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IN THE
SUPREME COURT OF FLORIDA

CASE NO.: SC16-1337

LOWER CASE NO.: 2016-CA-003471

CAROL ELIZABETH SCOTT, et. al.,

Petitioners,

v.

MIKE HOGAN, et al.,

Respondents.

On Review from the District Court of Appeal,
First District of Florida

JURISDICTIONAL ANSWER BRIEF OF RESPONDENT ALEXANDER PANTINAKIS

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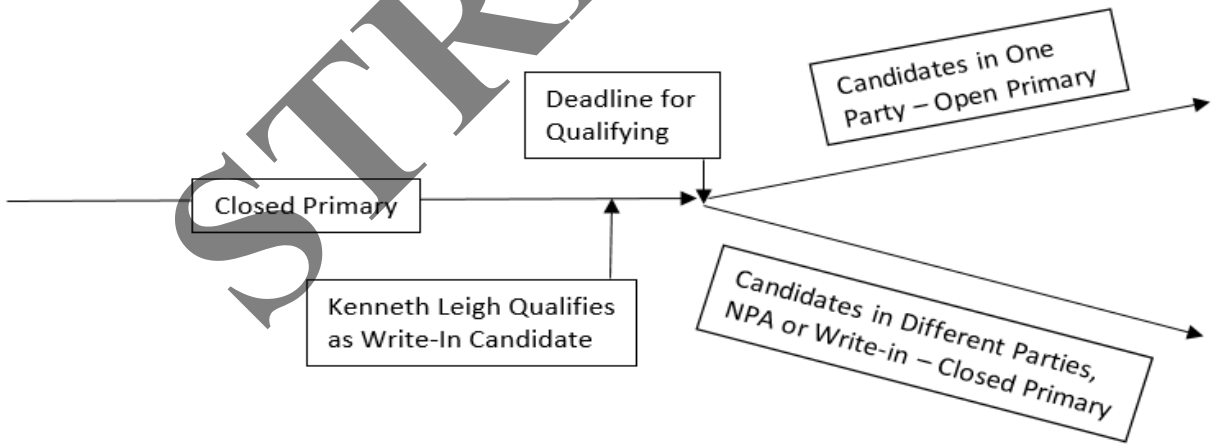
STATEMENT OF THE FACTS AND OF THE CASE

Petitioners seek to invoke the discretionary jurisdiction of this Court under Article V, Sec.3(b)(3) of the Florida Constitution which states that this Court "[m]ay review any decision of a district court of appeal that . . . expressly construes a provision of the state or federal constitution . . .." There is no basis for the Court to accept jurisdiction.

Incredulously, the Petitioners begin their statement of the case and facts with a falsehood. "The Republican primary for the Office of State Attorney for the Fourth Judicial Circuit was converted from an open to a closed primary by a sham, write-in election candidacy filed only to close the primary election." Ptnr., p.1[1]. The falsity of this statement is illustrated below:



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[1] References to the Jurisdictional Brief of Petitioners will be "Ptnr., p.__"; references to Petitioners' Appendix will be "Appx. __"; references to the appellate docket will "App.__"; and references to the Record will be "R.__".

At the time Kenneth Leigh qualified as a write-in candidate for the Office of State Attorney for the Fourth Judicial Circuit, the Republican Primary was closed, not open as the Petitioners have repeatedly misstated throughout this case. Petitioners never had the right to vote in the primary of a party of which they were not members.

Both the trial court (R. 151-162) and the First District Court of Appeal (Appx. A) applied the clear rule of law as stated by this Court in *Brinkman v. Francois*, 184 So.3d 504 (Fla. 2016) and rejected Petitioners' "dog whistle" argument for the judiciary to ignore the clear statement of law from this Court, to ignore the constitutional separation of powers, and to ignore the freedoms of speech and association within our state and federal Constitutions.

Petitioners' statement of the case is not one of facts, but instead is filled with argument, political rhetoric, and untrue statements that are irrelevant to the issue of jurisdiction. The irrelevant misstatements are too numerous to list in total, but include:

- Corey's campaign perceived Nelson to be a formidable opponent – Ptnr. p.1
- COREY believed that her prospects for re-election would fare better if the primary could be closed only to the Republican voters – Ptnr. p.2

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- LEIGH's appearance was not genuine opposition, but mere illusory opposition as a scheme to disenfranchise 438,894 non-Republican voters – Ptnr. p. 3
- [LEIGH is a] sham candidate who has had no desire to seek or occupy the office – Ptnr. p. 3

Twice Petitioners sought to have this case certified as a question of great public importance and twice the efforts were rejected because the case involves the application of existing law and does not involve expressly construing a constitutional provision. The First District Court of Appeal understood that inherently applying a constitutional provision is not the same as construing a constitutional provision and denied both of Petitioners' application for certification.

