IN THE FLORIDA SUPREME COURT

CASE NO.: SC19-385

STEVEN YOUNKIN,

Petitioner,

vs.

L.T. Case Nos.:
5D18-3548; 2017-CA-003610

NATHAN BLACKWELDER,

Respondent.
_____/

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT NATHAN BLACKWELDER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Justice Association ("FJA"), as amicus, supports Respondent Nathan Blackwelder. 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 counsel 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

Petitioner seeks to extend *Worley v. Central Fla. Young Men's Christian Ass'n.*, 228 So. 3d 18 (Fla. 2017) to shield from discovery the relationship between a law firm and its retained expert witness. In contrast, two amici seek to overrule *Worley*, while two amici seek to adjudicate a privacy claim. This Court, however, may not decide abstract questions. It must review whether the district court correctly decided the controversy below based on the facts and legal arguments presented.

The district court adjudicated a petition for certiorari, not an appeal. Yet, no party or amicus has addressed whether the district court correctly denied the petition. Nor has any party or amicus discussed the certiorari standards. But this Court must

consider those standards to stay within its constitutional lane. This Court does not have jurisdiction to answer a question; it has jurisdiction to "review [the district court's] decision." Fla. Const. Art. V, § 3(b)(4). An answer to the certified question must affect the outcome of the decision below. Petitioner has not established—or even argued— how an affirmative answer to the question will alter the outcome of the certiorari proceeding below. In fact, an affirmative answer will not change the result below. Even if this Court extends or overrules *Worley*, such actions will not establish that the trial court departed from the essential requirements of the law. Moreover, the district court never "passed upon" the certified question, and thus this Court must dismiss this case for lack of its own jurisdiction.

Also missing from the briefs so far is any consideration of Rule 1.280(b)'s actual text. Instead, the parties and other amici treat this Court like a legislature by offering policy arguments. The judicial power is to interpret, not make, the law. Judges may not impose policy preferences. The way judges stay in their lane is to interpret the law's text per its ordinary meaning. This brief, unlike every other brief, interprets the rule's text. That text authorizes Respondent's financial-bias discovery.

A more appropriate forum exists for considering policy preferences. That forum is a Rule 2.140 proceeding under this Court's rule-making authority. The FJA is prepared to advocate for individuals' rights in the rule-making forum. But, in this judicial proceeding, this Court may decide only this controversy, and nothing more.

ARGUMENT

I. This Court must decide this case, and only this case, under the applicable certiorari standards; however, because the district court never "passed upon" the certified question, this Court lacks jurisdiction.

A. This Court must decline the other amici's invitation to decide questions not at issue in this case.

Petitioner and its amici do not seek the same relief. Petitioner and one amicus (Florida Defense Lawyers Association) seek to extend the holding of *Worley*, 228 So. 3d at 18, which precluded discovery of the relationship between a law firm and its client's treating physician; they ask that *Worley* be applied to preclude discovery of the relationship between a law firm and its retained expert witness. (Pet'r's Initial Br. 5-6; FDLA Amicus Br. 10.) In contrast, two amici—the U.S. Chamber of Commerce ("Chamber") and the Florida Justice Reform Institute ("Institute")—seek to overturn *Worley* and ask this Court to authorize discovery of the relationship between a law firm and its client's treating physician (Chamber/Institute Amicus Br. 18); they seek this relief even though the facts here involve a relationship between a law firm and its retained expert witness. Another pair of amici, two retained experts, interject claims based on Florida's constitutional right to privacy, even though neither Petitioner, his law firm, nor any of his retained experts have asserted such claims. (Foley/Shim Amicus Br. 10 (citing Fla. Const. Art. I, § 23).)

This Court must decide this case, and only this case, based on the facts of this case. It may not decide abstract questions of law on which some amici seek advisory

opinions or grand pronouncements overturning precedent. "Courts of law are established for the sole purpose of deciding issues before them arising from litigated cases and should limit pronouncements of the law to those principles necessary for that purpose." *Dobson v. Crews*, 164 So. 2d 252, 255 (Fla. 1st DCA 1964), *aff'd by Crews v. Dobson*, 177 So. 2d 202 (Fla. 1965).

