IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-783

GREGG LERMAN and THOMAS R. BAKER,

Petitioners,

v.

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

Respondents.

GOVERNOR RICK SCOTT'S RESPONSE TO PETITION FOR WRIT OF QUO WARRANTO

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Petition for Writ of Quo Warranto questions the source of the Governor's authority to fill a vacancy on the Palm Beach County Court through appointment. The Governor's authority to fill vacancies in judicial office is derived from Article V of the Florida Constitution and has been confirmed repeatedly by this Court. The Petition should therefore be dismissed or resolved against the Petitioners on the merits.

The Florida Constitution provides that the Governor "shall fill each vacancy on a circuit court or county court" by appointing from a list of persons nominated by the appropriate judicial nominating commission. Art. V, § 11(b), Fla. Const. The Constitution also provides that the resignation of an incumbent county judge creates a vacancy in office. Art. X, § 3, Fla. Const. And this Court's precedents have established a bright-line rule that a judicial resignation accepted by the Governor before the candidate qualifying period for that office should be filled by gubernatorial appointment.

In this case, an incumbent Palm Beach County judge submitted a letter irrevocably resigning from office just over one year into her six-year term. The resignation was accepted by the Governor on April 22, 2016, before the May 2016 candidate qualifying period for judicial office. Under these circumstances, the

Governor has the constitutional authority and obligation to appoint a judge to fill the vacancy in office. Simply put, the Florida Constitution does not differentiate between different types of judicial vacancies in the manner urged by the Petitioners. The Petitioners' theory ignores this Court's modern jurisprudence regarding the gubernatorial appointment power and would elevate the terms of Florida's resign-to-run statute over the appointment power explicitly assigned to the Governor in Article V of the Florida Constitution. Should this Court choose to accept jurisdiction and reach the merits, the Petition should be resolved against the Petitioners.[1]

ARGUMENT

I. This Court need not exercise its quo warranto jurisdiction.

This Court has discretionary jurisdiction to issue writs of quo warranto to state officers such as the Governor. Art. V, § 3(b)(8), Fla. Const. This writ has been used to determine whether a state officer has properly exercised a power or right derived from the State. *Fla. House of Representatives v. Crist*, 999 So. 2d

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[1] Petitioners Gregg Lerman and Thomas R. Baker are referred to as the "Petitioners"; Respondent Governor Rick Scott is referred to as the "Governor"; and Respondent Secretary of State Ken Detzner is referred to as the "Secretary." References to the Petition for Writ of Quo Warranto are styled "Pet.[page]"; references to the Appendix to the Petition are styled "Pet.Appx.[page]"; and references to the Appendix to the Governor's Response to the Petition are styled

601, 607 (Fla. 2008). Unless there is a compelling reason for invoking the original jurisdiction of a higher court, however, a quo warranto proceeding should be commenced in circuit court. *See State ex rel. Vance v. Wellman*, 222 So. 2d 449, 449 (Fla. 2d DCA 1969). Extraordinary writ petitions are typically entertained by this Court in the first instance only "where the functions of government would be adversely affected absent an immediate determination by this Court." *Chiles v. Phelps*, 714 So.2d 453, 457 (Fla. 1998).

Although discretionary jurisdiction could be exercised in this case, the matters raised in the Petition do not require an "immediate determination by this Court" or threaten "the functions of government." Instead, the Petition's allegations involve matters that are sufficiently addressed by relevant precedent such that dismissal or transfer to a lower court may be warranted. Should this Court choose to address the Petition for Quo Warranto on the merits, it should be resolved against the Petitioners for the reasons described below.

II. The Florida Constitution authorizes the Governor to fill the vacancy created by Judge Johnson's resignation from office.

The Governor's authority to fill the vacancy created by Judge Johnson's resignation from office is provided by the Florida Constitution. Article V of the

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"Resp.Appx.[page]." References to Florida Statutes are to the 2015 codification.

Florida Constitution vests the Governor with the power to fill judicial vacancies, while Article X provides that an incumbent's resignation creates a vacancy in office. The Governor's exercise of his appointment power is compelled by the plain language of the Constitution and is consistent with this Court's precedents. The Petition for Writ of Quo Warranto should be dismissed or resolved against the Petitioners on the merits.

