SC18-1513

In the Supreme Court of Florida

KEN DETZNER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF FLORIDA, HEAD OF THE FLORIDA DEPARTMENT OF STATE, AND FLORIDA'S CHIEF ELECTION OFFICER,

Appellant/Respondent,

v.

HARRY LEE ANSTEAD AND ROBERT BARNAS,

Appellees/Petitioners.

APPELLANT'S INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL
Case No. 1D18-3804

PAMELA JO BONDI
Attorney General

AMIT AGARWAL (FBN 125637)
Solicitor General
EDWARD M. WENGER (FBN 85568)
Chief Deputy Solicitor General
JORDAN E. PRATT (FBN 100958)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3681
amit.agarwal@myfloridalegal.com

Counsel for Appellant

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STATEMENT OF THE CASE AND FACTS

1. Florida law requires a constitution revision commission ("CRC") consisting of 37 members to convene once every 20 years. Art. XI, § 2(a), Fla. Const. Among other things, the CRC must "examine the constitution of the state, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of [the Florida] constitution or any part of it." Art. XI, § 2(c), Fla. Const.

After more than a year of public meetings and deliberations, the 2017-2018 CRC approved eight proposed revisions to the Florida Constitution. On May 9, 2018, the CRC issued its final report, which included ballot titles and summaries of the proposed revisions.[1] That same day, the CRC transmitted its report to the Secretary of State for placement on the 2018 General Election ballot.

2. One week after the CRC issued its final report, the first of five lawsuits challenging various CRC proposals was filed.[2] All five challenges were brought in

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[1] *See Final Report*, Constitution Revision Commission 2017-2018 (May 9, 2018), available at http://flcrc.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCFinalReport/pdf.

[2] *See Fla. Greyhound Ass'n, Inc. v. Fla. Dep't of State*, No. 2018-CA-1114 (Leon Cty. Cir. Ct.) (Revision 8) (filed May 17, 2018); *Knowles v. Fla. Dep't of State*, No. 2018-CA-001740 (Leon Cty. Cir. Ct.) (Revision 1) (filed June 6, 2018); *Cty. of Volusia v. Detzner*, No. 2018-CA-001270 (Leon Cty. Cir. Ct.) (Revision 5) (filed June 15, 2018); *Hollander v. Fla. Dep't of State*, No. 2018-CA-001525 (Leon Cty. Cir. Ct.) (Revision 1) (filed July 12, 2018); *League of Women Voters v. Detzner*, No. 2018-CA-001523 (Leon. Cty. Cir. Ct.) (Revision 3) (filed July 12, 2018).

circuit court as actions seeking declaratory and injunctive relief. The lower courts and this Court expedited briefing and argument in every one of those five cases. On or before September 7, 2018, this Court resolved each of the challenges before it, which ensured that the Secretary would know which proposals could appear on the 2018 General Election ballot before the practical deadline (September 10, 2018, *see infra* at 17-18) for sending ballots to the printer.

3. On August 14, 2018—more than three months after the CRC issued its final report and more than a month after all the other CRC challengers brought their actions for declaratory and injunctive relief—Harry Lee Anstead and Robert Barnas ("Petitioners" or "Appellees") filed a petition for writ of quo warranto directly in this Court. ROA at 6. Petitioners alleged, *inter alia*, that six of the CRC's eight proposals impermissibly "bundled" more than one change to the Florida Constitution into a single proposal, and they asked this Court to order that all six of those revisions "be removed from the ballot." *Id.* at 24.

After expedited briefing, this Court transferred the petition to Leon County Circuit Court. "The transfer of this case," this Court explained, "should not be construed as an adjudication or comment on the merits of the petition nor that the petition has been properly denominated as a petition for writ of quo warranto." *See* Order, *Anstead v. Detzner*, No. SC18-1344 (Fla. Aug. 28, 2018). In addition to acknowledging Respondent's submission that Petitioners' claims were not properly

raised by way of a petition for a writ of quo warranto, this Court's order expressly contemplated the possibility that Petitioners could file new or amended pleadings: "Any future pleadings filed regarding this case," the Court explained, "should be filed in the above mentioned circuit court." *Id.* Following the transfer, Petitioners did not seek leave to file any additional or amended pleadings.

The Circuit Court (Gievers, J.) conducted a hearing on the afternoon of September 5, 2018. ROA at 123. Later that day, the Circuit Court issued an order granting Petitioners' petition for a writ of quo warranto. *Id.* at 131, 136. The Circuit Court did not appear to resolve the question whether Petitioner satisfied the standard for obtaining a writ of quo warranto against the Secretary of State, did not recharacterize the petition for a writ of quo warranto as a complaint seeking declaratory or injunctive relief, and did not purport to grant declaratory or injunctive relief. *See id.* at 132 n.2, 136. Rather, the Court reasoned that "[e]ven if a Petition for Quo Warranto is not the proper vehicle in which to seek the requested relief, the Court finds that the merits as argued remain the same." *Id.* at 132 n.2.

On the merits, the Circuit Court "agree[d]" that three[3] of the challenged

[3] Although the Circuit Court concluded that its "findings apply to all 6 of the proposed amendments" challenged by Petitioners, it addressed only the three proposals that were not, at that time, "pending before the Florida Supreme Court." ROA 133. This Court has since resolved the cases that were then pending, ordering that two of the three challenged amendments are to remain on the 2018 ballot. *See Dep't of State v. Fla. Greyhound Ass'n, Inc.*, No. SC18-1287, 2018 WL 4275358 (Fla. Sept. 7, 2018); *Cty. of Volusia v. Detzner*, No. SC18-1339, 2018 WL 4272435

proposals were "statutorily defective due to the bundling of independent and unrelated proposals into a single ballot question." *Id.* at 133. Specifically, the Circuit Court concluded that "functionally independent and unrelated" measures that "do not constitute a comprehensive plan of revision" must not "be imposed on the voters as a unit." *Id.* at 134.

