

**IN THE FLORIDA SUPREME COURT**

**CASE NO.: SC19-1118**

BRENT A. DODGEN,

Petitioner,

vs.

L.T. Case Nos.:

4D19-1010; 2016-CA-018196

KAITLYN P. GRIJALVA,

Respondent.

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**AMICUS BRIEF OF THE FLORIDA  
JUSTICE ASSOCIATION IN SUPPORT OF  
RESPONDENT KAITLYN P. GRIJALVA**

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Bryan S. Gowdy  
Amicus Chair for the  
Florida Justice Association  
Florida Bar No. 176631  
bgowdy@appellate-firm.com  
filings@appellate-firm.com  
865 May Street  
Jacksonville, Florida 32204  
Telephone: (904) 350-0075  
Facsimile: (904) 503-0441

*Attorney for Amicus Curiae Florida  
Justice Association*

RECEIVED, 02/28/2020 05:45:31 PM, Clerk, Supreme Court

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## **STATEMENT OF IDENTITY AND INTEREST**

The Florida Justice Association (“FJA”), as amicus, supports Respondent Kaitlyn P. Grijalva. The FJA has approximately 3,000 members, most of whom are Florida attorneys. The FJA’s mission is to strengthen and uphold Florida’s civil justice system and to protect the rights of Florida’s citizens and consumers. This case interests the FJA for two reasons. First, Petitioner seeks to strip away a party’s right to obtain critical discovery of the relationship between an adverse party’s insurer and a retained expert witness. Second, other amici have injected an issue into this proceeding, not raised by the parties, to overturn precedent that preserves the attorney-client relationship and enables tort victims to access medical care.

## **SUMMARY OF ARGUMENT**

**The related case.** This case is related to *Younkin v. Blackwelder*, SC19-385, a case in which the FJA filed an amicus brief on September 19, 2019. Both *Younkin* and this case touch on whether to extend or overrule *Worley v. Central Florida Young Men’s Christian Association*, 228 So. 3d 18 (Fla. 2017) and the impact of *Worley* on *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 997-98 (Fla. 1999). Rather than cut and paste from our *Younkin* brief and have this Court read the same material twice, we instead summarize the points made in our *Younkin* brief. For most of the points, enough has been said. Yet, there are a couple points from our *Younkin* brief on which further elucidation may assist the Court.

**The Court must decide only this case.** (*Younkin* FJA Br. § I.A, at 3-4.) Petitioner and his amici do not seek the same relief. Like the *Younkin* petitioner, Petitioner seeks to extend *Worley* by arguing that case “implicitly overruled” cases that applied *Boecher* to non-parties. (Pet.’s Br. 30-31.) Two amici—the U.S. Chamber of Commerce and the Florida Justice Reform Institute—seek to overturn *Worley*. (Chamber/Institute Amicus Br. 18.) Another pair of amici, two retained experts, impermissibly interject claims based on Florida’s constitutional right to privacy, just as they did in *Younkin*. (Foley/Shim Amicus Br. 7-16.) This Court must decide this case, and only this case, based on the facts of this case, and it may not decide abstract questions of law or issue advisory opinions. (*Younkin* FJA Br. § I.A, at 3-4.) Nothing more needs to, or will, be said on this topic.

**This Court must decide this case under the *certiorari* standards.** (*Younkin* Br. § I.B&C, at 4-11.) The district court adjudicated a petition for certiorari, not an appeal. As Respondent correctly argues in her brief, this Court must consider the certiorari standards to stay within its constitutional lane. (Resp. Br. § IV.B, at 12-16; *accord* *Younkin* FJA Br. § I.B, at 4-7.) In a related vein, even if this Court were to extend or overrule *Worley*, that would not mean the trial court departed from the essential requirements of the law. (*Younkin* FJA Br. § I.C, at 7-11.) Nothing more needs to, or will, be said on this topic.

