IN THE SUPREME COURT OF FLORIDA

GREGG LERMAN, ET AL.,

Petitioner,

Case No. SC16-783

v.

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

Respondents. /

REPLY BY GREGG LERMAN TO THE RESPONSES TO THE PETITION FOR WRIT OF QUO WARRANTO

Petitioner, Gregg Lerman, by and through undersigned counsel, respectfully submits this reply to the responses by Respondent, Governor Scott ("Governor") and Respondent, Secretary Detzner ("Detzner")[1] to the Petition for Writ of Quo Warranto. Petitioner also adopts and incorporates by reference the reply filed by Petitioner, Thomas R. Baker.

SUMMARY OF THE REPLY

Governor Rick Scott's Response ("Response")[2] to Gregg Lerman's Petition

[1] Regarding Secretary Detzner's argument that he is improperly joined, he became a necessary party when he exerted his authority as Florida's Chief Election Officer to compel Palm Beach County Supervisor of Elections to disobey § 99.012. (Pet. Amdd. App. at C) If the Petition is granted, Detzner's future conduct is directly implicated. (Resp. App. at 1, Commission of Judge Johnson bearing Secretary Detzner's signature.)

[2] For purposes of citation, the Response by the Governor shall be referred to as "Resp.", followed by the applicable page number; Respondent Detzner's Response

for Writ of Quo Warranto ("Petition") contends that the application of the Resign to Run statute to a judicial vacancy is irreconcilable with the Governor's "plenary" power of appointment. (Resp. at 9, 15 & 17) The Governor further argues his constitutional authority to fill judicial seats by appointment is only subject to a "narrow exception," when a vacancy occurs during the candidate qualifying period, as the initiation of the electoral process. (Resp. at 7) The Response attempts to completely marginalize the well-recognized conflicts between §§ 10(b) & 11(b) of Article V, and discounts the clause "wherein the judges are elected by a majority vote of the electors" as surplussage.

Both Respondents ignore a) that the Florida Constitution specifically recognizes "all political power is inherent in the people" and remains with the people where not specifically conferred upon the government[3]; b) the Governor's constitutionally enumerated power of judicial appointment is limited to interim appointments, when a term is interrupted, not when the term has ended;[4] c) the Governor's powers of appointment are subservient to the electoral process, when available; d) the election called for by the Resign to Run statute is part of the legislature's constitutional authority to regulate elections and prevent dual office

shall be referred to as "Detzner Resp."

[3] *See* Fla. Const. Art. I, § 1.

[4] *See* Fla. Const. Art. IV, § 1(f), and Art. V, § 11(b).

holding;[5] and e) the Resign to Run statute initiates the electoral process for the seat at issue, ends the term of the office holder at the moment before it becomes physically vacant, and requires an election to select the official who will commence the new term.

Further, the Governor now claims the authority to negate previously scheduled elections completely, by virtue of his "accepting" a resignation days before the candidate qualification period. The power the Governor now brazenly claims amounts to a nullification of Art. VI, § 5 and Art. V, 10(b)(2).[6] The Governor's arguments fail to reconcile the fact that an available electoral process is the constitutionally preferred method of selecting successors to elective offices.

I. Judge Johnson's Resignation, Pursuant to the Resign to Run Statute, Initiated The Electoral Process 10 Days Before The Qualification Period

Judge Johnson's resignation was filed in compliance with Florida's Election Code and marked the beginning of the electoral process for Group 11. Florida Statute § 97.011 sets forth that chapters 97 through 106 comprise Florida's Election Code. Florida Statute § 99.012 commands those falling under its purview to issue a notice

[5] *See* Fla. Const. Art. VI, § 1 and Art. II, § 5.

[6] Ultimately, the Governor's vision of his power portends instances where a letter of resignation is tendered and accepted moments before the qualification period commences, but specifying the effective moment of resignation at the end of the officer's elective term. In the Governor's view of such scenarios, the power to choose is his alone, the intent of the people to elect a successor would be inconsequential, secondary and ultimately thwarted.

to the officer before whom the resigning public officer qualified for the express purpose of holding an election to fill the resigning officer's seat. *See* § 99.012(3)(e)1, Florida Statutes (2016).