The Circuit Court did not expressly state that any of the proposed revisions violated the First Amendment, but its order made two passing references to that provision. In its discussion of CRC Revision 4 (but not in its discussion of CRC Revisions 2 and 6), the Circuit Court stated: "Voters cannot reasonably answer the statutorily required yes or no question, § 101.161(1), Fla. Stat., without *potentially* being deprived of their First Amendment constitutional right to cast a meaningful vote on each independent and unrelated proposal, and without Section 101.161(1) being complied with." *Id.* at 135 (emphasis added). In the last sentence of its order, the Circuit Court stated: "Under the Florida Constitution and § 101.161(1), Fla. Stat., the voters are entitled to a fair and adequate opportunity to exercise their First Amendment rights." *Id.* at 136. However, the Circuit Court did not analyze the text of the First Amendment, did not cite any case or other authority construing the First Amendment, and did not state that any of the CRC's proposed revisions actually—

(Fla. Sept. 7, 2018); *Dep't of State v. Hollander*, No. SC18-1366, 2018 WL 4275904, at *1 (Fla. Sept. 7, 2018); *Detzner v. League of Women Voters of Fla.*, No. SC18-1368, 2018 WL 4275905, at *1 (Fla. Sept. 7, 2018).

as opposed to "potentially," *see id.*—violated the First Amendment.

Finally, the Circuit Court struck from the ballot Revision 6, titled "PROPERTY RIGHTS; REMOVAL OF OBSOLETE PROVISION; CRIMINAL STATUTES," after concluding that Revision 6's ballot summary "is deceptive and misleading." *Id*.

The Secretary sought review in the First District Court of Appeal, *id.* at 138, and Petitioners filed a suggestion of pass-through jurisdiction to this Court. The First District certified the question raised in the petition as one of great public importance necessitating immediate resolution by this Court. *See* Order, *Detzner v. Anstead*, No. 1D18-3804 (Fla. 1st DCA Sept. 11, 2018). On September 12, 2018, this Court accepted jurisdiction and directed the Secretary to file his opening brief by September 17.

SUMMARY OF THE ARGUMENT

I. The Circuit Court should not have granted the petition for a writ of quo warranto, because Petitioners have made no attempt to satisfy the standard for obtaining such relief. As this Court has explained, the writ of quo warranto "historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the State." *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 607 (Fla. 2008) (quoting *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989)). Petitioners do not and cannot allege

that the only Respondent they have named, the Secretary of State, improperly exercised any power or right when he assigned ballot position to the challenged revisions. To the contrary, Petitioners expressly and unambiguously concede that the Secretary "has the *power and duty* to place proposals to amend the constitution on the 2018 general election ballot," ROA at 11 (emphasis added); and they do not claim that the Secretary had the power or duty to refuse such ballot placement based on an independent assessment of the proposals reported by the Commission. Thus, it is undisputed that Petitioners have not satisfied the standard for obtaining a writ of quo warranto as to the sole party against whom they have filed suit. That should be the end of this case.

II. At least two equitable considerations provide an independent basis for denying or dismissing the petition for an extraordinary writ without reaching the merits of Petitioners' claims.

First, Petitioners do not and cannot justify their delay in filing. After more than a year of public hearings concerning the background and potential impact of the proposed revisions, the CRC transmitted its final report to the Secretary of State on May 9, 2018. Plaintiffs began filing challenges in Leon County Circuit Court the very next week. Petitioners could have filed this challenge at that time, and they have never asserted otherwise. Nevertheless, they waited until August 14—more than three months after their claims became ripe, and just weeks before the practical

deadline (September 10, 2018) by which locally elected Supervisors of Elections in each of Florida's 67 counties were required to send final ballots to the printer so that, among other reasons, they may be timely mailed to overseas civilian and uniformed service voters in compliance with state and federal law.

Second, and relatedly, it is now too late for Petitioners to obtain the relief that they seek—i.e., to have the challenged proposals "removed" from the ballot. For a variety of reasons, both legal and practical, counties are required to send ballots to the printer well in advance of the November elections. Long before this suit was instituted, Florida's Division of Elections made September 10—one week *before* the filing of this brief—the target date for sending ballots to the printer. As of the date of this filing, in other words, local Supervisors of Elections throughout the State have already finalized and transmitted to their printers the ballots that will be submitted to the voters, including overseas civilian and uniformed service voters as well as early voters.

III. Assuming this Court deems it appropriate to resolve the merits, the Circuit Court erred in concluding that the challenged revisions violate Section 101.161, Florida Statutes. The plain text of the statute does not bar voters from approving or rejecting a single "proposal" embracing more than one change; because each revision submitted by the CRC constitutes its own "proposal," those revisions satisfy the statutory requirement that such measures "be styled in such a manner that

a ‘yes’ vote will indicate approval of the proposal and a ‘no’ vote will indicate rejection.” *See* § 101.161(1), Fla. Stat.

The Circuit Court’s contrary interpretation finds no support in applicable caselaw, cannot be reconciled with the CRC’s express constitutional authority to propose “a” singular revision embracing numerous and large-scale changes to the state constitution as a whole, and is in substantial tension with this Court’s caselaw explicating the scope of the single-subject limitation. If accepted, the Circuit Court’s ruling would cause more problems than it solves. For example, it would prevent the CRC from taking reasonable steps to mitigate ballot fatigue, and it would leave the courts without any judicially manageable standards for determining when multiple changes are too “unrelated” to be packaged together in the form of a single proposal.

At a minimum, Section 101.161(1) need not be construed to bar bundling of multiple changes in the form of a single proposal. Accordingly, Petitioners have not met their burden of showing that the challenged revisions “clearly and conclusively” violate the laws governing the amendment process.

