IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-1717

PEDRO DIJOLS, as candidate for the
Broward County Judge Circuit Court Group 3,

Petitioner,

v.

KURT S. BROWNING, as Secretary of
State, State of Florida, in his official capacity,

Respondent.

_____/

RESPONDENT KURT S. BROWNING'S RESPONSE TO THE ORDER TO SHOW CAUSE

Respondent, Kurt S. Browning, Secretary of State, responds to this Court's Order to Show Cause in opposition to the Emergency Petition for Writ of Quo Warranto and Emergency Petition for Writ of Mandamus of Petitioner, Pedro Dijols.[1] The Petition should be dismissed because it improperly seeks quo warranto and mandamus relief against the Secretary. Alternatively, if the Court determines that discretionary jurisdiction exists, it should choose not to exercise it given Dijols's original action pending in the Seventeenth Judicial Circuit Court on this same matter.

[1] While preparing this response, the Secretary has learned that the Broward County Supervisor of Elections office sent its general election ballot for printing on Saturday, September 13th, so the emergency relief Dijols seeks is no longer available.

STATEMENT OF THE CASE AND FACTS

Dijols is an appointed judge in the Seventeenth Judicial Circuit who was challenged by two attorneys in the first election for his seat. In the primary, he came in third by a slim margin, which initiated a recount producing the same result. Because Dijols did not receive one of the two highest vote totals in the primary, he cannot compete in the general election to retain his seat.

In the Seventeenth Judicial Circuit, Dijols instituted legal action against his two primary opponents, the county supervisor of elections, and the county canvassing board. In that action, he asserts that his closet competitor, Mardi Anne Levey, should be removed from the general election ballot because she has been using her maiden rather than married name in the race, a name by which she allegedly does not conduct private or official business. Levey is married to a sitting circuit judge in the Seventeenth Judicial Circuit, Judge Dale Cohen, and her married name is Mardi L. Cohen. None of the parties has responded to the allegations in the Complaint, which does not make clear when Dijols first became aware and acted on his belief that Levey was using an improper name in the election.

Dijols also claims in the circuit court action that Judge Cohen acted in violation of the Code of Judicial Conduct by purportedly observing the "counting team" during the recount this close primary spawned. He maintains that Judge

Cohen's presence and alleged participation was improper thereby supporting removal of his wife from the ballot.

In this Court, Dijols seeks the same result as in the circuit court. In this action, however, he has made the Secretary the only party, seeking to compel the Secretary to remove Levey from the ballot. He claims that discretionary writs of quo warranto or mandamus should issue from this Court, arguing that because he has asked the circuit bench in the Seventeenth Judicial Circuit to be recused in the pending case this Court should act now due to the exigencies of time.

ARGUMENT

I. THE PETITION FAILS TO PRESENT APPROPRIATE CLAIMS FOR QUO WARRANTO AND MANDAMUS AGAINST THE SECRETARY.

A. The Secretary is the wrong party to this quo warranto action.

Quo warranto "is employed either to determine the right of an individual to hold public office or to challenge a public officer's attempt to exercise some right or privilege derived from the State." State ex rel. Bruce v. Kiesling, 632 So. 2d 601, 603 (Fla. 1994). Here, Dijols's petition seeks to do neither.

The petition names only the Secretary as the respondent. Yet there is no allegation that the Secretary is acting outside of his authority or that there is any public right at issue. While quo warranto is the correct method for the public to force public officials to exercise their powers in a constitutional manner, the

petition makes no assertion that the Secretary is under any constitutional duty to act in the current circumstances. Chiles v. Phelps, 714 So. 2d 453, 457-58 (Fla. 1998).

In limited situations, this Court has used quo warranto to test the outcome of a disputed election. State ex rel. Gibbs v. Bloodworth, 184 So. 1, 2 (Fla. 1938); State ex rel. Clark v. Klingensmith, 121 Fla. 297 (Fla. 1935). But such actions name the opposing candidate as the respondent – not the Secretary of State – in order to test that person's right to hold office. Here, Levey is not a party to the petition. Moreover, she is not yet a public official, as the election below was not decisive in determining who would hold the elected position. A quo warranto action brought against her may be appropriate, if not deemed premature. Ex Parte Smith, 118 So. 306 (Fla. 1928) (rejecting quo warranto petition because primary candidate was not yet a public official), *but see* State ex. rel. Watkins v. Fernandez, 143 So. 638 (Fla. 1932) (finding primary candidate could bring a quo warranto action but dismissing because issues necessitated taking of testimony).

B. Mandamus is improper because Dijols has not sought to compel the Secretary to perform a ministerial act or a clearly established legal duty.

For mandamus to lie, the duty a petitioner seeks to compel must be both ministerial (non-discretionary) and clearly established (already in existence). Coral Gables v. State, 44 So. 2d 298, 300 (Fla. 1950) (stating "[i]f the discharge of the

duty requires the exercise of judgment or discretion the act is not ministerial and mandamus will not lie"); Florida League of Cities v. Smith, 607 So. 2d 397, 400-01 (Fla. 1992) (holding "mandamus may . . . not be used to establish the existence of . . . a right, but only to enforce a right *already* clearly and certainly established in the law"). The purpose of the writ is to coerce performance of existing official duties, which the official has refused or failed to fulfill. Id.

