IN THE SUPREME COURT OF FLORIDA
Case No. SC07-2154

FLORIDA HOUSE OF REPRESENTATIVES,
and MARCO RUBIO, individually and in his
capacity as Speak of the Florida House of
Representatives,

Petitioners,

v.

CHARLIE CRIST, in his capacity as
Governor of Florida, and
THE SEMINOLE TRIBE OF FLORIDA,

Respondents.

AMICUS CURIAE BRIEF OF
CITY OF HALLANDALE BEACH IN SUPPORT OF PETITIONERS

David Jove
Fla. Bar No. 525502
Andre McKenney
Fla. Bar No. 596892
City of Hallandale Beach
400 South Federal Highway
Hallandale Beach, Florida 33009
(954) 457-1325 (Tel.)
(954) 457-1660 (Fax)

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INTEREST OF THE AMICUS

The City of Hallandale Beach (the "Amicus") is located in Broward County, Florida. The Amicus is a municipal government that serves residents and nonresidents, manages and regulates land, provides essential infrastructure, and employment opportunities for many individuals. The Amicus is inherently unique and different from that of many municipalities within the State because within its jurisdiction resides Mardi Gras Racetrack and Gaming Center, a greyhound pari-mutuel facility, and Gulfstream Park, a thoroughbred pari-mutuel facility.

The Amicus, through contractual agreement, derives revenue from these facilities to defray the costs of providing essential services such as police, fire rescue, and emergency services. The Amicus is adversely affected by the Governor's *ultra vires* action because state law prohibits these pari-mutuel facilities from engaging in gaming activities that are permitted under the Tribal-State compact terms. Further, the expanding gaming offered to the Seminole Indian tribe will place an economic burden upon the Amicus' infrastructure through enhanced use that will ultimately be borne by the Amicus' residents. The Governor's actions will work to the economic detriment of the Amicus, its residents, and the two pari-mutuel facilities within its jurisdiction.

ARGUMENT

I. The Governor exceeded his power under the Florida Constitution

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

Art. II, § 3, Fla. Const.

It is unquestionable that the Governor surpassed his lawful power by binding the State to a Tribal-State compact (the "Compact") because such power does not reside with the executive branch. The subjects contained within the Compact are beyond the scope of the governor's authority under the Florida Constitution, alter established Florida public policy, and bind the State for a period of 25 years. The Governor lacks authority to bind the State to these terms when such power is vested with the legislative branch and has not been delegated to the Governor.

A. The Florida Constitution prohibits the Governor's action.

This Court has long held that the separation of powers clause embodied within the Florida Constitution is more stringent than that of the United States Supreme Court and numerous other States. See e.g., Askew v. Cross Keys Waterways, 372 So.2d 913, 924-25 (Fla. 1978); Avatar Dev. Corp. v. State, 723 So.2d 199, 201-02 (Fla. 1998); State v. Cotton, 769 So.2d 345, 353 (Fla. 2000). The Florida Constitution provides well-defined distinctions between the legislative and executive branches of state government. See Art. III, Fla. Const. (vesting

legislative power with the legislature), cf. Art. IV, Fla. Const. (vesting supreme executive power in the governor). The legislature is vested with the legislative power of the state and retains the power to make fundamental policy determinations on behalf of the State. See Art. III, § 1, Fla. Const., see also Gordon v. State, 608 So.2d 800, 801 (Fla. 1992). On the other hand, the executive branch is responsible for faithfully executing the laws of the State. See Art. IV, § (1)(a), Fla. Const. The duty to faithfully execute the laws is different and distinct from the power to make policy that has been conveyed to the legislature. See e.g., State ex rel. Stephan v. Finney, 836 P.2d 1169, 1178 (Kan. 1992) ("[T]he transaction of business connotes the day-to-day operation of government under previously established law or public policy.").

