APPENDIX E

IN THE APPELLATE COURT FOR THE FIRST DISTRICT OF FLORIDA

DONIVON CRAIG TINGLE,
Appellant

Case No. 1D22-1096
Lower Tribunal Case: 2021-CA-002155

vs.

FLORIDA DEPARTMENT OF HEALTH,
An Agency of the State of Florida
Appellee

APPELLANT'S, DONIVON CRAIG TINGLE'S, INITIAL BRIEF ON THE MERITS

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PREFACE

In this Brief, the Appellant, DONIVON CRAIG TINGLE, will be referred to as TINGLE. Appellee, FLORIDA DEPARTMENT OF HEALTH, an Agency of the State of Florida, will be referred to as DOH or the STATE.

The following symbols will be used:

(R) -- Record on Appeal

POINT ON APPEAL

This Court should reverse the trial Court's denial of Tingle's Motion for Final Summary Judgment. When similarly situated members of a suspect class are treated disparately by the government based on their race, then the government action must survive strict scrutiny of such action and the State has failed to carry such a burden. As such, the statutory exemption for a *Pigford/BFL* plaintiff opening a path to ownership of a MMTC license is unconstitutional without a companion exemption for an additional MMTC license for a similarly situated *Keepseagle* plaintiff and a MMTC license must be issued post haste to Tingle to cure the ongoing violation of his civil right to equal protection under the law.

STATEMENT OF THE CASE AND FACTS

Tingle filed a Complaint[1] alleging that Emergency Rule 64ER21-16[2] (hereinafter the "Rule") promulgated by DOH, which was later codified as Florida Statute § 381.986(8)(a)(2)(b) (hereinafter the "Statute"), treats similarly situated members of a suspect class differently, violating the principals of equal protection under the law.

The Statute contains the following language:

> *As soon as practicable, the department shall license one applicant that is a recognized class member of Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), or In Re Black Farmers Litig., 856 F. Supp. 2d 1 (D.D.C. 2011)*[3]

The *Pigford/BFL* class membership requirement in the Statute refers to litigation instituted by a group of African American farmers that was seeking damages from the USDA for historic discriminatory lending practices[4]. These

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[1] (R) Complaint, Pages 7-25

[2] Fla. Admin. Code R. 64ER21-16 (2021)

[3] Fla. Stat. 381.986(8)(a)(2)(b)

[4] *Pigford v. Glickman,* 206 F.3d 1212 (D.C. Cir. 2000); there was also affiliated litigation that is often grouped with *Pigford: In re Black Farmers' Discrimination Litigation,* 820 F.Supp.2d 78 (D.C. Cir 2008).

farmers were successful in their efforts and the case, *Pigford v. Glickman*[5], resulted in the largest civil rights settlement in US history: resulting in a settlement with approximately 60,000 class members for $2.3 Billion[6].

In the wake of the successful action by the African-American farmers, a group of Native American farmers similarly sought damages from the USDA for historic discriminatory lending practices[7]. These farmers were successful in their efforts and the case, *Keepseagle v. Vilsak*, resulted in a settlement with the approximately 3500 class members for $680 Million[8].

The Statute creates a distinction, on its face, that treats similarly situated members of a suspect class, race, differently in violation of constitutional principles of equal protection under the law[9]. Appellant urges this Honorable Court to re-read the two paragraphs immediately preceding this one to grasp the similar positions of these two plaintiff class groups. In fact, either a *Pigford* or *Keepseagle* class member is more similarly situated with his or her counterpart

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[5] *See Id.*

[6] *See Id.*

[7] *Keepseagle v. Vilsak*, 102 F. Supp. 3d 205 (D.D.C. 2015).

[8] *See Id.*

[9] See Amendment 14, United States Constitution, *Nixon v. Herndon*, 273 U.S. 536 (1927) and Art 1, § 2, Fla. Const.

class member than either is with a member of their own race, even another African American or Native American farmer (who was not a plaintiff class member.) Tingle's Motion for Final Summary Judgment was denied by the lower court, which ruled that a century of equal protection jurisprudence and explicit constitutional provisions were not applicable in this instance[10].

