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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1603

FLORIDA BANKERS ASSOCIATION,

Appellant,

vs.

STATE OF FLORIDA, et al.,

Appellees.

_____/

L.T. Case No.: 2014 CA 000548

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

ANSWER BRIEF OF APPELLEE, THE FLORIDA DEVELOPMENT FINANCE CORPORATION

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STATEMENT OF THE CASE AND FACTS

This is an appeal from an amended final judgment of the circuit court for the Second Judicial Circuit validating bonds to be issued by Appellee Florida Development Finance Corporation ("FDFC"). The bonds will pay for energy conservation, clean energy, and hurricane protection improvements to existing properties in Florida, with the costs repaid through non-ad valorem property assessments. This property-assessed clean energy ("PACE") program is authorized by a 2010 Florida law, Ch. 10-139, Laws of Florida, codified at § 163.08, Fla. Stat. (2014) (the "PACE Act"). This law is designed to provide a mechanism to make energy-efficient improvements affordable to average Florida property owners and to tie the obligation to repay the costs to the properties receiving the improvements.

Appellant Florida Bankers Association ("FBA") argues that the 2010 PACE Act violates Article I, section 10 of the Florida Constitution because the non-ad valorem assessment liens impair the obligation of prior mortgage contracts. The FBA appeared in the case only *after* the judgment and, thus, made none of these arguments below. The FBA has not identified a single contract that has been impaired. Since at least the 1920s, this Court has held that special assessment liens do not unconstitutionally impair prior mortgage contracts. And any such

impairment would not violate the Florida Constitution anyway because the Legislature found that the PACE program furthers many compelling state interests.

A. Facts Relevant to the Appeal

California first introduced PACE programs in 2008. These programs allow property owners to contract directly with qualified contractors to finance improvements to reduce energy consumption and increase efficiency. *See, e.g.*, § 163.08(11). Qualifying improvements include roof improvements, hurricane shutters, windows replacement, air conditioning, insulation, whole house fans, and solar thermal. *See* § 163.08(2)(b). PACE programs increase homeowners' disposable income because they spend less on energy. *See* Chad S. Friedman & MacAdam J. Glinn, *Florida is Keeping PACE: House Bill 7179*, 84 Fla. Bar J. 44, 45 (Oct. 2010). This lowers utility bills and makes homes more affordable. PACE improvements also increase property values because buyers and sellers place a premium on properties that reduce energy dependence and the risk of wind damage. *See id.* at 45-46; Rick Nevin & Gregory Watson, *Evidence of Rational Market Valuations for Home Energy Efficiency*, The Appraisal J. (Oct. 1998).

Since 2008, thirty-one states and the District of Columbia have adopted legislation authorizing PACE programs. *See* PACENow Financing Energy Efficiency, *What is PACE?*, available at http://pacenow.org/about-pace/what-is-pace/.

Florida's public policy in favor of energy conservation

Florida's public policy requires increased energy conservation and use of renewable energy sources. In 2008, the Legislature amended the energy goal in the State Comprehensive Plan to require Florida to reduce carbon dioxide in the atmosphere and to promote the use of renewable energy resources. § 163.08(1)(a); Ch. 08-227, § 4, Laws of Fla. The PACE Act also declared it "the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gases." § 163.08(1)(a). In furtherance of these goals, the Legislature amended the building code to encourage the use of energy-efficient technologies and renewable energy sources. *See id.*; Ch. 08-191, § 19-20, Laws of Fla. (creating §§ 553.886, 553.9061, Fla. Stat.).

Like the Legislature, the citizens of Florida voted to amend the Florida Constitution to encourage homeowners to use renewable energy sources or reduce wind damage. *See* Art. VII, § 4(i), Fla. Const.; § 163.08(1)(a). This amendment prohibits property appraisers from increasing the tax-assessed value of residential property when a homeowner installs renewable energy devices or prevents wind damage. *See* Art. VII, § 4(i), Fla. Const.

The 2010 PACE Act

In 2010, the Legislature passed the PACE Act to facilitate energy-related and hurricane improvements to existing properties. The PACE Act authorizes non-ad valorem assessments to pay for qualifying improvements in energy conservation (such as insulation and replacement of windows); renewable energy (such as solar panels); and wind resistance (such as roof reinforcements and hurricane shutters). § 163.08(2)(b). The law essentially adds PACE improvements to the list of many capital improvements that already qualify for non-ad valorem property assessments. *Cf.* § 170.01(1) (listing activities that qualify for non-ad valorem assessments, such as road, drainage and other capital improvements).

Under the PACE program, property owners find a licensed and registered contractor to install the improvements. § 163.08(11). The local government bears the initial cost of the contractor's work, and the property owner executes an agreement to pay for those improvements over time through a non-ad valorem assessment on the property. § 163.08(3). To avoid public borrowing and debt, local governments may issue bonds to obtain funding from third-party investors to be repaid with the PACE assessments, §§ 163.08(7), 288.9606, and may engage private companies to administer program logistics, § 163.08(6). Local governments then collect the non-ad valorem assessments to repay the bonds over the improvements' functional life. § 163.08(3). Like other non-ad valorem

assessments, PACE liens have equal dignity to county tax liens, which are superior to all others. § 163.08(8). The property owner pays the PACE assessment in annual installments as part of the tax bill. *See* Florida House of Rep. Staff Analysis, CS/HB 7179, at 4 (2010).