The relevant points on jurisdiction are that the trial court (R.151-162) and First District Court of Appeal (Appx. A) both applied the clear rule of law in *Brinkmann.* The appellate court clearly stated that it "affirm[ed] the dismissal of the first count based on *Brinkmann v. Francois*, 184 So. 3d 504 (Fla. 2016), and we affirm the dismissal of the second count without comment." Appx. A.

The trial court stated the rationale for it's ruling as follows:

> In the instant case, this Court holds that to permit a party to inquire into the subjective motives of an otherwise qualified

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> write-in candidate for public office would amount to judicial interference in the democratic process of elections, and would create a slippery slope leading to a proliferation of lawsuits resulting in unnecessary and unwarranted judicial interference in similar cases.

R. 157. Petitioners seek to magnify the speculative and hypothetical dicta of the trial court decision, but the trial court stated its actual ruling quite clearly, "Florida law as it currently exists does not offer the Plaintiffs the relief they seek. The opinions of the Supreme Court and the Fourth District Court of Appeal are binding authority on this Court, and this Court is compelled to apply the rationale and holdings of these courts." R. 158. There is no basis for this Court to accept jurisdiction. Fla. Const. Article V, Sec.3(b)(3)

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SUMMARY OF THE ARGUMENT

Petitioners' errant request that this Court accept discretionary jurisdiction over the straightforward decision of the First District Court of Appeal should be denied. The trial court and the appellate court applied the clear rule of law existing in Florida as stated by this Court in *Brinkmann*. At best the decision merely involved the inherent application Article VI, § 5(b) of the Florida Constitution. Neither the trial court nor the appellate court expressly construed any provision of the Florida Constitution nor of any Florida Statute.

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ARGUMENT

I. There is No Jurisdiction Over this Appeal Because the First District's Decision Did Not Expressly Construe Art. VI, § 5(b) of the Florida Constitution.

Neither the trial court, nor the First District Court of Appeal expressly construed a constitutional provision in this matter. A lower court's rendering of a decision that inherently involves the application of a constitutional provision, does not give this Court jurisdiction over this appeal. *Rojas v. State*, 288 So.2d 234 (Fla.1973); *Ogle v. Pepin*, 273 So.2d 391 (Fla.1973); *Armstrong v. City of Tampa*, 106 So.2d 407(Fla.1958).

As this Court has stated, "Our direct appeals jurisdiction is not properly invoked merely because the trial court may apply a constitutional provision to the facts before it, but rather is properly invoked as to construction of a constitutional provision only where the trial court has expressly construed the constitutional provision involved." *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973)(involving criminal prosecution).

In *Dykman* this Court accepted jurisdiction and affirmed a decision from the Third District Court of Appeal that passed upon the constitutional validity of Florida's grand jury statute, but remanded on the remaining issues raised in the appeal due to a lack of jurisdiction. The Court lacked jurisdiction because the lower courts' rulings were not based upon an express explanation, definition, or statement on a

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statutory or constitutional provision's validity. *Dykman*, at 634.

In looking at the issues in *Dykman* where the Court determined that jurisdiction was lacking, the same analysis shows a lack of jurisdiction in the present case. First, the Court in *Dykman* considered a motion to suppress evidence based upon a constitutionally invalid search.

> [W]e have previously indicated that the inherent construction of a constitutional provision would not support a direct appeal to this Court. In ruling upon the motions to suppress, **the trial court merely applied undisputed propositions of law to the facts it found to exist in the instant case**, and in so doing found the motion not to be well-founded. Even if the trial court ruling on the motion is erroneous, it would not support a direct appeal to this Court.

Dykman, at 635-636 (emphasis added).

In *Dykman* the Court rejected the other argued grounds for discretionary jurisdiction, and stated that in each ruling the court "did not pass upon the validity of any state or federal statute, nor did it construe any constitutional provision . . .." *Dykman* at 636. The support for the Court's ruling was based upon *Rojas v. State*, 288 So.2d 234 (Fla. 1973).

In *Rojas* the Court considered an attempt to invoke discretionary jurisdiction based upon a petit jury challenge. In rejecting jurisdiction, the distinction was made between simply applying a constitutional provision and construing one.

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> Although our direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a statute, **we may not accept a direct appeal based upon an inherent construction of a constitutional provision; . . .. The trial court, if anything, merely applied the provisions of the Fourteenth Amendment to the facts it determined existed in the instant case;** in fact, the apparent basis of the ruling was that no showing of unconstitutional discrimination was made. **Applying is not synonymous with construing; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is.** Hence, no basis for direct appeal to this Court has been presented . . ..

