IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC14-1603
L.T. CASE NO. 2014 CA 000548

FLORIDA BANKERS ASSOCIATION,

Appellant,

v.

STATE OF FLORIDA, *et al*.,

Appellees.

AMICUS CURIAE BRIEF OF GREEN CORRIDOR PROPERTY ASSESSMENT CLEAN ENERGY DISTRICT AND THE FLORIDA GREEN FINANCE AUTHORITY IN SUPPORT OF APPELLEE, THE FLORIDA DEVELOPMENT FINANCE CORPORATION

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

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INTRODUCTION

Pursuant to Fla. R. App. P. 9.370 and this Court's order dated November 14, 2014, Green Corridor Property Assessment Clean Energy (PACE) District ("Green Corridor") and The Florida Green Finance Authority ("Authority") hereby file this *amicus curiae* brief in support of appellee, The Florida Development Finance Corporation ("FDFC").

CONCISE STATEMENT OF IDENTITY AND INTEREST OF AMICI

A. Green Corridor's identity and interest.

Green Corridor is a valid and legally existing public body corporate and politic within the State of Florida, created pursuant to the Florida Interlocal Cooperation Act of 1969, Chapter 163, Part I, Florida Statutes, as amended. It operates pursuant to the provisions of a certain interlocal agreement filed in the public records of Miami-Dade County on August 6, 2012 at OR Book 28217, pages 0312-0333, initially among the Town of Cutler Bay, Florida, the Village of Palmetto Bay, Florida, the Village of Pinecrest, Florida, the City of South Miami, Florida, the City of Coral Gables, Florida, Miami Shores Village, Florida, and the City of Miami, Florida. Green Corridor's purpose is to finance qualifying improvements on properties in connection with Florida's Property Assessed Clean Energy ("PACE") legislation, codified predominantly at section 163.08, Florida Statutes. Since its commencement, the Village of Key Biscayne, Florida, has also

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joined as a member.[1] The participating cities will be referred to as the "Program Cities."

Green Corridor commenced an action in the circuit court of Leon County to validate their issuance of bonds in connection with Florida's PACE legislation, codified predominantly at section 163.08, Florida Statutes. On October 23, 2012, the trial court validated Green Corridor's bonds and no appeal was taken. As a result of the finality of that bond validation, Green Corridor commenced operations providing funding to property owners in its jurisdictions to effectuate the objectives of the PACE legislation. On January 15, 2013, the Green Corridor entered into an agreement with the Miami-Dade County property appraiser and tax collector in order to utilize the uniform method of collection contemplated by section 197.3632, Florida Statutes.

As the only PACE program in substantial operation as of this date, Green Corridor can provide insight as to actual operations, its interaction with actual lending institutions, and the statistical data available as to foreclosures of the properties subject to PACE liens and the impacts of such foreclosures on lending institutions. Moreover, should the Court accept the invitation of appellant, Florida Bankers Association ("FBA"), to declare the PACE Legislation unconstitutional on

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[1] Additional information about the program may be obtained online at https://ygrene.us/fl/green_corridor.

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grounds of impairment of contract, the validity of Green Corridor's program, which has been lawfully operating for more than two years, would be called into question and create chaos as to the existing financial obligations that have been created pursuant to that program. FBA has proffered no explanation as to what would happen to programs currently lawfully operating or to the financial interests created under those programs.

B. Authority's identity and interest.

Authority is also a valid and legally existing public body corporate and politic within the State of Florida, created pursuant to the Florida Interlocal Cooperation Act of 1969, Chapter 163, Part I, Florida Statutes, as amended. It, too, operates pursuant to the provisions of a certain interlocal agreement filed as required with the Palm Beach County Clerk and Comptroller on October 18, 2012, initially among the Town of Lantana, Florida, and the Town of Mangonia Park, Florida. Since its formation, numerous other local governments have executed "Party Membership Agreements" to become parties to the interlocal agreement. These members include ten other local governments across four county jurisdictions as follows: City of West Palm Beach, City of Lake Worth, City of Boynton Beach, City of Delray Beach, Village of Tequesta, City of Fellsmere, City of Sebastian, City of Stuart, Martin County, City of Gulfport. The Authority's purpose is also to finance qualifying improvements on properties in connection

