IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1186

IN RE: ADVISORY OPINION TO THE GOVERNOR RE: JUDICIAL VACANCY DUE TO RESIGNATION

BRIEF OF GOVERNOR CHARLIE CRIST

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STATEMENT OF THE CASE AND FACTS

Judge David B. Ackerman, formerly a judge on the Escambia County Court, submitted his letter of resignation on May 24, 2010, effective four days later. The Governor accepted his letter of resignation on May 28, 2010, creating an open seat and an actual vacancy on the Escambia County Court.

Judge Ackerman's then-current term of office was scheduled to expire on January 3, 2011, and the term beginning on January 4, 2011, is to be filled by regular election later this year. The statutorily mandated qualifying period for candidates for this office commenced at noon on April 26, 2010, and ended at noon on April 30, 2010. *See* § 105.031, Fla. Stat. Judge Ackerman qualified on April 28, 2010, a few weeks before resigning. He was the sole candidate to qualify. Accordingly, Judge Ackerman's resignation created an open seat on the court, although months prior to the election, at a time when no one other than Judge Ackerman could seek election.

When a candidate qualifies unopposed, his name does not appear on any ballot. § 105.051(1)(a), Fla. Stat. Rather, by operation of section 105.051(1)(a), Florida Statutes, the candidate is deemed to have voted for himself and is thus constructively elected. Therefore, if the vacancy created by Judge Ackerman's resignation is to be filled by the "election process," Judge Ackerman will be

elected to a six-year term beginning on January 4, 2011, without his name appearing on the ballot and without a single ballot cast on his behalf.

If filled by constructive election, the actual vacancy created by Judge Ackerman's resignation will last until at least January 3, 2011, a period of seven months. The vacancy will likely be longer because, subsequent to the tender of his resignation letter, Judge Ackerman orally represented to the office of the Governor that his then-current intention was to resume his judicial duties on February 1, 2011, twenty-eight days after the start of the term. As a consequence of the vacancy, the Escambia County Court is likely experiencing a twenty percent reduction in judicial manpower. *See* § 34.022(16), Fla. Stat. (limiting Escambia County Court to five judges).

On June 2, 2010, the First Circuit Judicial Nominating Commission (the "JNC") convened for the purpose of seeking nominees for appointment to fill the vacancy created by Judge Ackerman's resignation, pursuant to article V, section 11, Florida Constitution. That section provides, in relevant part:

> (b) The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority of the electors, 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 occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission . . . .

> (c) The nominations shall be made within thirty days from the occurrence of the vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to the governor.

Art. V, § 11, Fla. Const. Concurrently, the JNC requested that the Governor seek the opinion of this Court on whether the vacancy should be filled by election or gubernatorial appointment.

On June 21, 2010, the Governor sought an advisory opinion, pursuant to article IV, section 1(c), Florida Constitution, commencing this proceeding. On June 30, 2010, the JNC submitted a list of nominees for appointment.

SUMMARY OF THE ARGUMENT

The Justices should conclude that the Governor has the power and duty to fill the vacancy created by Judge Ackerman's resignation by appointment. The specific purpose of the Governor's interim appointment power is to minimize the burdens on the judicial system caused by judicial vacancies occurring under circumstances where the election process is unavailable. The election process is unavailable here because the vacancy did not occur until after the close of the statutory qualifying period. Through his resignation, Judge Ackerman created an open seat after it was too late for anyone other than Judge Ackerman to qualify. Giving precedence to the "election" process over the Governor's interim appointment power in these circumstances would incentivize judges to create

actual vacancies, and to do so with inadequate notice given to their courts, thereby cultivating the very evils the interim appointment power was intended to mitigate.

The appointment process will dramatically lessen the duration of the actual vacancy, thereby furthering the purpose of article V, section 11, without impairing the people's paramount interest in electing their county and circuit court judges. Due to the timing of the resignation, the people cannot have a full and fair opportunity to elect the judge of their choice until the next (2012) general election. Accordingly, the Justices should conclude that the Governor has the power and duty to appoint a county or circuit court judge to fill a vacancy that created an open, uncontested seat after the close of the statutory qualifying period.

ARGUMENT

The vacancy created by Judge Ackerman's resignation cannot be filled by constructive election without doing grievous injury to the letter and spirit of the constitutional provisions that set the parameters of the Governor's power to make interim judicial appointments. The purpose of this interim appointment power is to avoid "unreasonable vacancies" in Florida trial courts and their resulting burdens on the administration of justice. *In re Advisory Op. to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 463 (Fla. 1992). Permitting a judge to essentially elect himself to an open seat by creating a vacancy after the close of the statutory qualifying period would have precisely the opposite effect.