The Governor's attempt to unilaterally bind the State to the Compact was not authorized by a duty conveyed under the Florida Constitution or any statutory law. The terms of the Compact significantly alters Florida law and results in policy-making that is reserved to the Legislature. See Gordon, 608 So.2d at 801 (addressing the Legislature as "the ultimate policy-maker under our system"). For example, the Compact authorizes class III slot machine gaming outside of Broward County,[1] authorizes blackjack and other banked card games that are currently

[1] See Compact at Part III(E).

illegal under all circumstances in Florida,[2] collects revenue from the Indian tribe and penalizes the State for future non-tribal gaming expansion,[3] provides an exception to public records access,[4] changes the venue for disputes with tribal casinos,[5] provides procedures for tort remedies,[6] creates an enforceable contract right that waives the state's sovereign immunity,[7] and establishes a regulatory mechanism.[8]

The authorization of card games currently prohibited by Florida law is one of the more obvious examples that the Governor exceeded his power under the Florida Constitution. The mere existence of the Compact does not magically make the games contained therein legal under the relevant state law. See e.g. Citizen Band Potawatomi Tribe v. Green, 995 F.2d 179, 181 (10th Cir. 1993)(rejecting the argument that a Compact can legalize a type of gaming that is otherwise prohibited by state law); see also Op. Att'y Gen. Fla. 2007-36; see generally Ch. 849, Fla. Stat. (2007) (prohibiting gambling with few limited exceptions). Thus, the

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[2] See Compact at Part III(E). Banked card games are currently prohibited under all circumstances in Florida. See § 849.086(12)(a), Fla. Stat. (2007). In addition, non-banked card games, such as poker, are only authorized when played in conformance with existing Florida law at duly licensed pari-mutuel facilities. See generally § 849.086, Fla. Stat. (2007)(limiting authorized games to poker and dominoes, played in a non-banking manner, at licensed pari-mutuel facilities). Banked card games are treated differently because the "house" is a direct beneficiary of the game as compared to non-banked games where the players compete against each other. See § 849.086(2)(b), Fla. Stat. (2007).

[3] See Compact at Part XIV(A).

[4] See Compact at Part VII(B).

[5] See Compact at Part XIII(D).

[6] See Compact at Part VI(D).

[7] See Compact at Part IX.

[8] See Compact at Part III(T)(defining "State Compliance Agency").

negotiation of a Compact containing class III games currently prohibited by the State rightfully warrants legislative approval in order to validate the terms contained therein; otherwise, the games remain prohibited pursuant to state law.

B. The Compact was not "necessary."

It is erroneous to believe that the Compact at issue was somehow "necessary" to avoid a deadline established by the United States Department of the Interior (the "Department"). The Governor's brief suggests that the expansion of gaming "was set to commence as a matter of federal law" which triggered the Governor's duty to transact all necessary business. See Governor's Resp. at 21-7. This assertion is an inaccurate representation of the purported expansion of gaming. First, the authority of the Department to issue class III gaming procedures on the state is questionable at best. In Texas v. United States, 497, F.3d 491, 511 (5th Cir. 2007), the Fifth Circuit of the United States Court of Appeals ruled that the Department's regulations that establish a framework to impose class III gaming procedures in the absence of a valid Tribal-State compact were "invalid and constitute an unreasonable interpretation of IGRA." Second, the litigation between the Seminoles and the Department, currently pending in the Southern District of Florida, is entirely dependent upon the same Department regulations that were invalidated in the Texas decision. See App. A at 16. The Department was obviously not prepared to issue Class III gaming procedures upon the State;

otherwise, the Seminoles would not have felt obligated to seek a judicial declaration to impose such procedures.[9] Finally, the State, in conjunction with the State of Alabama, was previously involved in litigation against the Department to prevent issuance of Class III gaming procedures.[10] See Florida v. United States, No. 4:99cv137 (N.D. Fla. Sept. 7, 2007)(order dismissing Seminole's motion to reopen the case and order the Department to impose Class III gaming procedures). This litigation coupled with the recent decision in Texas stand in contrast to the Governor's present assertion that the Department's threat rendered the Compact "necessary."