Here, Respondent objected to Petitioner's request to discover the relationship between Respondent's counsel and treating physicians. (Resp't's Answer Br. 2.) Petitioner never obtained a ruling on that objection. (*Id.*) Thus, the discoverability of this counsel/treating-physician relationship is not before the Court. *See, e.g., Baker v. State*, 71 So. 3d 802, 814 (Fla. 2011) (an appellate court may not review an issue unless it is first "ruled on by the trial court"). Similarly, no party has argued that discovery of his expert's relationship with his law firm violated a privacy right; thus, this issue is not before this Court. *See D.H. v. Adept Cmty. Services, Inc.*, 271 So. 3d 870, 887–88 (Fla. 2018) (Canady, J., dissenting); (criticizing the majority for deciding an issue not preserved in the lower courts); *Sebo v. Am. Home Assurance Co., Inc.,* 208 So. 3d 694, 700 (Fla. 2016) (Polston, J. dissenting) (same).

B. This Court must review whether the district court correctly denied the petition for certiorari under the applicable standards.

The parties and other amici have overlooked the limited jurisdiction that the district court had below. That jurisdiction did not lie in the district court's power to adjudicate appeals of final judgments or interlocutory orders. *See* Fla. Const. Art. V,

§ 4(b)(1). Instead, its jurisdiction, if any, lie in a constitutional provision granting it the power to issue writs of certiorari. *See id.* § 4(b)(3). "Loosening" the certiorari standards vitiates the constitutional limits placed on the district courts' power; the improper issuance of a certiorari writ "is a backdoor way around the constitutional limitation on appeals from nonfinal orders, and usurps [this Court's] authority to designate certain nonfinal orders as appealable." *Adkins v. Sotolongo*, 227 So. 3d 717, 722 (Fla. 3d DCA 2017) (Luck, J. concurring);[1] Fla. Const. Art. V, § 4(b)(1).

A district court may issue a writ of certiorari only if the trial court's order: (i) departs from the essential requirements of law and (ii) results in material injury for the remainder of the case (iii) that cannot be corrected on a post-judgment appeal. *E.g., Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012). The first element is "something that is more than just a legal error." *Id.* "The last two elements are jurisdictional and must be analyzed before the court may even consider the first element." *Id.*

The basis of this Court's discretionary jurisdiction (certified question of great public importance) does not relieve this Court of its responsibility to review the case from the vantage point of the district court—which could only issue a writ of

[1] In *Adkins*, then-Judge Luck addressed the "loosening" of certiorari standards in the context of denials of discovery, whereas this case concerns the granting of discovery. But now-Justice Luck's concern applies equally here where no party or amicus has addressed whether the district court could issue a writ of certiorari in this case.

certiorari if the applicable standards were satisfied. *Cf. Ruffin v. Kingswood E. Condo. Ass'n, Inc.*, 719 So. 2d 951, 952 (Fla. 4th DCA 1998) (noting the "well settled" rule that an appellate court has "an independent duty to recognize [a] jurisdictional defect [in the lower tribunal] even if neither party raises the issue"). This Court's decision in *San Perdido* proves this point. There, the First District certified a question arising out of a petition for certiorari filed in the district court. 104 So. 3d at 346. The mere certification by the First District did not allow this Court to answer the certified question without regard to the certiorari standards that constitutionally limited the district court's power. To the contrary, while the majority, the concurrence, and the dissent disagreed whether the district court should have issued the writ of certiorari, all three opinions answered the certified question under the certiorari standards. *See id.* at 345-59. Indeed, Justice Canady reframed the question to clarify that he was answering the question under the certiorari standards. *Id.* at 358 (Canady, J. dissenting).

The requirement that this Court review the decision below—and not merely answer the certified question—is grounded in the constitution's plain text. This Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." Fla. Const. Art. V, § 3(b)(4) (emphasis added); *see also* Philip J. Padovano, *Florida Appellate Practice* § 3:11 (2018 ed.). Of course, this Court may answer the certified question while reviewing

the district court's decision, but it may not merely answer the question while failing to review the district court's decision. Stated another way, the Court's task is to decide whether the district court correctly decided the controversy below, not merely to answer the certified question. *See* Fla. Const. Art. V, § 3(b)(4); *see also* Padovano, *supra* § 7:1 (discussing the error-correcting function of appellate courts). In other proceedings, this Court may just answer a legal question without deciding an actual controversy and without reviewing the work of a lower tribunal. *See, e.g.,* Fla. Const. Art. V, § 3(b)(10) (allowing this Court to issue advisory opinions when requested by the Attorney General). But it may not do so in this proceeding.

The parties and other amici have not addressed the correctness of the Fifth District's decision below. Instead, they have argued the answer to the certified question without considering the certiorari standards that controlled the decision below. They are leading this Court to decide an abstract legal question contrary to the command of our constitution's plain language. *See* Fla. Const. Art. V, § 3(b)(4). They want the Court to answer a question that may not resolve the controversy decided by the district court; this, the Court may not do. *See id*.

