IN THE
Supreme Court of Florida

AMAMIS AYALA, as State Attorney
for the Ninth Judicial Circuit

Petitioner, Case No. SC17-653

v.

RICHARD L. SCOTT, as Governor
of the State of Florida,

Respondent

BRIEF OF AMICI CURIAE THE INNOCENCE NETWORK AND WITNESS TO INNOCENCE ON BEHALF OF PETITIONER

Nina Morrison
THE INNOCENCE NETWORK
40 Worth St, Suite 701
New York, NY 10013
(212) 364-5457
nmorrison@innocenceproject.og

Seth Miller
President
INNOCENCE NETWORK
INNOCENCE PROJECT OF FLORIDA, INC.
100 East Park Avenue
Tallahassee, FL 32301
(850) 561-6767
smiller@floridainnocence.org

WITNESS TO INNOCENCE
1501 Cherry St.
Philadelphia, PA 19102

Russell Neufeld, Esq.
99 Hudson St., Fl 8
New York, NY 10013
(646) 613-3859
rneufeld@neufeldoffice.com

Norman Adam Tebrugge
TEBRUGGE LEGAL
2337 Ixora Avenue
Sarasota, FL 34234
(941)544-6515
Fla. Bar No. 473650
adam@tebruggelegal.com

James C. Dugan (Pro Hac Admission Pending)
WILLKIE FARR & GALLAGHER LLP
787 7th Avenue
New York, NY 10019
(212) 728-8654
jdugan@willkie.com

Attorneys for Amici Curiae The Innocence Network and Witness to Innocence

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IDENTITY AND INTERESTS OF AMICI CURIAE

The Innocence Network (the "Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty five current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which innocent persons were convicted, the Network advocates study and reform designed to enhance the truth-seeking function of the criminal justice system to ensure that future wrongful convictions are prevented. The Network pioneered the post-conviction DNA model that has to date exonerated over 300 innocent and wrongly-convicted persons, and its member organizations have served as counsel in a majority of these cases. As perhaps the Nation's leading authority on wrongful convictions, the Network and its co-founders, Barry Scheck and Peter Neufeld (who are co-directors of the Innocence Project, Inc.) are regularly consulted by officials at the state, local, and federal levels.

The Network and its member organizations frequently file amicus briefs in cases raising important issues of criminal law, including cases implicating the use of the death penalty. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015). In those

briefs and elsewhere, the Network does not argue for abolition of the death penalty, but has focused on the extent to which innocent people face the risk of wrongful execution and how to minimize that risk. The Network files this brief to argue that the interests of justice are poorly served by the twenty three executive orders (the "Orders") issued by Governor Rick Scott removing State Attorney Aramis Ayala from each capital case pending in the Ninth Judicial Circuit, all because Ms. Ayala exercised her discretion as a prosecutor to decline to pursue the death penalty in capital cases absent an appropriately egregious circumstances. By issuing these unlawful Orders, Gov. Scott has not only unlawfully supplanted the constitutionally protected authority of Ms. Ayala to do the job that she was elected to do, he has also undermined an important check against the execution of the innocent.

Witness to Innocence (WTI) is the only national organization of death row exonerees. WTI, which advocates for the abolition of the death penalty, was founded in 2003 by renowned anti-death penalty activist Sister Helen Prejean. Its members know, first hand, the profound failure of America's capital punishment system. The organization is dedicated to empowering exonerated death row survivors to be the most powerful and effective voices in the public debate surrounding the death penalty in the United States. Some of the most powerful voices are among the 26 people who were sentenced to death in the State of

Florida, but were later proven to be actually innocent, including Juan Melendez and Sunny Jacobs. More people have been exonerated from Florida's death row than from that of any other state. Witness to Innocence has a strong interest in protecting the choice of the overwhelming majority of Florida's Ninth Judicial Circuit voters who elected Aramis Ayala as their State Attorney. WTI's insights and understanding of the compelling reasons for the Court to prevent Governor Scott's attempted usurpation of State Attorney Ayala's power and responsibilities will help inform the Court's ultimate decision in this matter.

