**IN THE SUPREME COURT OF FLORIDA**

RICHARD DELISLE,

Petitioner,

v.

CRANE CO., *et al*.,

Respondents.
_____/

Case No. SC16-2182
L.T. Case Nos. 4D13-4351
4D14-0146



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# BRIEF OF AMICUS CURIAE THE FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute is Florida's leading organization of concerned citizens, small business owners, doctors, lawyers, and business leaders who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. Since its founding, the Institute has advocated practices that build faith in Florida's court system. It represents a broad range of participants in the business community who share a substantial interest in a balanced litigation environment that treats plaintiffs and defendants evenhandedly.

The Institute and its members have a deep interest in ensuring that courts carefully observe the limits on their jurisdiction and that this Court exercises its discretionary review in compliance with the Florida Constitution. The Institute and its members are concerned that, as in times past, the Court has extended its conflict jurisdiction beyond constitutional bounds, and that the Institute's members are no longer assured of finality in the decisions of district courts, but are confronted with costly litigation that exceeds the limits drawn by the people of the State of Florida.

## SUMMARY OF ARGUMENT

Jurisdiction was improvidently granted and should be discharged because the district court did not decide the question that Petitioner presents to this Court: whether the expert-evidence standard codified in section 90.702, Florida Statutes, is procedural or substantive for purposes of article V, section 2(a) of the Florida

Constitution. In fact, no court has yet addressed that question. And of course, there can be no conflict until at least *two* courts have decided the same question of law.

All the district court did was confirm the general proposition that statutory rules of evidence may be applied before this Court considers them in rules cases. In doing so, the district court adhered to uniform practice and created no conflict. Courts have consistently held that amendments to the Evidence Code apply even before their consideration by this Court in a rules case, regardless of whether those amendments are procedural or substantive for purposes of article V, section 2(a).

To establish conflict jurisdiction, Petitioner points to district court decisions rendered *before* the Legislature amended section 90.702 and established the new expert-evidence standard. These cases do not conflict with the decision below; they were decided under prior law. To conflict, decisions must disagree in their resolution of the same question. It is insufficient to point to one decision that precedes and another that postdates an amendment to applicable law. Change is not conflict.

Absent an express basis for jurisdiction in article V, section 3(b) of the Florida Constitution, this Court has no power to review the decisions of district courts. Indeed, this provision was amended in 1980 to reaffirm that conflict jurisdiction requires a real, live, and vital conflict within the four corners of the decision below.

Still, conflict jurisdiction has at times been extended beyond its prescribed limits, eroding the finality to which, in most cases, the decisions of district courts

are entitled, and depriving litigants and the civil justice system itself of the benefits of that finality. As the ultimate expositor of the Florida Constitution and the only sentinel over its own authority, this Court must exercise vigilant self-restraint and reaffirm that true conflict—not perceived error—is the measure of its jurisdiction.

Even on prudential grounds, this case is not the appropriate vehicle for resolution of the constitutional question. Petitioner's challenge presents a question of first impression with no prior examination by a single, lower tribunal. As in the rules case, when it declined to entertain challenges to the *Daubert* standard and elected instead to await a true case or controversy, this Court would be well served to await a case in which the challenge is not presented as a naked question of law, but is fully clothed with the careful and comprehensive analysis of lower tribunals.

## ARGUMENT

### I. BECAUSE THE DISTRICT COURT DID NOT DECIDE THE QUESTION THAT PETITIONER PRESENTS, THIS COURT HAS NO JURISDICTION.

The district court did not decide whether section 90.702, as amended, is procedural or substantive. No court has. Rather, the court addressed a more general, practical question: do statutory amendments to the Evidence Code apply to pending cases *after* their effective dates, but *before* their consideration in a rules case?

Under established precedent, the answer is "yes"—*regardless of whether the amendments are procedural or substantive for purposes of article V, section 2(a).*

The district court followed precedent, applied the new standard, and did not decide the constitutional question that Petitioner asks this Court to be the first to resolve.

