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IN THE SUPREME COURT OF FLORIDA

FLORIDA BANKERS ASSOCIATION,

Petitioner,

Case No. SC14-1603

vs.

L.T. Case No. 14-CA-548

STATE OF FLORIDA, et al.,

Respondent.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. THE FBA HAS STANDING TO PURSUE THIS APPEAL.

Appellees fail to make a valid argument as to the FBA's supposed lack of standing. This failure is unsurprising, as the purpose of bond validation proceedings and appeals is to facilitate—not disallow—challenges that might affect the validity of bonds. *See State v. Manatee County Port Authority,* 171 So. 2d 169, 171 (Fla. 1965) (explaining that purpose of bond validation proceeding is "to put in repose any question of law or fact affecting validity of the bonds"). This is why bond validation cases have an expedited review procedure: so this Court may "provide assurance of the marketability of the bonds" prior to their issuance. *City of Oldsmar v. State*, 790 So. 2d 1042, 1050 (Fla. 2001).

And Appellees should want this Court to provide assurance as to the bonds' marketability. Indeed, if the FBA's appeal is saved for a later day—when inevitably argued by a lender with a superseded mortgage—Appellees will be faced with a challenge to the PACE Act that could undo two *billion* dollars' worth of bonds. That Appellees would still prefer to avoid the FBA's appeal and have the bonds issued anyway speaks to how little Appellees have to say on the merits.

The FBA Properly Appeared to Appeal the Final Judgment

Appellees' first standing challenge is to argue that the FBA did not participate in the trial court proceedings. Appellees acknowledge that this position

is contradicted by this Court's previous ruling in *Meyers v. City of St. Cloud*, which states that a party in a bond validation proceeding may appear for the first time on appeal. 78 So. 2d 402, 403-04 (Fla. 1955). But, according to the Appellees, *Meyers* is the only instance where this Court has so ruled. (FDFC AB, p.11).[1] The FDFC then asks this Court to recede from *Meyers* as an aberration that misunderstands the bond validation statutes. *Id.*

But *Meyers* is not an aberration. Indeed, this Court has consistently stated—both before and after *Meyers*—that a party may appear for the first time on an appeal from a bond validation judgment. *Rowe v. St. Johns County*, 668 So. 2d 196, 197-98 (Fla. 1996); *Lozier v. Collier County*, 682 So. 2d 551, 552 n.2 (Fla. 1996); *Bruns v. County Water-Sewer Dist.,* 354 So. 2d 862, 862 n.2 (Fla. 1977); *State v. Sarasota County*, 159 So. 797, 799 (Fla. 1935). The Appellants, then, are flatly wrong in their portrayal of *Meyers*. The FBA, following this Court's well-established precedent on appellate standing in bond validation cases, properly appealed the trial court's final judgment.

Section 75.08, Florida Statutes, Authorizes the FBA's Appeal

Section 75.08, Florida Statutes, is very liberal in allowing the appeal of a bond validation judgment, providing that "[a]ny party to the action whether

[1] Citations to answer briefs are to "AB" and the page number. Additionally, the Appellees' respective answer briefs are delineated by party, e.g., "FDFC AB" or "7th AB," for State Attorney's Office for the Seventh Judicial Circuit.

plaintiff, defendant, intervenor *or otherwise, dissatisfied with the final judgment*, may appeal...." § 75.08, Fla. Stat. (2014) (emphasis added). Nevertheless, Appellees contend the FBA does not have standing to appeal because it did not present any evidence of a special injury before the trial court. As a primary matter, the idea that the FBA was required to appear before the trial court to prove a special injury is irreconcilable with the FBA's right to appear for the first time on appeal (as discussed above). Appellees' argument fails on this basis alone.

