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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WALTER E. HEADLEY, JR.,
MIAMI LODGE #20, FRATERNAL
ORDER OF POLICE, INC.,

Petitioner,

v.

CITY OF MIAMI, FLORIDA,

Respondent.
_________________________________/

CASE NO.: SC13-1882
L.T. CASE NO. 1D12-2116

BRIEF OF AMICUS CURIAE HOLLYWOOD FIRE FIGHTERS, LOCAL 1375, IAFF, INC., IN SUPPORT OF PETITIONER WALTER E. HEADLEY, JR., MIAMI LODGE #20, FRATERNAL ORDER OF POLICE, INC., ON THE MERITS

Noah Scott Warman
SUGARMAN & SUSSKIND, P.A.
Counsel to Amicus Curiae Hollywood Professional Fire Fighters
100 Miracle Mile Suite 300
Coral Gables, Florida 33134
Tel. (305) 529-2801
Fax (305) 447-8115
E-mail: nwarman@sugarmansusskind.com
Florida Bar No. 30960

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STATEMENT OF INTEREST

The Hollywood Fire Fighters, Local 1375, IAFF, Inc. ("Union"), has a direct and immediate interest in this case. The City of Hollywood, which employs its members, made three separate declarations of financial urgency in 2010 and 2011. The Union filed two separate unfair labor practice charges to challenge declarations two (for FY 2010-11) and three (for FY 2011-12).

PERC adjudicated the first charge. *Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood*, 39 FPER ¶ 54 (2012). (At the parties' request it has indefinitely stayed the second.) PERC found that the City of Hollywood had properly invoked the financial urgency statute, §447.4095, Fla. Stat. (2012), and lawfully changed firefighters' wages, benefits, and work hours, even though the City itself had determined it would be solvent for the rest of FY 2010-11 without changing a single term of a single collective bargaining agreement. In its decision PERC cited its decision in *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc. v. City of Miami*, 38 FPER ¶ 330 (2012), and adopted its reasoning to resolve the Union's charge against the City of Hollywood.

The FOP appealed PERC's decision to the First District Court of Appeal, which sustained PERC's ruling, leading to the instant appeal. *Walter E. Headley, Jr., Miami Lodge #20, Fraternal Order of Police, Inc. v. City of Miami*, 118 So.3d 885 (Fla. 1st DCA 2013) ("*Headley*").

The Union appealed PERC's decision to the Fourth DCA, which reversed, finding that PERC failed to apply the *Chiles* test when determining whether the City had the right to unilaterally reduce contractually-guaranteed wages and benefits. *Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood*, 133 So. 2d 1042 (Fla. 4th DCA 2014) ("*Hollywood*"). The Fourth DCA expressly noted that its decision conflicted with the First DCA's *Headley* decision. The City's appeal to this Court has been stayed.

The resolution of *Headley* necessarily controls *Hollywood*, for both require the Court to determine whether its ruling in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993) ("*Chiles*") applies to the review of financial urgency declarations or, at a minimum, whether an employer must exhaust the impasse resolution process of the Act before unilaterally changing contractually-fixed terms and conditions of employment.

SUMMARY OF ARGUMENT

The right to bargain collectively is a fundamental right, subject to strict scrutiny. The government must use the least restrictive means to serve a compelling state interest when curtailing fundamental rights. PERC and the First DCA failed to apply that standard.

By treating collective bargaining agreements as the only contract of any kind that a governmental entity can unilaterally and selectively negate during the term

of that contract, over a union's objection, the financial urgency statute penalizes employees for exercising their fundamental right to bargain collectively and violates the contracts clause of the Florida Constitution as well.

Finally, PERC and the First DCA have ignored the plain language of the financial urgency statute in three separate ways: by allowing modifications to collective bargaining agreements even when they are not required, by declaring that bargaining over contractually-guaranteed wages and other working is "impact" bargaining, and by authorizing employers to selectively and indefinitely void contracts without first exhausting the Public Employees Relations Act's impasse resolution process. Without regard to the constitutional flaws in the statute, these three conclusions alone merit reversal.

