

IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-487  
L.T. Case No. 4D19-229

FREDERIC GUTTENBERG, ET AL.

Appellants,

v.

THE SCHOOL BOARD OF BROWARD COUNTY,

Appellee.

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**BRIEF OF *AMICI CURIAE* PANHANDLE AREA EDUCATIONAL  
CONSORTIUM, CALHOUN COUNTY SCHOOL BOARD, FRANKLIN  
COUNTY SCHOOL BOARD, GADSDEN COUNTY SCHOOL BOARD,  
GULF COUNTY SCHOOL BOARD, HOLMES COUNTY SCHOOL  
BOARD, JACKSON COUNTY SCHOOL BOARD, JEFFERSON COUNTY  
SCHOOL BOARD, LIBERTY COUNTY SCHOOL BOARD, MADISON  
COUNTY SCHOOL BOARD, TAYLOR COUNTY SCHOOL BOARD,  
WAKULLA COUNTY SCHOOL BOARD, WALTON COUNTY SCHOOL  
BOARD, WASHINGTON COUNTY SCHOOL BOARD AND FLORIDA  
A&M UNIVERSITY DEVELOPMENTAL RESEARCH SCHOOL  
IN SUPPORT OF APPELLEE,  
THE SCHOOL BOARD OF BROWARD COUNTY**

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BOB L. HARRIS, ESQ.  
Florida Bar No: 460109  
JAMES J. DEAN, ESQ.  
Florida Bar No.: 0832121  
CAMERON H. CARSTENS, ESQ.  
Florida Bar No: 112864  
MESSER CAPARELLO, P.A.  
Post Office Box 15579  
Tallahassee, FL 32317  
*Attorneys for Amici Curiae*

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## **STATEMENT OF IDENTITY AND INTEREST**

The Panhandle Area Educational Consortium (PAEC) is a non-profit regional educational consortium service organization established to provide joint programs and services to small school districts in Florida. *See* §1001.451, Fla. Stat. The PAEC member districts are small, primarily rural, school districts located in the panhandle of Florida.<sup>1</sup>

The PAEC districts, like other school districts throughout the state, are routinely sued for alleged negligence. The individual and aggregate cap on damages in section 768.28(5), Florida Statutes, has a direct impact on the fiscal operations and budgeting of PAEC districts. The PAEC districts submit this brief to explain how the Appellants' proposed interpretation of section 768.28(5) could have a devastating impact on these districts' fiscal operations, given their small size and very limited resources.

## **SUMMARY OF THE ARGUMENT**

The decision of the Fourth District Court of Appeal in *Dep't of Fin. Servs. v. Barnett*, 262 So. 3d 750 (Fla. 4th DCA 2018) is legally correct and furthers the

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<sup>1</sup> PAEC is one of three regional consortia, the others being NEFEC and Heartland. *See* NEFEC, <https://www.nefec.org> (last visited July 1, 2019); Heartland Educational Consortium, [www.heartlanded.org](http://www.heartlanded.org) (last visited July 1, 2019). Districts with 20,000 or less unweighted full-time equivalent students are eligible for membership. *See* §1001.451(1), Fla. Stat. Currently, more than half of Florida's school districts are small enough in student population to be eligible for membership in the three consortia.

legislative purpose for the aggregate cap in section 768.28(5), Florida Statutes. The Appellants' proposed statutory interpretation is not only incorrect, its acceptance would frustrate the legislative purpose and could imperil the fiscal health of school districts throughout the state. This is especially true for small school districts like the member districts of PAEC.

## **ARGUMENT**

### **I. THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY CONSTRUED SECTION 768.28(5), FLORIDA STATUTES, IN *DEPARTMENT OF FINANCIAL SERVICES V. BARNETT***

The Fourth District Court of Appeal in *Barnett* correctly concluded that section 768.28(5), Florida Statutes, is subject to a narrow construction; and the court correctly applied the statute's aggregate cap to the facts of that case. As explained by Appellee School Board of Broward County in its Answer Brief, the statutory language, legislative intent and case law in Florida and other states all support the Fourth District's decision in *Barnett*. Because Appellee School Board ably explains why this Court should adopt the Fourth District's interpretation of the statute and reject the interpretation being advanced by Appellants, PAEC and its member districts will not restate those arguments here.