SUMMARY OF THE ARGUMENT

To justify removing State Attorney Aramis Ayala from 23 homicide cases pending in the Ninth Judicial District, Governor Scott relied on a statute that he claimed permitted him to take such an action when "the Governor determines that the ends of justice would be best served." Fla. Stat. §27.14 (2017). However, the "ends of justice" are poorly served by the Orders, which will undermine prosecutorial discretion in capital cases to the detriment of Florida's criminal justice system. If allowed to stand, the Orders will work an injustice in at least three ways. First, by impinging on a prosecutor's discretion not to pursue the death penalty, the Orders may operate to deprive actually innocent people of a means to escape wrongful execution. Second, the Orders undermine public safety by, in this case, effectively requiring State Attorneys to allocate their limited resources to the prosecution of capital cases even if they deem other crime fighting

priorities to be more effective. Finally, the Orders set a bad precedent that opens the door to political interference on a host of issues best left to the sound judgment of State Attorneys elected by the communities they serve – including issues that directly impact innocent defendants in both capital and non-capital cases.

Without question, the exercise of prosecutorial discretion to decline to pursue capital punishment can serve to protect innocent people from wrongful execution. Over a hundred people in the United States, including many from Florida, have been exonerated after they were sentenced to death. For some, absolution came too late. The Orders will undermine the ability of States Attorneys to act independently and without fear of political reprisals in declining to seek a death sentence, including in cases where the defendant may actually be innocent.

The Orders also jeopardize public safety. Capital cases are expensive to prosecute, and the Orders encourage State Attorneys to bear that cost rather than allocate their limited resources in a manner that they deem better suited to the goals of improving the quality of criminal investigations and prosecutions, and reducing crime. In effect, therefore, the Orders actually hinder State Attorneys from ensuring that only the truly guilty are punished for committing crimes.

Furthermore, the Orders set a precedent for political interference with the ability of prosecutors to exercise control and decision-making authority over their

cases. Florida's Constitution specifically vests the responsibility to prosecute crimes in the Office of the State Attorney. A decision allowing the Governor to second guess the discretion of the State Attorneys not to seek the death penalty would undermine the constitutionally protected independence of State Attorneys, with potentially far reaching and negative consequences for the administration of justice. Protecting State Attorneys from unwarranted interference by the Governor would also allow them to continue to implement best practices designed to protect the innocent from wrongful prosecution and conviction, whether in the areas of forensic science, interrogation of suspects, or eyewitness identification.

I. The Exercise Of Prosecutorial Discretion To Decline To Pursue The Death Penalty Protects Innocent People From Wrongful Execution.

Each year, dozens of innocent individuals are exonerated for crimes that they did not commit, including some who were wrongfully sentenced to capital punishment. The broad pool of death row inmates who have been exonerated and freed since 1973 – based on new evidence of actual innocence, violations of due process, and/or other grounds – includes at least 157 known cases.[1] Within that larger group, Florida leads the nation in death row exonerations

[1] *See* Death Penalty Information Center, *Innocence Database*, https://deathpenaltyinfo.org/innocence-and-death-penalty (last visited April 19, 2017).

with 26 – nearly one-sixth of the national total.[2] Of the 349 total post-conviction DNA exonerations in the United States to date, 20 people served time on death row, including two from Florida. Innocence Project, *Exonerate the Innocent*, https://www.innocenceproject.org/exonerate/ (last visited Apr. 13, 2017). In total, there have been 117 exonerations (both DNA and non- DNA) on record since 1989 based on newly discovered evidence in capital cases nationally; eight of those recent death row exoneration cases are from Florida.[3]

Prosecutorial independence in deciding whether or not to pursue a death sentence is an important safeguard for protecting innocent people from the risk of wrongful execution. Through Article V §17 of the Florida Constitution, which provides that State Attorneys "shall" prosecute local cases, the people of Florida have expressly adopted a policy of prosecutorial independence. Neither the "supreme executive power," nor §27.14, Florida Statutes permits the Governor to override the people's policy preference by removing a prosecutor who refuses to pursue the death penalty. First, it is a well-known principle of construction that a provision of law "covering a particular subject matter is controlling over a . . . provision covering the same and other subjects in general terms." *Mendenhall v. State*, 48 So.3d 740, 748 (Fla. 2010) (quoting *McDonald v. State*, 957 So.2d 605,

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[2] *Id.*

[3] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 21, 2017);

610 (Fla. 2007)). Thus the broad, general grant of "supreme executive power" given to the Governor in Article IV §1(a) must yield to the specific grant of power in Article V §17 that gives State Attorneys the authority to prosecute local cases. Second, Florida Statutes §27.14, which allows the Governor to replace a State Attorney when he "determines that the ends of justice would be best served", cannot trump the state's constitutional delegation of power to State Attorneys to make prosecutorial decisions. *See City of Daytona Beach v. Harvey*, 48 So.2d 924, 925 (Fla. 1950) ("The voice of the people expressed in the constitution is the supreme law of the land and it rises above that of the legislature, the courts or the executive.").

