IN THE SUPREME COURT OF FLORIDA

GREGG LERMAN and
THOMAS R. BAKER,

Petitioners,

v. Case No. SC16-783

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

Respondents.
_____/

REPLY BY PETITIONER BAKER TO THE RESPONSES TO THE PETITION FOR WRIT OF QUO WARRANTO

Petitioner Thomas R. Baker, through undersigned counsel, respectfully submits this reply to the responses by Governor Scott and Secretary Detzner to the Petition for Quo Warranto. Petitioner Baker also adopts and incorporates by reference the reply filed by Petitioner Lerman.

For the reasons set forth in the Petition for Quo Warranto and the replies, the petition should be granted and the election for the judicial seat at issue in this case should be permitted to proceed.[1]

[1] As a matter of information for the Court, the Supervisor of Elections for Palm Beach County has advised that ballots for the election at issue are scheduled to be printed on June 25, 2016.

I. EXECUTIVE OFFICERS MAY NOT CHALLENGE THE CONSTITUTIONALITY OF A STATUTE, AND IN ANY EVENT RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT THE RESIGN TO RUN LAW CANNOT BE RECONCILED WITH ARTICLE V, SECTION 11(B) OF THE FLORIDA CONSTITUTION.

On its face, section 99.012(3)(f)1, Florida Statutes (2015), calls for the judicial opening created by Judge Johnson's resignation pursuant to that statute to be filled "by election." The only basis for the Respondents'[2] position that the office should be filled by gubernatorial appointment is their contention that this statute is irreconcilable with article V, section 11(b) of the Florida Constitution. But Respondents, as executive officers, cannot refuse to carry out a law based upon their unilateral opinion that it is unconstitutional. Furthermore, this Court has a duty to uphold the constitutionality of a statute if at all possible. And this Court long ago determined that the resign to run law *can* be reconciled with the governor's appointment powers under the Florida Constitution. Nothing in this case calls for a retreat from that ruling.

[2] The Court need not tarry over Secretary Detzner's contention that "he does not have anything to do with filling county court judge vacancies under article V, section 11 of the Florida Constitution" and therefore should be dismissed from this action. (Detzner Resp. 4). Having purported to possess the authority to declare to the Palm Beach County Supervisor of Elections that "an election *cannot* be held to fill the vacancy in Palm Beach County Court Judge, Group 11, created by Judge Johnson's resignation," (App. C-2) (emphasis added), the Secretary has made himself a proper party to this action.

A. Respondents, as executive officers, are not entitled to challenge the constitutionality of the resign-to run law.

Respondents are careful not to allege expressly that the resign to run law is "unconstitutional," but their code language is susceptible of no other meaning. *See* App. C-1 ("constitutional imperatives must prevail over statutory ones"); App. C-2 (the resign to run law "cannot be read to apply to judicial vacancies; otherwise, its operation would conflict with the article V process"); Scott Resp. 16 ("Petitioner's theory [based upon the plain language of section 99.012(3)(f)1] cannot be reconciled with the language of the Constitution"); *id.* at 18 ("it is a bedrock principle that a statute cannot supersede a provision of the state or federal constitution").

Respondents use euphemisms in their challenge to the constitutionality of the resign to run law as the basis for their refusal to acquiesce to an election for Judge Johnson's seat for good reason: this Court's precedents have long held that state officials may not defend the nonperformance of a statutory duty by challenging the constitutionality of the statutory duty at issue. *See Crossings at Fleming Isl. Comm. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 797 (Fla. 2008) (citing *State ex rel. Atlantic Coast Line Railway Co. v. State Bd. of Equalizers*, 94 So. 681 (1922)); *see also Barr v. Watts*, 70 So. 2d 347, 350 (Fla. 1953) ("[T]he right to declare an act unconstitutional is purely a judicial power, and cannot be

exercised by the officers of an executive department under the guise of the observance of their oath of office to support the Constitution.").

As the Court explained in *Barr*: "The people of this state have the right to expect that each and every . . . state agency will promptly put into effect the will of the people as expressed in legislative acts of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration." 70 So. 2d at 351.