A. The Governor has the constitutional obligation to fill vacancies in the office of county court judge by appointment.

The Florida Constitution vests the Governor with the power to fill judicial vacancies by appointment. Art. V, § 11, Fla. Const. In the case of a county court vacancy, the Constitution provides:

> The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority vote of the electors, by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

Art. V, § 11(b), Fla. Const.

Under the plain language of this provision, the Governor has the constitutional authority and obligation to fill circuit and county court vacancies by

appointing from a list of persons nominated by the judicial nominating commission. The Governor's letter requesting the Fifteenth Circuit Judicial Nominating Commission to convene upon the occurrence of a vacancy in the office of Palm Beach County judge, Resp.Appx.3, was therefore in full accord with the constitutionally prescribed process.

B. Judge Johnson's resignation created a vacancy in office upon acceptance of the resignation by the Governor.

The Florida Constitution identifies eight circumstances under which a vacancy in office "shall occur":

> Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or *resignation of the incumbent* or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

Art. X, § 3(b), Fla. Const. (emphasis supplied); *see also* § 114.01(1)(d); Fla. Stat. (providing that a vacancy in office occurs "[u]pon the resignation of the officer and acceptance thereof by the Governor").

In response to a request by Governor Chiles in 1992, this Court confirmed that a vacancy in judicial office occurs when a sitting judge's resignation is accepted by the Governor: "When a letter of resignation to be effective at a later

date is received and accepted by [the Governor], a vacancy in that office occurs and actuates the process to fill it." *In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992). At that point, the "duties of the appropriate nominating commission start." *Id*.; *accord Advisory Op. to Gov. re Judicial Vacancy Due to Resignation*, 42 So. 3d 795 (Fla. 2010) (noting that "a vacancy was created . . . when Governor Crist accepted Judge Ackerman's resignation"); *Advisory Op. to Gov. re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218 (Fla. 2006) (stating that "[u]nder our precedent, a judicial vacancy occurs when a letter of resignation is received and accepted by the Governor").

As applied to the present case, there can be no doubt that a vacancy in the office of Palm Beach County judge occurred on April 22, 2016, when the Governor accepted Judge Laura Johnson's irrevocable letter of resignation, effective January 3, 2017. Resp.Appx.2.; Pet.Appx.A-1. The Governor acted in accordance with the Florida Constitution and this Court's precedent in requesting the Fifteenth Circuit Judicial Nominating Commission to provide a list of nominees to be considered for an appointment to fill the vacancy created by Judge Johnson's resignation. Resp.Appx.3

C. The vacancy created by Judge Johnson's resignation did not occur after the "election process" for that seat had begun.

This Court has recognized a limited exception to the exercise of the Governor's appointment power to fill judicial vacancies under Article V. When a vacancy in judicial office occurs *after the candidate qualifying period for that seat* commences, this Court has opined that the Governor's power of appointment yields to the election process. *Advisory Op. to Gov. re Appointment or Election of Judges*, 824 So. 2d 132, 136 (Fla. 2002). That narrow exception does not apply to the vacancy created by Judge Johnson's resignation.

In a series of Advisory Opinions, this Court has held that "when a vacancy occurs in the county or circuit courts before the qualifying period for the seat commences, the vacancy should be filled by appointment, but once the election process begins, such a vacancy should be filled by election." *Advisory Op. to Gov. re Judicial Vacancy Due to Resignation*, 42 So. 3d at 797. The beginning of the statutory qualifying period is used to mark the commencement of the election process "[i]n order to promote consistency in the process of filling judicial vacancies." *Id*.

The decisions applying this principle have uniformly recognized the beginning of the candidate qualifying period for the judicial seat in question as the key factor in determining whether a vacancy in that seat should be filled by

appointment or election. *See Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d at 530 (vacancy created by involuntary retirement of a county court judge *during* a qualifying period in which any candidate qualifies for the judicial office is to be filled by election); *Advisory Op. to Gov. re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d at 1220 (vacancy created by circuit judge's resignation three weeks before qualifying period, but effective after conclusion of qualifying period, is to be filled by appointment); *Advisory Op. to Gov. re Appointment or Election of Judges*, 824 So. 2d at 133 (vacancy created by involuntary retirement of circuit court judge after qualifying period in which three candidates qualified is to be filled by election); *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014) (vacancy created by resignation of circuit judge four weeks before qualifying period but effective after qualifying period is to be filled by appointment); *cf. Advisory Op. to Gov. re Judicial Vacancy Due to Resignation*, 42 So. 3d at 797 (vacancy created *after* the election process had effectively concluded when incumbent judge resigned after qualifying unopposed is to be filled by appointment).

