IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-668

Advisory Opinion to Governor
Re: Sheriff and Judicial Vacancies Due to Resignation

By the Request of the Governor Pursuant to Article IV, Section 1(c), Florida Constitution

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BRIEF OF VICKI LEVY ESKIN
INTERESTED PARTY

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INTRODUCTION

The Governor has requested an advisory opinion from the Court concerning *inter alia*, the judicial vacancy created when the Governor accepted Judge Gene Stephenson's voluntary resignation from the Eighteenth Judicial Circuit, Group 12, on April 14, 2006, with a future effective date of May 31, 2006. The resignation was accepted before the statutory qualifying period, but made effective after the qualifying period. The Governor inquires whether under these circumstances Judge Stephenson's vacancy should be filled by election or appointment. Judge Stephenson's six year term of office is set to expire on January 2, 2007. The Governor also inquires if the vacancy is filled by appointment, as to whether the appointee would serve a term ending on the first Tuesday after the first Monday in January, 2009.

The undersigned interested party, Vicki Levy Eskin, filed required documents under Florida Statute 106.011(16) with the Division of Elections in October, 2005, to become a candidate for Judge Stephenson's soon to be vacated seat. Candidate Eskin followed Florida Statute 99.095 to qualify by the Petition Process, filing signatures of more than 8000 registered voters of the 18th Judicial Circuit to meet the deadline of April 10, 2006, with her multi-county Supervisors of Elections. These Supervisors of Elections then

certified Candidate Eskin's petitions to the Department of State, as required under Florida law. This brief submitted by Vicki Levy Eskin, an active candidate already campaigning for Judge Stephenson's seat, which was announced for election to take place on September 5, 2006, urges this Court to reaffirm its long standing precedent holding that Florida's citizens have the right to elect judges of their choice. This Court should deny any suggestion that the Governor's power of appointment should override an active election process where a candidate has submitted petitions in compliance with election laws to qualify the candidate to be placed on the ballot. Candidate Eskin respectfully asks this Court to advise the Governor that he should not, under the unique circumstances of this case exercise his power of appointment.

STATEMENT OF THE CASE AND FACTS

Circuit Judge Gene Stephenson's seat on the 18th Judicial Circuit, Group 12, is an open seat for election on September 5, 2006, as Stephenson is ineligible to serve an additional term of office pursuant to Article V, Section 8 of the Florida Constitution. On October 11, 2005, Vicki Levy Eskin announced her candidacy for the soon to be vacated seat pursuant to Florida Statute 106.011(16). Thereafter, she entered into contracts for routine campaign matters, raised funds through her campaign committee,

expended over Forty-Five Thousand Dollars in furtherance of the campaign, and followed Florida Statute 99.095 to qualify for placement on the ballot by qualifying petitions. She submitted over 8000 signed petitions from registered voters in Brevard and Seminole Counties to meet the statutory deadline of April 10, 2006.

On April 14, 2006, the Governor accepted a resignation submitted by Judge Gene Stephenson, to become effective on May 31, 2006, after the qualifying period of May 8 through May 12th. On April 19th, the Governor sought an advisory opinion from this Court as to whether he should fill the impending judicial vacancy under his Article V Appointment power where the future effective date is after the qualifying date but before the election. Simultaneously, the Governor notified the 18th Circuit Judicial Nominating Commission to convene and submit six (6) names to him by June 14, 2006, for consideration for appointment to fill Judge Stephenson's seat.

The Court deemed the questions posed by the Governor to be of significant public and media interest, placed it in a high profile status and invited interested parties to submit briefs on or before April 24, 2006, and this brief is in response to the Court's invitation.

ISSUE BEFORE THE COURT

The Governor's request for an answer to the following question: Should a vacancy created by a Circuit Judge's voluntary retirement accepted after a statutory notice of general election be filled by appointment or election?

SUMMARY OF THE ARGUMENT

This Court has firmly established that the public's right to elect must prevail when a judicial seat must be filled and when an election is already underway.

Article V, Section 11(b) does not preempt the voters' right to select their judges, but rather it clarifies the length of a temporary judicial appointment. The Amendment does not override a constitutional preference for the right of the voters to elect a judge for a full term of office. Indeed, when posed the question of whether voters should have the absolute right to select their judges through the election process, in 2000, as mandated by Article V, Section 10 (b)(3), the people of Florida voted to retain the right to select their judges by an overwhelming majority of votes cast. When an election process is underway, the election must prevail over the appointment process. To decide otherwise is to disenfranchise Florida voters and would raise a constitutional dilemma.

