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IN THE SUPREME COURT OF FLORIDA

BARBARA DEVANE

Petitioner,

Case No.: SC14-___

v.

HON. RICK SCOTT, GOVERNOR,

Respondent.

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Barbara DeVane petitions for a writ of mandamus directing the Governor to appoint a Lieutenant Governor. The question presented is whether following the resignation of Lieutenant Governor Jennifer Carroll in March, 2013, the Governor can defy the requirement of section 14.055, Florida Statutes, that "upon vacancy" he "shall appoint a successor" to serve the remainder of the term.

BASIS FOR INVOKING THE JURISDICTION OF THE COURT

This Court has original jurisdiction under Article V, Section 3(b)(8) of the Florida Constitution, as well as Florida Rule of Civil Procedure 9.030(a)(3), to issue writs of mandamus to direct the Governor to make an appointment required by statute. *Pleus v. Crist*, 14 So. 3d 941, 942 & 942 n.3 (Fla. 2009).

STATEMENT OF THE FACTS

Jennifer Carroll assumed the office of Lieutenant Governor of Florida on January 4, 2011. She resigned on March 12, 2013, and the Governor explained the resignation was a result of her affiliation with a criminal conspiracy involving Allied Veterans of the World. Governor Rick Scott Statement of the Resignation of Lt. Gov. Jennifer Carroll (March 12, 2013 (available at: http://www.flgov.com/governor-rick-scott-statement-on-the-resignation-of-lt-gov-jennifer-carroll-2/) (last visited January 3, 2014).

Various media reports indicated at the time that the Governor intended to wait until after the legislative session ended in May 2013 to "start looking." *E.g.*,

http://www.tampabay.com/news/politics/stateroundup/who-might-be-rick-scotts-next-lieutenant-governor/2110144 (last visited January 3, 2014). The Governor has issued no press releases regarding the office since then and has offered no public guidance on when, if ever, he intends to appoint a successor.

Florida Statute § 14.055 provides:

> Upon vacancy in the office of Lieutenant Governor, the Governor shall appoint a successor who shall serve for the remainder of the term, provided that if after the appointment a vacancy occurs in the office of Governor with more than 28 months remaining in the term, at the next statewide general election the electors shall choose a Governor and Lieutenant Governor to fill the remainder of the term in the manner provided in s. 5, Art. IV of the State Constitution.

There were less than 28 months remaining in her term when Lieutenant Governor Carroll resigned, and the responsibility fell squarely upon the Governor to appoint a successor upon that vacancy.

Governor Scott has defied the Legislature's directive in section 14.055 by failing to appoint a successor to the position of Lieutenant Governor. The office has remained vacant for more than nine months since Lieutenant Governor Carroll's resignation and more than seven months since he promised to "start looking" after the legislative session ended.

This refusal to follow the law upsets the order of succession the Legislature established in section 14.055. That statute provides that upon vacancy in the office of the Governor, the Lieutenant Governor shall become Governor. Thus, if the

Governor (who resigned his previous position as chief executive officer of a company that pled guilty to massive amounts of systematic fraud, including 14 felonies, leading to a historic $1.7 billion fine) resigns amid scandal like his lieutenant or dies, there is no Lieutenant Governor to fulfill the heavy responsibilities of the office.[1] Instead, the back-up succession rules clearly designed only for emergencies would require the Attorney General to leave her post to become Governor, further disrupting the orderly business of state government. § 14.055.

Worse, there would be a constitutional crisis if the Governor were to become physically or mentally incapacitated or were impeached. During times of incapacity or the time between impeachment and trial, section 14.056 provides for the Lieutenant Governor to become Acting Governor. While that statute addresses what happens should there then be a "vacancy in the office of the person serving as Acting Governor," it has no provision for what should happen if the Lieutenant Governor position is vacant before there is an Acting Governor. *See also* art. IV, § 3, Fla. Const. (providing that upon "vacancy in the office of governor" or "[u]pon impeachment of the governor and until completion of trial thereof, or

[1] Rick Scott, Former Healthcare CEO, Faces Questions About Past. http://www.politifact.com/florida/statements/2010/may/20/alex-sink/rick-scott-healthcare-ceo-faces-questions-a/ (Last accessed January 3, 2014)

during the governor's physical or mental incapacity," the lieutenant governor shall take over and "[f]urther succession … shall be prescribed by law").

Succession is not the sole concern. Section 376.13(1), Florida Statutes, the Governor has the authority to declare an emergency based on an oil spill and take immediate emergency action. The statute further provides that "[i]f the Governor is unavailable," then the Lieutenant Governor can take action in his stead. *Id.* Thus, at present, if there is another oil spill and the Governor is unavailable for whatever reason, the state will be powerless to respond.

Barbara DeVane is a citizen of the United States and a taxpaying resident of the State of Florida. Both as a taxpayer and concerned citizen, and as a former Social Studies teacher, she has an interest in ensuring the Governor complies with the law and the current threat to the orderly administration of state government is eliminated.