The notice required by § 99.012 is required to be submitted at least 10 days before the statutory candidate qualification period. All of the actions mandated by the Resign to Run statute are properly characterized as part of the electoral process. Consequently, an official who tenders notification of resignation required by § 99.012 has initiated the electoral process for the resigning public officer's seat.

II. Judge Johnson's Term As County Court Judge in Group 11 Ends By Operation of F.S. §99.012, Creating a New Term Requiring An Election

This Court has already held a judge's resignation tendered in furtherance of the Resign to Run statute renders the tenure of the resigning official ended the moment the resignation *takes effect*.

> Here, the statute ends the tenure of the incumbent holder of the office but it also provides for the election of a successor, who succeeds to the office at the precise moment that the resignation of the incumbent takes effect.[7]

In re Advisory Opinion to Governor, 239 So. 2d 247, 250 (Fla. 1970). In fact this Court held that the term "vacancy", as used in §99.012, "means the same as the

[7] Since this Court does not impliedly overrule its own prior decisions, the decision in *In re Advisory Opinion to Governor*, 239 So. 2d 247 (Fla. 1970) remains precedent until this Court holds otherwise. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio.").

ending of the term." *In re Advisory Opinion to Governor*, *supra*.

The Governor's Response contends the acceptance of Judge Johnson's resignation triggered his appointment power, regardless of Resign to Run. (Resp. at 1, 5-6, 9, 15 & 17) Notwithstanding, under the Resign to Run statute, Judge Johnson's resignation was not the Governor's to accept. Following § 99.012(3)(e)1, Judge Johnson submitted her letter of resignation to the Supervisor of Elections for Palm Beach County, with a copy to the Governor. (Resp. App. at 2) The purpose of § 99.012(3)(e)1 is to notify the authority who qualified the resigning officer that an election will be required. The legislature set forth ten (10) days as sufficient notice to the elections authority and the electorate. *Id*.

Further, while § 99.012(3)(f)1 creates a vacancy in office, the office will not become immediately vacant as a result of the resignation. *Id*. The Resign to Run statute, §99.012(3)(d), gives the office holder the option of making the resignation effective on a set future date. In other words, while Art. X, § 3 of Florida's Constitution sets forth that a vacancy in office is created upon the officer's resignation, § 99.012 renders the resignation a mere *brutum fulmen* until the resignation become operative. *See In re Advisory Opinion to Governor*, 239 So.2d at 250.

III. The Governor's Appointment Power is Limited to Interim Appointments & Does Not Include Selecting Successors To Commence New Terms of Elective Offices

The Florida Constitution recognizes that the Governor's appointment powers do not apply to circumstances where an elected officer's term will expire before the subsequent general election. Article VI, § 5 of the Florida Constitution mandates that general elections shall be held "to choose a successor to each elective state and county officer whose term will expire before the next general election *and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term.*" *Id*. (emphasis added). The Governor's appointment power does not abridge the constitutional mandate that successors of public elective officers whose terms are scheduled to expire shall be chosen by election. *See Judicial Nominating Com'n, Ninth Circuit v. Graham*, 424 So.2d 10, 12 (Fla. 1982).

The Governor's Response contends that the Petition misconstrues Article V, section 10(b)(2) "by tearing from its context the phrase 'the election of county courts judges shall be preserved.'" (Resp. at 13). The Governor's argument attempts to render the clause legally inert, as mere surplussage. In several post-Revision 7 cases this Court recognized the existence of a tension between "Article V, section 11(b) and Article V, section 10(b)(1) and 10(b)(2), which state that the election of circuit court and county court judges 'shall be preserved,' absent referendum of the voters to adopt retention elections as a local option . . . " *In re Advisory Opinion to Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 796 (Fla. 2010).

See In re Advisory Opinion to Governor re: ??Appointment or Election of Judges, 824 So. 2d 132, 134-35 (Fla. 2002) ("The conflicting directives are contained in article V, section 10(b)(1), (2), and (3)c., Florida Constitution, relating to the election and retention of circuit and county judges, and section 11(b), Florida Constitution, relating to the filling of vacancies occurring in the circuit and county courts.").

