IN THE SUPREME COURT OF FLORIDA
Case No. SC10-1220

NORTH PORT ROAD AND DRAINAGE DISTRICT,

Petitioner,

v.

WEST VILLAGES IMPROVEMENT DISTRICT,

Respondent.

Brief of the State of Florida, Office of the Attorney General; the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida; the Department of Agriculture & Consumer Services; the Department of Environmental Protection; the Department of Transportation; & the Fish & Wildlife Conservation Commission as Amici Curiae In Support of Respondent

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On Appeal From a Decision of the Second District Court of Appeal
Case No. 2D09-2221

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INTEREST OF AMICI CURIAE

The State of Florida, Office of the Attorney General, has an interest in defending the State's sovereign immunity. The Attorney General, who is authorized to appear in any suit in which the State may have an interest, *see* sections 16.01(4) and (5), Florida Statutes, appears in this action to preserve the core principle that the State's sovereign immunity is absolute absent an explicit legislative waiver. The additional amici, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida; the Department of Agriculture & Consumer Services; the Department of Environmental Protection; the Department of Transportation; and the Fish & Wildlife Conservation Commission, are state entities that own and manage state-owned real properties that are held in public trust for all Floridians. These amici have a strong interest in this case because the question certified to this Court, on which it accepted jurisdiction, asks whether municipal districts can impose non-ad valorem assessments on "real property owned by a *state governmental entity*." West Vills. Improvement Dist. v. North Port Rd. & Drainage Dist., 36 So. 3d 837, 842 (Fla. 2d DCA 2010) (emphasis added). The municipal district here, petitioner North Port Road and Drainage District, claims it has the authority to impose these assessments on "*all* specially benefitted real property within its jurisdictional boundaries, *irrespective* of whether

the real property was *governmentally* or privately owned." [IB 10 (second and third emphases added)][1]

The central question Amici address is whether state-owned lands can be subject to special assessments by municipalities even when the State's sovereign immunity has not been explicitly waived. Such assessments, if permitted, could result in the State potentially being subject to significant liability for monetary assessments on state-owned lands located within municipal districts. The Attorney General and Amici defend the core principles of sovereign immunity, which prohibits the imposition of any taxes or assessments on state-owned lands, absent express legislative waiver of immunity. Amici urge that this Court not diminish or undermine this long-standing doctrine and, instead, require that a strict standard of express legislative waiver apply before municipal assessments may be imposed on state property.

[1] References to North Port's initial brief and West Villages' answer brief shall be, respectively, [IB *] and [AB *] where * is the page number. References to the Florida League of Cities' and the Sarasota County School Board's amicus briefs shall be, respectively, [FLC *] and [SCSB *] where * is the page number.

SUMMARY OF ARGUMENT

Sovereign immunity is absolute, prohibiting the imposition of taxes or other monetary assessments on property that the State manages and holds in trust for the people. This ancient common law principle, reflected in the express language of Florida's constitution as well as this Court's jurisprudence, may be waived only by the express and unequivocal language of the Legislature. Art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."); Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471-72 (Fla. 2005). The municipal ordinance at issue, permitting the imposition of non-ad valorem assessments on all properties (including state properties) within the municipal services district, is supported by no express legislative waiver. Because no such waiver exists, the municipal district simply cannot assess state lands.

The Second District's certified question asks this Court to consider whether these assessments are permissible if waiver has occurred by necessary implication. West Vills. Improvement Dist. v. North Port Rd. & Drainage Dist., 36 So. 3d 837, 842 (Fla. 2d DCA 2010). Waiver of sovereign immunity, however, cannot occur by implication ("necessary" or otherwise), only by express legislative action. The Legislature has not expressly waived the State's immunity to the non-ad valorem assessments the municipal district seeks to impose via the municipal ordinance at

issue. As this Court has acknowledged, the Legislature did not intend that the enactment of home rule powers operated to waive the State's sovereign immunity; instead, the "more logical approach to intergovernmental finance would require, as the State contends, a clear and direct expression of the State's intention to subject itself to selective, local tax burdens." *See* Dickinson v. City of Tallahassee, 325 So. 2d 1, 4 (Fla. 1975). These assessments are impermissible on state-owned lands.

