Filing # 88150599 E-Filed 04/17/2019 04:57:17 PM

RECEIVED, 04/17/2019 04:57:36 PM, Clerk, Supreme Court

**SUPREME COURT OF FLORIDA**
**CASE NO. SC19-552**

---

**SCOTT J. ISRAEL,**
**As the Elected Sheriff of Broward County, Florida,**
**Appellant,**

**v.**

**RON DESANTIS,**
**Governor, State of Florida,**
**Appellee.**

---

**ON CERTIFICATION BY THE FOURTH DISTRICT COURT OF APPEAL OF A QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY.**
**HON. DAVID A. HAIMES, CIRCUIT JUDGE**

---

# REPLY BRIEF ON THE MERITS OF APPELLANT SCOTT J. ISRAEL

---

**STUART N. KAPLAN**
**KAPLAN & PARKER, LLP**
**3399 PGA Blvd Suite 150**
**Palm Beach Gardens, FL 33410-2809**
**Tel: 561.296.7900**
**Fax: 561.296.7919**
**skaplan@kaplanparkerlaw.com**

**BENEDICT P. KUEHNE**
**MICHAEL T. DAVIS**
**SUSAN DMITROVSKY**
**KUEHNE DAVIS LAW, P.A.**
**100 S.E. 2 St., Suite 3550**
**Miami, FL 33131-2154**
**Tel: 305.789.5989**
**Fax: 305.789.5987**
**efiling@kuehnelaw.com**

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE AND FACTS ..... 1

STANDARD OF REVIEW ..... 3

ARGUMENT ..... 3

I. THE GOVERNOR'S EXECUTIVE ORDER OF SUSPENSION EXCEEDED THE CONSITUTIONAL AUTHORITY TO SUSPEND AN ELECTED OFFICIAL. ..... 3

CONCLUSION ..... 9

CERTIFICATE OF COMPLIANCE ..... 9

CERTIFICATE OF SERVICE ..... 10

## TABLE OF AUTHORITIES

### Cases

*Ayala v. Scott*,
224 So. 3d 755 (Fla. 2017) .....5

*Detzner v. Anstead*,
265 So. 3d 820 (Fla. 2018) .....3

*State ex rel. Gibbs v. Rogers*,
193 So. 435 (Fla. 1940) .....9

*Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP*,
137 So. 3d 1081 (Fla. 3d DCA 2014).....3

*State ex rel. Hardie v. Coleman*,
115 Fla. 119, 155 So. 129 (Fla. 1934) .....4, 5

*Jackson v. DeSantis*,
Case No. SC19-329, 2019 WL 1614572 (Fla. April 16, 2019).....4

*Johns v. State*,
144 Fla. 256, 197 So. 791 (1940) .....5

*Martinez v. Florida Power & Light Co.*,
863 So. 2d 1204 (Fla. 2003) .....3

*Sanchez v. Lopez*,
219 So. 3d 156 (Fla. 3d DCA 2017).....6

### Constitutional Provisions and Statutes

Florida Constitution

Article I, Section 1.....7
Article IV, Section 7(a) .....1

Florida Statutes

§30.07 .....8
§30.15 .....7

## STATEMENT OF THE CASE AND FACTS

The Governor's Answer Brief on the Merits is itself an explicit recognition that the suspension at issue here is nothing more than an executive power grab that is outside the Governor's limited powers authorized by the Florida Constitution. Aided by hyperbole, *ad hominem* attacks, and political scapegoating, the Governor offers a false narrative, devoid of actual facts, that Sheriff Israel is responsible for "mass shootings [that] resulted in the tragic deaths of seventeen innocent students and faculty on February 14, 2018, at Marjory Stoneman Douglas High School, five deaths on January 6, 2017, at the Fort Lauderdale-Hollywood International Airport and dozens of injuries that resulted from a botched response from the Sheriff's Office." (Answer Brief at 1-2). Aside from the intentionally inflammatory diatribe that misdirects the constitutional issue under consideration in this appeal, the Governor's appellate position fails to identify a single statutory or mandatory duty of office that supports an executive suspension pursuant to Article IV, Section 7(a) of the Florida Constitution.