Appellees, in making their "special injury" argument, do not cite to any cases involving appellate standing in the bond validation context. (FDFC AB, p.13). The FBA was able to find only one instance where this Court found a lack of appellate standing in a bond validation case, and that was where the appellant was not actually dissatisfied with a judgment, but instead just wanted this Court "to put its stamp of approval" on the trial court's decision. *Bessemer Properties v. City of Opalocka*, 74 So. 2d 296, 298 (Fla. 1954). Appellees, conversely, cite to *Rich v. State*, 663 So. 2d 1321 (Fla. 1995), which discussed a party's ability to intervene at the trial court level under Section 75.07—not Section 75.08; as well as to a collection of cases that do not involve bond validation issues at all. (FDFC AB, pp.13-14). These arguments again ignore the plain language of section 75.08, which grants standing to any appellant dissatisfied with a final judgment who timely appeals. The FBA's dissatisfaction here is well-established.

Moreover, Appellees' standing argument—predicated on the notion that Appellees do not know "exactly what the FBA is" (FDFC AB, p.14)—is belied by common sense. To hear Appellees (particularly the FDFC) explain it, there is a chance the FBA may not be "adversely affected" by the bond issuance here. Appellees are unable to articulate how, exactly, this could be possible. The FBA is the Florida Bankers Association. Its membership—a mystery to the FDFC—is *Florida banks*. Albeit unsuccessfully on superpriority lien rights, this is why the Florida PACE Funding Agency consulted the FBA before moving to pass enabling legislation. *See* PaceNow, *Pace in Florida*, http://www.pacenow.org/resources/pace-in-florida/ (last visited December 17, 2014) ("[T]he Florida PACE law passed after substantial engagement with the Florida Bankers Association and individual lenders.").

As explained in the initial brief, the FBA will be adversely affected by the PACE Act when the FBA's members (and all banks operating in Florida) have their mortgages superseded by liens stemming from loan repayments. Thus, the FBA—particularly in light of Section 75.08's liberal language—has standing.

Appellees Cannot Argue Preservation to Escape This Appeal

Finally, Appellees argue that the FBA should be barred from raising arguments on appeal that were not specifically made at the trial court. This argument, then, is not about standing; it is about preservation. Such an argument is

incompatible with the established law that the FBA may appear on appeal despite not participating at the trial court. *See Bruns,* 354 So. 2d at 862 n.2 (rejecting appellee's argument that appellant "should not be permitted to raise issues before this Court that were not properly contested below").

Regardless, the FBA's appeal is predicated upon a constitutional challenge to the PACE Act's labeling of loan repayments as special assessments. As explained in the initial brief (and acknowledged in FDFC's answer brief), this is a challenge to the *facial* validity of the PACE Act. Such a challenge can be presented for the first time on appeal under the fundamental error exception. *Trushin v. State,* 425 So. 2d 1126, 1129 (Fla. 1982); *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 491 (Fla. 5th DCA 2004). Furthermore, the constitutionality of the PACE Act *was* challenged below. (Supp. A. 258).

II. THE TRIAL COURT ERRED WHEN IT VALIDATED THE PROPOSED FDFC REVENUE BONDS FOR PACE LOANS BECAUSE THE FDFC DOES NOT HAVE THE AUTHORITY TO ISSUE THE BONDS AS THE FINANCING ARRANGEMENT UPON WHICH THE BONDS ARE SECURED IS UNCONSTITUTIONAL.

The crux of the FBA's argument is straightforward—the PACE Act's so-called "non-ad valorem special assessments" are not special assessments at all; they are loan repayments. Because the liens resulting from the PACE loans do not stem from special assessments, they are not constitutionally permitted to have superpriority lien rights over earlier-recorded mortgagees' liens. The Appellees

have barely addressed this straightforward point.

Instead, Appellees have spent much of their respective answer briefs discussing the laudability of Florida's energy conservation and hurricane mitigation goals. They need not have done so; the FBA agrees that these goals are praiseworthy and important to Floridians. Likewise, the Appellees have devoted pages to explaining why the Florida Legislature's fact findings on these energy policy goals must be accepted. The FBA does not dispute that either. Finally, Appellees note that non-ad valorem special assessments do not unconstitutionally impair mortgage contracts. The FBA agrees with that, too, and even made the same point in its initial brief. (IB, p. 16).

All of these undisputed issues are fluff. The FBA's simple point is this: no matter how laudable the goal or how acceptable the fact finding, the statute implementing the goals must be constitutional. If it is not, then the Legislature must find some other way to implement the goal.

