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IN THE SUPREME COURT OF FLORIDA
Case No. SC21-_______

DAVID W. FOLEY, JR., and JENNIFER T. FOLEY,

Petitioners,

v.

JOHN A. TOMASINO, *in his official capacity as Clerk of the Supreme Court of Florida,*

Respondent.

_______________________________________ /

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APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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IN THE SUPREME COURT OF FLORIDA
Case No. SC21-_______

DAVID W. FOLEY, JR., and JENNIFER T. FOLEY,

Petitioners,

v.

KERRY I. EVANDER, RICHARD B. ORFINGER, JAY P. COHEN, F. RAND WALLIS, BRIAN D. LAMBERT, JAMES A. EDWARDS, JOHN M. HARRIS, MEREDITH L. SASSO, and DAN TRAVER, *in their official capacities as Judges of the Fifth District Court of Appeal,*

Respondents.

____/

PETITION FOR WRIT OF QUO WARRANTO

Petitioners, David and Jennifer Foley, petition this Court for a Writ of Quo Warranto directed to Respondents Kerry I. Evander, Richard B. Orfinger, Jay P. Cohen, F. Rand Wallis, Brian D. Lambert, James A. Edwards, John M. Harris, Meredith L. Sasso, and Dan Traver, in their official capacities as Judges of the Fifth District Court of Appeal.

BASIS FOR INVOKING JURISDICTION

This Court has authority to issue a Writ of Quo Warranto under Article V, Section 3(b)(8), Florida Constitution, and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. This Petition is properly filed as an original action in this Court because Respondents are state officers whom Petitioners claim are

exercising their judicial powers as a matter of practice in a manner that violates Article II, Section 3, of the Florida Constitution by abrogating common-law and statutory remedies against public servants who act *in absence of authority*.

This Court is the guardian of the separation of powers. Article V, Section 3, of the Florida Constitution was crafted to focus the Court's energies on that single concern. Even when it acts to guard against Federal intrusion (§3(b)(6)), or in death penalty cases when it acts to prevent the erroneous removal of a single Voice from the constitutional chorus of the People (§3(b)(1)), this Court acts solely to preserve the tripartite framework established by the Sovereign in Article II, Section 3, of its Constitution. This function of the Court is most clearly evident when it is called upon, as here, to ask the Judges of the Fifth District Court of Appeal in a Writ of Quo Warranto[1] – *By what authority do you abrogate the common-law exception to immunity – absence of authority?*

The Petitioners (the Foleys) are litigants before the Fifth District Court of Appeal. They are also residents of Orange County. And this case involves

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[1] *Chiles* v. *Phelps*, 714 So.2d 453, 457 n.6 (Fla. 1998) (An original proceeding is appropriate where inaction would adversely affect the functions of government, there are no material facts at issue, and the constitutional question is unavoidable.) (citing *Dickinson* v. *Stone,* 251 So.2d 268 (Fla. 1971)); *Martinez* v. *Martinez,* 545 So.2d 1338, 1339 n.3 (Fla. 1989) (Quo warranto is particularly appropriate to enforce the public right to the constitutional exercise of constitutional powers); *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So.144, 145 (1920) (Quo warranto is the proper means to challenge a public officer's exercise of any right or privilege derived from the State).

allegations of a decision and a policy of the Judges of the Fifth District Court of Appeal that encroach upon the Legislature's power to retain *absence of authority* as the common-law exception to sovereign immunity, and consequently a decision and policy that also encroach upon the Legislature's power to permit common-law and statutory remedies against public servants who forfeit immunity by subverting the state's constitution through acts *in absence of authority*.[2,3,4] The Foleys are

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[2] *Dept. of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258, 261 (Fla.1988), holds that only "basic policy decisions at the planning level" enjoy sovereign immunity: "We recede from any suggestion in [*Reddish v. Smith*, 468 So.2d 929, 932 (Fla. 1985)] that there has been no waiver of immunity for activities performed only by the government and not private persons. The only government activities for which there is no waiver of immunity are basic policy making decisions at the planning level."

[3] *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1019 (Fla.1979), created a four-question test to determine whether a challenged act is a "basic policy decision at the planning level" that enjoys sovereign immunity. Question four of that tests asks: "Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"

[4] *Dept. of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258, 260 †1 (Fla.1988), holds that when the answer to *Commercial Carrier*'s question four is "no," the responsible government employees, officers, or agents are personally liable: "Question number four [of *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1019 (Fla.1979)] has limited value under Florida's statutory waiver of immunity because the answer will almost invariably be yes unless the government employees, officers, or agents are acting without authority outside the scope of their office or employment. If this is so, they would be personally liable under §768.28 and the state would be immune because the waiver of immunity would not be applicable."

appropriate parties in this "unpopular cause;"[5] they are entitled to assert their rights on their own behalf as litigants before that court and as members of the public.[6]

STATEMENT OF THE CASE

I. The Foleys have standing as litigants defending rights flowing from Article I, Section 18, Article IV, Section 9, and Article VIII, Section 1(j), of the Florida Constitution.