The Answer Brief is replete with supposed "facts" that are not and cannot be considered when determining whether the Governor's suspension order contravenes the Constitution, because the appellate assertions form no part of the Executive Order of Suspension (R39-44). Even more to the point is that the Governor's appellate "facts" are belied by the record of proceedings in this case and additionally

misstate the documents on which the Governor purports to rely. Both incidents that the Governor is relying upon (the Fort Lauderdale-Hollywood Airport and the Marjory Stoneman Douglas High School mass murders) occurred during the tenure of Governor Rick Scott, well before the current Governor took office (R9-10). But as demonstrated and not disputed in the record, the current Governor campaigned on his intention to remove Sheriff Israel from office as political payback to the National Rifle Association (R18-19, 24).

Both mass shooting incidents were thoroughly investigated in the aftermath of the tragedies (R16-18). Neither of the independent, post-mortem investigations concluded that Sheriff Israel was responsible for the incidents, or incompetent or neglectful in discharging his sworn duties as Sheriff. The authors of the Marjory Stoneman Douglas High School Public Safety Commission even stated that they found no basis that might warrant Sheriff Israel's removal from office (R18, 70-73).

The Governor also inaccurately asserts that the filing of the Petition for Writ of Quo Warranto (R1) interfered with the Senate review process, notwithstanding that Senate Rule 12.9(2) expressly contemplates the abatement of Senate proceedings during the pendency of judicial review (Answer Brief 2-3). The necessity of a judicial determination of the Governor's suspension authority in this case became readily evident when the Governor demonstrated his political use of the suspension power in his State of the State threat to the Florida Senate warning that

legislative body, on the morning of the commencement of the Legislative Session, to not interfere with his suspension of Sheriff Israel (R19, 74-77).[1]

## STANDARD OF REVIEW

A circuit court's decision on a petition for writ of quo warranto is reviewed for abuse of discretion. *Detzner v. Anstead*, 265 So. 3d 820, 823 (Fla. 2018). The construction and interpretation of the Florida Constitution and statutes present questions of law that are subject to *de novo* review. *West Florida Regional Medical Center, Inc. v. See*, 79 So. 3d 1, 8 (Fla. 2012) ("Statutory and constitutional construction are questions of law subject to a de novo review."). Review of an order granting a motion to dismiss is also reviewed de novo. *Martinez v. Florida Power & Light Co.*, 863 So. 2d 1204, 1205 (Fla. 2003); *Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014).

## ARGUMENT

### I. THE GOVERNOR'S EXECUTIVE ORDER OF SUSPENSION EXCEEDED THE CONSITUTIONAL AUTHORITY TO SUSPEND AN ELECTED OFFICIAL.

This Court's recent decision in *Jackson v. DeSantis*, Case No. SC19-329, 2019 WL 1614572, *3 (Fla. April 16, 2019), confirms that quo warranto judicial review is properly available to determine whether an executive order of suspension

---

[1] https://www.news4jax.com/news/politics/sheriff-commment-by-desantis-causes-stir (March 5, 2019).

"names one or more grounds embraced in the Constitution and clothes or supports it with alleged facts sufficient to constitute the grounds or cause for suspension …" It is the second portion of that test ("clothes or supports it with alleged facts sufficient to constitute the grounds or cause for suspension") that is absent from Executive Order 19-14.

Despite abundant factual allegations, argued mightily in the Answer Brief (Answer Brief 10-12), the Governor's suspension order does not identify a single mandatory duty of the Sheriff that was neglected or incompetently executed or administered. Because the suspension power is strictly reviewed and applied only as stated in the text of the Constitution, *State ex rel. Hardie v. Coleman*, 115 Fla. 119, 155 So. 129, 134 (Fla. 1934), "the jurisdictional facts, in other words, the matters and things on which the executive grounds his decision, may be inquired into by the courts." *Id*., 115 Fla. at 127, 155 So. at 133.

