IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1449

On Appeal from the First District Court of Appeal
Lower Tribunal Case No. 1D05-4086

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

Petitioners,

v.

STOP THE BEACH RENOURISNMENT, INC.,

Respondent.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTRODUCTION

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, Pacific Legal Foundation (PLF) respectfully requests this Court's permission to submit this brief amicus curiae in support of Respondent Stop the Beach Renourishment, Inc. Respondent has consented to PLF's participation as Amicus in this case. Petitioners have not granted consent. Pursuant to Rule 9.370(a), a motion for this Court's leave to file accompanies this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Coral Gables, Florida. The Florida office, known as the Atlantic Center, is staffed full-time by two attorneys who are members of the Florida Bar.

As Amicus, PLF seeks to address the constitutional property rights protections at issue in this case. PLF respectfully submits that decisions of the United States Supreme Court, and of this Court, compel the conclusion that Petitioners' efforts result in government's physical taking of private property, and not a mere regulation

of uses of property subject to balancing tests or authorized under a broad claim of police powers.

During the last thirty years, PLF attorneys have participated in the United States Supreme Court in virtually every case involving the rights of private property owners. In four of theses cases, PLF attorneys directly represented the persons whose rights to use their private property were unlawfully denied by government action. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006) (limiting Clean Water Act jurisdiction to instances of substantial connection between wetlands and navigable waters); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2006) (that offending regulations pre-date owners' acquisition of property does not preclude takings claim); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (regulatory takings claim not rendered unripe merely because government offers transferable development rights to property owners); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (requiring casual nexus between burdens of land use regulations and putative harm regulations purport to address).

PLF attorneys also have participated in this Court on issues relating to private property rights. *See City of North Lauderdale v. SMM Properties, Inc.*, 825 So.2d 343 (Fla. 2002) (validity of special assessment for emergency medical services); *Orange County v. Costco Wholesale Corp.*, 823 So.2d 732 (Fla. 2002) (constitutional

challenge to local zoning ordinance); *Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997) (standard of review required for comprehensive land use amendments).

Finally, PLF has participated in Florida cases dealing with specific issues relevant to this case. In *Brevard County v. Stack*, 932 So.2d 1258 (Fla. 5th DCA 2006), PLF appeared as amicus curiae as the Fifth District Court of Appeals upheld the constitutionality of the Bert Harris Act against Claims that the Act's property rights protections wrongly limited government's police powers. And PLF attorneys currently are representing property owners in the Fifth District Court in *Trepanier v. Volusia County*, No. 5D05-3892, a case involving the rights of owners of beach property. The expertise gained by participating in this array of cases renders PLF attorneys particularly able to assist this Court in matters pertaining to the rights of private property owners, including the oceanfront owners in this case.

SUMMARY OF ARGUMENT

Petitioners' application of the Florida Beach and Shore Preservation Act (Act), Fla. Stat. § 161, Part I, effects the government's physical taking of private property requiring the payment of just compensation under the United States and Florida Constitutions. Amend. V, U.S. Const., Art. X, § 6. Contrary to the arguments of Petitioners and supporting Amici, the government's efforts under the Act do not constitute a mere regulation of the use of private property, but are an actual physical taking of lands and of riparian rights belonging to private owners. *Save Our Beaches,*

Inc., v. Florida Dep't of Envt'l. Protection, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *10 (Fla. 1st DCA 2006). The United States Supreme Court and this Court have recognized physical occupations of the sort effected by Petitioners under the Act as "per se" or "categorical" takings that mandate government payment of just compensation to the owners of the taken property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1983); *Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assoc.*, 493 So.2d 417, 419 (Fla. 1986).

The constitutional guarantees of security in property, and the judicial opinions interpreting them, serve as fundamental limits upon—and are not subordinate to—broad government assertions of the police power. These fundamental limitations on government authority are designed to constrain claims of unfettered plenary powers. Moreover, courts consistently have rejected governmental complaints that compliance with constitutional mandates is too expensive. This Court should affirm the decision of the lower court.