### **II. THE INTERPRETATION ADVANCED BY APPELLANTS COULD DEVASTATE FLORIDA SCHOOL DISTRICTS IF ADOPTED BY THIS COURT**

PAEC and its member districts share the grave concerns expressed by Amicus Florida League of Cities about the devastating impact that could result if the Court

were to adopt the Appellants’ proposed interpretation of section 768.28(5), Florida Statutes. It is not only large school districts that face the threat of school shootings and other mass tragedies. Small school districts, like large ones, also face this threat, on a daily basis. As potentially damaging as Appellants’ proposed interpretation could be for larger school districts, the impact on small school districts, like the PAEC districts, could have a much more devastating fiscal impact.

One of the primary reasons for the doctrine of sovereign immunity is to “protect ‘the public against profligate encroachments on the public treasury.’” *Hardee Cnty. v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017) (citing *Spangler v. Fla. St. Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958)). This purpose applies to governmental agencies of all sizes, but it is especially critical for small governmental agencies. As deftly observed by the Supreme Court of Utah when addressing a constitutional challenge to a similar aggregate sovereign immunity cap in *Tindley v. Salt Lake City Sch. Dist.*, 116 P.3d 295, 304 (Utah 2005):

We conclude that the classifications inherent in the aggregate cap are both reasonable and reasonably related to accomplishing the Act’s objective of protecting the fiscal resources of governmental entities. Damages arising from multiple-victim accidents resulting in personal injury are extremely difficult to predict and have a much greater potential than any single-victim accident for giving rise to a judgment that could drastically deplete the resources of a governmental entity. *A judgment in favor of numerous plaintiffs against a **small** municipality for damages resulting from a catastrophic event could have a devastating impact on the municipality’s fiscal health.* The aggregate cap protects against such a result by limiting the damages the municipality can be required to pay to multiple victims.



*Id.* at 304 (footnotes omitted) (emphasis added).

Many counties in Florida are vastly different in terms of population, local economies, land values and revenues. The size and budgets of the school districts in Florida's diverse counties often reflect these differences. For example, although there are several school districts in the state with over 100,000 students (including Duval, Polk and Palm Beach counties), and even some with over 200,000 students (Broward, Hillsborough, Miami-Dade and Orange counties), almost fifty percent of the school districts in Florida have less than 10,000 students.<sup>2</sup> Not surprisingly, the financial resources of the smaller school districts in Florida are substantially more limited than those of the larger school districts.

With respect to the thirteen PAEC districts, several are among the smallest school districts in the state. PAEC school districts average just over 3,000 students<sup>3</sup> and eight schools (including elementary, middle and high schools).<sup>4</sup> By comparison, there are over 345,000 students and 392 schools in the Miami-Dade County School

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<sup>2</sup> See *Student Enrollment (FTE), History, 2018-19 Fourth Calculation FTE*, Florida Department of Education (2019), <http://www.fldoe.org/finance/fl-edu-finance-program-fefp/fte-info/student-enrollment.shtml>.

<sup>3</sup> See *id.*

<sup>4</sup> See *Public Schools / Districts*, Florida Department of Education (2019), [https://web03.fldoe.org/Schools/schoolmap\\_text.asp](https://web03.fldoe.org/Schools/schoolmap_text.asp). When calculating the average number of schools in each district, only the elementary, middle and high schools were included.

District alone.<sup>5</sup> The Liberty County School District, a PAEC member, has only 1,304 students and just four schools.<sup>6</sup> In other words, the entire Liberty County School District student population could likely fit neatly into one or more wings of a single elementary school in the Miami-Dade County School District.

