

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-783

GREGG LERMAN,

Petitioner,

v.

RICK SCOTT, as Governor of the State of Florida;
and KEN DETZNER, as Secretary of State of the State of Florida,

Respondents.

**RESPONSE TO PETITIONER'S MOTION TO INVOKE THE
COURT'S ALL WRITS JURISDICTION TO MAINTAIN THE
STATUS QUO PENDING REVIEW OF THE
PETITION FOR WRIT OF QUO WARRANTO**

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Petitioner Gregg Lerman has filed a motion seeking “a Constitutional writ or other order” pending this Court’s review of his Petition for Writ of Quo Warranto. Noting that the Governor has convened the Judicial Nominating Commission for the Fifteenth Judicial Circuit, Petitioner has specifically requested that this Court enjoin the Governor from fulfilling his constitutional obligation to appoint a judge to fill the vacancy in the office of Palm Beach County Judge, Group 11, occasioned by the resignation of Judge Laura Johnson. In the alternative, Petitioner asks this Court to order the Judicial Nominating Commission to withhold its constitutionally mandated submission of nominees to the Governor.¹

As the Response to the Petition for Writ of Quo Warranto will make clear, the Petitioner’s theory of the Governor’s power to fill judicial vacancies is irreconcilable with the plain language of the Florida Constitution. Article V of the Constitution provides that the Governor “shall fill each vacancy on a circuit court or county court” by appointing one person from a list of three to six persons nominated by the appropriate judicial nominating commission. Art. V, § 11(b), Fla. Const. The “resignation of [an] incumbent” is among the circumstances that

¹ The Motion does not seek relief against Secretary of State Detzner.

will create a constitutional vacancy in office. Art. X, § 3, Fla. Const. An incumbent Palm Beach County Judge, Laura Johnson, has submitted an irrevocable resignation from the office of county court judge less than two years into her current six-year term, and that resignation has been accepted by the Governor.

This Court previously opined that a judicial vacancy occurs at the time the Governor accepts a resignation, and if such acceptance of resignation occurs prior to the commencement of the statutory qualifying period (the start of the electoral process), then the vacancy shall be filled by gubernatorial appointment. *See In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460 (Fla. 1992); *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006); and *Advisory Opinion to the Governor re Appointment or Election of Judges*, 983 So. 2d 526 (Fla. 2008). The Governor accepted Judge Johnson's letter of resignation on April 22, 2016, ten (10) days prior to commencement of the electoral process at the start of the statutory qualifying period on May 2, 2016. Thus, the Governor's decision to convene the Judicial Nominating Commission was compelled by the Constitution and this Court's prior opinions. The Petition's discussion of past resignations—many arising under circumstances factually and legally distinguishable from those

present here—cannot overcome the clear constitutional mandate for a gubernatorial appointment to fill the vacancy in office created by the resignation of Judge Johnson.

Although Governor Scott disputes both the merits of the underlying Petition and the sufficiency of the Motion, he nonetheless agrees that this matter should be resolved expeditiously. To that end, the Governor has taken (or will take) the following actions to promote the swift resolution of this case:

First, the Governor will file a response to the Petition for Quo Warranto on or before May 25, 2016, as requested by this Court's Order of May 10, 2016. That response will set out in detail the basis for the Governor's exercise of his constitutional authority to fill the vacancy in the office of Palm Beach County Judge that is the subject of the Petition.

Second, the Governor has requested the Judicial Nominating Commission for the Fifteenth Judicial Circuit to withhold certification of its nominations to fill the Palm Beach County Judge vacancy until the end of the 60-day period² prescribed by Article V, section 11(c), of the Florida Constitution. See *Correspondence to Chair, Fifteenth Circuit Judicial Nominating Commission*

² In prior correspondence, the Governor extended the 30-day period to make nominations by an additional 30 days, as authorized by Article V, section 11(c).

(May 13, 2016), attached to this Response as Exhibit “A”. Because this vacancy occurred on April 22, 2016, it is expected that the nominations will not be certified to the Governor until June 21, 2016.

