IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

CASE NO.: 5D16-2876
L.T. CASE NO.: 2016-CA-4466-O

UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES,
Appellant,

v.

KNIGHT NEWS, INC.,
Appellee.

BRIEF *AMICI CURIAE* OF THE STUDENT PRESS LAW CENTER, FIRST AMENDMENT FOUNDATION, FLORIDA PRESS ASSOCIATION, FLORIDA SOCIETY OF NEWS EDITORS, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND SPJ FLORIDA IN SUPPORT OF APPELLEE

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IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

Amici include national and state non-profit groups, and professional news associations dedicated to preserving and defending free press rights and access to government records. Specifically, *amici* include: (1) the Student Press Law Center ("SPLC"); (2) the First Amendment Foundation; (3) the Florida Press Association, (4) the Florida Society of News Editors; (5) the Reporters Committee for Freedom of the Press; and (6) SPJ Florida.[1] To this end, *amici* have unique expertise on the interaction of state public records laws with federal privacy statutes such as the Family Educational Rights and Privacy Act ("FERPA").

I. SUMMARY OF ARGUMENT

Public records are indispensable to effective investigative watchdog journalism, especially records of how government agencies spend the public's money. Court after court has recognized a paramount public interest in oversight of agency spending, including at the campus level. The trial court correctly recognized that "student privacy" was never intended to, and cannot be expanded to, obscure the public's ability to oversee a government agency in which students have voluntarily undertaken positions of prominence and responsibility.

[1] A complete description of all *amici* parties is set forth in *amici's* January 13, 2017, Motion for Leave to File *Amicus Curiae* Brief.

FERPA is about the maintenance and enforcement of a *policy* of confidentiality, and that is all it is about. The statute's "nuclear-option" penalty structure makes it clear that the single grant of a request for records of public concern cannot conceivably place a university into noncompliance. UCF *is* compliant with FERPA – it *has* a policy of not making its students education records indiscriminately open for inspection. The grant of Knight News' request is a narrow and commonsense exception to that federally required policy. Court after court has recognized that commonsense exceptions are not just permissible, but indeed, are necessary.

The records at issue in this case – records memorializing how student fee dollars are accounted for and spent – do not fit any of the statutory prerequisites to be confidential "education records," nor are they handled as truly confidential education records would be. Indeed, if these *were* genuinely FERPA records, UCF would have quite a lot to explain about letting dozens of students view confidential "education records."

Even if UCF's purported understanding of FERPA was ever tenable, it can no longer be entertained after the U.S. Supreme Court's ruling in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012). In that case, the Court made clear that a federal Spending Clause enactment, such as FERPA, cannot be interpreted to compel state compliance with a fiscal "gun to the

head." Basic principles of constitutional law and federalism require this Court to interpret FERPA the way its drafters always intended – as a prohibition on a *policy or practice* of willfully leaving records unsecured, not the good-faith grant of a lawful public records request by journalists seeking access to information of public importance in which any privacy interest is at best negligible.

II. ARGUMENT

A. Access to public records is essential to hold colleges and schools accountable.

Timely, complete access to records makes a decisive difference in whether the public learns of the shortcomings of government officials and programs. This specifically includes access to the types of records at issue here: expense reimbursement forms that government officials file to obtain compensation for travel and comparable expenses, access to which has produced countless investigative news stories exposing waste and corruption. Using expense account records, the Center for Investigative Reporting documented how employees at the University of California-Los Angeles were exploiting loopholes to get their public university to reimburse them for luxury travel.[2] Using expense account records,

[2] Erica Perez & Agustin Armendariz, "UCLA officials bend travel rules with first-class flights, luxury hotels," *The Center for Investigative Reporting* (Aug. 1, 2013).