ARGUMENT

POINT I

THE FINANCIAL URGENCY STATUTE VIOLATES EMPLOYEES' FUNDAMENTAL RIGHTS TO BARGAIN COLLECTIVELY AND TO CONTRACT

A. The right to bargain collectively remains a fundamental right that may only be restricted using the least restrictive means necessary to serve a compelling state interest.

This case presents a straightforward constitutional issue: are derogations of fundamental constitutional rights subject to strict scrutiny or instead to some lesser standard of review? The right to bargain collectively appears in Article I of

Florida's Constitution, its "Declaration of Rights," preceded by the freedom of speech and right to assemble, followed by the right to bear arms and to contract. For four decades this Court has found the right to bargain collectively to be a fundamental constitutional right.

Such fundamental rights may be impaired only upon the showing of a compelling state interest and then only if the government uses the means least restrictive of that right to attain its end. Any impairment of a fundamental right must pass strict scrutiny. The state cannot impair the freedom of speech for convenience or limit religious freedom for political expedience. The fundamental right to bargain collectively should fare no worse.

For this reason the Court should reject the First DCA's failure to apply the *Chiles* test. The First DCA adopted a reasonableness test that flies in the face of strict scrutiny. Upon a showing of a compelling interest the First DCA would obligate the government only to pass a reasonableness test, proving that the means it chose to serve that interest were merely reasonable, not the least restrictive means available. This analysis flies in the face of *Chiles*.

As in *Chiles* so here in *Headley* and also in *Hollywood* – a restriction on the right to bargain requires the government to prove it has used the least restrictive means to serve its compelling interest. As outlined below, selectively voiding a

collective bargaining agreement, during the term of that agreement, cannot be the least restrictive means available to a Florida municipality.

B. The financial urgency statute has no counterpart in the private sector, and the power it confers on public employers negates the right to bargain collectively and the right to contract.

As this Court has held, the right to bargain for public employers must be co-extensive to the greatest degree possible with that of their private sector counterparts, but for the right to strike and acknowledging the unique functions government performs in the lives of its citizens. *City of Tallahassee v. PERC*, 410 So. 2d 487 (Fla. 1981). The very definition of collective bargaining contemplates mutual agreement on a binding, enforceable contract – the antithesis of unilateral control by an employer over wages, hours of work, and other terms and conditions of employment. Once public sector employees have elected union representation, their employer "*shall* bargain collectively in the determination of the[ir] wages, hours, and terms and conditions of employment…" §447.309(1), Fla. Stat. (2012), emphasis added. The employer no longer has the right to unilaterally establish wages or other terms of employment.

The financial urgency statute violates the right to bargain collectively by conferring upon public employers the ability to selectively negate provisions of a collective bargaining agreement during the life of that agreement, a right no private sector employer has. In the private sector the only way an employer may negate

any provision of a collective bargaining agreement during its term over the objection of a union is to declare bankruptcy and to obtain judicial approval of its proposal *before* any changes are made. *See* 11 U.S.C. §1113. On the other hand, upon declaring a financial urgency an employer may cut wages, hours, and benefits unilaterally, immediately, and without any prior scrutiny or approval by any disinterested third party and without proving imminent or actual insolvency. This gross disparity in the treatment of collective bargaining agreements alone renders financial urgency unconstitutional. It unlawfully deprives Florida employees of collective bargaining rights their private sector counterparts take for granted. *See, e.g.*, *City of Tallahassee*, *supra*.

A collective bargaining agreement is the only contract that the Legislature has authorized its political subdivisions to unilaterally and selectively negate during the term of the contract. No other statute entitles a public entity to unilaterally negate provisions of a binding contract over the objection of the other party. The amorphous phrase "financial urgency" appears nowhere else in the Florida Statutes. The City could not declare financial urgency and then selectively void its agreements with the phone company, the electric company, its bank, its bondholders, or any party other than its employees' unions.