Sovereign immunity's continued importance is buttressed by the present-day purposes it serves, which are directly impaired by the municipal ordinance at issue. If Florida municipalities and their dependent districts have the independent power to impose and collect assessments on state properties under their home rule powers — without express legislative waiver of immunity — the State and its agencies would face great uncertainty and unprecedented financial obligations arising from the State's land holdings. Questions of where the money to meet those obligations would come from, who would pay it, and how non-payment would be enforced all implicate critical questions going to the proper administration of state government as well as separation of powers. The public fisc and efficient government functioning are both threatened should municipal assessments be permitted against state lands absent express and unequivocal legislative waiver.

ARGUMENT

I. A Municipal District May Not Assess State-Owned Lands Absent the Legislature's Unequivocal, Express Waiver of Its Sovereign Immunity.

This case squarely presents the issue of whether state-owned lands may be subject to monetary assessments imposed by units of local government, here a municipal district, absent express legislative waiver of the State's sovereign immunity. The municipal ordinance at issue permits the municipal district, North Port, to "levy non-ad valorem assessments against real property owned by *governmental entities*." West Vills. Improvement Dist. v. North Port Rd. & Drainage Dist., 36 So. 3d 837, 838 (Fla. 2d DCA 2010) (emphasis added); *see also* IB 31 (arguing that assessment should be permitted on property owned by "school boards, counties, state parks and state agencies"). The certified question highlights that the inquiry is whether assessments may be imposed "upon real property owned by a *state governmental entity*." West Vills. Improvement Dist., 36 So. 3d at 842 (emphasis added).

The certified question is resolved under long-standing and core principles of the State's sovereign immunity, which uniformly have held that public lands owned and managed by state agencies (such as Amici here) may not be subject to monetary assessments by units of local government. Sovereign immunity can only be waived by express and unequivocal legislative language, and never by implication, necessary or otherwise. *See, e.g.*, Spangler v. Fla. State

Turnpike Auth., 106 So. 2d 421, 424 (Fla. 1958) ("Waiver will not be reached as a product of inference or implication."). In doing so, sovereign immunity promotes efficient government, ensures the separation of powers, and protects the public fisc. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005); *see* Spangler, 106 So. 2d at 424 (sovereign immunity is "part of the public policy of the state. It is enforced as a protection of the public against profligate encroachments on the public treasury."). The certified question should be resolved in favor of state immunity from assessments by local governments.

To be clear, the State is not asserting an *exemption* from the assessments; instead, the State is *immune* from them, i.e., its lands cannot be subject to taxes or assessments. Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975) ("Precedent and logic both dictate that the sovereign's general freedom from taxation derives from an 'immunity,' not from an 'exemption.' "). For this reason, it is unsurprising that North Port found no "blanket statutory exclusion or exemption" from its assessments for governmentally-owned property. [IB 23] Rather, the State's immunity precludes North Port from exercising taxing or assessment powers against state lands. *See also* Canaveral Port Auth. v. Dep't of Revenue, 690 So. 2d 1226, 1228 n.7 (Fla. 1996) ("Immunity and exemption differ in that immunity connotes an absence of the power to tax while exemption presupposes the existence of that power.").

A. The history and purposes of sovereign immunity support the requirement of clear and unequivocal waiver before non-ad valorem assessments may be imposed on state lands.

Sovereign immunity is a centuries-old "fundamental tenet of Anglo-American jurisprudence" that "was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Florida Legislature." Am. Home Assurance Co., 908 So. 2d at 471 (citing § 2.01, Fla. Stat. (2004)). It is unnecessary to establish or create sovereign immunity; instead, the State's constitution sets forth the limited means by which sovereign immunity may be abrogated (by express legislative waiver). *See* art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."). That provision "implicitly recognizes that sovereign immunity was the prevailing common law in Florida at the time the constitution was written." Dep't of Children & Families v. Chapman, 9 So. 3d 676, 679 (Fla. 2d DCA 2009), *review denied*, Chapman v. Dep't of Children & Families, 19 So. 3d 310 (Fla. 2009). This common law jurisprudence "provide[s] absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment." Circuit Court of the Twelfth Judicial Circuit v. Dep't of Natural Res., 339 So. 2d 1113, 1114 (Fla. 1976).