II. This case is indistinguishable from the high court's of other States.

The high courts of Kansas, New Mexico, Rhode Island, New York, and Wisconsin have considered this precise issue and all have concluded that the governor lacked authority to unilaterally bind the state to a Tribal-State compact.

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[9] In 2001, the Department took the position that no class III gaming procedures would be issued until a final judicial determination was made as to the Department's regulations authorizing such procedures. See Statement of M. Sharon Blackwell, Deputy Commissioner of Indian Affairs for the Department's Bureau of Indian Affairs, to the Senate Committee on Indian Affairs, July 25, 2001, available at http://www.doi.gov/ocl/2001/igra.htm. Further, the Seminole's complaint in the Southern District highlights the fact that the Department has been unwilling to issue class III gaming procedures over the course of several years. See App. A at 5-9. Under these circumstances, it is reasonable to believe that the Department's November 15th deadline was anything but "necessary."

[10] The district court dismissed this action without prejudice because more than 8 years had elapsed since the State filed suit and the Department had failed to impose Class III gaming procedures. The district court ruled that there was no case or controversy and the State's claim was not ripe. See Florida v. United States, No. 4:99cv137 (N.D. Fla. Sept. 7, 2007)(order explaining that no controversy existed because the Department had failed to present Class III gaming procedures as expected).

See State ex rel. Stephan v. Finney, 836 P.2d 1169, 1183-85 (Kan. 1992); State ex rel. Clark v. Johnson, 904 P.2d 11, 26-27 (N.M. 1995); Narragansett Indian Tribe of Rhode Island v. State, 667 A.2d 280, 282 (R.I. 1995); Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1060-61 (N.Y. 2003); Panzer v. Doyle, 680 N.W.2d 666, 696-97 (Wis. 2004). Notably, the Wisconsin Supreme Court was the most recent to rule on this issue and observed that "[w]hen courts in other jurisdictions have dealt with this question, most have concluded that, under state law, a governor does not possess unilateral authority to reach binding compacts with tribes on behalf of the state." Panzer, 680 N.W.2d at 687.

In New York, legislators, organizations, and individuals opposed to gambling challenged the governor's authority to enter into Tribal-State gaming compacts with Indian tribes. See Saratoga County, 798 N.E.2d at 1049. New York's highest court found "no difficulty determining that the Governor's actions [in executing the compact] were policy-making, and thus legislative in character." Id. at 1060. The court determined that the Indian Gaming Regulatory Act ("IGRA") considered compact negotiations as a tool for addressing several policy choices applicable to States and Indian tribes. See id. at 1060 (citing Yavapai-Prescott Indian Tribe v. Arizona, 796 F.Supp. 1292, 1296-97 (D. Ariz. 1992)). The basis for this determination was the laundry list of subjects that IGRA views as

appropriate for compact negotiations. See Saratoga County, 798 N.E.2d at 1060 (citing 25 U.S.C. § 2710(d)(3)(C)).

As acknowledged by the Petitioner, the New Mexico Supreme Court's decision demonstrates the most thorough and compelling analysis of the separation of powers issues presented herein. See Pet. at 17-18. In State ex rel. Clark v. Johnson, the court analyzed a petition that contended the Governor of New Mexico lacked authority under the New Mexico Constitution to negotiate a Tribal-State compact with various Indian tribes. State ex rel. Clark v. Johnson, 904 P.2d 11, 14 (N.M. 1995). The court agreed with the petitioners and found that the governor exceeded his authority under the state constitution in several examples that are similar to the facts presented in the instant case. First, the compact with the Pojoaque Pueblo tribe allowed for termination of revenue sharing provisions in the event of certain changes to state law. Id. at 23; cf. App. A at Part XIV(A). Second, the compact with the Pojoaque Pueblo tribe was "disruptive of legislative authority" because it addressed the regulation of class III gaming activities, licensing of operators, and altered civil and criminal jurisdiction for the enforcement of state or tribal laws and regulations. See Johnson, 904 P.2d at 23; cf. Compact at Parts IV, VII, X, and XIII. Finally, the compact allowed "virtually any form of commercial gambling" without regard to the state legislature's

"general repugnance to this activity." See Johnson, 904 P.2d at 23-4; cf. Ch. 849, Fla. Stat. (2007)(outlawing gambling with few limited exceptions).

