CASE NO.: SC20-646

Supreme Court of Florida

WILLIAM S. ABRAMSON,

Petitioner,

v.

HON. RON DESANTIS,
in his official capacity as Governor of Florida,

Respondent.

GOVERNOR'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF QUO WARRANTO

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Petition for Writ of Quo Warranto seeks to invoke this Court's discretionary jurisdiction under Article V, section 3(b)(8) of the Florida Constitution by asking what authority Governor DeSantis has to issue two specific executive orders in response to the Novel Coronavirus Disease 2019 ("COVID-19") pandemic: Executive Orders 20-111 and 20-112 (collectively "the Phase 1 Orders") (Pet. App. at 1-8).[1] The Governor's authority to issue emergency management executive orders is derived from Article IV, section 1(a) of the Florida Constitution and Chapter 252, Florida Statutes. Therefore, the Petition should be dismissed or resolved against the Petitioner on the merits.

Article IV, section 1(a) of the Florida Constitution vests the Governor with "[t]he supreme executive power" and the duty to "take care that the laws [of Florida] be faithfully executed." This is a broad grant of constitutional authority to the Governor, as the chief executive, to act for the benefit of the State of Florida. Additionally, section 252.36(1)(a), Florida Statutes, provides that "[t]he Governor is responsible for meeting the dangers presented to this state and its people by emergencies." As such, under this authority, the Governor may "issue executive

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[1] Citations to the Petition will be abbreviated as "Pet. at __". Citations to the Appendix to the Petition will be abbreviated as "Pet. App. at __". Citations to the Appendix to the Response will be abbreviated as "Res. App. at __".

orders, proclamations, and rules" which "shall have the force and effect of law." *See* § 252.36(1)(b), Fla. Stat. Specifically section 252.36, Florida Statutes, provides enumerated emergency powers the Governor may use in responding to the emergency. *See* § 252.36(4)-(10), Fla. Stat. While these powers are purely discretionary, they *are* powers granted to the Governor.

On March 1, 2020, Governor DeSantis directed the State Surgeon General to declare a Public Health Emergency in the State of Florida because of COVID-19. *See* Executive Order 20-51, Res. App. at 4-7. On March 9, 2020, Governor DeSantis, under the authority vested in him by Article IV, section 1(a) of the Florida Constitution, and Chapter 252, Florida Statutes, issued Executive Order 20-52, declaring a State of Emergency for the entire State of Florida because of COVID-19. *See* Res. App. at 8-14. Since COVID-19 has entered the State of Florida, Governor DeSantis has exercised with great care and caution the discretionary emergency powers explicitly granted to him under Florida law. Taking prudent steps in consultation with health and business experts, on April 29, 2020, Governor DeSantis announced his "Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery" executive order, effective at 12:01 a.m. on May 4, 2020, lifting some of the initial measures implemented to protect Floridians from the spread of COVID-19. *See* Executive Order 20-112 (Pet. App. at 2-8); *see also*

Executive Order 20-111 (extending certain executive orders until the effective date of Executive Order 20-112) (Pet. App. at 1). Phase 1 for reopening Florida encouraged Floridians to continue limiting their movement and personal interactions outside of their homes, while permitting restaurants and other food establishments to allow on-premises food and beverage consumption and opening in-store retail sales at 25 percent building occupancy[2]. *See* Pet. App. at 2-8.

Here, Petitioner, a citizen and taxpayer in the State of Florida who alleges no specific harm or injury, alleges that Executive Orders 20-111 and 20-112 were without legal authority. While not clearly articulated, it appears Petitioner makes two claims: (1) Article IV, section 1(a) of the Florida Constitution does not provide the Governor the authority to issue the Phase 1 Orders; and (2) Chapter 252, Florida Statutes (the "State Emergency Management Act"), does not provide a valid basis for the Phase 1 Orders.

First, as a threshold matter, the Petition is an abuse of the extraordinary writ of quo warranto and is more properly raised as a declaratory judgment action. Petitioner does not seek to invoke this Court's discretionary jurisdiction*, see* Art. V, § 3(b)(8), Fla. Const., because he does not allege that "the functions of

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[2] Effective May 18, 2020, capacity has been increased to 50 percent. *See* Executive Order 20-123, Resp. App. at 49-50.

government [are] adversely affected absent an immediate determination by this Court." *See Chiles v. Phelps*, 714 So. 2d 453, 457 (Fla. 1998). In fact, Petitioner cannot allege any function of government is adversely affected *nor* any right of his has been impacted by the Governor's issuance of the Phase 1 Orders. Rather, Petitioner raises a generalized question as to the authority of the Governor to issue the Phase 1 Orders, but does not allege he has suffered a special injury as a result.

While this Court has held a petitioner in quo warranto proceedings "seeking the enforcement of a public right" need not show "any real or personal interest," *see Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989) (citation omitted), it has also traditionally limited the exercise of its discretionary jurisdiction to petitions wherein there is a showing of a special injury *or* one branch of government or government actor challenges the action of another government actor. *See, e.g.*, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011); *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998).

Second, even if Petitioner can overcome the jurisdictional deficiency, the Petition should still be denied on the merits because the arguments fail as a matter of law. Petitioner fails to acknowledge the grant of authority in Article IV, section 1(a) of the Florida Constitution *and* the full breadth of the emergency management powers granted to the Governor under Chapter 252, Florida Statutes. Incredibly,

Petitioner fails to provide for this Court a full recitation of section 252.36, Florida Statutes (titled "Emergency management powers of the Governor"), which provides specific statutory authority the Governor may use at his discretion to meet the dangers presented to the state and its people by emergencies. Indeed executive powers that Governor DeSantis cautiously used to respond to COVID-19, including the issuance of the Phase 1 Orders reopening the State of Florida.