To exercise conflict jurisdiction to decide a constitutional question that no court in Florida has decided—and where, by definition, there can be no conflict—would exceed the bounds of article V, section 3(b)(3). There is simply no conflict among the district courts as to whether section 90.702 is procedural or substantive.

To determine whether conflict jurisdiction exists in any particular case, the Court should ask several questions: (1) What is the question of law that this Court is asked to decide? (2) Did the district court below decide that question? (3) If so, did the district court's decision on that question conflict with the decision of another district court on the same question? (4) If so, is the conflict express and direct? The answers to these inquiries demonstrates the absence of jurisdiction in this case.

**1. What is the question of law that this Court is asked to decide?**

Petitioner asks this Court to hold that the expert-evidence standard codified in section 90.702, as amended by Chapter 2013-107, Laws of Florida, is procedural for purposes of article V, section 2(a), Florida Constitution, which authorizes this Court to adopt rules of judicial procedure, and therefore that the adoption of that standard by statute rather than court rule is unconstitutional. Initial Br. at 10–19.

### 2. Did the district court below decide that question of law?

The district court did not decide that question. Petitioner relies on footnote 7 of the court's opinion, but footnote 7 does not mention procedure and substance. Rather, it concerns Petitioner's argument below that the district court "lack[ed] authority to apply *Daubert . . . because it is a legislative change to the evidence code that has not yet been approved by the Florida Supreme Court*." (emphasis added).

Thus, the question before the district court was whether courts may apply statutory amendments to the Evidence Code *before* this Court addresses them in a rules case. The district court answered in the affirmative, stating in footnote 7 that "statutes are presumed to be constitutional and are to be given effect until declared otherwise." It did not consider whether the amendment here is procedural or substantive.

The district court's citation to *Mallory v. State*, 866 So. 2d 127, 128 (Fla. 4th DCA 2004), is the key that unlocks its decision. In *Mallory*, a statutory amendment to the Evidence Code had taken effect, but had not been reviewed in a rules case. The court expressly declined to consider whether the amendment was procedural or substantive—a question the parties had not presented. Invoking the presumption that "statutes are presumed constitutional and given effect until they are declared unconstitutional," the court proceeded to apply the amendment to the pending case.

Here too, the district court recognized that this Court had not yet considered the statutory amendment in a rules case. As in *Mallory*, the court did not decide whether the amendment is procedural or substantive, but applied it to a pending case.

*McLean v. State*, 854 So. 2d 796 (Fla. 2d DCA 2003), *approved*, 934 So. 2d 1248 (Fla. 2006), predated *Mallory* and illuminates the rule that *Mallory* applied. In *McLean*, the court considered a statutory amendment to the Evidence Code that took effect shortly before the trial, but was not adopted by this Court until the next year. The district court noted that the trial court's application of the statute in the interim between its effective date and its adoption by this Court was appropriate:

> Apparently, the supreme court intends to allow trial courts to utilize a rule of evidence during the period between its legislative enactment and its adoption by the supreme court if the trial court determines that the new rule of evidence is procedural [for purposes of retroactive application] and does not violate the prohibition against ex post facto application.

*Id*. at 803 n.7.

In *Mortimer v. State*, 100 So. 3d 99 (Fla. 4th DCA 2012), though the trial court had erroneously admitted hearsay evidence, the Legislature subsequently enacted a hearsay exception under which the same evidence would have been admissible. *Id*. at 101. The district court therefore considered whether the hearsay exception would apply to a retrial, and thus whether the error was harmless. *Id*. at 103. The court opined that the new hearsay exception was *procedural* for purposes of

article V, section 2(a)—but *still* determined that the hearsay exception would apply to a retrial even before its consideration in a rules case. *Id*. at 103–04. The court explained that "the Supreme Court's unwritten policy" is to permit courts to apply statutory amendments to rules of evidence before their adoption in rules cases—provided that their application is consistent with the Ex Post Facto Clause. *Id*. at 104. The court observed that statutes "are presumed constitutional and given effect until they are declared unconstitutional." *Id*. (quoting *Mallory*, 866 So. 2d 128).

