IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1336

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

vs.

DCA Case No. 5D18-2907
L.T. Case No. 2018-CA-000237

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

Respondent.
_____/

On Discretionary Review from the District Court of Appeal, Fifth District, State of Florida

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ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

Constitutional Provisions

Dictionaries

Laws of Florida and Legislative Materials

Law Reviews and Journals

Standard Jury Instructions

Treatises and Books

STATEMENT OF THE CASE AND FACTS

This case is *not* about a sudden lane change. Instead, the plaintiff's expert opined that the defendant driver negligently *drove in two lanes at once*, meaning he violated a traffic statute. (R180 ¶12); § 316.089, Fla. Stat. (2016). This opinion was based primarily on the defendant driver's dash cam video (not eyewitness testimony). (R179 ¶8.) The defendants' factual premise for invoking this Court's jurisdiction—the plaintiff's "sudden lane change" theory was contradicted by a video—is a fabrication. This Court should dismiss or affirm. This case is not the appropriate vehicle for changing Florida's summary judgment standard.

Respondent, Mr. Miguel Lopez (the plaintiff and the estate's personal representative), rejects the petitioners-defendants' statement of the case and facts.

a. Plaintiff's expert opined that the defendant driver drove in two lanes at once and that this negligence (not a lane change) caused the collision.

The plaintiff's decedent, Mr. Jon Lopez, drove an F-250 truck, the front of which collided with the right rear of a freightliner truck driven by the defendant driver, Mr. Rosario. (*E.g.,* R179-80 ¶¶5, 9.) The collision caused the decedent's death. (*See* R57:16-58:11.)

Mr. Rosario testified he was driving in the center lane of a three-lane road. (R171, Dep. 37:17-21.) The plaintiff's expert, Mr. Stewart, disputed this: "[The] Freightliner [was] positioned to the right side of the center lane, *with the right side of the Freightliner over the lane line separating the center lane and the right outside*

lane of travel." (R179, ¶8 (emphasis added).) The expert opined that, by driving in two lanes at once, Mr. Rosario caused the decedent's F-250 to collide with the freightliner: "The Freightliner failed to maintain his vehicle within a single lane. Had the subject Freightliner maintained a single lane, the…F-250 could have completed [its] lane change without contact with the subject Freightliner." (R180, ¶12.)

To reach his driving-in-two-lanes-at-once opinion, the plaintiff's expert relied on the following, none of which was filed before the summary judgment hearing:

- **<u>Two</u> (not just one) drive cam videos**: one from the eyewitness's vehicle (which is not in this Court's or the lower courts' records) and the other from Mr. Rosario's freightliner (which was filed after the summary judgment hearing and is in this Court's record). (R179 ¶5.)
- **Inspections of these vehicles**: (i) Mr. Rosario's freightliner; (ii) the decedent's F-250; and (iii) an exemplar F-250. (R179 ¶5.)
- **Materials created by the police**: the police department's at-scene photos and its traffic homicide investigation case packet. (R179 ¶5.)
- **A forensic inspection.** (R179 ¶5.)

He also relied on the depositions of a police officer (Officer Pinnell), the defendant driver (Mr. Rosario), and an eyewitness (Mr. Mendez) (R179 ¶5), all of which were filed before the hearing (R40-101, 114-76, 208).

The Fifth District's opinion has a *materially false* statement about the expert's opinion. It is not true that the expert's driving-in-two-lanes-at-once "conclusion was based, in large part, on the deposition testimony of…the independent eye witness." (AR81) In fact, the expert's opinion was supported, in large part, by the *freightliner's drive cam video* (not the eyewitness's testimony):

> The [Freightliner's] drive cam video…captures the approach path of the…Freightliner facing forward out of the front windshield. The… drive cam was clipped to the passenger side sun visor. The drive cam was located near the center line of the Freightliner…,[and it] *shows the Freightliner positioned to the right side of the center lane, with the right side of the Freightliner over the lane line separating the center lane and the right outside lane of travel*….

(R179 ¶8 (emphasis added).) The expert also opined that the eyewitness's testimony and the physical evidence from the collision of the two vehicles were "consistent with" the information from the freightliner drive cam, and that the physical evidence "place[d] the front of the F-250 in the right lane at impact." (R180 ¶9, 11.)

The plaintiff's expert did not opine that a sudden lane change caused the collision. (*See* R179-80; IB 13 (noting the expert "confirm[ed] that he did not conclude that Mr. Rosario made a sudden lane change").) The expert merely summarized the eyewitness's testimony—without agreeing or disagreeing with it—to be that the freightliner "attempted a lane change to the left prior to impact" (R179 ¶6) and that "[t]he movements of the Freightliner, testified to by [the eyewitness], would place the right rear of the Freightliner…the lane line separating the center

lane from the right lane" (R179 ¶7). The expert also noted that the eyewitness had attested that the decedent's "F-250 attempted to change lanes to the right" before it impacted the freightliner's rear. (R179 ¶6; *see* R81:5-20.)

Finally, the day *after* the summary judgment hearing, defense counsel deposed plaintiff's expert. (R237-332.) Plaintiff filed the deposition after filing the notice of appeal. (R236.) Nothing indicates the trial court considered this deposition. Yet, the defendants have quoted from it in their brief (IB 13-14), as did the plaintiff in his reply brief in the Fifth District (AR67-68). At the deposition, the expert testified that, based on the freightliner's video, he understood Mr. Rosario was "driving down two lanes." (R296:2-5.)

b. Evidence of the freightliner moving from the center lane to the left lane.

Plaintiff's theory of the case rests on Mr. Rosario's negligence in *driving his freightliner in two lanes at once*. *Supra* § a, at 1-4. Yet, because of defendants' mis-portrayal of plaintiff's theory, *infra* §§ d, f, at 6-9, the lower courts focused on whether Mr. Rosario's freightliner moved from the center lane to the left lane *before or after* the rear-end impact from the F-250. (*e.g.,* AR80-81.) Thus, this section covers the evidence on this "before or after" issue, although the resolution of this factual issue is irrelevant, *infra* § III.A-C, at 19-26.

An eyewitness, Mr. Mendez, testified:

> Q. And you saw [Mr. Rosario's freightliner] merging towards the left *prior to the impact*?

> A. *Yes.* He was in the center lane, and almost without warning just took the left lane, the outside left lane, as if he were to try to make the turn lane.

(R54:15-19 (emphasis added).) The underlined testimony is consistent with the video from the freightliner's drive cam,[1] as the video shows the freightliner lurching from the center lane to the left lane. However, a jury could infer that the video contradicts the italicized testimony. While the eyewitness says the freightliner moved from the center lane to the left lane *prior to* the F-250 impacting the freightliner (R54:15-17), a jury could infer, based on the video, that the freightliner moved from the center lane to the left lane *after* it was impacted.

c. The defendants misstate to this Court the basis of plaintiff's opposition to summary judgment.

The defendants say in their brief to this Court that the plaintiff opposed summary judgment based on "the proposition that [the decedent] rear-ended [Mr.] Rosario *because Mr. Rosario suddenly changed lanes*." (IB 1 (emphasis added) (citing R184-94).) This is untrue.

The record pages cited by the defendants (R184-94) prove the defendants are fibbing. These pages refer to Plaintiff's written response to the summary judgment motion. In the "undisputed materials facts" portion, nowhere was a sudden lane

[1] This video was played at the summary judgment hearing (R219:14), even though the defendants failed to identify the video in their motion as required by Fla. R. Civ. P. 1.510(c). (R102-176). The video is in this Court's record, and the relevant portion, the final minute (*cf.* R219:16), can be viewed at https://safeYouTube.net/w/pfRI.

change mentioned. (R184.) Then, the response recited the summary judgment standard and presented legal argument (R185-87). Not once did it argue a "lane change" caused the collision. Instead, it argued that Mr. Rosario's *failure to maintain his vehicle in a single lane* caused the collision and that Mr. Rosario violated section 316.089(1), Florida Statutes. (R186.) Finally, the response attached the affidavit of plaintiff's expert (R188-94) who opined that Mr. Rosario's failure to maintain his vehicle within a single lane caused the collision. (R191, ¶12.)

d. The parties' arguments at the summary judgment hearing.

This Court is not the only court in which the defendants have been untruthful. They also misled the trial court. Contrary to plaintiff's written response and expert affidavit (both of which were filed before the summary judgment hearing (R177-80, 184-94)), defense counsel at the hearing below said that plaintiff "probably" planned to overcome the rear-end presumption by arguing that the freightliner had made "a sudden and unexpected stop or unexpected lane change." (R213:8-12,18-20.)