C. Even if this Court extends or overturns *Worley*, the district court's decision—that the trial court did not depart from the essential requirements of law—was correct.

The controversy decided by the Fifth District was not whether the trial court's order was erroneous, but rather whether that order departed from the essential

requirements of law. *See Younkin v. Blackwelder*, Case No. 5D18-3584, 2019 WL 847548, at *1 (Fla. 5th DCA 2019). A departure from the essential requirements of law is "more than just a legal error." *E.g., San Perdido Ass'n*, 104 So. 3d at 351. No party or amicus has addressed whether the Fifth District correctly decided that the trial court's order did not depart from the essential requirements of law. For instance, the single argument heading in Petitioner's initial brief advises this Court only how to answer the certified question; it fails to state, one way of the other, whether the district court correctly decided the certiorari petition below. (Pet'r's Br. 6.)

If this Court were to extend *Worley* (as Petitioner seeks) or overturn *Worley* (as two amici seek), neither action would warrant a conclusion that the trial court departed from the essential requirements of law. When the law is "unsettled," a trial court cannot depart from the essential requirements of the law:

> There is an important difference between a departure from the essential requirements of law where there has been a violation of a clearly established principle of law and a case that involves an issue of law where the law is not yet settled. *See Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) ("Unfortunately, there is no Florida case squarely discussing [this legal question]. Without such controlling precedent, we cannot conclude that either court violated a 'clearly established principle of law.'" . . .). We would improperly expand certiorari jurisdiction by applying it to all cases where a party asserts only that the trial court erred . . . without regard to the higher threshold of whether the ruling departed from the essential requirements of law.

San Perdido Ass'n, 104 So. 3d at 355–56 (emphasis added).

Though Justices Canady and Polston dissented in *San Perdido Ass'n*, they did

not disagree with the foregoing statement. *See id.* at 358-59 (Canady, J. dissenting, joined by Polston, J.). To the contrary, these two justices later agreed that a departure from the essential requirements of law cannot be found when Florida case law on the substantive question is "ill-defined." *See Rodriguez v. Miami-Dade County*, 117 So. 3d 400, 409 (Fla. 2013) (Canady, J. concurring in result, joined by Polston, J.).

Rodriguez, like this case, arose out of a petition for certiorari filed in the district court, and it came to this Court based on a certified conflict.[2] 117 So. 3d at 401-02. Justice Canady explained the "ill-defined" nature of Florida case law on whether the so-called "emergency exception" negated a sovereign's waiver of immunity. *See id.* at 409 (Canady, J. concurring in the result). In reasoning that applies equally to this case, Justice Canady framed the question that this Court had to decide in reviewing the district court's decision as follows:

> [T]he issue on which this case properly turns is not whether the Third District correctly applied the emergency exception. Instead, the issue is whether the Third District could properly conclude that the circuit court departed from the essential requirements of law.

Id. at 409 (Canady, J. concurring in the result) (emphasis added). Then, Justice Canady correctly concluded, "[a] determination that the circuit court departed from the essential requirements of law in failing to apply the emergency exception is unwarranted because the scope of the emergency exception remains ill-defined in

[2] This Court's jurisdictional bases for "certified conflict" and "questions of great public importance" arise from the same provision. *See* Fla. Const. Art. V, § 3(b)(4).

the Florida case law." *Id.* (Canady, J. concurring in the result).

Here, the right claimed by the Petitioner—the purported right of his law firm to be free of discovery into its relationship with his retained expert witness—is not just "ill-defined." It has never been recognized before. In fact, when the trial court issued its order, multiple Florida appellate courts had squarely rejected the recognition of this right. (Pet'r's Br. 10 (citing *Vazquez v. Martinez*, 175 So. 3d 372, 374 (Fla. 5th DCA 2015) (allowing financial-bias discovery from a civil defendant's attorneys and other agents); *Herrera v. Moustafa*, 96 So. 3d 1020, 1021-22 (Fla. 4th DCA 2012) (allowing a jury to hear evidence of amounts paid by a civil defendant's attorneys' employer to the retained expert witness); *Springer v. West*, 769 So. 2d 1068, 1069 (Fla. 5th DCA 2000) (holding an "insurer's relationship to an expert is discoverable from the [defendant] insured").) The trial court was bound to follow these decisions, *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992), and so, its order following these decisions did not depart from the essential requirements of law.