When the principle announced in these decisions is applied to the present case, there can be no question that the vacancy in office created by Judge Johnson's resignation is to be filled by appointment. Judge Johnson's resignation

was accepted by the Governor on April 22, 2016, nearly five years before the scheduled conclusion of her current six-year term on January 4, 2021. Resp.Appx.1-2. Each of the decisions discussed above involved a seat that—but for the judge's resignation or involuntary retirement—would otherwise have been scheduled for an election that very same year. Judge Johnson's seat was not scheduled for an election until 2020.

But even if the relevant "qualifying period" under the applicable precedents were the one prescribed for the 2016 general election, this Court's past opinions would not dictate a different result. Judge Johnson's resignation was accepted on April 22, 2016, thereby creating a vacancy ten days before the qualifying period for judicial office commenced at noon on May 2, 2016. § 105.031, Fla. Stat. Under these circumstances, the vacancy in the office of Palm Beach County judge is to be filled by gubernatorial appointment for a term ending on January 8, 2019.

D. Petitioners' arguments lack support in the Florida Constitution and this Court's precedents.

The Petitioners' theory of the Governor's power to fill judicial vacancies is irreconcilable with the plain language of the Florida Constitution and this Court's precedents. Two principal arguments are advanced in the Petition for Writ of Quo Warranto. First, relying on out-of-context phrases and decisions that predate the current version of Article V, the Petitioners assert that the Governor's appointment

power is "subordinated" to the election process. Second, the Petitioners claim that a judge's resignation to seek another office under Florida's resign-to-run statute creates an "artificial vacancy" that is not subject to the Governor's constitutional appointment power. This Court should reject each of these arguments as contrary to the Florida Constitution and unsupported by the relevant case law.

1. The Florida Constitution does not subordinate the gubernatorial appointment power to the electoral process.

As to the first argument, the Petitioners generally concede that Article V of the Florida Constitution authorizes the Governor to fill vacancies in the office of county court judge. The Petition contends, however, that the phrase "wherein the judges are elected by a majority vote of the electors" in Article V, section 11(b), "should be viewed as subordinating the appointment power to the electoral process." Pet.10. Relatedly, the Petitioners claim that the phrase "[t]he election of county court judges shall be preserved" in Article V, section 10(b)(2), requires judicial vacancies to be filled by election rather than appointment whenever it would be "reasonably possible" to hold an election. Pet.9-12 (citing *Spector v. Glisson*, 305 So. 2d 777, 784 (Fla. 1974)). These arguments ignore the context of these isolated constitutional phrases in sections 10(b) and 11(b) of Article V, the circumstances under which these provisions were added to Article V under the 1998 Constitutional Revision Commission's Revision 7, and this Court's more

recent opinions adopting the period after candidate qualifying commences as a limited exception to the Governor's appointment power.

In 1998, the Constitution Revision Commission proposed a revision to the Florida Constitution entitled "Local Option for Selection of Judges and Funding of State Courts." Fla. Const. Rev. Comm'n, Revision 7 (1998). The ballot summary for Revision 7 disclosed, in relevant part, that the amendment "[p]rovides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges by governor, with subsequent elections to retain or not retain those judges; provides election procedure for subsequent changes to selection of judges." *Id*.; *see also Kainen v. Harris*, 769 So. 2d 1029, 1032-33 (Fla. 2000) (Anstead, concurring) (describing Constitution Revision Commission debate over ballot summary).

Revision 7 established a constitutional option for local jurisdictions in Florida to dispense with judicial elections at the trial-court level in favor of merit selection and retention. Before Revision 7, only a "justice of the Supreme Court" or "judge of a district court of appeal" could qualify for retention by a vote of the electors. Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(a), Fla. Const.). Following Revision 7, each circuit and county in the State of Florida was required to hold a local option vote at the general election in the year 2000 on

whether to select circuit and county court judges "by merit selection and retention rather than by election." Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(b)(3), Fla. Const.).