The citizens who elected State Attorney Ayala agree with the exercise of her constitutionally granted prosecutorial independence in this instance. A recent poll showed that 62% of Orange and Osceola county respondents prefer some form of life imprisonment to the death penalty for first-degree murder while only 31% of respondents preferred the death penalty to life imprisonment.[4]

Some exonerated individuals have come perilously close to death. At 22 years old, James Thompson, a father of two children, was sentenced to death after he was convicted of murder. During his 14 years in prison, Thompson had his

[4] Death Penalty Information Center, *Poll Shows Orange and Oseola County Voters Prefer Life Sentence Over Death Penalty* (Apr. 13, 2017), https://deathpenaltyinfo.org/node/6733.

execution date changed six times, and he witnessed 12 other condemned men leave death row to receive their sentence as he awaited his own fate. Days before he was set to die, his lawyer hired an investigator who discovered that the blood type of the person who committed the robbery that constituted the predicate offense to Thompson's death sentence did not match Thompson's. His armed robbery conviction was vacated, and he was subsequently taken off death row. Four years later, James Thompson was exonerated of murder when he was retried and acquitted after only 35 minutes of jury deliberation.[5]

Other innocent people have not been fortunate enough to live to see their names cleared. One of Florida's death sentence exonerations occurred posthumously. In 1986, Frank Lee Smith was sentenced to death for the rape and murder of an eight-year-old girl who was brutally beaten by someone who burglarized her home. Smith was convicted based primarily on shaky eyewitness identification and his criminal history. He maintained his innocence until January 30, 2000, the day he died of cancer on death row. On December 15, 2000, 11 months after his death and 14 years after his conviction, Frank Lee Smith was exonerated because DNA evidence revealed that Eddie Lee Mosely was the true perpetrator of the crime. DNA evidence implicating Mosely was also used to

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[5] Laura Candler, *After Innocence: Wrongfully Convicted Of Murder, Exonerated Days Before Execution Date*, WUNC 91.5 (June 10, 2013), *at* http://wunc.org/post/after-innocence-wrongfully-convicted-murder-exonerated-days-execution-date#stream/0.

exonerate Jerry Frank Townsend, another Florida inmate who spent twenty-two years in prison after confessing to two crimes that he did not commit.[6]

Others were actually executed before evidence demonstrating their innocence came to light. Claude Jones, a Texas man, was executed in 2000 for the 1989 murder of a liquor store clerk who was shot to death. The only evidence linking Jones to the shooting was a hair analysis and the testimony of one of his co-defendants. The state's chemist initially stated that the hair sample was too small to test, but testified at trial that it belonged to Jones. Seven years after Jones's death, a lawsuit was initiated on behalf of the Texas Observer, the Innocence Project, the Innocence Project of Texas, and the Texas Innocence Network to allow a DNA test. A judge ordered the tests in 2010, and the results proved that the hair sample could not have belonged to Jones. Since the only other evidence against Jones was the inconsistent testimony of an accomplice, which is insufficient under Texas law to prove guilt, it is likely that Claude Jones was executed for a crime he did not commit.[7]

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[6] The Innocence Project, *Frank Lee Smith*, https://www.innocenceproject.org/cases/frank-lee-smith/ (last visited Apr. 14 2017).

[7] *See* Nathan Thornburgh, *DNA Testing Casts Doubt on Texas Man's Execution*, Time (Nov. 12, 2010) http://content.time.com/time/nation/article/0,8599,2031034,00.html; The Innocence Project, *Injustice in Texas: The Claude Jones Case*, https://www.innocenceproject.org/injustice-in-texas-the-claude-jones-case/ (last visited Apr. 14, 2017).

A State Attorney is duty bound "to seek justice, not merely to convict," ABA Standards for Prosecution Function, Standard 3-1.2(c), and part of that duty includes the responsibility to pursue a fair sentence. Given the number of capital exonerations nationwide and in Florida more specifically, it is reasonable for a prosecutor to conclude that the potential for wrongful execution could be detrimental to the pursuit of justice in many cases. That conclusion should be free of politically-motivated interference by the Governor.