No school district in Florida has endless resources, small or large, but the constitutional and statutory obligations to provide the same level of services to students is the same for every school district, as are the risks of a tragic event impacting their students and staff. However, the budget and financial resources of a school district do increase, or decrease, depending on the size of the district. For example, the total budget of the Miami-Dade County School District for the 2018-19 fiscal year is \$3,297,406,317.00.<sup>7</sup> The total budget of the Liberty County School District for the 2018-19 fiscal year is \$14,233,405.20.<sup>8</sup> This means that the budget

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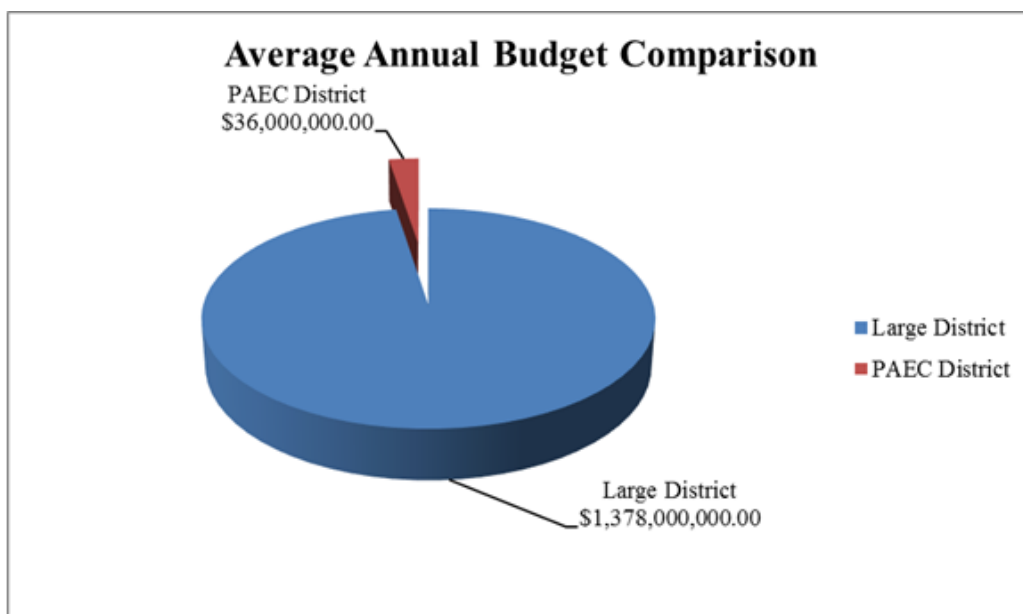
<sup>5</sup> See *Student Enrollment (FTE), History, 2018-19 Fourth Calculation FTE*, Florida Department of Education (2019), <http://www.fldoe.org/finance/fl-edu-finance-program-fefp/fte-info/student-enrollment.shtml>; DadeSchools.net, [www.dadeschools.net](http://www.dadeschools.net) (last visited June 25, 2019).

<sup>6</sup> See *List of Schools in Liberty District*, Florida Department of Education (2019), <https://web03.fldoe.org/Schools/schoolreport.asp?id=39>; *Student Enrollment (FTE), History, 2018-19 Fourth Calculation FTE*, Florida Department of Education (2019), <http://www.fldoe.org/finance/fl-edu-finance-program-fefp/fte-info/student-enrollment.shtml>.

<sup>7</sup> See *Florida Department of Education Finance Data Base, Miami-Dade District Summary Budget*, Florida Department of Education (2019), <http://cdn.fldoe.org/core/fileparse.php/7507/urlt/DadeBUD1819.pdf>.

<sup>8</sup> See *Florida Department of Education Finance Data Base, Liberty District Summary Budget*, Florida Department of Education (2019), <http://cdn.fldoe.org/core/fileparse.php/7507/urlt/LibertyBUD1819.pdf>.

of the Miami-Dade County School District is over 230 times larger than the budget for the Liberty County School District. The average budget of the thirteen PAEC districts is just over \$36,000,000 per year,<sup>9</sup> while the average budget of the districts in Florida with the thirteen largest budgets is \$1,378,000,000 – i.e., 38 times larger.<sup>10</sup> The pie chart below illustrates the enormous difference in financial resources between the PAEC districts and the larger districts:



Ad valorem property tax revenues are the primary tax revenue source for school districts.<sup>11</sup> School districts are limited to levying up to 10 mills by the Florida

<sup>9</sup> See *School District Summary Budget*, Florida Department of Education (2019), <http://www.fl DOE.org/finance/fl-edu-finance-program-fefp/school-dis-summary-budget.shtml>. The number for the average budget of the PAEC districts includes all districts except FAMU DRS.

