IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1639
L.T. CASE NO. 1D13-4775

On Appeal from the First District Court of Appeal

CRYSTAL SELLS, as Personal Representative of
THE ESTATE OF LARRY SELLS, deceased,

Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF RESPONDENT CSX TRANSPORTATION, INC.

Mark K. Delegal, Esq.
Fla. Bar No. 989924
mark.delegal@hklaw.com
Tiffany A. Roddenberry, Esq.
Fla. Bar No. 92524
tiffany.roddenberry@hklaw.com
Holland & Knight LLP
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

William W. Large, Esq.
Fla. Bar No. 981273
william@fljustice.org
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 222-0170
Facsimile: (850) 222-1098

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, small business owners, and business leaders who are working towards the common goal of promoting predictability in the civil justice system in Florida through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute is the first independent organization focused solely on civil justice in Florida. Since its founding, the Institute has worked to restore faith in the Florida judicial system.

Here, the Institute and its members have a substantial interest in ensuring that the Court exercises its limited discretionary review in compliance with the Florida Constitution and as circumscribed by the people of the State of Florida. Given the current Court's expansion of its power to review cases under article V, section 3(b)(3) of the Florida Constitution, the Institute's members are no longer assured of finality in the decisions rendered by Florida's district courts of appeal. Often a majority of this Court finds a conflict in district court of appeal decisions where there is none. Such expansive review is beyond the scope of the limited jurisdiction granted by article V, section 3(b)(3).

SUMMARY OF THE ARGUMENT

This Court's role is a limited one, embodied in the narrow grant of jurisdiction given by the people of this state to the Florida Supreme Court in article V, section 3(b), of the Florida Constitution. *In re Holder*, 945 So. 2d 1130, 1133-34 (Fla. 2006); *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 201 (Fla. 1976); *cf.* art. V, § 5(b), Fla. Const. (granting circuit courts broad plenary authority). Absent an express basis for jurisdiction found within article V, section 3(b), this Court has no power to hear a case.

Through section 3(b)(3) of article V, the people of the State of Florida have narrowly circumscribed the exercise of this Court's discretionary review of "any decision of a district court of appeal . . . that ***expressly and directly*** conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) (emphasis added) (quoting art. V, § 3(b)(3), Fla. Const.); *see also id.* (Section 3(b)(3) "is a constitutional command as to how [discretionary review] may be exercised. . . . While our subject-matter jurisdiction in conflict cases necessarily is very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded . . . ."). Indeed, this constitutional provision was amended in 1980 to reaffirm its goal: to reach only those cases containing true, direct, and express conflicts found within the four corners of the decision under review. Despite that

amendment, section 3(b)(3)'s reach has from time to time been extended beyond those constitutionally prescribed limits.

The Florida Constitution vests plenary appellate jurisdiction in Florida's district courts of appeal. In most instances, the decision of a Florida district court of appeal in a case should be "final and absolute." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). Florida's business litigants rightly expect that in most cases, the district court of appeal's decision will be the end of litigation. Yet by extending its review powers beyond the limits set by the Constitution, the Court risks depriving litigants of the finality that the district courts of appeal are meant to bring.

The Institute respectfully submits that this Court must, in this case and all others, limit the exercise of its discretionary review to only those cases that contain direct and express conflicts, in line with the constitutional command of the people of this state. Specifically here, this Court should find that conflict review was improvidently granted because the First District's decision in *Sells v. CSX Transportation, Inc.*, 170 So. 3d 27 (Fla. 1st DCA 2015), does not conflict with either *Limones v. School District of Lee County*, 161 So. 3d 384 (Fla. 2015), or *Hicks v. Kemp*, 79 So. 2d 696 (Fla. 1955). In circumstances like these, the appropriate course is to discharge jurisdiction as having been improvidently granted. *See, e.g.*, *Miranda v. State*, 181 So. 3d 1188, 1188-89 (Fla. 2016) (concluding that jurisdiction was improvidently granted under article V, section 3(b)(3)); *MIA Consulting Grp.*,

Inc. v. Hacienda Villas, Inc., 88 So. 3d 112, 113 (Fla. 2012) (same); *Fla. Hematology & Oncology Specialists v. Tummala*, 969 So. 2d 316, 316 (Fla. 2007) (determining after oral argument that jurisdiction was improvidently granted under article V, section 3(b)(3)).

ARGUMENT

A. This Court has expanded the reach of its conflict review beyond the bounds of article V, section 3(b)(3) of the Florida Constitution.