*Mallory*, *McLean*, and *Mortimer* exemplify the same practice: before this Court considers a statutory amendment to the rules of evidence in a rules case, courts need not consider whether that amendment is procedural or substantive for purposes of article V, section 2(a), but must faithfully apply the amendment to pending cases, absent a violation of the Ex Post Facto Clause. This rule is now well established. *See* Charles W. Ehrhardt, 1 FLORIDA EVIDENCE § 103.5 (2017 ed.) ("The District Courts of Appeal have indicated that trial courts can apply amendments to the [Evidence] Code before the amendment is adopted by the Supreme Court through its rule-making authority if the amendment is procedural." (citing *Mallory*, 866 So. 2d at 128; *McLean*, 854 So. 2d at 803)); *see also Perez v. Bell S. Telecomms., Inc*., 138 So. 3d 492, 498 & n.12 (Fla. 3d DCA 2014) (applying the *Daubert* standard without considering whether it is procedural or substantive, and finding "comfort" in this Court's periodic adoption of amendments to the Evidence

Code); *Crumbley v. State*, 876 So. 2d 599, 603 (Fla. 5th DCA 2004) (noting "with interest" that, when it adopts statutory amendments to the Evidence Code, this Court "usually specifies that the effective date of the rule is the date the Legislature designated," and that, according to *McLean*, trial courts may therefore apply such amendments after their effective dates but before their adoption by this Court).

The district court's statement in footnote 7 that "statutes are presumed to be constitutional and are to be given effect until declared otherwise" does not imply that it found the *Daubert* standard to be substantive and therefore constitutional. Both *Mallory* and *Mortimer* recited the same maxim—and neither of those courts found the statutes at issue to be substantive. The presumption of constitutionality merely lends support to the established practice that allows trial courts to apply statutory rules of evidence—whether procedural or substantive—to pending cases before their consideration in rules cases. Footnote 7 simply adheres to that practice.

The district court did not, therefore, decide the constitutionality of section 90.702. And a district court decision that does not decide the question presented to this Court cannot support conflict jurisdiction. *See Simmons v. State*, 305 So. 2d 178, 180 (Fla. 1974) ("[I]nasmuch as this point was not passed upon below, it cannot be cited for conflict nor considered by us on the merits."). Because the district court did not consider whether the expert-evidence standard is procedural or substantive, that question cannot be reviewed under this Court's conflict jurisdiction.

### 3. Did the district court's decision on the question of law it decided conflict with the decision of another district court on the same question?

On the question of law that the district court *did* decide—whether statutory amendments to the rules of evidence apply before this Court's consideration of them in rules cases—there is no conflict among the districts. No district court has held, in contrast to *Mallory*, *McLean*, and *Mortimer*, that such amendments are inapplicable until this Court adopts them, or that courts must assess the distinction between procedure and substance before this Court adopts those amendments.

But even if the district court implicitly held that section 90.702 is substantive law and therefore constitutional, there would be no conflict (and certainly not an express one), since there is no conflict case. No district court has held that the statute is procedural. If there were a conflict case, then Petitioner surely would have made that decision prominent in his brief. Petitioner, however, presents no decision on point—proof that there is no interdistrict conflict on the constitutional question.

Indeed, in his jurisdictional brief, Petitioner did not argue that district courts have disagreed on the classification of section 90.702 as procedural or substantive. Instead, Petitioner asserted conflict between the decision below and pre-*Daubert* cases that applied the *Frye* standard, such as *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). Those decisions do not establish conflict; they were decided before section 90.702 was amended in 2013 and could not, therefore, have decided the question

of law presented here—whether the *Daubert* standard is procedural or substantive.