The Foleys raise toucans, Collared aracari, *Pteroglossus torquatus*. And Florida's Constitution contains a unique provision that applies to their avocation – Article IV, Section 9. That provision creates an executive super-agency not found in the other forty-nine states – The Florida Fish and Wildlife Conservation Commission (FWC). Justice Wells said Article IV, Section 9, vests the FWC with *all* Florida's executive and legislative power with respect to "wild animal life," *Caribbean Conserv. Corp., Inc. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So.2d 492, 501 (Fla. 2003) ("In respect to 'wild animal life and fresh water aquatic life,' the FWCC is given '*the* regulatory and executive powers of the state.' (*emphasis* added)"). Florida's four-term Attorney General, Bob "tobacco-buster" Butterworth, went further, and in Op. Att'y Gen. Fla. 2002-23, said essentially that Florida counties are "prohibited by Article IV, section 9, Florida Constitution, and

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[5] *Department of Administration v. Horne*, 269 So.2d 659, 663 (Fla.1972) ("[I]t is the 'ordinary citizen' … who is ultimately affected .. who is sometimes the only champion of the people in an unpopular cause.")

[6] *Chiles* v. *Phelps*, 714 So.2d 453, 456 (Fla. 1998) ("[M]embers of the public seeking enforcement of a public right may obtain relief through quo warranto.")

the permit procedures provided in the Florida Statutes and administrative rules, from enjoining the possession, breeding or sale of non-indigenous exotic birds in neighborhoods where the county determines that such use of the individual's land constitutes a public nuisance or a threat to the public."[7] In sum, Orange County, where the Foleys live, is *without authority* to use its zoning power to pre-emptively regulate nuisance associated with raising toucans; it can only regulate such nuisance *post hoc*.

Nevertheless, the Foleys were prosecuted by a number of Orange County employees and officials for "raising birds to sell" despite the opinions of Justice Wells and the Attorney General.

Florida's Constitution contains another special provision – Article VIII, Section 1(j). It was meant to provide the Foleys with a Judicial Branch forum to contest that prosecution. It says, "Persons violating county ordinances shall be prosecuted and punished as provided by law." The legal expectation created by this provision, at least in part, is made a personal right by another provision of

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[7] This quote is taken from the Attorney General's rephrased question in Op. Att'y Gen. Fla. 2002-23. The Attorney General's answer was: "Columbia County is prohibited by Article IV, section 9, Florida Constitution, and the statutes and administrative rules promulgated thereunder, from enjoining the possession, breeding or sale of nonindigenous exotic birds. The authority to determine initially whether such use constitutes a public nuisance or a threat to the public is vested exclusively in the Florida Fish and Wildlife Conservation Commission. However, the county is authorized to regulate the abatement of public nuisances such as sanitation or noise that may be associated with the keeping of wildlife."

Florida's Constitution – Article I, Section 18. It says, "No administrative agency… shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." The Legislature has given effect to both provisions in Section 125.69, and Chapter 162, of the Florida Statutes. These statutes provide state court appellate review to any hapless toucan farmers, like the Foleys, who are prosecuted in court or before a code enforcement board for a violation of land use regulations, and who wish to challenge those regulations – before any deprivation occurs – for conflict with Article IV, Section 9, of the Florida Constitution.

However, in Orange County "home-rule" zealots have created an un-codified alternative to Section 125.69, and Chapter 162, of the Florida Statutes, a "locally-grown" alternative that exacts compliance immediately and completely denies any constitutional challenge on state court review, a prosecution alternative that exploits a "forum-shopping" opportunity inadvertently created by this Court's policy of avoiding all constitutional questions on certiorari review of local executive action, *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153, 158 (Fla.1982).[8,9,10]

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[8] *Key Haven Associated Enterprises., Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153, 158 (Fla.1982) "The executive branch has the duty, and must be given the opportunity, to correct its own errors in drafting a facially unconstitutional rule. As a matter of policy, therefore, a circuit court should refrain from interfering in the administrative process since a remedy for a facially unconstitutional rule can be fashioned within that process."