IV. The Circuit Court did not clearly rule that any of the CRC’s proposed revisions violate the First Amendment, the Circuit Court’s two passing references to the First Amendment do not provide an independent (i.e., non-statutory) basis for concluding that “the laws governing the [constitutional revision] process have been ‘clearly and conclusively’ violated,” and Petitioners have not taken a cross-appeal

challenging the Circuit Court's failure to clearly accept and grant relief on the basis of their novel First Amendment claim. Thus, it would seem that this Court need not and should not address that issue.

Assuming *arguendo* that the issue is properly before the Court, the First Amendment does not, as Petitioners contend, give citizens the right "to vote for or against specific independent and unrelated proposals to amend the constitution without paying the price of supporting a measure the voter opposes or opposing a measure the voter supports." ROA at 4 (emphasis omitted). The text of the First Amendment does not refer to any such right, no case construing the First Amendment has ever recognized such a right, and neither Petitioners nor the Circuit Court have suggested otherwise. Moreover, longstanding historical practice—for example, the adoption of the 1968 Florida Constitution, and the ratification of the United States Constitution and its amendments, including the First Amendment itself—militates against Petitioners' claim. At any rate, this Court's precedent requires that any residual doubts be resolved in favor of giving voters the chance to consider the CRC's proposed revisions, and there is ample room for doubting the validity of Petitioners' concededly novel constitutional theory.

V. The ballot title and summary of CRC Revision 6 satisfy applicable legal requirements. Article I § 2 of the Florida Constitution provides that "[a]ll natural persons . . . have inalienable rights, among which" is the right "to acquire, possess,

and protect property," but also contains a discriminatory—and, in light of longstanding caselaw, obsolete—exception pursuant to which "the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." Revision 6 would do away with that defunct and discriminatory exception. The Circuit Court found the ballot language "deceptive and misleading" because "it does not disclose to voters that the proposed amendment to Article I § 2 removes the power of the legislature to regulate or prohibit 'ownership, inheritance, disposition and possession of real property by *aliens ineligible for citizenship*." ROA at 136 (emphasis in original). As the summary accurately disclosed, however, the revision had the purpose of striking language that is "discriminatory" and "related to real property rights." Ballot language "is not required to explain every detail or ramification of the proposed amendment," and the ballot summary need not and should not be struck down just because it did not specify the particular way in which the concededly defunct text is impermissibly discriminatory.

ARGUMENT

I. PETITIONERS HAVE NOT SATISFIED, AND HAVE MADE NO ATTEMPT TO SATISFY, THE STANDARD FOR OBTAINING A WRIT OF QUO WARRANTO.

"The writ [of quo warranto] historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the State." *Fla. House of Representatives*, 999 So. 2d at 607 (citing *Martinez*, 545 So.

2d at 1339). Petitioners do not dispute that the only party against whom they have filed suit, the Secretary of State, had the authority to take the sole action that forms the basis for his status as Respondent—*i.e.*, his decision "to assign ballot position to [certain] proposals to amend the Florida Constitution," ROA at 10; *see id.* at 12 (arguing that this suit is ripe because "Respondent has already assigned ballot designation places to the proposals to amend the constitution submitted by the 2017-2018 Constitution Revision Commission"). To the contrary, Petitioners expressly and unambiguously concede that "Respondent has the *power and duty* to place proposals to amend the constitution on the 2018 general election ballot." ROA at 11 (emphasis added).[4] Notably, Petitioners do not claim that the Secretary had the power or duty to refuse such ballot placement based on an independent assessment of the proposals reported by the Commission.[5]

[4] In fact, it is not the Secretary of State who submits proposed revisions to the electorate. As discussed below, after receiving proposed revisions from the CRC, the Secretary is required by law to designate each proposed revision with an identifying number for convenient reference, and then furnish the proposed revisions to each of Florida's 67 supervisors of elections. The supervisors of elections then print the ballots and submit them, including the revisions at issue here, to the electorate. In discharging these limited duties, the Secretary wields no discretion.

[5] The Secretary has no role in formulating the revisions proposed by the CRC or the summaries of those revisions that ultimately appear on the ballot; he is involved in that process only with respect to amendments proposed by citizen initiative. *See* § 101.161 (2), Fla. Stat. ("The ballot summary and ballot title of a constitutional amendment proposed by initiative shall be prepared by the sponsor and approved by the Secretary of State in accordance with rules adopted pursuant to s. 120.54."). Petitioners do not claim otherwise.

Florida law supports Petitioners' concession that the Secretary has "the power and duty to place proposals to amend the constitution on the 2018 general election ballot," ROA at 11. The Florida Constitution provides that the CRC shall "file with the custodian of state records"—by statute, the Secretary of State—"its proposal, if any, of a revision of this constitution or any part of it." Art. XI, § 2(c), Fla. Const.; *see* § 20.10(1), Fla. Stat. ("The Secretary of State shall perform the functions conferred by the State Constitution upon the custodian of state records."). The Constitution further requires that such proposed revisions "*shall* be submitted to the electors at the next general election held more than ninety days after . . . it is filed with the" Secretary. Art. XI, § 5(a), Fla. Const. (emphasis added).

The Legislature, in turn, has designated the Secretary of State as the responsible official, and provided that he "shall give each proposed constitutional amendment a designating number for convenient reference," "[t]his number designation shall appear on the ballot," and that the Secretary "shall furnish the designating number, the ballot title, and, unless otherwise specified in a joint resolution, the ballot summary of each amendment to the supervisor of elections of each county in which such amendment is to be voted on." § 101.161(2), Fla. Stat.

In other words, Petitioners make no attempt to argue that *the Secretary* has "improperly exercised any power or right derived from the State"; instead, they claim that *the CRC* has proposed revisions that do not comply with applicable legal

requirements. Consistent with every other CRC-related challenge that has been brought to date—including five different suits challenging some of the same revisions at issue here—the proper way to raise such a claim is to file an action seeking declaratory and injunctive relief in circuit court.