Having erected a false strawman, defense counsel then proceeded to knock it down by arguing the freightliner's drive cam video contradicted the eyewitness's lane-change testimony—while initially ignoring altogether the expert's driving-in-two-lanes-at-once opinion. (R214:9-22.) Eventually, defense counsel did address the expert's affidavit and his actual opinion. (R216:6-217:9.)

Defense counsel admitted that plaintiff's expert had attested that Mr. Rosario's freightliner was "partially in the right lane when the accident happened." (R216:14-15.) Yet, counsel argued, this testimony was of no consequence because, counsel said, "what ha[d] to be shown" was that Mr. Rosario had made "a sudden lane change" for the plaintiff to "overcome [the rear-end] presumption." (R217:1-5 (citing *Dep't of Highway Safety & Motor Vehicles v. Saleme*, 963 So. 2d 969 (Fla. 3d DCA 2007)); *accord* R218:25-219:2.) This argument misstated the substantive common law. *Infra* § III.A-C, at 19-26.

After the trial court watched the freightliner's drive cam video (R219:14), plaintiff's counsel argued that his expert had opined "the right rear of the freightliner cargo box [was] over the lane line separating the center lane from the right lane." [2] (R221:5-7.) And, plaintiff's counsel reiterated, the expert "put[] [the freightliner] occupying more than one lane," as it "failed to maintain a single lane." (R224:25-225:2.) Admittedly, plaintiff's counsel also defended the veracity of the eyewitness's sudden-lane-change testimony. (R221:20-222:23.) But he never abandoned the expert's driving-in-two-lanes-at-once opinion. (R221:7-225:13.)

[2] At the hearing's conclusion, the trial court asked: "[T]he truck was maintaining the center lane and the *left* lane?" (R225:3-5 (emphasis added).) In a partial misstatement, plaintiff's counsel replied, "Yes." (R225:6.) Earlier, plaintiff's counsel had argued the freightliner was traveling in the center and *right* lanes. (R221:5-7.) Defense counsel agreed. (R216:7-15.)

Finally, in the trial court, the defendants *never* argued for a change in the summary judgment standard. (R102-13, 208-28.)

e. The trial court's summary judgment order.

Less than a week after the hearing, the trial court granted summary judgment. (R204-05.) The order makes no mention of plaintiff's driving-in-two-lanes-at-once theory. (*Id*.) Instead, it summarily found, "the video tape blatantly contradicts the eye witness testimony and the opinion of the plaintiff's expert." (R205.)

f. The parties' arguments to the Fifth District.

In the Fifth District, the plaintiff argued his expert had opined that: (i) the freightliner's dash cam video "position[ed] the [freightliner] 'over the lane line separating the center lane from the right lane'" and (ii) "the physical evidence from the accident scene and the dash cam video" showed that Mr. Rosario "failed to maintain [the freightliner in] a single lane" and this negligence "caused or contributed to the accident." (AR27.) Admittedly, parts of plaintiff's initial brief could be read as advancing a sudden-lane-change theory based on the eyewitness's testimony. (AR26 (citing *Saleme*, 963 So. 2d at 969); AR28.) Yet, the plaintiff also clearly relied on his expert's driving-in-two-lanes-at-once opinion. (AR27, 30.)

In their answer brief, the defendants brushed aside the expert's driving-in-two-lanes-at-once opinion by arguing: "While Florida law does recognize that a sudden lane change by the front driver overcomes the presumption of negligence, it

does not recognize the failure to maintain your lane as a way to overcome the presumption." (AR49; *accord* AR51-52, 59 & n.3.) *Contra* § III.A-C, at 19-26.

In his reply brief, plaintiff again summarized his expert's affidavit and argued it "rebut[ted] the presumption of negligence on the rear driver, dissipating its legal effect…consistent with *Birge v. Charron*, 107 So. 3d 350 (Fla. 2012)." (AR69-70.)

Finally, in the Fifth District, the defendants *never* argued for change in the summary judgment standard. (AR42-62.)

g. The Fifth District's opinion.

The Fifth District reversed the trial court's grant of summary judgment. (AR79-84.) Two points bear mentioning.

First, the only mention in the Fifth District's opinion of the plaintiff's driving-in-two-lanes-at-once theory is the following:

> The [plaintiff] also presented the affidavit of [his] expert, who concluded that part of the freightliner was in the right lane of the eastbound side when the collision occurred. *This conclusion was based, in large part, on the deposition testimony of…the independent eye witness*.

(AR81 (emphasis added).)

To repeat, the Fifth District's italicized statement was false. While the expert did mention the eyewitness's testimony in his affidavit (R179-80 ¶¶6-7, 10), his driving-in-two-lanes-at-once opinion was based on the freightliner's video (R179 ¶8) ("The Rosario drive cam video shows the Freightliner positioned to the right side

of the center lane, with the right side of the Freightliner over the lane line separating the center lane and the right outside lane….").

Second, the Fifth District's opinion neither decides the question it certified nor analyzes whether the standard suggested by that question is a correct interpretation of rule 1.510's text. (AR79-84); *infra* § I, at 12-17; § V.B, at 37-48.

h. This Court's* sua sponte *questions.

This Court has directed briefing on two questions (AR115):

(1) Should Florida adopt the federal summary judgment standard articulated in the 1986 trilogy[3]?

(2) If so, must rule 1.510 be amended to reflect any change in the summary judgment standard?

SUMMARY OF ARGUMENT

Spurred by this Court's own questions, interest groups advance legislative policy arguments—grounded in consequentialism not textualism—to change Florida's summary judgment law. Our state constitution allows this Court to both *make* and *interpret* the procedural law. This grant of *legislative* and *judicial* powers to a single institution is uncommon in our republic, and this Court should exercise its dual powers cautiously and with restraint. *Infra* § V.A, at 30-37.

[3] *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). *Anderson* reversed an opinion authored by then-Judge Scalia. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984).

In this *controversy*, the Court must not exercise its legislative power. This Court must act *solely* under its judicial power; that power enables this Court to clarify and settle the meaning of written laws (like rule 1.510)—but not to make law.

This Court may change the law *judicially* only if it determines that its predecessors "demonstrably erred" in *interpreting* rule 1.510. Text, context, and history fail to show any such error. The 1986 federal trilogy is of little interpretive value. Among other shortcomings, it interpreted a rule 56 that was textually different from rule 1.510, and today's rule 56 is even more different. *Infra* § V.B, at 37-48.

But before this Court may tackle whether it may, or should, change the law, four independent grounds restrain this Court from even considering the question.

First, this Court lacks jurisdiction. The district court never "passed upon" the question it certified to this Court. *Infra* § I, at 12-17.

Second, this Court should dismiss this appeal because the certified question rests on a false factual premise. The plaintiff's expert opinion was not that the defendant driver, Mr. Rosario, suddenly changed lanes. Instead, he opined that Mr. Rosario was driving his freightliner in two lanes simultaneously, and that opinion was supported—not negated—by the video recording. *Infra* § II, at 18.

Third, any statements in this case adopting the summary judgment standard will be dictum. Under either the federal or state standard, the plaintiff presented

enough evidence to rebut the rear-end presumption. The common law recognizes more than just four scenarios for rebutting the presumption. *Infra* § III, at 19-27.

Fourth, the defendants failed to preserve any arguments on the certified or *sua sponte* questions; the Court may not act as standby counsel. *Infra* § IV, at 27-29.

Lastly, because defendants cannot show a demonstrable interpretive error, rule-making—not judicial decision—is the sole method for this Court to change the law. For seventy-five years, this Court has benefitted from the advice of rules committees filled with judges and lawyers; it should continue that practice. *Infra* § V.C, at 49. And, if this Court changes the standard (via a judicial decision or rule-making), constitutional due process precludes this Court from applying any new standard to the summary judgment order under review. *Infra* § VI, at 50.

ARGUMENT

Standard of Review. *De novo.* (IB 4-5.)

I. This Court may not review the Fifth District's decision because it never "passed upon" the certified question.

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." Art. V § 3(b)(4), Fla. Const. (emphasis added). Thus, for jurisdiction to vest in this Court under this provision, the text plainly requires: (1) a certified question, *and* (2) a DCA decision that "passes upon" that question. *Id.* Here, the second element is not satisfied. The Fifth District's decision never "pass[ed] upon" the certified question. Thus, this

Court lacks jurisdiction. *See, e.g.*, *Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973, 974 (Fla. 2001) ("Because…[the district court] did not pass upon the question certified to this Court, we are without jurisdiction to review this case.").