In 2007, a number of Orange County employees and officials used this alternative to prosecute the Foleys for "raising birds to sell." This was done in three steps: *Step one*, in response to a citizen complaint that the Foleys were "raising birds to sell," a direct enforcement action was initiated per Chapter 162, Florida Statutes, resulting in an order that required the Foleys either to obtain a building permit for an "accessory structure," or to destroy that structure; *Step two*, at the permitting counter the Foleys were confronted for the first time with the citizen allegation that they were "raising birds to sell," and on that basis the building permit was denied to force destruction of the "accessory structure;" and *Step three*, a permit to rebuild the "accessory structure" was ultimately granted, but conditioned upon an exaction demanding the Foleys' abandon "raising birds to

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[9] Additional cases confirming the policy of *constitutional question avoidance* on certiorari review of a local administrative decision: *Nannie Lee's Strawberry Mansion, Etc. v. Melbourne*, 877 So.2d 793 (5th DCA 2004); *Wilson v. County of Orange*, 881 So.2d 625 (5th DCA 2004), citing *Key Haven Assoc. Enter. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So.2d 153,158 (Fla.1982); *Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So.2d 375 (3rd DCA 2003); *First Baptist Church of Perrine v. Miami-Dade County,* 768 So.2d 1114, 1115 †1 (3rd DCA 2000), rev. den., 790 So.2d 1103 (2001); *Nostimo, Inc. v. Clearwater,* 594 So.2d 779 (2nd DCA 1992); *Indialantic v. Nance*, 400 So.2d 37 (5th DCA 1981); approved, 419 So.2d 1041 (Fla.1982); *Sun Ray Homes, Inc. v. County of Dade*, 166 So.2d 827, 829 (3rd DCA 1964).

[10] *Also Foleys v. Orange County*, 08-CA-5227-0 (Fla.9thCir. October 21, 2009): "Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla.2003)." Certiorari denied, *Foleys v. Orange County*, 5D09-4195 (5th DCA October 8, 2010).

sell." These County employees and officials structured their prosecution in this way to out-maneuver and exhaust the Foleys in a "gotcha" game; during the first step the defendants purposely concealed the real objective of their prosecution – "raising birds to sell" – so that when it was revealed at the permitting counter the Foleys would be entirely at their mercy. They did this precisely because it affected an *immediate* injunction of "raising birds to sell" that could not avoided by extraordinary writ, appealed of right per Section 162.11, Florida Statutes, or corrected for constitutional conflict with Article IV, Section 9, of the Florida Constitution, on *Key Haven*'s deferential certiorari review. The Foleys brought suit against these County employees and officials personally because their alternative "gotcha" procedure was not authorized by the County Code, or by Article I, Section 18, or Article VIII, Section 1(j), of the Florida Constitution.

October 13, 2020,[11] Respondent Judges Orfinger and Edwards, and Eighteenth Judicial Circuit Judge Melanie Chase, issued a *per curiam* affirmance without opinion in *Foley et ux v. Orange County et al,* 5D19-2635. This decision affirmed the lower court decision on a motion to dismiss to grant the defendant

[11] December 8, 2020, the Respondent Judges of the Fifth District Court of Appeal denied without opinion the Foleys' "Amended Motion for Written Opinion, Rehearing, Rehearing *En Banc* and Certified Question."

January 7, 2021, the Respondent Judges Orfinger and Edwards, and Judge Melanie Chase denied without opinion the Foleys' "Motion for Rehearing of December 8th Order."

county employees and officials immunity from suit. The affirmed lower court decision does not identify the one element essential to any defense in immunity, namely, the source – in ordinance, statute, and constitution – of the defendants' authority to prosecute and punish county code violations in the manner challenged by the Foleys in their amended complaint. The only provision of law it identifies is Section 768.28(9)(a), Florida Statutes. The Foleys had alleged in their complaint that the challenged prosecution and punishment were *colore officii* and in *absence of authority* because they were not authorized by the County code. And the Foleys argued in the lower court and on appeal that the defendants could not and did not prove their actions were otherwise authorized by Articles I, Section 18, and VIII, Section 1(j), of Florida's Constitution. But these allegations and argument were ignored by the defendants, the lower court, and the Fifth District Court of Appeals.

In sum, the Foleys have standing as litigants to challenge the policy that resulted in this decision, a policy of the Judges of the Fifth District Court of Appeal that encroaches upon the Legislature's power to permit common-law and statutory remedies against public servants who forfeit immunity by subverting the state's constitution through acts *in absence of authority*.

