IN THE SUPREME COURT OF FLORIDA

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

Case No. SC19-1336

v.

MIGUEL LOPEZ, as Personal Representative of the Estate of JON LOPEZ, deceased,

Respondent.
_____/

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION AND AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTEREST

The Florida Justice Association is a large, voluntary, and statewide association of more than 3,000 trial lawyers concentrating on litigation in all areas of the law. The members of the FJA are pledged to the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law, and the right of access to courts. The lawyer members of the FJA care deeply about the integrity of the legal system and, toward this end, have established an amicus curiae committee. The FJA has been involved as amicus in hundreds of cases in the Florida appellate courts, including this one.

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil-justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members frequently represent plaintiffs seeking legal recourse and accountability in Florida courts.

The FJA and AAJ primarily address Florida Rule of Civil Procedure 1.510 and the counter-part federal rule of civil procedure, Rule 56, and urge this Court to not amend Rule 1.510 until and unless the issue is thoroughly examined through the rules committee process. The issues before this Court are of upmost importance to the members of our organizations, who advocate for their clients to have the right to

jury trial preserved in all cases, such that this right should only be taken away in the pre-trial process after having a full and fair opportunity to oppose Motions for Summary Judgment.

SUMMARY OF THE ARGUMENT

We fully support the Respondent's arguments in the Answer Brief. To this, we add a few points that we hope will assist this Court in resolving this case and the issues raised by this Court in accepting jurisdiction of this case.

First, the Petitioners and supporting amici give little credence to this Court's textualism and *stare decisis* doctrines. In ignoring these doctrines, the Petitioners and their supporting amici fail to show this Court has engaged in any demonstrable errors in interpreting Florida Rule of Civil Procedure 1.510. Thus, there is no reason for this Court to recede from or overturn past precedent interpreting the rule.

Second, while we understand this Court can adopt the United States Supreme Court's "trilogy" of cases interpreting Federal Rule of Civil Procedure 56, there are meaningful textual differences in the federal and state summary judgment rules. To adopt the federal interpretation of Rule 56, but without the importance procedures and due process protections that presently exist in Rule 1.510, would reflect judicial activism and public-policy making from this Court. Moreover, this would unfairly deprive litigants of a fair ability to litigate their cases and preserve their rights to jury trials – rights which the Petitioners and amici acknowledge must be honored.

Third, while we understand this Court can adopt the Supreme Court's trilogy of cases **and** simultaneously amend Rule 1.510, , this Court should utilize the rules process so all policy views can be heard, protections can be implemented into any rule change, and to ensure the preservation of the Legislature's right under the Florida Constitution to carefully scrutinize this Court's rule-making power.

ARGUMENT

I. Under this Court's textualism and *stare decisis* doctrines, the decisional law interpreting Rule 1.510 may be revised only if a demonstrable error is shown, and Petitioners and their allies have not shown this.

The FJA and AAJ support Respondent's textual argument that this Court's precedents on Rule 1.510 are not "demonstrably erroneous" (AB 37-48). Some amici supporting the Petitioners argue this Court may revise its prior interpretations of Rule 1.510 merely because those interpretations are found in the "decisional law." (*E.g.*, Fla. Health Care Br. 2, 9). This argument overlooks the doctrines of textualism and *stare decisis* adopted by this newly constituted Court.

"Decisional law" runs the gamut from, on the one hand, interpreting text to, on the other hand, making the common law and rule of courts. *Compare Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179 (Fla. 2020) (interpreting a rule of procedure), *with Birge v. Charron*, 107 So. 3d 350 (Fla. 2012) (making common law), *and In re Amendments to Fla. R. App. P. 9.130*, 289 So. 3d 866 (Fla. 2020) (adopting a new rule of appellate procedure). Here, this Court is interpreting text—not making law. *See Jackson*, 288 So. 3d at 1182 ("Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." (internal citations and alteration omitted)); *accord Koppel v. Ochoa*, 243 So. 3d 886, 891 (Fla. 2018) ("It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction.") (quoted

at Fla. Justice Reform Institute Br. 5). As the Respondent's Answer Brief highlights, significant textual differences exist between today's Florida Rule of Civil Procedure 1.510 and the 1986 and present versions of Federal Rule 56 (AB 45-48; App. 33-35). The FJA and AAJ elaborate further on the present differences in the next section of this amicus brief.