A. The original meaning of the phrase "passes upon a question" was to "decide" or "determine" a question.

This Court's "public importance" jurisdiction traces its origins to the 1950's. In November 1956, 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 (filed with Secretary of State on June 23, 1955) (App. 18). Then, in 1980, voters adopted a 1979 legislative proposal that changed this provision as follows:

> 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). 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. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 78-92 (2012). At both relevant 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.'"); *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.").

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). In 1977, when a district court did "not reach" the certified question, this Court held it was "without jurisdiction to consider and decide the question." *Revitz v. Baya*, 355 So. 2d 1170, 1171 (Fla. 1977) (internal quotes omitted).

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.).

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). As explained next, the Fifth District's decision never "passed upon" the certified question, and thus, this Court lacks jurisdiction under Article V, section 3(b)(4).

B. The Fifth District never "passed upon" the certified question.

The Fifth District never decided, determined, or "pass[ed] upon" the following question that it certified:

> Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?

(AR84; *see* AR79-84.)

1. The Fifth District could not—and did not—"pass upon" the question because it is a legislative, not judicial, question.

The Fifth District could not—and did not—pass upon the certified question because it lacked the power to do so. The certified question is not a *judicial* question. It is a *legislative* question, and the answer requires this Court to exercise its *legislative* power. (Yes, this Court, unlike the DCAs, has *legislative* rule-making power. More on this subject comes later. *See infra* §V.A, at 30-37.)

Judicial power clarifies and settles the meaning of written laws. *E.g., Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J. concurring). Legislative power makes the law. *E.g., Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018).

The Fifth District's question asks this Court to exercise its rule-making legislative power under Article V, section 2(a) of the Florida Constitution. It does not ask this Court to exercise its judicial power to clarify and settle the meaning of written laws under Article V, section 3(b) of the Florida Constitution.

Stated another way, the Fifth District's question asks whether this Court "[s]hould" *make* a law—that is, an "exception to the present summary judgment standards." (AR84.) The question does not ask what the *text* of the summary judgment rule *means*. (AR84); *see* Fla. R. Civ. P. 1.510. Indeed, nowhere in its opinion did the Fifth District decide or determine—or even consider—the *meaning* of rule 1.510's text. For example, while it noted the oft-quoted "slightest doubt"

standard (AR82), the Fifth District failed to determine, or "pass upon," whether this standard is a correct interpretation of rule 1.510's text. (AR79-84.)

2. The Fifth District could not—and did not—"pass upon" the question because the defendants did not preserve it.

There's another reason the Fifth District could not, and did not, pass upon the certified question—it was not preserved. While this Court's jurisdiction may not depend on the district court formulating a "specific question," this Court must be able to discern from a "review [of] the entire decision and record" that the district court, in fact, "passed upon" the question of great public importance. *Cf. Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970) (quoting); *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 922 (Fla. 1995). Here, the certified question—whether there should be an "exception" to the current summary judgment standard—was not raised or litigated below. (AR42-62; R102-13, 208-28.). Thus, the Fifth District could not—and did not—decide the question. *See Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 700-01 (Fla. 2016) (Polston, J. dissenting) ("[T]he issue decided by the [district court] and then by this Court…was not raised by the parties before the trial court or the [district court]. Accordingly, the [district court] should not have decided this issue."); *Salgat v. State*, 652 So. 2d 815, 815 (Fla. 1995) (dismissing because the district court did not pass upon a non-preserved issue in the certified question).

In sum, the Fifth District never passed upon the question it certified to this Court; thus, this Court lacks jurisdiction. *See* Art. V § 3(b)(4), Fla. Const.

II. This Court should not review the Fifth District's decision because the certified question rests on a factually false premise.

The certified question's factual premise is that the "video evidence completely negate[d] or refute[d] any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion." (AR84.) This premise is false. *Supra* §§ a, c, d, f, g, at 1-9. The plaintiff's expert attested: "The Rosario drive cam video shows…the right side of the Freightliner over the lane line separating the center lane and the right outside lane of travel…." (R179 ¶8.) Thus, the video proves, rather than negates or refutes, the plaintiff's driving-in-two-lanes-at-once theory.

The certified question's factual premise rests on a deception. The defendants have falsely told the courts that the plaintiff opposed summary judgment based on the "proposition that [the decedent] rear-ended [Mr.] Rosario *because Mr. Rosario suddenly changed lanes*." (IB 1 (emphasis added) (citing R184-94)); *see also* R212:8-12,18-20; AR49; 51-52, 59 & n.3). In fact, the plaintiff opposed summary judgment based on expert testimony that Mr. Rosario was driving his freightliner in two lanes simultaneously. *Supra* § a, at 1-4.

When a certified question's factual premise is false, this Court should dismiss the petition as improvidently granted. *See Abramson v. Fla. Psychological Ass'n*, 634 So. 2d 610, 613 & n. 8 (Fla. 1994) (Shaw, J. dissenting). This Court is charged with deciding real disputes based on facts—not made-up disputes based on fiction. Thus, here, this Court should exercise its discretion to dismiss the petition.

III. This Court must affirm, under either summary judgment standard, as the plaintiff rebutted the rear-end presumption.

Under either summary judgment standard (federal or state), the plaintiff presented enough evidence for a jury to find the front driver (Mr. Rosario) negligently caused the collision, at least in part, by driving his freightliner in two lanes at once. Thus, the plaintiff rebutted the rear-end presumption. The defendants' contrary arguments rest on their mistaken belief there are *only* four "recognized scenarios"—none involving driving in two lanes at once—by which a party may rebut the presumption. (IB 7, 12 (citing *Seibert v. Riccucci*, 84 So. 3d 1086 (Fla. 5th DCA 2012) and three other DCA cases).) The four scenarios listed in *Seibert* are merely *illustrative—not exhaustive*.

A. Under this Court's cases, the rear-end presumption dissipates when evidence exists that the front driver negligently caused the collision.

To prove our argument, we start with two cases of *this Court*, neither of which defendants mention and both of which were decided, without dissents, after the DCA cases cited by defendants. *See Birge v. Charron*, 107 So. 3d 350 (Fla. 2012); *Cevallos v. Rideout*, 107 So. 3d 348 (Fla. 2012). These two cases reiterated that, under the common law, "a rebuttable presumption of negligence…attaches to the rear driver in a rear-end motor vehicle collision case." *E.g., Birge*, 107 So. 3d at 353 (citing *Eppler v. Tarmac Am., Inc.*, 752 So. 2d 592 (Fla. 2000)). Unless it is rebutted, the presumption's beneficiary is entitled to judgment as a matter of law. *Id.*

So how does one rebut the presumption? Did this Court say the four "recognized scenarios" identified in the defendants' brief are the *only* scenarios by which a party may rebut the presumption? No. Instead, this Court unanimously held:

> [R]ear-end motor vehicle collision cases are substantively governed by the principles of comparative negligence….[W]here evidence is produced from which a jury could conclude that the front driver in a rear-end collision was negligent in bringing about the collision—or that the negligence of the rear driver was not the sole proximate cause of the accident—the presumption that the rear driver's negligence was the sole proximate cause of the collision is rebutted, and all issues of disputed fact regarding comparative fault and causation should be submitted to the jury.

Cevallos, 107 So. 3d at 349 (repeating *Birge*'s holdings). Simply stated, a party may rebut the presumption by showing either: (1) the front driver "was negligent in bringing about the collision," or (2) the rear driver's negligence "was not the sole proximate cause of the accident." *Id.*

Let's apply these straightforward principles. Did the plaintiff present evidence that the front driver, Mr. Rosario, was negligent? Yes. The plaintiff's expert opined: "The Rosario drive cam video shows the Freightliner positioned to the right side of the center lane, with the right side of the Freightliner over the lane line separating the center lane and the right outside lane." (R179 ¶8). Accepting the expert's testimony, could a jury find Mr. Rosario was negligent? Yes. Mr. Rosario's driving in two lanes at once violated a statute. *See* § 316.089, Fla. Stat. (2016) ("A vehicle shall be driven as nearly as practicable entirely within a single lane….").

of a statute is negligence *per se* or evidence of negligence. *See, e.g., deJesus v. Seaboard Coast Line R. Co.*, 281 So. 2d 198, 200-01 (Fla. 1973).