It is this singular point by the FBA—whether the "special assessments" charged under the PACE Act are truly special assessments—that Appellees fail to refute. And, Appellees must refute it, because if the property owners' payments are not special assessments, then they cannot constitutionally have superpriority lien rights over earlier-recorded mortgagees. *See, e.g., First Nationwide Mortg. Corp. v. Brantley*, 851 So. 2d 885, 887 (Fla. 4th DCA 2003).

The PACE Loan Repayments Are Not Special Assessments

Appellees claim that the Legislature's labeling of the PACE loan repayments as "special assessments" is, alone, enough to end the inquiry as to whether the repayments are, in fact, non-ad valorem special assessments. (AB, p. 22). However, that is not the case. While relevant, the label is not dispositive. *See City of Gainesville v. State*, 863 So. 2d 138, 145 (Fla. 2003).

Appellees then turn to the test for determining whether a government charge is a special assessment, (AB, p. 23), which is the same test the FBA set forth in its initial brief. (IB, p. 18). One prong of that test is whether the assessed property derives a special benefit from the service provided. *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 183 (Fla. 1995). Appellees point out that the assessed properties will receive a special benefit, as stated by the Legislature. (AB, pp. 23-24). Once again, the FBA agrees. The PACE properties would receive a benefit; the FBA does not quibble with the Legislature's findings in that regard.

But, special assessments must provide a benefit that is *public* in nature, despite the special benefit to a specific property. *See Atl. Coast Line R.R. Co. v. City of Lakeland*, 115 S. 669, 684 (Fla. 1927) (Strum, J., concurring); *see also, e.g.*, § 170.01, Fla. Stat. (2014) (authorizing levying of special assessments to pay for public improvements). This is one of the first ways in which it becomes clear that the PACE loan repayments are not "special assessments"—they are not at all

public in nature.

Appellees have conceded that the assessments must be public, (7th AB, p. 13; 10th AB, p. 15), but have failed to show how the PACE "assessments" are public. Appellees suggest only one tenuous public aspect: that properties adjacent to properties assessed under the PACE Act for wind resistance improvements would have a benefit of mitigating potential wind damage to their own properties. (7th AB, p. 16; 10th AB, p. 18).

In fact, the reason none of the Appellees point to, or are able to point to, a true public aspect of the PACE Act's assessments is because there is not one. As the FDFC rightly noted, examples of true special assessments are neighborhood improvements and electric utility placement. (FDFC AB, p. 26). Other examples include road and sewer construction, public park construction, wetlands drainage, and mass transportation systems. *See, e.g.,* § 170.01, Fla. Stat. The assessments under the PACE Act provide no such similar public benefit. The reason: they are voluntary loans for individual, private home improvements versus neighborhood-type improvements. They are not public in any way, and thus, they are not true non-ad valorem special assessments.

Likewise, as the FBA pointed out in its initial brief, the voluntariness of the "assessments" shows that they are not really special assessments. Appellees have seized upon this assertion, which the FBA illustrated in part in its initial brief

through cases debating whether a particular government charge was a special assessment or a user fee. Appellees have spent much time discussing the factors applied by Florida courts when making the user fee versus special assessment decision, and how voluntariness is only one of those factors. (7th Cir. AB, pp. 14-15; 10th Cir. AB, p. 17; FDFC AB, p. 26).

Appellees miss the argument. The FBA cited those cases because there are very few cases describing the characteristics of a special assessment, and cases on user fees versus special assessments do so in the greatest depth. The case at hand is not about user fees, as all parties agree, and so the factors for settling the dispute of user fee versus special assessment are not applicable. The FBA's point —as shown in the user fee cases—is simply that special assessments are involuntary, as shown in the user fee cases. Notably, none of the Appellees have cited an example of a special assessment that is both voluntary and private in nature.

The initial brief also illustrated this point about the involuntariness of special assessments through cases determining whether a government charge is a tax. Courts, when grappling with the question of whether a charge imposed upon a citizen is a tax, consider the voluntariness of the charge. In such cases, special assessments are included in the category of taxes, and taxes—like special assessments—are always involuntary. *See City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992); *Klemm v. Davenport*, 129 So. 904, 907 (Fla. 1930); Henry

Kenza Van Assenderp, *Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law*, 20 Fla. St. U. L. Rev. 823, 826 (1993).