1. *Section 3(b)(3) was amended in 1980 to curb this Court's use of conflict review.*

Since 1956, this Court has possessed some form of jurisdiction to review and resolve legal conflicts that develop in the district courts of appeal. From 1956 until 1980, article V, section 3(b)(3) of the Florida Constitution provided that this Court could review district court of appeal decisions "in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (1979). This "limitation of review to decisions in 'direct conflict' clearly evince[d] a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants." *Ansin*, 101 So. 2d at 811.

And yet, despite that focus on resolving conflicting precedents and not individual disputes, prior to 1980 this Court regularly accepted discretionary conflict review whenever it perceived that a district court of appeal decision misapplied some existing precedent to the facts. *See, e.g., Mw. Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665, 666 (Fla. 1973) (holding that the Third District had "misapplied and

misconstrued" a Florida Supreme Court decision by applying it to a case in which one operative fact in the supreme court's decision was missing); *Spivey v. Battaglia*, 258 So. 2d 815, 816-17 (Fla. 1972) (accepting review of a battery case in which the Fourth District's decision was a "misapplication" of a Second District decision involving unsolicited kisses to a case involving unsolicited hugs; the Court held that the Second District decision involved intentional harm while the case before the Fourth District did not).

Often "misapplication" simply meant that the Court disagreed with the way in which a district court of appeal had analyzed the facts or used precedent. For example, in *Wale v. Barnes*, this Court held that the Third District had misapplied its own intradistrict precedent by failing to consider certain facts that were present in the precedential cases but were not present in the case under review. 278 So. 2d 601, 604 (Fla. 1973). The Third District had affirmed the entry of a directed verdict in favor of the defendant doctors in a medical malpractice suit, relying on its own prior decisions. *Id.* at 603. This Court took conflict review jurisdiction, noting that in *Wale*, there was "direct medical evidence . . . attributing and pinpointing the cause" of the plaintiff's injuries to the doctors, whereas there was no such direct evidence in the prior Third District cases cited as precedent. *Id.* at 602, 604-05. This type of "conflict" was held sufficient to warrant this Court's review and resolution of any issue it wished to reach in the case.

Several justices were quick to point out that the Court was straying from the express language of the constitutional provision granting the Court conflict review. In criticizing the Court's taking a simple "per curiam affirmed" decision unsupported by a written opinion for perceived conflict, Justice B. Campbell Thornal explained:

> All of this simply means that the District Court decision[s] are ***no longer final*** under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court to come on up to the Supreme Court and be granted a second appeal—the very thing that many feared would happen—and the very thing which we assured the people of this state would ***not*** happen when the judiciary article was amended in 1956 [creating the district courts of appeal and restricting the supreme court's jurisdiction].
>
> . . . .
>
> If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a District Court. Under the majority decision today, there is always that potential opportunity to obtain another examination of the record by the Supreme Court with the hope that it will in some way differ with the District Court.

Foley v. Weaver Drugs, Inc., 177 So. 2d 221, 234 (Fla. 1965) (Thornal, J., dissenting). More than ten years later, as this practice continued, Justice Arthur England wrote: "[T]he district courts have more and more been regarded by a majority of this Court simply as inconvenient rungs on the appellate ladder." *Fla. Greyhound v. W. Flagler Assoc.*, 347 So. 2d 408, 411 (Fla. 1977) (England, J., concurring).

As a result of this "jurisdiction creep,"[1] section 3(b)(3) was amended by Florida's voters in 1980 to reorient the Court's review to only written decisions that expressly and directly conflict. *See Jenkins v. State*, 385 So. 2d 1356, 1358-59 (Fla. 1980). As the Court stated in reviewing the 1980 constitutional amendment:

> The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." . . . . As stated by Justice Adkins in *Gibson v. Maloney*, 231 So. 2d 823, 824 (Fla. 1970), "(i)t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari."

Id. at 1359 (some internal citations omitted).

Since the 1980 amendment, this Court has affirmed the principle that the "express and direct" conflict with the prior decision must be found within the four corners of the district court's majority decision and nowhere else. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision."). The overarching purpose of this Court's conflict review remains the elimination of inconsistent views within this state about the same question of law, not the righting

[1] Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 Alb. L. Rev. 543, 543 n.* (2006).

of perceived wrongs in district court of appeal decisions. *See, e.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985).