The Governor's brief claims that the mere inclusion of a series of alleged misdeeds on the part of the official must always be jurisdictionally sufficient to support an order of suspension, arguing that there is no requirement of an elected official's alleged incompetence or negligence to be traced to any mandatory duty on the part of the elected official (Answer Brief at 18-20). Not only is that argument directly contrary to the text of the suspension power, but its acceptance authorizes the use of the suspension power for political or partisan purposes. In an analogous

instance, this Court acknowledged in *Johns v. State*, 144 Fla. 256, 267, 197 So. 791, 796 (1940) that "[i]f the Governor should abuse [the assignment] power by arbitrarily and without reason whatsoever [for] making such an assignment, it might be that his action could be inquired into by writ of quo warranto …" This Court recently validated that position of judicial review in *Ayala v. Scott*, 224 So. 3d 755, 758 (Fla. 2017).

The stated grounds of "neglect of duty" and "incompetence" can serve as a jurisdictional foundation for a suspension only when the "duty" allegedly neglected or incompetently administered is in the language of the law an actual obligation on the part of the elected official. Otherwise, a mere illusory, undefined, or idealistic obligation becomes the very definition of the "arbitrary" and "without reason" exercise of power proscribed by this Court in *Hardie*. Precisely for that reason, the Florida Constitution's inclusion of the phrase "neglect of duty" is meant to allow suspensions only when an actual duty of office is neglected, an obligation that has historically been strictly construed as requiring "some duty or duties laid on him as such by virtue of his office or which is required of him by law." *State ex rel. Hardie v. Coleman*, 115 So. at 126, 155 So. at 132.

Accusing a public official of engaging in a neglect of duty requires, as a foundational jurisdictional measure, a specific mandatory duty the official is obligated to perform. *Sanchez v. Lopez*, 219 So. 3d 156, 159 (Fla. 3d DCA 2017).

Although the Governor attempts to distinguish *Sanchez v. Lopez* by pointing out that the case arose from a recall petition of an elected official (Answer Brief 20), the identical language mirroring the constitutional provision at issue here is amenable to only one construction: the duty neglected by the public official must be of a mandatory nature. Despite numerous opportunities, the Governor has identified no precedent whatsoever authorizing a governor to decide what duties and responsibilities an elected constitutional officer must perform to the governor's satisfaction upon pain of suspension. Even during the Circuit Court hearing on the quo warranto petition, the Governor offered no prior executive order whatsoever in which a predecessor Governor removed any elected officer for neglecting an unspecified or non-statutory duty (Transcript 22, 23-26).[2] The Governor's Answer Brief does not identify a single executive precedent by any Florida Governor supporting a suspension order for neglecting a supposed duty that is not mandated by law or statute.

The omission of any "duty" specified by law from the Executive Order constitutes the very lack of a jurisdictional threshold supporting the Governor's exercise of the suspension power. Even the Governor's description of supposed

---

[2] The Circuit Court hearing transcript is filed with this Court as an attachment to an agreed Motion to Supplement the Record.

commonsense "duties" such as setting up command centers, hiring competent deputies, training deputies, and dictating policies governing the office (Answer Brief 21) are the discretionary activities of elected constitutional officers who execute functions deemed to be consistent with the best interests of their communities. Whether an elected official fulfilled constituent expectations is why the Florida Constitution attributes "[a]ll political power" to the people. Art. I, §1, Florida Constitution. The citizens of Broward County overwhelmingly elected Sheriff Israel. It is for the citizens of Broward County to determine whether Sheriff Israel acted in the public interest when they decide who to elect as their sheriff in November 2020.

The Governor's citation to §30.15, Florida Statutes, in describing elected sheriffs as "conservators of the peace in their respective counties" (Answer Brief 22) was not alleged by even tenuous facts in the Executive Order to have been violated since, in both of the cited events, Sheriff Israel's deputies acted to protect lives and the public safety from the intentional actions of murderous criminals who armed themselves for war and took innocent lives in the course of their terrorist atrocities. Both perpetrators were promptly taken into custody by Broward Sheriff's law enforcement officials and have been or are being prosecuted. (R15).[3]

---

[3] At the Fort Lauderdale-Hollywood Airport, Deputy Madrigal apprehended the shooter in less than 85 seconds (R15), and was accordingly honored as the 2018 Florida Sheriffs Association Law Enforcement Officer of the Year (R62-65).