Collective bargaining agreements stand as the only type of contract governments may void unilaterally, selectively, indefinitely over the objection of

the other party. For this reason the law affirmatively penalizes employees for exercising their fundamental constitutional right to unionize. In enacting (after prodding from this Court) the Public Employees Relations Act Florida's legislature expressed a policy of neutrality with respect to organization: nothing in the Act "shall be construed either to encourage or discourage organization of public employees, …" §447.201, Fla. Stat. (2012). Financial urgency directly conflicts with that policy. It negates the right to bargain *collectively* – but not the right to contract *individually* with an employer.

The FOP's brief echoes a point that the Union itself has made to PERC and to the Fourth DCA: if the employees represented by the Union working under the terms of a collective bargaining agreement were instead not unionized, but party to individual contracts of employment containing the very same wages, hours, and working conditions as that collective bargaining agreement, financial urgency would not allow their employer to change a single term of their individual agreements over the employees' objections. Only employees who exercise the right to bargain collectively are subject to having their contracts voided unilaterally under the financial urgency statute.

Financial urgency violates the right to contract, a right inextricably intertwined with the right to bargain collectively as the Court acknowledged in *Chiles*. Indeed, it authorizes an employer to selectively void a contract that enjoys

protection under two separate articles of the Florida Constitution. Financial urgency thus transforms a binding contract that enjoys enhanced constitutional protection into an unconstitutional illusory promise.

POINT II

PERC HAS IGNORED THE PLAIN LANGUAGE OF THE STATUTE BY ALLOWING EMPLOYERS TO IMMEDIATELY, SELECTIVELY, AND INDEFINITELY VOID COLLECTIVE BARGAINING AGREEMENTS.

A. A party must not elect to modify a contract – it must be *required* to modify a contract, yet PERC has ignored this requirement.

PERC's interpretation of the financial urgency statute enjoys no particular deference. PERC cannot adjudicate constitutional disputes, nor may it contort the plain language of a statute beyond recognition as it has done here thrice over. A financial urgency must *require* modification of an agreement. If an employer has a range of options available to address its finances, such as raising taxes or reducing service levels, modification cannot be *required*. Even if the financial urgency requires modification of the parties' contract, the statute obligates the parties to bargain over the impact of a financial urgency; in no way does the statute suggest that this amounts to "impact bargaining," a term of art that does not appear in the statute. Moreover the plain language of the statute requires the parties to participate in and exhaust the Act's impasse resolution procedures *before* the employer may unilaterally change previously agreed-upon, contractually-binding

terms of employment. PERC, with the First DCA's approval, has ignored the plain language of the statute on all three counts.

The first threshold lies in "requiring modification." That threshold must be crossed before addressing whether a Union has any obligation at all to bargain during the life of its contract. This threshold will rarely, if ever, be met short of actual insolvency.

The very term "require" means obligation, not choice, expedience, or convenience. Contrary to the logic of PERC and the First DCA, in this regard the very language of the Act incorporates the *Chiles* test – an employer must have no other choice at all but to void its agreement with a union. Its financial condition must obligate it to do so.

Rarely will an employer be obligated to change the literal language of a collective bargaining agreement to remain solvent. Public employers statutorily enjoy "management rights" – unilateral rights to determine the breadth and depth, the very nature of its operations. They have the right "to determine unilaterally the purpose of each of [their] constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over [their] organization and operations." §447.209, Fla. Stat. (2012). PERC has crafted others, such as the right to furlough employees. *Teamsters Local Union No. 769 v. Martin County Bd. of County Comm'rs*, 37 F.P.E.R. ¶57 (2011) (employers have a management right

to implement furloughs "to alleviate economic shortfalls"). Collective bargaining agreements routinely incorporate these rights as well, making them contractual as well as statutory in nature. Most agreements go further and squarely address the *effects* of management rights, notably in the form of layoff clauses that establish the manner in which the workforce may be reduced and recalled.

For an employer to be *required* to modify an agreement, it must first exhaust those *elective* statutory and contractual rights. So long as an employer has a range of options available – subcontracting, reductions in force, reducing the level of service, raising taxes or service fees – it cannot be *required* to modify a contract.