Charleston's *Post and Courier* exposed profligate spending by medical school trustees that led to reforms.[3]

Access to expense reimbursement reports is not a matter of mere voyeurism, and in fact has led to the disclosure of much larger acts of wrongdoing. In California, access to meal receipts helped reporters discover that members of an elected board were having secret discussions over lunch without the legal formalities that government meetings require.[4] Journalists also used credit card receipts for business meals to unravel a wide-ranging pay-to-play corruption scandal in a San Diego-area school district that resulted in criminal charges against the superintendent, trustees, and more than 200 others.[5]

For these reasons, knowing the names associated with compensation paid to government officials – even at the "small-town" level of campus government – is essential to guarding against nepotism, self-dealing, and other misdeeds. Knowing only that an "unnamed government official" received $500 for a trip is simply inadequate for purposes of public accountability.

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[3] Doug Pardue & Lauren Sausser, "Special review committee recommends MUSC Board of Trustees drastically cut their previously lavish spending," *The Post and Courier* (Jan. 30, 2017).

[4] J.R. Sbranti, "Oakdale Irrigation District director luncheons may violate state law," *The Modesto Bee* (Dec. 6, 2014).

[5] Wendy Fru & Lauren Steussy, 232 Criminal Charges in South Bay Corruption Case, NBCSanDiego.com (Jan. 7, 2013).

Straining statutory construction and common sense to define student government expense reports as FERPA "education records" would be inconsistent not just with public integrity and good government, but with commonplace daily practice at campuses everywhere. Records reflecting how student government officials are compensated are not only routinely released to the public upon request, but are debated openly in student government meetings to which the public is invited, which of course would not be the case with actual confidential "education records."[6] To cite just one noteworthy example, University of Memphis student journalist Chelsea Boozer won national awards for articles utilizing the Tennessee open records statute to expose the practice of using student fee dollars to pay the tuition of student elected officials.[7] Her story was recognized with a national award for in-depth writing by the Hearst Foundation, the highest honor

[6] *See, e.g.*, Brian Yu, "Amid Confusion, UC Finance Committee Aims to Improve Communication," *The Harvard Crimson* (March 28, 2016), *available at* http://www.thecrimson.com/article/2016/3/28/UC-finace-committee-communication/; Nicholas Chigo, "USG debates retroactive funding precedent," *The Daily Campus* (Feb. 18, 2016), *available at* http://dailycampus.com/stories/2016/2/18/usg-debates-retroactive-funding-precedent.

[7] Chelsea Boozer, "Inside the RSOs," *The Memphis Helmsman*, Dec. 1, 2010, *available at* http://www.dailyhelmsman.com/archives/inside-the-rsos-part-of/article_ae863fb3-c2ca-5731-b754-dc04191ccea5.html.

afforded to college journalists.[8] In case it bears pointing out, the University of Memphis is still open for business and receiving the federal funds that UCF groundlessly claims it will lose if Knight News' request is granted. If UCF's position was sustained, stories like Ms. Boozer's would never exist, and the spending habits of student government associations would be obscured behind a curtain of secrecy.

B. Colleges and schools habitually misuse FERPA to conceal records even where no legitimate student privacy interest exists.

It is well-documented that educational institutions routinely over-classify harmless, non-education records as confidential under FERPA. Often, this is the product of institutional resistance to scrutiny and a fixation on minimizing "bad news."[9] Courts have been forced regularly to remind educational institutions that not every mention of a student's name transforms a document into a confidential "education record." Because of this history of manipulation of FERPA, and because of universities' self-serving motives to construe the law as broadly as

[8] The award citation is available on the Hearst Awards website at http://www.hearstawards.org/competitions/writing/2010-11/third-place-writing-in-depth/.

[9] *See* Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1558 (April 2012) ("Universities, often to protect their own image and to stave the free flow of information, regularly invoke FERPA in response to open-record requests or press inquiries where the information sought places the institution in a negative light.").

possible when called upon to produce public records, every boy-who-cried-wolf invocation of FERPA should met with skepticism and careful scrutiny.

FERPA has become the knee-jerk response whenever a school or college is confronted with a demand for unflattering public records. For instance, a student watchdog seeking public records from the University of Florida was forced to file suit after the university insisted that recordings of Student Senate meetings – meetings open for any member of the public to attend and record – were confidential FERPA records.[10] Although he prevailed, the university's misapplication of FERPA delayed his access by 17 months.