Yet this is exactly what has happened here. Governor Scott and Secretary Detzner have concluded, according to their own analysis, that the resign to run law—which unequivocally calls for Judge Johnson's office to be filled "by election"—should not be applied here because of their belief that it "cannot be reconciled" with article V, section 11 of the Florida Constitution. (Scott Resp. 16). Although the Governor has the unique authority within the executive branch to request an opinion of this Court regarding the interpretation of the Florida Constitution upon "any question affecting the governor's executive powers and duties," *see* article IV, section 1(c), Florida Constitution, he failed to seek such an interpretation in this case and instead proceeded based upon his unilateral determination that the resign to run law is unconstitutional as applied here.

This Court should conclude, as it did in *Atlantic Coast Line Railway*, that the allegation of unconstitutionality in response to the petition in this case is "unwarranted, unauthorized, and affords no defense to the allegations of the writ" to compel the state officials to comply with their statutory duties. 94 So. at 685.

B. Every reasonable doubt must be resolved in favor of the constitutionality of the resign to run law, and in favor of the will of the people that circuit and county judges be elected.

If the Court does proceed with consideration of Respondents' contention that the resign to run law is unconstitutional as applied to judicial openings, it must reject this contention if there is any way to harmonize the statute with the constitutional provisions. As set forth in the petition and the replies, there undoubtedly is a way to do so.

As challengers of the constitutionality of a statute, Respondents' burden is to establish the statute's invalidity "beyond a reasonable doubt." *E.g.*, *Jackson v. State*, -- So. 3d --, 2016 WL 2586306, at *2, No. SC14-842 (Fla. May 5, 2016). The statute is presumed constitutional, and the Court must construe it to effect a constitutional outcome whenever possible. *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013). As this Court explained when considering the constitutionality of the resign to run law shortly after its passage, "every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with

the Constitution, it is the duty of the Court to adopt that construction and sustain the act." *Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970).

Additionally, any analysis of the constitutionality of the resign to run law, which provides for the election of successors to offices vacated by resignation under the law, must take into consideration the strong presumption in favor of election, over appointment, of circuit and county court judges. *E.g.*, *Advisory Opinion to Governor re Appointment or Election of Judges*, 983 So. 2d 526, 530 (Fla. 2008) (it is the "will of the people that circuit and county court judges be elected"); *Advisory Opinion to the Governor re Appointment or Election of Judges*, 824 So. 2d 132, 136 (Fla. 2002) (the conflict between art. V, sections 10(b) and 11(b) "must be resolved by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election"); *Spector v. Glisson*, 305 So. 2d 777, 781 (Fla. 1974) ("We have historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the Constitution, absent clear provision otherwise, should always be resolved in favor or retention in the people of the power and opportunity to select officials of the people's choice.").

C. This Court has already upheld the constitutionality of the resign to run law as to judicial offices, and nothing in this case warrants a different result.

In the 46 years since the passage of the resign to run law, this Court has addressed the relationship between the terms of the law and the Governor's judicial appointment powers on several occasions. It has consistently applied the law as concluding the resigning judge's term simultaneous with the commencement of the term of office of the judge's elected successor, such that the Governor's constitutional appointment power for judicial officers is not invoked.

The Court first addressed the constitutionality of the statute almost immediately after its passage, in a declaratory judgment action alleging that the law imposed additional qualifying requirements beyond those set forth in the Florida Constitution. *Holley v. Adams*, 238 So. 2d 401 (Fla. 1970). The Court rejected these arguments, and further expressly opined with little elaboration that the statute "does not violate the appointive powers of the Governor." *Id.* at 407.

The Court addressed the issue more fully in *Advisory Opinion to the Governor*, 239 So. 2d 247 (Fla. 1970), a decision on all fours with the present case. At the time, the Constitution provided that the Governor was to "fill by appointment *any* vacancy in state or county office," with the term of the appointment for elective office varying based upon the time left in the term of the office. *Id.* at 249 (quoting art. IV, s. 1(f), Fla. Const.). Governor Kirk asked the Court whether the vacancy created by the resignation of Circuit Judge Dekle pursuant to the resign to run law must be filled "by gubernatorial appointment as

are other vacancies [as indicated in a previous advisory opinion regarding new judicial offices] . . . or should such vacancy be filled by a general election in 1970?" *Id.* at 248.