SUMMARY OF ARGUMENT

The Statute constitutes governmental action that explicitly discriminates between similarly situated members of a suspect class based solely on their race without serving a compelling governmental interest in the narrowest possible way, in violation of the 14th Amendment to the U.S. Constitution, US Supreme Court precedent and the Florida Constitution[11].

ARGUMENT ON APPEAL

The standard of review of a Final Summary Judgment is *de novo. Evergreen Communities, Inc. v. Palafox Preserve Homeowner's Association,* 213 So.3d 1127 (Fla. 1st DCA 2017.)

EQUAL PROTECTION AND STRICT SCRUTINY

Along with fundamental rights to equal protection under the law afforded by

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[10] *(R) Order and Final Judgment, Pages 313-314*

[11] See, Amendment 14, United States Const.; *Nixon v. Herndon*, 273 U.S. 536 (1927); and Art. I, § 2, Fla. Const

the 14th Amendment to the United States' Constitution[12], race is enumerated as one of the protected classes of people in the Florida Constitution: "[n]o person shall be deprived of any right because of race, religion, national origin, or physical disability."[13] Here, the Statute offers a right to one racial group, *Pigford* class members, to the exclusion of an identically situated racial group, *Keepseagle* class members[14].

It has long been the rule that any law that implicates a suspect class or a fundamental right must pass a test of strict scrutiny:

> *"When legislation classifies persons in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends on the basis for the classification. If a law treats individuals differently on the basis of race or another suspect classification, or if the law impinges on a fundamental right, it is subject to strict scrutiny.*[15]

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[12] See, *Nixon v. Herndon*, 273 U.S. 536 (1927).

[13] Art. I, § 2, Fla. Const.

[14] See, Fla. Stat. § 381.986(8)(a)(2)(b)

[15] *Leib v. Hillsborough County Public Transp. Com'n*, 558 F. 3d 1301 (11th Cir. 2009); citing *Gary v City of Warner Robbins, Ga.*, 311 F.3d 1334 (11th Cir 2002)

Other than their racial identity, *Pigford* and *Keepseagle* class members are identically situated: farmers who were historically disadvantaged through discriminatory government lending practices, who pursued their remedies in a court of law, and who received recognition of their injury in the form of a cash settlement[16].

The Statute's carve-out for licensure of a *Pigford* class member, while not providing the same opportunity to an identically situated *Keepseagle* class member is a patent violation of the equal protection principles that underpin the entirety of United States and Florida constitutional law and must be evaluated with strict scrutiny[17].

"'To withstand strict scrutiny, a law must be necessary to promote a compelling government interest and must be narrowly tailored to advance that interest." [18] Such a two-prong test must be satisfied in order to survive a challenge

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and *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); *See also*, *Jackson v State*, 191 So.3d 423, 427 (Fla. 2016).

[16] *See Supra.*

[17] *See, Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[18] *Westerheide v. State*, 831 So.2d 93, 111 (Fla. 2002).

to the law's constitutionality.

The seminal case from which this analysis springs, is *McLaughlin v. Florida* [19], which opined:

> *Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.*[20]

The *McLaughlin* Court was evaluating the constitutionality of a law that made it a crime for "any negro man and white woman, or any white man and negro woman, who are not married to each other" to "habitually live in and occupy in the nighttime the same room."[21] Here, the Court found that while the State had a compelling interest in preventing breaches of basic sexual decency[22], it could not justify the disparate treatment of the suspect class members and struck the law down as unconstitutional:

> *But we deal here with a classification based upon the race of the*

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[19] 379 U.S. 184 (1964).

[20] *McLaughlin* at 196.

[21] *McLaughlin* at 184.

[22] *McLaughlin* at 193.

participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,'...and subject to the 'most rigid scrutiny,'...and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose[23].

Therefore, while the State might be able to articulate a compelling interest in creating the *Pigford* exception (while not conceding that it has), the caselaw shows that the Statute's failure to treat similarly situated members of the same suspect class, race in this instance, in the same manner results in an impermissible violation of equal protection principles[24].

THE "UNDER-INCLUSIVENESS" STRAWMAN

The State, unable to counter this elementary analysis of a fundamental constitutional concept with any caselaw on point, has manufactured an argument that Tingle has never made, argued or otherwise advocated: "under-

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[23] *McLaughlin* at 191-92; citing *Bolling v. Sharpe,* 347 U.S. 497 (1954*); Korematsu v. United States,* 323 U.S. 214 (1944); *Kiyoshi Hirabayashi v. United States,* 320 U.S. 81 (1943).