The Legislature found that this program would have both private and public benefits. A retrofitted property "receives the special benefit of alleviating the property's burden from energy consumption" and "potential wind damage." § 163.08(1)(b). These improvements "promote energy conservation, energy security, and the reduction of greenhouse gases." *Id.* They also fulfill Florida's "hurricane mitigation policies," thereby reducing the damage hurricanes cause to individual homes and to the broader Florida community. § 163.08(1). The Legislature found that these are compelling state interests, and that "there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance." § 163.08(1)(b)-(c).

Since 2010, several Florida local governments have created PACE programs, and courts have approved their bonds. *St. Lucie Cnty. v. State*, Case No. 10 CA 005410 (Fla. 19th Cir. Ct. Nov. 30, 2010); *Fla. PACE Funding Agency v. State*, Case No. 2011 CA 001824 (Fla. 2d Cir. Ct. Aug. 25, 2011); *Green Corridor Prop. Assessment Clean Energy District v. State*, Case No. 2012 CA 002897 (Fla. 2d Cir. Ct. Oct. 23, 2012); *Leon Cnty. Energy Improvement Dist. v. State*, Case No.

2013 CA 003396 (Fla. 2d Cir. Ct. Mar. 10, 2014), *appeal pending on other grounds,* No. SC14-710 (Fla. 2014); *Thomas v. State,* Case No. 2013 CA 003457 (Fla. 2d Cir. Ct. May 27, 2014), *appeal pending on other grounds*, No. SC14-1282 (Fla. 2014).

In 2014, the FDFC, a public body created by section 288.9604, Florida Statutes, created a program to issue bonds to support PACE programs (A. 18-26).[1] The PACE Act authorizes the FDFC to finance "qualifying improvement projects." Ch. 10-139, § 6, Laws of Fla. (codified at § 288.9606(7)(c)).

In 2014, the FDFC adopted Resolution No. 14-02, authorizing the issuance of bonds in an aggregate principal amount not to exceed $2,000,000,000, the proceeds of which would be "made available to property owners to fund Qualifying Improvements" as defined in the PACE Act (A. 22). The FDFC will execute multiple interlocal agreements with participating local governments. It will provide financing for PACE improvements and the local governments will levy non-ad valorem assessments on properties receiving them (A. 23). Under the resolution's terms, the FDFC will execute an agreement with Renovate America, Inc. Renovate America will administer the program and provide third-party investors to purchase the bonds and avoid an increase in government debt by

[1] "A. #" refers to the page number of the FBA's appendix.

securing the repayment of the bonds with the PACE non-ad valorem assessments (A. 20, 24).

B. Course of Proceedings

In February 2014, the FDFC filed a complaint in the circuit court of the Second Judicial Circuit, seeking to "determine the validity of the Bonds, the pledge of revenues for the payment thereof, the validity of the non-ad valorem assessments which shall comprise all or in substantial part the revenues pledged, the lien priority of such assessments, the proceedings relating to the issuance thereof and all matters connected therewith" (A. 2). In March 2014, the circuit court issued an order to show cause, requiring any interested parties to appear at a hearing on June 11. Nine parties either answered the complaint or filed a response to the order—eight States Attorney and one private citizen, Robert Reynolds. Only two parties raised objections: the State Attorney for the Seventeenth Judicial Circuit (Broward County) and Reynolds. The FBA did not appear.

The Broward State Attorney's answer made a five-sentence argument that the bond validation "may run afoul of Article 1, Section 10 of the Florida Constitution as well as Article I, Section 10 of the U.S. Constitution's prohibition against the Impairment of Contracts," and cited the refusal of the Federal Housing Finance Agency ("FHFA") to allow Fannie Mae and Freddie Mac to purchase

mortgages for properties "with PACE funding attached to them." No other party argued that the PACE Act unconstitutionally impaired mortgage contracts.

At the hearing, the Broward State Attorney made only a limited appearance and presented no evidence. The only party to actively oppose validating the bonds was Reynolds (A. 191-255). He objected on grounds unrelated to impairment of contracts and, in fact, argued that the authorized special assessments do *not* impair preexisting contracts (A. 240-45). His own appeal in pending in this Court under Case No. SC14-1618.

Five days after the initial hearing, the circuit court issued a final judgment validating the bonds. Reynolds moved for rehearing, which was held on July 7. On July 17, the circuit court issued an amended final judgment, again validating the bonds (A. 151-68).

On August 15, 2014—over two months after the initial hearing and nearly a month after the amended final judgment—the FBA filed both a "notice of appearance" and a notice of appeal (A. 169-80). The FBA never participated in proceedings below, either by answering the complaint, responding to the order, or appearing at the hearings. The FBA never asserted a basis for its standing below, nor did it present any evidence about how it is allegedly harmed by the bonds.

FBA now argues for the first time that the special assessments impair preexisting mortgage contracts, claiming that its "members' constitutional interests

are in jeopardy due to the PACE Act's method of loan repayment" (br. at 7). The FBA raises a facial challenge to the PACE Act, stating that "the Act will always be facially unconstitutional" (br. at 32).

C. Standard of Review

In a bond validation proceeding, courts must "(1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law." *Strand v. Escambia Cnty.*, 992 So. 2d 150, 154 (Fla. 2008). Such a judgment comes "clothed with a presumption of correctness." *Id*. The Court "reviews the trial court's findings of fact for substantial competent evidence and conclusions of law de novo." *Id*. (marks omitted).

SUMMARY OF ARGUMENT

The FBA lacks standing to challenge the bonds' constitutionality. It did not appear in the proceedings below until it filed its notice of appeal. It now raises issues of fact and law never considered below. Neither the circuit court nor the FDFC had an opportunity to review or contest any of the factual issues the FBA now raises.

