IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC-16-645

FREDDY D'AGASTINO, FRATERNAL ORDER OF POLICE LODGE #20

Petitioners,

vs.

THE CITY OF MIAMI, ET AL.,

Respondents.

ON DISCRETIONARY CONFLICT REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

AMICUS BRIEF OF FLORIDA POLICE BENEVOLENT ASSOCIATION, INC. FILED ON BEHALF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Throughout this brief, the FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., will be referred to as "PBA."

Part IV, Chapter 112, Florida Statutes, commonly termed the Law Enforcement Officers Bill of Rights, will be referred to as the "LEO Bill of Rights."

The City of Miami's Civilian Investigative Panel, established by Article II, §11.5-26 – 11.5-37 of the Code of the City of Miami, will be cited as the Miami "CIP."

The PBA adopts the Statement of Case and Facts and the Standard of Review filed by Petitioners.

It is the position of the PBA that the Florida Legislature has preempted the field relating to the receipt and processing of complaints against law enforcement officers. It has "exclusively" placed this responsibility in the hands of the Miami Police Department solely in the manner prescribed by statute. In so doing, the Legislature has vitiated the ability of the City of Miami to adopt an ordinance empowering another agency of the City, the Miami CIP, to investigate, or in this case reinvestigate, allegations of use of force and abuse of power by law enforcement officers.

STATEMENT OF INTEREST

The Florida Police Benevolent Association, Inc. ("PBA") is a professional association of law enforcement and correctional officers comprised of in excess of 20,000 law enforcement members from over 150 of Florida's local, county and state law enforcement agencies. Substantially all of the PBA's active members are covered by the LEO Bill of Rights, which establishes the "rights and privileges" for law enforcement and correctional officers, including "the procedure" for investigating a "complaint against a law enforcement officer."

While the PBA is not the certified collective bargaining agent for law enforcement officers in the City of Miami, nevertheless, the PBA has a direct interest in the construction of sections 112.532 – 533, Fla. Stat., which were construed below.

This brief is filed in support of Petitioners and their position that the City of Miami's ordinance empowering the CIP to investigate allegations of officer misconduct that could lead to discipline is unconstitutional and is preempted by state law.

SUMMARY OF THE ARGUMENT

All investigations by a political subdivision involving a "complaint against a law enforcement officer" are covered by the LEO Bill of Rights. The majority opinion below suggests that the LEO Bill of Rights only applies to internal departmental investigations, not external citizen investigations by the same political subdivision. To the contrary, the LEO Bill of Rights properly applies to all investigations of any complaints "against a law enforcement officer" by a political subdivision.

The LEO Bill of Rights sets up the "exclusive" procedure to be used for investigation of any complaints against individual law enforcement officers, as is necessary to make sure that the broad protections, safeguards, and "rights and privileges" of the LEO Bill of Rights are not rendered meaningless. Moreover, the majority's interpretation ignores multiple provisions in Chapter 112, Part VI, which cannot be reconciled with the majority's analysis.

Under the plain reading of the LEO Bill of Rights, all complaints "against a law enforcement officer" are required to be referred by the political subdivision to the law enforcement agency within five days. § 112.533(1)(b)1. This requirement applies equally to all complaints against law enforcement officers initiated by or received by the political subdivision, including citizen complaints. After the complaint arrives at the law enforcement agency, § 112.533 mandates the sole

mechanism for the investigation of complaints in accordance with the protections in § 112.532. Because any investigations of alleged misconduct by a police officer could ultimately "lead to disciplinary action," any other interpretation would conflict with the broad protections of the LEO Bill of Rights. This conclusion is reinforced by the plain language of section 112.533(1)(a) which repeats that every law enforcement agency "shall" establish "a system" for the investigation of complaints received from "any person," which "shall be the procedure" for investigating complaints "*notwithstanding any other law or ordinance to the contrary.*" (emphasis added)