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with Florida's PACE legislation. The participating local governments are known as "Member Jurisdictions."[2]

On November 1, 2012, the Authority passed a Resolution to Use the Uniform Method of Collection its PACE Assessments pursuant to section 197.3632, Florida Statutes, as required by Florida's PACE legislation. On August 26, 2013, the Authority entered into an agreement with the Palm Beach County property appraiser, and on June 26, 2014, entered into a similar agreement with the Palm Beach County tax collector in order to utilize the uniform method of collection for PACE Assessments. The Authority commenced operations in 2012 launching its program throughout its Member Jurisdictions.[3]

As is the case with respect to Green Corridor's operations, the Authority is concerned that FBA's request to declare the PACE legislation unconstitutional is made without regard for the potential impact of such a ruling on currently lawfully operating programs or to the financial interests created under those programs.

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[2] Additional information about the program may be obtained online at http://www.floridagreenenergyworks.com.

[3] The final judgment of October 15, 2014, validating the Authority's bonds has been appealed. The Authority has nonetheless proceeded with its program temporarily using alternate financing mechanisms.

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C. Green Corridor's operations to date.

Green Corridor operates the PACE program for the Program Cities at no risk or cost to the cities. Green Corridor enters into the financing agreements with qualifying property owners who apply and levies the non-ad valorem special assessments for repayment of the costs of the improvements. A program administrator hired by the Green Corridor is responsible for program administration, marketing of the program, community outreach, contractor training and financing.[4]

In the 14 months that Green Corridor has been in full operation, it has processed approximately 1,000 applications under its PACE program, resulting in 150 completed projects for improvements worth approximately $5.5 million, the vast majority of which involve residential property owners. An additional 375 projects are currently under construction. At present, Green Corridor is processing approximately 100-150 applications per month. In all of these projects, there has not been a single foreclosure of a mortgaged property.

In addition to all of the safeguards required by section 163.08, Florida Statutes, *see infra* at 10-11, Green Corridor takes additional precautions to ensure the "creditworthiness" of the property owner seeking to improve his or her

[4] The Authority operates in a similar fashion, but for the sake of brevity, only a description of the Green Corridor's operations will be discussed.

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property and the qualifications of contractors who may adversely impact the property. For example, Green Corridor requires that there have been no more than one late mortgage payment in the preceding 12 months, that no bankruptcy have been declared during that same period, and that there be equity in the property. As a result of these safeguards, and those mandated by section 163.08, approximately 15-20 percent of those applying under the program are rejected.

With respect to the contractors, Green Corridor investigates the background of the contractor to ensure that not only are they insured and registered as required by law, but also that there are no substantial complaints asserted against the contractor. Qualifying contractors are also required to undergo training as to Green Corridor's program. Payments are not made to contractors by Green Corridor until their work has been inspected and approved by the appropriate local authorities. Green Corridor requires that the contractors executed a conditional release of lien as to the property.

When a property owner applies to Green Corridor to fund a qualifying improvement, Green Corridor provides the requisite 30-day notice to any mortgagee, as required by statute. This notice inevitably triggers one of four reactions: either the lender consents, or it does nothing, or it inquires of Green Corridor as to the nature of the program because its representative is unfamiliar with it, or it sends a letter to the property owner attempting to discourage the property owner from availing himself or herself of the PACE program.

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In the latter instances, Green Corridor corresponds with the lender in an attempt to educate the lender as to the PACE program and to assist the lender in safeguarding its interests in the property. A sample letter is enclosed at Appendix A.[5] In that letter, Green Corridor informs the lender as to when it may expect the PACE assessment to first appear on the tax roll so that it "will have time to work with [the borrower] to appropriately increase his monthly escrow amount if this is how you both would like to proceed." App. A. Green Corridor obtains and scans into its system a copy of any applicable mortgages on the property.

Green Corridor is unaware of any instance where a lender, having received the statutorily required 30-day notice from Green Corridor, has commenced legal proceedings to prevent the property owner from entering into a PACE financing agreement or otherwise sought declaratory relief as to the lender's priority rights vis-à-vis Green Corridor.

SUMMARY OF ARGUMENT

The Court should decline FBA's invitation to declare Florida's PACE programs facially unconstitutional on grounds of impairment of contract. The record before the Court is devoid of *any* evidence that would permit the Court to conclude that the PACE legislation is unconstitutional in all conceivable

[5] Identifying information relating to the property owner, property address and lender have been redacted from the letter.