ARGUMENT

I

PETITIONERS' APPLICATION OF THE ACT EFFECTS TAKINGS OF PRIVATE PROPERTY REQUIRING PAYMENT OF JUST COMPENSATION

A. Petitioners' Actions Are a Physical Taking of Private Property And of Appurtenant Riparian Rights

The key feature of Petitioners' projects is the establishment of an erosion control line. *Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *3. This line, set by Petitioner Board of Trustees to track the then-current mean high water line, becomes the permanent boundary of demarcation between private properties and the beach land that will be restored and, ultimately, will become the property of the state. *Id.* "Significantly, [ ]the erosion control line becomes the new property boundary, denying the upland landowners any property gained by accretion." *Id* at *4 (citing Fla. Stat. § 161.191). The seaward property becomes the state's not just theoretically or practically; under the Act, the state assumes legal, record title to the property. 2006 WL 111270 at *4. As the First District Court held, Petitioners' establishment of the erosion control line thus results in the elimination of property boundaries and the deprivation of property rights, and of physical property itself, by virtual fiat. *Id.*

This Court consistently has recognized that the right to accretion is a fundamental right of the owners of property abutting the ocean. *See Bd. Of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So.2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649, 651 (Fla. 1985). As implicated by its name, the mean high water line is not forever static, but is a boundary between public and private lands that moves as the tides naturally change over time. *Save our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *8-9.

It is well-settled in Florida that if the mean high waterline moves seaward, owners of property abutting the ocean are entitled to the widened, or accreted, beach. *Belvedere*, 476 So.2d at 651; *Save Our Beaches, Inc.*, 31 Fla L. Weekly D 1173, 2006 WL 1112700 at *10. This rule long has governed other coastal jurisdictions as well. *See e.g., State by Kobayashi v. Zimring*, 566 P.2d 725 (Wash. 1977); *State v. Gill*, 66 So.2d 141, 142 (Ala. 1953); Giraud's *Lessee v. Hughes*, 1 G. & J. 249, 1829 WL 1000 at *4 (Md. 1829). It also is the rule applied by courts, including the United States Supreme Court, construing federal law. *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967).

Petitioners' application of the Act operates to permanently deprive riparian owners—owners of property running to the mean high water mark—of any possibility of accreted beach land. Decisions of the U.S. Supreme Court and of this Court long

have held that such a deprivation necessarily results in a physical taking of private property requiring the payment of just compensation to the property's owners:

> "A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the short." . . . Both Federal and Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or relication, which right cannot betaken by the State without payment of just compensation.

State v. Florida Nat. Properties, Inc., 338 So.2d 13, 17 (Fla. 1976) (quoting *Hughes v. Washington*, 389 U.S. at 293) (citations omitted). In *Florida Natural Properties*, this Court went on to promulgate a holding with an even more specific application to the instant case, in light of the importance of Petitioners' establishment of erosion control lines:

> [R]equiring the *establishment of a fixed boundary line* between the sovereignty bottom lands and Plaintiff's riparian lands [ ] constitutes a taking of Plaintiff's property, including its riparian rights to future alluvion or accretion . . . .

338 So.2d at 17 (emphasis added); *see Sandy Key Assocs., Ltd.*, 512 So.2d at 936, 945-46.

Compounding the constitutional violation, once Petitioners freeze the boundary between private and sovereign lands by setting an erosion control line, they then proceed to fill the seaward side of this line with sand. *Save Our Beaches, Inc.*, 31

Fla. L. Weekly D1173, 2006 WL 1112700 at *1. This has the effect of widening the "sovereign" portion of the beach between the erosion control line and the water. *Id.* This introduces a strip of state-owned property between private property and the water, severing the owners' properties from the sea and instantly turning oceanfront property into something less. Such severance has a significant and detrimental impact on the property owners, for riparian owners are entitled to certain rights no afforded owners of inland property, in addition to the aforementioned right to accretion. *See Sand Key Assocs., Ltd.*, 512 So.2d at 936.

Among these riparian rights are the right of access to the water, the right to use the water for navigational purposes, and the right to an unobstructed view of the water. *Id.* Another is the basic right not to have these other rights eliminated by virtue of having the property removed from contact with the water. *Id.* Following precedent established by the U.S. Supreme Court, this Court has held plainly that these riparian rights are property rights that "may not be taken without just compensation and due process of law." *Id.* (citations omitted). Each of these rights indeed is taken by Petitioners pursuant to the Act without just compensation, contravening the federal and state Constitutions and the judicial opinions interpreting them.