Perhaps the most tragic misuses of FERPA involve requests made by grieving parents, who have been forced to go to court to obtain videotapes made in public settings of their child's last moments, because schools (when it suits their interests in secrecy) insist that even videos of public events such as football games are confidential "education records."[11] Such absurd over-compliance with FERPA almost invariably is rejected when challenged in court, but only after requesters are forced to waste thousands of dollars and years of needless litigation. Appellate

[10] *See Bracco v. Machen*, No. 1-2009-CA-4444 (Fla. Cir. Ct. Jan. 10, 2011), *available at* http://myfloridalegal.com/sun.nsf/cases/D4E2A2B220197A0985257911006D92CA/$file/Bracco+v.+Machen.pdf.

[11] Matthew Spina, "Parents of high school football player who died file claim," *The Buffalo News* (Jan. 28, 2014); Michelle E. Shaw, "Parents of dead Valdosta teen seek release of video," *Atlanta Journal-Constitution* (Oct. 24, 2013).

courts must give clear guidance to records custodians to stem the proliferation of these unfounded privacy claims.

Court after court has recognized that FERPA is to be applied in a common-sense manner that permits disclosure even of identifiable records where no legitimate expectation of privacy exists. In *Heller v. Safford Unified School District*, No. CV2011-00165 (Ariz. Super. Ct. Aug. 22, 2011), a journalist sought access to a settlement agreement in a long-running Fourth Amendment lawsuit between a school district and the family of an Arizona teenager who was strip-searched unlawfully, as determined by the U.S. Supreme Court. *Safford Unif. Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009). Over the school district's FERPA objection, the court ordered the settlement released, even though the requesters plainly knew the student to whom the records referred. The court reached its conclusion by a common-sense balancing test considering the "minimal" privacy interests of the now-famous student, "weighed against the greater public interest for transparency in the expenditure of public funds by the district." *See Heller* at *2.

Time after time, courts have afforded requesters access to public records referring to students over the unfounded FERPA objections of colleges and

universities bent on using FERPA to frustrate public accountability.[12] This Court should follow suit and order UCF to fully disclose, without redaction, the records sought by the Knight News.

Moreover, the "sky-is-falling" prediction of the university *amici* – that the district court's order will somehow result in throwing open access to limitless "confidential FERPA records" scattered throughout the campus is entirely unfounded. The court in *Phoenix Newspapers Inc. v. Pima Community College*, No. C20111954 (Ariz. Super. Ct. May 17, 2011), carefully and correctly analyzed why FERPA can logically apply only to "centrally maintained" records. In that case, a state college insisted that emails and correspondence referring to students and kept by instructors on their computers were protected against disclosure as FERPA education records. The court had little trouble concluding otherwise, because colleges do not handle correspondence in the hands of instructors in accordance with the protocols of FERPA. To the contrary, the court observed, an

[12] *See, e.g., Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998) (journalists could have access to parking tickets issued to UMD student athletes because they are neither "educational" nor confidential, and not the type of records Congress contemplated in enacting FERPA); *Bozeman Daily Chronicle v. Mont. State Univ.*, No. DV-11-581A (March 1, 2012) (reports of investigation of student sexual harassment complaints against professor not protected against disclosure by FERPA); *News & Observer Publishing Co. v. Baddour*, No. 10 CVS 1941 (N.C. Super. Ct. May 12, 2011) (records of calls made by UNC coaches on state-issued cell phones and parking tickets issued to student athletes not confidential under FERPA).

email in a professor's inbox can be deleted unilaterally by the professor at any time for any reason – certainly not the way genuine "education records" would be "maintained." *See id.*

The same is true – indeed, more true – of the records in this case. The records of how student activity fee dollars are spent, including requests for expense funds to cover student travel, are accessible to the elected members of the UCF Student Senate and discussed in open meetings of the Senate, which the public is invited to attend. Nothing about the way that UCF handles student expense allowance records is in any way consistent with the way actual FERPA education records would be handled.