Citizen review panels, like the Miami CIP, may be created to review matters of policy, procedures, training, and recruitment within a police department, without conflicting with the LEO Bill of Rights as long as they do not investigate individual officers or require them to submit to a subpoena or interrogations concerning conduct which "could lead to" disciplinary action. The Miami CIP, however, has been improperly empowered by city ordinance to act in those investigatory areas preempted by the LEO Bill of Rights. Accordingly, the following provisions of the City of Miami's CIP, without limitation, are unconstitutional based on a direct conflict with state law:

- Miami City Code §11.5-27(5) empowering the CIP to "conduct investigations, inquiries and public hearings to make factual determinations, facilitate resolution and propose recommendations to the city manager and

police chief regarding allegations of misconduct by any sworn officer of the city police department;

- Miami City Code §11.5-27(9) empowering the Miami CIP to "make recommendations as to the disposition of alleged incidents of police misconduct, to which the police chief is required to respond in writing within 30 days";

- Miami City Code § 11.5-27(6) and 11.5-32 empowering the Miami CIP to issue subpoenas for police officer testimony when the officer is or may be "the subject of an investigation".

These provisions directly and expressly conflict with the exclusive provisions and broad protections of the LEO Bill of Rights.

ARGUMENT:

I. The Law Enforcement Officer's Bill of Rights Preempts All Other Investigations by a Political Subdivision Involving a Complaint Against a Law Enforcement Officer.

The majority opinion below concluded that the LEO Bill of Rights only applies to *Rutherford* departmental investigations, not *Rutherford* citizen investigations by the same political subdivision. To the contrary, the LEO Bill of Rights expressly applies to all investigations of any complaints "against a law enforcement officer" by a "political subdivision." The LEO Bill of Rights sets up the exclusive procedure to be used for investigation of any complaints against individual law enforcement officers by a political subdivision, as is necessary to make sure that the broad protections, safeguards, and "rights and privileges" of the LEO Bill of Rights are not rendered meaningless by conflicting municipal legislation. In reaching a contrary result, the majority's interpretation ignores multiple provisions in Chapter 112 which cannot be reconciled with the majority's analysis.

The Doctrine of Preemption

A local ordinance is preempted under state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 29 So. 3d 880, 886 (Fla. 2010). Article VIII, section 2(b), Florida Constitution, recognizes the power

of municipalities to conduct municipal government "except as otherwise provided by law." For this reason, "municipal ordinances must yield to state statutes." *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014). Preemption may result from either express or implied preemption of the field. *Id.* Even where concurrent municipal regulation is permitted because the state has not preemptively occupied the entire field, "a municipality's concurrent regulation must not conflict with state law." *Masone* at 495; *see also Sarasota Alliance*, 29 So. 3d at 888 (considering each section of challenged county election code to provisions of state Florida Election Code notwithstanding lack of express or implied preemption).

The LEO Bill of Rights Is a Preemptive Statute

The PBA contends that all investigations of law enforcement officers which could lead to discipline are preempted by the LEO Bill of Rights. Even absent field preemption, Miami City Code sections 11.5-27(5), 11.5-27(6), 11.5-27(9), and 11.5-32, without limitation, are unconstitutional based on a direct and irreconcilable conflict with the LEO Bill of Rights.

At the outset, it should be recognized that the LEO Bill of Rights does not impede criminal or licensing investigations conducted outside of the political subdivision. Section 112.532(1)(j) unmistakably provides that notwithstanding the rights and privileges provides by this part, the LEO Bill of Rights "does not limit

the rights of an agency to discipline or pursue criminal charges against an officer." Similarly, section 112.533(2)(c) provides that "[n]otwithstanding other provisions of this section," the complaint "shall be available to law enforcement agencies, correctional agencies, and state attorneys in the conduct of a lawful criminal investigation."