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circumstances. FBA did not file suit seeking declaratory relief arising from the application of the legislation to any of its interests – or, for that matter, any of its members' interests. Instead, FBA chose to intervene belatedly in the proceedings and fashion an attack on the legislation premised entirely on supposition and speculation as to hypothetical banking entities entering into hypothetical mortgage contracts. As FDFC correctly points out in its brief, FBA has not identified for the Court a single banking entity or mortgage contract that has been adversely affected by the PACE legislation.

What FBA is asking this Court to do runs counter to the most fundamental principles of appellate jurisprudence. It asks the Court to make findings of fact in the first instance on appeal, announce principles of law in the vacuum of hypothesis alone, and declare unconstitutional legislation that cannot possibly be invalid in all conceivable applications of the law.[6] In fact, as more fully elaborated below, the *reality* of Green Corridor's operations under the PACE legislation during these past two years is that it has not resulted in the impairment of a single mortgage contract. This is, in large part, the result of the safeguards the Legislature built into the legislation to protect the very members FBA purports to

[6] For this reason, to the extent the Court concludes that FBA's standing on appeal is justified by *Meyers v. City of St. Cloud*, 78 So. 2d 402 (Fla. 1955), Green Corridor joins in the FDFC's suggestion to the Court that *Meyers* either be overruled or receded from. FDFC Answer Brief at 12.

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represent here. Accordingly, Green Corridor and the Authority respectfully suggest that the Court should affirm the trial court's judgment below in its entirety. Should the Court, however, reverse the judgment below, the effect of the decision should explicitly be limited to these proceedings and affect no other bonds previously validated and approved.

ARGUMENT

I. THERE IS NO BASIS TO DECLARE THE PACE LEGISLATION UNCONSTITUTIONAL BECAUSE OF IMPAIRMENT OF CONTRACT.

A. The legislation's built-in protections.

The non-ad valorem special assessments imposed on benefitted property to recoup the costs of qualifying improvements to the property constitute liens that run with the property until repaid. The amount financed is amortized over the life of the improvement, with payments made on an annual basis.[7] §§ 197.3632(3)(b), 5(a), (7), Fla. Stat.; *see also* Florida House of Rep. Staff Analysis, CS/HB 7179, at 4 (2010). "Any financing agreement entered into pursuant to [section 163.08] or a

[7] At present, Green Corridor offers the property owner two repayment options: 10 years or 20 years, depending on the useful life of the improvement. In the event of the transfer of ownership of the benefitted property, the property owner has the option to pay off the entire assessment at that time or to allow the new owner to continue paying the annual assessment amounts.

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summary memorandum of such agreement shall be recorded in the public records of the county within which the property is located … within 5 days after execution of the agreement. The recorded agreement shall provide constructive notice that the assessment to be levied on the property constitutes a lien of equal dignity to county taxes and assessments from the date of recordation." § 163.08(8), Fla. Stat.

When the Legislature enacted the PACE legislation, it contemplated and provided for certain protections intended to safeguard the interests of lenders with existing mortgage interests in properties to be improved pursuant to PACE programs. Specifically, section 163.08, Florida Statutes, requires that before "a property owner may apply to the local government for funding to finance a qualifying improvement and enter into a financing agreement," § 163.08(4), Fla. Stat., the following conditions must be satisfied:

> 1. Before entering into a financing agreement, "the local government shall reasonably determine that all property taxes and any other assessments levied on the same bill as property taxes are paid and have not been delinquent for the preceding 3 years or the property owner's period of ownership, whichever is less…." § 163.08(9), Fla. Stat.
>
> 2. Before entering into a financing agreement, "the local government shall reasonably determine … that there are no involuntary liens, including, but not limited to, construction liens on the property…." *Id.*
>
> 3. Before entering into a financing agreement, "the local government shall reasonably determine … that no notices of default or other evidence of property-based debt delinquency have been

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recorded during the preceding 3 years or the property owner's period of ownership, whichever is less…." *Id.*

4. Before entering into a financing agreement, "the local government shall reasonably determine … that the property owner is current on all mortgage debt on the property." *Id.*

5. "Without the consent of the holders or loan servicers of any mortgage encumbering or otherwise secured by the property, the total amount of any non-ad valorem assessment for a property under this section may not exceed 20 percent of the just value of the property as determined by the county property appraiser." § 163.08(12)(a), Fla. Stat.

