SC15-774

IN THE SUPREME COURT OF FLORIDA

DAN SOWELL, IN HIS OFFICIAL CAPACITY AS PROPERTY APPRAISER OF BAY COUNTY, FLORIDA; MARSHALL STRANBURG, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF REVENUE,
Appellants,

v.

PANAMA COMMONS L.P.,
Appellee.

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL
Case No. 1D14-1671

REPLY BRIEF OF APPELLANT MARSHALL STRANBURG

PAMELA JO BONDI
Attorney General

ALLEN WINSOR (FBN 16295)
Solicitor General

WILLIAM H. STAFFORD (FBN 70394)
Senior Assistant Attorney General

OSVALDO VAZQUEZ (FBN 70995)
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
allen.winsor@myfloridalegal.com
william.stafford@myfloridalegal.com
osvaldo.vazquez@myfloridalegal.com

Counsel for Executive Director Stranburg

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ARGUMENT

Panama Commons' arguments, if accepted, would deny the Legislature the ability to correct a tax statute, even where the correction has at most a modest retroactive effect, in the face of decades of authority establishing that both federal and state legislatures have this power. While the Answer Brief argues at length that Panama Commons did not *itself* engage in the activity that led the Legislature to correct Section 196.1978, *see, e.g.*, AB at 30, 38, the rule Panama Commons advocates would of course reach beyond its case and would deny the Legislature this power in every instance. The Legislature had good reason to believe that the tax law at issue could be misused—news reports, for example, detailed how the pre-amendment statute, which had been projected to reduce revenues by $200,000 annually "could cost schools and local governments more than $100 million a year."[1] Panama Commons' rule would provide a costly windfall to many actors and to countless others in the future. Because the Answer Brief fails to establish that the 2013 Amendment was unconstitutionally retroactive and fails to show the property would qualify for an exemption under the 2012 statute in any case,

[1] Susan T. Martin, *Florida Builders' Rich Tax Loophole Hurts Local Governments*, Tampa Bay Times, Dec. 15, 2012, *available at* http://bit.ly/1hEKHdr. *See also id.* (estimating annual lost tax revenues to Bay-area counties ranging from $856,755 to $12,131,206); Mary Shanklin, *Orlando Developers to Lose Tax Break*, Orlando Sentinel, May 9, 2013, *available at* http://bit.ly/1NUg65v (reporting $16 million in losses to Orange County).

Panama Commons provides no compelling reason to tie the Legislature's hands this way.

I. PANAMA COMMONS CANNOT SHOW THAT THE 2013 AMENDMENT WAS UNCONSTITUTIONALLY RETROACTIVE.

Panama Commons does not dispute that its burden in this case is to prove unconstitutionality "beyond reasonable doubt." *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008). Nor is it disputed that, because the 2013 Amendment is tax legislation, the burden is only heavier. *See* Stranburg IB at 25 (citing *E. Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d. 311, 314 (Fla. 1984)). In the face of this heavy burden, Panama Commons' inability to cite a single case holding that a taxpayer has a right to receive an exemption that vests on January 1 of each year is fatal to its case.

Because there is no authority finding a vested right to a statutory tax exemption as of January 1 or any other date,[2] Panama Commons instead relies on authority saying that land ownership and property values are determined *as of* January 1, *see* AB at 13-15, but this is plainly insufficient for purposes of

[2] *See* Dist. Ct. Op. at 8 (Benton, J., dissenting). The closest the Answer Brief comes is *City of Naples v. Conboy*, 182 So. 2d 412 (Fla. 1965), which Panama Commons says "in effect recogniz[ed] a vested right." AB at 22. But *Conboy* said nothing about vested rights, instead applying the equitable estoppel doctrine to invalidate a municipality's back assessments for prior *years*. *See* 182 So. 2d at 418. It is inapplicable in determining whether a taxpayer has a vested right as of January 1, when no taxes have been assessed or paid. *See also Straughn v. Camp*, 293 So. 2d 689, 695-96 (Fla. 1974) (finding "no basis whatever" for equitable estoppel where Legislature repealed tax exemption).