In fact, true special assessments are levied as part of a government's taxing authority. Thus, if the PACE "special assessments" were actually assessments, then superpriority lien rights would be appropriate because superpriority over prior-recorded mortgagees is constitutionally permissible only where mortgagees must yield to the government's taxing authority. *See Gailey v. Robertson*, 123 So. 692, 693 (Fla. 1929). The problem here is that the so-called assessments, labeled as such for the sole purpose of trying to pass constitutional muster, are mere loan repayments, not special assessments. And it is not constitutionally permissible for loan repayments, even municipal ones, to have superpriority lien rights over prior-recorded mortgagees. *Brantley*, 851 So. 2d at 887.

Finally, Appellees point out the ways in which they claim the PACE loan repayments are not like loans. The arguments are not persuasive, though. For example, the FDFC notes that the loan money does not go directly to a borrower, it goes to the contractor performing the work; however, that is no different than most any other secured loan. (FDFC AB, p. 27). Ultimately, though, this is irrelevant. While the FBA maintains that the PACE payments are loans, even if they are not loans, they are clearly not special assessments, and only special assessments (or taxes) can constitutionally have superpriority lien rights.

Brantley's Application and the Lack of Constitutional Protections

Appellees' answer briefs have also failed to address *Brantley*, which is instructive. *See* 851 So. 2d 885. *Brantley* involves municipal loans offered to private citizens to improve the citizens' private property, all as part of a legislative public policy focus of remedying slum and blight. *Brantley* explains that there is nothing wrong with such loans, but the lending municipality cannot have superpriority lien rights over existing mortgagees. Factually, *Brantley* is the closest Florida case to this one, and none of the Appellees chose to fully address it.

A footnote is the only way two of the Appellees refer to *Brantley*, asserting that, unlike here, *Brantley* involved loans, not special assessments and that the enabling legislation for the program in *Brantley* did not specify protections for prior mortgage liens. (7th AB, p. 16 n.3; 10th AB, p. 18 n.3). These distinctions are not persuasive. First, it is precisely the FBA's point that *Brantley* did not involve special assessments. The FBA is arguing here that the PACE loan repayments are also not special assessments, regardless of what the PACE Act titles them; they are loan repayments of the same type as those in *Brantley*. Second, we have no idea what the enabling legislation in *Brantley* said and whether it had any protections for prior mortgage liens.

The Appellees claim the PACE Act has protections for mortgagees. (7th Cir. AB, p. 17; 10th Cir., p. 19). However, these so-called "protections" do not change

the fact that prior-recorded mortgagees' contracts have been and will be impaired. Furthermore, even the "protections" have exceptions. *E.g.,* § 163.08(12), Fla. Stat. (2014). In the end, the PACE Act does not prevent a property owner from owing more on a property than the property's value. Moreover, the Act renders certain provisions of most mortgage contracts into nullities, such as the ability to accelerate a loan when the borrower enters into an unapproved secondary loan. A PACE loan would perhaps be such a loan. But, under the PACE Act, this mortgage provision would be void because mortgagees are barred from stopping borrowers from entering into PACE loans, and mortgagees are prohibited from accelerating a loan as a result of the borrower entering into a PACE loan, again, even if the mortgage contract allows it. Thus, "protections" or no, the mortgagees' contractual rights are no longer the same.

Additionally, citing inapplicable case law, Appellees note that the FBA has not pointed to one particular contract that is impaired. (FDFC AB, pp. 17, 19, & 36). The FBA does not need to do so. Under the FBA's facial challenge, any time a PACE loan is taken out, it will impair *any and all* earlier-recorded mortgage contracts, per the PACE Act's express terms. § 163.08(8), Fla. Stat. Furthermore, the FDFC cannot plausibly be suggesting that all of Florida's mortgage contracts are hypothetical, and that there are not thousands upon thousands of ongoing mortgage contracts in the state of Florida.