There remain three federal district court decisions that should be distinguished from the above-mentioned state high court decisions. In Mississippi, the federal district court relied heavily upon a broad state statute which authorized the governor to transact "all the business of the state, civil and military, with the United States Government or with any other state or territory." See Willis v. Fordice, 850 F.Supp 523, 532 (S.D. Miss. 1994) (quoting Miss. Code Ann. § 7-1-13 (1972)). The court interpreted this provision as authorizing the governor "to negotiate with Indian tribes located within the State." Willis, 850 F.Supp at 533. This decision is questionable at best because the court initially determined that the plaintiff lacked standing to bring the suit. Id. at 529. Regardless, there is no comparable broad statutory delegation under Florida law.

In Louisiana, the federal district court authorized the governor's action without any meaningful discussion as to whether negotiation of a Tribal-State compact constituted a legislative or executive function. See Langley v. Edwards, 872 F.Supp. 1531, 1536 (W.D. La. 1995). It should be noted that the court's discussion of this issue holds little weight because the court declared that the plaintiffs' lacked standing, failed to exhaust tribal remedies, and the Department possessed sovereign immunity from suit. See id. at 1533-35. Further, the

Wisconsin Supreme Court found this opinion, in addition to the afore-mentioned Willis decision, unpersuasive when analyzed against the other state high courts that have addressed the issue. See Panzer v. Doyle, 680 N.W. 666, 687 (Wis. 2004).

Finally, in Oregon, the federal district court found that the governor maintained authority to bind the state to a Tribal-State compact based upon state constitutional and statutory delegations of authority. See Dewberry v. Kulongoski, 406 F.Supp. 1136, 1154-55 (D. Or. 2005). This opinion, like Langley, is similar to a non-binding advisory opinion because the court had already decided to dismiss the case on procedural grounds. See id. at 1142 (finding standing and indispensability of the Indian tribes dispositive). However, regardless of the procedural disposition, the facts of Dewberry are easily distinguishable from the instant case. First, the court noted that Oregon statutory law authorized games of "chance" such as blackjack, roulette, and craps. Id. at 1151. It is undisputed that these games are prohibited by Florida law and violative of current public policy. See § 849.08, Fla. Stat. (2007) (prohibiting keno, roulette, and other games of chance). Second, Florida law has no similar statutory provision authorizing the governor to negotiate binding compacts with Indian tribes. Compare Dewberry, 406 F.Supp. at 1156 (analyzing the intent of Oregon statute and concluding that it authorized the governor to execute binding agreements with the Indian tribes).

In conclusion, the state high court opinions addressed above display a general consensus that the complex negotiations involved in Tribal-State compact negotiations involve policy-making powers that are held by the legislative branch of government. For example, this Compact provides the Seminoles with exclusivity rights to games that are not considered Class III devices. See App. A at Part XII(A) (exclusive rights include but are "not limited to (1) electronically-assisted bingo or pull-tab games or (2) video lottery terminals (VLTs) or similar games that allow direct operation of the games."). This decision is clearly policy driven and thus legislative in character. This Compact also authorizes the Seminoles to conduct celebrity/charity poker tournaments that are not subject to limitations or restrictions imposed by Florida law. See App. A at Part X(L). This provision would clearly entail legislative ratification because IGRA mandates that card games, including poker, be played in conformance with Florida laws "regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." 25 U.S.C. § 2703(7)(ii). These "celebrity/charity poker tournaments" will remain illegal under Florida law unless the legislature chooses to validate this provision. As previously stated, no court has ruled that a Tribal-State compact can legalize games that are illegal under state law. See e.g. Citizen Band Potawatomi Tribe v. Green, 995 F.2d 179, 181 (10th

Cir. 1993)(rejecting the argument that a Compact can legalize a type of gaming that is otherwise prohibited by state law).