B. Petitioners' Actions Are Not a Regulation of a Use of Private Property, but a Physical Occupation Requiring Payment of Just Compensation

Despite the facts and controlling authorities discussed above, Petitioners and Amici argue that the doctrine of regulatory takings governs this case. *See* Petitioners' Amended Initial Brief (Petitioners' Brief) at 34-43. This argument fails, however, for the takings doctrines of the Unites States Supreme Court and of this Court have distinguished between regulatory takings and the type of physical invasion and occupation of property, requiring compensation, resulting from Petitioners' actions under the Act.

"The concept of regulatory takings reflects the common sense observation that governments should not be allowed to escape the duty to compensate simply through the legalistic trick of co-opting the use of land without seizing the actual title to the land." Steven Geoffrey Gieseler, *et al.*, *Measure 37: Paying People for What We Take*, 36 Envtl. L. 79, 81 (2006). The united States Supreme Court has recognized several categories of regulatory takings. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 535-540 (2005). In *Lucas v. Southern Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that where a government regulation "denies all economically beneficial or productive use of land," it constitutes a taking. *Lucas*, 505 U.S. at 1015. In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), the

Court established a multi-pronged, ad hoc takings test for regulations that infringe on an owner's use of his property, but fall short of a *Lucas*-style restriction.

This kind of regulatory taking, based on the restricted use of property typically effected by a zoning ordinance, is what Petitioners argue is at issue in this case. *See* Petitioners' Brief at 34-35. But Petitioners' projects under the Act do not regulate the *use* of private property; they constitute an actual physical occupation and taking of property itself. For Petitioners to argue that their actions are a regulation of private property, they necessarily must claim that the accreted property seaward of the erosion control line remains under private control; any other assertion is a concession that title has changed hands, which would require the payment of just compensation. *See* Part I(A), *supra*.

This line of reasoning, then, must recognize that a litany of government or government-endorsed activities, including the operation of heavy machinery, the physical placement of sand that is the end purpose of beach renourishment, and the ingress and egress of the public on the newly-restored beach, *see Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *1, 8, is occurring on property in which the riparian owners have a vested interest. *Sand Key Assocs., Ltd.*, 512 So. 2d at 936. In *Sand Key*, this Court held that upland owners maintained a vested property right to future accretions. *Id.* Petitioners' restoration projects result in the physical placement of sand, and the subsequent traversing of the public on the

property that is the subject of this vested right, forever foreclosing the potential for the owners to benefit from accretion and their vested right. *Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *6.

It is unsurprising then that Petitioners argue for the Penn Central regulatory takings factors to govern, for there is no doubt under controlling takings law that where the government effects the physical occupation of property belonging to a private party, a taking requirement just compensation has occurred. The United States Supreme Court case that controls physical government occupations of private property is *Loretto*:

> [A] permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

458 U.S. at 441. In last year's *Lingle* opinion, the Court reaffirmed its adherence to *Loretto* and to the rule that physical government occupations of private property are "per se," or "categorical," takings. *Lingle*, 544 U.S. 537. Numerous Florida courts, including this Court, have relied on *Loretto's* rule. It is the law in Florida. *See Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assoc.*, 493 So.2d at 419; *Certain Interested Underwriters v. City of St. Petersburg*, 864 So.2d 1145, 1147-48 (Fla. 2d DCA 2003).

At issue in *Loretto* was the placement of cable wire across the rooftop of an apartment building in Manhattan. That the wires took up limited physical space was of no importance to the Court's taking analysis:

> [C]ases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

458 U.S. at 430. In this regard *Loretto* applies to Petitioners' efforts, for more egregious still is the instant situation where tons of sand are located permanently on property upon which—in the absence of Petitioners' actions the upland owners would have a "vested" property interest in, and right to, future accretions. *Save our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *7 (citing *Sand Key Assocs., Ltd.*, 512 So.2d 934, 936. This is done without the acquiescence of those properties' owners, and without the payment of just compensation.