Revision 7 also provided that the election of circuit and county court judges "shall be preserved notwithstanding the provisions of subsection (a)" unless a majority of those voting in the applicable local option election approved a change from election to merit selection and retention. Fla. Const. Rev. Comm'n, Revision 7 (1998) (proposed Art. V, § 10(b)(1) and (2), Fla. Const.).

Finally, Revision 7 amended Article V, section 11(b), as follows:

> (b) The governor shall fill each vacancy on a circuit court or on a county court, <u>wherein the judges are elected by a majority vote of the electors,</u> by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

To date, no circuit or county in Florida has voted in favor of replacing the election of circuit and county judges with merit selection and retention. Placed in their proper historical context, however, the clear intent and effect of the isolated phrases identified by the Petition is to accommodate the possibility of a local

option vote to select circuit and county judges by merit selection and retention rather than by election. After Revision 7, the Governor's authority to fill vacancies on a circuit or county court *that is subject to merit selection and retention* is governed by Article V, section 11(a), while the Governor's authority to fill vacancies on a circuit or county court "wherein the judges are elected by a majority vote of the electors" is governed by Article V, section 11(b). The addition of the clause in section 11(b) is used for the purpose of *identification*, not subordination of the Governor's appointment power to the electoral process.

The Petitioners similarly misconstrue Article V, section 10(b)(2), by tearing from its context the phrase "[t]he election of county court judges shall be preserved." Pet.9-10. When viewed in the context of Revision 7's amendments to subsection 10(a), the preservation of county court elections "notwithstanding the provisions of subsection (a)" simply clarifies that the election of judges by a vote of the qualified electors will remain in force *unless and until* the jurisdiction votes to abandon election in favor of selecting judges by merit selection and retention.

To be sure, this Court's decision adopting the limited exception to the gubernatorial appointment power after the commencement of the "election process" also suggested a conflict between sections 10(b) and (11)(b) of Article V. *Advisory Op. to Gov. re Appointment or Election of Judges*, 824 So. 2d at 134-35;

but see id. at 137 (noting the dissenting opinion of Justice Lewis finding "nothing in the Florida Constitution that limits the appointment powers with reference to the phrase coined by the majority as when 'the election process begins'"). The solution fashioned by this Court to the perceived conflict—a bright line rule recognizing the Governor's appointment power to fill circuit and county court vacancies other than those occurring during a limited "election process"—at least provides a degree of certainty to candidates and elected officials. Petitioners' proposed remedy—to have this Court adopt a standard that requires examination of the reasons for judges' resignations—would inject uncertainty and doubt into the process, making the determination of constitutional provisions vary "based upon the fluctuations of the individual 'election process' for a given year." *Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d at 530. This Court should decline the Petitioners' invitation to revisit its settled precedent in this area.

Finally, the Petitioners rely on portions of several older cases that are either distinguishable on their facts or have been superseded by later amendments to Article V and more recent opinions of this Court. This Court's 1970 Advisory Opinion to Governor Kirk, for example, involved an interpretation of the Governor's appointment power under Article IV, as the then-current version of

Article V did not "regulate the method" for filling a vacancy. *In re Advisory Opinion to Governor*, 239 So. 2d 247, 249 (Fla. 1970). That opinion's conclusion that a judge's resignation creates a vacancy in office upon the resignation's effective date, rather than when accepted by the Governor, is also utterly irreconcilable with this Court's modern precedents.

In *Spector v. Glisson*, 305 So. 2d at 784, an incumbent justice resigned effective at the end of his term—midnight on the last day. Under those circumstances, this Court held that the seat should be filled by election. *Id*. In *Advisory Op. to Gov. re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006), this Court has already receded in part from the holding in *Spector*. The First District has also concluded that *Spector* has effectively been limited to its facts. *Trotti*, 147 So. 2d at 644-45 (quoting *Pincket v. Harris*, 765 So. 2d at 287). In either event, the present circumstances are readily distinguishable, as Judge Johnson's resignation was not effective at the *end* of her term, but was effective nearly *five years* before the end of her scheduled term of office.

2. The Florida Constitution does not include a "resign-to-run" exception to the Governor's judicial appointment power.

The Petitioners' final argument is that the vacancy created by Judge Johnson's resignation should be filled by election because Judge Johnson herself resigned *for the purpose of seeking another elected office* rather than for some

other reason. The Florida Constitution does not contemplate the "resign-to-run exception" alleged in the Petition, and this Court should decline this attempt to elevate a statutory provision over a constitutional power unambiguously assigned to the Governor.