In the present case, an incumbent who was not eligible to run for an additional term due to age restrictions confirmed to many interested parties his intent to stay on the bench to allow his seat to be filled by election. Pursuant to the judge's announced intent to remain on the bench in order for a replacement to be elected to fill his seat, Candidate Eskin followed applicable laws regarding judicial elections by announcing her candidacy in October of 2005. Her campaign committee raised funds to undertake an election, she expended over $45,000.00 to prepare for the election and, most importantly, she collected and delivered more than 8000 individually signed petitions of the voters of the circuit interested in placing her name on the ballot in compliance with the required deadline of April 10, 2006, so that all of the voters of the 18th Circuit could consider her for election to the circuit bench. The signed petitions were counted and certified by the Supervisors of Elections to be sufficient to place her name on the September ballot for consideration by the voters.

If the Governor's power of appointment is permitted to override an election process which includes a specific deadline to place a candidate on the ballot through the Petition Process, where that deadline is met by a candidate and thousands of voters, future candidates will know that asking voters to place their names on the ballot through the petition process could

well be a futile effort. Further, voters will have no confidence that signing petitions has any impact whatsoever in the process to select a judicial candidate. This will have a chilling effect on judicial candidates seeking to qualify through the petition process or even to undertake the complexity and expense of attempting to qualify through the petition process knowing that an election could be halted if the incumbent vacates his or her seat for any reason including illness, death, or resignation after that process has been completed. Indeed, there would be no reason for Florida Statute 99.095, which provides a specific period for collecting and presenting the signed petitions and would mean that candidates may only be placed on the ballot by paying a specific fee. Further, it would have the effect of limiting active campaigning to less than three calendar months after the qualifying period. To effectively shorten the campaign period to the few months after the qualifying period places an unreasonable restraint on candidates who believe it necessary to communicate with hundreds of thousands of voters over multi-county jurisdictions, especially in a contested seat where no incumbent will be on the ballot.

The Governor states that the vacancy will probably be filled by appointment by August and suggests that the appointee would serve a term ending on the first Tuesday after the first Monday in January, 2009

(Governor's Inquiry to the Court dated April 19, 2006, paragraph 17.) That would extend the term of office for the seat that would have expired in a few months and disenfranchise the voters who indicated that they wanted Candidate Eskin's name on the ballot in 2006 for this seat and had actively participated in the election process to make that happen.

This Court previously held in In re Advisory Opinions to the Governor re: Appointment or election of Judges, 824 So.2d 132 (Fla. 2002) that senior judges may fill short vacancies on a bench in order for an election process to proceed. Where an election has been announced and voter petitions have been properly submitted and certified, a short vacancy for that position while awaiting the outcome of an ongoing election vote does not rise to a level to sufficiently harm the court's ability to function. There is no emergency requiring the Governor to step in and exercise his power of appointment.

Candidate Eskin respectfully urges the Court to answer the Governor's question in the negative to protect the people's constitutional right to elect their Circuit Judges, specifically those candidates they have helped to place on the ballot through the petition process.

ARGUMENT

The Court should advise the Governor to defer to the election process that is already underway. This brief will discuss the long-standing precedents holding the Constitutional preference of election over appointment when a vacancy occurs during an active election. The brief will analyze the prevailing Constitutional and statutory laws and address case law favoring scheduled elections and analyze the unique circumstances of this case to demonstrate why this judicial vacancy must be filled by election and not by appointment.

Article V, Section 11(b) of the Florida Constitution does not imply that the appointment process should be favored over election where the election process has commenced. This court in In re Advisory Opinions to the Governor re: Appointment or election of Judges, 824 So. 2d 132 (Fla. 2002), held that a vacancy created by the retirement of a circuit judge on May 30, 2002, effective immediately, from a judicial seat for which an election was ongoing for that year should be filled by election. Id. at 136. In that Opinion, the Court recognized the inherent conflict in various state constitutional sections including Article V, Section 10 (b)(1), section 10(b)(3) and Article V, Section 11(b) to conclude that the conflict must be resolved by a construction which gives effect to the clear will of the voters

that circuit judges be selected by election. The Court stated that once the election process begins, the election method is the method by which the judicial position is to be filled. In the Opinion, three candidates had qualified during the statutory qualification period and before the judge was involuntarily retired due to a physical disability. The Court's opinion left no doubt about the importance it placed on the election process, despite the fact the seat would remain vacant for six months, as in the present case, until an elected candidate would take the bench.

In Pincket v. Harris, 765 So. 2d 284 (Fla. 1st DCA 2000), the Court referred to Spector v. Glisson, 305 So. 2d 777 (Fla. 1975) to affirm that it had:

> ...historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice and that vacancies in elective offices should be filled by the people at the earliest practical date.