The relief Dijols seeks is neither a ministerial act nor a clearly established legal duty of the Secretary. Nor has the Secretary refused to fulfill an official duty. Still, Dijols asks this Court to require the Secretary to remove Levey from the ballot and compel recertification of the election results. But no court has considered the underlying factual dispute in this case. Only after Dijols prevails in a judicial proceeding would the Secretary have a ministerial and clearly established duty to perform these acts – for example, if Dijols prevails in the Seventeenth Judicial Circuit. Moreover, mandamus would be necessary only if the Secretary refused to perform these duties. Here, using mandamus as a means to require the Secretary to remove Levey from the ballot is, at best, premature. Thus, Dijols has failed to establish any of the prerequisites for mandamus, each of which is sufficient grounds for denial of his petition.

II. BECAUSE OF THE FACTUAL ISSUES RAISED AND THE LOCAL NATURE OF THE QUESTION PRESENTED, THIS CASE IS NOT SUITABLE FOR THE COURT'S ORIGINAL JURISDICTION.

If the Court determines that discretionary jurisdiction exists, it should decline to exercise such jurisdiction, requiring that Dijols proceed with the pending action in the circuit court. In Harvard v. Singletary, this Court emphasized that it will generally not exercise original jurisdiction over cases that raise issues of fact or are not of statewide importance. 733 So. 2d 1020, 1022-23 (Fla. 1999). The present case falls far short of those jurisdictional standards. Dijols has raised many factual allegations against Levey and her husband that require fact-finding and credibility determinations, which this Court is ill-suited to resolve. In addition, the central issue in this case, whether a candidate in a local circuit court race has used a legally permissible name, falls short of an issue of immediate statewide importance. Granting original jurisdiction would enmesh the Court in matters that are better addressed in the first instance in the trial courts.

That quo warranto and mandamus are improper is highlighted by the need for fact-finding and procedural due process. The petition is addressed solely to the Secretary, who is not in a position to defend Levey or her husband, or to play a meaningful role in the factual adjudication of the contested allegations. The

Secretary's role is not to pick sides in this type of dispute.[2] In fact, the Secretary recognizes that a cause of action exits, in certain circumstances, for removing someone from the ballot for using an improper. *E.g.*, Planas v. Planas, 937 So.2d 745 (Fla. 3d DCA 2006); Division of Elections Opinion 86-06 (May 1, 1986).

In light of the factual allegations that likely are in dispute, however, this Court is not suited to hear this case in the first instance. *See* Klingensmith, 163 So. at 705 (finding burden is on petitioner to establish facts that would support ouster of candidate for election). Indeed, this Court long ago held that it would not entertain a quo warranto proceeding brought by the losing party in a primary election against the prevailing party when there were disputed issues of fact because the proper place for such a consideration was the circuit court. Fernandez, 143 So. at 641. Thus, the Court should deny the petition and require Dijols to proceed with his complaint in the circuit court to resolve the factual issues presented.

Notably, Dijols has filed the correct type of action (though in the wrong court) under the statutory procedure for an election contest outlined in Florida Statutes section 102.168. He has named the defendants in this local election matter

[2] It bears noting that Dijols's factual allegations cannot be tested sufficiently unless and until the persons directly affected, principally Levey and her husband, are given notice and provided a fair opportunity to respond, which has not occurred in this proceeding. Dijols also raises allegations against Levey's husband, Judge Cohen, concerning the recount that appear to have little relation to the central issue of whether Levey used the proper name in the election.

with whom he has an actual dispute: both of his judicial opponents, the county supervisor of elections, and the county canvassing board (he did not sue Judge Cohen below). Given the fact-finding that will be necessary in this action, the circuit court is the superior forum to hear the matter.

Nonetheless, Dijols seeks to avoid circuit court review by arguing that a pending matter of reassignment may be before this Court due to his motion to recuse all the judges on the Seventeenth Judicial Circuit. A pending motion for reassignment, however, does not convert an otherwise garden variety local election contest matter into one warranting exercise of this Court's original jurisdiction in an extraordinary writ proceeding.

Dijols also argues that the circuit court may not have jurisdiction to force the Secretary to fashion the remedy he seeks. Beyond speculation that the Secretary would refuse to follow a valid order of Florida court, Dijols's concerns are of his own making because he should have filed his contest action in the proper circuit court, which is the Second Judicial Circuit in and for Leon County. *See* §102.1685, Fla. Stat. (venue is where the contestant qualified, which is Tallahassee for circuit court candidates); *see also* Cardenas v. Smathers, 351 So.2d 21 (Fla. 1977) (finding jurisdiction over Secretary of State in Leon County Circuit Court). Having erroneously filed his action in the incorrect venue, he should not now be permitted to obtain the extraordinary relief he seeks in this

Court on matters that require fact-finding and do not involve issues of immediate statewide importance.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this response complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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