Moreover, Petitioner has not argued that he has established a departure from the essential requirements of law. Petitioner thus has abandoned any such argument, and he cannot resurrect it in his reply. *See, e.g., Parker-Cyrus v. Justice Admin. Com'n*, 160 So. 3d 926, 928 (Fla. 1st DCA 2015) (citing multiple cases holding an argument not raised in an initial brief is abandoned and may not be raised in a reply).

In sum, this Court must review whether the district court correctly denied the

petition below under the certiorari standards; this Court may not simply answer the certified question. The Fifth District correctly decided the controversy below. Given the status of the case law, the trial court did not depart from the essential requirements of the law. No party or amicus has argued to the contrary, and thus Petitioner has abandoned any such argument.

D. This Court lacks jurisdiction because the Fifth District did not "pass upon" the certified question.

This case suffers from a fatal jurisdictional flaw. Our constitution's plain text grants this Court subject matter jurisdiction only if the district court of appeal "passes upon" the certified question. Fla. Const. Art. V, § 3(b)(4); *see Pirelli Armstrong Tire Corp. v. Jensen,* 777 So. 2d 973, 974 (Fla. 2001); *Gee v. Seidman & Seidman*, 653 So. 2d 384, 385 (Fla. 1995). The Fifth District adjudicated a petition for certiorari. Thus, the question the Fifth District "passed upon" was whether the trial court departed from the essential requirements of law. *See, e.g., Younkin*, 2019 WL 847548, at *1 ("Petitioner is not entitled to relief because he has failed to show that the trial court's order departed from the essential requirements of law.").

The certified question, however, asks this Court to answer a question different from any question on which the Fifth District "passed upon." With its certified question, the Fifth District seeks an advisory opinion on the discoverability of a law firm's relationship with a retained expert, unburdened with the heightened standards of certiorari. Specifically, the Fifth District asks, "Whether . . . *Worley* should also

apply to preclude a [non-party] defense law firm . . . from having to disclose its financial relationship with [retained CME] experts . . . ?" *Id.* at *2. The Fifth District never passed upon this question; instead, it passed upon on whether Petitioner had shown a departure of the essential requirements of law. Accordingly, this Court lacks jurisdiction, and it should dismiss jurisdiction as being improvidently granted. *See, e.g., Pirelli Armstrong Tire Corp.,* 777 So. 2d at 974.

II. Rather than weigh the parties' and amici's policy arguments, this Court should examine Rule 1.280(b)'s plain text; that text authorizes discovery of the relationship between a party's law firm and retained expert.

If this Court decides it has jurisdiction, this amicus brief assists the Court by navigating around the conflicting policy agendas presented by the parties and other amici. This brief applies accepted judicial and textualist principles that are not based on impermissible policy preferences or unsworn factual assertions.

The judicial power, unlike the legislative and executive powers, "requires [a court] to clarify and settle . . . the meaning of written laws." *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J. concurring) (citing The Federalist No. 78, at 468; The Federalist No. 37, at 229). In exercising their interpretive powers, judges should not let the policy consequences of their interpretation "change [their] understanding of the law." *United States v. Davis*, 139 S. Ct. 2319, 2335 (2019) (Gorsuch, J.). The parties and other amici have overlooked these core principles. Their briefs are filled with policy arguments and unsubstantiated factual assertions.

What is lacking in their briefs, however, is any examination of the governing text.

The first step in exercising judicial power is to examine the governing text. *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 2, at 56 (2012) ("When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge . . . examines the very words of the instrument."). "[T]he Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction." *E.g., Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). Thus, a court must examine the rule's text, and if it is "clear and unambiguous," then the court must apply its "plain and ordinary meaning." *E.g., Daniels v. Fla. Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005).

The text of the governing rule, Rule 1.280(b)(1), states, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . ." Plainly stated, the rule permits discovery of any evidence that is: (i) "relevant" and (ii) "not privileged." *See* Fla. R. Civ. P. 1.280(b)(1). This rule is clear and unambiguous. Thus, this Court must apply the rule's plain and ordinary language. When that language is applied, the relationship between a party's counsel and retained expert is clearly both "relevant" and "not privileged."