The appointment process can dramatically shorten the actual vacancy on the Escambia County Court resulting from Judge Ackerman's unexpected resignation. Even more importantly, an opinion validating the "election" process in the face of an abrupt resignation under the circumstances like those presented would create a perverse incentive for sitting circuit and county court judges that directly contravenes Florida public policy. Judges would be tempted to create extended, actual judicial vacancies with inadequate notice, as is the case here, even though the constitution abhors extended, actual judicial vacancies.

Moreover, while the Governor acknowledges and agrees that the people's right to elect their judges takes precedence over the Governor's interim appointment power in the case of any conflict, there is no conflict here. As developed below, no Florida precedent or previous advisory opinion suggests otherwise. This Court has identified the commencement of the qualifying period as the start of the election process. However, when a vacancy occurs following the close of a qualifying period in which no candidate other than the incumbent has qualified for election, the election process has ended, because no actual election with voter participation will occur.

The timing of Judge Ackerman's resignation was such that, although an open seat was created, it was created too late for anyone other than Judge Ackerman to qualify. An opinion concluding that an election is appropriate in

these circumstances could lead to gamesmanship in the future that would undermine the people's ability to participate in full and fair elections of their circuit and county court judges, contravening the mandate of article V, section 10(b), that the people's right to elect their county and circuit court judges be preserved. For these reasons, set forth in detail below, the Justices should conclude that the vacancy created by Judge Ackerman's resignation must be filled by appointment.

I. Filling the vacancy by gubernatorial appointment would avoid an unreasonable and extended vacancy, thus furthering the purpose of article V, section 11.

The Governor has the "constitutional authority and obligation to fill vacancies by appointment." *In re Advisory Op. to Governor re Appointment or Election of Judges*, 824 So. 2d 132, 136 n.8 (Fla. 2002) (hereinafter "*Appointment or Election [2002]*"). Article V of the Florida Constitution sets forth that authority in the context of judicial vacancies, providing that "[w]henever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy" by interim appointment lasting until after the next general election occurring at least one year after the date of appointment. Art. V, § 11(a), Fla. Const. The Governor has been tasked with the duty to appoint judges because, notwithstanding the constitutional preference for the elective process, "no unreasonable vacancy should exist" in a judicial office. *Judicial Vacancies*, 600

So. 2d at 463. To that end, article V "strikes a proper balance between" expeditiously filling judicial vacancies and "the policy favoring elections." *Pincket v. Harris*, 765 So. 2d 284, 288 (Fla. 1st DCA 2000).

This Court and others have recognized the intuitive purpose of the Governor's power and duty to fill judicial vacancies by appointment: to reduce the incidence and duration of those vacancies. "Vacancies in office are to be avoided whenever possible." *Judicial Vacancies*, 600 So. 2d at 462. As such, "the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." *Id.*

Giving effect to the Governor's appointment power in this case would reduce the duration of the current vacancy and, as explained in detail below, would in no way jeopardize the "policy favoring elections." *Pincket*, 765 So. 2d at 288. On the other hand, if the vacancy resulting from Judge Ackerman's resignation is to be filled by constructive election, there will be a vacancy on the Escambia County Court for over half a year.[1] Forcing the county court to operate for an extended period of time with a significant reduction in judicial resources would be

[1] If Judge Ackerman resumes his judicial duties when the new term begins in January the vacancy will last over seven months. However, Judge Ackerman has expressed his intention to wait until February to resume his judicial duties.

contrary to the public policy, embodied in article V, that the people should not be forced to endure extended vacancies on their courts.

It has long been acknowledged that the gubernatorial appointment power serves the crucial purpose of ensuring that vacancies in office do not disrupt the effective functioning of government. Under the circumstances of this case, giving effect to the plain meaning of article V, section 11—that the Governor shall fill judicial vacancies whenever they occur—would put the appointment process to its intended purpose of avoiding "unreasonable" vacancies and minimizing "the time that vacancies exist." *Judicial Vacancies*, 600 So. 2d at 463.

Conversely, an interpretation of article V, section 11 validating Judge Ackerman's constructive election under the facts of this case would result in perverse incentives to judges that directly contravene these policy goals and would risk serious disruption of the orderly administration of justice in Escambia County and elsewhere. The Justices should avoid such a construction because it would encourage judges to burden the court system by creating short-term actual judicial vacancies, a result that is repugnant to the well-recognized policy that "[v]acancies in office are to be avoided whenever possible." *Id.* at 462.

The Justices have voiced their confidence "that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." *Id.* In fact,

the specific purpose for the 1996 amendment to article V, section 11(b), which extended the length of interim appointments, was to avoid the problem of short-term actual vacancies that resulted from the fact that "many persons [we]re unwilling to sacrifice successful legal practices for the uncertainty that they could face an election challenge immediately after taking office." *See* Op. Att'y Gen. Fla., 2000–41, n.9 (2000) (quoting Recommendation 8 of the Final Report of the Florida Article V Task Force (December 1995)); *see also Judicial Nominating Comm'n, Ninth Cir. v. Graham*, 424 So. 2d 10, 12 (Fla. 1982) (suggesting an amendment to the constitution, ultimately approved by the voters in 1996, to address the problem of short-term actual vacancies occurring as a result of seats becoming open in election years); *Pincket*, 765 So. 2d at 288–89 ("[T]he suggestions recognized by the *Graham* court were incorporated into article V, section 11(b) by the people.").

