IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULE OF CIVIL PROCEDURE 1.280

NO. SC21-929

On behalf of the State of Florida, the Attorney General supports the Court's changes to Florida Rule of Civil Procedure 1.280, with one exception: the changes to how the apex doctrine applies to current or former high-ranking government officials. As to those changes, Florida respectfully submits that the Court should revise its new rule to conform to how that doctrine has functioned in Florida for many years. *See* Appendix.

The Office of the Attorney General frequently represents agency heads and other high-ranking government officials in lawsuits challenging the statutes and rules that they administer. In those cases, as well as in enforcement challenges brought by the Attorney General, parties often seek to depose the agency head or high-ranking government official. In the vast majority of those instances, the agency head plainly has no unique personal knowledge of the information sought, or that information is discoverable from other sources, including from lower-ranking government officials—suggesting that the depositions are sought only for purposes of

harassment or delay. As a result, courts have entered protective orders preventing the depositions when the apex doctrine's requirements—as previously recognized by the district courts of appeal—are not met.

The State of Florida's interests in protecting the separation of powers, promoting the efficient functioning of government, and ensuring that qualified individuals seek opportunities as public servants counsel in favor of preserving the apex doctrine's viability as to high-ranking government officials.

I. The Court's codification of the apex doctrine as to high-ranking government officials narrows the protections available to them.

Before this Court's opinion issued, the apex doctrine's application to high-ranking government officials was "well-established." *Fla. Off. of Ins. Regul. v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 950 (Fla. 1st DCA 2015) ("*OIR*"). Under that settled rule, "[b]efore requiring the head of a state agency to testify, a trial court must find: 1) the party seeking the testimony has exhausted all discovery tools in an attempt to obtain the information sought; and 2) the testimony sought is necessary and unavailable from other witnesses." *Id.* at 947; *see Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002); *State,*

Dep't of Health & Rehab. Servs. v. Brooke, 573 So. 2d 363, 371 (Fla. 1st DCA 1991); *see also Horne v. Sch. Bd. of Miami-Dade Cty.*, 901 So. 2d 238, 241 (Fla. 1st DCA 2005) (applying rule to former government officials).

But in creating a rule that applies the apex doctrine to both corporate and government officials, the Court has substantially curtailed the protections available to government officials. In other words, the Court's amendment does more than to "codif[y] a doctrine of long legal standing" in that context. *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459, 462 (Fla. 2021). The new rule deviates from the established rule in Florida for government officials in two important ways.

First, the new rule provides that when moving for a protective order, a government official must provide "an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated." *Id.* at 461. No such requirement, however, appears in cases applying the apex doctrine to government officials. *See, e.g.*, *OIR*, 159 So. 3d at 947, 950; *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 462 (recognizing that "Florida courts applying the doctrine in the government context have not always required such an affidavit" (citing *Miami Dade*

College v. Allen, 271 So. 3d 1194, 1199 (Fla. 3d DCA 2019) (Miller, J., specially concurring))).

Second, the new rule provides that a government official may be deposed if the party seeking the deposition "demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 461. By contrast, under the established rule in Florida, the party seeking the deposition must demonstrate not only that the information sought is discoverable but also that it is "necessary." *OIR*, 159 So. 3d at 947.

In short, the new rule imposes (1) a new affidavit requirement, and (2) appears to broaden the scope of information that may be sought from government officials.

II. The new rule does not account for concerns unique to the governmental context.

When considering whether to make changes to the apex doctrine in the context of government officials, the Court should carefully consider the unique considerations animating its application in that context.

"[T]he impetus for [the Court's] decision to take up the apex doctrine" was *Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107 (Fla. 1st DCA 2019). *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 459. That case involved the apex doctrine's application in the *corporate* context, rather than the government context. Thus, the Court explained, "[t]his rules case allows [the Court] to decide whether to adopt the apex doctrine in the corporate context." *Id.* at 460. In other words, the question presented was not whether the rule should change as it applies to government officials, but whether it should be extended to corporate officials. And although the Court concluded that the new rule "allows [the Court] to ensure consistency across the two contexts," *id.* at 461, important reasons exist to treat the two contexts differently. *See id.* at 461 n.4 ("recogniz[ing] that certain privileges or constitutional principles might be applicable in one context and not the other").