Given the depth and breadth of employers' management rights, one becomes hard pressed to imagine just how bad an employer's financial situation must be to *require* modification of a collective bargaining agreement. For this reason, the Union maintains that financial urgency must be at a minimum the equivalent of a financial emergency, a statutorily-defined concept that occurs when a governmental entity has an actual or anticipated inability to meet its financial obligations as they come due. To remedy financial hardships faced by Florida's political subdivisions the Legislature enacted the "Local Governmental Entity, Charter School, Charter Technical Career Center, and District School Board Financial Emergencies Act," a detailed statute with objective criteria providing for state oversight and funding of a political subdivision in the event of actual or

impending insolvency. §§218.50-218.504, Fla. Stat. (2012). It contains the procedural safeguards utterly lacking in the financial urgency statute as presently interpreted by PERC.

Indeed, the very definition of financial urgency adopted by PERC and approved by the First DCA amounts to financial emergency. Financial urgency requires a determination that "funding was not available to meet the employer's financial obligations to its employees, …" *Headley,* 118 So.3d at 890. A financial emergency occurs when an employer will be unable to pay employees' wages or benefits as they come due, to make bond payments, or to compensate creditors in a timely manner. §218.503(1)(a)-(d), Fla. Stat. (2012). It does not require that the failure to pay actually occur. §218.503(2), Fla. Stat. (2012). PERC's definition of "financial urgency," taken at face value, functionally amounts to financial emergency, yet PERC has concluded otherwise, find that financial urgency is a *lower* threshold than financial emergency. An employer actually in a state of financial emergency cannot selectively void any contracts of any kind, whereas declaring financial urgency, ostensibly to avoid financial emergency, entitles an employer to void one and only one specific type of contract unilaterally, immediately, and indefinitely.

The financial emergency statute contains objective criteria established by the Legislature that apply uniformly to all Florida political subdivisions. It provides

oversight and financial assistance without voiding any contracts of any kind. Its very existence means that voiding a collective bargaining agreement cannot be the least restrictive means to address an employer's bona fide financial crisis.

Moreover the financial emergency statute provides the clarity, uniformity, and objectivity so sorely lacking in the financial urgency statute. PERC has adopted an ad hoc test; it knows financial urgency when it sees it. As matters now stand, three unelected Commissioners, two of whom are part time, serve as the arbiters of the wisdom of financial and political decisions made by elected officials that go to the very heart of the services they provide to their constituents.

For decades PERC has categorically – and wisely – refused to assume this role. *See, e.g., Martin County Education Ass'n v. School Bd. of Martin County*, 18 F.P.E.R. ¶23061 (1992) (PERC "may not intrude into the political decision-making process of local school boards as they decide how to prioritize spending"). However, in order to evaluate whether an employer has legitimately declared financial urgency PERC must engage in a detailed review of the employer's financial decisions, second guessing its governing officials as to whether and to what extent the city should have laid off employees, reduced services, subcontracted, raised taxes, increased fees, pursued loans, and so forth. PERC will necessarily need to adjudicate such sensitive issues as the appropriate levels of fire-rescue and police service.

PERC may have expertise in matters of labor relations, but the financial urgency statute as interpreted by PERC itself and the First DCA now obligates the agency to make after-the-fact political and economic judgments of a highly-sensitive nature far beyond that realm of expertise. By failing to interpret financial urgency as akin to financial emergency, at least provides objective bases to scrutinize an employer's actions, PERC has instead placed itself in a devil's dilemma: either to adhere to settled precedent, continuing to refuse to review and pass judgment upon decisions made by elected officials regarding taxation, service levels, and finance, indeed, the very nature of their local government; or instead to determine appropriate levels of taxation, adequate standards of service, sufficient staffing levels for police officers and firefighters, and acceptable pay rates and benefits. Thus financial urgency becomes fundamentally unreviewable, should PERC give deference to employer's political decisions, or else requires intrusive review and oversight of elected officials' decisions by three unelected officials.

B. The statute does not entitle an employer to engage only in "impact" bargaining; indeed, the bargaining authorized by PERC is not bona fide impact bargaining at all.