Nearly thirty years ago, this Court recognized that sovereign immunity exists "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Cauley v. City of Jacksonville, 403 So. 2d 379, 381 (Fla. 1981) (citation and quotation marks omitted). Today, sovereign immunity continues to be "necessitated by the compelling policy reasons of fiscal management and constitutional homogenization." Canaveral Port Auth., 690 So. 2d at 1227.

Beyond the history and the traditions of the State's common law, sovereign immunity continues to serve sound policy rationales. "First is the preservation of the constitutional provision of separation of powers. … Second is the protection of the public treasury. … Third is the maintenance of the orderly administration of government." Am. Home Assurance Co., 908 So. 2d at 471; *see also* Kelley H. Armitage, It's Good to Be King (At Least It Used to Be and Could Be Again): A Textualist View of Sovereign Immunity, 29 Stetson L. Rev. 599, 602-603 (2000) ("In Florida, for example, the public policy considerations cited in support of sovereign immunity include: (1) the public treasury must be protected from excessive encroachments; (2) orderly government administration would be disrupted if the state could be sued at the instance of every citizen; (3) governmental decision-making requires flexibility and discretion; and

(4) separation of powers concerns prohibit the judicial branch from interfering with the discretionary functions of the legislative or executive branches absent a violation of a constitutional or statutory right.").

Specific to this case, this Court has recognized that the State's immunity from monetary assessments on its land is necessary to the proper functioning of our government. Dickinson, 325 So. 2d at 4 (noting that it would be illogical for the Legislature to "authorize state taxation by municipalities without some advance indication as to which municipalities would choose to tax the State and to what extent" because "[t]he State would have no way to anticipate revenue needs or appropriate funds sufficient to meet those variant tax burdens."). It is beyond contention that the State is immune from taxation of its lands. State ex rel. Charlotte Cnty. v. Alford, 107 So. 2d 27, 29 (Fla. 1958). No principled reason exists to prohibit the application of this core principle of sovereign immunity to non-ad valorem municipal assessments on state lands absent explicit legislative waiver. [AB 22 n.9]

Owing to its critical importance and long history, sovereign immunity rightfully is not easily waived. It is well-established that "[o]nly the Legislature has authority to enact a general law that waives the state's sovereign immunity." Am. Home Assurance Co., 908 So. 2d at 471. That waiver must be "clear and unequivocal," and this Court is to "strictly construe" any language alleged to create

waiver. Id. at 472. Waiver simply cannot be found by mere inference or implication. Id.; Spangler, 106 So. 2d at 424 (general statutory authority of entity to "sue and be sued" is insufficient to waive sovereign immunity). Nor can it be accomplished by any law other than one enacted by the state legislature. Manatee Cnty. v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla. 1978).

These strict requirements for waiver are justified, because the question of whether sovereign immunity may be waived is a policy question reserved for the Legislature. The decision to waive immunity necessarily includes a determination of the expense the State will be exposed to by potential litigation costs and ultimate liability. Those costs require appropriations, an exclusively legislative determination. Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 407-408 (Fla. 1996) ("the power to appropriate state funds is expressly reserved to the legislative branch."). North Port's ordinance imposing a non-ad valorem assessment on state lands would require that the Legislature appropriate funds in order to prevent the loss of those lands. The effect of this ordinance would not only subject state property to assessments, but would also impermissibly delegate to the municipal district the State's appropriation power.

B. The Legislature has not expressly waived Florida's sovereign immunity for municipal non-ad valorem assessments on state-owned property.