Rather than acknowledging the State's responsibility to ensure preparedness for the possibility of emergencies and disasters, including "to provide for the common defense and to *protect the public peace, health, and safety; and to preserve the lives and property of the people of the state*," § 252.32, Fla. Stat. (emphasis added), Petitioner attempts to further an incomplete and unusual reading of the Emergency Management Act that is without merit. Not to mention dangerous to the public good. Petitioner boldly claims that the Emergency Management Act is intended to only "facilitate the opening of the State, not closing it," and even then, only for "[n]atural emergenc[ies] . . . caused by a natural event, including, but not limited to: a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake." Pet. at 3 (emphases omitted). This reading does not comport with the plain language of the Emergency Management Act, including the enumerated powers of the Governor in section 252.36, Florida

Statutes, the explicit intent articulated in section 252.311, Florida Statutes, and the policy and purpose articulated in section 252.32, Florida Statutes.[3] This Court should decline Petitioner's invitation to read such a restrictive view of the Governor's executive power and specifically his emergency management powers enumerated in the Emergency Management Act.

Because Petitioner fails to show that the functions of government are adversely affected absent immediate determination by this Court or that he has suffered a special injury, and because there is no legal merit to the claims asserted, this Court should dismiss or deny the Petition for Writ of Quo Warranto.

BACKGROUND

A. Novel Coronavirus 2019

In late 2019, a novel infectious respiratory disease was detected in Wuhan, China. This virus, eventually named COVID-19, spread rapidly across the globe, leading the World Health Organization to declare a Public Health Emergency of

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[3] The Governor acknowledges that the supremacy-of-text principle is what guides statutory interpretation. *See Advisory Op. to Governor re: Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). The Petitioner seeks to import meaning into the text of the statute by citing legislative intent and history, while drawing conclusions not rooted in the text. While the legislative intent *may* provide background or context, it does not bind this Court's plain language interpretation of the text of the Emergency Management Act.

International Concern and a global pandemic. On March 1, 2020, Governor DeSantis issued Executive Order 20-51, directing the State Surgeon General to declare a public health emergency due to COVID-19. *See* Executive Order 20-51 at Res. App. at 4-7. Governor DeSantis, under the authority granted to him by Article IV, section 1(a) of the Florida Constitution and Chapter 252, Florida Statutes, declared a State of Emergency by issuing Executive Order 20-52 on March 9, 2020. *See* Res. App. at 8-14.

Since declaring a state of emergency, Governor DeSantis has cautiously and deliberately exercised the discretionary emergency management powers defined in section 252.36, Florida Statutes, through the issuance of additional executive orders. These Executive Orders chiefly follow guidance from the White House and the Centers for Disease Control and Prevention ("CDC") on ways to minimize the spread of COVID-19. *See* http://www.flgov.com/2020-executive-orders (publicly available list of Governor DeSantis' Executive Orders). On March 22, 2020, Governor DeSantis requested that President Donald J. Trump declare a major disaster for the entire State of Florida due to COVID-19. *See* Res. App. at 54-62. That request was granted on March 25, 2020. *See* Res. App. at 63.

While responding to COVID-19, and in consultation with guidance from the CDC, Governor DeSantis issued Executive Order 20-91 restricting the movement

of persons. *See* Executive Order 20-91, Res. App. at 15-48. Executive Order 20-91, for example, directed all persons in Florida to limit their movements and personal interactions outside the home to those necessary for obtaining or providing essential services or conducting essential activities. *See* Res. App. at 17-18.

On April 29, 2020, the Governor signed Executive Orders 20-111 and 20-112 (collectively "the Phase 1 Orders"). *See* Pet. App. at 1-8. The Phase 1 Orders for Florida's reopening cautiously removed certain restrictions on the movement of persons and the operations of restaurants and other specific businesses.

B. The Emergency Management Act, Chapter 252, Florida Statutes

In 1974, the Florida Legislature enacted the State Disaster Preparedness Act of 1974, creating sections 252.31-252.52, Florida Statutes. *See* Ch. 74-285, Laws of Fla. Governor Reubin Askew approved the legislation on June 25, 1974. *Id*. at § 4. The Legislature explained the policy and purpose of the State Disaster Preparedness Act of 1974 was to create the "division of disaster preparedness" because of the occurrence of disasters, including natural, man-made or terrorist, to reduce vulnerability and "generally to provide for the common defense and to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state." Ch. 74-285, § 1, Laws of Fla.; *see also* § 252.34(5), Fla. Stat. (1974) (defining disaster as severe damage, injury, or loss of life or property

from any natural or man-made cause). This Act also created section 252.36, Florida Statutes, defining the Governor's responsibility to meet the dangers presented by disasters and enumerating specific emergency management powers. Ch. 74-285, § 1, Laws of Fla.; *see also* § 252.36, Fla. Stat. (1974).