The *Loretto* Court explained the reason for its holding, rooted in the basic legal and philosophical concepts of what it means to own property:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand. Property rights in a physical thing have been described as the rights to 'possess, use and

> dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights.

458 U.S. at 435 (internal citations omitted). The *Loretto* Court further distinguished between the effects of a *per se* physical occupation taking and a taking based on a restriction on land use of the sort argued for by Petitioners:

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . . [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Id. At 436. Such a "special kind of injury" is precisely what is suffered by private property owners affected by Petitioners' application of the Act. After Petitioners establish the ECL, upland owners retain absolutely no control over the property in which they would, if not for Petitioners' actions, maintain a vested property right. This land becomes the property of the government. *See* Part I(A), *supra*.

The motive and purpose for the physical occupation are irrelevant. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Loretto*, 458 U.S. at 426. Thus is refuted the argument that this Court should overlook the United States Supreme Court's precedent, and the protections guaranteed property owners in the federal and state Constitutions, in order to further

The stat's tourism interests, *see* Brief Filed in Support of the Petitioners' Initial Brief (Convention Brief) at 2, 7-9, or for any other reason. *See* Part II, *infra*.

II

CONSTITUTIONALLY-GUARANTEED PRIVATE PROPERTY RIGHTS MUST NOT BE SUBORDINATED TO GOVERNMENT ASSERTIONS OF POLICE POWERS

The right to own and be secure in one's property is one of the essential freedoms deserving of the utmost judicial protection. The Florida Constitution recognizes this guaranteed right in no fewer than three places. Article I, Section 2, which enumerates Basic Rights, declares:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property.

In order to ensure that the rule of law governs the abrogation of this Basic Right, Article I, Section 9, requires that

> No person shall be deprived of life, liberty, or property without due process of law . . . .

Article 10, Section 6, establishes concrete limitations on the government's power to take private property:

> No private property shall be taken except for a public purpose and with full compensation thereof paid to each owner . . . .

This multifaceted protection of Floridians' property rights reflects the agreement of the state constitution's drafters with the Founders of the federal Republic. The chief author of the Constitution, James Madison, recognized the paramount importance of property rights when he wrote in 1792 that

> [g]overnment is instituted to protect property of every sort; as well as which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his.

James Madison, *Property*, Mar. 29, 1792, reprinted in *The Papers of James Madison* (William T. Hutchison, et al., eds., Univ. of Chicago Press 1962). This Court has echoed Madison's words, referring, for example, to the "sacred" nature of property rights. *Corn v. State*, 332 So.2d 4, 7 (Fla. 1976).

Yet Petitioners and supporting Amici would subordinate these constitutional protections, and their philosophical underpinnings, to government claims of "police powers." Amicus Florida Association of Convention & Visitors, Inc., (Convention Brief), summarizes its argument on this point by relegating constitutional property protections to inferior status, claiming that Petitioners' application of the Act "falls squarely within the police power of the state to regulate private property rights for the good of the whole and for the protection of Florida's beaches, as well as, [sic] the

Tourism industry." Convention Brief at 3.[1] According to this theory it is this police power that is predominant, with the provisions of the united States and Florida Constitutions—and the decisions of the United States and Florida Supreme Courts—left but to fill in the gaps the police power leaves empty. To the contrary, these constitutional provisions and the judicial decisions interpreting them have as their fundamental purpose the limitation of the government's police power.

Few doctrines are as ambiguous or as ripe for government overreaching as that of the "police power." *See, e.g.*, Walter Wheeler Cook, *What is the Police Power*, 7 Colum. L. Rev. 322, 322 (1907) ("No phrase is more frequently used and at the same time less understood than the one which forms the subject of the present discussion."); *see also* Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 Mich. L. Rev. 173, 173 (1921) ("The police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and place it within any bounds.").