retroactivity analysis. As this Court held in *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (2008), for a "right" to be vested based on a preexisting statute, the statute must not only state the right, it must protect it. *See, e.g.*, 984 So. 2d at 490 (noting that the preexisting statute provided that records were "not subject to discovery or introduction into evidence," but did not create a statutory privilege). Indeed, where rights are subject to modification at any time, such protection is entirely absent. *See id.* at 491; Stranburg IB at 32.[3] Here, Panama Commons is in a weaker position because it cannot point to a statute that even states a right to a tax exemption as of January 1. In *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004), the court similarly noted that a contractor did not possess a vested right to cure its unlicensed status—a right granted by a preexisting statute—because it was "on 'fair notice' that the statutory provision . . . was a matter of legislative grace that could be withdrawn by subsequent legislative action" and therefore "could have no 'settled expectation' or claim of 'reasonable reliance.'" *Id.* at 1217. The caselaw is clear that statutory tax

[3] The Answer Brief downplays the fact that tax exemptions are often modified, arguing that past changes have either been prospective, AB at 23, or created new exemptions, *id.* at 25 n.3. But under *Buster*, a party cannot claim a vested right based on statutes that are constantly changing. Moreover, the Answer Brief acknowledges that new exemptions create harm to *other* taxpayers, though it brushes off these effects as "speculative" or "de minimus." AB at 25 n.3; *but see Korash v. Mills*, 263 So. 2d 579, 582 (Fla. 1972) (noting that "the basic purpose of taxation" includes the principle that no taxpayer should "bear[] an added or unfair burden by reason of other taxpayers not paying their just share").

exemptions are precisely these types of rights. *See* Stranburg IB at 35 (quoting *Hous. by Vogue, Inc. v. Dep't of Revenue*, 403 So. 2d 478, 480 (Fla. 1st DCA 1981), *aff'd* 422 So. 2d 3 (Fla. 1982)).[4]

Panama Commons fails to rebut any of this showing, instead citing caselaw on unrelated issues. First, the Answer Brief cites cases that address procedural due process or the unconstitutional conditions doctrine. *See* AB at 20-21 (citing *Speiser v. Randall*, 357 U.S. 513 (1958), among other cases). But whether a benefit can be "property" for either doctrine says nothing about whether it constitutes a *vested right* for retroactivity purposes. Indeed, the point of the unconstitutional conditions doctrine is to prevent the government from "deny[ing] a benefit to a person on a basis that infringes [a separate constitutionally protected freedom] even if he has *no entitlement to that benefit*." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (emphasis added); *see also id.* at 680 (citing *Speiser* in the same discussion); *cf. Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001) (noting that procedural due process can protect a property right, quasi-property right, or even a simple "legitimate claim of entitlement"). The retroactivity doctrine, by contrast, requires that the claimant not only have a right, but one with sufficient protection

[4] Panama Commons faults the appellants for pointing out this fact, accusing the briefs of "disparag[ing] tax exemptions as just a 'privilege,'" AB at 20, but it is the courts, not the parties, that recognize that tax exemptions are "special favors," *Hous. by Vogue, Inc.*, 403 So. 2d at 480, which are subject to the "unquestioned authority" of the Legislature to repeal them, *Straughn*, 293 So. 2d at 694.

to render it a vested right. *Compare Crocker*, 778 So. 2d at 986-88 (finding next of kin has legitimate claim of entitlement to possession of decedent's remains based on "indicia" in "statutes and caselaw"), *with Buster*, 984 So. 2d at 490 (finding no vested right to discovery exemption despite explicit statutory provision).