2. *The Court has resumed expansive use of its conflict review, depriving district courts of appeal and litigants of finality and certainty.*

Despite the clear mandate found in the constitutional amendment and the overarching goal of simply eliminating inconsistency, "jurisdiction creep" appears in recent years to have returned, as the Court has accepted review of cases that involve not an express conflict, but a point of law on which the justices of this Court have simply disagreed with the judges on the district courts of appeal. *See, e.g.*, *Paton v. GEICO Gen. Ins. Co.*, 190 So. 3d 1047, 1048 (Fla. 2016); *see also id.* at 1053 (Quince, J., dissenting); *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 86-87 (Fla. 2005); *see also id.* at 99 (Wells, J., dissenting).

In effect, this expansive use of conflict review has deprived district court of appeal decisions of their finality. *See Ansin*, 101 So. 2d at 810. By amending section 3(b)(3) in 1980, Florida's voters confirmed that this Court's role was limited to resolving express conflicts, with Florida's district courts of appeal serving as the final appellate courts in most instances. Absent actual, direct, and express conflict, or another express basis for jurisdiction as set forth in article V, section 3(b), this Court has no role to play in the "adjudications of the rights of particular litigants." *See Ansin*, 101 So. 2d at 811. Indeed, petitioners invoking this Court's discretionary

review power should be "fighting against a presumption that the Court cannot hear the case." *See* Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova. L. Rev. 431, 483 (2005).

Yet despite section 3(b)(3)'s clarity, this Court continues to accept review in cases where no acknowledged conflict exists—often over strenuous objections by some members of this Court. *See, e.g.*, *Valladares v. Bank of Am. Corp.*, No. SC14-1629, 2016 WL 3090385, at *13 (Fla. June 2, 2016) (Canady, J., dissenting) (conflict review improvidently exercised because the decisions at issue did not announce conflicting rules of law); *Paton*, 190 So. 3d at 1053 (Quince, J., dissenting) (concluding that no conflict existed because the district court decisions addressed different questions of law); *Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1230 (Fla. 2016) (Canady, J., dissenting) (dissenting as "[t]he majority finds conflict between cases in which the causes of action are not the same and the courts address and resolve different legal issues"); *Miles v. Weingrad*, 164 So. 3d 1208, 1215-16 (Fla. 2015) (Canady, J., dissenting) (finding no conflict where district court of appeal decision was a single sentence containing no point of law upon which it rested); *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1257 (Fla. 2015) (Polston, J., dissenting) (finding no conflict where the decision under review could actually be harmonized with decision with which it allegedly conflicted); *Pratt v. Weiss*, 161 So. 3d 1268, 1273-74 (Fla. 2015) (Canady, J., dissenting) (finding allegedly

conflicting decision distinguishable and thus there was no basis to review for conflict); *Audiffred v. Arnold*, 161 So. 3d 1274, 1281 (Fla. 2015) (Canady, J., dissenting) (finding no conflict where decisions at issue involved different facts and different questions of law); *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273, 282 (Fla. 2015) (Polston, J., dissenting) ("*ERP* is entirely consistent with *Cox* as both cases applied the same rule of law and only reached different conclusions due to the differing circumstances of the two cases."); *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1162 (Fla. 2014) (Polston, C.J., dissenting) (finding no conflict where decisions involved entirely different principles of law); *Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co.*, 140 So. 3d 529, 537 (Fla. 2014) (Polston, C.J., dissenting) (finding no conflict where decision under review considered entirely different question of law from the decisions with which it allegedly conflicted); *Franks v. Bowers*, 116 So. 3d 1240, 1254 (Fla. 2013) (Canady, J., dissenting) (stating that jurisdiction should be discharged and observing that "[a] discussion of how the majority believes [the decisions] conflict—and its resolution of that 'conflict'—is notably absent from the majority opinion"); *DelMonico v. Traynor*, 116 So. 3d 1205, 1221-22 (Fla. 2013) (Canady, J., dissenting) (no conflict was presented and majority compounded error by reversing the district court on an issue never presented in the district court); *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 444 (Fla. 2013) (Polston, C.J., dissenting) ("Instead of recognizing the

differences in the decisions, the majority appears to extrapolate conflict between them based on how it would interpret [the prior case] in light of the different set of facts in [the present case]."); *Wallace v. Dean*, 3 So. 3d 1035, 1055 (Fla. 2009) (Wells, J., dissenting) (pointing out that "Florida courts ha[d] not directly addressed" the question at issue, and because the majority could "point[] to no conflicting authority," there was no conflict and the case should be discharged);[2] *see also Mendez v. Hampton Court Nursing Ctr.*, No. SC14-1349, 2016 WL 5239873, at *9 (Fla. Sept. 22, 2016) (Polston, J., dissenting) ("[T]he majority incorrectly states that the district courts disagree on whether a nursing home resident is bound by an arbitration clause in a nursing home contract when the resident did not sign or otherwise agree to the contract. To the contrary, the district courts have all applied