Petitioners did not do that. Notwithstanding this Court's transfer to the Circuit Court, moreover, Petitioners did not avail themselves of the opportunity to file additional or amended pleadings. In addition, the Circuit Court did not recharacterize the petition for a writ of quo warranto as a complaint seeking declaratory and injunctive relief; the Circuit Court did not grant declaratory or injunctive relief; and Petitioners have not taken a cross-appeal from the Circuit Court's decision not to grant such relief. Accordingly, this appeal does not raise the question whether Petitioners would be entitled to obtain declaratory or injunctive relief if they had properly instituted such an action.

In sum, Petitioners do not claim that the Secretary had the *power or duty* to refuse ballot placement based on an independent assessment of the proposals reported by the Commission; they properly concede that the Secretary "has the *power and duty* to place proposals to amend the constitution on the 2018 general election ballot," ROA at 11 (emphasis added); and Florida law supports that concession. Thus, it is undisputed that Petitioners have not satisfied—and, indeed, have made no attempt to satisfy—the standard for obtaining a writ of quo warranto

as to the sole Respondent against whom they have filed suit. That should be the end of this case.

II. EQUITABLE CONSIDERATIONS PROVIDE AN INDEPENDENT BASIS FOR DENYING THE PETITION FOR A WRIT OF QUO WARRANTO.

The issuance of a writ of quo warranto is discretionary, *see Fla. House of Representatives*, 999 So. 2d at 603, and the exercise of this discretion is informed by equitable considerations, including undue delay in seeking the writ. *See, e.g.*, *City of Winter Haven v. State ex rel. Landis*, 170 So. 100, 105 (Fla. 1936) (explaining that the writ of quo warranto may "be refused on the ground of laches" (citation omitted)); *Walker v. David*, 876 So. 2d 729 (Fla. 4th DCA 2004) (per curiam) ("while there is no thirty-day time limit for challenging orders by the Parole Commission in extraordinary writ petitions, the question of timeliness may be raised by the affirmative defense of laches"). The Circuit Court should have denied the petition without reaching the merits, for at least two reasons.

First, Petitioners failed to "act within reasonable temporal bounds" in bringing this suit. *Rice v. State*, 132 So. 3d 222 (Fla. 2013) (quoting *Brown v. State*, 885 So. 2d 391, 392 (Fla. 5th DCA 2004)); *see Landis*, 170 So. at 108. The CRC conducted its year-long proceedings in full public view, and the public has known about the precise language, background, and effect of the challenged proposals since at least May 9, when the CRC transmitted its final report to the Secretary of State. *See Final Report*, *supra* note 1.

Nevertheless, Petitioners chose not to file this action until August 14—more than three months after their claims became ripe and just weeks before locally-elected Supervisors of Elections in each of Florida's 67 counties had to send ballots to the printer so that they may be timely mailed to overseas civilian and uniformed services voters. *See* 52 U.S.C. § 20302(a)(8)(A) (requiring each state to transmit a validly requested absentee ballot to absent uniformed services voter or overseas voter at least 45 days before an election for federal office); § 101.62(4)(a), Fla. Stat. (requiring supervisors of elections to send vote-by-mail ballots to absent uniformed services voters and overseas voters no later than 45 days before general election).

Petitioners offer no explanation for their delay in filing. Nor can they. Other challenges to the CRC's proposed revisions—including cases that raised overlapping or similar claims, that have already made their way through the lower courts, and that were resolved by this Court *before* the practical deadline for submitting final ballots to the printer—demonstrate that Petitioners' delay was altogether avoidable. For example, on May 17, 2018, just a week after the CRC issued its final report, plaintiffs filed suit in Leon County Circuit Court challenging the ballot summary corresponding to proposed Revision 8. *See Fla. Greyhound Ass'n, Inc. v. Fla. Dep't of State*, No. 2018-CA-1114 (Leon Cty. Cir. Ct.). Like Petitioners here, *see* ROA at 21-23, the plaintiffs alleged that the ballot summary corresponding to Revision 8 is misleading. The Circuit Court agreed, and this Court

granted review, ordered expedited briefing and argument, and resolved the case on September 7. Various litigants have filed numerous other timely challenges to the CRC's proposed revisions and their corresponding ballot summaries. *See Cty. of Volusia v. Detzner*, No. 2018-CA-001270 (Leon Cty. Cir. Ct.) (Revision 5) (filed June 15, 2018); *Hollander v. Fla. Dep't of State*, No. 2018-CA-001525 (Leon Cty. Cir. Ct.) (Revision 1) (filed July 12, 2018); *League of Women Voters v. Detzner*, No. 2018-CA-001523 (Leon. Cty. Cir. Ct.) (Revision 3) (filed July 12, 2018); *Knowles v. Fla. Dep't of State*, No. 2018-CA-001740 (Leon Cty. Cir. Ct.) (Revision 1) (filed August 3, 2018). All of those cases were likewise litigated in the proper manner, culminating in a timely and conclusive disposition by this Court.

This Court's equitable analysis should take into account the scope of Petitioners' challenge, the high stakes for the State, the availability of practical alternatives for properly adjudicating Petitioners' claims, and the prudential reasons for requiring challenges of this kind to be litigated in a careful and deliberate manner. The CRC is convened just once every 20 years. After more than a year of public proceedings and three months of media coverage concerning the other pending challenges to the proposed revisions, Petitioners now belatedly seek—in one fell swoop—to invalidate six of the Commission's eight proposed revisions. *See* ROA at 10-11. Not only is the vast majority of the work of the 2017-2018 CRC at stake in this case, but also the work of every subsequent CRC. Petitioners' chief claim is that

the proposed revisions are invalid because they cover more than one subject. In other words, Petitioners' theory, if accepted, would effectively invalidate the Commission's constitutionally prescribed authority to propose a singular revision to "this constitution" as a whole. *See* Art. XI, § 2(c), Fla. Const. (authorizing the CRC to propose "a revision of this constitution *or* any part of it" (emphasis added)). In addition, as discussed above, this case presents no question as to whether the sole respondent "has improperly exercised a power or right derived from the State." *Fla. House of Representatives*, 999 So. 2d at 607. Thus, to proceed, the Court would have to reexamine the very scope of the writ of quo warranto—specifically, whether Petitioners may use the writ as a vehicle for routine challenges to allegedly unconstitutional provisions of law.