Some amici supporting the Petitioners, however, downplay these textual differences. (*E.g.*, Chamber of Commerce Br. 17 (citing Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. B.J. 20, 27 (Feb. 2002)). But the article these amici cite relies on a faulty method for interpreting text. Specifically, Logue [now the Honorable Judge Logue, of the Third District Court of Appeal] and Soto urge the "modification of the summary judgment standard in Florida by judicial decision," as that process, they say, would "reflect the classic process of common law reasoning." Logue & Soto, *supra*, at 28 & n.48 (emphasis added).

Of course, this Court has adopted textualism as the proper method for interpreting all texts. *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020). Textualists reject the notion that judges should interpret text with a common-law "attitude." Antonin Scalia, *Common-Law Courts in a Civil-Law System…*88 (Tanner Lectures March 1995) (https://tannerlectures.utah.edu/_documents/a-to-

z/s/scalia97.pdf). In other words, textualists refuse to use an interpretive "mindset that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'" *Id.* Simply put, textualists have discarded the consequentialist method of interpretation that is so prevalent when courts exercise their power to make the common law. *See, e.g.*, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, §§ 22, 61, at 353 (2012) (discussed at AB 32, 41); *see also Bostock v. Clayton County, Georgia*, 2020 WL 3146686 (U.S. June 15, 2020) (utilizing textualism to hold that Title VII of the Civil Rights Act's prohibition of employer discrimination on the basis of "sex" includes discrimination based on sexual orientation or transgender status).

Notwithstanding this Court's adherence to textualism, now-Judge Logue—one of the authors of the 2002 article on which Petitioners' amici heavily rely—recently wrote a judicial opinion that employs consequentialism to urge this Court to discard the "slightest doubt" standard. *See Mobley v. Homestead Hosp., Inc.*, 291 So. 3d 987, 992 (Fla. 3d DCA 2019) (Logue, J. concurring).[1] Granted, Judge Logue's opinion admirably explores history to assert that, in the context of a directed verdict, the U.S. Supreme Court in 1871 discarded the "scintilla" rule (a variation of the

[1] Judge Logue's concurring opinion in *Mobley* was written in 2019, prior to this Court's adoption of textualism and the supremacy of the text principles.

"slightest doubt" standard). *Id.* at 992-93 (citing *Schuylkill & Dauphin Imp. Co. v. Munson*, 81 U.S. 442, 448(1871)). He then reasons that, because summary judgment and directed verdict are "two sides of the same coin," the scintilla/slightest-doubt standard likewise should be discarded today.[2] *Id*. at 992-95 (Logue, J. concurring).

Judge Logue's concurring opinion, however, is infected with the very consequentialist reasoning that textualists abhor. For example, he contends, like many of Petitioners' amici, that a "party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict." *Id.* at 993 (Logue, J. concurring) (internal quotes omitted). Similarly, he argues: "Florida would be well served by a restatement of the summary judgment standard to bring Florida in line with the best practices adopted long ago by most other jurisdictions in the nation." *Id.* at 994 (Logue, J. concurring). This is classic consequentialism and policy-based reasoning, which also overlooks the methods of how many other jurisdictions have revisited or adopted summary judgment standards, and overlooks the rule-making process here in Florida.

[2] A scholar who has undertaken a textualist examination of Rule 56 has rejected Judge Logue's proposition that the standards for summary judgment and directed verdict should be the same. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 133 (1988) (arguing that Rule 56's "language does not compel or even support the view that the summary judgment standard mirrors the directed verdict standard").