Even if the FBA had standing, its challenge lacks merit. The FBA has failed to make a threshold showing that the PACE Act unconstitutionally impairs mortgage contracts. Although the FBA challenges the facial constitutionality of

the PACE Act, the 2010 law by definition does not impair contracts formed after the law's effective date. The FBA also has not identified a single mortgage contract which it claims the PACE Act impairs.

Florida cases uniformly hold that non-ad valorem property assessments do not impair mortgages. Even if the PACE Act did impair a mortgage, however, any harm is outweighed by the compelling state interests in improving energy conservation, energy security, and hurricane protection.

ARGUMENT

I. THE FLORIDA BANKERS ASSOCIATION IS NOT THE PROPER PARTY TO APPEAL THE CIRCUIT COURT JUDGMENT

The FBA lacks standing to appeal the final judgment because (A) it did not participate in the proceedings below, (B) fails to make any showing that it has standing to pursue an appeal on behalf of its members, and (C) raises new factual and legal arguments not presented to the circuit court. We address each of these problems below.

A. The FBA Cannot Appeal Because It Did Not Participate in the Circuit Court Proceedings

In bond validation proceedings, "[a]ny property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint *at or before the time set for hearing*." § 75.07, Fla. Stat. (2014) (emphasis added). Section 75.08, Florida Statutes, then provides that "*[a]ny party*

to the action whether plaintiff, defendant, intervenor or otherwise, dissatisfied with the final judgment, may appeal to the Supreme Court within the time and in the manner prescribed by the Florida Rules of Appellate Procedure." § 75.08, Fla. Stat. (2014) (emphasis added). In other words, to have a right to appeal, one must have been a party in the underlying proceedings.

The circuit court issued the order to show cause in March 2014, held the hearing in June, and held a second hearing and issued the amended final judgment in July. The FBA first appeared in the circuit court nearly a month later, on the same day it filed a notice of appeal (A. 169-90). That was too late. The bond validation statute does not allow a person to become a party to a bond validation proceeding *after* the judgment. Because the FBA did not appear at either hearing, it never became a party under section 75.07. Therefore, it had no standing to appeal under section 75.08.

This Court did once, many years ago, allow a party who had not previously appeared in bond validation proceedings to appeal an order. *See Meyers v. City of St. Cloud*, 78 So. 2d 402 (Fla. 1955). In that case, however, this Court held that the appellants fell within section 75.06, which requires the circuit court clerk to provide notice of the proceeding to "all property owners, taxpayers, citizens, and others having or claiming any right, title or interest in the county, municipality or district, or the taxable property therein," who are then "made parties defendant to

the action." *Id*. at 403; *see* § 75.06, Fla. Stat. There was no dispute that the appellants were "taxpayers" and "citizens" because they were "citizens and taxpayers of the petitioning political unit bringing the proceedings." 78 So. 2d at 403 (quoting *State v. Sarasota Cnty.*, 159 So. 797, 799 (Fla. 1935)); *see also Rich v. State*, 663 So. 2d 1321, 1324 (Fla. 1995) (stating that *Meyers* "dealt with the right of *property owners* and *taxpayers* of the City of St. Cloud, who were proper parties to the proceeding, to intervene on appeal") (emphasis in original). By contrast, the FBA has never demonstrated that it is a citizen, taxpayer, or property owner in any jurisdiction where the FDFC bonds will support PACE improvements.

Even if *Meyers* could be read to apply, this Court should overrule it. *Meyers* misinterprets the statute. Section 75.06—which was critical to this Court's analysis in *Meyers*—simply addresses how the clerk of the circuit court may provide notice of the validation hearing to "all property owners, taxpayers, citizens, and others having or claiming any right, title or interest in the county, municipality or district, or the taxable property therein." § 75.06. In contrast, section 75.07 provides that "[a]ny property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint *at or before the time set for hearing*." § 75.07 (emphasis added). Only those who become a "party to the action" may appeal a decision. § 75.08. By

permitting non-parties to appear for the first time on appeal, *Meyers* allows individuals to avoid the circuit court proceedings altogether and raise new facts and arguments for the first time on appeal—just as the FBA and others have done.[2] Such a policy violates the well-established doctrine, confirmed both before and after *Meyers*, that only the parties to a proceeding may appeal an order emanating from it. *See, e.g., Dickinson v. Segal*, 219 So. 2d 435, 436-37 (Fla. 1969) (dismissing an appeal and noting that "the general rule—universally—is that intervention may not be allowed after final judgment" and observing that "this Court has consistently refused to allow intervention in appeals here by strangers to the record"); *State v. Fla. State Improvement Comm'n*, 75 So. 2d 1, 6 (Fla. 1954) ("As [appellants] were not parties to the cause, they had no right or authority to prosecute an appeal and have no standing in this Court.").

B. The FBA Lacks Standing Because It Failed to Show that It Suffered Any Special Injury

Because the FBA did not participate below, it never proved standing. To possess standing, a party must demonstrate that it has a "direct and articulable stake in the outcome of the controversy." *Public Defender, Eleventh Judicial Circuit v. State*, 115 So. 3d 261, 282 (Fla. 2013). To obtain organizational standing, a party must present facts establishing that its members could be

[2] In two other appeals pending before the Court, the appellants intervened only after the judgment and then appealed. *Reynolds v. Leon Cnty. Energy Improvement Dist.*, Case No. SC14-710; *Gowen v. State*, Case No. SC14-2269.

adversely affected. *See Fla. Chapter of the Sierra Club v. Suwannee Am. Cement Co.*, 802 So. 2d 520, 521-22 (Fla. 1st DCA 2001) (finding that an organization lacked standing because it "has provided no facts concerning any member who is individually adversely affected"). To intervene in a bond validation proceeding, a party must stand to gain or lose as a result of the bond issuance. *Rich*, 663 So. 2d at 1324.