No evidence exists that the State has expressly waived its immunity from non-ad valorem assessments imposed by municipalities or their dependent districts. This lack of an express waiver disposes of this case; no assessment may be imposed against state lands located in the municipal district. *See, e.g.*, Dickinson, 325 So. 2d at 4 ("A more logical approach to intergovernmental finance would require, as the State contends, a clear and direct expression of the State's intention to subject itself to selective, local tax burdens."); Cason v. Dep't of Mgmt. Serv., 944 So. 2d 306, 314 (Fla. 2006) ("intent to authorize taxes on lands of the State must be expressed in 'clear and unmistakable terms.' ") (citation omitted); *see also* Op. Att'y Gen. Fla. 90-85 (1990) ("State-owned lands are subject to special assessment by local government only when such liability is clearly provided by statute" and that "in the absence of a statute expressly so providing, state-owned land is not subject to such assessment."). None of the statutory provisions authorizing local governments to impose non-ad valorem assessments, *see* City of Boca Raton v. State, 595 So. 2d 25, 28-30 (Fla. 1992), explicitly waive the State's sovereign immunity. The municipal district possesses no authority to waive the sovereign immunity of the State by the enactment of a municipal ordinance.

North Port asserts in its initial brief that its home rule powers allow it to impose non-ad valorem assessments on state lands. [IB 27-28] Municipal power is a creature of statute, enacted in 1973 by the Legislature in the Home Rule Powers Act, located at chapter 166, Florida Statutes. Ch. 73-129, Laws of Fla. This statutory authorization, following on the heels of the 1968 constitution revision enabling broad powers for municipalities, article VIII, section 2(b), Florida Constitution,[2] cannot be considered a waiver of the State's sovereign immunity. Rather, home rule powers must co-exist with sovereign immunity, a doctrine, as explained above, that is entrenched in the State's common law and is grounded in the state constitution. No authority exists for the proposition that the existence of home rule powers somehow negates sovereign immunity thereby rendering article X, section 13, superfluous. Rather, article X, section 13 makes clear that only a "[p]rovision … made by general law" is sufficient to waive sovereign immunity and to allow for "bringing suit against the state as to all liabilities now existing or hereafter originating." Separate provisions of the constitution must be read to coexist in harmony, and not to negate one another. Bush v. Holmes, 910 So. 2d

[2] This constitutional provision authorizing home rule power was in effect when this Court held that "[s]tatutes authorizing a municipality to tax are to be strictly construed, are not to be extended by implication, and are not to be enlarged so as to include any matter not specifically included, even though said matter may be closely analogous to that included." City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1, 3 (Fla. 1972).

392, 406 (Fla. 2006) (constitutional provisions must be read "*in pari materia*, rather than as distinct and unrelated obligations"). North Port's argument, that its home rule powers override the State's sovereign immunity, violates this basic canon of constitutional interpretation.

Furthermore, home rule authority under article VIII, section 2 and as implemented by chapter 166, Florida Statutes, only permits municipalities to "exercise any power for municipal purposes, *except when expressly prohibited by law*," and expressly excludes from municipalities' powers "any subject expressly preempted to state or county government by the constitution or by general law." §§ 166.021(1), (3)(c), Fla. Stat. (emphasis added). Additionally, when the home rule provisions were added to the constitution in its 1968 revision, no changes were made to the sovereign immunity provision. Therefore, the authority of municipalities to impose any assessment must give way to sovereign immunity when state land is at issue; it is not the other way around.

If home rule power waived the State's sovereign immunity to municipal assessments, it would have to have done so via implication because no express waiver exists. But sovereign immunity cannot be waived by implication. Moreover, this Court has rejected the argument that municipal home rule powers impliedly waive sovereign immunity to monetary assessments on state lands. As the Court made clear in Dickinson, "it is inconsistent with sound governmental

principles to suggest that a state which cannot finance itself on a deficit basis would indirectly authorize an indeterminate amount of revenue to be taken from all of its citizens for the benefit of some of its municipal governments." 325 So. 2d at 4. The home rule power does not evidence the clear intent required to waive the State's sovereign immunity to municipal special assessments.