Another express exception authorizes investigation by the Criminal Justice Standards and Training Commission which is not precluded "from exercising its authority under chapter 943." §112.533(1)(a). The courts and the PBA have thus recognized that "allegations of excessive force and abuse of power against Florida law enforcement officers are subject to possible investigation by the state attorney's office, state grand jury, state criminal courts, Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, Federal Bureau of Investigations, United States Department of Justice, federal grand jury and federal criminal courts." *See e.g. Demings v. Orange County Citizens Review Board*, 15 So. 3d 604, 608 n.3 (5th DCA 2009).[1] Accordingly, there are already multiple avenues for independent investigation against a law enforcement officer.[2]

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[1] Each of the investigatory agencies listed above are truly independent of the political subdivision that employs the law enforcement officer, unlike that Miami CIP. Twelve of the thirteen members of the CIP are appointed by majority vote of the City Commission of the City of Miami, except for the one member appointed by the Chief of Police. Miami City Code §11.5-28(e). All members of the CIP are required to be "either permanent residents of the city, own real property in the city, or work or maintain a business in the city" except for the Chief of Police's

Yet, when an investigation of a "complaint against a law enforcement officer" is conducted by a "political subdivision," the "exclusive"[3] procedures and rights set forth in the LEO Bill of Rights necessarily and exclusively attach. Under the plain reading of the LEO Bill of Rights, all complaints "against a law enforcement officer" are required to be forwarded by "any political subdivision that initiates or receives a complaint against a law enforcement officer" to the law enforcement agency within five days. § 112.533(1)(b)1. This requirement applies equally to complaints initiated by or received by the political subdivision. Importantly, section 112.533(1)(b)1 provides that copies of a complaint against a

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appointee. *Id.* §11.5-28(d)(1). The membership of the CIP is required to include at least two members from each of the five city commission districts. *Id.* §11.5-28(a).

[2] Law enforcement officers involved in disciplinary investigations by their employing agency must answer all questions posed by the agency's investigators which are specifically, narrowly and directly related to the alleged employee misconduct under investigation. *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Gardner v. Broderick*, 392 U.S. 273 (1968). Officers must answer the questions fully and truthfully because even a "general denial" of misconduct may subject them to discipline. *LaChance v. Erickson*, 522 U.S. 262 (1998); *see also* Miami City Code §40-123(b)(listing grounds for dismissal including failure to provide requested information or testimony).

[3] As recognized by Judge Rothenberg's dissent, there is nothing ambiguous about the 2003 or 2007 amendments to section 112.533. *D'Agastino v. City of Miami*, 189 So. 3d 236, 248 (Fla. 3d DCA 2016), *citing Demings v. Orange County Citizens Review Board*, 15 So. 3d 604, 608-09 (Fla. 5th DCA 2009)(recognizing that the LEO Bill of Rights conveys a "clear and definitive directive that the employing agency is the only local governmental entity" authorized to investigate the complaint). Judge Rothenberg also cites *Demings* for the proposition that the title of Chapter 2003-149 designates the Chapter 112 investigation as "the exclusive procedure" for investigation of complaints against a law enforcement officer. *Id.* at 248.

law enforcement officer "shall" be forwarded to the employing agency "for review or investigation." Section 112.533 does not otherwise permit investigation of the law enforcement officer by the political subdivision.

Preemption of municipal investigations by citizen panels of "complaints against a law enforcement officer" is also required by the definition of the term "political subdivision." By broadly defining political subdivision in the immediately following section to include "a separate agency *or unit* of local government created or established by law *or ordinance*," any municipal citizen investigatory panel created by the political subdivision, as was the Miami CIP, is necessarily covered by this definition. 112.533(1)(b)2 (emphasis added). Likewise, the definition extends to not merely the political subdivision itself, but covers "the officers thereof" and "includes but is not limited to, an *authority*, *board*, branch, bureau, *city*, *commission*, ... institution, metropolitan government, *municipality*, *office, officer*..." 112.533(1)(b)2 (emphasis added). Thus, the Miami CIP squarely falls under this definition as a municipal office, authority, commission or board. The Miami CIP is thereby required to forward a complaint against a law enforcement officer to the police department, at which point the complaint triggers the LEO Bill of Rights, and the CIP's investigatory authority ends.[4]