II. Public Safety Interests Are Advanced by the Decision Not to Pursue Capital Punishment.

There is overwhelming support for the conclusion that the death penalty does not benefit public safety. *See, e.g.*, Dr. Oliver Roeder, Lauren-Brooke Eisen, & Julia Bowling, *What Caused The Crime Decline?*, Brennan Center for Justice 43-45 (2015) (running a regression analysis with data from all 50 states and the District of Columbia and concluding that, "[c]apital punishment played no appreciable role in the crime drops in the 1990s or 2000s"); Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The View of Leading Criminologists*, 99 J. Crim. L. & Criminology 489, 500-501 (2009) (finding that, in a survey that included responses from 79 criminologists associated with the American Society of Criminology, 88.2% did not believe that the death penalty deterred crime). Capital punishment can, however, undermine public safety when

it diverts taxpayer funds from other uses that could have a more significant impact on crime reduction.

Enforcing the death penalty is an expensive endeavor. By one estimate, each death row inmate in the United States costs the government $1.12 million more than an inmate in the general prison population. Torin McFarland, *The Death Penalty vs. Life Incarceration: A Financial Analysis*, 7 Susquehanna U. Pol. Rev. 46 (2016). Death penalty cases are more expensive to litigate than cases where the government seeks life imprisonment. *Id.* at 57-58. Also, because death row inmates are usually housed separately and in higher security facilities than other prisoners, they have greater incarceration costs. *See id.* at 59, 73-75 (comparing each state's daily and yearly costs of incarcerating a death row inmate versus an inmate in the general prison population). These costs influenced State Attorney Ayala's decision to no longer pursue the death penalty. She estimated that the death penalty costs Florida $2.5 million more per prisoner than a life sentence does. Emergency Non-Routine Petition for Writ of *Quo Warranto*, *Ayala v. Scott*, No. SC17-653 (Fla. Apr. 11, 2017).

The Orders undermine public safety because they incentivize prosecutors to pursue the death penalty even if that money could be used more effectively elsewhere. For example, a State Attorney might consider spending the saved funds on victim services or enhancing the quality of criminal investigations. Certainly,

diverting taxpayer resources from death penalty cases to enhance criminal investigative efforts would advance public safety. When an innocent person is convicted of a crime, a true and potentially violent perpetrator remains at large. In nearly half of all DNA exonerations, the real perpetrator was ultimately identified after going on to commit more violent crimes. Emily West, Ph.D & Vanessa Meterko, M.A., *Innocence Project: DNA Exonerations, 1989-2004: Review of Data and Findings from the First 25 Years*, 79 Alb. L. Rev. 717, 731 (2016). Sixty-eight of those perpetrators committed an additional 142 violent crimes, including 77 rapes and 34 homicides. *Id.*

The case of Randall Dale Adams serves as an infamous example of how wrongful convictions threaten public safety. Adams, whose wrongful conviction was the subject of the film *The Thin Blue Line*, was sentenced to death for the 1976 murder of a Dallas police officer. The real perpetrator, David Harris, framed Adams for the crime and testified against him at trial. Although the overwhelming amount of evidence implicated Harris in the murder, prosecutors viewed him as a less appealing defendant than Adams because he was too young to be executed.[8] Harris went on a violent crime spree after Adams's conviction. His offenses included a series of burglaries, the attempted killing of a police officer, two

[8] Frank R. Baumgartner, et al., *The Mayhem of Wrongful Liberty Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, Paper Presented at the Innocence Network Conference 1 (Apr. 11-12, 2014), *available at* https://www.unc.edu/~fbaum/papers/WrongfulLiberty2014.pdf.

separate kidnappings, and the murder of Mark Mays.[9] Adams's example demonstrates that the public safety benefits in prosecutors declining to pursue the death penalty are twofold; not only are the lives of potentially innocent death row inmates saved, but the financial savings can be used to assist law enforcement to identify and punish the truly guilty.