[2] *See also, e.g.*, *Limones*, 161 So. 3d at 394 (Canady, J., dissenting); *Chase v. Horace Mann Ins. Co.*, 158 So. 3d 514, 523 (Fla. 2015) (Polston, J., dissenting); *Saunders v. Dickens*, 151 So. 3d 434, 443-44 (Fla. 2014) (Polston, J., dissenting); *Dorsey v. Reider*, 139 So. 3d 860, 866-67 (Fla. 2014) (Canady, J., dissenting); *Ruble v. Rinker Materials Corp.*, 116 So. 3d 378, 380 (Fla. 2013) (Canady, J., dissenting); *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085, 1098 (Fla. 2013) (Canady, J., dissenting); *Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363, 378 (Fla. 2013) (Canady, J., dissenting); *Hasan v. Garvar*, 108 So. 3d 570, 579 (Fla. 2012) (Polston, C.J., dissenting); *Rippy v. Shepard*, 80 So. 3d 305, 309 n.1 (Fla. 2012) (Polston, J., dissenting); *Chandler v. Geico Indem. Co.*, 78 So. 3d 1293, 1302-03 (Fla. 2011) (Canady, C.J., dissenting); *Krause v. Textron Fin. Corp.*, 59 So. 3d 1085, 1091-92 (Fla. 2011) (Canady, C.J., dissenting); *Cox v. St. Josephs Hosp.*, 71 So. 3d 795, 802 (Fla. 2011) (Canady, C.J., dissenting); *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 119-20 (Fla. 2011) (Canady, C.J., dissenting); *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 847-48 (Fla. 2011) (Canady, C.J., dissenting).

well-settled third-party beneficiary law and held that those residents are bound by the arbitration clauses." (internal citation omitted)).

As a consequence of this jurisdiction creep, litigants—including the Institute's members—must contend with the likelihood that if a case, otherwise finally resolved after review in the district court of appeal, piques the interest of a majority of this Court, a petition lacking a true conflict but invoking conflict review all the same is likely to be granted. As Justice England cautioned long ago, district courts of appeal are now regrettably regarded "as inconvenient rungs on the appellate ladder" that now ends at this Court for final review. *See Fla. Greyhound*, 347 So. 2d at 411 (England, J., concurring).

This practice finds no support in the text of the Florida Constitution. That the Court may disagree with the result reached by a district court is no basis for this Court to exercise jurisdiction under article V, section 3(b)(3). *See*, *e.g.*, *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975) ("Our jurisdiction cannot be invoked merely because we might disagree with the decision of the district court []or because we might have made a factual determination if we had been the trier of fact . . . ."); *Nielsen v. City of Sarasota*, 117 So. 2d 731, 735 (Fla. 1960) ("Such a difference of view, however, is not the measure of our appellate jurisdiction to review decisions of Courts of Appeal because of alleged conflicts with prior decisions of this Court on the same point of law."); *see also Cortez*, 123 So. 3d at 1098 (Canady, J.,

dissenting) (stating that jurisdiction should not be exercised based on case outcomes, or else "conflict can be found in any case where a majority of this Court disagrees with the conclusion reached by a lower court").

To comply with the plain and intended meaning of the constitutional amendment, the Court should accept conflict jurisdiction only when the decisions at issue involve conflicting decisions on the same question of law that cannot be reconciled. In other words, when the decision under review actually produces a result that truly cannot be harmonized with preexisting law, conflict review is appropriate so that this Court may resolve that inconsistency.

B. Conflict jurisdiction was improvidently granted in this case.

The continuing pattern and practice of accepting any case that is of interest to a majority of this Court under the guise of conflict review is demonstrated here. This Court's jurisdiction was improvidently granted because the First District's decision below does not—and could not—conflict with either *Limones v. School District of Lee County*, 161 So. 3d 384 (Fla. 2015), or *Hicks v. Kemp*, 79 So. 2d 696 (Fla. 1955).

To begin with, the specific question at issue in this case—whether a railroad has a duty under the Federal Employer's Liability Act to anticipate and plan for a non-work-related medical emergency suffered by its employee—has not been addressed by this Court or any district court of appeal other than the First District in *Sells*. It is impossible to imagine how a case of first impression on the subject of a

duty of care under a specific federal law traditionally governed by federal precedent can give rise to "conflict" with prior Florida precedent. *See Wallace*, 3 So. 3d at 1054 (Wells, J., dissenting) (where the decision under review was the first of its kind to address the question at issue, there was no conflict).