The citation to §30.07, Florida Statutes, holding the Sheriff responsible for the negligence of deputies (Answer Brief 22-23), was not supported by any facts denoting its violation or neglect since Sheriff Israel has always been responsible for the legal consequences of his deputies' actions. But Executive Order 19-14 does not identify any "neglect" of that statutory duty.

Nor does Executive Order 19-14 even purport to identify a single fact supportive of a violation of §30.07, Florida Statutes, that obligates a sheriff to appoint deputies (Answer Brief 23-24). The Executive Order itself admits that Sheriff Israel appointed deputies, which is the "duty" the statute imposes on a sheriff. "Accountability" as the Governor writes in his Answer Brief at 24 is not a power defined by the Constitution as allowing a gubernatorial suspension. While the Governor's appointees may be accountable to the Governor, elected constitutional officers are accountable to the people, and the discretionary decision making of constitutional officials is not subject to an Executive Branch veto for political purposes.

In determining whether the subject Executive Order strictly conforms to the text of the Florida Constitution, this Court should be mindful of the admonition that the Governor's constitutional duty is to "take care that the laws be faithfully executed." *State ex rel. Gibbs v. Rogers*, 193 So. 435, 438 (Fla. 1940). Without identifying with specificity any law imposing a duty on Sheriff Israel that he

neglected or incompetently administered, the Governor's suspension represents an effort to elevate his own personal and political preferences above that of the Constitution and laws of Florida. Such gubernatorial overreach cannot be condoned.

## CONCLUSION

The Governor's suspension order failed to identify with any semblance of factual support an itemized, articulated duty of office for which duly elected Sheriff Israel is legally responsible. The Executive Order defies the jurisdictional authority of the Governor, for which this Court has the power and authority to confine the Governor to the strict limits defined by the Florida Constitution. Because the Governor, for reasons outside his constitutional authority, imposed his will on the people of Broward County to decide who would be the Sheriff of Broward County, quo warranto should be exercised in this instance. The decision of the lower tribunal should be reversed, and the case remanded for further proceedings upon issuance of a writ of quo warranto.

## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

Respectfully submitted,

*S/ Stuart N. Kaplan*
**STUART N. KAPLAN**
Florida Bar No. 647934
**KAPLAN & PARKER, LLP**
3399 PGA Blvd Suite 150
Palm Beach Gardens, FL 33410-2809
Tel: 561.296.7900
Fax: 561.296.7919
skaplan@kaplanparkerlaw.com

*S/ Benedict P. Kuehne*
**BENEDICT P. KUEHNE**
Florida Bar No. 233293
**MICHAEL T. DAVIS**
Florida Bar No. 63374
**SUSAN DMITROVSKY**
Florida Bar No. 73296
**KUEHNE DAVIS LAW, P.A.**
100 S.E. 2nd St., Suite 3550
Miami, FL 33131-2154
Tel: 305.789.5989
Fax: 305.789.5987
ben.kuehne@kuehnelaw.com
mdavis@kuehnelaw.com
susand@kuehnelaw.com
efiling@kuehnelaw.com

## CERTIFICATE OF SERVICE

I certify the foregoing was emailed on April 17, 2019, to:

Joe Jacquot
Florida Bar No. 189715
General Counsel
Nicholas A. Primrose
Florida Bar No. 104804)
Deputy General Counsel
John Maciver
Florida Bar No. 97334)
Deputy General Counsel
Colleen Ernst
Florida Bar No. 112903
Deputy General Counsel

James Uthmeier
Florida Bar No. 113156
Deputy General Counsel
Executive Office of The Governor
The Capitol, PL-05
Tallahassee, FL 32399-0001
Tel: 850.717.9310
Joe.Jacquot@eog.myflorida.com
Nicholas.Primrose@eog.myflorida.com
John.MacIver@eog.myflorida.com
Colleen.Ernst@eog.myflorida.com
James.Uthmeier@ eog.myflorida.com

By: *S/ Benedict P. Kuehne*
**BENEDICT P. KUEHNE**