In 1983, the Legislature amended the State Disaster Preparedness Act, broadening the scope and renaming sections 252.31-252.60, Florida Statutes, the "State Emergency Management Act." *See* Ch. 83-334, § 13, Laws of Fla. While the policy and purpose were not substantially amended, the Legislature exchanged the word "disaster" for "emergency" and changed its definition. *See* Ch. 83-334, § 16, Laws of Fla. (amending § 252.34(2), Fla. Stat. (1983)). Specifically, the Legislature defined "emergency" as "any occurrence, or threat thereof, whether accidental, natural, or caused by man, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property." *Id.* The amendment also provided additional authority to the Governor, explicitly adding that if the emergency was beyond local control, the Governor could assume "direct operational control over all or any part of the emergency management functions within this state." *See* Ch. 83-334, § 19, Laws of Fla. (amending § 252.36(1)(a), Fla. Stat. (1983)).

It was in 1993 that the Legislature categorized and defined the various types

of emergencies covered under the Emergency Management Act, including the extent of the emergency. *See* Ch. 93-211, § 10, Laws of Fla. (amending § 252.34, Fla. Stat. (1993)). Specifically, the Legislature defined "[m]anmade," "[n]atural," and "[t]echnological" emergencies. *Id.* A "[n]atural emergency" was defined as "an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake." Ch. 93-211, § 10, Laws of Fla.; *see also* § 252.34(7), Fla. Stat. (1993). This definition is consistent with current law. *See* § 252.34(8), Fla. Stat. (2019).

Today, the Governor still maintains responsibility to meet the dangers presented to the state from emergencies. *See* § 252.36(1)(a), Fla. Stat. (2019). The Governor shall declare a state of emergency by executive order or proclamation if he finds an emergency has occurred or is imminent. § 252.36(2), Fla. Stat. (2019). Upon the declaration of a state of emergency, the state activates the necessary plans and activities to "mitigate, respond to, or recover from an emergency or disaster." § 252.34(1), Fla. Stat. Additionally, the Governor has the discretion to use various enumerated emergency powers under section 252.36(5), Florida Statutes.

C. The Petition for Writ of Quo Warranto

On May 5, 2020, Petitioner filed his Petition for Writ of Quo Warranto

challenging Governor DeSantis' authority to issue the Phase 1 Orders. Pet. at 1-2. Petitioner does not challenge the issuance of any prior or subsequent executive orders. Nor does Petitioner allege any of the Phase 1 Orders violate his constitutional rights. Rather, Petitioner, a resident of the State of Florida, claims neither Article IV, section 1(a) of the Florida Constitution nor the Emergency Management Act provides the authority to issue the Phase 1 Orders. Petitioner moves this Court to "strike and render null and void the [Phase 1 Orders]." Pet. at 2. However, as more fully addressed below, Petitioner's claims are defective and the Petition should either be dismissed for lack of jurisdiction or denied on the merits.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

This Court should dismiss the Petition for lack of jurisdiction. Extraordinary writ petitions, including petitions for quo warranto, may be dismissed or denied "based on a number of reasons other than the actual merits of the claim." *Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004). Because writs of quo warranto are extraordinary, this Court should only employ them "with great caution and under very limited circumstances." *Whiley*, 79 So. 3d at 723 (Polston, J., dissenting); *see also English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977) (extraordinary writ of

prohibition to be employed with great caution and utilized only in emergencies). Specifically, as this Court has explained, accepting discretionary jurisdiction for extraordinary writ proceedings should be limited to cases "where the functions of government would be adversely affected absent an immediate determination by this Court." *Whiley*, 79 So. 3d at 707 (quoting *Chiles*, 714 So. 2d at 457). Here, Petitioner cannot show that the functions of government are or would be adversely affected absent an immediate determination by this Court. Unlike prior quo warranto actions wherein one government actor seeks to challenge the authority of another government actor infringing on their rights, this is not that case. And unlike the historical use of quo warranto, wherein one individual seeks to challenge the authority of another to claim title to particular office, this is not that case either. *See State ex rel. Landis v. Prevatt*, 148 So. 578, 579-80 (Fla. 1933) (quo warranto is a common-law remedy to test the right to office); *see also* § 80.01, Fla. Stat. Rather, lacking any special injury, Petitioner seeks to convert a declaratory action, which should be filed in circuit court, into a quo warranto action in this Court by asking "what authority does the Governor have to issue the Phase 1 Orders?" This Court should avoid invoking its discretionary jurisdiction under Article V, section 3(b)(8) of the Florida Constitution by finding that Petitioner failed to show how a function of government has been adversely affected *or* that he has not alleged a

special injury as a result of the issuance of the Phase 1 Orders.

A. The functions of government are not adversely affected, and, therefore, this Court should decline to invoke its discretionary jurisdiction.

The discretionary jurisdiction to consider extraordinary writ petitions has been traditionally limited to situations where "the functions of government would be adversely affected absent an immediate determination by this Court." *See Chiles*, 714 So. 2d at 457. Petitioner has not alleged same, nor is this that situation.

Compare the instant action to *Martinez*, wherein Representative Elvin Martinez challenged via quo warranto Governor Bob Martinez's ability to call a special session on issues already the subject of a prior call for special session. *Martinez*, 545 So. 2d at 1338-39. This Court specifically acknowledged Representative Martinez, being a member of the legislature that was called to special session, was "directly affected by the governor's actions" and determined to invoke its discretionary jurisdiction and decide the merits. *Id.* at 1339. Subsequent to *Martinez*, additional quo warranto actions have been brought by one branch of government testing the another branch's authority to act in a way that infringes on its constitutional duties. *See, e.g.*, *Fla. House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008) (Florida House quo warranto challenge to Governor Crist's authority to bind the State of Florida in the Seminole Tribe Gaming Compact); *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998) (consolidated

action wherein Governor Chiles and an affected clinic and doctor challenged the legislature's veto override); *Fla. House of Representatives v. Martinez*, 555 So. 2d 839 (Fla. 1990) (Florida House petition for writ of mandamus challenging Governor Martinez's veto authority); *Fla. Senate v. Graham*, 412 So. 2d 360 (Fla. 1982) (Florida Senate challenging Governor Graham's authority to limit special apportionment session to less than 30 days).