To rebut the presumption, the plaintiff also had to present evidence that Mr. Rosario's negligence "[brought] about the collision," i.e., substantially contributed to the collision. *See Cevallos*, 107 So. 3d at 349 (quoting); Fla. Std. Jury Instr. (Civ.) 401.12 (defining "legal cause"). Did the plaintiff present such evidence? Yes. His expert opined: "Had [Mr. Rosario's] Freightliner maintained a single lane, the [decedent's] F-250 could have completed [its] lane change without contact with the subject Freightliner." (R180 ¶12; *see also* R179 ¶6 (plaintiff's expert noting the eyewitness's testimony that the decedent's F-250 was attempting to change lanes to the right); R81:5-20 (eyewitness testimony).

So, plaintiff presented evidence to rebut the presumption. Does that mean the jury is precluded from finding the deceased rear driver at fault? No. The presumption, if not rebutted, establishes that the negligence of the rear driver, here the decedent, "was the *sole* proximate cause of the collision." *Cevallos*, 107 So. 3d at 349 (emphasis added). Once the presumption is rebutted, "all issues of disputed fact regarding *comparative fault and causation* should be submitted to the jury." *Id.* (emphasis added). Thus, for example, a jury here could find that the decedent was 99% at fault and Mr. Rosario was 1% at fault, or that each was 50% at fault, or with many other percentage combinations.

In sum, to rebut the presumption, the plaintiff merely had to show that Mr. Rosario, the front driver, "was negligent in bringing about the collision." *Id.* The plaintiff showed this. Mr. Rosario was driving in two lanes at once, and had he not done so, the decedent would not have collided with Mr. Rosario. (R179-80 ¶¶8,12.)

B. The DCA cases do not establish the four "recognized" scenarios as the *only* scenarios that rebut the presumption.

Without any mention of this Court's case law, the defendants argue:

> Florida law recognizes four scenarios under which a rear driver can overcome the presumption of negligence in a rear-end collision: (1) a mechanical failure in the rear driver's vehicle, (2) the lead driver's sudden stop, (3) the lead driver's sudden lane change, and (4) the lead driver's illegal or improper stop." [sic] *Seibert*, 84 So. 3d at 1089. [The] affidavit [of the plaintiff's expert] merely concludes that Mr. Rosario failed to maintain a single lane (R180), which is not recognized as a scenario that can overcome the presumption of negligence in a rear-end collision.

(IB 12; *see also* IB 7.)

The case cited by the defendants (the Fifth District's *Seibert* case) says:

> In a rear-end collision, a presumption exists that the rear driver was negligent. *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570, 572-73 (Fla.2001). The rear driver can rebut this presumption by presenting evidence supporting a reasonable explanation of why he was not negligent. *See id.* at 573. Four types of explanations have been recognized: (1) a mechanical failure in the rear driver's vehicle, (2) the lead driver's sudden stop, (3) the lead driver's sudden lane change, and (4) the lead driver's illegal or improper stop. *See Dep't of Highway Safety & Motor Vehicles v. Saleme*, 963 So.2d 969, 972 (Fla. 3d DCA 2007); *Alford v. Cool Cargo Carriers, Inc.*, 936 So.2d 646, 649–50 (Fla. 5th DCA 2006); *Tozier v. Jarvis*, 469 So.2d 884, 886–87 (Fla. 4th DCA 1985).

84 So. 3d at 1088.

Two observations on the Fifth District's *Seibert* opinion. First, neither *Clampitt* (this Court's case cited in *Seibert*) nor any other opinion of *this Court* has "recognized" only four scenarios by which one may rebut the presumption. *See, e.g.,* 786 So. 2d at 570-76. Second, *Seibert*, and the DCA cases cited therein, did not address whether a scenario, outside of the four scenarios, could serve to rebut the presumption, as the parties attacking the presumption in these cases limited themselves to one of the "recognized" scenarios. *See* 84 So. 3d at 1088-89; *Saleme*, 963 So. 2d at 969-77; *Alford*, 936 So. 2d at 646-51; *Tozier*, 469 So. 2d at 884-88.

Fairly read, this passage from *Seibert* and other similar passages from DCA opinions indicate the list of "recognized" scenarios is *illustrative*, not *exhaustive*. To be sure, most cases—including this Court's *Birge* and *Cevallos* cases—do fit under one of the four "recognized" scenarios. But *not every* case where the presumption has been rebutted falls into the "recognized" scenarios.

For example, in one case, the front vehicle "re-entered the highway at a speed less than the posted minimum speed," and its lights malfunctioned and did "not provide adequate information for following vehicles to evaluate the rate of speed change between the vehicles." *See Davis v. Chips Exp., Inc.*, 676 So. 2d 984, 986-87 (Fla. 1st DCA 1996). Though this was not a "recognized" scenario, the district court reversed the summary judgment for the front vehicle's driver and owner. *See id.*; *see also Edward M. Chadbourne, Inc. v. Van Dyke*, 590 So. 2d 1023, 1024 (Fla.

1st DCA 1991) (holding the presumption was rebutted because the front driver was travelling at 8-10 m.p.h. when the posted speed limit was 55 m.p.h.).

In sum, the DCA case law does not limit the available scenarios for rebutting the presumption. Even if it did, this Court is not bound by—and should not follow—any such limit imposed by the DCA case law. We argue this next.

C. This Court should reject any common-law rule that "recognizes" only four scenarios for rebutting the presumption.

The rear-end presumption is a creature of the common law, as it is not based on any statute, rule, or constitutional provision. *See Cevallos*, 107 So. 3d at 349; *see also Bellere v. Madsen,* 114 So. 2d 619, 621 (Fla. 1959) (adopting *McNulty v. Cusack,* 104 So. 2d 785 (Fla. 2d DCA 1958)). The common law is "a doctrine of reason applied to experience." *E.g., Quinn v. Phipps*, 113 So. 419, 425 (Fla. 1927).

The defendants' formulation of this common-law presumption defies reason and experience. It makes the presumption *conclusive* and *non-vanishing*—rather than *rebuttable* and *vanishing*—for any "scenarios" that fall outside of the four "recognized" scenarios. Only "presumptions imposed by the Legislature to advance strong social policies do not disappear in the face of contrary evidence." *Birge*, 107 So. 3d at 359-60 n. 16 (citing *Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 54 (Fla. 2012)). Evidentiary presumptions, like the rear-end presumption, "disappear[]" when "a set of facts is produced that 'fairly and reasonably tends to show' that the presumption is misplaced or that the 'real fact is not as presumed.'"

Id. at 360 (quoting *Gulle v. Boggs*, 174 So. 2d 26, 28–29 (Fla. 1965)).

Yet, under the defendants' misplaced formulation of the rear-end presumption, the rear driver's negligence could be conclusively presumed to be the sole proximate cause of the collision, even if the real facts fairly and reasonably tended to show that the front driver's or a third party's negligence contributed to collision. Below are some realistic scenarios of when the rear driver would be presumed to be solely responsible for a collision simply because the scenario does not fit into one of the defendants' four "recognized" scenarios:

- On the 4th of July, a passenger in the front vehicle illegally shoots a firework out of the car. The rear driver is startled and distracted. He fails to notice the front vehicle has stopped and then collides into it. Under the defendants' argument, the rear driver is solely responsible, and neither the passenger nor driver in the front vehicle bear any responsibility.
- Two eighteen-year-olds throw a baseball back and forth across a road. The baseball shatters a window of the rear driver's vehicle. Scared and distracted, the rear driver fails to notice the front vehicle has stopped and rear-ends it. Under the defendants' argument, the rear driver is solely responsible for the collision, and the two teenagers bear no responsibility.
- On a stormy night, the front driver's vehicle is carrying a heavy load and can travel only at 5 m.p.h. The driver fails to turn on her vehicle's lights, violating section 316.217(1)(a)-(b), Florida Statutes (2019). She then proceeds on a road, with a 30 m.p.h. posted speed limit, that lacks street lights. Another driver, unable to see, rear-ends the slow-moving, unlit front vehicle. Under the defendants' argument, the rear driver is solely responsible for the collision, and the front driver is not responsible.

Each of these examples, and many others, show the defendants' argument—that the rear-end presumption may be rebutted only by one of four "recognized" scenarios—cannot be reconciled with reason or experience. *See, e.g., Quinn*, 113 So. at 425.