III. If Allowed to Stand, The Orders Set a Bad Precedent That Undermines Local Prosecutorial Independence.

By constitutional design, the people of Florida have chosen to vest the power to determine how to prosecute crimes in the Office of the State Attorney. *See* Fla. Const. Art. V § 17 (2016). The Orders undermine that prosecutorial discretion and independence. A decision that permits the Orders to stand would have far reaching consequences for the conduct of criminal cases beyond the issue of whether the death penalty should be pursued in a particular case. Taken to logical extremes, such a decision could condone politically motivated gubernatorial interference in a host of prosecutorial decisions, including what sort of evidence to use in prosecuting a case, with the threat of summary replacement hanging over the head of any State Attorney that dared to exercise independent judgment that diverged from what the Governor believed furthered the "ends of justice."

As recently as last month, the United States Supreme Court emphasized the importance of using scientifically backed evidence in death penalty cases. *See*

[9] *Id.* at 3.

Moore v. Texas, 137 S. Ct. 1039, 1044 (2017) (holding that the use of an evidentiary test that was "[n]ot aligned with the medical community's information" to determine whether a defendant was intellectually disabled for death penalty purposes violated the Eighth Amendment). In many cases, however, criminal convictions are supported by scientifically unreliable evidence. One study that reviewed the trial transcripts of 137 exonerated defendants found that 60% of the wrongful convictions involved forensic science testimony that was unsupported by empirical data. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony And Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009). The research discovered that the flaws in forensic expert testimony were systemic and "included invalid testimony by 72 forensic analysts called by the prosecution and employed by 52 laboratories, practices, or hospitals from 25 states." *Id.* at 24.

In addition to defective expert testimony, some forms of evidence are themselves inherently unreliable. Concern about the use of forensic science in criminal cases prompted President Obama to ask the President's Advisors on Science and Technology ("PCAST") to identify what steps could be used to strengthen the discipline. PCAST identified two "gaps" that existed in forensic evidence: "(1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid

and reliable."[10] The widely discredited junk science surrounding bitemark evidence was singled out for criticism by PCAST. After extensively reviewing studies that analyzed the validity of bitemark analysis, PCAST concluded that "available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bitemark with reasonable accuracy."[11]

Another type of unreliable evidence is microscopic hair analysis. After three men were exonerated based on scientifically flawed microscopic hair tests, the FBI and Department of Justice decided to review all cases prior to 1999 where the practice was used to convict. In 2016, FBI Director James Comey wrote a letter in which he admitted that "in a large number of cases, [FBI] examiners made statements that went too far in explaining the significance of a hair comparison and could have misled a jury or judge."[12] After a review of 268 cases where examiners provided hair analysis testimony to convict a defendant, FBI and DOJ discovered

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[10] President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 1 (Sept. 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

[11] *Id.* at 87.

[12] Letter from FBI Director James Comey to U.S. Governors (June 10, 2016), *available at* https://www.fbi.gov/file-repository/second-governor-letter-061016.pdf/view.

that erroneous statements were made in 96% of those cases.[13] Nine of the defendants who were inculpated were executed and five others died while on death row.[14] Florida was one of the states where defendants were convicted based on microscopic hair analysis evidence.[15]

State Attorneys have a responsibility to "do justice" and, unlike career politicians, are uniquely positioned to assess the reliability of different categories of evidence. In a high-profile and emotionally-impactful case, such as the murder of a police officer, the ends of justice are poorly served when politicians without prosecutorial experience are permitted to overrule State Attorneys on matters that are traditionally within their sound prosecutorial judgment. The people of the state of Florida, through constitutional amendment, have placed the authority to make such decisions into the hands of persons who have been elected by local communities to serve independently as their prosecutors. The ends of justice require that this Court overrule the Orders.

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[13] Press Release, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015), *available at* https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review.

[14] *Id.*

[15] Eyewitness identification can also be unreliable if not conducted under the proper conditions. *See State v. Henderson*, 27 A.2d 872 (N.J 2011)

CONCLUSION

For the foregoing reasons, the Amcici urge the Court to grant petitioner's request for a writ of *quo warranto*.