Judge Logue's opinion (like the briefs of Petitioners and their amici) misses the mark in the world of textualism. A textualist does not "'interpret legal texts to produce the best outcome for society,'" or "'to produce optimal policy results.'" (AB 32 (quoting Neil Gorsuch, *A Republic, If You Can Keep It* 137 (2019)). Instead, a textualist tries to determine the original public meaning of a text at the time it was adopted. *See* Scalia and Garner, *supra* § 7, at 78-92. Rule 1.510 and its predecessors were not adopted either in 1871 or to govern motions for directed verdict. Rule 1.510 and its predecessors were adopted in 1950 to govern motions for summary judgment (AB 38). Thus, under textualism, the pertinent inquiry is what did the text of Rule 1.510 mean in 1950 (AB 39-40).[3]

Not only do Judge Logue, Petitioners, and their amici fail to follow the bedrock textualist principle of determining what Rule 1.510 meant when it was

[3] Today's United States Supreme Court decision in *Bostock* focused on what did the text of Title VII mean in 1964. The fact that Congress did not even consider issues such as transgender status was not material; what mattered was what the text meant when the statute was enacted, 2020 WL 3146686, at *3:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

adopted in 1950, they also skip over this Court's law on precedent and *stare decisis*. The question to be answered here is not merely whether this Court's prior interpretations of Rule 1.510 were wrong. Rather, the question is whether they were so wrong that "demonstrable error" has been shown such that this Court's precedents should be overturned. (AB 37); *State v. Poole*, No. SC18-245, 2020 WL 3116597, at *14 (Fla. Jan. 23, 2020). Stated another way, have Petitioners shown a "serious interpretative error" in the precedents that "impos[ed] a meaning on the [written law] that is unsound in principle?" *Roughton v. State*, 185 So. 3d 1207, 1211 (Fla. 2016) (Canady, J.) (internal quotes omitted). No such showing has been attempted, let alone made. And, Petitioners cannot meet either of these tests.[4]

To the contrary, when Rule 1.510's predecessors were adopted in the 1950's, the federal courts already had ingrained the slightest-doubt standard into the

[4] For the Petitioners to prevail here, their only recourse is for this Court to amend Rule 1.510, without the benefit of the rule-making process, and to somehow have the rule govern this case, even though Petitioners did not advocate for a different standard in the lower courts. The FJA and AAJ urge that any change to the standard by this Court, and without the rule-making process, not retroactively govern pending summary judgment rulings made by lower courts that utilized the current text of Rule 1.510 and this Court's prior decisions interpreting the current text of Rule 1.510. Instead, any rule change by this Court should be prospective only, whether in this case or all other pending cases in the Florida trial and appellate courts. *Cf. Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1186 (Fla. 2020) (while issuing a separate opinion amending Rule 9.130, this Court explained that, "[o]ur decision is without prejudice to FHP to argue sovereign immunity to the trial court pursuant to this opinion and, if necessary, to seek interlocutory review *under the new version of rule 9.130*.") (emphasis added).

meaning of Rule 56 (AB 42). When one jurisdiction (here, Florida) adopts a written law from another jurisdiction (here, the United States), the courts of the adopting jurisdiction "look to" the originating jurisdiction's "interpretation [of the written law] at the time [the written law] was adopted, even if the [adopting jurisdiction's] highest court subsequently has changed its construction of the [written law]." 2B *Sutherland Statutory Construction* § 52:2 & n.51 (7th ed. Oct. 2019). By following the federal interpretation of the rule at the time of adoption (1950), and by declining to follow the new federal interpretation announced thirty-six years after adoption (1986), this Court's predecessors did not demonstrably err.

II. Rules 1.510 and 56 are textually different, and state and federal practice provide different procedures and due process protections.

Because of a 1963 amendment to Rule 56, the version of Rule 56 interpreted by the U.S. Supreme Court in the 1986 trilogy[5] was textually and materially different than today's version of Rule 1.510 (AB 45-48); *see also Jones v. Gen. Motors Corp.*, 939 P.2d 608, 615-616 (Or. 1997) (declining to following 1986 federal trilogy to interpret the state summary judgment rule adopted in 1975). The FJA and AAJ agree with, and will not belabor, this point.

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In this brief, the FJA and AAJ emphasize other textual and practical differences between the two rules that—along with the local federal rules—result in significantly different procedures and due process protections in the two systems. It would make no sense—and be unfair—for this Court to adopt the federal trilogy standard on "no genuine issue as to any material fact" but then leave out the procedures and due process protections in Rule 56 and the local federal rules. Of course, adding the federal procedures and protections can be done only by way of this Court's rule-making authority. *See* Art. V, § 2(a), Fla. Const.