II. The Foleys have standing as citizens residing in Florida's Fifth District.

The *corpus juris* of the Fifth District, unlike that of other District Courts of Appeal, does not recognize *absence of authority* as an exception to sovereign

immunity. Its body of immunity law, particularly that relating to Section 768.28(9)(a), Florida Statutes, is also conspicuously lean – in the Fifth District no more than eighteen cases touch upon the "scope of employment or function" clauses in Section 768.28(9)(a), Florida Statutes,[12] compared to forty-six in the First District,

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[12] *Talmadge v. Dist. Sch. Bd. of Lake City*, 406 So.2d 1127 (5th DCA 1981) (amendment making §768.28(9), retroactive is unconstitutional); *Huhn v. Dixie Ins. Co.*, 453 So.2d 70 (5th DCA 1984) (reversed by *Everton v. Willard*, 468 So.2d 936 (Fla. 1985), which held that injury that could have been prevented through reasonable law enforcement does not establish common law duty of care to individual absent a special duty to the victim); *EJ Strickland v. Dept. of Agr.*, (5th DCA 1987) (conversion requires no *mens rea* and is not outside scope of employment); *Kirker v. Orange County*, 519 So.2d 682 (5th DCA 1988) (need to allege and prove willful, wanton or malicious conduct to sustain action for mental pain, anguish and suffering makes claim non-actionable against county); *Hutchinson v. Miller*, 548 So.2d 883 (5th DCA 1989) (sheriff and his deputies owed decedent duty of reasonable care for his safety while incarcerated); *Williams v. City of Minneola*, 619 So.2d 983 (5th DCA 1993) (need to allege and prove willful and wanton conduct to sustain action for outrageous infliction of emotional distress by reckless conduct makes claim non-actionable against city or police department); *McGhee v. Volusia County*, 654 So.2d 157 (5th DCA 1995) (reversed by *McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996), which held the question of bad faith, malicious purpose, and wanton or willful disregard must be put to fact-finder); *Goldman v. Halifax Medical Ctr., Inc.*, 662 So.2d 367 †1 (5th DCA 1995) (radiologic technologist immune from suit for acts of simple negligence committed in the course of public hospital employment); *Pate v. Worthington*, 679 So.2d 790 (5th DCA 1996); *Johnson v. Gibson*, 837 So.2d 481 (5th DCA 2002) (PCA. Harris dissenting urged questions of fact remained regarding failure of duty to protect inmate); *Lemay v. Kondrk*, 860 So.2d 1022 (5th DCA 2003); *Storm v. Town of Ponce Inlet*, 866 So.2d 713 (5th DCA 2004) (decision to hire or fire agency head is discretionary); *Dept. of Environmental Protection v. Hardy*, 907 So.2d 655 (5th DCA 2005) (court found no statutory or common law duty for negligent enforcement of environmental regulations, and no negligent supervision of agent); *Lemay v. Kondrk*, 923 So.2d 1188 (5th DCA 2006) (question of willful and wanton conduct is for jury); *Willingham v. City of Orlando*, 929 So.2d 43

thirty-eight in the Second District, twenty-two in the Third District, and thirty-five in the Fourth District.

No decision in the Fifth District, regarding "activities performed only by the government," finds *legal status* a defining element of "scope of employment or function," or *absence of authority* an exception to immunity (*Cf. supra* ††2-4, p.3). Instead, the decisions of the Fifth District focus, almost exclusively, on the mental state of the defendants and the related exceptions to *respondeat superior* liability in the "bad faith and with malicious purpose" clause, or the "wanton and willful disregard" clause, of Section 768.28(9)(a), Florida Statutes. Only one opinion admits to a litigant's challenge of "scope of employment" – *EJ Strickland v. Dept. of Agr.* In that case the defendant Sheriff sought to avoid vicarious liability by claiming his detectives were liable for any alleged *conversion* because *conversion* was outside their "scope of employment or function." The Fifth District disagreed, held the Sheriff liable, and ruled that conversion requires no *mens rea* and consequently is not *per se* outside the scope of a detective's employment. Thus, even in *Strickland*

(5th DCA 2006) (no cause of action for false arrest or false imprisonment against officer or involved agencies can be alleged for execution of valid warrant); *Kist v. Hubbard*, 93 So.3d 1100 (5th DCA 2012) (malice, intent, knowledge, mental attitude, and other conditions of mind may be averred generally); *Taival v. Barrett*, 204 So.3d 486 (5th DCA 2016) (order that denies motion for summary judgment, but does not determine summary judgment is improper, is not appealable); *Qadri v. Rivera-Mercado*, Case Nos. 5D20-427, 20-429, 5D20-457 (5th DCA 2020) (prosecutor is shielded from liability for damages for commencing and pursuing prosecution, regardless of allegations that his actions were undertaken with improper motive).

the Fifth District's concern was the detective's *subjective intent*, or state of mind, and not the *legal status* of the detective's "scope of employment." In no case before it has the Fifth District denied immunity to a public servant because they lacked the legal authority to take the challenged action.