<sup>10</sup> See *id.*

<sup>11</sup> Fla. H.R. Comm. on Fin. & Tax, HB 1015 (2016) Staff Analysis 2 (Jan. 19, 2016), *available at*

Constitution,<sup>12</sup> but are also capped by the Florida Legislature.<sup>13</sup> Across the state, an average of 47.96% of revenues for school districts derives from local ad valorem property taxes.<sup>14</sup> So, despite the argument of some, raising local taxes to meet additional budget needs to pay judgments is not always the answer for small school districts.

For a small district like Liberty County, and other small PAEC districts, raising local ad valorem taxes would provide very little to pay a judgment imposed upon them as a result of even one tragic catastrophic incident. The millage rate for Liberty County, for example, is 6.424 percent, and a total tax roll (for 2017) of \$248,816,055.<sup>15</sup> The result is a total of \$1,176,163 to meet the District's required local effort.<sup>16</sup> Even if Liberty County were to raise their millage to equal the highest rate (Alachua County at 7.625 percent), the additional local revenue would only be \$298,838, which is less than the aggregate cap set for one incident or occurrence by section 768.28(5).<sup>17</sup>

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<https://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h1015.FTC.DOCX&DocumentType=Analysis&BillNumber=1015&Session=2016>.

<sup>12</sup> Art. VII, §9(b), Fla. Const.

<sup>13</sup> §1011.71, Fla. Stat.

<sup>14</sup> *See Financial Profiles of Florida School Districts – 2017-18 Financial Data Statistical Report*, Florida Department of Education, Bureau of School Business Services, Office of Funding and Financial Reporting, p. 16, <http://www.fldoe.org/core/fileparse.php/7507/urlt/1718Profiles.pdf>.

<sup>15</sup> *Id.* at pp. 14-15.

<sup>16</sup> *Id.* at p. 15.

<sup>17</sup> *Id.* at p. 15.

Yet, mass shootings and other catastrophic events can occur at the small PAEC districts, just as they can occur at the larger school districts. And the Court's decision in this case will equally establish the damages exposure for the much smaller PAEC districts as well as for the much larger districts.<sup>18</sup>

In section 768.28(5), the Legislature enacted a one-size-fits-all limited waiver of sovereign immunity that would apply to government agencies of all sizes. The Legislature established the level of the monetary cap so that it would be high enough to allow a reasonable recovery (without a claims bill), but low enough to “protect ‘the public [of small counties and municipalities] against profligate encroachments on the[ir] [limited] public treasur[ies].” *Spangler*, 106 So.2d at 424. To further this legislative purpose, the Legislature not only imposed a “per-person” cap; it also imposed an aggregate cap for “all claims or judgments ... arising out of the same incident or occurrence.” §768.28(5), Fla. Stat.

To construe section 768.28(5) in a way that would treat each separate shot in this case as a separate “incident or occurrence,” as argued by Appellants, would

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<sup>18</sup> Mass shootings are not the only tort claim risk that could devastate a small school district if the Appellants' interpretation of an “incident or occurrence” is adopted by this Court. Many districts in the Panhandle are still recovering from Hurricane Michael. If, for example, claims are brought by individuals who develop illnesses at different times due to mold in the buildings as a result of the storm, and those claims were all treated as a separate “incident or occurrence,” PAEC school districts could face numerous judgments from the individual claims all separately subject to the sovereign immunity caps, in addition to the tens of millions of dollars in damages already incurred as a result of the storm.

render the aggregate cap illusory and completely frustrate the legislative purpose for the aggregate cap. It would also be contrary to legislative intent, knowing the Legislature failed to maintain a “no cap” waiver on its sovereign immunity back in 1969 and has continually imposed an aggregate cap ever since it took up the issue for a second time in 1973.<sup>19</sup> It could also have a devastating impact on the PAEC districts, given their extremely limited fiscal resources.

Despite the assertions made by the Florida Justice Association (FJA) in their Amicus Brief, the Florida Legislature has and continues to understand their responsibility to limit the calls on the public purse. A major part of the reason is because the Legislature knows it is spending much of its own dime every time a school district is forced to expend funds to satisfy a judgment. And that is exactly why the claims bill process exists, so that the Legislature can watch the collective purse of funds available for the education of its students.