The Application of *Pomponio* if the PACE Loan Repayments are Not Special Assessments

Appellees ultimately argue that even if the PACE Act loan repayments are not special assessments, the repayments, with their superpriority lien rights, are still constitutional because the state's interests outweigh any contractual impairment. (FDFC AB, p. 28). Florida applies a balancing test to determine whether a statute's impairment of contracts is constitutionally tolerable. *See Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1980). Although Florida employs a balancing test that is similar to the federal contract clause analysis, Florida law remains more protective of contracts. Even *Pomponio* states that Florida allows "virtually no impairment" of contracts, *id.*, and this Court has enforced a broad view that allows any diminishment of a contract. *See, e.g., Citrus County Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 39 Fla. L. Weekly S697a, 2014 WL 5856370, at *5 (Fla. Nov. 13, 2014).

The FDFC has suggested that more impairment is constitutionally tolerable when it is the contractual remedy, rather than a contractual term, being impacted. (FDFC AB, p. 30). Not so. With respect to lien priority rights, Florida courts have already determined that superpriority over an earlier-recorded mortgage lien will always cause an immediate diminishment in a mortgage contract's value and is repugnant to Florida's constitution. *See Sarasota County v. Andrews*, 573 So. 2d 113, 115 (Fla. 2d DCA 1991). Here, the PACE loans would affect more than the

mortgagee's foreclosure remedy. (FDFC AB, p. 32). Like the loan in *Andrews*, the PACE loans also affect the marketability of the mortgage, not to mention that the change in priority puts the mortgagee at a substantially greater risk of losing its investment. 573 So. 2d at 115.

In fact, any legislation that diminishes the value of an existing contract clashes with the constitution. *See Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978). To distinguish this point, the FDFC notes that *Dewberry* and other cases involved as-applied constitutional challenges instead of facial challenges. However, if a statute is facially unconstitutional like the PACE Act, it is certainly unconstitutional as-applied. Regardless, the type of constitutional challenge is irrelevant. The question, in either case, is whether there is an impairment. Negatively impacting a mortgagee's contracted-for lien position is an impairment that diminishes the mortgage contract's value and thus runs afoul of the Florida Constitution. *See, e.g., Andrews*, 573 So. 2d at 115.

Ultimately, going back to *Pomponio* and its balancing test, the FBA did not apply *Pomponio* in its initial brief because this case effectively involves a "per se" issue of constitutionality. That is, it all comes down to whether the PACE loan repayments are truly special assessments. If they are assessments, then the state is exercising its taxing authority, and even earlier-recorded mortgagees must yield to that authority. If they are not special assessments, the *Pomponio* balancing test is

unnecessary because allowing superpriority lien rights over earlier-recorded mortgagees is, effectively, per se unconstitutional, because Florida courts have already held that the state cannot trump the vested rights of a mortgagee. (IB, pp. 13-16).

This is true for existing and prospective mortgage contracts. Contrary to Appellees' assertions that the PACE Act cannot impair mortgage contracts entered into after 2010, (FDFC AB, pp. 16-18 & 36), if the PACE loan repayments are not special assessments, then the superpriority lien rights granted these loans are unconstitutional as to all mortgage contracts—current and prospective. As noted by the FDFC, "**valid 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." (FDFC AB, p. 18) (emphasis added). Here, the PACE Act is not valid because PACE loans cannot constitutionally have superpriority lien rights over earlier-recorded mortgages.[2]

CONCLUSION

In this case, the financing agreement securing the bonds is illegal, and thus the FDFC does not have the authority to issue the bonds. The bonds cannot be validated, and this Court should reverse.

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[2] Obviously, if the PACE loan were entered into before a mortgage contract, then the PACE loan would be entitled to priority like any earlier-recorded loan. But any PACE loan that comes into being after a mortgage is recorded cannot constitutionally have priority lien rights over the already-recorded mortgage.

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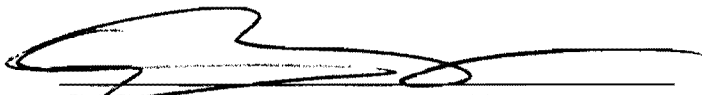

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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