Second, and relatedly, it is now too late for Petitioners to obtain the principal relief that they seek—i.e., to have the challenged proposals "removed from the ballot," ROA at 24, before the upcoming election. For a variety of reasons, both legal and practical, counties are required to send ballots to the printer well in advance of the November elections. Long before this suit was instituted, Florida's Division of Elections made September 10—one week *before* the filing of this brief—the target date for sending ballots to the printer. Thus, by the date of this filing, local Supervisors of Elections throughout the State will have already finalized and transmitted the ballots that will be submitted to the voters, including overseas

civilian and uniformed service voters as well as early voters.

Some additional background may help to explain why that is so. Federal law provides that vote-by-mail ballots must be sent to absent stateside uniformed and overseas voters by September 22, 2018. *See* 52 U.S.C. 20302(a)(8)(a); *see also* 101.62(4)(a), Fla. Stat. Failure to comply with that deadline could expose election supervisors to federal criminal liability. *See* 18 U.S.C. § 608.

Well before September 22, however, the ballots must be prepared and printed; and the finalization of ballots is "a critical, complex, and detail-oriented process wherein each precinct may need a different ballot style and contents." *Madera v. Detzner*, 1:18-cv-152-MW/GRJ at 23 (Order Sept. 7, 2018). Preparation of the ballot requires formatting, programming, testing, and proofing for each ballot style, all of which must be done before the date on which the ballots are sent to one of a small handful of printing companies certified to prepare election ballots. Although this practical deadline varies slightly by county, Florida's Division of Elections uses September 10 as the target for sending the ballots to the printers—i.e., one week before the date on which this brief is being filed. *See, e.g., id.* at DE 42-2 (Lake County Decl.) (September 7 deadline), (Duval County Decl.) (September 10 deadline), (Bay County Decl.) (September 12 deadline). As of the date of this filing, in other words, it is no longer possible for the challenged provisions to be removed from the ballots which will ultimately be submitted to the State's voters.

In short, Petitioners effectively ask this Court to nullify a constitutionally mandated enterprise that takes place only once every 20 years and which, in this case, labored in plain view for more than a year to craft the challenged proposals. *See* Art. XI, § 2(c), Fla. Const. The Court should decline to award such drastic and extraordinary relief based on a rushed decision-making process—and that is particularly so inasmuch as Petitioners' decision not to file this challenge until the eleventh hour has made it impossible to grant the relief they seek.

III. SECTION 101.161, FLORIDA STATUTES, DOES NOT CREATE A RIGHT TO UNBUNDLED CRC PROPOSALS.

The Circuit Court held that CRC Revisions 2, 4, and 6 violate Section 101.161, Florida Statutes. ROA at 133; *see id.* at 18-21. That is wrong.

A. Legal Background

Petitioners' statutory "bundling" challenged should be considered in light of two well-established principles.

First, the Florida Constitution affirmatively authorizes multi-subject revisions proposed by the CRC. Specifically, it grants the Commission authority not only to propose discrete revisions to "any part of" the Florida Constitution, but also to propose "a" singular and comprehensive "revision of this constitution" as a whole. *See* Art. XI, § 2(c), Fla. Const. (authorizing the CRC to propose "a revision of this constitution *or* any part of it" (emphasis added)).

Consistent with the constitutional text, this Court has recognized that the

single-subject limitation that the Florida Constitution imposes on citizen initiative proposals does not apply to revisions proposed by the CRC. *Charter Review Comm'n of Orange Cty. v. Scott*, 647 So. 2d 835, 837 (Fla. 1994) (citing Art. XI, Fla. Const.). This is clear not only from the Commission's mandate to propose "a revision of this constitution *or* any part of it," Art. XI, § 2(c), Fla. Const. (emphasis added), but also from the framers' decision to expressly impose a single-subject requirement on amendments proposed by citizen initiative while remaining silent as to amendments proposed by the CRC. *See Telli v. Broward Cty.*, 94 So. 3d 504, 507 (Fla. 2012) ("'By the constitution identifying the offices to which a term limit disqualification applies, we find that it necessarily follows that *the constitutionally authorized offices* not included in article VI, section 4(b), may not have a term limit disqualification imposed.'") (quoting *Cook v. City of Jacksonville*, 823 So. 2d 86, 93-94 (2002)).

The framers' decision not to impose a single-subject rule on the CRC makes sense because the Commission reflects the tradition of the "great debates and compromises" of the conventions that produced the United States Constitution. *Clinton v. City of N.Y.*, 524 U.S. 417, 439-40 (1998). The CRC, moreover, affords the electorate comprehensive procedural protections that the citizen initiative process does not and cannot: public hearings and a publicly visible drafting process. The public lacked such access even with respect to the processes that produced both

the United States Constitution and the Bill of Rights. As this Court has observed, "'[t]he framers of the [United States] Constitution scrupulously maintained the secrecy of their deliberations in the convention of 1787.'" *Bassett v. Braddock*, 262 So. 2d 425, 426 n.4 (Fla. 1972) (quoting Paul A. Freund, *On Prior Restraint*, Harvard Law School Bulletin (Aug. 1971)); *see id* at 427 n.4 ("When the first Congress proposed the First Amendment, the Senate, it is worth remembering, sat in secrecy. For five years the Senate held its debates behind closed doors.").