Second, the Answer Brief misreads both *Buster* and *R.A.M.* It argues that *R.A.M.* "held that once a party complies with conditions for an exemption, an exemption right can vest," AB at 24, but the case did no such thing. *R.A.M.* did not involve an exemption; it addressed a statutory change disallowing unlicensed contractors to cure their status. The "right" at issue was the contractors' ability to take steps to cure. Unsurprisingly, the Court noted in the section quoted in the Answer Brief that if "R.A.M. had taken the steps necessary to be legally licensed," that is, if R.A.M. had *already* used the cure provision that the Legislature later removed, the case would be different. The Answer Brief attempts to explain *Buster* by saying that it turned on "the parties' reasonable expectations in the circumstances," "possibly" the amendment's remedial nature, and the fact that the case involved a constitutional amendment that "could not be invalid under the Florida Constitution." AB at 24. But, as the Initial Brief explains, that *Buster* turned on the parties' expectations, which were based only on believing existing law would continue, supports the *appellants'* position. *See* Stranburg IB at 34-35. *Buster* itself disproves the Answer Brief's remaining two points—as the dissent

noted, the Court did not even "discuss the remedial/substantive distinction," *Buster*, 984 So. 2d at 496 (Wells, J., concurring in part and dissenting in part), and the opinion made clear that the same retroactivity standard applies to both constitutional and statutory changes, *see id.* ("Although this case involves a change which was adopted by constitutional amendment, as opposed to a statutory amendment, the principles governing a change in statutory law apply equally to the current scenario."); *see also id.* at 490-92 (majority op.) (addressing retroactivity question by relying on authority developed in statutory amendment realm).

Panama Commons fares no better in addressing appellants' showing that the 2013 Amendment would easily satisfy the standard the United States Supreme Court has for decades applied to retroactive tax laws. *See* Stranburg IB at 38-41, Sowell IB at 30-34. The Answer Brief acknowledges, as it must, that the legal standard is identical to the general rational basis standard. AB at 34 (citing *United States v. Carlton*, 512 U.S. 26, 30-32, 35 (1994)); *accord* Stranburg IB at 39. In *Carlton*, the Court held this standard satisfied where the legislature's purpose was "neither illegitimate nor arbitrary"—Congress had "acted to correct what it reasonably viewed as a mistake"—and its means involved "only a modest period of retroactivity" of just over one year. 512 U.S. at 32-33. Here, the Legislature acted to correct an "unintended effect of the expanded provision" passed four years earlier, *see* Stranburg IB at 9-10 (quoting H. Final Bill Analysis, CS/CS/HB 437, at

6 (May 30, 2013)); *see also supra* n.1, and it imposed a shorter period of retroactivity, assuming the law was retroactive at all. The Answer Brief never contests these facts, instead attempting to cloud the issue by insisting the 2009 law was not "passed by mistake," AB at 29, *see also id.* at 26.[5] But *Carlton* does not say a legislature must have "mistakenly" passed a law—a standard no law could meet—the question is instead whether the Legislature purposely passed a law, found it contained a mistake, and corrected it with modest retroactivity. Because, assuming the law is retroactive at all (*but see* Stranburg IB at 27-30), the facts here show *Carlton*'s standard is satisfied, the 2013 Amendment is constitutional.[6]

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[5] The Answer Brief also relies on standards contained in pre-Depression-era caselaw that the Supreme Court has since expressly repudiated. *Compare* AB at 32, *with* Stranburg IB at 40 n.16. In addition, the brief implies that different standards apply based on whether the tax at issue is an income, property, or estate tax. AB at 31-32. But the same standard applies regardless of the type of tax involved, *see* Ronald R. Rotunda & John E. Nowak, *2 Treatise in Constitutional Law*, § 15.9(a)(iv), at 914 (5th ed. 2012) (discussing *Carlton*). And if the standard did vary, this would only hurt Panama Commons—it bears emphasizing that the change here did not involve a new tax or an increase in a tax rate; it involved a removal of a statutory exemption. If the former types of changes are constitutional, the latter certainly is. *See supra* at 3-4 & n.5.

[6] Panama Commons argues that the Court need not look to anything but Florida caselaw. *See AB* at 31. But as the Initial Brief shows, this Court has long relied on federal retroactivity decisions, and the Florida and federal Due Process Clauses contain identical protections. Stranburg IB at 38 n.15. Panama Commons concedes that federal law is "flexible," but purports to contrast this with Florida law which, without citation, it says "prohibits *any* new retroactive obligation." AB at 34, n.14; *but see supra* at 4-6 (discussing *Buster* and *R.A.M.*); IB at 31-32.