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[4] Under the record in this case, the City and the FOP have adopted in their collective bargaining agreement, as an integral part of the disciplinary process, a departmental disciplinary review board (DDRB) which is based on the complaint

After the complaint arrives at the law enforcement agency, section 112.532 mandates the sole mechanism for the investigation of complaints against law enforcement officers. Because any other kind of municipal investigations of a police officer could *ultimately* be used in disciplinary actions, any other interpretation would be an end run around the broad protections of the LEO Bill of Rights. This conclusion is reinforced by section 112.533(1)(a) which repeats that every law enforcement agency "shall" establish "*a system*" for the investigation of complaints received from "any person," which "shall be *the* procedure" for investigating complaints "notwithstanding any other law or ordinance to the contrary." (emphasis added). The use of the phrase "a system" which shall be "the procedure" for investigating complaints by the municipality requires a single, uniform, "integrated procedure," notwithstanding any other law to the contrary. Op. Att'y Gen Fla. 2006-35 (2006)(concluding that the employing law enforcement agency is "the exclusive agency responsible for the receipt, investigation and determination of complaints"; Op. Att'y Gen. Fla. 97-62 (1997)

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review board identified in §112.532(2). *See* Article 8, Collective Bargaining Agreement between the City of Miami and FOP Lodge 20 (Appx. 1). The Miami DDRB dates back to the 1970s. *See City of Miami v. FOP Lodge No. 20*, 378 So. 2d 20 (Fla. 3d DCA 1979). Having contracted through the constitutionally protected bargaining process, the City lacks the authority to separately deviate from that agreement by establishing the CIP. Conflicts of this nature have been expressly disapproved. *See City of Miami Beach v. Board of Trustees*, 91 So. 3d 237 (Fla. 3d DCA 2012) (charter provision cannot control over general state law); *U.S. v. City of Miami*, 664 F.2d 435 (5th Cir. *en banc* 1981) (city cannot violate labor contract by separate agreement to avoid EEO liability).

(indicting that the complaint review procedure contemplated by Part VI of Chapter 112 is an "integrated procedure involving the receipt, investigation and determination of complaints about law enforcement officers by the officers' employing agencies").[5]

II. The Broadly Written "Rights and Privileges" in the LEO Bill of Rights Are Inconsistent with Any Other Interpretation.

The very first sentence in section 112.532 begins by declaring that all law enforcement officers shall have enumerated "rights and privileges" commonly referred to as the LEO Bill of Rights. Subsection (1)(a) – (i) proceeds to list nine sets of protections that apply while the law enforcement officer is "under investigation" and subject to interrogation. These protections apply whenever a law enforcement officer is subject to interrogation by their agency "for any reason that *could lead* to disciplinary action," which triggers the LEO Bill of Rights protections in subsection (1)(a) – (i). §112.532(1)(emphasis added). The protections of section 112.532(1) are properly understood in the context of the broadly written protections in all of part VI of Chapter 112, which must be read *in pari materia* to avoid rendering them meaningless.[6] Furthermore, a plain reading of

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[5] The 1997 Attorney General Opinion was decided prior to the 2003 and 2007 amendments to the Law Enforcement Officer's Bill of Rights and determined that no public involvement was permitted until the law enforcement agency has concluded its investigation.

[6] All of the broadly written provisions of the LEO Bill of Rights are properly read together in their entirety to effectuate the protections of the entire statute.

the LEO Bill of Rights underscores that its rights and privileges are wider than the interrogation provisions of subsection 112.532(1).

In addition to the plain language in section 112.533 discussed above,[7] it is also critical to recognize the broad scope of the remaining, less litigated provisions in the LEO Bill of Rights. In particular, the "civil rights" enforcement provisions of section 112.532(3) are properly considered as part of the analysis of the interrogation provisions of 112.532(1). *See Mesa v. Rodriguez*, 357 So. 2d 711, 713 (Fla. 1978)(referring to subsection 112.532(3) as a "companion section" of the statute which is "also part of the "The Policeman's Bill of Rights").[8]

Significantly, to the extent that the Miami CIP is investigating alleged misconduct in connection with an officer's official duties, the CIP investigation

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Fraternal Order of Police v. Rutherford, 51 So. 3d 485, 487 (Fla. 1st DCA 2010)(construing section 112.533 in pari materia with 112.532); *Waters v. Purdy*, 345 So. 2d 368, 369 (Fla. 3d DCA 1977)(reading subsection 112.532(2) in pari materia with subsection (1)).