Respondent's appendix has a side-by-side comparison of today's Rules 1.510 and 56 (App. 33). It deftly illustrates how the two rules are textually very different.[6]

Presentation of evidence and arguments. Federal and Florida practice under the two rules diverge greatly when it comes to presenting evidence and arguments.

Rule 1.510(c) requires the motion to "state with particularity the grounds upon which it is based and the substantial matters of law to be argued" and to "specifically

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[6] One treatise compares the two rules, in part, as follows:

> The 2010 federal amendments [to Rule 56]…brought very significant changes to the organization of the rule and to many of its details, with subdivisions no longer easily corresponding to the Florida rule, and thus making comparison considerably more difficult. Substantively, however, the rules remain the same, though one must look to different subdivisions to find the comparable provisions.

Bruce J. Berman and Peter D. Webster, *Florida Civil Procedure* § 1.510:2 (April 2020). Though characterizing the two rules as "substantively" the same, the treatise describes multiple differences between the two rules. *See id*.

identify" the evidence "on which the movant relies." This provision does not require pinpoint citations to the record, but rather a mere identification of the deposition, affidavit, etc. on which the movant relies. The time periods for specifying grounds and supporting evidence are brief; the movant must do so just twenty days before the hearing, while the opposing party may wait as late as just two days before the hearing to identify his or her evidence. *See* Fla. R. Civ. P. 1.510(c). Florida courts have interpreted the rule as requiring a hearing. Berman and Webster, *supra* § 1.510:23 n.5.

In contrast, in federal court, a hearing is generally not held. *Id.* § 1.510:3 n.1; *see, e.g.*, S.D. Fla. L.R. 7.1(b)(1); N.D. Fla. L.R. 7.1(K), 56.1(G); M.D. Fla. L.R. 3.01(j). Thus, the order and timing of the presentation of the evidence and arguments are driven by the local rules and case management orders. *See, e.g.*, N.D. Fla. L.R. 56.1(C) (allowing twenty-one days for written opposition to a motion). The nature of federal practice means that, unlike in state court, a party cannot surprise his or her opponent with a flurry of evidentiary filings just two days before the motion is to be heard. *Cf.* Fla. R. Civ. P. 1.510(c).

Critically, the federal movant—unlike the state movant—must "cit[e] to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1) (emphasis added). The local federal rules elaborate further on this requirement. For example, in one district, each party must submit a separate statement of facts, and each fact must be

in a stand-alone numbered paragraph, supported by "specific, pinpoint references to particular parts of record material." *E.g.*, S.D. Fla. L.R. 56.1(b)(1)(B); *see also* N.D. Fla. L.R. 56.1(F) ("Each memorandum must include pinpoint citations to the record evidence supporting each factual assertion."). A judge may review up to three statements of fact: (i) the movant's; (ii) the opposing party's; and (iii) the movant's reply. S.D. Fla. L.R. 56.1(b). If a party fails to controvert a fact stated in his or her opponent's papers, that fact may be deemed admitted. *See* Fed. R. Civ. P. 56(e); S.D. Fla. L.R. 56.1(c). The district court is required to consider only the cited materials, though it may consider non-cited materials in the record. Fed. R. Civ. P. 56(c)(3); N.D. Fla. L.R. 56.1(F). The federal rule also regulates objections to the admissibility of submitted materials. *See* Fed. R. Civ. P. 56(c)(2).

No comparable analogues exist in Florida Rule 1.510 for these multiple federal provisions, discussed immediately above, concerning the presentation of evidence. But if those differences are not enough to persuade this Court to send this matter to the rules committee, consider the differences between federal and state practice with respect to memoranda of law. Memoranda of law are not required by any Florida civil rule. Many lawyers submit them, but a fair number of lawyers do not, particularly those without the resources to submit memorandums of law that are not even compelled by rule. The timing and lengths of such memoranda—and whether replies or sur-replies are allowed—are also unregulated by the Florida rules.