The Legislature has maintained the aggregate cap in its limited waiver of sovereign immunity at \$300,000 or less for a reason. An average of approximately 41% of revenues available for school districts to use to provide their services comes

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<sup>19</sup> See Fla. H.R. Select Comm. on Claim Bills, PCB SCCB 13-01 (2013) Staff Analysis 2-3 (Mar. 20, 2013), *available at* <https://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?FileName=pcb01.SCCB.DOCX&DocumentType=Analysis&CommitteeId=2735&Session=2013>.

from state coffers.<sup>20</sup> And for many of PAEC's small districts, in landlocked counties with no coastline or Disney World to increase its property values, the percentage of its revenues to provide educational services to students that comes from the state is much higher. Liberty County receives 76.02% of its revenue<sup>21</sup> from the state, while other PAEC districts receive a similarly high percentage level of revenue from the state.<sup>22</sup> In other words, the Legislature knows that every \$1.00 Liberty County spends on its students or is forced to spend to satisfy a judgment, 76 cents of that dollar is their money. The Florida Legislature has a vested interest in not seeing single incidents with an aggregate limit of \$300,000 blossom to become the limit for each injury.

School districts are required to have a budget.<sup>23</sup> If the sovereign immunity aggregate cap means each injury is subject to its own cap, how can a small district develop a budget? There is no "money cloud" out there to which small school districts are hooked. A budget is nothing more than a prediction of future revenues and expenditures, based upon experience and good evidence. The budget for

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<sup>20</sup> See *Financial Profiles of Florida School Districts – 2017-18 Financial Data Statistical Report*, Florida Department of Education, Bureau of School Business Services, Office of Funding and Financial Reporting, p. 25, <http://www.fldoe.org/core/fileparse.php/7507/urlt/1718Profiles.pdf>.

<sup>21</sup> *Id.* at 64.

<sup>22</sup> Calhoun County (70.08%), Holmes County (73.62%), Jackson County (68.95%), Madison (62.51%), Wakulla County (69.58%), and Washington County (64.67%). See *id.* at pp. 32, 55, 57, 65, 90 and 92.

<sup>23</sup> §1001.42(12)(b), Fla. Stat.

preparing for risk-adverse events for school districts, especially small ones, has always been an issue of available funds. Because school districts are not Walmart or a movie theater, and its inhabitants are required by law to be there, there is nothing a small school district can do to mitigate the risk by limiting the number of persons subject to the risk of collectively being in the same place at the same time and impacted by the same events.

Small school districts hit with an aggregate cap for each injury could be bankrupt, just like small cities. However, the difference is that by law, school districts have to continue to operate regardless of their financial status. Constitutionally and statutorily,<sup>24</sup> school districts must continue to provide classes, hire and retain staff, maintain facilities, and provide for the general safety of the students in their care.<sup>25</sup> And, if school districts fail to maintain an appropriate reserve of funds for the operation of their schools, they can be virtually taken over by the Florida Department of Education and an appointed financial emergency board.<sup>26</sup>

The FJA wrongly argues that protection of the public treasury should not be recognized as one of the policies underlying sovereign immunity in this case because, FJA argues, commercial general liability insurance (including “active

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<sup>24</sup> *See generally* Art. IX, Fla. Const.; Chapters 1000-1003, Fla. Stat.; Chapters 1006-1013, Fla. Stat.

<sup>25</sup> *See* Fla. SB 7026 (2018), Ch. 2018-3, Laws of Fla.; Fla. SB 7030 (2019), Ch. 2019-22, Laws of Fla.

<sup>26</sup> *See* §1011.051(2)(a), Fla. Stat; §218.053, Fla. Stat.



shooter” insurance) can be purchased at reasonable cost by governmental agencies. The FJA argues that if a governmental agency chooses to self-insure, rather than purchase liability insurance, the governmental agency should bear the consequences of that choice, and the public it serves should lose the benefit of sovereign immunity.