These cases are distinguished from Petitioner's because they were brought by one branch of government seeking quo warranto on a question directly related to the separation of powers. At the heart of these cases was an allegation that the functions of government may be adversely affected without immediate decision by this Court. *See Chiles*, 714 So. 2d at 456 ("[T]his Court historically has taken jurisdiction of writ petitions where members of one branch of government challenged the validity of actions taken by members of another branch."). Here, Petitioner does not allege *any* function of government is being adversely impacted by the Phase 1 Orders. In fact, Petitioner makes no claim that the authority to issue the Phase 1 Orders explicitly belongs to another branch of government or government actor. And to be sure, there is no allegation as to an emergent need for this Court to address the question.

Because Petitioner does not allege any specific function of government will

be adversely impacted by Governor DeSantis issuing the Phase 1 Orders, this Court should decline jurisdiction.

B. Petitioner lacks standing to seek relief because he has not alleged a special injury.

Petitioner lacks standing to present the challenge because he does not claim a special injury or real interest due to Governor DeSantis' issuance of the Phase 1 Orders, even if a declaratory action.

Standing is a threshold jurisdictional question that "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). The petitioner must demonstrate he or she has standing to invoke the power of the court to determine the merits of an issue. *McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016), *review denied*, SC16-1668, 2017 WL 192043 (Fla. 2017). "[E]xcept as otherwise required by the constitution, Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994).

This Court's long-standing precedent supports, that to demonstrate standing to a challenged governmental action, a citizen taxpayer is required to allege he or she suffered or will suffer a special injury, distinct from other members of the

community at large. *See Rickman v. Whitehurst*, 74 So. 205, 207 (Fla. 1917). Exceptions to the special injury rule exist when standing is explicitly granted by statute or a constitutional challenge is based directly upon the Legislature's taxing and spending power. *See, e.g.*, *Sch. Bd. of Volusia County v. Clayton*, 691 So. 2d 1066, 1067 (Fla. 1997) (explaining that a constitutional challenge means an attack upon constitutional grounds based directly upon the Legislature's taxing and spending power).

The "special injury" rule was applied to a Sunshine Amendment challenge in *St. John Medical Plans, Inc. v. Gutman*, 696 So. 2d 1294 (Fla. 3d DCA 1997). There, private plaintiffs brought an action under the Article II, section 8 of the Florida Constitution, (the "Sunshine Amendment"), to challenge an official action even though the plaintiffs recognized they had no special injury. *Id.* at 1295. The district court noted the Sunshine Amendment provides "[t]he people . . . the right to secure and sustain [public] trust against abuse" but, regardless, denied the claim based on lack of standing. *Id.* (citation omitted). In so holding, the district court cited long established precedent that, in order to establish standing, "a taxpayer must allege either a special injury distinct from other taxpayers or a constitutional violation of the legislature's taxing and spending power." *Id.* (citing *School Bd. of Volusia County*, 691 So. 2d at 1068). Upon review, this Court agreed with the

district court, holding "only the state has standing under article II, section 8(c), not individual citizens." *St. John Medical Plans, Inc. v. Gutman*, 721 So. 2d 717, 720 (Fla. 1998).

Here, Petitioner appears only as "a resident, citizen, registered voter, taxpayer, and former employee of Cucina Cabana, a restaurant located in North Palm Beach, Florida." *See* Pet. at 1. Petitioner relies on this Court's prior opinions conferring standing to seek quo warranto to "citizens and taxpayers" because the procedure is used to "enforce a public right." *See* Pet. at 1-2. But as more fully addressed below, a petitioner in a quo warranto action should be held to the same standing requirements as other actions challenging governmental action.

Petitioner fails to allege facts sufficient to confer standing. Chiefly, Petitioner fails to allege that he has suffered any distinct harm because of the Phase 1 Orders. As mentioned *supra*, aside from citing his prior occupation (which is not actually tied to the Phase 1 Orders, nor is an impacted alleged), Petitioner affirmatively equates himself to every other citizen of Florida. *See* Pet. at 1-2. Nowhere does Petitioner allege he has suffered a special injury as a result of Governor DeSantis' actions. This is precisely the type of generalized harm insufficient to confer standing, as required in declaratory judgment actions, to create a justiciable controversy. Likewise, Petitioner does not claim, nor does this

case present, an applicable exception to the *Rickman* rule. Certainly, Petitioner does not suggest that Chapter 252, Florida Statutes, the law forming the basis of the Petition, creates a generalized taxpayer standing, nor does Petitioner allege a constitutional violation of the legislature's taxing and spending power.

