to the Department and did not enlarge, modify, or contravene the Code:

[The Rule] implements or interprets the above-cited statutory definitions [of check casher, payment instrument, and cashing] by clarifying that a postdated check is within the definition of payment instrument and that a check casher may accept a postdated check . . . There is no requirement in Chapter 560, Florida Statutes, that requires a check casher to deposit the customer's check or that prohibits the check casher from holding the customer's check for an agreed-upon period of time. The only limitations are the fees set forth in Section 560.309(4), Florida Statutes.

[The Rule] is consistent with the language of the Money Transmitters' Code defining check cashers, payment instruments and cashing. Moreover, the rule interprets and provides clarification for those regulated by the Department under Chapter 560, Florida Statutes.

Appendix B at 26-28 (§§66, 73).

Mrs. Betts did not seek judicial review of the ALJ's Final Order. Therefore the rule remained valid and binding on all check cashers and their customers, as it had been since its effective date of September 24, 1997.

G. The Fifth District Court of Appeal Confirms the Department's Interpretation of the Code.

In 2002, Mrs. Betts advanced the same argument before the Fifth District Court of Appeal that she advanced in the trial court in this case. The Code did not authorize deferred presentments and these transactions were therefore loans subject to fees that

amounted to usurious interest. *Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294, 297 (Fla. 5<sup>th</sup> DCA 2002).

Looking to the plain language of the Code, the Fifth District rejected the argument that the deferred cashing of the check took the transaction outside the Code: Chapter 560 . . . contains **no requirement for the disposition of checks after receipt by the Defendants**. As in any other business transaction, the Defendants were free to do whatever they desired with the check after receiving it subject only to the deferral agreement with the Plaintiffs.

*Id.* at 297 (emphasis added). In express agreement with the Department's 1995 Advisory Letter, the Fifth District held that the Code did not prohibit deferred presentment transactions. *Id.* In doing so, the Court also noted the Legislature's creation of a new Part IV of the Code in 2001 (the *Deferred Presentment Act*), which further codified the regulation of deferred presentments.

The Fifth District then proceeded to reject the argument that all transactions after the initial deferred check-cashing transaction constituted usurious loans, observing as follows:

It appears to us that the parties' options at the end of each redemption period were that the Defendants could deposit a check for payment, or the Plaintiffs could redeem the check. If the Defendants deposited the check for payment, and the Plaintiffs had insufficient funds in their respective account at the drawee bank, the consequences of a dishonored check would be imposed upon the Plaintiffs, the Defendants and the drawee bank. If the Plaintiffs had the funds on deposit with the drawee bank it is doubtful that they would have authorized the costly *rollover* of the initial transaction unless they had another use for those funds.

If the Plaintiffs wished to redeem the initial check rather than to allow the Defendants to deposit it, they would either have to pay the Defendants in cash or deliver still another check that would be honored in a timely fashion. If they had no cash, they would be required to obtain it in some manner and apparently found that their easiest practical source was the Defendants. . . . Their choice to again use the Defendants to satisfy their initial obligation that was voluntarily entered was theirs to make.

*Id.* at 298.

Finally, the Fifth District noted the delicate balance struck by the Florida Legislature between protecting consumers and ensuring a continued source of readily available short-term funds:

The Legislature has made it possible for both sides of the deferred presentments transaction to engage in the economic exercise of supply and demand and has begun the job of fine tuning the statutory scheme in the Deferred Presentment Act. It is apparent that the policy of this state is to find workable restrictions for an originally broad statute without drying up the well for those who are in need of financial assistance even though it may be an expensive source.

*Id.* at 299.