Moreover, while Panama Commons cites federal cases that uniformly recognize a policy basis for treating tax laws differently for retroactivity purposes,

In a final attempt to salvage its constitutional arguments, Panama Commons argues that "[i]f particular case-by-case circumstances are considered," it should prevail, AB at 37-38, but it cites no authority holding that retroactivity should be determined on a case-by-case basis rather than the deferential examination of the legislature's motives and means that *Carlton* requires. There is good reason that no such authority exists; a rule requiring an individualized determination of whether a party took advantage of a loophole that a legislature sought to close would create an administrative nightmare. Nor does Panama Commons cite a case saying that the particular circumstances it chose are material. But even accepting Panama Commons' premises, the argument fails. Panama Commons points to its reliance on prior law (AB at 37, factors 1 & 3), but that is immaterial. *Carlton*, 512 U.S. at 34 ("Carlton's reliance . . . alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."). Moreover, Panama Commons applied for LIHTC funding before the tax exemption in Section 196.1978 was even expanded, *see* Stranburg IB at 32; in other words, it established financial feasibility assuming that

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see, e.g., Carlton, 512 U.S. at 37 (O'Connor, J., concurring in judgment) *cited in* Stranburg IB at 26, it insists that appellants have provided "no textual or policy basis" for this differential treatment. AB at 18. Not only is there such a reason, the federal courts have consistently found it sufficiently compelling to the point that retroactivity is "generally tolerated" in this area. Stranburg IB at 39 (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 534 (1998) (plurality op.)).

it would *not* receive an exemption. Panama Commons also argues that it provides a public benefit (AB at 37, factor 2), but this too is immaterial. *See Carlton*, 512 U.S. at 31-32 (noting that original law had been passed to promote Employee Stock-Ownership Plans, which were viewed as a public good). Finally, Panama Commons argues that there is "[n]o proferred reason why retroactive application of the new tax is needed," (AB at 38, factor 4) but it says this despite acknowledging the language of the staff analysis that puts forward just such a reason. The fact that Panama Commons believes it did not "misuse" the exemption in the manner cited by the Staff Analysis does not mean that others did not.

Panama Commons' arguments boil down to an argument that the 2013 Amendment was unfair to it. But this Court has recognized that some unfairness to parties is a feature of any retroactive legislation—again, assuming the 2013 Amendment was even retroactive—and it is a factor to be considered by the Legislature. That is the purpose of the clear statement rule, which ensures that the Legislature has "affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994)); *see also Landgraf*, 511 U.S. at 267 ("[A]bsent a violation of [a] specific [constitutional] provision[],the potential unfairness of retroactive civil legislation is not a sufficient

reason for a court to fail to give a statute its intended scope."). Accepting Panama Commons' arguments would deny the Legislature the power to obtain such benefits or, at minimum, consign it or the courts to a costly, case-by-case system. Panama Commons provides no support for this novel approach.

II. THE COURT SHOULD HOLD THAT PANAMA COMMONS DID NOT QUALIFY FOR A TAX EXEMPTION UNDER THE PRE-AMENDMENT STATUTE.

As the Initial Brief noted, this Court need not even reach the constitutional issue because Panama Commons fails to establish that it would be eligible for an exemption even if the 2013 Amendment were invalid. The Answer Brief argues that this Court should not address the issue, at multiple points faulting the Executive Director for making an "effort to avoid the constitutional issue," AB at 4, 11. But avoiding a constitutional issue is precisely what this Court has said it must do in circumstances like this. *See* IB at 17 (citing *In re Holder*, 945 So. 2d 1130, 1133 (Fla. 2006)). Panama Commons argues waiver because Sowell did not cite Panama Commons' noncompliance with Section 196.195 in the initial denial. But it does not cite a single statute supporting this argument, instead citing laws that set a deadline for an assessor to provide a sufficiently detailed denial of an exemption, AB at 46, or impose deadlines on property owners, *id.* at 47. Nor does Panama Commons' position make sense as a matter of policy, logic, or practicality. Under the proposed rule, a property appraiser would have to research and cite every possible reason for denying an exemption—even reasons assuming clearly

applicable statutes would later be stricken—or risk forfeiting a subsidiary argument if the first, second, or third reason were rejected. The administrative cost of such a system would be staggering and, unsurprisingly, Panama Commons cites no authority requiring it.