Second, this Court's precedent requires that any residual doubt regarding the validity of the proposed Revisions must be resolved in favor of giving voters the opportunity to pass on the Commission's proposed revisions. The amendment process is "the most sanctified area in which a court can exercise power." *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958). Under the Florida Constitution, "[s]overeignty resides in the people," *id*., and "the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited *only* by those instances where there is an *entire* failure to comply with a *plain* and *essential* requirement of the organic law in proposing the amendment," *id.* at 842 (emphases added).

Accordingly, courts must exercise "'extreme care, caution, and restraint'" before removing a proposed amendment from the vote of the people. *In re Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward Cty. Voters to Approve Slot*

Machines in Parimutuel Facilities, 880 So. 2d 522, 523 (Fla. 2004) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). If "'any reasonable theory'" exists supporting an amendment's placement on the ballot, it should be upheld. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). Compared to the deference owed legislative acts, this standard "is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval." *Id.* (internal quotation marks omitted). To that end, Florida courts are not to interfere with the amendment process "unless the laws governing the process have been 'clearly and conclusively' violated." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 499 (Fla. 2002).

B. Analysis

Applying those principles here, the Circuit Court erred in holding that the challenged revisions are "statutorily defective." ROA at 133. The provision on which the Circuit Court relied, Section 101.161(1), Florida Statutes, in relevant part provides:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection.

§ 101.161(1) Fla. Stat. In the Circuit Court's view, a proposed revision that covers multiple subjects does "not allow the voter to answer the simple yes or no question" contemplated by Section 101.161(1), Florida Statutes. *See* ROA at 133.

That conclusion is wrong for at least five reasons.

First, the plain text of Section 101.161(1) does not support the proposition that arguably distinct CRC proposals may not be grouped together. The conclusion that citizens cannot vote "yes" or "no" to a revision that covers multiple subjects proceeds on the assumption that each subject comprises a separate proposal, much like a compound question improperly posed to a witness during a deposition. That assumption is not valid. While a witness cannot answer "yes" or "no" to a compound question because it will be impossible for the factfinder to ascertain the meaning of the witness's response, a "yes" or "no" vote for or against a multi-subject revision to the Florida Constitution signifies approval or rejection of the entire package. Thus, a "yes" or "no" vote for or against a multi-subject "proposal" satisfies the statutory requirement that voters have the opportunity to cast a "'yes' vote [to] indicate approval of the proposal and a 'no' vote [to] indicate rejection" of it. Section 101.161(1), Florida Statutes.[6]

[6] Petitioners claim that the ballot summaries corresponding to the proposed revisions violate Section 101.161(1) because they do not include an "explanatory statement" of "the chief purpose of the measure." ROA at 20 (emphasis and internal quotation marks omitted). Petitioners' argument seems to be that a revision which covers multiple subjects cannot have a "chief purpose." But nothing in the statute

Second, the Circuit Court's unprecedented interpretation of the *statutory* requirement set out in Section 101.161(1) cannot be reconciled with the CRC's express *constitutional* authority to propose "a" single revision to the Florida Constitution as a whole. *See* Art. XI, § 2(c), Fla. Const. (authorizing the CRC to propose "*a revision* of this constitution *or* any part of it" (emphases added)). There is no basis for concluding that, even though the CRC has the greater authority to propose a single "revision" embracing numerous, varied, and large-scale changes to the constitution as a whole, it lacks the lesser authority to propose a single revision embracing multiple but less substantial changes. *Id.*

Third, the Circuit Court's novel interpretation of Section 101.161(1) would effectively invalidate this Court's well-established caselaw explicating the way in which constitutional amendments may be adopted. Without analysis, explanation, or citation to any authority, the Circuit Court effectively ruled that the single-subject requirement applicable to citizen initiative proposals also applies to revisions proposed by the CRC. Consistent with the constitutional text, however, this Court has concluded that the single-subject limitation applicable to citizen initiative proposals does not apply to amendments formulated by the CRC. *See, e.g.*, *Charter*

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suggests that each ballot summary must identify only a *single* chief purpose, and indeed such a reading would be entirely inconsistent with the fact that Florida law expressly authorizes the CRC to propose revisions that cover multiple subjects, as discussed more fully above.

Review Comm'n of Orange Cty, 647 So. 2d at 837. Like the current CRC, prior CRCs have relied on such caselaw. For example, in 1998—the last time the CRC proposed amendments to the Florida constitution—it too bundled multiple suggested changes into umbrella proposals. *See, e.g.*, Revision 7 (titled "LOCAL OPTION FOR SELECTION OF JUDGES AND FUNDING OF STATE COURTS"), *available at* http://fall.fsulawrc.com/crc/ballot.html.

Fourth, the Circuit Court's ruling, if accepted, would cause more problems than it solves. For example, it would prevent the CRC from taking reasonable steps to mitigate ballot fatigue. As election officials have explained, long ballots often *discourage* citizens from voting at all, and if the CRC had listed all the proposed amendments separately, there would appear *twenty-five* questions on the ballot this fall, rather than fifteen. *See* Open Letter from Brecht Heuchan, Chairman, CRC Style & Drafting Committee (May 1, 2018), *available at* https://www.flcrc.gov/Media/PressRelease/Show/1100. In other words, the CRC acted reasonably and with the proper intention of minimizing ballot fatigue when it decided to bundle proposed constitutional amendments. The Circuit Court's ruling points to a potential problem associated with "bundling," but does not acknowledge the competing interests that are served by the longstanding practice that the court struck down.

In addition, the Circuit Court's ruling would place the courts of this state in

an untenable position: Courts would be required to strike down ballot proposals that "bundle" together "independent and unrelated" measures, but if and only if those measures "do not constitute a comprehensive plan of revision." *See* ROA at 135. The Circuit Court did not point to any judicially manageable standards for determining when multiple changes are too "independent and unrelated" to be bundled together. Still less did the court identify any workable standard for determining when discrete measures, although "independent and unrelated" for purposes of its newly minted test, may nevertheless be grouped together on the theory that, taken together, they give rise to "a comprehensive plan of revision" for the Constitution as a whole.