After quoting the resign to run statute, the Court concluded: "Under the quoted statute a successor to Judge Dekle will take office simultaneously with the effectiveness of his resignation. Hence, no vacancy occurs to activate the constitutional executive power of appointment. *"Vacancy" in the sense used in this statute means the same as the ending of a term*." *Id.* at 250 (emphasis added). Thus, upon consideration of language and operation of the resign to run statute as a whole, the Court interpreted the word "vacancy" in the statute as meaning something different than the word "vacancy" that invoked the Governor's appointment powers in article IV, section 1(f) of the Florida Constitution.

The Court reiterated this position in dicta in *Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973), stating: "Of course, resignations under . . . [the] Resign to Run Law [] or under similar circumstances do not create a vacancy which activates the duties of the commissions or empower the Governor to make direct appointments." *Id.* at 30.

Governor Scott points to the fact that his appointment power for judges now derives from article V rather than article IV of the Florida Constitution, but this is a distinction without a difference. The resign to run law still provides that a

resigning judge's successor will be elected and take office immediately upon the departure of the resigning judge "as if the public officer's term were otherwise scheduled to expire." § 99.012(3)(f)1, Fla. Stat. (2015). The Court's conclusion in the *1970 Advisory Opinion* that this statutory process does not create a "vacancy" as that term is used with respect to the Governor's constitutional appointment powers, whether derived from article IV or article V, is a sound harmonization of the governing statutory and constitutional provisions which applies with equal force today.

The Court relied upon this analysis for its subsequent decision in *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974), with respect to Justice Ervin's unconditional resignation from this Court in February, 1974, effective January 6, 1975, due to having reached the mandatory retirement age under the Florida Constitution. The Court acknowledged that under article X, section 3, "a vacancy has been created, albeit to take effect In futuro." *Id.* at 780. The Court described this situation as "very similar to the situation existing under our resign to run law, in which there is a known termination date of the office and an intervening election for selection of a successor." *Id.* Recognizing that the provision in article V, section 10 calling for the election of judges "is the prime and basic provision and precept of article V," and that the provision in section 11 for filling vacancies is "subordinate and supplementary thereto," the Court construed section 11(a) as providing for "prompt

appointment [of] those vacancies which occur at times and in situations where there is a need for someone to fill an interim judgeship so that the business of the courts can continue . . . but only in those instances where the elective process is not available." *Id.* at 781, 783.

This holding in *Spector* remains good law today. Although Governor Scott contends that *Spector* is distinguishable from the present case because Justice Ervin resigned effective as of the end of his term (Gov. Resp. 15), the opinion does not state when Justice Ervin's term was scheduled to end and in fact suggests that he was compelled to retire with two years remaining in his term. *Id.* at 782. But more importantly, even if true, such fact would not distinguish the holding in *Spector*, as the Court specifically, expressly analogized the facts in that case to those under the resign to run law, in which the resigning judge's term is truncated as a matter of law with the same effect as an incumbent judge who chooses not to stand for reelection. *Id.* at 782-83. Therefore, *Spector* cannot be distinguished from the present case based upon the length of time remaining in the resigning judge's term.

This Court again addressed the interaction between the resign to run law and the governor's authority to appoint judges in *Judicial Nomination Comm'n, Ninth Circuit v. Graham*, 424 So. 2d 10 (Fla. 1982), in which it affirmed the Governor's order of an election to fill a judicial vacancy caused by a resignation under the

resign to run law. The Judicial Nominating Commission asserted that the opening should be filled by appointment, but the Court, citing *Spector*, held that article V, section 11 "was intended to have the election process select members of the judiciary if the electorate had adequate knowledge that a vacancy would occur and that candidates could qualify and run during the regularly scheduled primary and general election process." *Id.* at 11-12.