[7] Earlier in this amicus brief the PBA has asserted that the plain language in subsection 112.533 specifies "the" exclusive procedure for investigating complaint against a law enforcement officer. As set forth in section I, the LEO Bill of Rights preempts other investigations by the political subdivision, which "must" forward the complaint to the employing agency for "review or investigation."

[8] In *Mesa* the Florida Supreme Court upheld the LEO Bill of Rights against constitutional challenge and described subsection 112.533(3) as declaring that "every law enforcement officer has the right to bring a civil suit for damages suffered during the performance of his official duties or for abridgement of his civil rights arising out of the performance of official duties." 357 So. 2d at 712. The fact that the rights under 112.532(3) and in the same Section with the rights in 112.532(1) demonstrates that the Legislature intended to fully preemept the field relating to police investigations and the rights to be accorded law enforcement officers in that process.

squarely falls under the LEO Bill of Rights protections in section 112.532(3). Any contrary holding would erode, if not entirely erase, the civil rights protections for police officers under section 112.532(3). The knowing filing of false complaints is but one example. Because all investigations of a police officer could eventually result in discipline, any other interpretation would render the broad protections of the LEO Bill of Rights meaningless.

Similarly, the confidentiality provisions of the LEO Bill of Rights must be read in pari materia with the entire statute. Section 112.533(2)(a) requires that a "complaint filed against a law enforcement officer" and "all information obtained pursuant to the investigation" by the agency of the complaint is confidential and exempt from the provisions of s. 119.07(1) until the investigation ceases to be active or the agency provides written notice that the investigation has concluded.[9] It is not insignificant that subsection 112.533(2)(a) was codified immediately following subsection 112.533(1)(b)1, which requires that "complaint against a law enforcement officer" are required to be forwarded to the employing agency for review or investigation.

Reading these two provisions together, it becomes abundantly clear that any complaint against a law enforcement officer received by a city is confidential until the investigation by the police department has been concluded. If a new complaint

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[9] By contrast, all Miami CIP meetings "shall be open to the public." Miami City Code §11.5-30.

is received after an investigation has been completed, the new complaint is confidential until a second investigation has been conducted by the agency under the same protections of the LEO Bill of Rights. Based on the broad protections of the LEO Bill of Rights, investigations of law enforcement officers by the political subdivision can only be conducted by the agency, affording all Bill of Rights protections to the officer.

The LEO Bill of Rights Was Adopted to Prevent Specific Harm

The reading adopted by the majority in the Third District would permit – if not incentivize – agencies to rely on wide ranging CIP investigations, because a CIP would not be restricted by the protections of the LEO Bill of Rights. This is more than an academic concern in the current environment targeting law enforcement officers. While disciplinary actions against a law enforcement officer are subject to a 180 days statute of limitations, investigations can be reopened at any time if "significant new evidence has been discovered that is likely to affect the outcome of the investigation" and the evidence could not reasonably have been discovered in the normal course of investigation. §112.532(6).