Let's start with "not privileged." Neither Petitioner nor any amicus have argued that discovery of the relationship between counsel and the retained expert

witness would encroach on any privilege. Thus, the information is not privileged.[3]

Next, let's discuss relevancy. Is the relationship between the other party's counsel and his retained expert witness relevant? Yes, undoubtedly. The Chamber and the Institute make this point. (Chamber/Institute Amicus Br. 4, 12.) As those amici explain, proof of a witness's bias is relevant to a jury's determination of whether the witness is being truthful. (*Id.* at 4 (citing *United States v. Abel*, 469 U.S. 45, 52 (1984)).) Thus, "a party is entitled to present evidence to demonstrate that 'a witness might be more likely to testify favorably on behalf of the [other] party because of the witness's financial incentive to continue the financially advantageous relationship.'" (*Id.* (quoting *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997-98 (Fla. 1999)).) The Chamber and the Institute apply this general, common-sense rule to this case (where a retained expert witness is paid by one party to perform a

[3] Petitioner's brief poses a brief rhetorical question, with a citation to dictum from the 4th DCA, that might suggest a referral relationship between a law firm and a retained expert could be privileged. (Pet'r's Initial Br. 17 (citing *Bellezza v. Menendez*, 273 So. 3d 11, 16 (Fla. 4th DCA 2019)). This question is not a sufficiently developed argument to establish a privilege or a basis for reversal. *See, e.g. Fla. Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001) (citing Fla. R. App. P. 9.210(b)(5) and several cases in holding: "[T]o obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal."). Petitioner bore the burden of establishing the privilege. S. *Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994). His briefs in this Court and the Fifth District failed to satisfy that burden. *See D.H.*, 271 So. 3d at 888 (Canady, J., dissenting) ("Our precedent requires that an argument for reversal be specifically preserved in the trial court and then be specifically raised and briefed to the appellate court in order for that appellate court or a higher appellate court to consider it.")

compulsory medical exam (CME) on the other party and to testify about that exam) and cogently explain why the relationship between a party's counsel and the retained CME physician is relevant:

> It can be argued that a CME physician may have a financial incentive to testify favorably for a defendant in order to maintain his or her referral relationship with an insurance company or a defense law firm. Because of this potential for financial bias, the current state of the law allows plaintiffs to conduct discovery into the CME physician's relationship with a particular insurance company or defense law firm and then present any relevant and admissible findings to the jury. *See Boecher*, 733 So. 2d at 997-98.

(*Id.* at 12 (emphasis added).)

Having established that discovery of the relationship between counsel and his retained expert is "relevant" and "not privileged" and thus authorized under Rule 1.280(b)(1)'s text, what else should we do to interpret the law as written (not based on policy preferences)? We may need to consider principles for interpreting legal instruments like the whole-text canon. *See* Scalia and Garner, *supra* § 24, at 167; *see, e.g., Fla. Dept. of Envtl. Prot. v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) (applying the whole-text canon).

Subdivision (b)(5) supplements the already discussed general discovery rule in subdivision (b)(1); it is titled, "Trial Preparation: Experts." Fla. R. Civ. P. 1.280(b)(5). The plain text of this rule does not provide the relief that Petitioner seeks

from this Court;[4] that is, it does not contain a blanket bar on discovering information about the relationship between a party's counsel and retained expert witness. *See* Fla. R. Civ. P. 1.280(b)(5). Instead, this rule, by its plain text, merely restricts—without completely precluding—the buckets of information that a party may obtain directly from a retained expert. *See id.*

The conclusion that subdivision (b)(5) regulates only discovery obtained from an retained expert—and not discovery obtained from parties, their agents, non-parties, or anyone else in the world—is proven by the plain text of the subdivision's introductory sentence: "Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows." *Id.* (emphasis added). Plainly stated, subdivision (b)(5) limits the broad discovery allowed under subdivision (b)(1), but only as to "facts known and opinions held by experts."[5] *Id.* (emphasis added). Subdivision (b)(5), by its plain text, has no application when a party seeks discovery of facts known or possessed by a law firm, an insurer, or anyone other than a retained expert.

[4] Petitioner is asking the Court to answer the certified question in the affirmative, meaning that it should apply *Worley* to "preclude" a law firm from having to disclose its relationship with a retained expert. (Pet'r's Initial Br. 5-6, 18.)

[5] An "expert" under Rule 1.280(b)(5) is an "expert witness" as defined by Fla. R. Civ. P. 1.390(a). *See* Fla. R. Civ. P. 1.280(b)(5)(D).

Twenty years ago in *Boecher*, this Court examined the text of Rule 1.280(b)(5)'s materially identical predecessor and concluded: "We find no indication from either the language of [the] rule. . . or our opinion in *Elkins*[6] that the rule was intended to shield a party from revealing the extent of its relationship with an expert witness."[7] 733 So. 2d at 999. In other words, this Court interpreted Rule 1.280(b)(5)'s restrictions as not applying when discovery was sought from a party. *See id.* at 998-99.