**The district court did not “pass upon” the certified question.** As the Respondent correctly notes, the district court never “passed upon” the certified question, and thus this Court must dismiss this case because it lacks jurisdiction. (Resp. Br. § IV.A.2, at 9-12.) In *Younkin*, the FJA argued this Court’s “public importance” jurisdiction was lacking for this same reason. (*Younkin* FJA Br. § I.D, at 11-12.) Since filing that brief, the FJA has done more historical research into this Court’s “public importance” jurisdiction and the meaning of the phrase “pass upon.” That research is shared *infra* §I, at 4-7.

**Rule 1.280’s plain text authorizes Respondent’s financial-bias discovery.** (*Younkin* FJA Br. § II, at 12-18.) The rule’s text permits discovery of any evidence that is: (i) “relevant” and (ii) “not privileged.” See Fla. R. Civ. P. 1.280(b)(1). As we argued in *Younkin*: “When [this] language is applied, the relationship between a party’s counsel and retained expert is clearly both ‘relevant’ and ‘not privileged.’” (*Younkin* FJA Br. 13.) Here, we replace “party’s counsel” with “party’s insurer,” and the conclusion is the same. Indeed, our argument is stronger here because, as Respondent notes, the insurer is the real party in interest. (Resp. Br. 24-27.) Nothing more needs to, or will, be said on this topic.

**This Court should *interpret*—not *make*—law where, as here, it wears its judicial hat as opposed to its legislative rulemaking hat.** (*Younkin* FJA Br. § III, at 18-20.) This Court is sitting in its judicial capacity under Article V, section 3(b)

of the Florida Constitution, not its legislative rulemaking capacity under Article V, section 2(a). So, it is *interpreting* the law, not *making* the law. But Petitioner is asking this Court to *make*, not *interpret*, law. In this brief, we bring to the table a deeper discussion of the distinction between this Court’s law-*interpretation* power under Article V, section 3(b) and its law-*making* power under Article V, section 2(a). This analysis is grounded in a recent decision of this Court, as well as history. *Infra* § II, at 7-16.

## **ARGUMENT**

### **I. The original meaning of the phrase “passes upon a question” in Article V, section 3(b)(4) was to “decide” or “determine” a question**

This Court’s “public importance” jurisdiction traces its origins to the 1950’s. In November 1956, as part of many changes to the judiciary (including the creation of the district courts of appeal), the voters adopted a legislative proposal that amended the constitution to say in pertinent part: “The supreme court may review by certiorari any decision of a district court of appeal...that *passes upon a question* certified by a district court of appeal to be of great public interest.” Art. V § 4(b), Fla. Const. (1957) (emphasis added); *see* Committee Substitute for House Joint Resolution No. 810, § 4(b) (filed with Secretary of State on June 23, 1955) (App. 63-65). Then, in March 1980, voters adopted a 1979 legislative proposal that made the following non-material changes to this provision:

The supreme court...may review ~~by certiorari~~ any decision of a district court of appeal...that passes upon a question certified by ~~it a district court of appeal~~ to be of great public importance ~~interest~~.

*Compare*, Art. V § 4(b), Fla. Const. (1957) *with*, Art. V § 3(b)(4), Fla. Const. (1980); *see* Senate Joint Resolution 20-C, Journal of the Senate, No. 2, at 12 (Nov. 28, 1979) (App. 118); *see* Arthur J. England et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147, 191-92 (1980) (opining the 1980 changes were of “limited significance”) (App. 48-49). This jurisdictional provision reads the same today. *See* Art. V § 3(b)(4), Fla. Const.

The meanings of words are fixed at the time they were adopted. *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 78-92 (2012). At both relevant time periods (the mid-1950’s and late 1970’s), dictionaries defined “pass upon” to mean “decide” or “determine.” *See Radin Law Dictionary* 242 (1955) (“With the preposition ‘on’ or ‘upon,’ [‘pass’] is equivalent to ‘decide’ or ‘determine.’”) (App. 114); *Black’s Law Dictionary* 1012 (5th ed. 1979) (“The term also means to...authoritatively determine the disputed questions which it involves. In this sense a jury is said to pass upon the rights or issues in litigation before them.”) (App. 61).