Regardless, the First District in *Sells* did not announce a contrary rule of law, misapply this Court's law, or arrive at a decision that conflicts with any prior precedent of this Court. In *Limones*, this Court held that the district court impermissibly intruded upon the jury's role by examining whether a school's duty to a student-athlete was breached. 161 So. 3d at 391, 394. The school district—which was already required to maintain an AED on campus and trained staff on AED use, § 1006.165, Fla. Stat.—had a "duty to take appropriate post-injury efforts to avoid or mitigate further aggravation of [the student's] injury." *Limones*, 161 So. 3d at 391. Thus, *Limones* involved a question of law concerning a school's post-injury duty to its students, where the school's pre-injury duty was already circumscribed by statute and where the school had an additional, common-law duty based on its *in loco parentis* relationship with the student. *See id.* at 390-92. The Court rightly found that the issue was one of breach and not of duty.

Sells did not involve the same question of law concerning the existence of a ***post-injury*** duty. Instead, the First District decided whether CSX had a ***pre-injury, pre-emergency*** duty to train employees in the use of CPR or AEDs in the context of

the Federal Employer's Liability Act. Consequently, no conflict can arise in any "divergent decisions" on these very different points of law. *See Kyle v. Kyle*, 139 So. 2d 885, 886 (Fla. 1962) ("[I]f the points of law settled by the two cases are not the same, then no conflict can arise."); *see also Paton*, 190 So. 3d at 1053 (Quince, J., dissenting) (concluding that decision under review did not expressly and directly conflict with prior supreme court decision because it addressed a different question of law).

The purported conflict Petitioner identifies with respect to *Hicks v. Kemp* is even more tenuous. In *Hicks*, this Court stated that the duty of a master to his or her servant is greater than the duty "exist[ing] between persons dealing at arm's length and in the absence of a master-servant relationship." *Hicks*, 79 So. 2d at 699; *see* Pet'r's Br. on Jurisdiction at 9. Nothing in *Sells* at all conflicts with this Court's master-servant relationship statement in *Hicks*. In *Sells*, the First District reasoned that an employer-employee relationship was more like the property owner-invitee relationship in *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550 (Fla. 4th DCA 2008), than the special school-student relationship in *Limones*. *Sells*, 170 So. 3d at 34. It strains all logic to conclude that the First District's analogy is somehow a "decision" that conflicts with the Court's "decision" in *Hicks* that a master-servant relationship carries a greater duty of care than an arm's-length transaction with no master-servant relationship. *Sells* and *Hicks* simply do not involve the same

questions of law, and they do not announce statements of law that are at all in conflict with one another.

CONCLUSION

Conflict review should be exercised only when the decisions at issue are irreconcilable and this Court has an actual and express legal conflict to resolve. *See Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166-67 (Fla. 2006). The question at issue here has not been addressed by this Court or any district court of appeal other than the First District in this case. Therefore, no other decision exists with which *Sells* can be said to conflict. Consequently, this Court's grant of jurisdiction was improvidently issued and should be discharged.

Respectfully submitted on September 26, 2016.

HOLLAND & KNIGHT LLP

/s/Mark K. Delegal
Mark K. Delegal, Esq.
Fla. Bar No. 989924
mark.delegal@hklaw.com
Tiffany A. Roddenberry
Fla. Bar No. 92524
tiffany.roddenberry@hklaw.com
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301

-and-

William W. Large
Fla. Bar No. 981273
william@fljustice.org
Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, Florida 32301

Counsel for Amicus Curiae Florida Justice Reform Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed and that a copy has been served by e-mail to the following on September 26, 2016:

John S. Mills
Andrew D. Manko
The Mills Law Firm, P.A.
The Bowen House
325 N. Calhoun St.
Tallahassee, Florida 32301
jmills@mills-appeals.com
amanko@mills-appeals.com
service@mills-appeals.com

Counsel for Petitioner

Jeffrey R. White
Center for Constitutional Litigation, P.C.
777 6th St., N.W., Suite 250
Washington, DC 20001
jeffrey.white@cclfirm.com

Counsel for Amicus Curiae American Association for Justice

Andrew J. Knight II
Moseley Prichard Parrish Knight & Jones
501 W. Bay St.
Jacksonville, Florida 32202
ajknight@mppkj.com

Evan M. Tager
Michael B. Kimberly
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
etager@mayerbrown.com
mkimberly@mayerbrown.com

Counsel for Respondent

/s/Mark K. Delegal
Attorney

CERTIFICATE OF RULE 9.210 COMPLIANCE

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

/s/Mark K. Delegal
Attorney