Accordingly, this Court should reject the defendants' formulation of the rear-end presumption. It should stick to the principles it announced in *Birge* and *Cevallos*.

D. This Court should exercise judicial restraint, decide this case based on the principles of the rear-end presumption, and avoid issuing dictum on the summary judgment standard.

This case can be decided by applying the straightforward principles of the rear-end presumption to the facts. *See supra* § III.A-C, at 19-26. Irrespective of what summary judgment standard is applied, the result under the substantive law is the same—the plaintiff rebutted the presumption by presenting evidence from which a jury could find the front driver (Mr. Rosario) negligently caused the collision, at least in part, by traveling in two lanes at once. *See id.* Thus, whatever this Court may say here about the summary judgment standard will be dictum.

Many interest groups want this Court to adopt a new summary judgment standard. But this Court is sitting in its judicial capacity, not as a legislative rule-maker. It should exercise judicial restraint and decide only the questions necessary to decide *this case*—and nothing else. As the First District eloquently has stated:

> [A]ny…expression beyond that necessary to decide the narrow issue involved in this appeal would be pure obiter dictum….[A]n appellate court should confine its opinion to those statements of legal principles necessary for the solution of the particular question[s]…under consideration. Courts…are established for the sole purpose of deciding issues…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); *see also Pedroza v.*

State, 291 So. 3d 541, 547 (Fla. 2020) (defining dictum).

This Court recently exercised judicial restraint when it avoided deciding a question of alleged religious discrimination. *See State v. Pacchiana*, 289 So. 3d 587, 588 (Fla. 2020). As tempting as it may have been to decide such an important issue, this Court correctly abstained from doing so because the criminal defendant in *Pacchiana* had not preserved the issue. *Id.* The same is true here of these two civil defendants, as we argue next.

IV. This Court may not decide the certified question, or its *sua sponte* questions, because the defendants did not preserve in the lower courts any argument to change the summary judgment standard.

The defendants seek reversal by arguing—for the first time in this Court—for a change in how Florida courts should apply rule 1.510. (IB 15-26.) Though this Court and the Fifth District have raised these new issues *sua sponte*, the defendants never raised them in the lower courts. Thus, the issues and the related arguments were not preserved and may not be considered by this Court.

This Court's "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*." *D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Canady, J. dissenting, joined by Lawson, J.) (emphasis added) (citing *Brown v. Bowie*, 50 So. 637, 638 (1909)). The appellate court does not "act as standby counsel for the

parties." *Id.* (Canady, J. dissenting, joined by Lawson, J.).

Unlike European countries, "where the judge often charts the course of litigation…, our common law system generally affords litigants the opportunity and duty to choose which arguments to advance." Neil Gorsuch, *A Republic, If You Can Keep It* 195-96 (2019). Our courts follow this party-presentation principle to maintain their "role of neutral arbiter." *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting) (internal quotes omitted) (unanimously reversing the Ninth Circuit for failing to follow the party-presentation principle).

Requiring an argument be raised first in the lower courts is "only logical." *D.H.*, 271 So. 3d at 888 (Canady, J. dissenting, joined by Lawson, J.) Such a requirement "alerts the other party to what steps may be taken [in the trial court] to alleviate the problem." *Bowers v. State*, 104 So. 3d 1266, 1269 (Fla. 4th DCA 2013) (internal quotes omitted). An appellate court "does not consider an issue not passed upon below" because the parties must "have the opportunity [below] to offer all the evidence…relevant to the issues." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

These reasons for the preservation rules are apropos here. Florida's summary judgment rule long has meant that the party opposing summary judgment "is not required to present to the [trial] court his entire case [or]…all of his witnesses." *Williams v. Bd. of Pub. Instruction of Flagler County*, 61 So. 2d 493, 494 (Fla. 1952). Relying on this settled law, the plaintiff did *not* present below his entire case.

Specifically, the plaintiff did not put into the record a wealth of evidence on which the plaintiff's expert relied below, including a *second* video of the collision.[4] *See supra* § a, at 1-4. Had the defendants alerted the plaintiff in the trial court that they were seeking a change to the federal standard, then the plaintiff would have presented this additional evidence to ensure that his case satisfied the new standard.

In sum, because the defendants never argued below for a change to the federal standard, this Court may not entertain such arguments.

V. In this judicial controversy, this Court may not adopt the federal standard, as doing so would be an impermissible legislative change to the meaning of rule 1.510's text.

This Court may not, or should not, decide the certified or *sua sponte* questions because of four independent grounds. *See supra* § I-IV, at 12-29. But if this Court rejects all four of these grounds, it still may not adopt the federal summary judgment standard in this *judicial controversy*. This Court may adopt such a rule only in its *legislative rule-making capacity*.

Our argument is threefold. First, we draw the lines between this Court's judicial and legislative powers over the procedural rules; this Court should not blur those lines. *Infra* § V.A, at 30-37. Second, because this is a judicial (not a rule-making) proceeding, we apply textualism to interpret Florida's summary judgment rule and conclude that the 1986 trilogy's interpretation of a textually different rule

[4] The plaintiff requested to supplement this Court's record with this additional evidence. This Court denied that request. (4/24/2020 Order.)

56 does not show that this Court's precedents on rule 1.510 were "demonstrably erroneous." *Infra* § V.B, at 37-48. Third, we urge this Court to seek input from the rules committees before it changes Florida's rule.[5] *Infra* § V.C, at 49.

A. This Court's power to adopt rules of courts is a legislative power, and it should not be exercised in deciding this judicial controversy.

When exercising its power to "adopt rules for the practice and procedure in all courts," Fla. Const. Art. V, § 2(a), this Court "function[s] in a legislative capacity." Talbot D'Alemberte, *The Florida State Constitution* 159 (2d ed. 2017). A recent decision of this Court and history prove the legislative nature of this Court's § 2(a) rule-making power. They also prove, along with textualism, that this *judicial* controversy is the wrong forum for the defendants' and its amici's policy arguments.

1. As this Court recently recognized, its judicial power to interpret a rule and its rule-making power are different.

This Court recently interpreted a procedural rule (just as it must do in this case), and it adopted a new procedural rule (something it may not do in this case).

In *Florida Highway Patrol v. Jackson,* this Court decided whether a sovereign entity, the FHP, could take an interlocutory appeal under a rule of appellate procedure. 288 So. 3d 1179, 1182-86 (Fla. 2020) (citing Fla. R. App. P. 9.130(A)(3)(C)(XI)). Like this case, the parties and amici in *Jackson* presented both judicial and legislative arguments. *See id.* The judicial arguments were grounded in

[5] While this case concerns rule 1.510 of the civil rules, the same text is in rule 12.510 of the family law rules.

the rule's text, its "contextual indicators," judicial canons, and precedent. *See id*. The legislative arguments were grounded in public policy. *See id*.

Based solely on the *judicial* arguments (text, context, canons, and precedent), this Court rejected the FHP's interpretation of rule 9.130 and affirmed that rule, as written, did not allow the FHP to take an interlocutory appeal. *Id.* at 1182-85. Then, switching to its *legislative* rule-making power under Article V, section 2(a), the Court agreed with the FHP's policy arguments to make (rather than interpret) the law. Specifically, in a separate case number and opinion, the Court invoked its § 2(a) legislative power to re-write rule 9.130 so that, *in the future*, the FHP could appeal on an interlocutory basis. *See id.* at 1185-86; *In re Amendments to Fla. R. App. P.* 9.130, 289 So. 3d 866 (Fla. 2020); *see also* Gorsuch, *supra* 51 ("[T]he founders understood the *legislative power* as the power to prescribe new rules of general applicability *for the future*." (emphasis added)).

Any new legislative rule adopted by this Court, under § 2(a), may not be applied to this appellate proceeding where Mr. Lopez and the defendants are embroiled in a judicial controversy.[6] As Justices Scalia and Gorsuch have taught,

[6] Under its § 2(a) legislative power, this Court could change rule 1.510 to apply to future proceedings in this case, but that new rule would apply only to subsequent summary judgment motions, not the motion that is the subject of this appeal. *See Jackson*, 288 So. 3d at 1186 (holding that, on remand, the FHP could "argue sovereign immunity to the trial court" and then "seek interlocutory review under the new version of rule 9.130"). However, this Court should not change rule 1.510 without first seeking advice from the rules committees. *Infra* § V.C, at 49.

judges—unlike legislators—should "apply the law *as it is, focusing backward, not forward*, and looking to text, structure, and history—*not to…the policy consequences they believe might serve society best*."[7] *Id*. at 47-48 (emphasis added). Thus, this Court's sole function here is to interpret rule 1.510 based on the text, context, structure, history, and canons. "[P]olicy considerations and broad statements of purpose cannot trump the text of the rule." *Jackson*, 288 So. 2d at 1186.