Sovereign immunity is a critical firewall that protects the State and its taxpayers from unauthorized and thereby unforeseen financial obligations. It must not be overcome via a standard other than explicit waiver. Judicially opening the door to waiver via some lesser standard, such as by implication, is inconsistent with the history of sovereign immunity and would amount to an exercise of power reserved solely to the Legislature under the Florida constitution in article X, section 13. Whether it is an attempt to tax or impose special assessments on the State, the only relevant inquiry is whether the State's immunity has been abrogated via explicit legislative language. Any questions regarding the general scope of municipal taxation power or general distinctions between taxes and special assessments or the lasting effect of Blake v. City of Tampa, 156 So. 97 (Fla. 1934), are simply irrelevant.[3]

[3] This Court's footnote in City of Gainesville v. State did not resolve the issue presented by this case. 863 So. 2d 138, 142 n.3 (Fla. 2003) (Department of Transportation (DOT) "would be exempt from special assessments absent a statute specially authorizing, either explicitly or 'by necessary implication,' special (Continued…)

C. The State owns and manages millions of acres of Florida land, which could be subject to significant costs and administrative disorder if local government assessments may be imposed without express authorization by the Legislature.

Protecting the public fisc and the orderly administration of government are key purposes of sovereign immunity. Am. Home Assurance Co., 908 So. 2d at 471. The possibility of municipal assessments on state lands — a real and imminent threat given the position of the municipal amicus [FLC 2] — potentially jeopardizes the State's pocketbook and the orderly administration of its governmental functions and budget. Indeed, many state governmental functions are conducted on state land located within municipalities, where facilities such as courthouses and other state-owned buildings are located. As one example, the attached map [Attachment 1] shows the substantial amount of state-owned property in a three-block radius of downtown Tallahassee.[4] Of course, because

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assessments on state property.") (citation omitted). The Court did not consider any claim that DOT was immune in that case; only a claimed exemption was at issue. *See* id. at 148 (deeming argument that sovereign immunity applied was "beyond the scope of a bond validation proceeding"); *see also* supra page 6 (discussing distinction between immunity and exemption). And the Court's holding ultimately was that the charges were utility fees, not special assessments, rendering its comments as to special assessments dicta. City of Gainesville, 863 So. 2d at 146. Finally, although the Court did not consider the sovereign immunity of the State and its agencies to special assessments, it still held that the State could not be subject to those assessments absent authorizing legislative language. Id. at 144.

[4] This map was requested from and prepared by the Leon County Property Appraiser's office.

article II, section 2, of the constitution requires the "offices of the governor, lieutenant governor, cabinet members and the supreme court" to be in Tallahassee, and that the "sessions of the legislature" must be held here, the proportion of state lands is significantly higher than in other municipalities across the State. The point, however, is simply that Florida municipalities, particularly the seats of the sixty-seven counties, will have state lands within municipal boundaries that might be subject to assessments. In addition, these types of state properties, where governmental services are provided, would be assessed at a higher rate than other state lands under North Port's ordinance. *See* IB App. 59. These types of assessments would place unforeseen burdens on state budgets and require additional revenues.

The potential magnitude of the burden on the State, if it lacked immunity from municipal assessments, is substantial. The State of Florida owns 3.3 million acres of uplands. *See* Fla. Dep't of Envtl. Prot., Florida's Lands & Waters — Brief Facts, *available at* http://www.dep.state.fl.us/lands/files/Florida_ Numbers_110510css.pdf (last visited Jan. 6, 2011). This land includes conservation acres, forests, public university facilities, agency offices, state parks, and, indeed, courthouses.[5] When it became a state in 1845, "Florida [also] received

[5] The figure does not include state lands managed by school districts.

title to all lands beneath navigable water," with "title vested in the state to be held as public trust." Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339, 342 (Fla. 1986); *see also* art. X, § 11, Fla. Const. When sovereign submerged lands are included, the state lands figure jumps to 11 million acres. Fla. Dep't of Envtl. Prot., Division of State Lands, http://www.dep.state.fl.us/lands/ (last visited Dec. 22, 2010). Water management districts manage approximately an additional 2.5 million acres of state lands.[6] The Department of Transportation estimates that it owns an additional 257,150 acres of land.