Case law in the vicinity of the adoption periods is consistent with these dictionary definitions. It evidences that the phrase “passes upon a question” meant to “decide” or “determine” a question in a manner that is binding on the parties. For

instance, in 1946 while discussing the law-of-the-case doctrine, this Court used the phrase “passes upon” to suggest that an appellate court had “settled” and “determined” a question of law that was binding on the parties:

[W]hen an appellate court *passes upon* a question and remands the cause for further proceedings, the question there *settled* becomes the ‘law of the case’ upon a subsequent appeal, provided the same facts and issues which were *determined* in the previous appeal are involved in the second appeal.

*Ball v. Yates*, 158 Fla. 521, 539, 29 So. 2d 729, 738 (1946) (emphasis added); *accord King v. Citizens & S. Nat. Bank of Atlanta, Ga.*, 119 So. 2d 67, 69 (Fla. 3d DCA 1960). And, in 1977, when a district court “[did] not reach” the question it certified, this Court held: “Since. . . the District Court specifically found it unnecessary to pass upon the question now certified to this Court, we are without jurisdiction to consider and decide the question.” *Revitz v. Baya*, 355 So. 2d 1170, 1171 (Fla. 1977) (quoting *Baya v. Revitz*, 345 So. 2d 340, 341 (Fla. 3d DCA 1977)).

To accept jurisdiction under the “public importance” provision, this Court in recent times still has insisted that the district court must “pass upon” the certified question: “[I]t is essential that the district court of appeal pass upon the question certified by it to be of great public importance.” *Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007). There’s a good reason for this: “[This Court] lacks authority to answer an abstract question presented by a district court of appeal no matter how useful the answer

might be.” Philip J. Padovano, *Florida Appellate Practice* § 3:11 (2019 ed.). And this Court may not “create its own jurisdiction” where the constitution’s text does not grant it jurisdiction. *Advisory Opinion to the Attorney Gen. re Raising Fla.’s Minimum Wage*, 285 So. 3d 1273, 1280-81 (Fla. 2019).

In this case, one can read the Fourth District’s opinion again, again, and again. The reader never will find where the Fourth District decided or determined the certified question. In fact, the Fourth District did not decide, determine, or “pass upon” the question. (*See* Resp. Br. § IV.A.2, at 9-12.) Nor did the Fifth District in *Younkin*. (*Younkin* FJA Br. § I.D, at 11-12.)

The district courts in these cases could not—and did not—pass upon the questions they certified because they lacked the constitutional power to decide the questions. The certified questions are not *judicial* questions. They are *legislative* questions, and the answers to them requires this Court to exercise its *legislative* rulemaking power. We discuss next the distinction between this Court’s judicial and legislative powers.

**II. This Court’s power to adopt rules of courts is a legislative function, and this power generally should be exercised after input is received from a rules committee.**

A great Floridian who recently died taught us that, when this Court exercises its power to “adopt rules for the practice and procedure in all courts,” Fla. Const. Art. V, § 2(a), it “function[s] in a legislative capacity.” Talbot D’Alemberte, *The*

*Florida State Constitution* 159 (2d ed. 2017). As one might expect, Mr. D’Alemberte’s statement about our state’s constitution is firmly rooted in our state’s history. More on that history in a moment. Let’s first discuss a case this Court decided recently.