Respectfully Submitted:

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Norman Adam Tebrugge
TEBRUGGE LEGAL
2337 Ixora Avenue
Sarasota, FL 34234
(941) 544-6515
Florida Bar No: 473650
adam@tebruggelegal.com

James C. Dugan (Pro Hac admission pending)
WILLKIE FARR & GALLAGHER LLP
787 7th Ave
New York, NY 10019
212-728-8654
jdugan@willkie.com

Nina Morrison
THE INNOCENCE NETWORK
40 Worth St., Suite 701
New York, NY 10013
(212) 364-5357
nmorrison@innocenceproject.org

Seth Miller
President
INNOCENCE NETWORK
INNOCENCE PROJECT OF FLORIDA, INC.
100 East Park Avenue
Tallahassee, FL 32301
(850) 561-6767

Fla. Bar No. 0806471
smiller@floridainnocence.org

WITNESS TO INNOCENCE
1501 Cherry St.
Philadelphia, PA 19102

Russell Neufeld, Esq.
99 Hudson St., Fl 8
New York, NY 10013
(646) 613-3859
rneufeld@neufeldlawoffice.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

Undersigned counsel hereby certify that on this the 21st day of April 2017, a true copy of the foregoing was electronically filed with the Florida E-File Portal, and sent via email to the following parties of record:

Marcus E. Hasbun, Esq. mhasbun@zuckerman.com Mamie V. Wise, Esq. mwise@zuckerman.com ZUCKERMAN SPAEDER, LLP 101 E. Kennedy Blvd., Suite 1200 Tampa, FL 33602 *Counsel for Petitioner*	Roy L. Austin, Esq. raustin@hwglaw.com Amy E. Richardson, Esq. arichardson@hwglaw.com HARRIS, WILTSHIRE & GRANNIS, LLP 1919 M. Street, N.W., Eighth Floor Washington, D.C. 20036 *Counsel for Petitioner*
Daniel E. Nordby, Esq. daniel.nordby@eog.myflorida.com EXECUTIVE OFFICE OF THE GOVERNOR The Capitol Tallahassee, FL 32399-0001 *Counsel for Respondent*	Solicitor General Amit Agarwal, Esq. amit.agarwal@myfloridalegal.com FLORIDA DEPARTMENT OF LEGAL AFFAIRS PL-01, The Capitol Tallahassee, FL 32399-1050 *Counsel for the Attorney General*
Adam S. Tanenbaum, Esq. adam.tanenbaum@myfloridahouse.gov FLORIDA HOUSE OF REPRESENTATIVES 418 The Capitol 402 South Monroe Street Tallahassee, FL 32399-1300 *Counsel for Amicus Curiae The Florida House of Representatives*	Arthur I. Jacobs, Esq. aijacobs@comcast.net Richard J. Scholz, Esq. Douglas A. Wyler, Esq. JACOBS SCHOLZ & ASSOCIATES, LLC 961687 Gateway Blvd., Suite 201-I Fernandina Beach, FL 32034 *Counsel for Amicus Curiae Florida Prosecuting Attorneys Association*
Judith A. Brownie Dianis, Esq. jbrowne@advancementproject.org Donita Judge	Shayan Elahi, Esq. Floridaattorney@gmail.com SHAYAN ELAHI, P.A.

Denies D. Lieberman Thomas Mariadason Jennifer Lai-Peterson ADVANCEMENT PROJECT 1220 L Street, NW, Suite 850 Washington, D.C. 20005 *Counsel for Amici Curiae*	P.O. Box 4490 Winter Park, FL 32793 *Counsel for Amici Curiae*
Mark Heron, Esq. mherron@lawfla.com Robert J. Telfer III, Esq. rtelfer@lawfla.com MESSER CAPARELLO, P.A. 2618 Centennial Place Tallahassee, FL 32308 *Counsel for Amici Curiae*	

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation.

Respectfully Submitted:

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Norman Adam Tebrugge
TEBRUGGE LEGAL
2337 Ixora Avenue
Sarasota, FL 34234
(941) 544-6515
Florida Bar No: 473650
adam@tebruggelegal.com

James C. Dugan (Pro Hac admission pending)
WILLKIE FARR & GALLAGHER LLP
787 7th Ave
New York, NY 10019
212-728-8654
jdugan@willkie.com

Nina Morrison
THE INNOCENCE NETWORK
40 Worth St., Suite 701
New York, NY 10013
(212) 364-5357
nmorrison@innocenceproject.org

Seth Miller
President
INNOCENCE NETWORK
INNOCENCE PROJECT OF FLORIDA, INC.
100 East Park Avenue
Tallahassee, FL 32301
(850) 561-6767
Fla. Bar No. 0806471
smiller@floridainnocence.org

WITNESS TO INNOCENCE
1501 Cherry St.
Philadelphia, PA 19102

Russell Neufeld, Esq.
99 Hudson St., Fl 8
New York, NY 10013
(646) 613-3859
rneufeld@neufeldlawoffice.com

Attorneys for Amici Curiae