On the merits, the Answer Brief's arguments fail because they turn on an account of the 2009-12 statute that has no grounding in the statutory text or legislative history. Panama Commons argues that "[t]he reason for this expanded tax exemption was to exempt projects with for-profit limited partners, e.g., *under the LIHTC program*," AB at 29 (emphasis added), but it points to nothing at all to support this view.[7] Indeed, as the Initial Brief pointed out, the vast majority of LIHTC projects are undertaken by for-profits, Stranburg IB at 23, a point that Panama Commons made no attempt to rebut. Starting from this premise, Panama Commons argues that Section 196.195 cannot be read to bar an exemption where a non-profit owner directly derives a benefit from the property or where a for-profit entity derives a benefit, because that would be inconsistent with the operation of Section 196.1978. *See* AB at 43. Of course it can. The plain text of Section

[7] As the Initial Brief noted, there was no legislative history associated with the 2009 law. Panama Commons attributes to appellants an argument they have not made that the law was rushed or passed by mistake, AB at 26, but the point of discussing the law's passage was that there was no basis supporting Panama Commons' specific intent argument. Panama Commons does not rebut the argument that the Initial Brief did make.

196.195 bars an exemption where a property owner receives a benefit from the property, *see* Stranburg IB at18-21; *TEDC/Shell City, Inc. v. Robbins*, 690 So. 2d 1323 (Fla. 3d DCA 1997), and Section 196.1978 has, at all times, expressly incorporated Section 196.195's standards. § 196.1978, Fla. Stat. (2012) ("All property identified in this section shall comply with the criteria for determination of exempt status . . . as defined in § 196.195."). Simply put, the natural reading of the two sections is that the Legislature extended the Section 196.1978 exemption to certain limited partnerships, *provided they otherwise satisfied the standards of Section 196.195*, which do not allow a non-profit owner or any for-profit entity to receive a benefit from the property. Panama Commons would have this Court ignore this deliberate textual choice on the basis of a supposed legislative purpose for which it can provide no evidence.

The Answer Brief's textual arguments are incompatible with standard statutory analysis. Panama Commons argues that applying *TEDC/Shell* to its case would "nullify" the 2009 amendments, AB at 43, but as the Initial Brief pointed out, it is certainly possible for a non-profit to own a low-income housing project without directly receiving benefits from the property. *See* Stranburg IB at 24. A nonprofit may, for example, use donations or funds obtained from other sources to purchase land and build affordable housing. Panama Commons does not challenge this point. Because Panama Commons does not demonstrate that it is impossible

for the law to work, or that any provision is rendered meaningless read in context, its attempts to avoid the plain text of the statute fail. *See, e.g.*, *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (discussing in pari materia doctrine)[8]; *see also Koile v. State*, 934 So. 2d 1226, 1230-31 (Fla. 2006) (noting that where the statute is clear, the "plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent").