The FJA’s argument is wrong for several reasons. First, this Court has long held, and continues to reiterate, that “protection of the public treasury” is a policy that “underpin[s] the doctrine of sovereign immunity.” *Am. Home Assurance Co. v. Nat’l Railroad Passenger Corp.*, 908 So.2d 459, 471 (Fla. 2005) (citing *Spangler*, 106 So.2d at 424). Second, if the Court were to accept FJA’s argument, there would be no cap on the liability facing school districts in connection with any mass shooting or similar catastrophic event. This is because any liability policy will likewise have aggregate limits, and public funds above any such insurance limits will potentially be at risk. Third, utilizing self-insurance is a recognized form of risk management, and there is nothing improper with this approach. Fourth, as noted by Appellee School Board of Broward County, there is no record evidence in this case regarding whether the Appellee is self-insured, has liability insurance in place or utilizes some combination of the two.

Finally, the availability of liability insurance is completely irrelevant in any event because the Legislature has never mandated the purchase of liability insurance as a condition for sovereign immunity. This is a matter, like all planning-level,

budgetary matters, left to each individual governmental agency to decide. The argument of the FJA is for the Florida Legislature, not this Court. As the Fourth District correctly observed in *Barnett*:

Although appellees' recoveries through a judgment may be substantially limited by section 768.28(5), they are not without remedy. The legislature may approve a claims bill authorizing further compensation. While this is a cumbersome process, the legislature has deemed it necessary to assure the protection of the state's revenues to the good of the entire population. If the process is objectionable to the public in situations such as this, where multiple parties make claims against a state actor for a single tort, then the remedy is to petition the legislature to change the law.

*Barnett*, 262 So.2d at 754-55.<sup>27</sup>

The Fourth District Court of Appeal in *Barnett* got it right. The limited waiver-of-sovereign immunity statute, section 768.28(5), should be narrowly construed; and applying that construction, all claims arising out of the catastrophic event in this case are subject to the aggregate cap in the statute. Appellants may seek further recovery from the Legislature in the form of a claims bill.

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<sup>27</sup> Indeed, in 2013, a bill, which did not pass, was introduced that would have increased the sovereign immunity caps applicable to local governments (to \$1,000,000 per person and \$1,500,000 per incident or occurrence) and would also have provided an option for local governments to avoid a claims bill if they purchase insurance or self-insure to cover liabilities resulting from negligence lawsuits in an amount equal to or greater than three times the caps on damages (i.e., \$3,000,000 per person and \$4,500,000 per incident or occurrence). *See* Fla. HB 7123 (2013).

## **CONCLUSION**

For the reasons expressed herein, PAEC and its member districts urge this Court to affirm the trial court's declaration that the limitation on the waiver of sovereign immunity set forth in section 768.28(5) caps the liability of Appellee School Board of Broward County for the claims of all persons arising out of the mass shooting at Marjory Stoneman Douglas High School on February 14, 2018, and that any further relief may only be obtained through an act of the Legislature.