Here, the FBA presented no evidence that it has suffered any specific injury or has a stake in the matter sufficient for standing. Nothing in the record explains exactly what the FBA is. Presumably, it is a non-profit trade association which does not itself issue mortgages. Assuming that it is a trade association, no specific bank or other institution is identified as being part of it. The FBA makes only vague references to its "members" and "constituents" (br. at 29). Nor does it identify a specific property or mortgage that a PACE assessment has affected.

Now is not the time for the FBA to prove its standing. That showing had to occur in the circuit court. *See City of Ft. Myers v. Splitt*, 988 So. 2d 28, 32 (Fla. 2d DCA 2008) (finding that the court below "failed to apply the correct law when it determined the standing issue on the basis of the allegations of [appellants] in their certiorari petition rather than on the basis of the record made in the proceedings before the City"); *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943 (Fla. 5th DCA 1988) ("The first time any [ ] allegation [regarding standing] was

made was in [the] petition to the circuit court, where it was made too late."). Here, the FBA offered no evidence that it has a "direct and articulable" stake in a controversy, or that any of its members have one. Nor did the FBA present any evidence that it will be "adversely affected" by the bond issuance. Because it cannot present such evidence now, it lacks standing to appeal.

C. The FBA Improperly Raises Factual and Legal Arguments Not Presented to the Circuit Court

Only one party below—the Broward State Attorney—argued that the PACE Act unconstitutionally impaired the obligation of contracts, and that argument consisted of five sentences. It did not raise the due process arguments the FBA now raises (br. at 13); it did not argue that the PACE assessments were not "special assessments" under Florida law (br. at 17-26); it did not argue that the Legislature's findings of a compelling state interest were incorrect (br. at 26-27); and it did not make the other arguments the FBA now raises. The FBA cannot raise arguments on appeal that no party raised in the circuit court. *See Rosado v. DaimlerChrysler Fin. Servs. Trust*, 112 So. 3d 1165, 1171 (Fla. 2013) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") (citing *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005)).

The FBA also relies on facts not in the record. It makes several assertions of harm, claiming that the PACE "loans" (as they term them) affect the soundness of banks, opining about prudent practices of bank regulators, and the like (br. 28-29). No evidence supports *any* of those allegations. If the FBA had presented such evidence, the FDFC would have had a right to rebut it. The Court should not consider these allegations now. *Smith v. State*, 931 So. 2d 790, 805 (Fla. 2006) ("The appellate record is limited to the record presented to the trial court."); *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000) (same).

II. THE PACE SPECIAL ASSESSMENTS DO NOT VIOLATE THE CONSTITUTIONAL BAR ON IMPAIRMENT OF CONTRACT

Even if the FBA had standing to appeal, and even if it could raise issues never raised below, it fails to show that the PACE Act is unconstitutional. The PACE Act by definition cannot impair mortgages that post-date the law, and the FBA does not identify a single existing contract that has been impaired. At least 90 years of Florida law expressly permits local governments to impose special assessment liens senior to any preexisting mortgage liens. And even if the PACE Act did impair mortgage contracts, the impairment is constitutional because of the compelling state interests the Legislature identified and the lack of significant effects on mortgages.

Below we explain that (A) the FBA fails to show that the PACE Act is unconstitutional; (B) non-ad valorem special assessments do not unconstitutionally

impair mortgage contracts; and (C) even if the PACE assessments were not non-ad valorem assessments and impaired mortgage contracts, the compelling public interests involved outweigh any impairment.

A. The FBA Fails to Make Even a Threshold Showing that the PACE Act is Unconstitutional

The FBA challenges the PACE Act on its face, arguing that "the Act will always be facially unconstitutional" (br. at 32). For a statute to be facially unconstitutional, there must be "no set of circumstances . . . in which the statute can be constitutionally applied." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) ("[T]he Act will not be invalidated as facially unconstitutional simply because it could operate unconstitutionally under some hypothetical circumstances."); *see also Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) ("[A] determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid."); *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005) (same). The FBA fails to show that "no set of circumstances exists" under which the PACE Act would be valid because (1) the PACE Act does not impair mortgage contracts executed after its effective date; and (2) the FBA has failed to identify a single contract that the PACE Act has impaired.

1. The PACE Act does not impair mortgage contracts executed after the statute's effective date

By definition, the PACE Act cannot impair mortgage contracts executed after the law's 2010 effective date. It is well-established that a contract is deemed to incorporate existing law at the time it is made. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977) ("This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.'"); *State ex rel. Select Tenures, Inc. v. Raulerson*, 176 So. 270, 272 (Fla. 1937) ("The laws in force at the time of making a contract, and in pursuance of which the contract is made, enter into and form a part of the contract, as if they were incorporated into it, including those which affect its validity, construction, discharge, and enforcement.") (marks omitted).

Laws cannot impair contracts formed after the date of enactment. In *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992), this Court held that a pre-existing statute did not impair a subsequent contract, noting that "[v]alid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into the contract." That principle is consistent with federal cases. *See Harmon v. Markus*, 412 F. App'x 420, 423 (2d Cir. 2011) ("A contract[] cannot be impaired by a law in effect at the time the contract was made."); *Washington v. Maricopa Cnty.*, 152 F.2d 556, 559 (9th Cir. 1945) ("Contracts are made with

reference to existing law and [cannot] be impaired by it."); *McGuire v. Ameritech Servs., Inc.*, 253 F. Supp. 2d 998, 1006 (S.D. Ohio 2003) ("It has long been settled that a contract cannot be impaired by a law in effect at the time of the making of the contract, for that is the law which binds the contract.").