Governor Scott's claim that the Court in *Advisory Opinion to Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006), "receded" in part from the holding in *Spector* is incorrect. In the 2006 *Advisory Opinion re Mandatory Retirement*, the Court construed the constitutional provision pertaining to judges subject to merit retention which specifically provided that in the event such judge was ineligible or failed to qualify for retention, a vacancy existed "upon the expiration of the term being served by the justice or judge." *Id.* at 1091 (quoting art. V, § 10(a), Fla. Const.). The Court found the presence of this specific provision rendered that case "totally distinguishable from earlier judicial vacancy cases which involved elected judicial officials and in which the general definition of vacancy provided in article X, section 3, of the Florida Constitution was applied," including *Spector*. *Id.* at 1092. Nothing in 2006 *Advisory Opinion re Mandatory Retirement* remotely suggests the Court intended to "recede" from *Spector* and its progeny as they relate to elected judges.

II. THIS COURT'S CASES APPLYING A "DATE OF ACCEPTANCE TEST" DO NOT CONSTRUE THE RESIGN TO RUN LAW AND DO NOT JUSTIFY INVALIDATION OF THE LAW AS TO JUDICIAL VACANCIES.

Governor Scott relies upon a series of cases *not* construing the resign to run law for his assertion that the only inquiry relevant to whether the Governor's appointment power is triggered in this case is the date the resignation is accepted by the Governor: if the acceptance occurs before the qualifying process has begun, the Governor appoints, *e.g., Advisory Opinion to the Gov. re Sheriff & Judicial Vacancies Due to Resignations*, 928 So. 2d 1218, 1220 (Fla. 2006), but once the qualifying process has begun, the vacancy is to be filled by election, *e.g. Advisory Opinion to the Governor re Appointment or Election of Judges*, 983 So. 2d 526 (Fla. 2008); *Advisory Opinion to Governor re: Appointment or Election of Judges*, 824 So. 2d 132, 136 (Fla. 2002).

These authorities are inapposite to the present case for the obvious reason that in none of these cases was the Court presented with the interplay between article V, section 11(b) and the requirement in section 99.012(3)(f)1, Florida Statutes, that the office is "to be filled by election." The Court must harmonize these provisions "if at all possible," and has repeatedly done so. As to this interplay, the Court's prior authorities in the *1970 Advisory Opinion*, *Spector*, and *Judicial Nomination Comm'n*, discussed *supra* at pages 6-10, clearly govern.

To the extent the Court deems it necessary to reconcile its ruling in the present case with its single-factor test of whether the Governor accepts the resignation before the election process has begun, it should conclude that a resignation pursuant to the resign to run statute begins the "election process" for the successor to that office. Establishing the "statutory qualifying period as the start of the election process" is a rational judicial demarcation for offices which are scheduled to be up for election and for which interested candidates have the opportunity to qualify. *See* 2006 *Advisory Opinion re Sheriff and Judicial Vacancies*, 928 So. 2d at 1221. However, application of this timeline to resignations under the resign to run law would fail to give effect to the purpose and effect of such statutorily mandated resignations.

The resign to run law mandates that the resignation be submitted "at least 10 days prior to the first day of qualifying for the office he or she intends to seek," and noncompliance with this timeline precludes the officer from qualifying for the office sought. *See* § 99.012(3)(c), (5), Fla. Stat. (2015). One purpose of this provision is to give the public and election officials notice that the office will become available, if it was not otherwise scheduled for election, or even if it was, to give notice that the incumbent will not stand for reelection. This is so that those interested in running have the opportunity to qualify for the office being vacated. Thus, a resignation tendered pursuant to section 99.012(3), Florida Statutes,

represents the beginning of the "election process" for the office being vacated. Application of the statutory qualifying period as the start of the "election process" for resignations tendered under this law would render invalid the provisions of the law calling for election of the resigning officer's successor, *see id.* § 99.012(3)(f)1., as to *every* judicial resignation submitted under this law. Such a result would violate this Court's duty to harmonize the statute with the Constitution if it can rationally do so. *Holley*, 238 So. 2d at 407.