In instances where there are conflicts between constitutional provisions permitting an appointment, and those requiring the selection of a public officer by the people, this Court has rightfully upheld the people's right to select those holding elective public office. In *Spector v. Glisson,* 305 So. 2d 777 (Fla. 1974), this Court recognized the historic bias towards permitting an election to fill official positions over the exercise of an appointment power.

> 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 of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.

Id. at 781.

The Governor's response posits the addition of the clause "wherein the judges are elected by a majority of the vote of the electors," in Art. V, § 11(b), was merely "for the purpose of identification." (Resp. at 13) The Governor's position is alarmingly indifferent to the will of the electorate and patently false. The added clause reinforces the purpose of judicial appointments are to fill the absence of the

elected official, not to choose a successor when the term is at an end. In other words, the interim appointment power exists to fill seats between elections when an incumbent can no longer serve the remainder of the term. Even if the purpose of "identification" was the impetus behind the inclusion of the clause, it makes little difference. The inclusion of the clause reinforces the longstanding principle that the Governor's power is limited to interim appointments.

The primacy of elections as the method to choose successors of elective officers, whose terms are scheduled to expire, is also buttressed by Art. IV, § 1. Art. IV, § 1, setting forth the Governor's position and boundaries of authority, limits the duration of appointments for vacancies in elective offices to the remainder of the term. Art. IV, § 1 specifies that an election shall fill a vacancy of an elective office if the remainder of the term would be longer than twenty-eight months. *Id*. In other words, the appointment power must not supplant the electoral process.

Contrary of the Governor's position, this Court has repeatedly recognized that gubernatorial appointments to the judiciary are the narrow exception to the rule that the people choose their trial court judges.

> We must bear in mind that in all events the Governor's judicial appointments are only interim appointments, in effect 'stop gap' measures until an election can be held. It is not, therefore, a measure to be applied in those instances where the electorate has a reasonable, available opportunity to express its choice.

Glisson, 305 So.2d at 783. This Court has never retreated from the position that the Governor's judicial appointments are interim.

IV. An Appointment to Fill Judge Johnson's Seat Serves No Purpose And Is Inconsistent With The Constitution's Bias Towards Filling Vacancies By Election, If Available

In the year 1996, Art. V, § 11 was amended to enlarge the duration of judicial appointments, whereas appointments lasting mere months did not attract large pools of applicants for appointment. *See Judicial Nominating Com'n, Ninth Circuit v. Graham*, 424 So. 2d at 12. Notwithstanding, the 1996 amendment was not intended to permit an appointment to supplant an available electoral process, nor was it presented to the people as such. Further, the mere enlarging of the term of appointees did not diminish the well-established constitutional preference for elections.

In this Court's opinion in *Graham*, the same opinion recommending the enlargement of the term of an appointee, this Court reaffirmed "it is clear that the framers of the constitution intended the election process to be used except 'when there is no earlier, reasonably intervening election process available.'" *Id*. at 12 (quoting *Glisson*, 305 So. 2d at 784). At the time of this Court's pronouncements in *Graham*, Art. V, § 11(b) set forth that "[t[he governor shall fill each vacancy on a circuit court or on a county court 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. . ." *Id*. at 11. This Court in *Graham* advised that elections should be used where judicial resignations were tendered sufficiently in advance to give the

electorate "adequate knowledge a vacancy would occur and that candidates could qualify and run during the regularly scheduled primary and general election process." *Id*. at 11-2.

In the year 2002, this Court addressed the inherent tension between Art. V, § 10 and § 11, with the goal of giving "effect to the clear will of the voters that circuit and county judges be selected by election." *In re Advisory Opinion to Governor re: ??Appointment or Election of Judges*, 824 So.2d 132, 136 (Fla. 2002). This Court then held that the Governor's constitutional authority to fill a judicial vacancy was foreclosed upon the commencement of the electoral process, identified as the beginning of the qualification period. *Id*. To promote consistency in the process of filling judicial elections, this Court has maintained the qualification period as the commencement of the electoral process.[8] *See In re Advisory Opinion to Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 797 (Fla. 2010).