The quo warranto process should not be a tool to avoid what should otherwise be brought through a declaratory judgment action. *See Fla. House of Representatives v. Crist*, 999 So. 2d at 619-20, 619 n.13 (Lewis, J., concurring in result). Without some showing that either (a) the functions of government are adversely affected or (b) there is some infringement on one branch of government or government actor's powers, quo warranto challenges essentially become requests for an advisory opinion available to anyone in the state against any government actor. *Contra Martinez*, 545 So. 2d at 1339 ("In quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit 'need not show that he has any real or personal interest in it.'" (internal citations omitted)); *Florida Cent. & P.R. Co. v. State ex rel. Mayor*, 13 So. 103, 105 (Fla. 1893) (same as to mandamus). However, standing is required in quo warranto actions challenging a person's right to hold office. *See* § 80.01, Fla. Stat. (only the Attorney General *or* "[a]ny person claiming title to an office which is exercised by another has the right" to file the quo

warranto action); *see also Tobler v. Beckett*, 297 So. 2d 59, 61 (Fla. 2d DCA 1974) ("Ordinarily, quo warranto is the proper remedy to determine the right of an individual to hold public office. It may be instituted only by the Attorney General of Florida, *or by a person claiming title to the office*." (emphasis added) (footnote omitted)).

Requiring both a justiciable controversy *and* standing to invoke this Court's discretionary jurisdiction in quo warranto proceedings is not a high bar to clear, but it is nonetheless important. This Court should dismiss the Petition because it fails to allege that the functions of government are adversely impacted requiring immediate determination *and* because there is no allegation that Petitioner has suffered a special injury as a result of Governor DeSantis' issuance of the Phase 1 Orders.

II. IF NOT DISMISSED ON JURISDICTIONAL GROUNDS, THE PETITION SHOULD BE DENIED ON THE MERITS

If the Petition is not dismissed based on the jurisdictional deficiency above, it should be denied on the merits. Petitioner alleges that Governor DeSantis does not have authority to issue the Phase 1 Orders, claiming the authority is not derived from Article IV, section 1(a) of the Florida Constitution or Chapter 252, Florida Statutes. Both allegations fail.

A. Under the Florida Constitution, the Governor has the authority to issue the Phase 1 Orders.

The Florida Constitution provides that "[t]he supreme executive power shall be vested in a governor" and "[t]he Governor shall take care that the laws be faithfully executed." Art. IV, § 1(a), Fla. Const. Additionally, the Governor is charged as the "chief administrative officer" responsible for the planning and budgeting for the state. *Id.* Governor DeSantis cites to Article IV, section 1(a) of the Florida Constitution as authority for the issuance of the Phase 1 in responding to the COVID-19 emergency, including re-opening the state in a safe manner.

The vesting of "supreme executive power" in the Governor is intentional—the words have purpose. Taken together with the explicit direction that the Governor "shall take care that the laws be faithfully executed" and that he be responsible for the planning of the state, these powers provide a grant of authority to take all actions traditionally exercised and granted to the executive that are not explicitly prescribed to another government actor. *See also* Art. II, § 3, Fla. Const. This is not a novel understanding that the Governor's supreme executive power exists absent any statute defining, aiding or directing its use. *See Ayala v. Scott*, 224 So. 3d 755, 757 (Fla. 2017). In *Ayala*, the Governor used the authority granted to him under Article IV, section 1(a) of the Florida Constitution, in combination with section 27.14(1), Florida Statutes, to discharge a state attorney of her duties

because the ends of justice would be best served. *Ayala*, 224 So. 3d at 756-57. While explaining the supreme executive power, this Court stated that "Florida law facilitates the Governor's *discharge of this duty* . . . through state attorney assignments. Specifically, section 27.14(1)." *Id*. at 757 (emphasis added). Naturally, the grant of the supreme executive power empowers the Governor to act as necessary for the proper function of government. *See generally Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 270 (Fla. 1991) (McDonald, J., dissenting) ("If the legislature were to refuse to adopt measures necessary to balance an unbalanced budget, the Governor would not be relieved of the constitutional obligation to employ the supreme executive power of the state to assure the budget was balanced. The mandates of the Constitution prevail over both the legislative and executive branches of government."); *Petition of Fla. State Bar Ass'n for Adoption of Rules for Practice & Procedure*, 21 So. 2d 605, 607 (Fla. 1945) ("Historically what constitutes executive, legislative, or judicial power has been determined in light of the common law and what these powers were considered to be at the time of the adoption of the Constitution. The Constitution defines the three powers *but makes no attempt to compartmentalize them*." (emphasis added)). Additionally, this Court has recognized that the Governor's supreme executive power is self-executing, unlike other provisions of the

Constitution. *See Florida Dept. of Educ. v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993) ("Our present constitution contains numerous examples of [self-executing grants of power] . . . . 'The supreme executive power shall be vested in a governor.'" (quoting Art. IV, § 1(a), Fla. Const.).

Here, the Governor relies on his constitutional authority in responding to a global pandemic effecting the health, safety and welfare of the citizens of the State of Florida. The police powers afforded to the Governor are broad and extensive. *See, e.g.*, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing that the states have inherent police power to protect public health and welfare); *State ex rel. Fulton v. Ives*, 167 So. 394, 400 (Fla. 1936); *cf.* § 14.021, Fla. Stat. (Governor is authorized to use emergency powers to quell violence which are "supplemental to and in aid of powers" vested in the Governor under the "constitution, statutory laws, *and police powers of said state*" (emphasis added)). "Police power is the power *inherent* in government within constitutional limits[.]" *Gandy v. Borras*, 154 So. 248, 252 (Fla. 1934) (Ellis, J., dissenting) (emphasis added). In *Fulton*, this Court affirmed that the state's police power "extends to the protection of . . . lives" and "may be exercised for preserving the public health, safety, morals, or general welfare." *Fulton*, 167 So. at 400.