Finally, *and fifth*, Section 101.161(1), at a minimum, need not be construed to invalidate six out of the Commission's eight revisions or to effectively eviscerate the Commission's constitutionally prescribed authority to propose a single revision embracing large-scale reforms. As this Court has explained, Florida courts must not interfere with the amendment process "unless the laws governing the process have been '*clearly and conclusively*' violated." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 499 (Fla. 2002) (emphasis added). In light of the considerations discussed above, Petitioners do not come close to satisfying that demanding standard.

IV. THE CIRCUIT COURT DID NOT CLEARLY RULE THAT THE CHALLENGED CRC PROPOSALS VIOLATE THE FIRST AMENDMENT, AND ANY SUCH RULING SHOULD BE REVERSED.

In assessing CRC Revision 4, the Circuit Court opined that Florida's electorate "cannot reasonably answer the statutorily required yes or no question, § 101.161(1), Fla. Stat., without *potentially* being deprived of their First Amendment constitutional right to cast a meaningful vote on each independent and unrelated proposal." ROA at 135 (emphasis added). The Circuit Court did not state that CRC Revision 4 *actually* violates the First Amendment, and a court may not deny voters the chance to pass on a proposed constitutional amendment "unless the laws governing the process have been 'clearly and conclusively' violated." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d at 499. In addition, the Circuit Court did not analyze the text of the First Amendment or cite any case or other authority construing that provision, and Petitioners have not taken a cross-appeal from the Circuit Court's failure to clearly accept their First Amendment claim. Accordingly, it would seem that Petitioners' First Amendment claim is not properly before this Court, and this Court need not and should not resolve it.

Assuming *arguendo* that the Circuit Court accepted Petitioners' First Amendment claim, any such ruling should be reversed. The First Amendment does not give citizens the right "to vote for or against specific independent and unrelated proposals to amend the constitution without paying the price of supporting a measure

the voter opposes or opposing a measure the voter supports." ROA at 13 (emphasis omitted). The text of the First Amendment does not refer to any such right, and no case construing the First Amendment has ever recognized such a right. Moreover, longstanding historical practice—i.e., the ratification of the United States Constitution and its amendments, including the First Amendment itself—militates against Petitioners' novel constitutional theory, and this Court's precedent requires that any residual doubt be resolved by declining Petitioners' request to interfere with the submission of the proposed revisions to the electorate.

The text of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Amend. I, U.S. Const. Nothing in that text suggests that voters have a right "to vote for or against specific independent and unrelated proposals to amend the [state] constitution without paying the price of supporting a measure the voter opposes or opposing a measure the voter supports," ROA at 13 (emphasis omitted), and Petitioners do not argue otherwise.

Caselaw construing the First Amendment does not support Petitioners' novel constitutional theory. Petitioners cite just two cases in support of their First Amendment claim, *see id.*, both of which are inapposite. Indeed, neither of those

cases even addresses the First Amendment. One stands for the well-established but generic proposition that certain rights, including the First Amendment and the right to vote, are fundamental and infringements on those rights are subject to heightened scrutiny. *See In re Greenberg's Estate*, 390 So. 2d 40, 42-43 (Fla. 1980). The other correctly applies Florida's single-subject requirement to a constitutional amendment proposed by citizen initiative. *See Askew*, 421 So. 2d 151. But nothing in that case suggests that the First Amendment imposes a *federal* single-subject requirement, and, as discussed above, it is well-settled that *Florida's* single-subject requirement does not apply to revisions proposed by the CRC.

Petitioners' contention that the First Amendment entitles "the voter to vote for or against specific independent and unrelated proposals," ROA at 13 (emphasis omitted), is irreconcilable with our constitutional history. Of particular relevance, Florida's 1968 Constitution—the whole document—was presented to the voters as a set of three ballot amendments. *See* Open Letter from Brecht Heuchan, Chairman, CRC Style & Drafting Committee (May 1, 2018), *available at* https://www.flcrc.gov/Media/PressRelease/Show/1100.

Similarly, the United States Constitution covers a wide variety of subjects—not merely the structure of government, but myriad issues, including, *e.g.*, the definitions of "pirac[y]" (Art. I, § 8, U.S. Const.) and "[t]reason" (Art. III, § 3, U.S. Const.), the validity of the national debt (Art. VI, U.S. Const.), and the requirement

that criminal trials be by jury (Art. III, § 2, U.S. Const.). Nevertheless, the Constitution was presented and ratified as a single, unified proposal.

Each of the many Amendments to the United States Constitution, too, was proposed and ratified as a single, unified proposal. Critically, many of them cover arguably "independent and unrelated" subjects. For example, the First Amendment—the very provision Petitioners invoke as the basis for his challenge—prohibits the "establishment of religion" *and* safeguards the right "to petition the Government for a redress of grievances." Amend. I, U.S. Const. If Petitioners' theory is sound, the process by which the First Amendment was ratified would have violated the First Amendment.

In any event, the proposals in the revisions challenged by Petitioners are not as "unrelated and independent" as the Circuit Court concluded. For example, Revision 2 affects the state college and university system; Revision 4 addresses environmental and health concerns; and Revision 6 removes certain obsolete or discriminatory language from the Florida Constitution. All three bundled proposals cover related subject matter in a manner consistent with the way in which the individual clauses of the First Amendment all protect rights broadly related to belief and expression.

In short, our constitutional history is replete with examples of situations in which voters have been asked to vote up or down on bundled provisions addressing

distinct rights and issues—including the ratification of the Constitution and the First Amendment. This longstanding historical practice militates against any suggestion that the First Amendment requires arguably unrelated provisions to be adopted on a piecemeal basis. And it underscores the line-drawing problems that Petitioners' theory would generate: Petitioners offer no judicially manageable standard for determining how "unrelated" two provisions must be to trigger the First Amendment right he asks this Court to recognize for the first time in the history of American jurisprudence.