This is precisely the type of harm that was successfully challenged under a broad reading of the LEO Bill of Rights in *Rutherford*. *FOP v. Rutherford*, 51 So. 3d 485 (Fla. 1st DCA 2010). Prior to *Rutherford*, whenever a Jacksonville deputy sheriff used force or discharged a weapon, the Jacksonville "Response to

Resistance Board" would be convened if the State Attorney's Office determined that the officer did not commit criminal wrongdoing. *Rutherford*, 51 So. 3d at 486. In the course of these investigations, officer(s) who engaged in the use of force were typically questioned to determine whether the use of force complied with the Sheriffs' written directives and training. Yet, Jacksonville had a long-established practice of opening these meetings to the public "in an effort to promote transparency in the review of an officer's use of force." *Id.* Accordingly, the investigation and interrogation of police officers was laid bare and on full display in an emotionally charged setting before the alleged victims of police misconduct.[10]

The *Rutherford* circuit court upheld this practice reasoning that the confidentiality provision of section 112.533(2)(a) only applies when an agency receives a written complaint, not when a law enforcement agency conducts an investigation pursuant to its internal operating procedures. *Id.* at 477. The First District reversed, concluding that "an investigation within the meaning of section 112.532(4)(b) occurs whenever a law enforcement officer or corrections officer faces possible dismissal, demotion, or suspension without pay, and because the

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[10] It was not uncommon that the plaintiff in the pending civil case against an officer was accompanied by their attorney and extended family. While the *Rutherford* decision does not provide specific examples, undersigned counsel has extensive knowledge of the facts in *Rutherford* having litigated the *Rutherford* case.

Board's investigation may result in such discipline, the investigation triggers the confidentiality protections of section 112.532(4)(b)." *Id.* at 487. Reading sections 112.533(2)(a) *in pari materia* with section 112.532(4)(b) the *Rutherford* court determined that the broad confidentiality protections applied whenever a law enforcement officer faces "possible" disciplinary action. *Id.* at 488.

The court was mindful that the LEO Bill of Right's confidentiality provisions are exceptions from the public's general right of access to public records and public meetings and must be narrowly construed in favor of public access. *Id.* Nevertheless, the *Rutherford* court concluded that under the plain language of sections 112.532(4)(b) and 112.533(2)(a) confidentiality was required during the period of investigation. It thus follows that the Miami CIP can investigate training, recruitment, procedures and policy, but may not investigate a "complaint against a law enforcement officer," which is preempted by the broad, wide ranging protections of the LEO Bill of Rights.

Protection of Law Enforcement Officers is a Matter of Statewide Concern

The adoption of the LEO Bill of Rights is a clear expression of legislative concern for the protection of law officers who in turn daily risk themselves for the protection of all Floridians. The Third District majority's narrow reading of the Bill of Rights undermines the Legislature's unequivocal requirement for a uniform system of investigations which could result in the end of an officer's career.

As this Court said in *Florida House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008): "the legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies." The people of Florida, in their constitution have taken great care to empower the Legislature to protect the citizens from the potential abuse of the state's power. To that end, the Legislature has enacted a well-defined program of comprehensive screening and education of police recruits; an exacting program of licensure; and permitting the orderly investigation of allegations of police misconduct in the LEO Bill of Rights. By enacting that body of law, the Legislature has also recognized the need to ensure fairness in the investigatory process by enacting procedural and substantive safeguards to protect law enforcement officers from endless and often overzealous inquisitions outside where no due process safeguards exist. Allowing Miami, or any other city, to do what the Third District's majority has sanctioned usurps the Legislature's policy making authority. Just as the Legislature has adopted enhanced penalties to discourage those who threaten the physical safety of police officers, the LEO Bill of Rights protects officers' professional safety.

If permitted to stand, the Third District's majority has the great potential to drive the overwhelming majority of dedicated law enforcement officers from the

ranks of the profession or discourage public minded young citizens from entering. That result would truly be a public tragedy for all Floridians.

CONCLUSION

The decision of the Third District Court of Appeal below should be quashed and the decision of the Fifth District Court of Appeal in *Demings v. Orange County Citizens Review Board* should be approved. Miami City Code sections 11.5-27(5), 11.5-27(6), 11.5-27(9), and 11.5-32 should be declared invalid and unconstitutional based on a direct and irreconcilable conflict with the LEO Bill of Rights, which preempts this field.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in Times New Roman 14 font in compliance with the requirements of the Florida Rules of Appellate Procedure.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing on this 12th day of August, 2016, to the Clerk of Court of the United States Supreme Court and to the following:

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