And while Governor DeSantis carefully exercises those powers, including

the issuance of the Phase 1 Orders, he maintains the discretion to exercise them to preserve the public health, safety and welfare. *See, e.g.*, *In re Advisory Opinion to the Governor*, 9 So. 2d 172, 176 (Fla. 1942) ("[E]mergencies may afford occasions for the exercise of powers already existing. This principle of law is particularly applicable to Executive powers and authority to meet great public emergencies and to conserve governmental efficiency and the welfare of the State."); *Fulton*, 167 So. at 400. It is worth noting the vesting of the supreme executive power has continuously existed in Florida since its first constitution in 1838. *See* Art. III, § 1, Fla. Const. (1838) ("The Supreme Executive Power shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Florida.").

Similarly, because the Governor is charged with taking care that the laws be faithfully executed and acting as the chief administrative officer, there is a robust constitutional scheme vesting the Governor with the authority to issue the Phase 1 Orders. *Cf. Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-204, 2020 WL 2110416, at *11 (E.D. Va. May 1, 2020) (noting that the state's "Take Care" clause, in combination with state emergency power statutes, gave the Governor authority to declare a state of emergency and to implement mitigation measures in response to a public health threat by a communicable disease); *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *8-9 (Pa. Apr. 13, 2020) (same),

cert denied, 590 U.S. ---- (May 6, 2020). Even absent the Emergency Management Act, and section 252.36, Florida Statutes, the Governor is charged with both taking care that the laws be faithfully executed *and* protecting the State of Florida. *See Austin v. State ex rel. Christian*, 310 So. 2d 289, 292 (Fla. 1975) (explaining that the "Take Care" clause is sufficient constitutional responsibility absent any statute to authorize Governor's assignment of a state attorney).

As more fully discussed in Section II.B., the supreme executive power and take care responsibility are even more applicable where, as here, there are clear statutory powers afforded to the Governor in responding to a threat and emergency presented to the state. *See Whiley*, 79 So. 3d at 717 (Canady, C.J., dissenting) ("But if 'supreme executive power' means anything, it must mean that the Governor can supervise and control the policy-making choices—within the range of choices permitted by law—of the subordinate executive branch officers who serve at his pleasure."). And as Justice Polston wrote in *Whiley*, "[t]his Court has explained that '[t]he Governor is given broad authority to fulfill his duty in taking 'care that the laws be faithfully executed.' This Court has also recognized that a Governor's actions are presumptively in accord with his official duties." *Id.* at 724 (Polston, J., dissenting) (second alteration in original) (citations omitted).

Put simply, Article IV, section 1(a) of the Florida Constitution provides more than sufficient authority for Governor DeSantis to issue the Phase 1 Orders. Additionally, it provides the authority for similar executive orders to protect the health, safety and welfare of the citizens of the State of Florida in responding to an emergency. Therefore, if this Court addresses the merits of the Petition, it should determine that Article IV, section 1(a) of the Florida Constitution provides Governor DeSantis the authority to issue the Phase 1 Orders challenged in the Petition.

B. Under Florida Law, the Governor has authority to issue the Phase 1 Orders.

The Emergency Management Act, Chapter 252, Florida Statutes, provides the Governor with statutory authority to issue the Phase 1 Orders in responding to the COVID-19 emergency, including re-opening the state in a safe manner.

In the most general sense, the Emergency Management Act is the statutory scheme for the State of Florida's response to a "wide range of emergencies, including natural, technological, and manmade disasters," which pose a threat to the "life, health, and safety of [Floridians]." *See* § 252.311(1), Fla. Stat. As articulated in section 252.311(2), the intent of the Emergency Management Act was to

> reduce the vulnerability of the people and property of this state; to prepare for efficient evacuation and shelter of threatened or affected

> persons; to provide for the rapid and orderly provision of relief to persons and for the restoration of services and property; and to provide for the coordination of activities relating to emergency preparedness, response, recovery, and mitigation.

§ 252.311(2), Fla. Stat. And because of the likelihood of an emergency, whether natural, technological or manmade, it was imperative to grant emergency powers to the Governor, the Division of Emergency Management, and various governing political subdivisions. *See* § 252.32, Fla. Stat. In granting the statutory emergency powers, the Legislature explained the necessity:

> Because of the existing and continuing possibility of the occurrence of emergencies and disasters resulting from natural, technological, or manmade causes; in order to ensure that preparations of this state will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters; to provide for the common defense and to protect the public peace, health, and safety; and to preserve the lives and property of the people of the state.

§ 252.32(1), Fla. Stat. And to be sure, the grant of statutory emergency powers was not without limitation. *See* § 252.33, Fla. Stat.