A change in law does not create a reviewable conflict; a conflict arises only when courts apply the *same* law differently. *See* art. V, § 3(b)(3), Fla. Const. (authorizing review of certain decisions that conflict "on the same question of law"). Thus, in *State v. De Abreu*, 613 So. 2d 453, 453 (Fla. 1993), this Court found no conflict because the later case applied rule changes adopted *after* the earlier case had been decided. Likewise, in *State v. K.C.*, 873 So. 2d 316, 316 (Fla. 2004), the Court concluded that two cases did not conflict "because the statute at issue was amended after the Fifth District's decision" in the earlier case. The two decisions were not in conflict, therefore, and the Court did not have conflict jurisdiction.

As in *De Abreu* and *K.C.*, the application of amended section 90.702 by the court below does not conflict with the application of the *Frye* standard in *Marsh* and other pre-amendment decisions. The law changed. The district courts did not decide the "same question of law," art. V, § 3(b)(3), Fla. Const., and their decisions do not create disharmony between the districts. If a change in law were sufficient to create a conflict between pre-amendment decisions and post-amendment decisions, then every decision that applies a new statute or a new rule would conflict with some pre-amendment decision and be reviewable by this Court. That expanse of jurisdiction was clearly not the intent of the narrow constitutional provision that permits this Court to resolve conflicts, or disharmonies, between judicial districts.

Petitioner also suggests conflict with *R.C. v. State*, 192 So. 3d 606 (Fla. 2d DCA 2016); *Maines v. Fox*, 190 So. 3d 1135 (Fla. 1st DCA 2016); and *Baan v. Columbia County*, 180 So. 3d 1127 (Fla. 1st DCA 2015). According to Petitioner, these cases "held that ***only*** when the Art. V, § 2(a), constitutional issue is not raised may the court apply the *Daubert* enactment." Juris. Br. at 6 (emphasis in original). They did no such thing. The parties in those cases did not challenge the constitutionality of the *Daubert* standard. *R.C.*, 192 So. 3d at 609 n.2; *Maines*, 190 So. 3d at 1140 n.*; *Baan*, 180 So. 3d at 1133 n.8. Those cases do not hold, therefore—and could not have held—that the *Daubert* standard is inapplicable where its constitutionality is challenged before the rules case. Nor did they state as much, even in dicta. And they surely express no opinion on the merits of the constitutional question that Petitioner urges this Court to decide as a matter of first impression.

"Courts are bound to take notice of the limits of their authority, and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *W. 132 Feet v. City of Orlando*, 86 So. 197, 198–99 (Fla. 1920); *see also Fla. Hematology & Oncology Specialists v. Tummala*, 969 So. 2d 316, 316 (Fla. 2007) (deciding after oral argument that jurisdiction was improvidently granted). Because the court below did not decide the constitutional question, this Court has no jurisdiction to decide it here.

### 4. Is any conflict direct and express?

Even if the decision below were in conflict with that of another district, the conflict would not be direct and express. There is no trace of conflict within the four corners of the district court's decision—and certainly no trace of a conflict that is not only direct, but also express. Indeed, the court's decision contains no internal recognition of conflict with any other decision, as this Court has required even when its exercise of jurisdiction has been the most debatable. *See, e.g.*, *Miles v. Weingrad*, 164 So. 3d 1208, 1211 (Fla. 2015). Nor could it; neither the district court, nor any other court in Florida, has decided the question that Petitioners ask.