Either the Fifth District is blessed with unfailingly loyal public servants, or its courts do not consider acts *in absence of authority* as an exception to immunity. The history and precedents of the Fifth District suggest the later. They teach its lower courts that "scope of employment or function" is established in the Fifth District as an irrebuttable presumption as soon as a complaint identifies the defendant as a public servant; that is, even faced with allegations, as in the Foleys' case, that the challenged act, event, or omission was *colore officii* and *in absence of authority*, the courts of the Fifth District are unlikely to require a defendant public servant to prove their legal pedigree, as courts elsewhere would, Harlow v. Fitzgerald, 457 US 800, 812 (1982) "The burden of justifying [immunity] rests on the official asserting the claim," *also* Junior v. Reed, 693 So.2d 586, 589 (1st DCA 1997).[13] The precedents of the Fifth District effectively discourage the judges of

[13] Curiously, while a government servant need not prove their legal pedigree or status in the Fifth District, the Government itself must do so. In fact, this pattern is so pronounced the Foleys suggested, in their failed motion for rehearing *en banc*, that the Fifth District had unofficially adopted §219(2)(c) and (d) Restatement (Second) of Agency. *See* Glynn v. City of Kissimmee, 383 So.2d 774, 776 (5th DCA 1980) (Sharp, Dauksch, C.J., and Sharp, G.K.) (government defendant has initial burden to prove privilege); Fla. Fern Growers Assoc., Inc.

the Fifth, Seventh, Ninth, and Eighteenth Judicial Circuits, from making any inquiry into the *legal status* of a public servant's "scope of employment or function."

III. The Fifth District's practice contrasts sharply with the other Districts.

In the First District, for example, an inmate's bald allegation that a guard's destruction of personal property was "outside the scope of their employment" was sufficient to overcome a motion to dismiss, Allen v. Frazier, 132 So.3d 361 (1st DCA 2014). Likewise, in Hall v. Knight, 986 So.2d 659 (1st DCA 2008), a motion to dismiss was overcome simply because "the appellant's pleadings tracked all of the pertinent language in section 768.28(9)(a)." In Hall v. Knipp, 982 So.2d 1196 (1st DCA 2008), the Court made it very clear that immunity asserted in a motion to dismiss could still be overcome in the First District the old fashion way – by a simple allegation that the defendant had exercised power not lawfully vested in them, to wit, *in absence of authority*. And again, in Medberry v. McCallister, 937

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v. Concerned Citizens of Putnam County, 616 So.2d 562, 565 (5th DCA 1993) (Dauksh, Harris, Diamantis) (accord Glynn); Randolph v. Beer, 695 So.2d 401, 404 (5th DCA 1997) (Goshorn, Peterson, Harris) (government defendant has initial burden to prove privilege); Malone v. City of Satellite Beach, 717 So.2d 1067, †2 (5th DCA 1998) (Cobb, Orfinger, Sharp) (accord Beer); Magre v. Charles, 729 So.2d 440, 443 (5th DCA 1999) (Griffin, Torpy, Jacobus) (government defendant has initial burden to prove privilege); Gionis v. Headwest, Inc., 799 So.2d 416, 419 (5th DCA 2001) (Palmer, Cobb, Harris) (government defendant has initial burden to prove discretionary function immunity).

So.2d 808 (1st DCA 2006), a defense in immunity was not available on a motion to dismiss where the complaint did no more than track the language of §768.28(9)(a). Finally, in Gardner v. Holifield, 639 So.2d 652 (1st DCA 1994), Martin v. Drylie, 560 So.2d 1285 (1st DCA 1990), and Knauf v. McBride, 564 So.2d 251 (1st DCA 1990) – all cases involving defendant doctors working simultaneously at public and private medical institutions – the First District again made clear that the *legal status* of the doctor at the time of the injury, not the doctor's *state of mind*, determined the availability of sovereign immunity.