If sovereign immunity is lost via judicial decree, rather than through an explicit waiver, all of the state lands located in municipalities could be subject to local government assessments. Of the nearly 3.3 million acres of state land held by the Board of Trustees, 98.1 thousand acres are within the boundaries of a municipality, according to the 2010 tax rolls. Indeed, North Port's Fire Rescue District billed $700,695 to the Board of Trustees, one of the amici here, and the

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[6] *See* Nw. Fla. Water Mgmt. Dist., http://www.nwfwmd.state.fl.us/about district.html (last visited Jan. 18, 2011) (200,000 acres); Suwannee River Water Mgmt. Dist., http://www.srwmd.state.fl.us/index.aspx?NID=302 (last visited Jan. 25, 2011) (160,000 acres); St. Johns River Water Mgmt. Dist., http://www.sjrwmd.com/landmanagement/index.html (last visited Jan. 18, 2011) (700,0000 acres); S. Fla. Water Mgmt. Dist., http://www.sfwmd.gov/portal/page/portal/xweb%20protecting%20and%20restoring/land%20management (last visited Jan. 18, 2011) (1 million acres); Sw. Fla. Water Mgmt. Dist., 2012-2016 Strategy Plan, at 22, *available at* http://www.swfwmd.state.fl.us/files/database/site_files/StrategicPlan.pdf (last visited Jan. 25, 2011) (440,000 acres).

Southwest Florida Water Management District for non-ad valorem assessments solely for fire protection and first response medical services allegedly provided to the 8,532 acres of Myakka State Forest located in North Port in 2009. [Attachment 2] (The Department of Agriculture and Consumer Services, land manager for the state forest and also one of the amici here, would be responsible for paying this bill if sovereign immunity is waived and no exemption applied.)

Even state property located outside municipal boundaries, but within charter counties that have been authorized to impose these assessments [*see* SCSB 6 n.1], might be subject to other assessments. The Florida Legislature, which is required to maintain a balanced budget, would have to find funds not previously required or budgeted to meet its burden, raising money to pay those costs through other taxes and revenue-raising measures. If the Florida Legislature intended such a result, it would have done so by "clear expression of intent"; it has not. Van Brocklin v. Anderson, 117 U.S. 151, 174 (1886).

The potential for unexpected financial and administrative burdens is apparent, raising many questions about how the State could comply with potentially many types of assessments by local governments. For instance, how could non-payment even be enforced against government property? By statute, state property is not subject to liens. *Compare* § 11.066(5), Fla. Stat. (2010) ("The property of the state, the property of any state agency, or any monetary recovery

made on behalf of the state or any state agency is not subject to a lien of any kind."), *with* IB 19 (noting that non-ad valorem assessments like North Port's "become a lien against the benefited property coequal to county or city taxes"), and IB App. 25 (section 66.57 of North Port's ordinance titled "Non ad valorem assessments to constitute liens").

These questions implicate separation of powers concerns, which this Court has recognized underlie the foundation of sovereign immunity. Wallace v. Dean, 3 So. 3d 1035, 1045 (Fla. 2009) ("Accordingly, we take this occasion to reaffirm that, in Florida, governmental immunity derives entirely from the doctrine of separation of powers, not from the absence of a duty of care or from any statutory basis." (internal quotation marks, citations, emphasis, and alterations omitted)). The specter of the judicial system being called upon by local governments to issue judgments against state property to pay for local projects and services is an unpleasant one. The history and purposes of sovereign immunity compel the conclusion that the imposition of non-ad valorem assessments on state lands absent the express and unequivocal waiver of sovereign immunity is impermissible.

CONCLUSION

For the foregoing reasons, Amici urge this Court to hold that a municipal dependent special district (and, indeed, any other entity) may not impose a non-ad valorem special assessment upon real property owned by a state governmental entity, in the absence of express legislative waiver of sovereign immunity.

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CERTIFICATE OF SERVICE/COMPLIANCE

I certify that this brief was prepared with Times New Roman 14-point in compliance with Fla. R. App. P. 9.210(a)(2), and that a copy of the foregoing has been furnished by U.S. Mail on February 2, 2011, to the following:

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