NATURE OF THE RELIEF SOUGHT

The relief sought is a writ of mandamus directing the Governor to appoint a Lieutenant Governor within a reasonable period of time of no less than 30 days.

ARGUMENT

Under article V, section 3(b)(8) of the Florida Constitution, this Court has jurisdiction to issue writs of mandamus to state officers such as the Governor. *E.g.*, *Pleus v. Crist*, 14 So. 3d 941, 942 & 942 n.3 (Fla. 2009). In order to obtain a writ

of mandamus, petitioners must "have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Id.* at 945. All three elements are present in this case.

I. PETITIONER HAS A CLEAR LEGAL RIGHT AS CITIZEN AND TAXPAYER TO REQUEST MANDAMUS RELIEF.

At the outset, Petitioner has a clear legal right as a citizen and taxpayer to request mandamus relief to compel the Governor to carry out an indisputable legal duty concerning the appointment of a Lieutenant Governor. *Pleus*, 14 So. 3d at 945 (finding retired judge had "clear legal right" as citizen and taxpayer to demand that the governor choose his replacement from the list certified by the JNC via mandamus petition). As a former Social Studies teacher she taught students that no person is above the law, not even a Governor.

II. THE GOVERNOR HAS A CLEAR LEGAL DUTY TO FILL THE VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR.

The Governor has a clear legal duty to appoint a Lieutenant Governor under section 14.055, which provides "Upon vacancy in the office of Lieutenant Governor, the Governor shall appoint a successor who shall serve for the remainder of the term … ." The plain language provides that the Governor "shall" make the appointment. If the statute allowed the position to remain unfilled it would provide "the Governor *may* appoint a successor", but it does not. There is

simply no reasonable way to construe this provision to authorize the Governor to perpetually refuse to perform his duty.

Moreover, this is not a duty that the Governor can choose to undertake when he feels like it. The statute directs him to make the appointment "[u]pon vacancy." The term "upon" means at the time of, and clearly does not mean several months later. For example, this Court has concluded that a statute authorizing the Governor to reinstate a suspended state officer " 'upon satisfactory evidence that the … charges … are untrue' may and should be given their natural meaning." *State ex rel. Kelly v. Sullivan*, 52 So. 2d 422, 427 (Fla. 1951). The Court concluded that that the phrase "may be read and understood to mean 'as soon as he has received' " the information, and it therefore rejected the contention that the Governor lacked the power to immediately reinstate the subject officer. *Id.* Indeed, a wide variety of Florida decisions consistently interpret the word "upon" to mean at the same time of, as opposed to some point in time significantly earlier or sooner. *E.g., Rogers v. Bandy*, 182 So. 281, 283 (Fla. 1938); *Dean v. Crews*, 81 So. 479, 480 (Fla. 1919); *Careerxchange, Inc. v. Unemployment Appeals Com'n*, 916 So. 2d 68, 70 (Fla. 4th DCA 2005); *Lawyer v. Munro*, 118 So. 2d 654, 656 (Fla. 1st DCA 1960); *see also Gordon v. State*, 901 So. 2d 399, 403 (Fla. 2d DCA 2005) (interpreting the word in its special sense, but noting that the word "is 'regularly employed as a simple

equivalent of *on*, in all the varieties of meaning which that proposition has developed" (quoting XIX *Oxford English Dictionary* 299, 300 (2d ed. 1989)).

While Petitioner does not assert that the appointment must come at the exact second of the resignation, something that often would be impossible, there is no reasonable reading of the term that would allow the Governor to shirk his duties for months on end as he has here. It is also important to note that Petitioner is not seeking to compel the Governor to choose any particular individual. All Petitioner seeks in this case is an order compelling the Governor to adhere to his duty to make an appointment and do it now. *See Pleus*, 14 So. 3d at 945 (concluding that mandamus lies to compel Governor to "adhere to his duty to *make* an appointment" given that Court was not directing "the Governor's discretionary decision as to the actual appointment").

III. PETITIONER HAS NO OTHER ADEQUATE REMEDY.

Mandamus is the only adequate remedy available to Petitioner given that the circumstances here call for an immediate resolution. *E.g.*, *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980); *Pleus*, 14 So. 3d at 946. *Pleus* involved a six-month delay in filling a judicial vacancy; its principles are equally applicable here where the Governor has taken more than nine months to fill the second highest office in the Executive Branch. The law provides that the Governor shall appoint a successor and we ask that the Court direct the Governor to fulfill his duty.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus compelling the Governor to comply with the mandate of section 14.055 and fill the vacancy in the office of Lieutenant Governor forthwith.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Peter Antonacci, General Counsel, Office of the Governor, Tallahassee, Florida, by email at peter.antonacci@eog.myflorida.com, on this 6th day of January, 2014:

__/s/ Donald M. Hinkle _____
Donald M. Hinkle

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

__/s/ Donald M. Hinkle _____
Donald M. Hinkle