After the PACE Act's effective date, every mortgage was executed with the understanding that PACE assessments would be senior to any mortgage lien. Indeed, the FBA does not even argue that mortgages issued after that date have been impaired. For that reason alone, its facial challenge fails.

2. The FBA fails to identify a single contract that the PACE Act has impaired

Identification of a specific contract is a threshold requirement to prove an unconstitutional impairment of contract. *Babin v. Breaux*, __ F. App'x __, 2014 WL 4748140, at *8 (5th Cir. Sept. 25, 2014) (noting the "requirement that the plaintiff actually identify a provision of his contract that has been impaired" and finding that summary judgment was appropriate because "Appellants here have done no such thing."); *Metro. Washington Chapter v. District of Columbia*, __ F. Supp. 2d __, 2014 WL 3400569, at *21 (D.D.C. July 14, 2014) (dismissing an impairment claim where the plaintiffs "do not identify which contracts would be impaired, only that some hypothetical contracts that some Plaintiff is a party to will be impacted. That is not sufficient to state a claim."); *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 500 (E.D.N.Y. 2012) (granting summary

judgment for defendants on an impairment claim because "Plaintiffs do not—as they must, even at this stage—identify any specific contractual obligations or point to specific contracts that are purportedly impaired by Local Law 15.").

The FBA fails to identify a single contract that the PACE Act has impaired. Its claim of impairment of contract fails for this reason as well.

B. Non-ad Valorem Special Assessments Do Not Unconstitutionally Impair Mortgage Contracts

Even if the FBA had made a sufficient threshold showing to pursue a claim of impairment of contract, the PACE Act does not impair preexisting mortgages. As we now explain, (1) decades of Florida case law confirms that special assessments do not impair mortgage contracts; and (2) the assessments the PACE Act authorizes are non-ad valorem assessments.

1. Decades of Florida case law holds that special assessments do not impair mortgage contracts

Since at least the 1920s, Florida law has provided that special assessments are "superior in dignity to all other liens, titles, and claims, until paid." § 170.09. As early as *Gailey v. Robertson*, 123 So. 692 (Fla. 1929), this Court upheld a special assessment, even though the mortgagee's interest in the property predated the passage of legislation authorizing the special assessment. The Court explained:

> The mortgagee has no greater vested right . . . than the fee-simple owner, and the rights of both must yield alike to the sovereign power when exercised to impose proper

> and lawful taxes. . . . This is true, as everyone must admit, in relation to general taxes, where the only return to the taxpayer is the protection and security which the government gives him, and a fortiori should it be true in case of special assessments where, in theory at least, he receives an adequate and complete return for the money assessed in the enhanced value of the estate or property which he owns or to which his lien attaches.

Id. at 693; *see also Shavers v. Duval Cnty.*, 73 So. 2d 684, 692 (Fla. 1954) ("Special assessments based upon special benefits is a fertile field [sic] for the impairment of contracts without violating the Constitution."); *Boatright v. City of Jacksonville*, 158 So. 42, 53 (Fla. 1934) (acknowledging the constitutionality of a statutory lien on property to the extent of an authorized assessment as a means of better securing the enforcement of the assessment).

Federal courts, too, hold that non-ad valorem assessment liens do not unconstitutionally deprive mortgagees of their due process rights. *See, e.g.*, *Zipperer v. City of Fort Myers*, 41 F.3d 619, 624 (11th Cir. 1995) ("special assessments and their lien prioritization do not constitutionally impair or deprive a mortgagee of his [pre-existing] interest in mortgaged land"); *Fed. Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610 (5th Cir. 1991) (upholding the priority of assessment liens against a mortgagee's takings claim).

The PACE Act simply adds another activity that can be implemented through non-ad valorem assessments. It did not change the law that non-ad valorem assessments liens are senior to any pre-existing mortgage liens. *See* §§

170.09, 197.122(1), Fla. Stat. The FBA's position is contrary to nearly a century of cases.

2. The assessments authorized by the PACE Act are non-ad valorem assessments

Faced with a local government's authority to impose non-ad valorem assessments senior to mortgage liens, the FBA argues that the PACE assessments are really "loans" (br. at 2, 19). But PACE assessments clearly fit the definition of non-ad valorem assessments, and are no different from other local government assessments that pay for capital improvements property owners' request.

The FBA ignores the express language of section 163.08, which provides that "[a] local government may levy non-ad valorem assessments to fund qualifying improvements." § 163.08(3). The Legislature itself has stated that these are non-ad valorem assessments and that PACE can only operate as an assessment-based program. This should end the matter. To the extent that this label reflects a finding of fact, the Legislature is entitled to deference. *See*, *e.g.*, *Westerheide v. State*, 831 So. 2d 93, 101 (Fla. 2002) ("[T]he courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous."); *Kush v. Lloyd*, 616 So. 2d 415, 422 (Fla. 1992) ("This Court is not authorized to second-guess the legislature's judgment.").

PACE non-ad valorem assessments are consistent with the definition of the term under Florida law. Section 197.3632, Florida Statutes, defines "non-ad valorem assessments" as "assessments which are not based upon millage and which can become a lien against a homestead permitted in Section 4, Article X of the State Constitution." In a case the FBA itself cites, this Court defined "special assessments" as "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money." *City of Gainesville v. State*, 863 So. 2d 138, 144 (Fla. 2003). Here, PACE-assessed property "derives some special benefit from the expenditure of the money" because funds go directly to pay for improvements to a property to save energy, use renewable power, and increase hurricane protection. Moreover, unlike a loan, the assessment runs with the land, rather than with a borrower; is paid in fixed, annual installments as part of a property tax bill; and does not accelerate upon default. *See* Florida House of Rep. Staff Analysis, CS/HB 7179, at 4 (2010).