**A. This Court recently recognized the distinction between its judicial power to interpret the law and its legislative power to make the law.**

In January 2020, the Court had to decide whether a sovereign entity, the FHP, could take an interlocutory appeal under a rule of appellate procedure. *See Fla. Highway Patrol v. Jackson*, No. SC18-468, 2020 WL 370366, at \*3 (Fla. Jan. 23, 2020) (discussing Fla. R. App. P. 9.130(A)(3)(C)(XI)). Similar to this case, the parties in *Jackson* presented both judicial and legislative arguments. *See id.* at \*3-7. The judicial arguments were grounded in the rule’s text, its “contextual indicators,” judicial canons, and precedent interpreting the rule’s text or identical text from another subdivision of the rule. *See id.* at \*3-5. The legislative arguments were grounded in public policy. *See id.* at \*5-6; *cf. State v. Poole*, No. SC18-245, 2020 WL 370302, at \*17 (Fla. Jan. 23, 2020) (Lawson, J. concurring) (noting that the majority had properly decided the constitutional issues “through legal reasoning, not policy analysis” and that “policy choices...are constitutionally entrusted to the political branch”).

Based solely on the judicial arguments (text, context, canons, and precedent), the Court rejected the FHP’s interpretation of rule 9.130 and affirmed the district

court's decision that the FHP was not entitled to an interlocutory appeal. *Jackson*, 2020 WL 370366, at \*3-\*5, \*7. Stated another way, based on its judicial power in Article V, section 3(b), this Court interpreted and applied rule 9.130, as then written, to bar the FHP's appeal. *See id.*

Then, switching to its legislative rulemaking power under Article V, section 2(a), the Court agreed with the FHP's policy arguments to make (rather than interpret) the law. Specifically, by way of a separate case number and opinion, the Court expressly invoked its legislative power under section 2(a) to amend rule 9.130(a) such that the FHP *in the future* could appeal on an interlocutory basis the order it had tried to appeal in *Jackson*. *See id.* at \*7; *In re Amendments to Fla. R. App. P. 9.130*, No. SC19-1734, 2020 WL 370367, at \*1 (Fla. Jan. 23, 2020).

In sum, this Court in *Jackson* did not entertain policy arguments to *interpret* the procedural law (rule 9.130), but rather it considered policy arguments to *make* the procedural law (i.e., by amending rule 9.130). The arguments being advanced by Petitioner here in the context of another procedural law (rule 1.280) are largely *policy* arguments for *making*—not *interpreting*—the law.<sup>1</sup> (*See* Pet. Br. § I.A-C & G, at 8-19, 27-29.) These legislative policy arguments should be resolved by this Court in a rule proceeding, not in a judicial controversy like the instant proceeding.

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<sup>1</sup> To be sure, parts of Petitioner's brief do advance non-policy judicial arguments. (*See* Pet. Br. § I.D-F, at 19-27.) Respondent has explained why Petitioner's judicial arguments are wrong. (Resp. Br. § IV.D-F, at 21-31.)

*See Jackson*, 2020 WL 370366, at \*4 (rejecting a prior approach taken by this Court in which it failed to interpret the procedural rule, but instead amended the rule and applied it to the pending case, *see Beach Cmty. Bank v. City of Freeport, Fla.*, 150 So. 3d 1111 (Fla. 2014)).

In *Jackson*'s companion opinion, this Court made the procedural law without waiting for any input from a rules committee. *See In re Amendments to Fla. R. App. P. 9.130*, 2020 WL 370367. To justify this process, the Court cited rule 2.140(d). *Id.* at \*1. That rule authorizes this Court to “change court rules at any time if an emergency exists that does not permit reference to the appropriate committee of The Florida Bar.” Fla. R. Jud. Admin. 2.140(d). Neither of the Court's opinions explained the emergency that precluded a reference of the amendment to the appellate rules committee. *In re Amendments to Fla. R. App. P. 9.130*, 2020 WL 370367; *Jackson*, 2020 WL 370366. Quite to the contrary, the Court directed the appellate rules committee—without any sense of urgency—to consider a similar amendment to another subdivision of rule 9.130. *In re Amendments to Fla. R. App. P. 9.130*, 2020 WL 370367, at \*1. And this Court's docket indicates the rules case was opened more than three months before the Court amended the rule. SC19-1734.