Moreover, even if the First Amendment included the right Petitioners assert, the CRC had a rational basis for bundling some of the amendments for inclusion on the 2018 General Election ballot. As explained above, long ballots often *discourage* citizens from voting at all, and if the CRC had listed all the proposed amendments separately, there would appear *twenty-five* questions on the ballot this fall, rather than fifteen. *See* Open Letter from Brecht Heuchan, Chairman, CRC Style & Drafting Committee (May 1, 2018), *available at* https://www.flcrc.gov/Media/PressRelease/Show/1100. In other words, the CRC acted reasonably and with the proper intention of minimizing ballot fatigue when it decided to bundle proposed constitutional amendments.

Finally, and as emphasized above, this Court's precedent requires that any residual doubt regarding the validity of the proposed Revisions must be resolved in

favor of giving voters the opportunity to pass on the Commission's proposed revisions. The amendment process is "the most sanctified area in which a court can exercise power." *Pope*, 104 So. 2d at 842. Under the Florida Constitution, "[s]overeignty resides in the people," *id*., and "the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited *only* by those instances where there is an *entire* failure to comply with a *plain* and *essential* requirement of the organic law in proposing the amendment." *id.* at 842 (emphases added). Accordingly, courts must exercise "'extreme care, caution, and restraint'" before removing a proposed amendment from the vote of the people. *In re Advisory Op. to Att'y Gen. re Authorizes Miami-Dade & Broward Cty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522, 523 (Fla. 2004) (quoting *Askew*, 421 So. 2d at 156). If "'any reasonable theory'" exists supporting an amendment's placement on the ballot, it should be upheld. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). Compared to the deference owed legislative acts, this standard "is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval." *Id.* (internal quotation marks omitted). To that end, Florida courts are not to interfere with the amendment process "unless the laws governing the process have been 'clearly and conclusively' violated." *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 499 (Fla. 2002). Petitioners

have not satisfied that demanding standard for undoing the work of a constitutionally mandated commission.

V. REVISION 6'S BALLOT TITLE AND SUMMARY WILL NOT MISLEAD THE ELECTORATE OR HIDE ITS LEGAL EFFECT.

Section 101.161(1), Florida Statutes, codifies the standard for ballot titles and summaries of proposed constitutional amendments. Any such measure "submitted to the vote of the people" shall include a ballot title "not exceeding 15 words in length, by which the measure is commonly referred to or spoken of," and a ballot summary, "not exceeding 75 words in length," that must explain "the chief purpose of the measure." § 101.161(1), Fla. Stat. (2017). The purpose of the ballot title and summary is "to provide fair notice of the content of the proposed amendment." *Advisory Op. to the Att'y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). "[S]ection 101.161 requires that the ballot title and summary state in clear and unambiguous language the chief purpose of the measure," *Askew*, 421 So. 2d at 155, so that the proposed amendment does not "fly under false colors" or "hide the ball" as to its effect, *Armstrong*, 773 So. 2d at 16 (internal quotation marks omitted).

In assessing a proposed amendment's ballot title and summary, a court asks two questions: "First, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'" *Fla. Educ. Ass'n v. Fla. Dep't*

of State, 48 So. 3d 694, 701 (Fla. 2010) (quoting *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008)).

If approved by the electorate, Revision 6 would eliminate certain obsolete or discriminatory language from two provisions of the Florida Constitution. ROA at 68. Pursuant to Section 101.161(1), Florida Statutes, the CRC has approved the following title and summary for placement on the November 2018 General Election ballot:

> CONSTITUTIONAL AMENDMENT
> ARTICLE I, SECTION 2
> ARTICLE X, SECTIONS 9, 19
>
> PROPERTY RIGHTS; REMOVAL OF OBSOLETE PROVISION; CRIMINAL STATUTES.—Removes discriminatory language related to real property rights. Removes obsolete language repealed by voters. Deletes provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment; retains current provision allowing prosecution of a crime committed before the repeal of a criminal statute.

ROA at 70.

The Circuit Court concluded that "the ballot language for Revision 6 is deceptive and misleading" because "it does not disclose to voters that the proposed amendment to Article I, § 2 removes the power of the legislature to regulate or prohibit 'ownership, inheritance, disposition and possession of real property by *aliens ineligible for citizenship.*" ROA at 136 (emphasis in original). This conclusion

was erroneous.

Revision 6 would amend Article I, Section 2 of the Florida Constitution as follows:

> Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property~~; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law~~. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Id. at 68-69.[7]

As the ballot summary discloses, the revision would strike language that is "discriminatory" and "related to real property rights." Petitioners' argument seems to be that the ballot summary must also disclose precisely how the stricken language is discriminatory—i.e., that it discriminates against aliens ineligible for United States citizenship. As this Court has repeatedly held, however, the summary "need not explain every detail or ramification of the proposed amendment." *Advisory Op. to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 974 (Fla. 2009); *see also Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982).

[7] Proposed deletions are shown in strikethrough font.

CONCLUSION

This Court should reverse the trial court's order granting the petition for a writ of quo warranto.

Respectfully submitted.

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Amit Agarwal
AMIT AGARWAL (FBN 125637)
Solicitor General

EDWARD M. WENGER (FBN 85568)
Chief Deputy Solicitor General
JORDAN E. PRATT (FBN 100958)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3683
amit.agarwal@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Amit Agarwal
Amit Agarwal

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 17th day of September, 2018, to the following counsel:

Joseph W. Little
3731 NW 13th Place
Gainesville, Florida 32605
littlegnv@gmail.com

Attorney for Petitioners-Appellees

/s/ Amit Agarwal
Amit Agarwal