When reviewing local government special assessments under general law, this Court has held that a special assessment must meet two requirements: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned according to the benefits received. *Sarasota Cnty. v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 183-84 (Fla. 1996); *State v. Sarasota Cnty.*, 693 So. 2d 546, 548 (Fla. 1997); *City of*

Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). Both prongs constitute findings of fact for a legislative body rather than the judiciary, and legislative determinations to that effect must be upheld unless clearly arbitrary. *Sarasota Cnty.*, 667 So. 2d at 183-84; *Workman Enter., Inc. v. Hernando Cnty.*, 790 So. 2d 598, 600 (Fla. 5th DCA 2001) (holding that a challenger "has the burden to rebut the presumption of correctness of special assessments and such presumption can be 'overcome only by strong, direct, clear and positive proof'") (quoting *City of Gainesville v. Seaboard Coastline R.R. Co.*, 411 So. 2d 1339, 1340 (Fla. 1st DCA 1982)).

Here, the Legislature expressly found that "[i]mproved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption" and that "[i]mproved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage." § 163.08(1)(b). The FBA presented no evidence to rebut those findings, and fails to meet its burden of presenting "strong, direct, clear and positive proof" to the contrary.

The cases on which the FBA relies to argue that these assessments are not "special assessments" do not apply. They analyze whether specific local government charges are special assessments, taxes, or user fees, and determine

whether the local government had authority to issue them. *See City of Gainesville*, 863 So. 2d at 144 (evaluating whether the city's stormwater fees constituted user fees or special assessments); *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1995) (evaluating whether the city's "transportation utility fees" were taxes or user fees); *Okeechobee Utility Auth. v. Kampgrounds of America, Inc.*, 882 So. 2d 445 (Fla. 4th DCA 2004) (evaluating whether the authority's "base facility charge" on campgrounds was a user fee or a special assessment); *First Nationwide Mortg. Corp. v. Brantley*, 851 So. 2d 885, 887 (Fla. 4th DCA 2003) (holding that the city's lien "was not the result of municipal services, *special assessments* or any other type of liens covered under section 23-68 of City's Code of Ordinances") (emphasis added). Here, the Legislature specified that PACE assessments are non-ad valorem special assessments. § 163.08(3). As noted above, they are. None of the cases the FBA cites holds otherwise.

Although the FBA does not argue that PACE assessments are user fees, it cites user fee cases (br. at 19-21) to argue that PACE assessments are not classic "special assessments" that local governments are authorized to impose. PACE assessments clearly do not fit the criteria for local government user fees, which are charges based upon "the proprietary right of the governing body" permitting the use of the government instrumentalities. *City of Gainesville*, 863 So. 2d at 144. Local governments will not be charging property owners for the use of a specific

government instrumentality, such as roads, sewers, or sidewalks. Instead, the assessments pay for the installation of improvements in a person's home or business designed to reduce energy use and increase windstorm protection. The assessments pay for the capital cost of these improvements.

The FBA's criticisms of the program as "voluntary" do not change the analysis. There is nothing unusual about a property owner requesting government-financed improvements that result in a special assessment. Examples of such property owner-requested assessments include neighborhood improvements (Ch. 163, Fla. Stat.) and placing electric utilities underground (Ch. 170, Fla. Stat.). *See also, e.g., Fed. Deposit Ins. Corp.,* 921 F.2d at 612 (noting that property owners had petitioned the local government for improvements that resulted in assessments). Moreover, once a property owner subscribes to the PACE program, payment of the assessments is mandatory and the property owner must pay them in annual installments.

While the FBA cites *City of Gainesville* to argue a PACE assessment is not a "special assessment" because it is "voluntary" (br. at 20-21), that was only one of several factors this Court outlined. The FBA ignores the other factors this Court identified, including "the name given to the charge; the relationship between the amount of the fee and the value of the service or benefit; . . . whether the fee is charged to recover the costs of improvements to a defined area or infrastructure or

for the routine provision of a service; whether the fee is for a traditional utility service; and whether the fee is statutorily authorized as a fee." 863 So. 3d at 145. Here, the Legislature labelled the charge a "non-ad valorem assessment," the charge is tied to the costs of improvements to property, it has no relationship to a utility service, and it is not a statutorily-authorized fee. Nothing prohibits the Legislature from authorizing an assessment where a homeowner requests it.

Although the FBA tries to characterize the PACE assessments as loans (br. at 23-24), the two are fundamentally different. Under the PACE Act, local governments will pay for capital improvements to property that have both public and private benefits. The FDFC will not provide any money directly to property owners, as a private lender would do. Instead, the FDFC pays contractors to make PACE improvements. Property owners benefit not from receiving money from the FDFC, but from the improvements themselves. This arrangement is no different from how local governments fund street improvements and other common subjects of non-ad valorem assessments. Also unlike a private loan, which is a personal obligation of the borrower, the PACE program places the repayment obligation on the property itself, and requires payment as part of an annual property tax bill. In other contexts, courts have held similar government assessments not to be consumer loans. *Cf. Pollice v. Nat'l Tax Funding L.P.*, 225 F.3d 379, 410 (3d Cir. 2000) (holding that neither the Truth in Lending Act nor the Fair Debt Collections

Practices Act apply to tax liens and assessments, as "a tax obligation is not a 'debt.'").