In fact, contrary to the university *amicis'* insistence, *broadening* the category of documents to which FERPA applies is in fact the "disaster scenario," for this reason: Because FERPA is both an access statute as well as a confidentiality statute, and anything categorized as an "education record" for purposes of withholding from journalists is equally an "education record" when a student asks to inspect her own FERPA records.

UCF knows very well that, when a student presents herself at the provost's office and asks to see her FERPA records, the university does not respond by conducting a campus-wide search for every scrap of paper, email, or recording in which she is identifiable. Rather, she receives what the U.S. Supreme Court has

defined to be the limited universe of education records under FERPA – namely, transcripts and grades – that are centrally maintained in files corresponding to that student.

Indeed, as noted in Appellee's brief, UCF admitted in discovery that it does not accompany student government expense records with the federally required log that must be maintained alongside genuine FERPA records to memorialize when someone has requested access and why. *See* 20 U.S.C. § 1232g(b)(4)(A). This log requirement itself runs counter to the universities' insistence that every Post-It note mentioning a student is a FERPA education record, since no employee is asked to keep a log alongside her computer memorializing the contents of every fragmentary document that mentions a student. UCF would be forced to admit that it has failed in this statutory duty – *if* SGA records really were covered by FERPA and *if* FERPA really carried the ruinous financial penalties that the universities allege.

C. UCF's interpretation of FERPA is neither legally nor logically permissible.

1. *FERPA was never intended to, and cannot be understood to, override deep-rooted state public access regimes.*

Florida has an especially strong tradition of respect for the public's right to know, having enshrined the right of access not only in Florida statutes, § 119.01 *et*

seq., but in the state Constitution (Art. I, Sec. 24). Federal statutes cannot be lightly read to override this right of access where no such intent appears in the statute.

By its plain language, FERPA declares an educational institution ineligible for all federal education funding if it maintains a "policy and practice" of disclosing students' confidential education records. 20 U.S.C. § 1232g(b)(1). Most courts to be asked the question have decided that FERPA must mean what it says: it penalizes only an institutional breakdown in recordkeeping, not a one-time decision to honor a public records request in compliance with state law.[13] Indeed, the Department of Education itself took the position, when sued over its now-discredited interpretation that police crime reports were "education records," that FERPA does not override or excuse compliance with state public records laws, but merely "makes disclosure financially unattractive(.)" *Student Press Law Ctr. v. Alexander*, 778 F.Supp. 1227, 1232 n.13 (D.D.C. 1991).

[13] *See, e.g., Haughwout v. Tordenti*, 2016 WL744083, No. CV166032526, at *10 (Conn. Super. Nov. 17, 2016) (holding that nothing in FERPA prohibits the one-time disclosure of education records to a student who needs the records to prepare his defense in a disciplinary case: "The court … does not read FERPA as prohibiting any such disclosure at any time for any purpose. What it punishes, by the withholding of federal funds, is a 'policy or practice' of permitting disclosure of educational records."); *Laramie Cty. Cmty. Coll. v. Cheyenne Newspapers Inc.*, No. 176-092 (Wyo. Dist. Ct. May 25, 2010) at *2 (FERPA penalizes only a "policy or practice of permitting the release of education records," and that the assertion that a one-time leak of records would result in a determination that the college violated FERPA "is purely speculative").

While it is possible for a federal statute to supersede state law where there is a direct conflict between the two that makes compliance with both literally impossible,[14] such is not the case with FERPA. *See Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 432 (2002) (in holding that a student assignment did not satisfy the FERPA definition of "education records," the U.S. Supreme Court, invoking principles of federalism, stressed it did not want to interpret FERPA to interfere with state and local functions of education). As the U.S. Supreme Court has stated: "In the interest of avoiding unintended encroachment on the authority of the States … a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, preemption will not lie unless it is the clear and manifest purpose of Congress." *CSX Transp. v Easterwood*, 507 U.S. 658, 663-64 (1993) (internal quotes omitted). In the collision between FERPA and Florida law, three areas traditionally governed by the states are at issue: education, privacy, and access to state records. Thus, federal authority is at its nadir.