By comparison, the local federal rules mandate memoranda and have specific requirements. *See, e.g.*, S.D. Fla. L.R. 7.1(a)(1)&(c); N.D. Fla. L.R. 56.1(B)-(C); M.D. Fla. L.R. 3.01(a).[7]

When a party may move for summary judgment. Under Rule 1.510, a defendant may move at "any time," while a claimant may move twenty days after the action's commencement or any time after a defendant moves for summary judgment. Fla. R. Civ. P. 1.510(a)-(b). Under Rule 56, absent a court order, either party may move "at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b). The federal rule's express tying of the motion's timing to the discovery cut-off suggests the importance of allowing discovery before a judicial ruling on the motion. *Cf.* 10A Mary Kay Kane, *Wright & Miller Federal Practice and Procedure*, § 2717 (4th ed. April 2020) (noting that, at the "very early stage in the litigation, the court may be reluctant" to rule on a motion). While some Florida courts also have expressed a similar reluctance, other Florida courts have not been so reluctant to

[7] The Amicus Brief of Retired Florida Circuit Court Judges in Support of Respondent also points out numerous safeguards under Rule 56, such as timing, notice, discovery, and forms of evidence, that are absent under Rule 1.510 and the Florida Rules of Civil Procedure. Additionally, the Amicus Brief explains that federal judges have full-time law clerks who aid federal judges in sorting through evidence in a directed- verdict-like analysis and rendering decisions on summary judgment motions, including the memoranda of law submitted by the parties.

allow summary judgment before the close of discovery. *See generally* Berman and Webster, *supra* § 1.510:10 nn.4-7.

Similar but not identical provisions. Admittedly, the two rules have provisions that are similar, but even these similar provisions are far from identical in their wording. Here are a few examples:

- Fed. R. Civ. P. 56(d); Fla. R. Civ. P. 1.510(f) (what a party opposing summary judgment may do if facts are unavailable to him or her).
- Fed. R. Civ. P. 56(g); Fla. R. Civ. P. 1.510(h) (bad-faith affidavits).
- Fed. R. Civ. P. 56(c)(4); Fla. R. Civ. P. 1.510(e) (form of affidavits).

Surely, in some case someday, the textual differences between these similar provisions will affect the outcome.

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In sum, federal and state practice under Rules 56 and 1.510 have considerable differences, especially insofar as how evidence and arguments are presented, and reviewed by the trial court judges, with full-time law clerks only in federal court. If this Court is inclined to adopt the federal trilogy for interpreting the phrase "no genuine issue as to any material fact," then it should, and we would say must, consider a thorough revision of Rule 1.510, not just doing a touch up. That's a job for the rules committees, or at the least, with the input of the rules committees. This Court recently removed itself from the process of adopting jury instructions,

entrusting those rules committees to handle that process. *See In re Amendments to the Florida Rules of Judicial Administration, the Florida Rules of Civil Procedure, and the Florida Rules of Criminal Procedure—Standard Jury Instructions*, No. SC20-145, 2020 WL 1593030 (Fla. Mar. 5, 2020), Here, we simply ask this Court, if it is inclined to adopt the federal trilogy, to first send this to the rules committees to consider proposed revisions to rule 1.510, and the impact that any rule change will have on our court system.

III. This Court should employ the rules process so all policy views can be heard, and so the Legislature does not lose its constitutional check on this Court's rule-making power.

The Petitioners and their supporting amici briefs have provided this Court with many policy arguments. Tellingly, there is <u>almost nothing</u> on interpreting the text of Rule 1.510. The FJA and AAJ share Respondent's understanding that this Court has adopted textualism and that doctrine strongly condemns the consideration of policy when interpreting text (like Rule 1.510). *Cf. Bostock*, 2020 WL 3146686, at *17:

> With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. post, at 44–54 (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it

> comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

So, given this Court's embrace of textualism, the FJA and AAJ proceed cautiously into the policy arena. But it seems something needs to be said to counter all the pro-trilogy policy arguments.