Beyond whether an employer's finances dictate modification of a collective bargaining mid-term, it must engage in bargaining over subjects such as wages and work hours before those mandatory subjects may change, and it must do so until agreement is reached or impasse resolution concluded. This is decision bargaining,

not impact bargaining. The financial urgency itself statute does not entitle an employer to engage only in "impact bargaining," contrary to the holdings of PERC and the First DCA. The very language of the statute reads otherwise: "the impact of the financial urgency." To bargain over the impact of subsequent events upon one's contract does not equate with the distinct labor law concept of "impact bargaining." Notably PERC had long referenced impact bargaining before the Legislature passed the financial urgency statute. Had the Legislature meant to use that term of art, it had ample opportunity to do so. It elected otherwise.

True impact bargaining occurs when an employer exercises a right of unilateral action, such as determining how many workers it will employ, whether it will provide a public service, and if so, the level of service it will provide. Those decisions indirectly may or may not affect the wages and working conditions of its workers. On the other hand, bargaining under the financial urgency statute involves directly changing only matters expressly covered by the parties' collective bargaining agreement: wages, pension benefits, health insurance, and other working conditions that cost the employer money, subjects that Act itself expressly makes mandatory subjects of bargaining. *See* Fla. Stat. § 447.309(1) and (5) (2012).

Bona fide impact bargaining results from management doing something it has an inherent right to do on its own – i.e., exercising its management rights. But

for the financial urgency statute, a public employer would have no right at all to selectively negate portions of a binding contract. Impact bargaining occurs when management makes decisions outside of the scope of an agreement that may affect wages and working conditions, whereas bargaining a financial urgency seeks to change only contractually-guaranteed wages and working conditions.

Management rights concern the very nature and scope of the employer's operations. As the U.S. Supreme Court observed in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), a "change in the scope and direction of the enterprise, … akin to the decision whether to be in business at all," is a decision that need not be bargained; nevertheless, the effects of that decision on employees' job security and working conditions must be. 456 U.S. at 676-77. Moreover, when an employer exercises a management right, "[t]he [decision] cannot be a 'fait accompli' which would make good-faith bargaining 'futile or impossible,'" *NLRB v. Emsing's Supermarket, Inc.,* 872 F.2d 1279, 1286 (7th Cir. 1989). Nevertheless PERC has interpreted financial urgency to allow this very fait accompli, authorizing the employer to pick and choose which sections of the parties' agreement it wishes to change and imposing those changes without even exhausting the Act's impasse resolution process beforehand.

To analogize the logic of impact bargaining to remedies, injunctive relief – such as keeping a factory open or stopping the subcontracting of the public works

department – is simply not available to the union over the employer's objection. On the other hand, monetary "damages," such as severance payments or benefit fund contributions, must be bargained upon the demand of just one party until either agreement is reached or impasse is fully resolved in accord with §447.403.

This distinction is what makes the PERC's financial urgency rulings so radical. There is no "injunctive" aspect to financial urgency. The employer is not closing, downsizing, subcontracting, or otherwise changing the nature of its operations. It seeks solely monetary relief by reducing employees' wages and benefits, which otherwise cannot be legally changed by the employer during the term of an agreement. Bargaining the effects of financial urgency upon a binding, fully-funded contract is not bona fide impact bargaining.

C. To the extent PERC has authorized employers to unilaterally change contractually-guaranteed wages and other working conditions without first exhausting the impasse resolution process, it has ignored the plain language of the statute.

But for financial urgency, employee's wages, work hours, and other terms of employment cannot change without either agreement or exhaustion of the Act's impasse resolution process. Nevertheless PERC and the First DCA have ruled that upon declaring financial urgency an employer has no obligation to participate in impasse resolution before changing wages and working conditions. This holding ignores the very language of the statute: if the parties fail to reach agreement, they "*shall then* proceed pursuant to the provisions of s. 447.403." (Emphasis added.)