The correct method to interpret all legal texts (including rules) is textualism.[8] *Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020). Contrary to textualism, the defendants and their amici have loaded their briefs with policy arguments that can best be characterized as consequentialism. A "consequentialist[] believe[s] that judges should interpret legal texts to produce the best outcome for society," and his arguments are "calculated to produce optimal policy results." Gorsuch, *supra* 137. Textualists rejected consequentialism. *See* Scalia and Garner, *supra* 22, 353.

Soon, we do what the defendants and their amici largely have failed to do but what this Court must do—determine rule 1.510's *meaning* based on *textualism*. *Infra*

[7] Contrary to this teaching, this Court's predecessor amended a rule and then applied it to a pending case. *Beach Cmty. Bank v. City of Freeport, Fla.*, 150 So. 3d 1111, 1115 (Fla. 2014). In *Jackson*, however, this Court correctly rejected this process of retroactively applying a newly adopted rule. *See* 288 So. 3d at 1183.

[8] In contrast to this Court's firm commitment to interpreting rules under textualism, *see Jackson*, 288 So. 3d at 1182, the U.S. Supreme Court often has used a non-textualist "managerial" method to interpret rules, *see* Elizabeth G. Porter, *Pragmatism Rules*, 101 Cornell L. Rev. 123, 137 (2015).

§ V.B, at 37-48. But, first, we review history to reinforce our point that this Court's rule-making power is legislative and should not be blended with its judicial power.

2. This Court in 1945 recognized that its rule-making power has legislative elements and should be exercised with restraint.

Let's go back to December 1937 when the U.S. Supreme Court adopted, under a congressional authorization, the Federal Rules of Civil Procedure. *See* W.F. Himes, *The Federal Rules of Civil Procedure*, 12 Fla. L.J. 195, 195 (June 1938).[9] During the 160 years or so preceding this 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); *see also* Bruce J. Berman and Peter D. Webster, *Florida Civil Procedure* § 1.010:1 (April 2020). At the dawn of the 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." Gilbert Newkerk, *Should Florida Adopt the Federal Rules of Civil Procedure by Rule of Court?*, 14 Fla. L.J. 305, 305 (1940).

Dissatisfied with legislative procedural rules, some from the late 1930's and early 1940's urged state judiciaries to change the procedural law on their own and

[9] We have put in our appendix most (if not all) the materials cited herein that are unavailable on Westlaw (such as the Florida Law Journal).

"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 "usurp[ed]" judicial power. Newkerk, *supra* at 308 (internal quotes omitted); *see generally* Q. Leo Levin & Anthony F. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1 (1958) (discussing whether procedural rule-making was a legislative or judicial function).

With this historical backdrop, the Florida State Bar Association petitioned this Court in 1940 to adopt the federal rules. Like the business amici in this case, the Association cited the business community's desires:

> That, as a result of the delays in court caused by the present procedure in Florida, the courts are being criticised and businessmen are turning more to other methods of settling their business differences[.]…[A]dopt[ing] the proposed rules…will greatly aid the businessmen and other citizens of the State of Florida by giving to them the possibility of speedier and more efficient service in court.

Pet. of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure, 14 Fla. L.J. 229, 233 (July 1940). 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."). 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 1940 state constitution as vesting the power to make rules of court in both the Legislature and the Judiciary. *Id.* at 58. And the Court held the Legislature's rules of court generally "would be respected." *Id.*

Then, in 1943, the Legislature expressly delegated its legislative power to this Court to allow to it make procedural law.[10] *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 determined this delegation of power by the Legislature to the Judiciary was constitutional (under a prior constitution). *See id*. at 606-07. Although 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 opined that this power was not "strictly legislative" and could be delegated to the Judiciary. *Id.* at 607, 609.

[10] Later, in 1956, the voters did by constitutional amendment what the Legislature had done by statute in 1943 when they approved an amendment giving this Court its rule-making power. *See* Committee Substitute for House Joint Resolution No. 810, § 3 ("The practice and procedure in all courts shall be governed by rules adopted by the supreme court."). In 1972, the voters made this Court's rule-making authority subject to an override by the Legislature with a supermajority vote. *See* D'Alemberte, *supra* 157-58; Art. V, § 2(a).

Vested with this newly granted legislative power to make procedural law, the 1945 Court proceeded with restraint. It denied the petition to adopt the federal rules as the Florida rules. *Id.* at 609-610. Instead, the Court began the committee process that Florida has used for seventy-five years to draft and adopt procedural rules:

> [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. This committee's work later resulted in this Court adopting the rules of civil procedure, including the summary judgment rule. *Infra* § V.B.1, at 38-40.

What does this history teach us? The Court's rule-making power is a legislative power (at least in part). Article V, section 2(a)'s grant of *legislative* power to this *judicial* body is uncommon. Normally, our republic separates legislative and judicial powers. *See, e.g.,* Art. II § 3, Fla. Const. When these legislative and judicial roles are "muddle[d]," then "dangers…follow." Gorsuch, *supra* 47. The founders understood that the blending of legislative and judicial powers threatens our liberties. *See, e.g., id.* at 39-41, 73-74. Yet, the committee process started in 1945—even if not constitutionally required—has mitigated against the dangers posed by this Court's unusual § 2(a) power that allows it to both *make* and *interpret* law.

Textualism also lessens these dangers, as that doctrine "respect[s] the divide between making legislation and interpreting it." *Id.* at 131. In touting the 1986 trilogy, defendants and their amici say little about rule 1.510's text. Perhaps this is

because rule 56's text in 1986 was different than the text of today's rule 1.510. *Infra* § V.B.3, at 45-48. We now tackle the *judicial* task of *interpreting* rule 1.510's *text*.

B. This Court's precedents on rule 1.510 are not demonstrably erroneous, and they should not be replaced by federal precedents.

The defendants argue that this Court's precedents on rule 1.510 should be replaced by federal precedents construing Fed. R. Civ. P. 56. (IB 25-27.) This Court has adopted Justice Thomas' view on overruling precedent:

> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).

State v. Poole, SC18-245, 2020 WL 370302, at *14 (Fla. Jan. 23, 2020). Under this view, precedent should be overruled only if it is shown to be "demonstrably erroneous." *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring).

We conduct a searching inquiry of rule 1.510's meaning to determine if this Court's predecessors have demonstrably erred. To accomplish this task, we examine: (1) the origins and textual history of rule 1.510 and its predecessor rules first adopted in 1950; (2) the precedent construing rule 1.510, its predecessors, and rule 56 during the period before and immediately after the Florida rules were adopted; and (3) the text of today's rule 1.510 compared with rule 56's text interpreted by the 1986

trilogy. This Court's predecessors have not demonstrably erred, as there can be reasonable differences of opinion on what rule 1.510 means.

1. The origins and textual history of Florida's rule 1.510.

Before rule 56's adoption in 1937, multiple English and American jurisdictions had various summary judgment rules dating back two centuries. *E.g.,* Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J.L. & Liberty 173, 175-84 (2010). Rule 56's drafters borrowed from several jurisdictions. *Id*. at 190-91, 195-96. Rule 56 took effect in 1938, and a 1946 amendment took effect in 1948. Fed. R. Civ. 56 Advisory Committee Notes.

As discussed above, in the 1940's, this Court twice denied petitions to adopt the federal rules, but in 1945 formed a committee to draft rules. *Supra* § V.A.2, at 33-37. This committee worked until 1949.[11] Then, this Court adopted the new rules that took effect in 1950. *Rules of Civil Procedure*, 24 Fla. L.J. 121, 148 (1950).

