

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-783

GREGG S. LERMAN and
THOMAS R. BAKER,

Petitioners,

v.

GOV. RICK SCOTT and
SEC'Y OF STATE KEN DETZNER,

Respondents.

**SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF *QUO WARRANTO***

The Florida Secretary of State opposes the petition filed in this case, and it should be dismissed or denied for any or all of the reasons set out in the Governor's response. The Secretary incorporates the Governor's arguments here by reference.

Simply put, the Florida Constitution does not make distinctions regarding judicial or other vacancies; there is but one type of vacancy, including a judicial vacancy. *Cf.* Art. X, § 3, Fla. Const. (specifying when a “[v]acancy in office shall occur”). A statute cannot create such an artificial distinction when not contemplated by the Constitution. With one exception not applicable here (for vacancies occurring after commencement of the election process), a judicial vacancy categorically must be filled by the Governor via appointment, as mandated by article V, section 11(b), of the Florida Constitution. *See In re Advis. Op. to the Gov. (Judicial Vacancies)*,

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600 So. 2d 460, 462 (Fla. 1992); *see also Trotti v. Detzner*, 147 So. 3d 641, 644 (Fla. 1st DCA), *rev. denied*, 157 So. 3d 1051 (Fla. 2014) (“The Florida Supreme Court has provided that when a vacancy is created prior to the commencement of the qualifying period, the vacancy *is required* to be filled by gubernatorial appointment.”) (emphasis supplied).

Similarly, a resignation’s legal effect does not vary based on the incumbent’s incantation of a particular statute. Regardless of whether a resignation cites Florida’s resign-to-run law or some other statutory or constitutional provision, if the resignation is effective before the end of a constitutionally mandated term of office, it creates a “vacancy” by operation of article X, section 3, of the Florida Constitution. *Cf. Op. Att’y Gen. Fla. 2010-51* at 4 (Dec. 28, 2010) (noting that article X, section 3, of the Florida Constitution sets out the exhaustive list of circumstances under which “vacancy” occurs in office, and that expiration of a term of office is not one of those specified circumstances); *State ex rel. Hardee v. Allen*, 172 So. 222, 224 (Fla. 1937) (explaining that “‘term of office’ has reference to that fixed by law” and that the concept of vacancy “necessarily confined to the current term [of office] or that for which he is then in commission”); *State ex rel. Landis v. Baxter*, 165 So. 271, 271 (Fla. 1936) (“It is settled law that an office is not vacant as long as it has an incumbent who has lawful right under constitutional or statutory authority to continue therein, either for a fixed term or until the happening of a future event.”);

State ex rel. Landis v. Bird, 163 So. 248 (Fla. 1935) (discussing vacancies in office and expiration of terms of office).

Judge Johnson's term of elective judicial office was not set to expire until January 2021. Resp. App. 1.¹ She irrevocably resigned effective January 3, 2017, Pet. App. A; and the Governor accepted that resignation and convened a judicial nominating commission, Resp. App. 2, 3. Why Judge Johnson resigned and her stated statutory basis for doing so are of no moment. There is a judicial vacancy in Palm Beach County Court Judge, Group 11, that the Florida Constitution commands be filled by the Governor's appointment from names certified by the judicial nominating commission.

This being said, the Court certainly should reject the petition in this case as to both the Governor and the Secretary. But it properly could dismiss the Secretary here as a preliminary matter, as well. The petition purports to challenge, among other things, the Secretary's authority to write a letter to the Palm Beach County Supervisor of Elections setting out his view on whether the election contemplated there was legally sanctioned. Petition at 1, 6; Pet. App. C. The petition also seems to assume, without any legal or factual citation, that the Secretary is involved in the judicial appointment process. Petition at 22-23 (requesting as relief a writ directing

¹ Citations to "Pet. App." are to the petition's appendix, and citations to "Resp. App." are to the appendix submitted with the Governor's response.

the Secretary to show by what authority he “intend[s] to fill the seat in Group 11 of the Fifteenth Judicial Circuit by an appointment”). Even so, the petition on its face fails to set out why the Secretary is a party here or any basis at all for relief against the Secretary.

The purpose of *quo warranto* is to test a state officer’s right to take action in an official capacity. *See, e.g., Fla. House of Reps. v. Crist*, 999 So. 2d 601, 607 (Fla. 2008) (explaining that historical purpose of writ is “to determine whether a state officer or agency has improperly exercised a power or right derived from the State”) (internal citation omitted). Here, the Secretary wrote a letter to the Palm Beach Supervisor of Elections. Pet. App. C. The petition does not suggest that the letter had any legal or binding effect regarding the initiation of the appointment process as to the Group 11 seat. Of course, the Secretary is free to correspond with others regarding his views. The Secretary though does not have anything to do with filling county court judge vacancies under article V, section 11, of the Florida Constitution.

The Secretary does have the “responsibility to [o]btain and maintain uniformity in the interpretation and implementation of the election laws.” § 97.012(1), Fla. Stat. He also has the authority to “[p]rovide written direction and opinions to the supervisors of elections on the performance of their official duties with respect to the Florida Election Code.” § 97.012(16), Fla. Stat. Not once does the petition address how the Secretary’s May 2, 2016, letter went beyond his

authority set out in section 97.012, Florida Statutes. And, in any event, the Secretary is not the filing officer for county court judge elections. *See* § 105.031(1), Fla. Stat. There is no reason for the Secretary to be a party in this action.

The petition should be denied or dismissed. But the Secretary should be dismissed out of hand because there is nothing on the face of the petition that shows why he is a respondent.

Respectfully submitted,

/s/ Adam S. Tanenbaum

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23d day of May, 2016, a true copy of this response was filed electronically with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to the following counsel of record, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b) and Florida Rule of Appellate Procedure 9.420(c):

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated response complies with the font requirement of Florida Rule of Appellate Procedure 9.100(1) because it has been prepared in Times New Roman 14-point font.

/s/ Adam S. Tanenbaum
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