Finally, the Answer Brief is also wrong on the facts, relying on irrelevant issues but failing to obscure the salient points that: i) Panama Commons has received benefits from the property, and ii) a for-profit entity has directly received benefits from the property. Panama Commons cannot dispute that the entity-owner, which is 99.99% owned by a for-profit, received a federal loan, on favorable terms, that will convert into a gift after a certain period. *See* Stranburg IB at 7-8. The

[8] The Answer Brief attempts to stretch the in pari materia doctrine beyond its bounds, arguing that, because under the 2009-12 version of Section 196.1978, "a limited partner's interest is not deemed ownership or use of the property, . . . it cannot be considered ownership or use for purposes of § 196.195(3)." AB at 43. But this misreads the pre-amendment version of Section 196.1978, which at best required *ownership* to be disregarded for purposes of the exemption without saying anything about *use* of the property. *See* § 196.1978 (2012) ("The Legislature intends that any property owned by a . . . limited partnership which is disregarded as an entity for federal income tax purposes . . . shall be treated as owned by its . . . sole general partner."). Even if the reading were correct, Panama Commons points to no authority holding that a court can disregard the plain language of a statute—here, the standards of Section 196.195, which are expressly incorporated into Section 196.1978 and which say nothing about limited partners—and employ a definition from one statute to govern how every other statute must be construed.

Answer Brief instead argues that the loan is not an award of LIHTC credits or that the purpose of the loan is ultimately beneficial, AB at 44-45, but both points are immaterial—the gift/loan clearly constitutes a benefit within the ordinary meaning of the word. *See TEDC/Shell City* , 690 So. 2d at 1325 ("benefit" for purposes of §196.195, Fla. Stat., construed as used in its plain and ordinary sense). Independently, Panama Commons does not and cannot dispute that a for-profit entity, PHINDA Panama, LLC, purchased the valuable right to take a depreciation expense, based on ownership of the property, in order to reduce its tax burden. *See* Stranburg IB at 20; AB at 45. Instead, the Answer Brief makes the irrelevant point that the amount the for-profit paid for this right is small in relation to the overall project cost, *see* AB at 6, 45, though Section 196.195 does not even contain a de minimis exception. The Answer Brief also attempts to minimize the depreciation right as just a "bookkeeping entry," but taking a depreciation expense results in a reduction in taxes to the for-profit entity, a valuable right as evidenced by the for-profit's having paid hundreds of thousands of dollars for it.

Even if the law and facts did not clearly favor the exemption denial, the rule that "tax exemptions should be strictly construed against the claimant," *Straughn*, 293 So. 2d at 695,[9] would require reversal. Panama Commons has not overcome

[9] Quoting at length a 1939 case, Panama Commons argues that there is an exception to this rule for "exemptions that are intended to induce publicly beneficial development." AB at 43-44 (quoting *City of Tampa v. Tampa*

the rule and not shown it would qualify for an exemption even if the 2013 Amendment were not a fully constitutional exercise of the Legislature's power.

CONCLUSION

This Court should reverse the decision of the District Court.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Osvaldo Vazquez
ALLEN WINSOR (FBN 16295)
Solicitor General
WILLIAM H . STAFFORD (FBN 70394)
Senior Assistant Attorney General
OSVALDO VAZQUEZ (FBN 70995)
Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, FL 32399-1050
allen.winsor@myfloridalegal.com
william.stafford@myfloridalegal.com
osvaldo.vazquez@myfloridalegal.com
(850) 414-3300
(850) 410-2672 (fax)

Counsel for Executive Director Stranburg

Shipbuilding & Eng'g Co., 186 So. 411, 412 (Fla. 1939)). The quotation does not create an exception, merely discussing the uncontroversial rule that a statute should be applied to effectuate legislative intent. If it did, however, it is no longer good law in light of the unbroken line of more recent, unambiguous authority. Indeed, *most* exemptions induce publicly beneficial acts. *See, e.g.*, §§ 196.192, 196.1961-87, Fla. Stat. Panama Commons' proposed exception would swallow the rule.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on August 31, 2015 to the following counsel of record:

Loren E. Levy
The Levy Law Firm
1828 Riggins Lane
Tallahassee, FL 32308
levytorres@me.com

M. Stephen Turner
David K. Miller
Broad and Cassel
P.O. Drawer 11300
Tallahassee, FL 32302
sturner@broadandcassel.com
dmiller@broadandcassel.com

/s/ Osvaldo Vazquez
Attorney

CERTIFICATE OF COMPLIANCE

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

/s/ Osvaldo Vazquez
Attorney