In the Second District the story is similar to that of the First District. In Sierra v. Associated Marine Institutes, Inc., 850 So.2d 582 (2nd DCA 2003), a contract case, the Court compared the "scope of the contract" clause of §768.28(11)(a), to the "scope of employment" clause of §768.28(9)(a), and said an inquiry into *legal status* was required by both. The Second District reached the same conclusion in another contract case that included a defense in §768.28(9)(a), Mingo v. ARA Health Services, Inc., 638 So.2d 85 (2nd DCA 1994). In Randles v. Moore, 780 So.2d 158 (2nd DCA 2001), the court numerically outlined four exceptions to immunity per §768.28(9)(a), and expressly made "while acting outside the scope of his employment" its first inquiry.

The Third District charts a different course but still permits a jury question where the Fifth District does not. Rather than ask whether a challenged act is *in*

excess or *in absence* of authority – that is, whether it is an improper exercise of one's own power and therefore within the scope of employment, or is a usurpation of another's power and therefore outside the scope of employment[14] – the Third District holds that an allegation of conduct prohibited by the employing government entity – that is, conduct at minimum *in excess*, if not *in absence*, of authority – is synonymous with an allegation of conduct in "bad faith," with "malicious purpose," or in "wanton and willful disregard," and therefore conduct that creates a jury question. Examples of this approach are: Davis v. Baez, 208 So.3d 747 (3rd DCA 2016); *The District Board Of Trustees Of Florida Keys Community College v. Martin*, 642 So.2d 816, 94 Educ. L. Rep. 1075 (3rd DCA 1994); *Alvarez v. Cotarelo*, 626 So.2d 267 (3rd DCA 1993); *Woodall v. City of Miami Beach*, 599 So.2d 231 (3rd DCA 1992).

The Fourth District, like the Third District, is inclined to define unauthorized conduct as "outside the scope of employment" and to conflate it with "bad faith," "malicious purpose," or "wanton or willful" conduct, but only where the misconduct rises to the level of "satanic rituals" or sexual battery on minors, as in

[14] 21 Fla.Jur., Civil Servants, §69: "Acts conducted "by virtue of office" are acts that are within the authority of a public officer but done in an improper exercise of his or her authority or in abuse of the law. Acts of a public officer are "by color of office" if they involve a pretense of an official right to do an act made by one who has no such right … Under the common law, acts conducted by virtue of office may result in liability for the state agency; however, acts that are by color of office would not." *Id.*, p.615.

Duyser by Duyser v. School Bd. of Broward County, 573 So.2d 130 (4th DCA 1991), *Cf.* Hennagan v. Dept. of Highway Safety, 467 So.2d 748 (1st DCA 1985). Otherwise, like the Fifth District, the Fourth District is suspiciously silent on the common-law exception to immunity – *absence of authority*. Like the Fifth, it is either blessed with unfailingly loyal public servants, or selectively blind to their constitutional betrayals.

IV. The Fifth District's policy conflicts with this Court's precedent, the common law, and Article I, Section 23, of the Florida Constitution.

This Court long ago gave decisive import to *absence of authority* as an exception to sovereign immunity, and denied immunity to putative official action for *absence of authority* in cases like *First National Bank v. Filer*, 107 Fla. 526 (Fla.1933), *Swenson v. Cahoon*, 111 Fla. 789 (Fla.1933), and *Malone v. Howell*, 192 So.224 (Fla.1939). The Legislature has done nothing in Section 768.28(9)(a), Florida Statutes, to expressly or by implication abrogate this common-law exception to immunity. Consequently, *absence of authority* remains an exception to immunity in Florida's common-law. It is one of the rights of access and remedy encompassed by Article I, Section 21, of the Florida Constitution, *Kluger v. White*, 281 So.2d 1 (Fla. 1973); *Smith v. Dep't of Ins.*, 507 So.2d 1080, 1087-1089 (Fla. 1987). And it is promised by Article I, Sections 23, Florida Constitution. Nevertheless, in an unlucky 13 of Florida's 67 counties – Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, St. Johns, Seminole, Sumter,

and Volusia – the Fifth District Court of Appeal has abrogated *absence of authority* as the common-law exception to immunity. This is not an isolated erroneous misapplication of law – the practice is too consistent to be so. It is a usurpation of the Legislature's prerogative – a violation of the Separation of Powers.

NATURE OF RELIEF SOUGHT

Petitioners respectfully ask this Court to issue a Writ of Quo Warranto, to direct the Respondents to justify their authority to abrogate the common-law exception to immunity for acts *in absence of authority*, and to declare that the common-law and Article I, Sections 9 and 23, of the Florida Constitution, require every court in Florida which grants immunity, or affirms a grant of immunity, to clearly identify the rule, statute, or order, and the respective supporting constitutional provision, that are, and that the defendant public servant asserts to be, the source of the defendant's authority to take the actions challenged by the plaintiff's complaint.