Florida's "resign-to-run" statute prohibits any state or municipal officer from qualifying as a candidate for another state, district, county, or municipal public office if the two terms of office (or any part thereof) run concurrently, unless the officer first resigns from the office he or she presently holds. § 99.012(3), Fla. Stat. The resignation must be irrevocable, submitted at least 10 days before the first day of qualifying for the office sought, and effective no later than the earlier of the date the officer or the officer's successor would take office. *Id*. Judge Johnson's resignation in this case was expressly made pursuant to the resign-to-run statute. Pet.Appx.A-1.

Relying on forty-year old cases that predate several revisions to Article V—and ignoring the entirety of this Court's modern jurisprudence on the Governor's judicial appointment power—the Petition asks this Court to recognize a "resign-to-run exception" to the Governor's appointment power. Petitioners' theory cannot be reconciled with the language of the Constitution or this Court's precedents and should be rejected.

The Petition quotes *In re Advisory Opinion to Governor*, 239 So. 2d 247 (Fla. 1970), for the purported principle that a judge's irrevocable resignation tendered and accepted by the Governor "in cadence with the Resign to Run statute does not result in a vacancy in office." Pet.18 (emphasis in original); *see also* Pet.20 (quoting *dicta* from *In re Advisory Opinion to Governor*, 276 So. 2d 25, 30 (Fla. 1973)). The argument that a vacancy in judicial office occurs upon the resignation's *effective date* is irreconcilable with Article X, section 3(b), of the Florida Constitution; with section 114.01(1)(d) of the Florida Statutes; and with this Court's uniform holding in its more recent cases that a vacancy in judicial office occurs at the time the resignation is *accepted* by the Governor, not upon its effective date. *See, e.g.*, *In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d at 462.

The Petitioners also effectively ask this Court to revisit its 2008 Advisory Opinion and determine that the submission of a resignation under section 99.012 "initiates the electoral process." Pet.21. In that 2008 opinion, this Court explicitly rejected the concept of establishing "a fluctuating date based upon some variable factor such as when potential candidates take specific actions toward qualifying" in favor of a set date: the statutory beginning of the candidate qualifying period. *Advisory Op. to Gov. re Appointment or Election of Judges*, 983 So. 2d at 530.

There is no reason to reconsider that decision here.

To the extent the Petitioners ask this Court to elevate the terms of section 99.012(3)(f) of the Florida Statutes over the Governor's constitutional appointment power, it is a bedrock principle of jurisprudence that a statute cannot supersede a provision of the state or federal constitution. *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994). For similar reasons, no deference is owed by this Court to Division of Elections Advisory Opinion 90-27, which does not even purport to address the application of any relevant constitutional provisions. *See* § 106.23(2), Fla. Stat. (authorizing the Division of Elections to provide advisory opinions relating to provisions of "Florida election laws"); R. 1S-2.010(1), Fla. Admin. Code (providing that the Division of Elections has the responsibility to render advisory opinions "as to the application of Chapters 97 through 106" of the Florida Statutes).

Finally, the interpretation urged by the Petitioners would lead to absurd results. Under the Petition's theory, a "resign-to-run exception" exists such that the vacancy created by Judge Johnson's resignation for the explicit purpose of seeking election to another office must be filled by election. But under a "resign-to-run exception," a vacancy in office created by another judge's resignation, submitted and accepted by the Governor at the same time, with the same effective

date, but where that judge intended to leave the bench for any other reason (for example, to return to the private practice of law) would be filled by gubernatorial appointment. The Petitioners' "standard" would discard this Court's bright-line rule anchored in the candidate-qualifying period in favor of a case-by-case examination of the underlying reason for the judge's resignation. There is no textual basis in the Florida Constitution to justify disparate treatment of these two hypothetical vacancies, or the relief sought by the Petitioners in this case.

CONCLUSION

Should this Court choose to exercise jurisdiction, the Petition for Writ of Quo Warranto should be dismissed or resolved against the Petitioners on the merits.

Respectfully submitted,

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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 Florida Rule of Appellate Procedure 9.100(l) and that a true copy of the foregoing has been furnished this 23rd day of May, 2016, through the e-filing Portal to:

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