To begin with, the apex doctrine in the governmental context is "rooted in separation of powers considerations." *OIR*, 947 So. 3d at 950; *see Brooke*, 573 So. 2d at 371 (explaining that the rule is necessary to "guard the constitutional prerogatives of the other branches under the doctrine of separation of powers").

Some of the separation of powers concerns include the problems presented by "questioning an agency head" about "discretionary actions," and "subjecting agency heads to a flood of discovery requests about what they might have done concerning decisions made in collaboration with staff that would preclude them from being able to reasonably exercise the statutory duties of the office." *OIR*, 159 So. 3d at 952. For example, "[q]uestions concerning what might have been done in the past or what will be done in the future may serve to limit the ability of an agency head to exercise his or her statutory duties in the future." *Id.*; *see Brooke*, 573 So. 2d at 371 (explaining that "any inquiry involving the discretion of the [agency head] would *not* be a relevant inquiry and the judges would have been precluded from inquiring into those matters").

As well as potentially intruding into the executive's decision-making realm, depositions of high-ranking officials take them "away from [their] duties and responsibilities." *OIR*, 159 So. 3d at 953. A permissive standard for such depositions would "subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole." *Broward Cty.*, 810 So. 2d at 1058. And being subjected to frequent depositions—as a current or former

government official—would serve as a significant deterrent to accepting a position as a public servant. *OIR*, 159 So. 3d at 950 (noting that the rule is also grounded in "policy concerns that overly burdensome requirements for public officials could discourage people from accepting positions as public servants").

Thus, in the governmental context, the apex doctrine (1) recognizes the separation of powers problems inherent in requiring an executive to testify about discretionary matters; (2) promotes the efficient operation of government as a whole; and (3) ensures that qualified people will accept important public service jobs. Those considerations counsel in favor of the greater protections available under the previously well-established rule for government officials.

In promulgating the new rule, the Court stated that "requiring an affidavit or declaration is essential to the proper functioning of the rule in both" the governmental and corporate contexts. *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 462. But that is not so when it comes to government officials. Requiring an affidavit *first* from the government official, before the party seeking a deposition has demonstrated that their testimony is necessary and unavailable from other sources, is contrary to a rule that has functioned well in

Florida for decades. *See Brooke*, 573 So. 2d at 371 ("[d]epartment heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and *unavailable from a lesser ranking officer*" (emphasis added)). The new affidavit requirement would allow parties to seek information first from the highest-ranking government official, significantly increasing the risk of harassment and distracting the official from her duties. If a party can obtain the necessary information from lower-ranking government officials, it should be required to do so before intruding upon the high-ranking government official's time.[1]

CONCLUSION

For many years, the apex doctrine as established by the lower courts has functioned efficiently and fairly in the governmental context. The Attorney General therefore respectfully asks the Court to codify that standard, instead of departing from it in a rule that insufficiently accounts for the unique considerations of the

[1] The Court did not explain why it changed the standard from establishing that the information is "necessary" to establishing that it is "discoverable." The reasons for treating governmental officials differently apply equally in counseling in favor of the "necessary" standard.

governmental context. *See* Appendix. That would be particularly appropriate here, where the rule change was prompted by the question of whether to extend the apex doctrine's protections—albeit in different form—to the corporate context. Whether any changes to the well-settled Florida rule applicable to government officials are warranted should be addressed in a case demonstrating the need, if any, for such changes.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing comment has been furnished by electronic service through the Florida Courts E-Filing Portal on this 9th day of November, 2021, on all parties required to be served.

/s/ Christopher J. Baum
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CERTIFICATE OF COMPLIANCE

I certify that this comment complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

/s/ *Christopher J. Baum*
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