III. IGRA does not authorize the Governor to act on behalf of the State

IGRA provides an extensive regulatory framework that governs gaming between the states and Indian tribes. IGRA regulates Class I and Class II gaming on Indians lands in a manner that pre-empts state law. See 25 U.S.C. § 2710(a)-(b). IGRA defines Class I gaming as social games that are played for prizes of minimal value during or in connection with tribal ceremonies or celebrates. 25 U.S.C. § 2703(6). Class II gaming is defined as bingo and non-banked card games that are played in conformity with laws and regulations of the state regarding hours of operation and limitations on wagers or pot sizes. See 25 U.S.C. § 2703(7)(A)(i)-(ii).

In contrast, Class III gaming consists of all gaming, including slot machines and blackjack, that is not classified as Class I or Class II gaming. See 25 U.S.C. § 2703(8). There are three prerequisites that must be met before an Indian tribe can begin conducting Class III gaming. First, the Class III gaming activities must be authorized by tribal ordinance or resolution that is approved by the governing body or the Indian tribe, meets the requirements of IGRA, and is approved by the Chairman of the National Indian Gaming Commission. See 25 U.S.C. § 2710(d)(1)(A). Second, the Class III gaming activities must be located in a state

that "permits such gaming."[11] 25 U.S.C. § 2710(d)(1)(B). Third, the games must be played in conformance with a valid Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C). These three requirements must be met in their entirety prior to Indian tribe conducting Class III gaming.

A. IGRA does not invest the Governor with authority to act

The Governor erroneously claims that the Compact is entered under authority vested by IGRA. See e.g. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 75, n. 17 (1996)("[T]he duty imposed by [IGRA] ... is not of the sort likely to be performed by an individual state officer or even a group of officers."). There are no provisions within IGRA that would authorize a governor to unilaterally bind a state to a Tribal-State compact. See e.g. State ex rel. Clark v. Johnson, 904 P.2d 11, 26 (N.M. 1995)(discussing that a governor derives power from the state constitution and statutes and that IGRA does not invest power beyond what is provided under state law). To the contrary, IGRA contemplates that the negotiation of a Tribal-State compact would necessarily entail the establishment of public policy by authorizing the following provisions as acceptable subjects for compact negotiation:

[11] While this case can be decided without interpretation of this phrase, the Respondents' representation of the scope of gaming allowed under federal law is erroneous. See Pet'r reply at 12, fn. 5.

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C)(i)-(vii). These provisions, all of which are included in the Compact at issue, are fundamental policy choices that are appropriately addressed by the legislative branch as envisioned by the Florida Constitution, this Court, and other state high courts. See Art. III, § 1, Fla. Const.; see also Gordon v. State, 608 So.2d 800, 801 (Fla. 1992) (explaining that the legislature is the ultimate policy-maker of the state); cf. Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1060 (N.Y. 2003) ("Decisions involving licensing, taxation, and criminal and civil jurisdiction require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure.").

Congress enacted IGRA as a balancing of interests to allow "tribal and State governments to realize their unique and individual government objectives" with

regard to gambling. S. REP. NO. 100-446, at 18 (1988). There are no provisions within IGRA that even remotely indicate that Congress intended for Class III gaming to occur in absence of a valid Tribal-State compact. See id. at 6 ("[IGRA] does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a [T]ribal-State compact."). Thus, tribal governments and state governments are required to engage in intimate negotiations in order to create a valid Tribal-State compact that addresses the concerns of both sovereigns. This negotiation rightfully entails public-policy concerns that cannot be addressed by a single state actor. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 75, n. 17 (1996).