ARGUMENT

The Foleys claim that the Fifth District Court of Appeal has a practice of ignoring the critical, separation-of-powers question at the heart of any grant or denial of sovereign immunity – Are the acts alleged in the complaint under review *in excess* or *in absence* of authority, that is, are they vindications or violations of the state constitution? The Foleys' evidence lies primarily in opinions of the Fifth

District on the issue of sovereign immunity that teach its courts not ask that question. The Foleys' own appeal to the Fifth District exemplifies the practice because it pointedly asked the Fifth District to answer a similar but more specific question that the defendants and the lower court ignored – Did the acts alleged in their complaint violate Article I, Section 18, or Article VIII, Section 1(j), of the Florida Constitution, and if so did defendants as a consequence forfeit immunity? The Fifth District confirmed its practice when it too ignored the Foleys' question and affirmed without opinion. This is a proper basis for requesting this Court to ask the Judges of the Fifth District Court of Appeal in a Writ of Quo Warranto – *By what authority do you abrogate the common-law exception to immunity – absence of authority?*

I. "[O]fficials cannot do indirectly what they are prevented from doing directly." *Jones v. Tanzler*, 238 So.2d 91 (Fla. 1970).[15]

The Judges of the Fifth Judicial District cannot do *without opinion* what they cannot do *with opinion* – violate the separation of powers.

This Court has said "that those provisions of the Florida Constitution governing [its] jurisdiction to issue extraordinary writs may not be used to seek review of an appellate court decision issued without a written opinion," Grate v. State, 750 So.2d 625, 626 (Fla. 1999). (Emphasis added.)

[15] *Also* Cummings v. Missouri, 71 U.S. 277, 325 (1867). "[W]hat cannot be done directly cannot be done indirectly."

Yet, this Court in Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007), said, "When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies."

And, this Court in *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla. 1978), further said, "The doctrine of inherent judicial power … has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights."

The Foleys here do not seek *review* of a decision *without opinion*. They seek *relief* from the policy exemplified by that decision. They seek relief both as citizens and as litigants, relief from a multiplicity of ignored violations – at every level in their local government – of Florida's separation of powers, and of Florida's fundamental promise of freedom from unauthorized government intrusion.[16] Who, if not this High Court, will join them in defense of Article II, Section 3, of Florida's Constitution? Who, if not this High Court, will restore *absence of authority* to the common-law as its historic exception to immunity, as

[16] Article I, Section 23, Florida Constitution**: "**Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

its "incentive for more careful performance of official duties and obligations," Chief Justice England in _District Sch. Bd. Of Lake Cty. v. Talmadge_, 381 So.2d 698 (Fla. 1980)?

This Court has the procedural, administrative, and inherent authority in Article V, Sections 2 and 3, of the Florida Constitution, to provide for that relief, to prevent Florida's one Constitution from becoming five different District constitutions. So, while this Court may not in mandamus require the Fifth District to write an opinion in the Foleys' case, _Sch. Bd. of Pinellas Cty. v. Dist. Ct. of App._, 467 So.2d 985, 986 (Fla.1985), it can inquire into the policy and practice of the Fifth District and ask in a Writ of Quo Warranto – *By what authority do you abrogate the common-law exception to immunity – absence of authority?*

II. "[T]he common law, if not abrogated by statute or constitutional provision, is in full force and effect in this state." _Hoffman v. Jones_, 280 So.2d 431, 441 (Fla. 1973).

The Fifth District Court of Appeal "has no more right to abrogate the common law than it has to repeal the statutory law. In other words, courts may properly extend old principles to new conditions, determine new or novel questions by analogy, and even develop and announce new principles made necessary by changes wrought by time and circumstance. Under our constitutional system of government, however, courts cannot legislate. They cannot abrogate, modify, repeal, or amend rules long established and recognized as parts of the law of the

land." State v. Egan, 287 So.2d 1, 6 (Fla. 1973), *also* Shands Teaching Hosp. and Clinics v. Smith, 497 So.2d 644 †3 (Fla. 1986).