This Court's predominate consideration in *In re Advisory Opinion to Governor re Judicial Vacancy Due to Resignation*, just as in *In Re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992), was to avoid seats becoming actually vacant whenever possible, given the right of the people to the services of a

[8] This Court has also stated that while fidelity to precedent provides stability, *stare decisis* does not command blind allegiance to precedent and yields "when an established rule of law has proven unacceptable or unworkable in practice." *State v. Green* 944 So.2d 208, 217 (Fla. 2006).

judge.

When applied to a "vacancy" created by the Resign to Run statute, there are at least three reasons why treating the start of the qualification period as the start of the electoral process is inconsistent with the constitutional imperative of deferring to the electoral process, if available. *See Glisson*, 305 So. 2d at 784 ("As between the appointive power on the one hand and the power of the people to elect on the other, the policy of the law is to afford the people priority, if reasonably possible, and of course here it was very logically available. If such policy is to be modified, let the people speak.").[9]

First, there is no provision in the Florida Constitution which specifies the commencement of the qualification period as the initiation of the electoral process. Rather, the qualification period was chosen by this Court as a moment of significance created by the legislature. *See In re Advisory Opinion to Governor re: ??Appointment or Election of Judges*, 824 So.2d at 135 (citing 2002-17, § 23, Laws of Fla. and F.S. § 105.051(1) as the legislative implementation of Art. V, § 10(b)(1)

[9] The people spoke in the year 2000. In accordance with Revision 7, the electorate of each county in Florida voted on the question "shall County Court Judges be appointed by the Governor with retention by vote of the people." Without exception, and by very large margins, Palm Beach County and every other county in Florida voted "no." Consequently, the people's chosen method for selection of judges of the county court remains by election. https://results.elections.myflorida.com/Index.asp?ElectionDate=11/7/2000 (last viewed May 31, 2016) [Note: select "const. amendments" from "select office" drop-down menu.]

and (2)). [10] The justification underlying the choice of the qualification period as the commencement of the electoral process equally supports the selection of the moment of tendering the notification of resignation, created by the Resign to Run statute. *See* §99.012(3)(c) & (e), Florida Statutes (2016). With respect to county court judicial positions, both events referenced above are created by Florida's Election Code, both involve submissions to the county Supervisors of Elections, and both result in affirmative actions by said entities.

Second, this Court's recognition that the election process is commenced by a resignation tendered in compliance with the Resign to Run statute gives "effect to the clear will of the voters that circuit and county judges be selected by election." *In re Advisory Opinion to Governor re: ??Appointment or Election of Judges*, 824 So.2d at 136. The Resign to Run statute was designed to initiate an election for the elective office at issue, and the recognition of such does not diminish the Governor's actual constitutional authority. As discussed above, the Governor's appointment power is limited to interim appointments, successors are to be chosen by election and this Court has consistently recognized the primacy of the electoral process.

As this Court said in *Glisson*, "interpretations of the constitution, absent clear provision otherwise, should **always be resolved in favor of retention in the people**

[10] § 23 of 2002-17, Laws of Fla., amends F.S. § 105.031. *See* http://laws.flrules.org/2002/17 (last viewed May 30, 2016).

of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date." *Glisson*, at 781 (emphasis added). There are conflicts between Art. V, § 10(b) and §11(b), and consequently, this Court should continue resolving its interpretations favoring elections over appointments, when available. At present, there is an election readily available for the seat in Group 11, for which candidates have lawfully qualified.