PACE assessments are no different from other local government assessments that pay for capital improvements property owners request. They are non-ad valorem assessments, and such assessments do not impair contracts.

C. Even if the PACE Assessments Were Not Non-Ad Valorem Assessments and Impaired Mortgage Contracts, Compelling State Interests Outweigh Any Impairment

As stated above, PACE assessments do not impair mortgage contracts. But even if they did, they would still be constitutional because compelling state interests outweigh any impairment. Many governmental actions may somehow affect contracts. Therefore, when considering an impairment claim this Court balances the nature and extent of the impairment, the state's objectives, and whether the impairment is greater than necessary to achieve those objectives. Here, the Legislature identified compelling state interests behind the PACE Act, including energy conservation, energy security, and hurricane protection. By contrast, the FBA presented no evidence of any contractual impairment and instead relies on material outside the record.

Below we (1) explain the standard for determining impairment; (2) demonstrate that PACE assessments serve important public purposes; and (3) show that, in light of those purposes, any impairment is reasonable.

1. Standard for Determining Impairment

To determine whether a government enactment unconstitutionally impairs a contract, Florida law applies a balancing test.[3] In the leading case, *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774 (Fla. 1979), this Court explained that "[t]o determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.* at 780. This Court noted that "this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Id.* This Court recently acknowledged that test: "In determining the question of unconstitutional contract impairment in Florida, where a contract has been found to exist and to have been impaired by subsequent legislation, this Court in *Pomponio* . . . adopted a balancing approach to determine if a statute unconstitutionally impairs a contract. We recognized in *Pomponio* that 'virtually no degree of impairment' will be

[3] The FBA appears to challenge the PACE Act based only on Article I, section 10 of the Florida Constitution. To the extent that it also raises issues under Article I, section 10 of the U.S. Constitution, the same analysis applies. *See Pomponio*, 378 So. 2d at 779-80 (developing "an approach to contract clause analysis similar to that of the United States Supreme Court"); *Scott v. Williams*, 107 F.3d 379, 385 (Fla. 2013) (following *Pomponio* and *U.S. Trust*).

tolerated, but 'allow[ed] the court to consider the actual effect of the provision on the contract and to balance a party's interest in not having the contract impaired against the State's source of authority and the evil sought to be remedied.'" *Scott v. Williams*, 107 So. 3d 379, 385 (Fla. 2013) (quoting *Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 193 n.6 (Fla. 2011)).

The FBA argues that "[a]ny legislative action that diminishes a contract's value is repugnant to the Florida Constitution" (br. at 14), citing *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978). The Court's recent decision in *Citrus Cnty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 39 Fla. L. Weekly S697a (Fla. Nov. 13, 2014), relies on *Dewberry*. But neither *Dewberry* nor *Citrus County* overruled *Pomponio*. And unlike the FBA's facial challenge to the PACE Act, *Dewberry* and *Citrus County* were as-applied challenges to laws that affected specific contracts. In *Dewberry*, a statute directly changed an insurance policy's terms and reduced its coverage. 363 So. 2d at 1079-80. In *Citrus County*, a special law constituted "a rewrite of the parties' contractual agreements" relating to management of a hospital. Such laws, which directly change a contract's terms—as opposed to merely affecting a remedy—are subject to more stringent review. *U.S. Trust*, 431 U.S. at 19 n.17 ("a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the

express terms of an agreement"). Here, however, FBA makes a facial challenge; and it identifies not one contract that has been impaired.

The PACE Act does not change the obligations of parties to preexisting mortgage contracts. At most, it affects a mortgagee's remedy (the value of the collateral), and as discussed below, that effect is minimal. Therefore, if the PACE Act impairs contracts, this Court should apply the *Pomponio* balancing test.

2. The PACE assessments serve an important public purpose

The authority for the PACE program comes directly from the Legislature. The Legislature made findings about the important and compelling state interest in reducing greenhouse gas emissions, increasing energy efficiency, and protecting against hurricanes. § 163.08(1). It also found that "the actions authorized under this section, including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants." § 163.08(1)(c). These findings echo similar findings the Legislature made in 1980 that "it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems in order to protect the health, prosperity and general welfare of the state and its citizens." Ch. 80-65, § 5, Laws of Fla. (codified at § 366.81,

Fla. Stat.). Legislative findings are entitled to deference. *See, e.g., Westerheide,* 831 So. 2d at 101.

The FBA does not challenge the public importance of these goals, or contest the legislative findings. Indeed, there can be no dispute that energy conservation, energy security, and hurricane protection are important policy interests. *See U.S. Trust,* 431 U.S. at 28 ("energy conservation and environmental protection are goals that are important and of legitimate public concern"). The FBA must overcome the legislative findings' presumption of correctness by "strong, direct, clear and positive proof." *Desiderio v. City of Boynton Beach,* 39 So. 3d 487, 493-94 (Fla. 4th DCA 2010). Given its failure to present any evidence, the Court must defer to these legislative findings.

3. Any impairment is minor and reasonable in light of the important public purposes

Nothing in the PACE assessment liens changes the terms of any mortgage contract: the property owner must still repay the mortgage loan, and in the event of default the mortgagee retains the option of foreclosure. The PACE assessment's only potential effect is on the mortgagee's remedy in a foreclosure: a PACE lien would take priority over a mortgage lien. But "[i]t is well established that, by legislative enactment, a state may modify existing remedies . . . without impairing the obligation of contracts as long as a sufficient remedy is left or another sufficient remedy is provided." *Ruhl v. Perry,* 390 So. 2d 353, 355 (Fla. 1980).