[1] Amicus's invocation of the mere "regulat[ion] of property rights is at odds with the facts of this case as found by the appeals court, and case law governing government's physical invasion of private property. *See* Part I, *supra.*

The police power originally was understood to permit government to intercede only when the abuse of a citizen's rights directly affected the welfare of the general public. Regulations restricting individual rights in its name were to be narrowly tailored, used only to enforce the boundaries between individuals' fundamental rights. *See Pennsylvania Coal co. v. Majon*, 260 U.S. 393, 415 (1922). From America's founding, government's police power has been valid only insofar as it was derived "from the consent of the governed." Declaration of Independence, 1 Stat. 1 (1776). As Alexander Hamilton explained in Federalist No. 78, a Legislature's authority is subordinate to, and derivative of, the sovereignty of the people. *See* The Federalist No. 78, at 467-69 (Clinton Rossiter ed., 1961). And, because the people give government its powers, the people continue to retain the authority to set limits on how those powers may be exercised.

The most fundamental way the people set these limits is by ratifying the documents that form the supreme laws of their jurisdictions: their federal and state Constitutions. *See* art. VI, cl.2, U.. CONST. These are the guidelines within which the police power must operate, and not the other way around. None would dispute government's general power to regulate in the interests of the public's safety and welfare. But government's exercise of the police power is valid only to the extent it does not violate "applicable provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive government action."

Everglades Sugar & Land Co. v. Bryan, 87 So. 68, 77 (Fla. 1921). Such constitutional protections do not shift with the winds of the day, nor according to the whims of government officials. The security and certainty they afford the citizens who ratified them form the backbone of our rule of law. And by their plain language and through their interpretation by the United States Supreme Court and this Court, they require compensation for takings of property of the sort effected by Petitioners under the Act. *See* Part I, *supra*.

As this Court has held in a variety of contexts, and on several occasions, "It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." *See, e.g., Lewis v. The Florida Bar*, 372 So.2d 1121, 1122 (Fla. 1979) (Quoting *State ex rel. Powell v. Leon County*, 182 Sol. 639, 642 (Fla. 1938)). Applied to the instant case. This principle renders it improper for Petitioners to rely on the police power to physically take (or even to physically invade and take via "regulation") private property without paying full compensation, when a formal eminent domain action seeking to so avoid compensation clearly and expressly would be prohibited by the federal and state Constitutions.

In its brief, Amicus Florida Shore & Beach Preservation Association puts forth an argument that is a cousin to the "police power supremacy" claim. The Association argues that since it would be too expensive for governments to pay compensation for

Property they take under the Act, this Court should not require the payments in the first place. Brief of Florida Shore & Beach Preservation Association at 2. This principle would prove a disaster if held to apply to constitutional rights. Constitutional requirements often are expensive, but failure to enforce these guarantees due to administrative burden or cost to government is not a valid excuse. *See Watson v. City of Memphis*, 373 U.S. 526, 537-38 (1963) (rejecting the argument that financial constraints justified failure to desegregate city parks); *see also* Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 52 (1999) (explaining that "[u]nder the First Amendment's protection of freedom of speech, states must keep streets and parks open for expressive activity, even though it is expensive to do this, and to do it requires an affirmative act.").

Government no more can ignore the Constitution's Just Compensation Clause in the name of saving money than it can house peacetime soldiers in private homes to save the money necessary to build barracks, Amend. III, U.S. Const. Nor would Amicus's rule be any more valid than a government eschewing search warrants so as to avoid police administration costs. *Rush v. Obledo*, 517 F. Supp. 905, 916 n.16 (N.D. Cal. 1981) (rejecting a city's argument that the cost of surveillance justified warrantless inspections, holding that "neither administrative convenience nor budgetary constraints justify governmental deprivation of fundamental constitutional rights."). Even if true, that the government cannot afford to pay when it takes private

Property is a good argument for governmental restrain and respect for property rights, not for seeking to avoid constitutional responsibilities. *See* Gieseler, *et al.*, 36 Envtl. L. 79, 86-86, 100 (addressing similar "cost" arguments, in the context of Oregon's land use reform initiative).

CONCLUSION

Petitioners' application of the Act effects takings of private property requiring the payment of just compensation pursuant to the United States and Florida Constitutions. For the reasons set forth above, the Court should affirm the lower court's decision.

DATED: December 5, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondent was prepared in Times New Roman 14-point font, and complies with the requirements of Florida Rule of Appellate Procedure 9.21(a).

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