6. "At least 30 days before entering into a financing agreement, the property owner shall provide to the holders or loan servicers of any existing mortgages encumbering or otherwise secured by the property a notice of the owner's intent to enter into a financing agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. A verified copy or other proof of such notice shall be provided to the local government." § 163.08(13), Fla. Stat.

7. To minimize potential harm to the property serving as collateral for an existing mortgage, any work performed to install the qualifying improvements on the assessed property must be completed by a licensed and registered contractor. § 163.08(11), Fla. Stat.

8. "At or before the time a purchaser executes a contract for the sale and purchase of any property for which a non-ad valorem assessment has been levied under this section and has an unpaid balance due, the seller shall give the prospective purchaser a written disclosure statement" informing the purchaser that the property is subject to the assessment. § 163.08(14), Fla. Stat.

9. Any assessments imposed become due and are collected through a combined tax bill, as authorized by section 197.3632, Florida Statutes. § 163.08(4), Fla. Stat.

Perhaps most importantly, the statute recognizes the authority of any lender "to *increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment*." § 163.08(13), Fla. Stat. (emphasis added).

Much of the FBA's claim of impairment turns on the fundamentally flawed assumption that the value of its members' hypothetical collateral under a hypothetical contract would be substantially impaired by the PACE assessment. Even assuming the nature of such impairment rose to a level worthy of constitutional protection, the fact remains that PACE assessments are not "accelerated" upon foreclosure. The amount, therefore, that would take "priority" over an existing mortgage is the assessment amount due that year, as reflected in the combined tax bill for the property. And presumably, the lender would have availed itself of the ability to collect on a monthly basis escrow payments to cover the amount of the annual PACE assessment, thus further reducing the "risk" to the collateral.[8]

B. The reality of Green Corridor's program.

As previously noted, despite hundreds of projects completed and underway, there has not been a single instance where a benefitted property has been

[8] When one factors in potential increases to the market value of a PACE-improved property, there may in many instances be no risk at all to the lender's interest in the collateral. *See* FDFC Answer Brief at 33-34.

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foreclosed, much less one where a foreclosure resulted in a substantial impairment of a lender's mortgage interests. On the contrary, as noted above, Green Corridor cooperates with existing lenders to remind them that they have the option to escrow the annual PACE assessment amount to protect their interests in the property. In fact, Green Corridor's review of typical mortgage agreements associated with benefitted properties reveals that lenders frequently foresee the need to increase an escrow to account for these kinds of assessments.

For example, in one JPMorgan Chase Bank mortgage agreement, the following provisions are included:

> **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and *other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property*…. (emphasis added).
>
> *** * ***
>
> **Charges; Liens.** Borrower shall pay all taxes, *assessments*, charges, fines, and impositions attributable to the Property *which can attain priority over this Security Instrument*, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and *Assessments*, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

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Excerpted portions of the JPMorgan Chase Bank mortgage agreement are included at Appendix B.[9] This same agreement contemplates that the lender's security interest in the property is subject to, among other things, state statute: "**Governing Law; Severability; Rules of Construction**. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. *All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law*." App. B (bold emphasis in the original; italicized emphasis added). "Applicable Law," in turn, is defined by the agreement to include "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." *Id.*

As a result of the safeguards afforded by section 163.08, as well as the statutory and contractual rights enjoyed by lenders to protect themselves and their interests in mortgaged properties, Green Corridor has seen no evidence whatsoever that any lender's interests have been impaired by a property owner's participation in a PACE program.

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[9] This particular agreement is recorded in the public records of Miami-Dade County at OR Book 27533, Page 1356.

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II. THE COURT SHOULD DECLINE FBA'S INVITATION TO INVALIDATE LEGISLATION ON CONSTITUTIONAL GROUNDS BASED ON HYPOTHETICAL SITUATIONS, OR ALTERNATIVELY, EXPLICITLY LIMIT THE SCOPE OF ANY ADVERSE RULING.