The FJA does not want to quarrel with the Court on whether the amendment to rule 9.130 was warranted by an emergency as the plain text of rule 2.140(d) clearly requires. But the FJA does want to emphasize this Court's long history of relying on

input from the rules committees before it exercises its legislative function in section 2(a). A brief tutorial on that history is next.

**B. This Court has long relied on the advice of the rules committees when exercising its legislative rulemaking power.**

Our history lesson starts in December 1937. That month, the U.S. Supreme Court adopted, under a congressional authorization, the Federal Rules of Civil Procedure, which took effect in September 1938. *See* W.F. Himes, *The Federal Rules of Civil Procedure*, 12 Fla. L.J. 195, 195 (June 1938) (App. 120). During the 160 years or so preceding this landmark event, the procedural law of the American states was “a conglomeration of legislative enactments, rules and orders of courts, ancient usages, and judicial decisions.” Laurance M. Hyde, *From Common Law Rules to Rules of Court*, 22 Wash. U. L. Q. 187, 187 (1937) (App. 93); *see also* Gilbert Newkerk, *Should Florida Adopt the Federal Rules of Civil Procedure by Rule of Court?*, 14 Fla. L.J. 305, 305 (1940) (App. 80); Bruce J. Berman and Peter D. Webster, *Florida Civil Procedure* § 1.010:1. At the dawn of the new era of the federal civil rules, “Florida procedure [was] governed by the common law, subject to such alterations, modifications and additions as the legislature ha[d] seen fit to enact, and subject to rules of Court not inconsistent with law.” Newkerk, *supra* at 305.

Dissatisfied with legislative procedural rules, some from this era of the late 1930’s and early 1940’s urged state judiciaries to change the procedural law on their

own and “without legislative authority.” *E.g.*, Hyde, *supra* at 188. For example, a 1940 Florida commentator argued “the rule-making power is inherently judicial and is not legislative;” he criticized this Court’s “acquiesce[nce]” to the Legislature’s exercise of the rule-making power; he opined that “experience with legislative codes ha[d] shown that the Legislature [was] not the proper body to exercise the [rule-making] power;” and he suggested the Legislature’s exercise of rule-making power was an “usurpation of judicial power.” Newkerk, *supra* at 308 (internal quotes omitted).

With this historical backdrop, the Florida State Bar Association petitioned this Court in 1940 to adopt the federal rules. As a matter of policy, the 1940 Court agreed that Florida’s procedural laws needed to be changed. *See, e.g., Pet. of Fla. State Bar Ass’n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57, 59 (1940) (Terrell, C.J.) (“A wealth of experience teaches that court made rules have worked much more effectively than legislative made ones.”); *id.* at 61 (Brown, J. concurring) (commending the Association for its “active interest” in “improving and simplifying court procedure in this State”). But this Court declined to do so. Why? Because it stayed in its constitutional lane.

Contrary to those urging a judicial override of the legislative rules of court, this Court read the state constitution of 1940 as vesting the power to make rules of court in both the Legislature and the Judiciary. *Id.* at 226. And when the Legislature

made rules of court, the 1940 Court held such legislative acts generally “would be respected.” *Id.* at 226-27.

Then, in 1943, the Legislature, by statute, delegated its legislative power to this Court to allow to it make procedural law—that is, the Legislature granted this Court “the power to prescribe from time to time the rules, forms of process, writs, pleadings, motions, and the practice and procedure in actions at law or in suits in equity.” *Pet. of Fla. State Bar Ass’n for Adoption of Rules for Practice & Procedure*, 21 So. 2d 605, 606 (1945) (quoting Ch. 21995, Laws of Fla. (1943)). The 1945 Court, after a lengthy discussion, determined this delegation of power by the Legislature to the Judiciary was constitutional (under a prior version of the constitution). *See id.* at 606-07. Even though in the “early history of this country” the power to make rules of court “was generally exercised by the Legislature in most of the States,” this Court also was of the opinion that this power was not “strictly legislative” and thus could be delegated to the Judiciary. *Id.* at 607, 609.