To emphasize, absolutely nothing in FERPA or in U.S. Department of Education regulations implementing FERPA even *acknowledges the existence* of

[14] *See English v. Gen. Elec.*, 496 U.S. 72, 79 (1990).

state public records laws. An intent to override substantive legal rights safeguarded by state law cannot be inferred from silence.

There is no conflict preemption here; it is possible to maintain a *policy and practice* of safeguarding education records (as FERPA requires) while at the same time making disclosures when a requester presents a statutorily valid request under the Florida open records act. It would contravene basic tenets of federalism to interpret FERPA as overriding entrenched principles of state law in the absence of any indication that Congress intended that result or even that it was aware that its enactment might produce that result.

2. *FERPA's structure and function are inconsistent with UCF's understanding of the statute as a prohibition on honoring requests for newsworthy public records.*

UCF's claim that FERPA penalizes the fulfillment of public records requests for newsworthy documents is simply incompatible with the plain language of FERPA – which penalizes only a *policy* of unauthorized disclosure – and with a penalty structure that can only be intended for a total institutional breakdown in information security.

Congress equipped the Department of Education with only one remedy for a FERPA violation: *complete* disqualification from federal education funding. *See* 20 U.S.C. § 1232g(b)(1) (providing that "no funds shall be made available" under any federal education program to an institution violating FERPA's prohibitions on

disclosure). Revoking UCF's federal funding would functionally put it out of business, since it receives many tens of millions of dollars in federal subsidies annually, including life-sustaining Pell Grants.[15] To insist that Congress could have intended to shutter an entire educational institution because it fulfilled a public records request is simply nonsense.

Realistically, Congress intended FERPA to penalize only the rare outlier institution that wantonly makes a *practice* of handling confidential student education records carelessly. Otherwise, Congress would have provided (and the Department of Education would have implemented by rulemaking) milder intermediate penalties for one-off disclosures of records, just as is true of comparable education funding statutes. *See* Dep't of Educ., *Adjustment of Civil Monetary Penalties for Inflation*, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 CFR Part 36) (specifying range of civil monetary penalties for violating statutes administered by the Department of Education, all but one of which is capped at $35,000 per violation).

It is nonsensical to take the position that, for example, the penalty for falsifying a crime report to mislead the public in violation of the federal Clery Act,

[15] During the 2013 fiscal year, UCF received $87,096,780 in federal grants and contracts, according to its annual financial audit. That amounts to 20 percent of its $435 million operating revenues. *See* State of Florida Auditor General, University of Central Florida Financial Audit, Report No. 2014-127, at 14, *available at* http://www.myflorida.com/audgen/pages/pdf_files/2014-127.pdf.

20 U.S.C. 1092(f), is an offense carrying a capped penalty of $35,000, while the penalty for granting a request for public records is in excess of $87 million. For its penalty structure to make any sense, FERPA must penalize only a one-in-a-million decision to abandon confidentiality as a routine institutional practice. This explains why, in its 43 years of existence, FERPA has never resulted in sanctions against any educational institution.

D. The circuit court was correct that FERPA is subject to waiver by voluntarily taking on a position of public responsibility.

Even if FERPA would otherwise apply to the records at issue – and plainly, it does not – the circuit court was correct that FERPA confidentiality must necessarily be subject to waiver by conduct. A contrary ruling would produce intolerably absurd results.