Petitioner raises three issues with the Governor's reliance on the Emergency Management Act as authority to issue the Phase 1 Orders: (1) the purpose of the Emergency Management Act "is to facilitate the opening of the State, not closing it," *see* Pet. at 3 (emphasis omitted), (2) COVID-19 is not a listed or contemplated emergency under the Emergency Management Act, *see* Pet. at 3-5, and (3) the Phase 1 Orders fail to comply with the requirements of section 252.36(3), Florida

Statutes, *see* Pet. At 6. Each of these fails.

i. Petitioner misconstrues the purpose of the Emergency Management Act

As outlined above, Petitioner misconstrues and selectively reads the intent and purpose of the Emergency Management Act. Contrary to Petitioner's argument, the purpose of the Emergency Management Act is not *only* to facilitate the opening of the state. *See* Pet. at 3. In fact, the plain language of the Emergency Management Act refutes that position. For example, section 252.311(2), Florida Statutes, specifically contemplates actions that "close" the state, including evacuations, sheltering affected persons, and responding to the emergency. And section 252.32(1), Florida Statutes, explains the need to "provide for the common defense and to protect the public peace, health, and safety; and to preserve the lives and property of the people of the state." Additionally, the Legislature, in defining "[e]mergency management," reiterated the responsibilities to reduce the vulnerability of injuries and loss of life from emergencies, using all plans and resources to preserve the health, safety and welfare of persons, and assisting in the anticipation, prevention and mitigation of emergencies. *See* § 252.34(5), Fla. Stat.

More precisely, the Governor is provided specific emergency powers in section 252.36, Florida Statutes, that confirm the response is more than to open the state. Of the emergency powers explicitly defined, the Governor may:

> (a) Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.
>
> . . .
>
> (g) Control ingress and egress to and from an emergency area, the movement of persons within the area, and the occupancy of premises therein.
>
> . . .
>
> (h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages[.]
>
> . . .
>
> (k) Take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic prior to, during, and subsequent to drills and actual or threatened emergencies, the calling of public meetings and gatherings[.]

§ 252.36(5), Fla. Stat. Additionally, the Governor "shall employ such measures and give such directions to the Department of Health and the Agency for Health Care Administration as may be reasonably necessary" to secure compliance with the Emergency Management Act. *See* § 252.36(7), Fla. Stat.

These provisions, read individually or *in pari materia*, confirm the Emergency Management Act is appropriately available for responding in a manner that protects the people from imminent or current emergencies, just as much as it is

about helping the State and its people quickly recover.

ii. COVID-19 is a contemplated emergency under the Emergency Management Act

Contrary to Petitioner's claim, COVID-19 is a contemplated emergency that triggers the Emergency Management Act and all its powers and responsibilities. Petitioner is correct that Florida law defines a "[n]atural emergency" as "an emergency caused by a natural event, *including, but not limited to*, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake." § 252.34(8), Fla. Stat. (emphasis added). However, his conclusory statement that COVID-19 is "neither listed nor contemplated" because the Legislature did not act after "SARS and H1N1" has no merit. *See* Pet. at 3.

A "[n]atural emergency" as defined in section 252.34(8), Florida Statutes, is "an emergency caused by a natural event." First, "natural" is defined as "present in or produced by nature." *The American Heritage Dictionary* 1174 (5th ed. 2011); *e.g., Merriam-Webster's Collegiate Dictionary* 826 (11th ed. 2005) (defining "natural" as "existing in or produced by nature"). Further, Merriam-Webster's defines "natural disaster" as "a sudden and terrible event in nature . . . that usually results in serious damage and many deaths." *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/natural%20disaster. The occurrence of COVID-19 is, under a plain meaning definition, present in and produced by

nature, and, therefore, falls under section 252.34(8), Florida Statutes.[4]

Where Petitioner's argument fails is his application of the *expressio unius est exclusion alterius* ("negative-implication") canon to the list of natural emergencies. Rather, the phase, "including, but not limited to" is "intended to defeat the negative-implication canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* 132-33 (2012) (emphasis omitted). This is because "the word *include* does not ordinarily introduce an exhaustive list." *Id.* Recently, this Court affirmed that *expressio unius* should not be applied where the word "include" is used because "[include] is 'a word of expansion, *not one of limitation*.'" *Advisory Op. to Governor re: Implementation of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1080 (Fla. 2020) (citation omitted) (emphasis added); *see also White v. Mederi Caretenders Visiting Servs. of*

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[4] There may be debate as to whether COVID-19 is naturally occurring or manmade. *See* Jack Brewster, *A Timeline Of The COVID-19 Wuhan Lab Origin Theory*, Forbes (May 10, 2020, 4:13 PM), https://www.forbes.com/sites/jackbrewster/2020/05/10/a-timeline-of-the-covid-19-wuhan-lab-origin-theory/#667b908e5aba. The Emergency Management Act defines "[m]anmade emergency" as "an emergency caused by an action against persons or society, including, but not limited to, enemy attack, sabotage, terrorism, civil unrest, or other action impairing the orderly administration of government." § 252.34(7), Fla. Stat. Assuming *arguendo* that COVID-19 is "manmade," it would still fall under the scope of the Emergency Management Act. *See* §§ 252.311(1); 252.32(1), Fla. Stat. (including "manmade" causes in the intent and purpose sections).