A review of the constitution in 1982, when this Court recognized judicial vacancies must be satisfied by an election, if readily available, and 2002, when this Court first focused upon the qualification period as starting the election process begs the question, what changed? The relevant amendments to Art. V, §§ 10 & 11 occurring between the 1982 opinion in *Graham* and the 2002 opinion in *In re Advisory Opinion to Governor re: ??Appointment or Election of Judges* were in 1996 and 1998. The 1996 amendment to Art. V, § 11, expanded of the term of a judicial appointment and the Governor's Response argues the 1998 "Revision 7" amendments provided no substantive changes to Art. V, §§ 10[11] or 11. (Resp. at 10-13) None of the amendments between 1982 and 2002 abrogated the constitutional

[11] Revision 7 amended Art V, § 10's provision relevant to the election of county court judges from "[c]ircuit judges and judges of county courts shall be elected by vote of the qualified electors. . ." to "[t]he election of county court judges shall be preserved." http://archive.law.fsu.edu/crc/conhist/1998amen.html (last viewed on May 30, 2016).

preference for using an available electoral process to fill a judicial vacancy.

Third, recognition of a Resign to Run resignation as commencing the election process will not result in the people suffering the loss of a judge's service. Judge Johnson's letter to Supervisor of Elections Bucher, crafted in strict compliance with the Resign to Run statute, specified her last day in Group 11 would either be the date her successor takes office or the date Judge Johnson would take her new office, if elected. As it happens, both dates are the same. (Pet. Amdd. App. at A-1) The date specified by Judge Johnson, as well as the Resign to Run statute itself,[12] is also the date any appointee would take office. (Resp. App. at 2) In other words, while "vacancies" should be minimized, the office at issue will never become vacant, regardless of the outcome to this controversy.

Indeed, this Court's interpretation as to when an appointee's term commences, harkening back to the 1950's, continues to follow what was then considered a general rule as to resignations of public officers. "[W]here a public officer resigns his office to take effect at a future day . . . the appointing power . . . authorized to fill the vacancy when it shall occur, may appoint a successor, the appointment to take effect when the resignation becomes operative." *Tappy v. State ex rel. Byington*, 82 So.2d 161, 166 (Fla. 1955) (citing *Mechem, Public Offices and Officers*, s. 133 (pp. 66, 67) (emphasis added)). *See Spector v. Glisson*, 305 So. 2d at 780. In accord with

[12] *See* F.S. § 99.012(3)(d)1 & 2.

Tappy and *Glisson*, regardless of when a "vacancy" occurs, an appointee's term does not commence until the position is physically vacant. *See In re Advisory Opinion to the Governor*, 600 So.2d at 462 ("Judges are encouraged to and do submit their resignations, to be effective in the future.").

When notification of a future resignation is made with sufficient time to use an already scheduled, readily available election, the application of the Governor's power of appointment is irreconcilable with the constitutional imperative of preserving elections. *See* Art. V, § 10(b)(2), Florida Constitution. The Governor's view of his appointment authority subverts the democratic process and cannot stand.

CONCLUSION

Judge Johnson's letter of resignation marked the initiation of the election process, foreclosing the Governor's power of appointment. This Court has repeatedly declared that the Florida Constitution requires the use of an available electoral process for the people to select public elective officers. The use of the Governor's appointment power is incompatible with this Court's declarations where, as here, an election is statutorily mandated to occur with sufficient advance notice to the electorate and the qualifying officer.

s/ Leonard Feuer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished through the e-filing Portal to: Governor Rick Scott (Rick.Scott@eog.myflorida.com), Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399; Office of the General Counsel (William.Spicola@eog.myflorida.com), Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399; Jason Gonzalez (JasonGonzalez@shutts.com), Counsel for Governor Scott, Shutts & Bowen, LLP, 215 S. Monroe Street, Suite 804, Tallahassee, Florida 32301; Ronald G. Meyer, (RMeyer@meyerbrookslaw.com), Counsel for Petitioner Thomas Baker, Meyer, Brooks, Demma and Blohm, P.O. Box 1547, Tallahassee, Florida 32302; Secretary Ken Detzner (SecretaryofState@DOS.MyFlorida.com), R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399; Adam Tanenbaum (Adam.Tanenbaum@dos.myflorida.com), Counsel for Secretary Detzner, R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, Florida 32399; and Office of the General Counsel (dos.generalcounsel@dos.myflorida.com), Florida Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399, this 31st day of May 2016.

s/ Leonard Feuer
LEONARD FEUER
Florida Bar No.: 501751

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

s/ Leonard Feuer
LEONARD FEUER
Florida Bar No.: 501751