## II. THIS COURT HAS EXPANDED ITS CONFLICT REVIEW BEYOND THE BOUNDS OF ARTICLE V, SECTION 3(B)(3).

This Court must exercise relentless care to honor the boundaries that the people, through their Constitution, have drawn around its authority. It must remain on its guard against enticements to loosen those restraints and to assume power that the people never conferred. This self-awareness and vigilant self-restraint are more important attributes in this Court than in any other organ of government, since, as the supreme interpreter of the Constitution, this Court is the final judge of its own authority. Steady and unswerving fidelity to the constitutional allocation of power is exceedingly more important than the correction of errors in any particular case.[1]

[1] *Cf.* Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 483 (2005) ("Thus, in close cases,

Soon after district courts were first established, this Court recognized that its own authority is "limited and strictly prescribed," and that district courts are not intermediate courts in most cases, but "courts primarily of final appellate jurisdiction." *Ansin v. Thurston*, 101 So. 2d 808, 910 (Fla. 1958). The new paradigm was essential to the speedy and efficient administration of justice, which had become clogged by the great volume of cases that presented themselves to this Court. *Id*.

The Court long ago recognized that a simple disagreement with a decision of a district court is not the measure of its conflict jurisdiction. *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). Rather, the Court's exercise of conflict jurisdiction requires a "real, live and vital conflict," *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734–35 (Fla. 1960)—a district court decision that, "if permitted to stand, would be out of harmony with a prior decision . . . on the same point, thereby generating confusion and instability among the precedents," *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962). "Our concern in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law." *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985).

It was not long, however, before the Court "began to relax the well-defined

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the presumptions would disfavor jurisdiction in a court of limited jurisdiction . . . . This has an important consequence. When parties invoke the jurisdiction of the Supreme Court of Florida, they usually are fighting against a presumption that the Court cannot hear the case, and they carry a heavy burden to demonstrate jurisdiction.").

barriers which constitutionally circumscribed its jurisdiction." *Bunkley v. State*, 882 So. 2d 890, 903 (Fla. 2004) (Wells, J., dissenting). Justice Thornal memorably lamented the rapid erosion in the finality of district court decisions: "If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a District Court. Under the majority decision today, there is always that potential opportunity to obtain another examination of the record by the Supreme Court with the hope that it will in some way differ with the District Court." *Foley v. Weaver Drugs, Inc*., 177 So. 2d 221, 234 (Fla. 1965) (Thornal, J., dissenting). Years later, Justice England sounded the same wistful note: "Since *Foley*, as I have attempted to point out, the district courts have more and more been regarded by a majority of this Court simply as inconvenient rungs on the appellate ladder." *Fla. Greyhound v. W. Flagler Assocs.*, 347 So. 2d 408, 411 (Fla. 1977) (England, J., concurring).

The Court's acknowledged failure to police the boundaries of its jurisdiction prompted a flood of petitions and, in 1980, a constitutional amendment to cabin the Court's jurisdiction and relieve its crowded docket. *Jackson v. State*, 926 So. 2d 1262, 1266 (Fla. 2006); *Bunkley*, 882 So. 2d at 903 (Wells, J., dissenting). Sixty-seven percent of voters approved the amendment. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, http://dos.elections.myflorida.com/initiatives. The amendment limited the Court's conflict jurisdiction to decisions that conflict not only *directly*, but also *expressly* with another decision on the same question of law. Fla. SJR 20-C (1979).

Since 1980, this Court has often emphasized that the Constitution confines its jurisdiction to a "narrow class" of enumerated cases. *Wells v. State*, 132 So. 2d 1110, 1112 (Fla. 2014) (quoting *Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003)); *see also Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980) (reiterating that district court decisions are usually "final and absolute" (quoting *Ansin*, 101 So. 2d at 810)). To support conflict jurisdiction, a district court's opinion "must contain a statement or citation effectively establishing a point of law upon which the decision rests." *The Fla. Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). Implied conflict will not do, *Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986); conflict "must appear within the four corners of the majority opinion," *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Despite the clear constitutional mandate to limit conflict jurisdiction to cases of genuine disagreement among district courts, "jurisdiction creep" appears to have resumed. This Court has accepted review of cases that involve no acknowledged conflict, but rather a point of law on which members of this Court have disagreed with the judges of the district courts. Jurisdiction has often been accepted over the strenuous objections of other members of the Court.[2] In this very case, four justices