As this Court explicitly stated, only this year, legislation "will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some *hypothetical* circumstances." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) (emphasis added). It is undisputed that FBA, for whatever its reasons, chose not to participate in the trial court proceedings. Instead, it has appeared for the first time on appeal to raise arguments that are based entirely on hypothetical circumstances involving hypothetical banking members. One need not elaborate at length that appellate courts do not engage in fact-finding for the first time on appeal. *See, e.g.*, *Smith v. State*, 931 So. 2d 790, 805 (Fla. 2006) ("The appellate record is limited to the record presented to the trial court."); *McCollough v. Bush*, 868 So. 2d 1271, 1274 (Fla. 1st DCA 2004) ("Bush's argument overlooks an important precept of appellate judging – appellate courts will not address for the first time on appeal factual disputes which have not been resolved by appropriate findings of fact.").[10] And yet, that is precisely what

[10] Even application of the "tipsy coachman" doctrine is dependent on the trial court having made the requisite factual findings to support the alternate theory for affirmance. *See Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009).

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FBA is asking this Court to do in order to declare Florida's PACE legislation unconstitutional.

FBA makes its request without so much as a suggestion as to what might happen to those PACE programs – like Green Corridor's and the Authority's – already in operation and to the hundreds of financing agreements that have already been executed and recorded. FBA did not object to Green Corridor's or the Authority's efforts to have its bonds validated, and yet it effectively seeks to invalidate both programs through a broad-side attack on the PACE legislation.

To the extent this Court were inclined to countenance the FBA's belated constitutional challenge to the FDFC's validation of its bonds – a position the amici strenuously oppose – the Court's ruling should be limited in scope to these particular bond validation proceedings. To rewind the clock, as it were, and allow for retroactive invalidation of other bonds already approved without legal challenge, such as the Green Corridor's bonds, would fundamentally undermine not only the finality of those proceedings, but also the entire bond validation mechanism, which is designed to achieve finality and lend stability to economic markets that trade in these bonds.

The Florida Legislature has explicitly recognized the importance of this finality:

> **Effect of final judgment**. – *If the judgment validates such bonds*, certificates or other obligations, which may include the validation of the county, municipality, taxing district, political district, subdivision,

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> agency, instrumentality or other public body itself *and any taxes, assessments or revenues affected, and no appeal is taken within the time prescribed*, … such judgment is ***forever conclusive*** *as to all matters adjudicated against plaintiff and all parties affected thereby, including all property owners, taxpayers and citizens of the plaintiff, and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds*, certificates or other obligations, or to be affected in any way thereby, and ***the validity of said bonds, certificates or other obligations or of any taxes, assessments or revenues pledged for the payment thereof***, or of the proceedings authorizing the issuance thereof, including any remedies provided for their collection, ***shall never be called in question in any court by any person or party.***

§ 75.09, Fla. Stat. (emphasis added). This Court on more than one occasion has also noted the importance of achieving finality in bond validation proceedings. *See Lipford v. Harris*, 212 So. 2d 766, 768 (Fla. 1968) ("Public policy demands that we adhere to our many holdings that a validation decree once it becomes final puts at rest all questions which were raised in the validation as well as all questions which could have been raised."); *State v. Florida State Turnpike Authority*, 80 So. 2d 337 (Fla. 1955) (holding that the purpose of a decree of validation pursuant to statutory requirement of validation of bonds … is that defenses to collection are set at rest in the beginning); *Wright v. City of Anna Maria*, 34 So. 2d 737 (Fla. 1948); (holding that the purpose of a decree under this statute is to put in repose any question of law or fact that may be raised affecting the validity of such bonds)

Consequently, while Green Corridor and the Authority urge the Court to reject the FBA's belated attempts to undermine FDFC's final judgment, should the

Court disagree, the amici respectfully requests that the Court explicitly limit the scope of its opinion to these particular proceedings and no other.

CONCLUSION

The FDFC correctly asserts that there is no basis, either legal or factual, for the FBA's belated attempt to have Florida's PACE legislation declared facially unconstitutional. The Court, respectfully, should not issue what would amount to be an advisory opinion based on hypothetical scenarios posited by the FBA. As such, the judgment below should be affirmed. If, however, the Court were to consider FBA's challenge to be meritorious, any ruling reversing the final judgment below should be explicitly limited to these proceedings and should not extend to any other bonds finally approved in connection with existing PACE programs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Edward G. Guedes*
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