FERPA contemplates a body of harmless "directory information" that a college may freely publish (name, major, extracurricular activities, and so on), but also enables a student to "opt out" and forbid disclosure of all information gleaned from FERPA records, even directory information. *See* 20 U.S. Code § 1232g(a)(5)(B). Indulging UCF's position that documents produced by and circulated within student government are confidential "education records," envision the result if a member of student government were to sign that FERPA opt-out forbidding disclosure of directory information. Would the student be listed as "Candidate X" on campus election ballots? Would the student be identified as

"Unnamed Senator" on vote tally sheets? Would the student be referred to as "Anonymous Senator" in minutes of Senate floor proceedings? Of course not. Because ballots, voting sheets, minutes of student government meetings, and other such documents are not confidential "education records" to which FERPA can apply. UCF well knows this, which is why none of those records is handled with the formalities accompanying actual FERPA records.

Indeed, if the university *amici* were correct that FERPA applies to any mention of a student in any document no matter where it is stored and how ephemerally it is maintained, then every university in America would be a serial FERPA violator, because no one is consulting the list of FERPA opt-out signatories before writing a Post-It note, sending an email, or otherwise incidentally identifying a student in a non-centrally-maintained record, nor could that be logically possible. If it applied at all to the records at issue here, FERPA would necessarily be waivable to allow UCF to transact routine business. For its own sake, UCF and all universities must hope this is the case.

E. FERPA cannot constitutionally be interpreted as a "gun to the head" overriding Florida's strong public policy favoring transparency.

While Congress may condition the receipt of federal funds on accepting reasonable conditions under its Spending Clause authority, the financial penalty for noncompliance cannot be "so coercive as to pass the point at which pressure turns

into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). In the *Sebelius* case, the U.S. Supreme Court determined that pressure had become compulsion where states where threatened with ineligibility for hundreds of millions of dollars in federal Medicaid funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility.

Significantly, the Court views Spending Clause enactments with special skepticism where, as here, the condition purportedly being imposed – exempting anything meeting FERPA's description of an education record from disclosure regardless of the privacy and disclosure interests at stake and in derogation of state open records laws – does not relate to the actual grant program. *Sebelius*, 132 S. Ct. at 2604; *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (striking down as an "unconstitutional condition" a federal policy conditioning receipt of federal AIDS-education grants on an agreement to adopt federal "party line" condemning prostitution, unrelated to the purpose of the grant program).

While courts at times have misinterpreted FERPA as a prohibition against honoring individual requests for public records, that interpretation is no longer tenable after *Sebelius*. If honoring a public records request will put a university in violation of FERPA, and the result of being found in violation of FERPA is the "death penalty" of disqualification from all federal funding, then FERPA fails the

compulsion standard of *Sebelius*. Indeed, educational institutions have argued for decades that FERPA operates as *Sebelius*' "gun to the head," because refusing federal funds would so disastrous as to be no choice at all.

Declaring legislative enactments unconstitutional is a disfavored "nuclear option," and courts properly avoid doing so when a statute can be given a limiting and salvaging construction. *See Firestone v. News-Press Pub. Co.*, 538 So. 2d 457, 459 (Fla. 1989) ("Whenever possible, a statute should be construed so as not to conflict with the constitution."). As the U.S. Supreme Court has repeatedly instructed, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. Calif.*, 155 U.S. 648, 657 (1895)).

FERPA is readily harmonized with state open records laws by giving it the limited understanding that its drafters intended – as a prohibition on a policy or practice of failing to secure centrally maintained education records containing non-public information of the type that could be used detrimentally against a student if disclosed.

III. CONCLUSION

FERPA cannot be read as UCF insists without rendering the statute both absurd in its application and unconstitutionally void under the *Sebelius* doctrine.

FERPA was intended to be, and courts widely understand it to be, governed by principles of common sense. In cases such as this one, in which the student privacy interest is at best minimal and the public's interest in transparency great, Florida law points indisputably toward disclosure. FERPA cannot, and does not, nullify state law on this matter of unique state expertise and concern.

For the foregoing reasons, *amici* therefore respectfully urge this Court to affirm the lower court's order.

Respectfully submitted, this 7th day of February, 2017.

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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief *amici curiae* is typed in 14-point (proportionately spaced) Times New Roman and otherwise meets the requirements of Florida Rule of Appellate Procedure 9.210.

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