[2] *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 929 (Fla. 2017) (Canady, J., dissenting); *Myers v. State*, 211 So. 3d 962, 984 (Fla. 2017) (Canady, J., dissenting); *Patrick v. Hess*, 212 So. 3d 1039, 1044 (Fla. 2017) (Canady, J., dissenting); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1265 (Fla. 2017) (Canady, J., dissenting); *Dockswell v. Bethesda Mem'l*

accepted jurisdiction over the dissent of three members of the Court. This expansive use of conflict review has deprived district court decisions of their finality and reduced this Court from an arbiter of conflict to a general court of errors, like the district courts. As a consequence, litigants must anticipate that, if a district court decision piques the interest of this Court, a petition that cannot show true conflict might still be granted. This practice finds no support in the text of the Constitution.

This Court must resist jurisdiction creep and exercise conflict jurisdiction only when a true conflict—"real, live and vital," *Nielsen*, 117 So. 2d at 734–35—appears on the face of the decision below. The decision below presents no conflict, nor would review resolve a disagreement among districts on the same question of law. It would, however, once again erode the finality that the people conferred on

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*Hosp., Inc.*, 210 So. 3d 1201, 1214 (Fla. 2017) (Polston, J., dissenting); *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1219 (Fla. 2016) (Canady, J., dissenting); *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1, 13–15 (Fla. 2016) (Canady, J., dissenting); *Paton v. GEICO Gen. Ins. Co.*, 190 So. 3d 1047, 1053 (Fla. 2016) (Quince, J., dissenting); *Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1230 (Fla. 2016) (Canady, J., dissenting); *Miles*, 164 So. 3d at 1215–16 (Canady, J., dissenting); *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1257 (Fla. 2015) (Polston, J., dissenting); *Pratt v. Weiss*, 161 So. 3d 1268, 1273–74 (Fla. 2015) (Canady, J., dissenting); *Audiffred v. Arnold*, 161 So. 3d 1274, 1281 (Fla. 2015) (Canady, J., dissenting); *Sanders v. ERP Operating Ltd. P'ship*, 157 So. 3d 273, 282 (Fla. 2015) (Polston, J., dissenting); *Warmington v. State*, 149 So. 3d 648, 657 (Fla. 2014) (Perry, J., dissenting); *Wallace v. Dean*, 3 So. 3d 1035, 1055 (Fla. 2009) (Wells, J., dissenting).

the decisions of district courts. By dismissing this case, the Court would reaffirm that true conflict—not perceived error—is the measure of its conflict jurisdiction.[3]

## III. THIS COURT SHOULD DECLINE TO DECIDE CONSTITUTIONAL QUESTIONS BEFORE LOWER COURTS CAN CONSIDER THEM.

Even if this Court had jurisdiction, it should decline to exercise that jurisdiction here. Rather than be the first responder to the scene of an intractable legal problem, this Court should await a proceeding in which Petitioner's question has been thoroughly canvassed by lower courts and received the full and deliberate consideration of at least one district court. After all, this Court's constitutional charge is to "review" district court decisions that create conflict, art. V, § 3(b)(3), Fla. Const.—not to decide in the first instance matters that no court has considered.