Respectfully submitted,

/s/Bob L. Harris

**BOB L. HARRIS, ESQ.**

Florida Bar No: 460109

**JAMES J. DEAN, ESQ.**

Florida Bar No.: 0832121

**CAMERON H. CARSTENS, ESQ.**

Florida Bar No: 112864

**MESSER CAPARELLO, P.A.**

Post Office Box 15579

Tallahassee, FL 32317

Telephone: (850) 222-0720

Facsimile: (850) 558-0662

Primary E-Mail: bharris@lawfla.com

jdean@lawfla.com

ccarstens@lawfla.com

ahopkins@lawfla.com

statecourtpleadings@lawfla.com

## **CERTIFICATE OF SERVICE**

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<p><i>Counsel for Daniela Menescal:</i></p> <p>LAWLOR &amp; ASSOCIATES Patrick W. Lawlor, Esq. One Royal Palm Place, 1877 S. Federal Highway, Suite 302, Boca Raton, Florida 33432 <a href="mailto:pat@pwlawlor.com">pat@pwlawlor.com</a> <a href="mailto:tammy@pwlawlor.com">tammy@pwlawlor.com</a></p>	<p><i>Counsel for Frederic Guttenberg as Personal Representative of the Estate of Jaime T. Guttenberg, deceased:</i></p> <p>PODHURST ORSECK, P.A. One S.E. 3rd Avenue, Suite 2300 Miami, Florida 33131 Steven C. Marks <a href="mailto:smarks@podhurst.com">smarks@podhurst.com</a> Dayron Silverio <a href="mailto:dsilverio@podhurst.com">dsilverio@podhurst.com</a> Kristina M. Infante <a href="mailto:kinfante@podhurst.com">kinfante@podhurst.com</a> Stephen F. Rosenthal <a href="mailto:srosenthal@podhurst.com">srosenthal@podhurst.com</a></p>
<p><i>Counsel for Martin Duque and Daisy Anguiano, as parents of the Martin Duque, deceased:</i></p> <p>THE BRODY LAW FIRM, LLC. Daman Brody, Esq., 1688 Meridian Ave, Suite 700 Miami Beach, Florida 33139 <a href="mailto:daman@bomlegal.com">daman@bomlegal.com</a></p>	<p><i>Counsel for Manuel Oliver and Patricia Padauy, as Co-Personal Representatives of the Estate of Joaquin Oliver, deceased, Stacy Lippel, Linda Beigel, as Personal Representative of the Estate of Scott Beigel deceased:</i></p> <p>HAGGARD LAW FIRM, P.A. 330 Alhambra Circle, First Floor Coral Gables, Florida 33134 Michael A. Haggard, Esq. <a href="mailto:MAH@haggardlawfirm.com">MAH@haggardlawfirm.com</a> Christopher Marlowe, Esq. <a href="mailto:CLM@haggardlawfirm.com">CLM@haggardlawfirm.com</a></p>

	<p>Todd J. Michaels, Esq.  <a href="mailto:TJM@haggardlawfirm.com">TJM@haggardlawfirm.com</a></p>
<p><i>Counsel for Ashley Maria Baez, a minor by and through her parents and natural guardians, Katherine Baez and Juan David Baez; Isabel Chequer, a minor, by and through her parents and natural guardians, Gabriela Chequer and Amin Chequer; Anthony and Jentúfer Montalto, as Proposed Co-Personal Representatives of the Estate of Gina Rose Montalto, deceased; and Kong Feng Wang a/k/a Jacky Wang and Hui Ying Zhang a/k/a Linda Wang, as Co-Personal Representatives of the Estate of Peter Wang, deceased:</i></p> <p>GROSSMAN ROTH YAFFA  2525 Ponce de Leon Blvd., Suite 1150  Coral Gables, Florida 33134  Stuart Z. Grossman  <a href="mailto:szg@grossmanroth.com">szg@grossmanroth.com</a>  Alex Arteaga-Gomez  <a href="mailto:aag@grossmanroth.com">aag@grossmanroth.com</a>  William P. Mulligan  <a href="mailto:wpm@grossmanroth.com">wpm@grossmanroth.com</a></p>	<p><i>Counsel for Andrew Pollack, as Co-Personal Representative of the Estate of Meadow Pollack, deceased:</i></p> <p>BRILL &amp; RINALDI, THE LAW FIRM  17150 Royal Palm Boulevard, Suite 2  Weston, Florida 33326  David W. Brill, Esq.  <a href="mailto:david@brillrinaldi.com">david@brillrinaldi.com</a>  <a href="mailto:yamile@brillrinaldi.com">yamile@brillrinaldi.com</a>  Joseph J. Rinaldi, Jr., Esq.  <a href="mailto:joe@brillrinaldi.com">joe@brillrinaldi.com</a>  <a href="mailto:yamile@brillrinaldi.com">yamile@brillrinaldi.com</a>  Chelsea R. Ewart, Esq.  <a href="mailto:chelsea@brillrinaldi.com">chelsea@brillrinaldi.com</a>  <a href="mailto:yamile@brillrinaldi.com">yamile@brillrinaldi.com</a></p> <p>JOEL S. PERWIN, P.A.  Alfred I. Dupont Building, Suite 1422  169 E. Flagler Street  Miami, Florida 33131  Joel S. Perwin, Esq.  <a href="mailto:jperwin@perwinlaw.com">jperwin@perwinlaw.com</a>  <a href="mailto:sbigelow@perwinlaw.com">sbigelow@perwinlaw.com</a></p>
<p><i>Counsel for Shara Kaplan, as Co-Personal Representative of the Estate of Meadow Pollack, deceased:</i></p> <p>TRACY CONSIDINE, P.A.  1 Sleiman Parkway, Suite 210  Jacksonville, Florida 32216  Tracy Considine, Esq.  <a href="mailto:tconsidine@tcjaxlaw.com">tconsidine@tcjaxlaw.com</a>  <a href="mailto:jcolucci@tcjaxlaw.com">jcolucci@tcjaxlaw.com</a></p>	<p><i>Counsel for Max Schachter, as Personal Representative of the Estate of Alex Schachter and Benjamin E. Wikander:</i></p> <p>COLSON HICKS EIDSON, P.A.  255 Alhambra Circle, Penthouse  Coral Gables, Florida 33134  Curtis B. Miner  <a href="mailto:curt@colson.com">curt@colson.com</a>  Julie Braman Kane</p>