**IV. The Opinion of the Fourth District Court of Appeal in this Case Improperly Rejects 10 Years of Operation Under the Code and Is Erroneous As A Matter of Law.**

In holding that deferred presentments are not authorized under the Code, that the Department's Rule was invalid, and that deferred presentments are subject to Florida's usury laws, the decision of the Fourth District Court of Appeal now before this Court flies in the face of almost 10 years of history under the Code. *Betts v. McKenzie Check*

*Advance of Fla., LLC*, 879 So. 2d 667, 674-75 (Fla. 4<sup>th</sup> DCA 2004). Prior to the decision of the Fourth District, every governmental entity and court that has reviewed this issue **B** from the Department of Banking and Finance to Florida's Attorney General and from the Division of Administrative Hearings to the Fifth District Court of Appeal and the trial court below in this case **B** has reached the legal conclusion that deferred presentment transactions were authorized under the Code.

At all times, the FSCF and its members have done everything responsible business persons could be expected to do to ensure that they were operating within the confines of the law. In February 1995, the FSCF sought guidance from the Department and received confirmation that deferred presentment transactions were authorized under the Code. *See* Appendix A. This was followed by Department rulemaking in 1997, as well as Department guidance in its 1998 Advisory Letter and a 2000 opinion from the Florida Attorney General.

In 2001, after Florida check cashers had operated for 6 years under the Department's interpretation of the Code, Mrs. Betts challenged the Department's Rule. The Rule was upheld as a valid exercise of delegated legislative authority by an Administrative Law Judge. This ruling was not appealed by Mrs. Betts.

In 2002, the Fifth District Court of Appeal again confirmed the Department's interpretation of the Code, as did the trial court below in the instant case.

But the long line of authority supporting this common understanding of the Code was cast aside by the Fourth District. The result is that FSCF's members, who operated from 1995-2001 in reliance upon the Department's reasonable interpretation of the Code, are now under the threat of potentially ruinous lawsuits under Florida's usury laws.

No small business, including the predominantly small businesses that comprise Florida's check-cashing industry, can be expected to operate in an environment of such regulatory uncertainty. Having requested and obtained confirmation from the Department that deferred presentments were lawful under the Code, Florida check cashers entered into thousands of these transactions and advanced huge sums of money to customers with short-term cash flow needs. In doing so, these check cashers knowingly accepted the risk that the customers' checks that they accepted in return ultimately would not be redeemed or honored.

What these check cashers did not know, and could not have reasonably anticipated under the circumstances, was that a Florida court would come along and declare these transactions unlawful, thereby putting their businesses at much graver risk and converting them into potential criminals under Florida's usury law. *See* ' 687.071, Fla. Stat. (2004).

Respectfully, if the Department's regulation of deferred presentments under the Code is invalidated **B** almost 10 years after the Department's initial interpretation of the Code, one must question how Florida hopes to sustain the growth of its vibrant, small-business-driven economy. Why would any business person risk their hard work and

capital in Florida if they can never be certain that the regulatory approvals they invariably must receive in order to operate may be voided a decade or more after they have been operating in reliance upon them?

### **CONCLUSION**

As a matter of equity, justice, and fundamental fairness, Florida businesses must be able to rely upon a regulator's reasonable interpretation of the statutes and rules that govern their business operations. This must especially be the case when, as here, the businesses specifically request the regulator's guidance and permission before operating in a particular regulated field. The Department's interpretation of the Code with respect to deferred presentments was a reasonable one that must be upheld, and the decision of the Fourth District in this case must be reversed as a matter of law.

Respectfully submitted on this 5<sup>th</sup> day of January, 2005.

METZ, HAUSER, HUSBAND & DAUGHTON, P.A.

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing Amicus Curiae Brief with its appendices was furnished by United States Mail, first-class postage prepaid, on this 5th day of January, 2005, to the following:

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## **CERTIFICATE OF FONT**

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced.

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- Appendix D - Op. Att’y Gen. Fla. 00-26 (2000).
- Appendix E - *Betts v. McKenzie Check Advance of Fla., LLC*, 879 So. 2d 667 (Fla. 4<sup>th</sup> DCA 2004).