B. This Court is not required to interpret IGRA

Finally, this Court is not required to look at federal law to determine that the Governor exceeded his authority under the Florida Constitution. See Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1558 (10th Cir. 1997)("State law must determine whether a state has validly bound itself to a compact.")(citations omitted). This issue can be resolved by reviewing the subjects covered in the Compact and determining whether or not the Governor possesses such authority under Florida constitutional or statutory law. IGRA does not address the authority that any governor possesses under the relevant state constitutional and statutory law.

IGRA provides the process by which States and Indian tribes negotiate a Tribal-State compact governing the conduct of Class III gaming activities. See 25 U.S.C. §§ 2710(d)(1), 2710(d)(3). These provisions are rightfully silent on the issue of which individual or individuals constitute the "State" for purposes of compact negotiation. IGRA simply serves as a balance between the sovereign States and Indian tribes. See S. REP. NO. 100-446, at 17-9 (1988). This balance, during the course of compact negotiations, is ever changing based upon the scope of gaming involved, the parties, and the relevant law of the affected State. Thus, this Court should avoid an attempt to construe IGRA and instead focus upon the relevant provisions of the Compact and the Governor's authority under the Florida Constitutional and statutory law to negotiate those provisions.

CONCLUSION

The Governor's attempt to unilaterally bind the State to the Compact has usurped legislative power and exceeded the power granted to the Governor under the Florida Constitution. This attempt by the Governor is directly contrary to Florida law and policy. For these reasons, we recommend that the Court grant the Petitioner's request and issue a Writ of Quo Warranto declaring that the Governor has exceeded his power under the Florida Constitution because legislative authorization or ratification is necessary for any Tribal-State compact governing gaming on Indian lands to be valid in this State.

RESPECTFULLY SUBMITTED

David Jove
Fla. Bar No. 525502
Andre McKenney
Fla. Bar No. 596892
City of Hallandale Beach
400 South Federal Highway
Hallandale Beach, Florida 33009
(954) 457-1325 (Tel.)
(954) 457-1660 (Fax)
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to BOB HANNAH, ESQUIRE, Deputy Attorney General and Chief Counsel, and SIMONE MARSTILLER, ESQUIRE, Associate Deputy Attorney General, Office of The Attorney General, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050; PAUL HUCK, ESQUIRE, General Counsel, Florida House of Representatives, 422 The Capitol, Tallahassee, Florida 32399-001; JERIMIAH M. HAWKES, ESQUIRE, General Counsel, Florida House of Representatives, 422 The Capitol, Tallahassee, Florida 32399-1300; BARRY S. RICHARD, ESQUIRE, of Greenberg Traurig, P.A., 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302; and JON MILLS, ESQUIRE, TIMOTHY McLENDON, ESQUIRE, Post Office Box 2099, Gainesville, Florida 32602, and JOSEPH H. WEBSTER, ESQUIRE, JERRY C. STRAUS, ESQUIRE, and F. MICHAEL WILLIS, ESQUIRE, of Hobbs Straus Dean & Walker LLP, 2120 L Street N.W., Suite 700, Washington D.C. 20037, CYNTHIA S. TUNNICLIFF, ESQUIRE AND MARC W. DUNBAR, ESQUIRE, of Pennington, Moore, Wilkinson, Bell, & Dunbar, P.A. 215 South Monroe Street – 2nd Floor (32301), Post Office Box 10095, Tallahassee, FL 32302-2095, JASON VAIL, ESQUIRE, Special Counsel, Florida Senate, R. 304, Senate Office Building, 404 S. Monroe St., Tallahassee, FL 32399-1100, CHRISTOPHER M. KISE, ESQUIRE, of Foley & Lardner LLP, 106 East College Avenue, Tallahassee, FL 32301, JAMES A. MCKEE, ESQUIRE of Foley & Lardner LLP, 106 East College Avenue, Tallahassee, FL 32301 this 17TH day of December, 2007.

____

Andre Mckenney

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amicus Curiae Brief was prepared using Times New Roman 14-point font and complies with Fla. R. App. P. 9.210(a).

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Andre Mckenney