	<a href="mailto:julie@colson.com">julie@colson.com</a> Patrick Montoya <a href="mailto:patrick@colson.com">patrick@colson.com</a>
<i>Counsel for Philip and April Schentrup, as Representatives for the Estate of Cannen Schentrup, deceased:</i>  RENNERT VOGEL MANDLER & RODRIGUEZ, P.A. 100 S.E. Second Street, Suite 2900 Miami, Florida 33131 Robert M. Stein, Esq. <a href="mailto:rstein@rvmrlaw.com">rstein@rvmrlaw.com</a> Jeffrey A. Tew, Esq. <a href="mailto:jtew@rvmrlaw.com">jtew@rvmrlaw.com</a>	<i>Counsel for the Broward County School Board:</i>  HALICZER, PETTIS & SCHWAMM, P.A. Eugene K. Pettis, Esq. Debra Potter Klauber, Esq. 1 Financial Plz Fl 7 Fort Lauderdale, Florida 33394 <a href="mailto:epettis@hpslegal.com">epettis@hpslegal.com</a> <a href="mailto:dklauber@hpslegal.com">dklauber@hpslegal.com</a>
<i>Co-counsel for the Broward County School Board:</i>  Barbara J. Myrick Office of Broward County School Board 600 SE 3 <sup>rd</sup> . Ave. #11FL Ft. Lauderdale, Florida 33301-3125 <a href="mailto:barbara.myrick@browardschools.com">barbara.myrick@browardschools.com</a>	<i>Counsel for Lisa and Richard Olson, As parents of William Olson, a minor:</i>  LEIGHTON LAW, P.A. John Elliott Leighton 1401 Brickell Avenue, Suite 900 Miami, Florida 33131 <a href="mailto:john@leightonlaw.com">john@leightonlaw.com</a> <a href="mailto:max@leightonlaw.com">max@leightonlaw.com</a>
<i>Counsel for Ilan Alhadeff and Lori Alhadeff as Co-Personal Representatives of the Estate of Alyssa Alhadeff, deceased; Samantha Fuentes, a minor, by and through her parents and guardians James Grady and Sovereign Grady; Samantha mayor, a minor, by and through her parents and guardians Jess Mayor and Ellyn Mayor; Kyle Laman, a minor, by and</i>	<i>Counsel for Amicus Curiae FJA</i>  Phillip M. Burlington, Esq. Adam Richardson, Esq. Burlington & Rockenbach, PA Courthouse Commons/Suite 350 444 West Railroad Ave. West Palm Beach, FL 33401 561-721-0400 <a href="mailto:pmb@FLAppellateLaw.com">pmb@FLAppellateLaw.com</a> <a href="mailto:ajr@FLAppellateLaw.com">ajr@FLAppellateLaw.com</a>

*through her parents and guardians  
Franz Laman and Marie Laman:*

Kelley / UUSTAL PLC  
Robert W. Kelley, Esq.  
Kimberly L. Ward, Esq.  
500 North Federal Highway  
Suite 200  
Fort Lauderdale, Florida 33301  
[rwk@kulaw.com](mailto:rwk@kulaw.com)  
[klw@kulaw.com](mailto:klw@kulaw.com)

/s/Bob L. Harris

**BOB L. HARRIS, ESQ.**

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief is in Times New Roman 14 Point Font  
and is in compliance with Rule 9.210, Fla. R. App. P.

/s/Bob L. Harris

**BOB L. HARRIS, ESQ.**