Third, the Governor has authorized the undersigned counsel to represent that he will not appoint a judge to fill the Palm Beach County Judge vacancy until the end of the 60-day period after the nominations have been certified under Article V, section 11(c), unless this Court acts before that time to dismiss or determine the merits of the Petition for Quo Warranto. If the nominations are certified on June 21, 2016, the Governor’s 60-day period to make the appointment will conclude on August 20, 2016.

Finally, to the extent this Court has not already expedited its consideration of the Petition for Writ of Quo Warranto, the Governor requests that this matter be afforded priority status.

As this Court has repeatedly cautioned, the constitutional “all writs” authority under Article V, section 3(b)(7), does not constitute a separate source of original or appellate jurisdiction. *See, e.g., Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). Instead, the Court will entertain the exercise of the all writs jurisdiction only when it is “necessary” to the complete exercise of the Court’s ultimate jurisdiction conferred elsewhere in the Constitution. *Id.*; *see also Petit v.*

Adams, 211 So. 2d 565, 566 (Fla. 1968) (providing that all writs authority may be exercised if necessary to preserve the status quo and protect the Court's ability to completely exercise jurisdiction at a future time). This Court has also noted, in the context of mandamus, the "well-established fundamental principle" that the extraordinary writ "will never be granted in cases when, if issued, it would prove unavailing, or when compliance with it would be nugatory in its effects, or would be without beneficial results and fruitless to the relator." *State ex rel. Ostroff v. Pearson*, 61 So. 2d 325, 326 (Fla. 1952) (citing *Campbell v. State ex rel. Garrett*, 183 So. 340 (Fla. 1938); *Davis ex rel. Taylor v. Crawford*, 116 So. 41 (Fla. 1928); *Pippin v. State*, 74 So. 653 (Fla. 1917)).

Based on the Governor's actions (and proposed actions) outlined above, a constitutional writ in this case is neither "necessary to the complete exercise of [the Court's] jurisdiction," nor is it required to preserve the status quo or to protect the Court's ability to exercise its jurisdiction over the underlying Petition for Writ of Quo Warranto. The Petitioner's Motion to Invoke the Court's All Writs Jurisdiction should be denied.

Respectfully submitted,

/s/ Jason Gonzalez

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this filing is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 13th day of May, 2016, through the e-filing Portal to:

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May 13, 2016

Mr. Gregor J. Schwinghammer, Jr.
Chair – Fifteenth Circuit
Judicial Nominating Commission
777 South Flagler Dr.
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West Palm Beach, Florida 33401-6161

Dear Mr. Schwinghammer:

On April 22, 2016, Governor Scott requested that you convene the Fifteenth Circuit Judicial Nominating Commission for the purpose of selecting and submitting to the Governor the names of highly qualified lawyers for appointment to the Palm Beach County Court. This appointment is to fill the vacancy created by the resignation of Palm Beach County Judge Laura S. Johnson. Since that time, the Governor's authority to fill the vacancy created by Judge Johnson's resignation has been questioned in *Lerman v. Scott*, No. SC16-783, now pending before the Florida Supreme Court.

In light of the pending challenge and in order to allow the Court adequate time to review this matter, Governor Scott has directed me to request the Fifteenth Circuit Judicial Nominating Commission to withhold certification of its nominations to fill the vacancy created by the resignation of Palm Beach County Judge Laura S. Johnson until Tuesday, June 21, 2016. This is the end of the 60-day period authorized by Article V, section 11(c) of the Florida Constitution, which includes the discretionary 30-day extension already previously authorized.

Upon receipt of the Commission's nominations on June 21, 2016, the Governor will have 60 days, concluding on Monday, August 20, 2016, in which to fulfill his constitutional obligation to make an appointment under Article V, section 11(c). The Governor will refrain from fulfilling his obligation to make an appointment until the end of the 60-day period, unless the Florida Supreme Court acts before that time to dismiss or determine the merits of the pending challenge.

If I may be of assistance to you or the members of the Commission, please call me at (850) 717-9310.

Sincerely,

William N. Spicola
General Counsel

cc: The Honorable Jeffrey Colbath
Chief Judge