First, a substantial minority of states have rejected the 1986 federal trilogy. One recent study argues fourteen states have rejected the federal standard in whole or in part. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Calif. L. Rev. 411, 429–31 (2018); *see also Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 820 n.11 (Iowa 2019) (Appel, J. dissenting) (listing states and academic articles rejecting or criticizing the federal standard). An amicus supporting Petitioner puts this number at just nine states (FDLA Br. 7). But it is not important whether the exact number is nine or fourteen or somewhere in between. What is notable is that the federal trilogy has not been universally accepted. A State's willingness to break away from the pack is "one of the happy incidents of [our] federal system." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

Second, the opposition to the federal standard is alive and well here within Florida. Take, for example, Republican State Senator David Simmons. He has co-

authored an article that is highly critical of the federal standard and of its impact on the constitutional right to a jury trial. *See* David H. Simmons *et al*., *Celotex Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard is Undermining the Seventh Amendment Right to a Jury Trial*, 1 Fla. A&M U. L. Rev. 1 (2006); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, 78 N.Y.U.L. Rev. 982 (2003) (criticizing the "expansive reading of the trilogy [as] encroach[ing] upon traditional litigation values").

Third, Florida's constitution gives Senator Simmons and his fellow legislators a role to play in the rule-making process. With a super-majority vote, they may rescind any rule of court adopted by this Court. *See* Art. V., § 2(a), Fla. Const. ("Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."). The Legislature has exercised this power before. *See, e.g., In re Clarification of Fla. Rules of Practice & Procedure*, 281 So. 2d 204, 204 (Fla. 1973). But what if this Court were to change the meaning of Rule 1.510 by "re-interpreting" it to mean what the trilogy says? Could the Legislature repeal this Court's "decisional law" re-interpreting Rule 1.510 to mean something different than it meant last year? That seems questionable. By avoiding the rules process and re-fashioning Florida law thorough creative re-interpretation,

this Court would be flouting the constitutional check on its own power—a check granted by the voters in 1972 to the Legislature to repeal rules of court. (*See* AB 35 n.10 (explaining the 1972 amendment to Article V, section 2(a)).

Fourth, video recording evidence—while powerful—is often neither conclusive nor susceptible to only one solitary reasonable interpretation. *See Patel v. City of Madison, Alabama*, 18-12061, 2020 WL 2745533, at *1 (11th Cir. May 27, 2020) ("It's long been said that a picture is worth a thousand words. Of course, people might reasonably differ on what those words are.") In the U.S. Supreme Court case discussed in the lower courts, Justice Stevens viewed the video recording there differently than his colleagues. *See Scott v. Harris*, 550 U.S. 372, 389 (2007) (Stevens, J. dissenting). A later study found that Justice Stevens was not alone. A substantial minority of study respondents—who included a fair number of "African Americans" and "low-income workers"—"tended to form more pro-plaintiff views of the facts than did the [*Scott* majority]." Dan M. Kahan, et. al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 841 (2009). Thus, the notion suggested by the lower appellate court—that modern video recording is a game changer when deciding whether a jury should decide case or not—is unfounded. It is like any other evidence subject to differing reasonable interpretations and inferences. The recent law enforcement videos seen on our television screens and web browsers in the last few weeks,

showing interactions between police officers and protesters, and police offers and individuals who may have violated the law, demonstrates that video evidence is often subject to different, reasonable interpretations.[8]

Fifth and finally, the FJA and AAJ would agree with the arguments of other amici supporting the Respondent (ABOTA and the retired judges) that the rules committee is the appropriate forum for this Court to initiate any changes to the Florida rules. Those committees are full of experienced judges and lawyers of all stripes who can provide invaluable advice and assistance to this Court when amending the rules.

CONCLUSION

The FJA and the AAJ ask this Court to not overturn or recede from past precedent interpreting Rule 1.510, that this Court recognize the textual differences between Rule 1.510 and Rule 56, and if this Court were inclined to amend Rule 1.510, that this Court first refer the issue to Florida's rules committees to evaluate the important considerations that will protect the due process rights of all parties.

[8] We are not specifically referring to any particular law enforcement videos; there are certainly some videos for which there is only one reasonable interpretation. The Respondent's Answer Brief well addresses this particular case, but the important point is that video evidence is not often what a first or even observation may seem to reveal to one observer, one trial judge, or even a panel of appellate judges.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing has been furnished to all counsel on the attached service list by e-mail on June 15, 2020.

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CERTIFICATE OF TYPE SIZE & STYLE

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SERVICE LIST

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