The 1950 predecessors to today's rule 1.510 were Equity Rule 40 and Common Law Rule 43. (App. 38, 40-41.) The two rules merged in 1954 to become rule 1.36 (App. 89), and rule 1.36 was re-codified to its current number (1.510) and slightly modified to take effect in 1967. *In re Fla. Rules of Civ. Proc. 1967 Revision*,

[11] *See, e.g., Report of Mid-Winter Conference of Bar Delegates*, 20 Fla. L.J. 27, 28 (1946); *President's Annual Address*, 20 Fla. L.J. 163, 163-65 (1946); Glenn Terrell, *Status of the Rules of Civil Procedure*, 20 Fla. L.J. 279 (1946); Glenn Terrell, *The Rules of Civil Procedure*, 21 Fla. L.J. 81 (1947); *Proceedings Conference Bar Delegates—April 15, 1948*, 22 Fla. L.J. 181, 193 (1948); *President's Message*, 23 Fla. L.J. 271 (1949).

187 So. 2d 598, 629 (Fla. 1966).

The text of all these early rules—the pre-1950 versions of federal rule 56 and the 1950, 1954, and 1967 Florida rules—is materially identical to the text of today's rule 1.510 (but not to the text of the rule 56 in 1986 or today, *infra* §§ V.B.3, at 45-48). All the early rules said the following with only minor variations:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that…there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law.[12]

E.g., Fed. R. Civ. P. 56(c) (1938) (emphasis added). Today's rule 1.510 has wording almost identical to the wording from these early rules, as the following depicts:

> The judgment sought must be rendered immediately if the pleadings~~,~~ **and summary judgment evidence** ~~depositions, and admissions~~ on file~~, together with the affidavits, if any,~~ show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fla. R. Civ. P. 1.510(c) (2020).

"[N]o genuine issue as to any material fact." Those are the keys words. What did these words mean in *1950* when this Court—exercising its legislative power granted by the 1943 Legislature—adopted them as the procedural law of Florida?

[12] The ellipsis in the text omits a phrase ("except as to the amount of damages") deleted by the 1946 amendment to rule 56. (App. 61, 65.) Common Law Rule 43's wording was identical to the text above. (App. 38.) Equity Rule 40 substituted the phrase "final decree" for "judgment." (App. 40.) The 1954 rule (rule 1.36) used the phrase "judgment or decree" rather than just "judgment." (App. 96.) The 1967 rule inserted the phrase "answers to interrogatories" after "depositions." (App. 102-03.)

This is the proper *judicial* question for this Court to answer because the meanings of words remain fixed and do not "evolve." *See* Scalia and Garner, *supra* § 7, at 78-79.

A couple of textualist tools can help this Court find the correct answer. First, since the early Florida rules borrowed this text from the pre-1950 version of rule 56, these "transplanted" words "br[ought] the old soil with [them]." *Jackson*, 288 So. 3d at 1183 (internal quotes omitted). Another textualist tool is to examine the meaning given to the text by courts from the same period when the text was adopted. *See, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 540 & nn.2-3 (2019) (Gorsuch, J.) (examining cases in the vicinity of 1925 to determine the meaning of "contract of employment" as used in a 1925 statute). So, we go back to the 1930's, 40's and 50's.

2. The adoption period's judicial interpretations show this Court's precedents on rule 1.510 are not demonstrably erroneous.

Before exploring what the courts from the adoption period had to say, we note that we searched diligently for dictionaries from that era. They aren't much help. One dictionary says "genuine" meant "[r]eal or original, as opposed to adulterated, false, fictious, simulated, spurious, or counterfeit." *Ballentine Law Dictionary* 550 (1948 ed.). Perhaps rule 56's drafters chose the word "genuine" because, in the latter half of the nineteenth century and early twentieth century, summary judgment often was used offensively to root out "sham defenses" that delayed jury trials. *See, e.g.,* Louis C. Ritter & Evert H. Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 21 Marq. L. Rev. 33, 33, 35-36, 40-41, 48

(1936); Charles E. Clark and Charles E. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 442, 444-45, 450-51, 453, 463 (1929).

While the dictionaries aren't much help to this Court's interpretive task, the briefs of the defendants and their amici are of even less help. Myopically focused on *legislative* arguments, these briefs neglect to say how this Court's predecessors *misinterpreted* rule 1.510. They just criticize this Court's prior interpretations for producing "bad" results. This is precisely the consequentialist method of interpretation that textualists condemn. *See, e.g.,* Scalia and Garner, *supra* § 61, at 353. One exception is the amicus brief led by the Florida Justice Reform Institute; it makes a textual argument. Because this is a judicial (not legislative) proceeding, we tangle with the Institute and ignore the other amici.

i. The "slightest doubt" standard is not demonstrably erroneous.

Quoting the decision below, the Institute takes aim at precedents that "hold that a genuine issue of material fact exists 'if the record raises the *slightest doubt* that material issues *could* be present.'" (Institute Br. 14.) A precedent from this Court—issued *just three years* after the adoption of rule 1.510's predecessors—is where this "slightest doubt" interpretation of the rule began in Florida:

> [Summary] judgments should be sparingly granted and only in those cases where there remains *no genuine issue of any material fact*. To put it another way, such motion should be granted only where the moving party is entitled to a judgment as a matter of law. It was never intended by this rule that cases should be tried by affidavit or that affidavits, interrogatories or depositions or similar evidence, could be used as

> substitutes for a jury trial. *To sum it all up, if there are issues of fact and the slightest doubt remains, a summary judgment cannot be granted*.

Williams v. City of Lake City, 62 So. 2d 732, 733 (Fla. 1953) (emphasis added). The Institute argues this 1953 case and other cases "diverge significantly from federal case law with respect to the meaning of the phrase 'genuine issue as to any material fact.'" (Institute Br. 14.)

In fact, however, the "slightest doubt" interpretation was the *same* interpretation applied by federal courts at the time rule 1.510's predecessors were adopted. *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (quoting *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945)); *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948); *Shafer v. Reo Motors, Inc.*, 205 F.2d 685, 688 (3d Cir. 1953); *Lloyd v. United Liquors Corp.*, 203 F.2d 789, 793 (6th Cir. 1953). One federal court from that period called the "slightest doubt" interpretation of rule 56 the "best statement" on the rule's applicability. *Cox v. Am. Fid. & Cas. Co.*, 249 F.2d 616, 618 (9th Cir. 1957). The "divergence" alleged by the Institute resulted from the 1986 trilogy, decisions made *thirty-six years after the Florida rule's adoption* and that interpreted a version of rule 56 *textually different* than rule 1.510. *See infra* § V.B.3, at 45-48. Thus, the 1953 Court did not demonstrably err with its "slightest doubt" reading of the rule.

ii. *Holl* does not apply to this case and is not demonstrably erroneous.

The Institute also argues *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966) and its progeny must be overruled. (Institute Br. 13-15; *see also* IB 25-26.) *Holl* "held that a moving party can obtain summary judgment '[o]nly after it has been conclusively shown that the party moved against cannot offer proof to support [its] position on the genuine and material issues.'" (Institute Br. 13 (quoting *Holl*, 191 So. 2d at 47).) We respond with two points.

First, *Holl* is irrelevant to *this case*. The lower courts did not rely on *Holl*'s "conclusive showing" holding—not even implicitly. (AR79-84; R204-05.) The lower courts here never faulted the showing of the *moving* party (the defendants)—like the *Holl* court did—for failing to "prov[e] a negative. i.e., the non-existence of a genuine issue of material fact." 191 So. 2d at 43. Instead, here, the lower courts (incorrectly) faulted the showing of the *non-moving* party (the plaintiff) as being "blatantly" contradicted by a video recording. (R205, AR82-83.) Thus, the lower courts reasoned, summary judgment would be appropriate if *Scott v. Harris*, 550 U.S. 372 (2007) was the law for Florida. (AR82-84; R204-05.) But the lower courts did not base their rulings—in any way—on *Holl* or its progeny. (AR79-84; R204-05.) Accordingly, any comments by this Court on *Holl*'s continued vitality would be dictum, from which this Court should refrain. *Supra* at 26-27.

Second, going back to the adoption period, *Holl* was not alone in how it

interpreted "no genuine issue as to any material fact." Federal courts from that era had similar interpretations. *See Traylor v. Black, Sivalls & Bryson*, 189 F.2d 213, 216 (8th Cir. 1951) (holding summary judgment for the defendant was permitted only if it the record showed "affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances"); *Nat'l Sur. Corp. v. Allen-Codell Co.*, 5 F.R.D. 3, 5 (E.D. Ky. 1945) (holding that summary judgment was appropriate only if the "uncontroverted facts and circumstances disclosed by the record so clearly and conclusively demonstrate[d] the truth upon the issues involved"); *S. Rendering Co. v. Standard Rendering Co.*, 112 F. Supp. 103, 108 (E.D. Ark. 1953) (denying summary judgment because the plaintiff's admissions were not "conclusive evidence of the unreality of [the plaintiff's] claims"). Thus, *Holl* did not demonstrably err in how it interpreted the rule.

iii. The conflict issue raised by the Institute is waived.