Nevertheless, as previously stated, the Judges of the Fifth District have abrogated the long established[17] exception to sovereign immunity – *absence of authority*. This cannot be defended by reading the "scope of employment or function" clauses of Section 768.28(9)(a), Florida Statute, to do so by implication because "[s]tatutory abrogation by implication of an existing common law remedy, particularly if the remedy is long established, is not favored." Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, 918 (Fla. 1990). Moreover, "statutes abolishing or limiting the common law must be clear as to the abrogation or change; when the extent of the abrogation or change is not clear from the text of the statute, then the common law rule stands." Slawson v. Fast Food Enters., 671 So.2d 255, 257-58 (Fla. 4th DCA 1996), *citing* Carlile v. Game & Fresh Water Fish Comm., 354 So.2d 362 (Fla.1977). So, in the absence of any such clear abrogation by the Legislature the Fifth District's policy and practice are indefensible.

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[17] The Marshalsea, 77 Eng. Rep. 1027 (Star Chamber 1612). *See* J. Randolph Block, "Stump v. Sparkman and the History of Judicial Immunity," 1980 Duke Law Journal 879-925, 892 (1980): "The court of the *Marshalsea* had tried a case in assumpsit and had found against the defendant, whose "bail," or surety, was imprisoned until the judgment was paid. The surety then brought an action against the officers responsible for his imprisonment. Coke sustained the suit, finding that the *Marshalsea* court lacked jurisdiction over actions in assumpsit, and consequently that proceedings conducted in the absence of jurisdiction were void *ab initio*."

The Judges of the Fifth District have no right to conceal in decisions *without opinion* a policy and practice that abrogates the common-law, that usurps legislative power, that conflicts with this Court's precedent, and that denies the Constitution's fundamental promise of freedom from unauthorized government action. This Court does have the right to ask *by what authority* they do so.

CONCLUSION AND PRAYER FOR RELIEF

The Judges of the Fifth Judicial District have encroached on the exclusive power of the Legislature to "abrogate, modify, repeal, or amend rules long established and recognized as parts of the law of the land." This unilateral attempt to abolish the common law protection from acts *colore officii* and *in absence of authority* – embodied in the fundamental promises of freedom from unauthorized government intrusion in Article I, Sections 9 and 23, Florida Constitution – violates Florida's separation of powers. For these reasons, Petitioners respectfully request this Court issue a Writ of Quo Warranto and declare that the common-law and Article I, Sections 9 and 23, of the Florida Constitution, require every court in Florida which grants immunity, or affirms a grant of immunity, to clearly identify the rule, statute, or order, and the respective supporting constitutional provision, that are, and that the defendant public servant asserts to be, the source of the defendant's authority to take the actions challenged by the plaintiff's complaint.

CERTIFICATE OF COMPLIANCE

Petitioners certify that this petition complies with Rule 9.100(l), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

Petitioners certify that on January 13, 2021, the foregoing was electronically filed with the Clerk of the Court using eDCA which electronically served this petition in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure to the following: *The Honorable Kerry I. Evander*, hiestanl@flcourts.org; *The Honorable Richard B. Orfinger*, rickorfinger@gmail.com; *The Honorable Jay P. Cohen*, cohenj@flcourts.org; *The Honorable F. Rand Wallis*, wallisr@flcourts.org; *The Honorable Brian D. Lambert*, lambertb@flcourts.org; *The Honorable James A. Edwards*, edwardsa@flcourts.org; *The Honorable John M. Harris*, harrisj@flcourts.org; *The Honorable Meredith L. Sasso*, sassom@flcourts.org; and *The Honorable Dan Traver*, tranthamk@flcourts.org.

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Date: Januray 13, 2021

Supreme Court of Florida

THURSDAY, JANUARY 21, 2021

CASE NO.: SC21-80
Lower Tribunal No(s).:
5D19-2635; 482016CA007634A001OX

DAVID W. FOLEY JR., ET AL. vs. ORANGE COUNTY, ET AL.

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court's jurisdiction to issue extraordinary writs may not be used to seek review of an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Foley v. State*, 969 So. 2d 283 (Fla. 2007); *Persaud v. State*, 838 So. 2d 529 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Grate v. State*, 750 So. 2d 625 (Fla. 1999).

No motion for rehearing or reinstatement will be entertained by the Court.

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THURSDAY, JANUARY 21, 2021

CASE NO.: SC21-80
Lower Tribunal No(s).:
5D19-2635; 482016CA007634A001OX

DAVID W. FOLEY JR., ET AL. vs. ORANGE COUNTY, ET AL.

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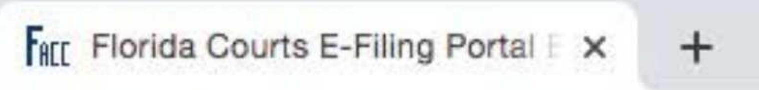

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Jennifer T. Foley

Date: February 1, 2021

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