There, the Court construed Article V, Section 11(a) to permit the Governor to appoint only when the elective process was not available. According to this Court:

> Section 11(a) does not contemplate a strained application which would give priority to the appointive power over the paramount elective process when there is a known vacancy to occur in conjunction with and reasonably before a judicial election; the

> elective machinery should be allowed to function to provide the successor.

Id. at 783.

In the unique case at hand, Judge Stephenson's resignation was accepted after Candidate Eskin met the statutory date for submission of the requisite number of signatures of verified voters necessary to be placed on the ballot through the Petition Process. As the Petition Process was completed before the Judge's resignation was accepted, the election process was in place. There is adequate time to continue with an election, which is already underway without causing undue harm to the function of the court function. The case of In re Advisory Opinions to the Governor re: Appointment or election of Judges, 824 So. 2d 132 (Fla. 2002) supports the requirement that Judge Stephenson's vacancy must be filled through election of a new judge by voters who have already begun to participate in the election process through signing petitions during the statutory period when the petitions could be collected and submitted.

Had the election process not progressed through the time period restricted for the collection and submission of the verified petitions through the required Florida statutory process, had Candidate Eskin not relied upon Judge Stephenson's frequent and explicit avowal that he would retain his seat long enough for an election to replace him and thus, proceeded with the

certification process to collect over 8000 voters' signatures on petitions to place her name on the ballot, and had the vacancy occurred so far in advance of the election that court business might suffer by an extended vacancy, then the power of appointment should be utilized.

This case is simple in that a contested election for an open seat in an announced election was underway when Judge Stephenson resigned. The qualification process, which occurs while Judge Stephenson is still seated on the bench, is a mere formality for Candidate Eskin to complete as she has completed the process necessary to qualify through the petition process. The Supervisors of Elections certifying her petitions have already accepted required payments to count and verify the petitions submitted by Candidate Eskin and voters of Seminole and Brevard Counties. The election time was clearly set and anticipated when the resignation was accepted. Voters were aware that the seat was to be up for election and had begun to exercise their roles in the electoral process by signing petitions of an announced candidate, a candidate who had been active in the election process for seven months. The impending election will not result in an undue burden upon the functioning of the court nor will the election cause an extended vacancy. The Governor suggests that the appointee will probably be appointed by August of 2006. Assuming 60 to 90 days for the appointee to wind up his or

her practice, it is unlikely that an appointee would be able to take the bench before November of 2006. Thus, the appointment process would reduce the net vacancy by no more than two or three months while disenfranchising the voters of the 18th Circuit who have already indicated their interest in participating in a election for the seat and in placing Candidate Eskin's name on the ballot for a position that if elected, she would take the first week in January. There is no Florida law to remotely suggest that a two or three month vacancy should supersede the right of the people to elect their judicial candidate. There is no emergency situation which requires an appointment to fill Judge Stephenson's vacancy, as there are a number of well qualified Senior judges that can fulfill the needs of any ongoing court matters. Indeed, a new appointee with no previous judicial experience would not provide a sufficient solution to a very short vacancy. An election process was in full swing when the requisite petitions were timely submitted to the appropriate Supervisors of Elections in two counties to meet the laws of placement on the ballot by petition. If the Governor were to appoint someone to fill the short vacancy, the voters would be shortstopped from the affirmative actions they have already taken to participate in the election process - something no reading of the Constitution could possibly contemplate.

The only reported case dealing with the issue of whether an appointment or an election should occur when a judicial vacancy occurred after the 1996 Amendment to Article V, Section 11(b) of the Florida Constitution is Pincket v. Harris, 765 So. 2d 284 (Fla. 1st DCA 2000). That case is distinguishable from the present case in that the candidate sought to qualify for the position by paying a qualifying fee after a judge had submitted his resignation, after the election had been cancelled, after an appointment had been announced, and after an Attorney General's opinion had been issued that gubernatorial appointment should occur. Id. 285. There is no indication that he had completed the necessary steps to qualify through petition before the decision to cancel the election occurred. The First District found that within the context of Pincket, the Governor's power to appoint was predicated on the premise that the election process had not begun as the qualifying period occurred after the vacancy occurred. The Court affirmed the opinion of the Attorney General's office which had effectively halted the process for any candidate seeking to qualify. The broad construction of the appointment powers proposed by Pincket overlooks this Court's history of firmly construing a constitutional provision in favor of a construction which promotes the public policy of the election process, particularly where thousands of voters have already begun to

participate in a particular election by timely signing petitions to place a candidate's name on the ballot and the decision was made before the 2000 referendum which overwhelming confirmed the voters' interest in the election process.