[24] *See, McLaughlin, Adarand, Croson, Bolling* and *Korematsu,* supra.

inclusiveness[25]." This is a convenient argument for the State, as there does exist caselaw from distant and foreign jurisdictions for this proposition with which the State can then defend its strawman and, with a little help from a puzzlingly un-inquisitive Court, carry the day[26].

The State relies almost exclusively in its misguided argument on *Jana Rock*[27] and the Court was ostensibly swayed by this deviation from the long-held judicial standard in Florida: "I'm going to find that the rational basis test applies to this case under *Jana-Rock.*[28]"

The *Jana-Rock* opinion, arising out of the 2nd Federal District, was a case involving a challenge to the statutory definition of "Hispanic" in the New York Department of Transportation's set-aside program for Disadvantaged Business Enterprises[29]. The Plaintiff in that case was seeking to have "people of Portuguese

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[25] (R) *Defendant's Motion for Final Summary Judgment, Pages 194-198*

[26] (R) *Hearing Transcript, March 30, 2022, Page 353, line 25 and Page 354, lines 1-2*

[27] *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*, 438 F.3d 195 (2nd Cir. 2006)

[28] (R) - *Hearing Transcript, March 30, 2022, Page 353, line 25 and Page 354, lines 1-2.*

[29] *Jana-Rock* at 200.

or Spanish descent" added to the statutory definition[30]. After a lengthy discussion of the widely accepted and long-standing standards for applying strict scrutiny to facially discriminatory laws[31] (which would apply in the instant case, though were roundly ignored by the State in its arguments), the Court then devolves into a discussion about the matter before it (which, to be clear is NOT the matter before this Court): is omission of sub-categories of racial groups in government contract set-aside statutory regimes permissible by the State?

Jana-Rock might apply if Tingle were arguing that he was a member of a sub-category of African-American, entitled to relief, or if a *Keepseagle* exception had been created by the State, but that Tingle's tribe had been wrongfully omitted. Those are **not** the issues before this Court[32]. This Court must recognize that two similarly situated members of a suspect class are being treated disparately by the State[33]. The disingenuous nature of the State's argument was belied when its counsel admitted during the March 30, 2022, hearing on the Motions for Summary Judgment and Sanctions that he grasped the nature of Tingle's claim, "I think you

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[30] *Id.*

[31] *Jana-Rock* at 204-205; *See, Johnson v. California*, 543 U.S. 499 (2005).

[32] (R) - *Complaint, Page 7-25*

[33] (R) - *Complaint, Page 7-25*

heard him, quote: 'We want to be treated just like black folks[34].'"

The Circuit Court in this case went on to say in its Judgment, after explicitly adopting the *Jana-Rock* analysis in contravention of all existing Florida caselaw on point in this matter, that "even if that's wrong and the strict scrutiny test applies, either way, the State has met its burden[35]..." This conclusion is completely unsupported by the existing caselaw and flies in the face of every fundamental precept upon which equal protection has been built, brick by brick.

Tingle will forego any further comment on Jana-Rock, as it is wholly inapplicable to the facts or law in this case and the reliance on such case by the State and, more vexingly by the Circuit Court, is grossly misplaced and this Court must correct this miscarriage of justice.

CONCLUSION

Based upon the foregoing, Tingle urges this Court to find that his right to equal protection under Federal and State law has been violated by the State and to Order the following remedies:

- Vacation of the Circuit Court's Final Summary Judgment, entered April 11, 2022;
- Instruction to the Circuit Court to enter a Final Summary Judgment in

[34] (R) - *Hearing Transcript, March 30, 2022*, Page 348, lines 23-25.

[35] (R) - *Hearing Transcript, March 30, 2022*, Page 354, lines 3-5.

favor of Plaintiff/Appellant and awarding Plaintiff/Appellant an MMTC license, to be issued forthwith; and

- For any other, further relief this Court deems appropriate.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Expedite was served via the Florida Courts' E-Filing System on this the 3rd day of June, 2022 to:

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