Vested with this newly granted legislative power to make procedural law, the members of the 1945 Court proceeded with caution and restraint. They denied the petition to adopt the federal rules as the Florida rules. *Id.* at 609-610. Instead, Chief Justice Chapman appointed Justice Terrell to draft proposed rules, and the Court set in motion the committee process that Florida has used for seventy-five years:

It is the consensus of the court that a committee should be selected by the Chief Justice, composed of lawyers and judges who shall, using

these proposals as a basis, make such recommendations on the subject to the court as may appear to them advisable for early consideration and adoption.

*Id.* at 610; *see also* Glenn Terrell, *Rules of Civil Procedure*, 23 Fla. L.J. 230, 230-35 (1949) (Justice Terrell’s summary of the work of the first committee that led to the 1950 adoption of the predecessor to today’s civil rules) (App. 86-91).

This committee process, which originated in 1945, continued after Florida voters in 1956 constitutionally transferred the legislative rulemaking authority exclusively to this Court. *See* Committee Substitute for House Joint Resolution No. 810, § 3 (App. 63) (“The practice and procedure in all courts shall be governed by rules adopted by the supreme court.”). And, it continued after Florida voters in 1972 made this Court’s rulemaking authority—unlike its judicial authority—subject to an override by the Legislature with a supermajority vote. *See* D’Alemberte, *supra* 157-58 (discussing Senate Joint Resolution 52-D (1971)); Art. V, § 2(a) (1972 & 2020); *see also* Gary Blankenship, *The Story of the Florida Bar*, 74 Fla. B.J. 18, 22 (April 2000) (“The Bar was also heavily involved in overhauling and creating procedural rules.”); Berman and Webster, *supra* § 1.010:1 (discussing the early history of the Florida rules).

In short, when exercising its legislative rulemaking power granted to it by the people of Florida, this Court for the last seventy-five years has relied on the input of the rules committees, as well as the public. *Cf. In re Amendments to Fla. Evidence*

*Code*, 278 So. 3d 551, 555 (Fla. 2019) (Lawson, J. concurring, joined by Canady, C.J., Lagoa, and Muniz). (acknowledging “generally” such input is sought before the Court amends the rules). When amending the rules, this Court should use the committee process established by rule 2.140 and follow that rule just as everyone else in Florida must follow the rule. *See id.* at 562-63 (Luck, J. dissenting) (“Because we established mandatory procedures for exercising our rulemaking authority under article V, section 2(a), we are as required to follow them as everyone else.”).

**C. The rules committee and the rules process will provide this Court with valuable, practical input on how to amend the rules to be fair and just.**

The issues raised by discovery of an expert’s financial bias—though perhaps appearing simple on the surface—are complex in the real world. The rules committee is filled with hard-working judges and lawyers (for both civil defendants and plaintiffs) with years of practical experience. The committee members, all of whom are volunteers, can help this Court craft rules that are both fair and just. And the public should have a say too.

Treating physicians are different than retained experts. Consequently, the discovery rules for treating physicians should be different than the rules for retained experts. The FJA has a significant, genuine concern that intrusive discovery into the personal finances of treating physicians will discourage them from medically caring for individuals injured by torts. The pool of these physicians is already quite limited. If this Court were to impose rules that permit overly intrusive discovery into a

treating physician's business, then the FJA is concerned that few, if any, physicians will continue to treat tort victims.

If a Rule 2.140 proceeding were initiated, the FJA will participate in good faith and make the policy case for the appropriate discovery of financial biases of experts. That rule proceeding will be a more suitable forum than the instant judicial proceeding for resolving the policy arguments presented by the parties and amici. In a rule proceeding, this Court may change the rule, and make law, after being fully informed by all interested persons with all the available evidence. It cannot change the rule, or make law, in this judicial proceeding. It can only interpret and apply the rule and the law in this judicial proceeding.