Se. Fla., LLC, 226 So. 3d 774, 781-84 (Fla. 2017) (confirming the inclusion of "includes, but is not limited to" in a statute signals a non-exhaustive list). While it is true that COVID-19 is not one of the enumerated events, by all accounts it is an emergency caused by a natural event. § 252.34(8), Fla. Stat. Therefore, it is exactly the type of event that falls under the scope of the Emergency Management Act.

iii. The Phase 1 Orders do comply with the Governor's Emergency Management powers in Section 252.36(3), Florida Statutes

As outlined above, Governor DeSantis has explicit emergency management powers under section 252.36, Florida Statutes. On March 1, 2020, Governor DeSantis initially ordered the State Surgeon General to declare a public health emergency due to COVID-19. *See* Res. App. at 4-7. On March 9, 2020, Governor DeSantis issued Executive Order 20-52, declaring a state of emergency for all 67 counties due to the risk posed to the entire state. *See* Res. App. at 8-14; *see also* § 252.36(2), Fla. Stat. (Governor must declare a state of emergency by executive order or proclamation if he finds the emergency has occurred or the threat is imminent). In Executive Order 20-52, Governor DeSantis designated the Director of the Division of Emergency Management as the State Coordinating Officer and directed him to "execute the State's Comprehensive Emergency Management Plan and other response, recovery, and mitigation plans necessary to cope with the emergency." *See* Res. App. at 10. Florida law contemplates a state of emergency

can exist for sixty days, unless renewed by the Governor. *See* § 252.36(2), Fla. Stat.

On March 9, 2020, there were confirmed cases of COVID-19 in eight counties. *See* Res. App. at 8. On March 22, 2020, Governor DeSantis requested that President Donald J. Trump declare a major disaster for the entire State of Florida due to COVID-19. *See* Res. App. at 54-62. That request was granted on March 25, 2020. *See* Res. App. at 63. Prior to the expiration of the state of emergency, Governor DeSantis issued Executive Order 20-114 on May 8, 2020, extending Executive Order 20-52 an additional 60 days. *See* Res. App. at 49-50. Executive Order 20-114 references the March 25, 2020 declaration by President Donald J. Trump of a major disaster for the entire State of Florida. *Id.*

Petitioner misses the target claiming that the Phase 1 Orders do not include requirements under section 252.36(3), Florida Statutes, namely "[a]ctivat[ing] the emergency mitigation, response, and recovery aspects of the state . . . emergency management plan[]" or "[i]dentify[ing] whether the state of emergency is due to a minor, major, or catastrophic disaster." § 252.36(3)(a), (c), Fla. Stat.

First, the activation of the emergency mitigation, response and recovery aspects of the emergency management plan occurs by operation of the declaration of a state of emergency. *See* § 252.36(3)(a), Fla. Stat. Contrary to Petitioner's

allegation, this does not require an explicit whereas clause or section affirmatively declaring activation. And, even if Petitioner is correct, as mentioned above, Executive Order 20-52 explicitly directs the State Coordinating Officer to "execute the State's Comprehensive Emergency Management Plan and other response, recovery, and mitigation plans necessary to cope with the emergency." *See* Res. App. at 10.

Second, on March 9, 2020 when Governor DeSantis declared a state of emergency, just as when a state of emergency is declared prior to landfall of a hurricane, it was incredibly difficult to determine how bad the emergency would be: minor, major or catastrophic. Rather, what *is* important is the initial declaration triggering the state's ability to prepare and respond to the imminent threat of the emergency, *and* then the determination of the emergency's true scope to clarify whether it is minor, major or catastrophic. The type of emergency is not a condition precedent to the declaration of a state of emergency. *See* § 252.34(2), Fla. Stat. ("Disasters shall be identified by the severity of *resulting* damage"). This is because the category is wholly dependent on the availability of resources and the extent of additional assistance required based on the damage caused by the emergency. *See* § 252.34(2)(a)-(c), Fla. Stat. To be sure, each category of emergency carries different available responses and resources. *See, e.g.*, §

252.36(3)(c)2., Fla. Stat. (only under a catastrophic disaster does the request constitute a request for the President of the United States to mobilize the military).

Additionally, in Executive Order 20-52 (the declaration of the state of emergency) there are numerous characterizations as to the extent of the availability of resources, implicitly declaring a major disaster. *See, e.g.*, Res. App. at 10-13 (Sections 2.A.; 4.; and 5). This understanding is bolstered by the whereas clauses outlining and describing that COVID-19 had been declared by the World Health Organization as a public health emergency of international concern and that it poses a risk to the entire State. *See* Res. App. at 8-9. And, as described above, subsequent executive orders include that President Donald J. Trump has declared a major disaster for the entire State of Florida at the request of Governor DeSantis—which would cure any defect that may have previously existed. *See* Res. App. at 49.

And even if Petitioner is correct that section 252.36(3), Florida Statutes, requires the above statements, the Phase 1 Orders are not declarations of a state of emergency as contemplated in the section. *See* Executive Order 20-52 (declaration of a state of emergency). Rather, the Phase 1 Orders are declarations of the use of the Governor's emergency management powers enumerated in section 252.36(5), Florida Statutes. Additionally, the absence of the statements does not make a

declaration of a state of emergency defective or grounds to be deemed null and void as Petitioner requests.

Considering the state of emergency declared under Executive Order 20-52 as extended by Executive Order 20-114, the Governor has complied with the requirements of section 252.36(3), Florida Statutes. And, the Phase 1 Orders are a proper execution of the Governor's statutory emergency management powers under the state of emergency declared in Executive Order 20-52.

Therefore, if this Court addresses the merits of the Petition, it should determine that the Emergency Management Act, including section 252.36, Florida Statutes, provides Governor DeSantis the authority to issue the Phase 1 Orders.

CONCLUSION

The Petition for Writ of Quo Warranto should be dismissed on jurisdictional grounds or denied on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated Response 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 and correct copy of the Response to Petition for Writ of Quo Warranto has been furnished by electronic service through the Florida Courts E-Filing Portal this 18th day of May, 2020, to the following:

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