Any effect on a mortgagee's remedies is minimal and speculative. All mortgage contracts executed after this Court's 1929 decision in *Gailey* were made with the understanding that special assessment liens have priority. Adding new improvements that can be subject to special assessments does not fundamentally change the legal context in which mortgage contracts were formed.

Moreover, the amount of a special assessment to be paid at the time of mortgage foreclosure is much smaller than the overall assessment amount. Unlike mortgages, non-ad valorem assessments do not become due in full upon foreclosure; no acceleration occurs. The assessment requires annual payments, and the payment obligation remains with the property even after a change in ownership. §§ 197.3632(3)(b), 5(a), (7). Upon foreclosure, only the annual portion of the assessment becomes due. For example, assuming PACE improvements for hurricane windows of $20,000, spread equally over ten years, the amount that would have priority over a mortgage would be only the unpaid annual assessment—about $2000. This would hardly affect a typical mortgagee's security interest.

The FBA ignores that PACE assessments pay for improvements to real property, which by definition increases that property's value. *See, e.g.*, Rick Nevin & Gregory Watson, *Evidence of Rational Market Valuations for Home Energy Efficiency*, The Appraisal J., July 1998, available at

http://www.ongrid.net/AppraisalJournalPVValue10.98.pdf (finding that residential real estate markets assign to energy-efficient homes an incremental value that reflects annual energy savings); *Cf. Zipperer*, 41 F.3d at 625 (noting that the assessments were the result of "valuable improvements" which "obviously benefitted" the mortgaged property); *Fed. Deposit Ins. Co.*, 921 F.2d at 615 (noting that even the mortgagee's expert acknowledged that improvements increased the property's value). If improvements increase a property's value immediately, but their total cost does not become due upon foreclosure, then the PACE program may *increase* a mortgagee's security interest.

In addition, unlike other special assessments, the PACE Act protects mortgagees' interests in several ways. Among other provisions, it (i) requires that the local government confirm "that no notices of default or other evidence of property-based debt delinquency have been recorded during the preceding 3 years or the property owner's period of ownership, whichever is less; and that the property owner is current on all mortgage debt on the property" (§ 163.08(9)); (ii) allows "the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment" (§ 163.08(13)); and (iii) generally limits the allowable assessment to 20 percent of a property's value (§ 163.08(12)(a)-(b)). The escrow provision alone allows

mortgagees to prevent a property's foreclosure due to an owner's nonpayment of a PACE assessment.

The FBA fails to rebut the Legislature's findings that compelling state interests exist, and fails to show that any harm to mortgagees outweighs those interests. The FBA presented no evidence that the Legislative findings are incorrect. The evidence it attempts to introduce now through links to websites (br. at 28-31) is outside the record. *Smith v. State*, 931 So. 2d 790, 805 (Fla. 2006) ("The appellate record is limited to the record presented to the trial court."). Nor are those extra-record citations convincing. The FBA relies principally on a claim that the Federal Housing Finance Agency ("FHFA") purportedly will not allow Freddie Mac and Fannie Mae to purchase mortgages on houses with PACE assessments, which arguably reduces the value of the mortgage contracts on the secondary market (br. at 31). There was no fact-finding on this issue in circuit court, so there was no opportunity to make a record about the significance of this purported FHFA policy. And it is not even clear that the FHFA refuses to allow purchase of mortgages for houses with PACE assessments, given news reports that the agency has quietly changed its position. *See, e.g., Are Housing Regulators Quietly Dropping Their Opposition to PACE?* Greentech Efficiency (Nov. 10, 2014), available at http://www.greentechmedia.com/articles/read/federal-housing-regulator-drops-opposition-to-pace. Therefore, this purported FHFA policy may

have no effect on the value of such mortgages in secondary markets. The uncertainty about the actual facts regarding this purported FHFA policy, and its effect (if any) on the ability of mortgage originators to resell their mortgages on a secondary market, reinforces the importance of fact-finding in the circuit court.

Even if the FBA's citations to extra-record evidence are accurate, it would not change the analysis. The FHFA's policy decision at most affects prospective mortgages—that is, mortgages that it has not already purchased and which the agency knows are subject to PACE assessments—*not* preexisting mortgages which have already been purchased on the secondary market and which may be subject to subsequent PACE improvements. By definition, the 2010 PACE Act cannot unconstitutionally impair any prospective mortgage contract (see discussion above). Therefore, the only mortgages that the FHFA's alleged policy even potentially affects are those the FBA cannot challenge. In addition, because the FBA challenges the PACE Act only facially, whether it is constitutional as applied to loans that the FHFA may not purchase is irrelevant.

Finally, because the FBA has failed to identify a single mortgage contract that the PACE Act impairs, this Court cannot determine whether the impairment is substantial or how it weighs against the compelling public interests behind the assessments. Courts do not consider hypothetical impairments of contract. *See State v. Great N. Insured Annity Corp.*, 667 So. 2d 796, 800 (Fla. 1st DCA 1995)

(affirming the refusal to find a future, hypothetical impairment of contract); *Hous. Auth. of City of Omaha, Neb. v. U.S. Hous. Auth.*, 468 F.2d 1, 10 (8th Cir. 1972) ("[T]he issue of contract impairment at this time is purely hypothetical.").

CONCLUSION

For the reasons stated above, this Court should reject the FBA's challenge to the constitutionality of the PACE Act and affirm the Amended Final Judgment.

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CERTIFICATE OF SERVICE

I certify that on December 1, 2014, a copy of the foregoing was served by e-mail to all counsel on the attached service list.

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I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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