Surveying seventy years of Florida decisional law, the Institute—but not the defendants—points to inconsistencies in interpreting rule 1.510. (Institute Br. 11-15.) But none of the three *sua sponte* questions touch on any conflict in Florida decisional law. Our hands are full answering the three questions. So, we don't engage on the conflict issue and ask the Court to follow its "well-settled" rule that amici may not raise new issues. *E.g., Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1041 n. 1 (Fla. 2018).

3. The textualist case for adopting the 1986 trilogy fails because rule 56 in 1986 was materially different from today's rule 1.510.

Material differences exist between the wording of today's rule 1.510 and the 1986 version of rule 56. The Institute glosses over these differences. (Institute Br. 6-11.) Granted, rule 56(c) as it existed in 1986 was materially identical to today's rule 1.510(c). (Institute Br. 8). But, as the Institute concedes, two cases from the trilogy "looked to the text of Rules 56(c) *and (e)*." (Institute Br. 9 (emphasis added) (citing *Anderson*, 477 U.S. at 242 and *Matsushita*, 475 U.S. at 574)).

What did rule 56*(e)* say in 1986? It said in part the following, which was added to the rule by a 1963 amendment that took effect in 1964:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(App. 70.)

The 1963 Advisory Committee Notes justified adding these two sentences to rule 56(e) "to overcome a line of cases," and the Notes described a "typical" case from this line:

> A party supports his…summary judgment [motion] by…evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party…does not produce any evidentiary matter, or produces…not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation[, some] cases have taken the

> view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate.

Fed. R. Civ. P. 56, Advisory Committee Notes, 1963 Amendment (citing cases from 1948 to 1961).[13] The Supreme Court later held this 1963 amendment was for "the precise purpose of overturn[ing] this line of cases." *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 n. 19 (1968). The cases overturned by the 1963 amendment sound like the Florida cases that the defendants and their amici want overturned now.

But never—not once—has this Court added to the Florida rule these two sentences that were added in 1963 to then-rule 56(e). The 1963 amendment made rule 56 materially different from Florida's rule 1.510.[14]

The 1963 amendment to rule 56(e)—which is missing from rule 1.510—was essential to *Anderson*'s and *Matsushita* holdings. Rejecting the respondents' reliance on a case predating the 1963 amendment, *Anderson* reasoned:

> Rule 56(e) itself provides that a party opposing a properly supported

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[13] We do not rely on this drafting, or legislative, history for the impermissible purpose of showing "legislative intent." Instead, we rely on it to establish the legal landscape when rule 56 was amended in 1963. This use comports with the textualist principle that a judge must give a meaning to a text that "fits most logically and comfortably into the body of both previously and subsequently enacted law." *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (Scalia, J.) (quoting).

[14] The Institute suggests a provision added to rule 1.510(c) in 2005 and 2016 is the equivalent of the 1963 amendment to rule 56. (Initial Br. 11.) Not so. That provision merely established a deadline by which the adverse party must identify any evidence on "on which [he] relies." It neither requires that any evidence be identified nor warns—like the 1963 amendment—that summary judgment will be entered against the adverse party if he fails to identify evidence.

> motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, [this Court] held [in *First National Bank*, 391 U.S. at 289 & n.19] that the plaintiff could not defeat the properly supported summary judgment motion of a defendant…without offering "any significant probative evidence tending to support the complaint."

Id. at 256 (rejecting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962)); *see id.* at 248, 250; *see also Matsushita*, 475 U.S. at 585-86 & n.11, 587, 596, 597-98.

As the Institute correctly notes, "*Anderson* and *Matsushita* explain what the nonmoving party"—here, the plaintiff—"must do to defeat summary judgment" under rule 56. (Institute Br. 9.) In contrast, the third case of the trilogy, *Celotex*, 477 U.S. at 317, holds that "Rule 56 does not require the moving party"—here, the defendants—"to do certain things to demonstrate the absence of a genuine issue for trial." (Institute Br. 9.) We agree with the Institute on how *Anderson*/*Matsushita* and *Celotex* interact with one another. We would add that the case discussed by the lower courts, *Scott v. Harris*, descends from *Anderson* and *Matsushita*, and that it never mentions *Celotex*. *See* 550 U.S. 372, 380 (2007).

Our agreement with the Institute is bad news for the defendants. Why? Well, this case is about whether the *nonmoving party* (plaintiff) did enough to defeat summary judgment. It is not about whether the *moving parties* (defendants) did enough to show the absence of a genuine issue of material fact. *Supra* at 43-44. So, to have any chance of winning this appeal, the defendants must convince this Court

to interpret rule 1.510 in accordance with *Anderson*/*Matsushita* (not *Celotex*). That is a tall order to fill given that the holdings of *Anderson* and *Matsushita* depended on words in then-rule 56(e) that can't be found in rule 1.510.

Celotex's holding would not apply even if this case were in federal court. But what if it did? Could this Court transpose *Celotex*'s interpretation of rule 56 onto rule 1.510? That would be a strange thing to do. Even if rule 56(e)'s wording was not central to *Celotex*'s holding, *Celotex* extensively discussed that wording. 477 U.S. at 324-25. Why follow a decision construing a textually different federal rule to interpret rule 1.510? Doing so makes no sense. *See Casey*, 499 U.S. at 101 (Scalia, J.) ("[O]ur role [is] to make sense rather than nonsense out of the *corpus juris*.")

The Institute knows its textual argument is problematic, as it tries to cobble together parts of today's rule 1.510 to make that rule look like the 1986 and present versions of rule 56. (Institute Br. 11.) The truth is that the two rules are textually different. Included in our appendix is a side-by-side comparison of today's rules 1.510 and 56. (App. 33-35.) While seventy years ago they may have been materially identical to one another, the two rules have since grown far apart. The rules committees can help pull the rules back together, if that is the Court's policy choice.

C. If this Court is inclined to exercise its § 2(a) legislative power to change rule 1.510, it should seek the advice of the rules committees.

For seventy-five years, this Court has benefited from using committees of judges and lawyers to assist in drafting rules of court. *See supra* § V.A.2, at 33-37. Generally, this Court seeks input from the public and the bar before it amends the rules. *See In re Amendments to Fla. Evidence Code*, 278 So. 3d 551, 555 (Fla. 2019) (Lawson, J. concurring). Granted, in rare circumstances, a rule amendment may be simple enough that the Court can do it on its own. *See, e.g., In re Amendments to Fla. R. App. P.* 9.130, 289 So. 3d at 866. But those are not the circumstances here.

This Court infrequently has amended rule 1.510 in the last seventy years. In contrast, rule 56 has been amended frequently and significantly. (*Cf.* App. 33-35.) If the Court is inclined to revamp rule 1.510, it should ensure that it is done correctly with the input of the experienced judges and lawyers on the rules committees. That is also the way the federal courts revise their rules. The issues to be carefully considered are too numerous to list. Just a few examples include:

- Should the Court adopt a new process for presenting evidence and arguments as many local federal rules do? *See, e.g.* S.D. Fla. Loc. R. 56.1.
- How will the new standards interact with the rules on discovery, pre-trial conferences, scheduling, and case management?
- Will the new standards apply to the county and small claims courts? Or will they apply only to business and other complex litigation?
- Will the new standards apply in family law? *See* Fla. Fam. L. R. P. 12.510.

The rules committees can ably assist this Court in considering these and other issues.

VI. Any change to the summary judgment standard should be applied only prospectively to protect Mr. Lopez's federal and state due process rights.

Any new summary judgment standard should not be applied to the motion filed below. Doing so would violate Mr. Lopez's federal and state constitutional due process rights, as he relied on the present standard. *See* Amend. V, U.S. Const.; Art. I § 9, Fla. Const.; *Ex parte Gen. Motors Corp.*, 769 So. 2d 903, 910 (Ala. 1999). Mr. Lopez should have the opportunity to present additional evidence and arguments.

CONCLUSION

This Court should affirm the Fifth District's decision or dismiss this appeal. Alternatively, if this Court reverses, it should instruct the lower courts to grant Mr. Lopez the opportunity to present additional evidence and arguments to oppose the defendants' summary judgment motion.

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