At the time the Legislature passed the financial urgency statute, PERC case law required exhausting the impasse process even before implementing management rights. *Central Florida Professional Firefighters Ass'n, Local 2057 v. Bd. of County Comm'rs of Orange County*, 9 F.P.E.R. ¶14372 at 776 (1983), *aff'd in relevant part*, 467 So. 2d 1023 (Fla. 5th DCA 1985); *United Faculty of Palm Beach Junior College v. Palm Beach Junior College Board of Trustees*, 7 F.P.E.R. ¶12300 (1981). Several years passed after the law took effect before PERC changed its tune and opined that employers could implement a management right without first exhausting impasse. *See Jacksonville Supervisors Association v. City of Jacksonville,* 26 FPER ¶31140 at 255-56 (2000), *rev'd in part on other grounds*, 791 So. 2d 508 (Fla. 1st DCA 2001). Notably the First DCA did not adopt PERC's rationale regarding imposition and impact bargaining.

PERC has determined that financial urgency mandates prompt action, and thus an employer may implement before impasse resolution. That need for prompt action finds no support in the statute, which expressly obligates the parties to use the procedures set forth in §447.403 should they fail to reach agreement. Had the Legislature intended to expedite or even avoid the impasse process, it could have so stated. Indeed, it has done so on at least one occasion. In 2007 the Legislature amended § 447.403 to provide for expedited impasse resolution to address disputes over merit pay for teachers. *See* Fla. Stat. § 447.403(c) (2007) (creating an

expedited special magistrate process for those particular disputes). If the Legislature intended for there to be expedited impasse procedures for financial urgencies, it could certainly follow that example and create them. It did not.

Indeed, PERC, with the First DCA's blessing, has rendered impasse resolution an exercise in futility. Presently the City's negotiators, acting at the direction of the City Commission, pursuant to the Commission's own declaration of financial urgency, must bargain for no more than 14 days. The City Commission may then immediately make the changes to wages and working conditions it directed its negotiators to bargain for, and only after making those changes is the City required to invoke the Act's impasse resolution process. That process culminates in a hearing before the very same City Commission and entitles that Commission to unilaterally impose changes to wages and working conditions! Rather than the reasoned process contemplated by the impasse process, financial urgency entitles the union to simply beg the very same decision makers to change their mind after the damage has already been done.

Those changes become the new status quo indefinitely. The changes are not limited in duration to the term of the financial urgency. They remain in effect for at least the remainder of the fiscal year in which impasse is declared, if not longer. Nothing in the financial urgency statute obligates the employer to limit the changes solely to the duration of its financial urgency. To the extent that the statute

contains no temporal limitation on changes to the contract, that too violates the right to bargain collectively. By allowing changes to the parties' agreement beyond the duration of the crisis allegedly necessitating those changes, the statute fails to use the least restrictive means to serve the government's interest.

Compare and contrast this state of affairs with *Baltimore Teachers Union v. City of Baltimore,* 6 F.3d 1012 (4th Cir. 1993). In that case, a contracts clause case (and an outlier at that), the Court found that the City of Baltimore did not violate the federal constitution's contract clause when selectively modifying collective bargaining agreements because the employer expressly limited the duration of its changes to the duration of its financial crisis. Had Baltimore indefinitely changed the terms of its contracts – the very sort of action authorized by the financial urgency statute – that would have violated the contracts clause. In sum, the *Chiles* test, whether viewed through the lens of the right to collectively bargain or the right to contract, would require an employer to use a scalpel to solve its financial problems – at a minimum to limit the changes to the duration of the crisis. The financial urgency statute fails to pass constitutional muster because it entitles the employer to take a hatchet to its employees' collective bargaining agreements.

CONCLUSION

What financial urgency allows an employer to do is very simple – and that is to do nothing of consequence at all, other than cut its unionized employees'

contractually-guaranteed wages and benefits to save money. It can keep the same hours of work. It can maintain the same levels of staffing. It can keep every single union-represented employee on the payroll. It can preserve precisely the same level of service. It can even *lower* taxes while claiming financial hardship.