In this case, no party or amicus has asked this Court to revisit the textual interpretation it gave in *Boecher* to Rule 1.280(b)(5). Indeed, the Chamber and the Institute appear to agree that this Court correctly decided *Boecher*. (Chamber/Institute Amicus Br. 12.) In fact, Petitioner makes no argument grounded in the rule's text. Instead, pandering to policy agendas, Petitioner asks this Court to "equal the playing field" and to declare (like a legislative body) a total bar to discovery from a party's counsel and insurer about their relationships with a retained

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[6] In *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), this Court adopted criteria governing the discovery of financial information of expert witnesses and directed that criteria be made part of Rule 1.280. *Id.* at 518; (Pet'r's Initial Br. 8.) These criteria, now located in subdivision (b)(5) of the rule, were first codified in subdivision (b)(4). *In re Amendments to Fla. R. Civ. P.*, 682 So. 2d 105, 106, 114, 116 (Fla. 1996).

[7] The *Boecher* Court directed the rules committee to recommend changes to the rule to clarify that it did not impose a "blanket bar on discovery from parties about . . . [their] financial relationship with [an] expert" 733 So. 2d at 999. The next year, this Court approved commentary to the rule making this clarification. *Amendments to Fla. R. Civ. P.*, 773 So. 2d 1098, 1098, 1112 (Fla. 2000).

expert witness. (Pet'r's Initial Br. 18.) We address these policy arguments next.

III. This Court should address the competing policy arguments only when acting under its rule-making role, not under its judicial role.

Our state constitution grants this Court a slice of legislative power under which, subject to the Legislature's override, it may "adopt rules for the practice and procedure in all courts." Fla. Const. Art. V, § 2(a); *see* Talbot D'Alemberte, *The Florida State Constitution* 159 (2d ed. 2017) (noting that, under section 2(a), the Court "function[s] in a legislative capacity"). The non-textual, policy arguments offered by the parties and amici are more appropriately considered when this Court sits in its legislative rule-making role, not where, as here, it sits in a judicial role.

Unlike with constitutional provisions and statutes, the Court not only interprets and applies procedural rules, but it also may change them like a legislature does. *See* Fla. Const. Art. V, § 2(a). Yet, this Court should not change a rule's original meaning where, as here, it is deciding a controversy and exercising judicial power. It should change a rule's meaning only when it exercises its legislative rule-making power in section 2(a). And this Court should be clear to the public and the

bar which power (judicial or rule making) it is exercising when it changes the rule.[8]

Rule 1.280(b)(1)'s text has not materially changed since *Boecher*. *See supra* at 17-18 & nn. 6-7. Four justices believe this Court may change rules by exercising its rule-making power without input from the public or the bar. *In re Amendments to Fla. Evidence Code*, Case No. SC19-107, 2019 WL 2219714, at *5 (Fla. 2019) (Lawson, J. concurring, joined by Canady, C.J., Lagoa, and Muniz). Yet, these justices acknowledge "generally" such input is sought before the Court amends the rules. *See id.* at *4. One justice has opined that this Court must seek such input under Fla. R. Jud. Admin. 2.140. *See id.* at *8 (Luck, J. dissenting).

This Court need not rehash its internal debate on whether Rule 2.140 is mandatory or permissive. All the justices should agree that, under these circumstances, this Court should follow Rule 2.140 and seek input from the public and the bar before it changes any rules that regulate the discovery of financial bias by either retained experts or treating physicians.

The FJA's policy position is consistent with Respondent's argument.

[8] Granted, this Court previously has changed the rules in the context of a judicial controversy. *See, e.g., Elkins*, 672 So. 2d at 521. But this newly constituted Court should break from this practice. By changing the meaning of procedural rules when deciding a judicial controversy, this Court may confuse the public and bar to think that this Court may exercise its judicial power to change the meaning of statutes and constitutional provisions, something judges clearly may not do. *Cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019) (Gorsuch, J.) (warning the judiciary it acts like a legislature when it "invest[s] old . . . terms with new meanings").

(Resp't's Answer Br. 6, 8, 28.) Treating physicians are different than retained experts. Consequently, the discovery rules for treating physicians must be different than the rules for retained experts. The FJA also 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,

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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.

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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 September 19, 2019, and an electronic copy has been furnished to the following counsel of record:

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