Another significant factual distinction between this case and the more recent cases applying the "date of the acceptance test" is that in each of those cases, there was to be a physical vacancy in office for some period of time. *See* 2008 *Advisory Opinion*, 983 So. 2d at 527 (office would have been unoccupied for eight months); 2006 *Advisory Opinion to the Governor re Sheriff & Judicial Vacancies*, 928 So. 2d at 1219 (office would have been unoccupied for seven months); 2002 *Advisory Opinion*, 824 So. 2d at 134 (same).

Although the Court did not expressly rely upon the length of the vacancy as grounds for its rulings in these cases, it had earlier called for an interim appointment to fill a five month vacancy because "no unreasonable vacancy should exist." *Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992). The Court has not expressly abandoned, and should not now abandon, its examination of whether the resignation creates an "unreasonable vacancy" before determining

whether to apply the "date of acceptance test."[3] Where, as here, there is no physical vacancy whatsoever—much less an "unreasonable" one—the Court's decisions in 1970 *Advisory Opinion* and *Spector* dictate that no vacancy occurs as contemplated in article V, section 11(b). Accordingly, the "date of acceptance test" is inapplicable.

CONCLUSION

Respondents have failed to satisfy their burden of establishing beyond a reasonable doubt that section 99.012(3)(f)1, Florida Statutes (2015) cannot be reconciled with article V, section 11(b) of the Florida Constitution as to the filling of judicial vacancies.

WHEREFORE, Petitioner Baker respectfully requests that this Court issue an order directing the Respondents to cease the appointment process and allow the election for Judge Johnson's successor to proceed.

[3] The only decision applying the "date of acceptance test" to a vacancy that could not be deemed "unreasonable" is *Trotti v. Detzner*, 147 So. 3d 641 (Fla. 1st DCA 2014), *rev. denied*, 147 So. 3d 641 (Fla. 2014), in which the First District held that because the resigning judge submitted his resignation and the governor accepted it prior to the qualifying period, the governor was entitled to appoint the judge's successor notwithstanding the fact that the resignation would not be effective until more than nine months later and the office would be vacant for only three calendar days. This decision has nothing to do with the resign to run law, is not binding upon this Court, and is irreconcilable with this Court's precedents.

/s/ Lynn C. Hearn
Ronald G. Meyer, Esquire
Florida Bar Number: 0148248
Email: RMeyer@meyerbrookslaw.com
Lynn C. Hearn, Esquire
Florida Bar Number: 0123633
Email: LHearn@meyerbrookslaw.com
Meyer, Brooks, Demma and Blohm, PA
Post Office Box 1547
Tallahassee, Florida 32302
Telephone: (850) 878-5212
Facsimile: (850) 656-6750

ATTORNEYS FOR PETITIONER BAKER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Fla. R. Jud. Admin. 2.516(b)(1), a copy of the foregoing has been provided by e-mail through the Florida Courts e-filing Portal on this 31st day of May, 2016 to:

Leonard Feuer
lfeuer@feuerlawfirm.com
1601 Forum Place, Suite 610
West Palm Beach, Florida 33401

Adam S. Tanenbaum
adam.tanenbaum@dos.myflorida.com
David A. Fugett
David.fugett@dos.myflorida.com
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399

Jason Gonzalez
JasonGonzalez@shutts.com
Daniel E. Nordby
DNordby@shutts.com
Shutts & Bowen LLP
215 South Monroe Street, Suite 804
Tallahassee, Florida 32301

William N. Spicola
William.Spicola@eog.myflorida.com
Benjamin J. Gibson
Ben.Gibson@eog.myflorida.com
Executive Office of the Governor
The Capitol
Tallahassee, Florida 32399-0001

/s/ Lynn C. Hearn
Lynn C. Hearn

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this reply complies with the font requirements of Rule 9.100(l), Florida Rules of Appellate Procedure.

/s/ Lynn C. Hearn
Lynn C. Hearn