The 1996 Amendment to Article V Section 11(b) in its purist state simply resolves the problem that temporary appointees find when they close their practice to fulfill a term. The amendment gives potential appointees an incentive of an additional year in office to increase the number of people willing to submit their names for the temporary appointment. In the present case, five individuals have already filed necessary paperwork with the Division of Elections to announce their candidacy and thus, there is no shortage of potential persons interested in filling the seat and no reason to provide an extension of a year for this particular seat. Further, one candidate alone met the statutory requirements necessary to place her name on the ballot by petition before Judge Stephenson's retirement was announced. All five candidates have announced their candidacy before the resignation was submitted, designated a campaign treasurer and commenced spending funds to promote their election.

This Court has always found that whenever reasonably possible, the people's right to select a candidate must prevail. Even in the situation of a lack of qualified candidates in Republican State Executive Committee v. Graham, 388 So. 2d 556, (Fla. 1889), this Court found:

> If two equally reasonable constructions might be found, this Court in the past has chosen the one which enhances the elective process by providing voters with the greater choice in exercising their democratic rights:
>
> (It is the) steadfast public policy of this State . . . that if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date.

In that case, extending the time for an election would mean an extended vacancy in an elected office. Again, in the unique case at hand, no extended vacancy would occur through allowing an election process already in motion to move forward. There is no precedence to support the premise that an appointment should preempt an election which has already begun. Canceling the scheduled election to fill the seat which would have been vacated by Judge Stephenson and which was already up for election would raise serious state and federal constitutional questions about citizen rights to participate in the election process through the petition process. Judge Stephenson will still be on the bench when the qualifying period occurs, while the appointment process is underway and, presumably, could revoke

his resignation and remain on the bench if he changes his mind again about serving out his term. There is no emergency situation here to necessitate a suspension in the election process and indeed, allowing the election process to proceed is the only option to resolve all constitutional issues which have been raised by this issue.

In 2000, Florida voters struck down by overwhelming majority, an option to select circuit judges and county court judges by merit selection and retention rather than by election. When given a choice, the voters of this state clearly want to exercise their right to select a judge of their choice.

If the Court determines that the election process must halt and an appointee of the Governor's selection must assume the seat being vacated by Judge Stephenson, it may have a far-reaching impact on future judicial elections. Here, Candidate Eskin worked diligently to encourage voters to be involved in every possible way in the election process and went to great efforts to meet and exceed the required number of signed petitions required to place her name on the ballot. Further, she met the statutory deadline to submit those signed petitions by the specific deadline, which was fixed approximately one month before the qualifying period and before the Judge's resignation was accepted by the Governor. She campaigned for six months to encourage voters to learn about the election process and to use their

voting rights to impact who would be sitting on the judicial seat hearing cases which impact them on a daily basis. If the Court advises the Governor to appoint someone to fill the seat for which voters have indicated a strong interest in an election, they will be unlikely to believe that their participation in the petition process matters. Further, few candidates will be willing to devote the effort involved in participating in an exacting process which defines the specific format and presentation of petitions to qualify. Candidates may then be confined to qualifying only by paying a qualifying fee, which omits the process of petitioning, an active method to involve concerned voters from participating in determining who will be on the ballot. Candidates in this and future elections must be confident that if they go through the process of collecting and submitting thousands of signatures of registered voters to help them place their names on the ballot, that that effort will not be a waste of valuable time and resources.

Candidate Eskin asked thousands of voters to help place her name on the ballot for a seat she knew was soon to be vacated by a retiring judge. Voters placed their trust in her and in the election process by responding in overwhelming numbers to that request. She submitted over 8000 individually signed petitions to place her name on the ballot in time to comply with existing election rules. The retiring judge then submitted his

resignation after acknowledging to anyone who would listen that his intent was to have the seat filled by election and with the full knowledge that Candidate Eskin and others were actively campaigning to fill the seat.

The election process is underway, over 8000 petitions to place Candidate Eskin's name on the ballot have been submitted and certified by the Supervisors of Election in Seminole and Brevard Counties and the scheduled election should proceed. To advise the Governor to appoint someone to fill the vacancy means removing the voters' right to complete the election process which is already in full steam.

CONCLUSION

For all the foregoing reasons, Candidate Eskin respectfully suggests that this Court advise the Governor that he should not use his power of appointment to fill the vacancy created by Judge Gene Stephenson's retirement, but rather he must allow the election process to continue unimpeded and allow the voters to finish the process they have already begun.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via **First Class U.S. Mail** to:

Honorable Jeb Bush
The Capitol, Tallahassee, FL 32399-001

Honorable Sue M. Cobb
R.A.Gray Building, 500 S. Bronough Street, Tallahassee, FL 32399

Honorable Charles J. Crist, Jr.
The Capitol PL-01, Tallahassee, FL 32399

Honorable Kerry I. Evander
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on the 22nd day of April, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210

_____
Vicki Levy Eskin