PERC has not required a single employer to lay off a single employee, to subcontract or eliminate a single service, to raise taxes a single dollar, in a single financial urgency case. It has adopted the employer's claims of financial "urgency" carte blanche, allowing marked reductions in wages and benefits without exhausting the impasse resolution process. It has thus interpreted the statute to obliterate the right to bargain collectively. The First DCA, by failing to apply strict scrutiny as required by *Chiles*, has endorsed this unconstitutional interpretation. The Court should reverse and remand, directing the agency to apply the appropriate standard of review in order to preserve the fundamental rights of contract and collective bargaining afforded Florida's workers by our Constitution.

Respectfully submitted,

/s/ Noah Scott Warman
Noah Scott Warman, Esquire
SUGARMAN & SUSSKIND, P.A.
Counsel for Amicus Curiae IAFF Local 1375
100 Miracle Mile Suite 300
Coral Gables, Florida33134
Telephone: (305) 529-2801
E-Mail: nwarman@sugarmansusskind.com
Florida Bar No. 30960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 3rd day of November, 2014, to the following:

Ron Cohen
Rice Pugatch Robinson & Schiller, P.A.
101 N.E. Third Avenue
Suite 1800
Fort Lauderdale, Florida 33301
E-mail: rcohen@rprslaw.com

John A. Greco, Esq.
Victoria Mendez, Esq.
Diana Vizcaino, Esq.
City of Miami, Office of the City Attorney
444 SW 2nd Avenue
Suite 945
Miami, Florida 33130
E-mail: jgreco@miamigov.com
E-mail: victoriamendez@miamigov.com
E-mail: dvizcaino@miamigov.com

William D. Salmon, Esq.
Public Employees Relations Commission
4050 Esplanade Way
Tallahassee, Florida 32399-0950
E-mail: Bill.Salmon@perc.myflorida.com

Michael Mattimore, Esq.
Allen, Norton & Blue, PA.
906 N. Monroe Street
Tallahassee, Florida 32303
E-mail: mmattimore@anblaw.com

Luke Savage, Esq.
Allen, Norton & Blue, P.A.
121 Majorca Avenue

Suite 300
Coral Gables, Florida 33134
E-mail: lsavage@anblaw.com

Thomas W. Brooks, Esq.
Meyer, Brooks, Demma and Blohm, P.A.
131 North Gadsden Street
P.O. Box 1547
Tallahassee, Florida 32302
E-mail: tbrooks@meyerbrookslaw.com

Paul A. Donnelly, Esq.
Donnelly and Gross, P.A.
2421 NW 41st Street
Suite A-1
Gainesville, Florida 32606
E-mail: pdonnelly@laborattorneys.org

G. Hal Johnson, Esq.
Florida Police Benevolent Association
P.O. Box 11239
Tallahassee, Florida 32301
E-mail: hal@flpba.org

Richard A. Sicking, Esq.
Touby, Chait & Sicking, PL
2030 S. Douglas Rd., Suite 217
Coral Gables, Florida 33134-4620
E-mail: sickingpa@aol.com

David C. Miller, Esq.
Bryant Miller Olive, P.A.
SunTrust International Center
1 SE 3rd Avenue
Suite 2200
Miami, Florida 33131
Email: dmiller@bmolaw.com

Stephen Hale Cypen, Esq.
Cypen & Cypen

777 Arthur Godfrey Road
Miami Beach, Florida 33140-3449
Email: scypen@cypen.com
Michael P. Spellman, Esq.
Hetal H. Desai, Esq.
Sniffen and Spellman
123 North Monroe Street
Tallahassee, Florida 32301
Email: mspellman@sniffenlaw.com
Email: hdesai@sniffenlaw.com

Harry Morrison, Jr., Esq.
Kraig Conn, Esq.
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32302
Email: cmorrison@flcities.com
Email: kconn@flcities.com

Mitchell Wayne Berger, Esq.
Berger Singerman LLP
350 E. Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Email: mberger@bergersingerman.com

Daniel H. Thompson, Esq.
Berger Singerman LLP
125 S. Gadsden Street, Suite 300
Tallahassee, Florida 32301
Email: dthompson@bergersingerman.com

By: /s/Noah Scott Warman
Noah Scott Warman

CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been typed in 14 point proportionately spaced Times New Roman.

/s/ Noah Scott Warman
Noah Scott Warman