Rojas at 236 (emphasis added).

In the present case, it is apparent that the First District Court of Appeal applied the undisputed law to the facts alleged in the case when it ruled, "We affirm the dismissal of the first count based on *Brinkmann v. Francois*, 184 So. 3d 504 (Fla. 2016), and we affirm the dismissal of the second count without comment." Appx. A.

Likewise, the trial court very clearly stated that granting the motions to dismiss was based upon applying the binding case law to the facts alleged. "Florida law as it currently exists does not offer the Plaintiffs the relief they seek. The opinions of the Supreme Court and the Fourth District Court of Appeal are binding authority on this Court, and this Court is compelled to apply the rationale and holdings of these courts." R. 158.

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Petitioners state, incorrectly, in their brief that the opinion of the First District Court of Appeal "expressly addresses and resolves the issue of whether the UPA [Universal Primary Amendment] applies to sham candidates." Ptnr. P.6. They go on to claim that this was a new ruling upon the issue because, they incorrectly claim, *Brinkmann* did not address their alleged issue of a sham candidacy. Appellants misread *Brinkmann*.

In *Brinkmann* this Court specifically cited the language in *Telli v. Snipes*, 98 So. 3d 1284 (Fla. 4th DCA 2012), which quoted *Lacasa v. Townsley*, 883 F. Supp. 2d 1231 (S.D. Fla. 2012), when it noted that Courts "will not consult a crystal ball to determine when and whether a given write-in candidate constitutes 'real' or mere illusory opposition." *Brinkmann*, 184 So. 3d at 511 (*quoting Telli* at 1287 (*quoting Lacasa* at 1243)). Accordingly, *Brinkmann* did address the issue of "sham" or "real" candidacy and the clear ruling was that the quality of any opposition under the UPA is immaterial; it is only the fact of opposition in the general election that prevents a party primary from being opened under the UPA. The First District Court of Appeal applied the clear ruling of *Brinkmann* to the facts and determined, just as the trial court did, that Florida law does not afford the Plaintiffs/Petitioners the relief they seek.

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At best, the lower court's rulings involved an inherent construction of the UPA, but in reality the decisions involved the simple application of the provision to the facts. The law in Florida is very clear. There is no ambiguity. "[T]he plain and obvious meaning of 'opposition' [in the UPA] includes write-in candidates." *Brinkmann* at 514. Appellee, Kenneth Leigh, qualifying as a write-in candidate made him opposition as set forth in the UPA. As this Court ruled in *Brinkmann*, the UPA "does not specify the type of 'opposition' one must encounter in a general election." *Brinkmann* at 511. Both the trial and appellate courts applied these clear statements of law to the facts in their rulings.

Finally, on page 10 of their brief Petitioners make arguments as to the ramifications if the First District Court of Appeal's decision were to stand. Although irrelevant to jurisdiction, the arguments must be rebutted. Petitioners' arguments, if adopted by this Court, present far more dire consequences to our system of government. Petitioners would have this Court violate the separation of powers, violate the freedom of speech, and violate the declared "strong public policy against judicial interference in the democratic process of elections." *Brinkmann* at 510 (citation omitted). Petitioners want the courts to measure candidates, rather than the voters.

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The egregious effects of accepting Petitioners' arguments and permitting voters and candidates to file lawsuits challenging candidates' motives in running for office will be chaos in the courts and in the electoral process. Political rivals will use litigation as the next campaign tool to rip asunder the political veil and expose the inner workings of opposing political campaigns. The candidates, consultants, and family members of candidates will all be subject to examination under oath as to the **real reason** the candidate is running. Emails, text messages, and phone records of a campaign will all be subject to discovery to **divine the true motives** of the campaign. Then, under Petitioners' argument the government will determine who has proper motives in running for office and who does not.

There is no middle ground on Petitioners' argument. Either the Court determines whether a candidate has worthy motives in running for office or the people determine those motives when they step into the ballot booth. The law in Florida has clearly sided with the people and Petitioners want to change that. The lower courts applied the clear rule of law to the facts before them in this case. Nothing construed – nothing expounded – the law in Florida as applied to the case does not afford Plaintiffs/Petitioners the remedy they seek. The Court should deny jurisdiction in this matter.

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CONCLUSION

For all of the foregoing reasons, the Court should reject the request for discretionary jurisdiction in this matter.

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Dated: August 23, 2016.

Respectfully submitted,
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I HEREBY CERTIFY that the foregoing brief uses Courier New 12-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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