In rules cases, this Court has long declined to consider the constitutionality of rules of evidence, electing instead to await a true case or controversy in which the challenge can be raised, argued, and squarely decided by the lower tribunals in an adversarial proceeding. *See In re Amendments to Fla. Evidence Code*, 210 So. 3d 1231, 1238–39 (Fla. 2017) (declining to address "constitutional concerns" with

[3] In its notice invoking the Court's discretionary jurisdiction, Petitioner cited two additional jurisdictional grounds, claiming that the decision below expressly declares valid a state statute, and expressly construes a provision of the Florida Constitution. Petitioner's jurisdictional brief does not mention these alternative grounds and thus appears to have abandoned those arguments. Indeed, the district court did not conduct a constitutional analysis or even mention any provision of the Constitution. It did not, therefore, "expressly" (or even impliedly) declare a statute valid or construe the Constitution.

the *Daubert* standard, "which must be left for a proper case or controversy"); *In re Amendments to the Fla. Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002) (declining to address constitutional challenges to rules of evidence); *In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339, 341–42 (Fla. 2000) (declining to "pass on the constitutionality of the legislation" until the question arises "in a true 'case or controversy'"); *see also In re Amendments to Fla. Evidence Code*, 144 So. 3d 536, 538 (Fla. 2014) (Pariente, J., concurring in part and dissenting in part) (concluding that the constitutionality of the statute must be decided "in an actual case or controversy, where the statement of an unavailable declarant is admitted pursuant to this newly added hearsay exception and the issue is raised and argued by the parties").

Here, the constitutional question presents itself in much the same posture as in a rules case: as a question of first impression, and with no prior analysis or even discussion by any lower court. Nowhere in its opinion did the district court address the question that Petitioner asks this Court to answer. In fact, no Florida court has.

Appellate courts are appropriately reticent to decide questions that have not received thorough consideration by lower courts. The United States Supreme Court has commended the "wisdom of allowing difficult issues to mature through full consideration by the courts of appeals." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977); *accord Am. Med. Int'l, Inc. v. Sec'y of Health, Ed. & Welfare*, 677 F.2d 118, 122–23 (D.C. Cir. 1981) ("And it is a truism that pro-

posed legal rules can be improved through repeated examination by a variety of legal minds. . . . [I]ndependent reconsideration of legal issues by the circuits can facilitate Supreme Court review by highlighting their complications and controversial aspects, and thus make for better informed decisions." (footnote omitted)). For the same reason, this Court has counseled district courts, when certifying questions of great public importance, to "provide this Court with the benefit of its analysis of the questions certified." *Weiand v. State*, 732 So. 2d 1044, 1047 n.2 (Fla. 1999).

Indeed, this Court has consistently declined to address questions that district courts have not addressed in their opinions. *See Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 596 (Fla. 2013); *Cox v. St. Josephs Hosp.*, 71 So. 3d 795, 802 (Fla. 2011); *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010); *State v. Ratner*, 948 So. 2d 700, 703 n.1 (Fla. 2007); *Milks v. State*, 894 So. 2d 924, 928 n.5 (Fla. 2005). All courts—and especially those whose decisions are binding—are well served to consider the opinions and analyses of other courts that have first sifted the arguments and presented their resolution of difficult questions.

In February, in a rules case, this Court declined to resolve constitutional challenges to section 90.702. The Court explained that it "does not address the constitutionality of a statute . . . within the context of a rules case," and that those challenges "must be left for a proper case or controversy." *In re Amendments to Fla. Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017). It would be incongruous

indeed to decide a constitutional challenge to the same statute in this case, which, like a rules case, presents no analysis of the constitutional challenge by any lower tribunal. This case presents a fact pattern, but not one upon which any court has performed the constitutional examination that Petitioner asks this Court to perform. This is not the "proper case or controversy" for a constitutional adjudication. *Id*.

This Court should decline to be the first to address the constitutionality of section 90.702 under article V, section 2(a). It should instead await a proceeding in which the lower tribunals, after mature consideration, have thoroughly examined the constitutionality of the statute and offered their views for this Court's benefit.

## CONCLUSION

For these reasons, jurisdiction was improvidently granted and should be discharged.


/s/ *George N. Meros, Jr.*

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## CERTIFICATE OF SERVICE

I certify that on October 30, 2017, the foregoing document was furnished by email on all counsel identified on the Service List that follows.

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## CERTIFICATE OF COMPLIANCE

I certify that brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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