### **CONCLUSION**

This Court should dismiss for lack of jurisdiction, or it should affirm.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/Bryan S. Gowdy

Bryan S. Gowdy

Amicus Chair

Florida Bar No. 176631

bgowdy@appellate-firm.com

filings@appellate-firm.com

865 May Street

Jacksonville, Florida 32204

Telephone: (904) 350-0075

Facsimile: (904) 503-0441

*Attorney for Amicus Curiae Florida  
Justice Association*

### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Bryan S. Gowdy

Attorney

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on February 28, 2020, and an electronic copy has been furnished to the following counsel of record:

**Kansas R. Gooden, Esq.**

BOYD & JENERETTE, P.A.  
11767 S. Dixie Hwy., #274  
Miami, FL 33156  
Telephone: (305) 537-1238  
Facsimile: (904) 493-5658  
kgooden@boydjen.com  
*Attorney for Petitioner*

**Marc Schechter, Esq.**

ROBINSON PECARO & MIER, P.A.  
501 Shotgun Road, Suite 404  
Sunrise, FL 33326  
Telephone: (954) 761-9002  
Facsimile: (954) 252-7199  
mschechter@lawdrive.com  
kristen@lawdrive.com  
*Attorney for Defendant/Petitioner*

**Kevin D. Franz, Esq.**

BOYD & JENERETTE, P.A.  
1001 Yamato Road, Suite 102  
Boca Raton, FL 33431  
Telephone: (954) 622-0093  
Facsimile: (954) 622-0095  
kfranz@boydjen.com  
*Attorney for Petitioner*

**Douglas F. Eaton, Esq.**

EATON & WOLK, P.L.  
2665 So. Bayshore Drive, Suite 609  
Miami, Florida 33133  
Telephone: (305) 249-1640  
Facsimile: (786) 350-3079  
deaton@eatonwolk.com  
cgarcia@eatonwolk.com  
*Attorney for Respondent*

**Brett M. Rosen, Esq.**

GOLDBERG & ROSEN, P.A.  
1111 Brickell Ave., Suite 2180  
Miami, FL, 33131  
Telephone: (305) 374-4200  
Facsimile: (305) 374-8024  
pleadings@goldbergandrosen.com  
bmr@goldbergandrosen.com  
*Attorney for Plaintiff/Respondent*

**Amber Stoner Nunnally, Esq.**

**Jason Gonzalez, Esq.**  
SHUTTS & BOWEN LLP  
215 S. Monroe Street, Suite 804  
Tallahassee, Florida 32301  
Telephone: (850) 241-1717  
jasongonzalez@shutts.com  
anunnally@shutts.com  
*Attorneys for Amici Curiae Chamber of  
Commerce of the United States of  
America and Florida Justice Reform  
Institute*

**William W. Large, Esq.**  
FLORIDA JUSTICE REFORM  
INSTITUTE  
210 S. Monroe Street  
Tallahassee, Florida 32301  
Telephone: (850) 222-0170  
william@fljustice.org  
*Attorney for Amici Curiae Chamber of  
Commerce of the United States of  
America and Florida Justice Reform  
Institute*

**John C. Hamilton, Esq.**  
LAW OFFICE OF JOHN HAMILTON  
OF TAMPA, P.A.  
P.O. Box 1299  
San Antonio, Florida, 33576  
jhamlawyer@gmail.com  
*Attorney for Amici Curiae Drs.  
Michael Foley and John Shim*

**Patrick A. Brennan, Esq.**  
HD LAW PARTNERS, P.A.  
P.O. Box 23567  
Tampa, Florida, 33623  
brennan@hdlawpartners.com,  
maizo@hdlawpartners.com  
*Attorney for Amici Curiae Drs.  
Michael Foley and John Shim*

/s/ Bryan S. Gowdy  
Attorney