Validating Judge Ackerman's constructive election would accomplish precisely the opposite. It would allow judges to create actual vacancies that disrupt the court system and incentivize judges to create these vacancies with insufficient notice to the courts and the Bar.

Practitioners in Florida rarely challenge sitting judges. The vast majority of contested judicial elections involve open seats. In light of this established deference for incumbent judges, judges seeking to resign under circumstances

similar to Judge Ackerman would be tempted to wait until the close of the qualifying period to avoid dramatically increasing the risk of attracting a challenger. This would run directly contrary to the Justices' declaration that judges should time their resignations in a way "that permits the process to proceed in an orderly manner and keep the position filled." *Judicial Vacancies*, 600 So. 2d at 462. In fact, the timing of such resignations would likely be made with the specific intent to prevent the court from "keep[ing] the position filled." *Id.* Otherwise, the incumbent could not simply resume his duties following "reelection."

In short, the election process prescribed in article V was never intended to be a mechanism that would allow for incumbent judges to take extended leaves of absence at the expense of the needs of the judicial system. The election process was intended to give the people of Florida the ability to fully and fairly participate in the election of public officials. The Justices should construe article V, section 11 in a manner that acknowledges this reality, along with the well-recognized policy, embodied in that section, disfavoring unreasonable and extended vacancies. The Governor's obligation to appoint county and circuit judges on an interim basis exists for the specific purpose of addressing circumstances like these.

II. The vacancy should be filled by appointment because there is no conflict between the Governor's duty to make interim appointments in article V, section 11, and the paramount public policy favoring elections.

In previous advisory opinions this Court has carefully balanced the interest in avoiding judicial vacancies against another interest—the people's right to elect their trial judges. In this case, however, there is no conflict between the appointment power and this preference for elections. Allowing the vacancy to be filled by constructive election would give no "effect to the clear will of the voters," because there will be no voters. By operation of law, no name will appear on any ballot. Judge Ackerman will be deemed elected without a single vote cast on his behalf. § 105.051(1)(a), Fla. Stat.

In 1998, the Florida Constitution was amended to provide voters with the opportunity to choose whether to maintain a system of non-partisan elections of trial judges or switch to a system of merit selection and retention. Article V now provides that the "election of county [and circuit] court judges shall be preserved . . . unless a majority of those voting in the jurisdiction of that county approves a local option to select county judges by merit selection and retention rather than by election." Art. V, § 10, Fla. Const. The voters chose the former. *See Appointment or Election [2002]*, 824 So. 2d at 135.

In 2002, this Court observed that "the election section and the vacancy section" of article V "appear to be in conflict." *Id*. Whereas the election section states that "the election of county [and circuit] judges shall be preserved," article V, section 10(b), "the vacancy section provides that the 'governor shall fill each

vacancy on a circuit court or on a county court,'" article V, section 11(b). *Id*. This Court concluded that the "conflict must be resolved by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election." *Id.* at 136. Consequently, once the "election process begins" the judicial position is to be filled by election. *Id.*

In *Appointment or Election [2002]*, the vacancy occurred *after* the qualification period terminated and multiple candidates had qualified to run. *Id.* at 134, 136. In *Advisory Opinion to Governor re Sheriff and Judicial Vacancies Due To Resignations*, 928 So. 2d 1218 (Fla. 2006) (hereinafter "*Sheriff and Judicial Vacancies*"), this Court addressed the conflict under a different set of facts. Because there the vacancy occurred *before* the qualifying period commenced, this Court concluded that the vacancy should be filled by appointment, because "the election process ha[d] not yet begun." *Id.* at 1220.

Most recently, this Court contemplated whether a vacancy that occurred *during* the qualifying period should be filled by appointment or election. *Advisory Op. to Governor re Appointment or Election of Judges*, 983 So. 2d 526 (Fla. 2008) (hereinafter "*Appointment or Election [2008]*"). At the time the advisory opinion was sought, multiple candidates had qualified, and all had taken affirmative steps to qualify prior to the time the incumbent judge's involuntary retirement created the vacancy. *Id.* at 527, 529 n.3. This Court determined that the vacancy should

be filled by election, recognizing "the statutory qualifying period as the start of the election process." *Id.* at 529–30 (quoting *Sheriff and Judicial Vacancies*, 928 So. 2d at 1221).

Thus in a number of factual scenarios, this Court has resolved the conflict between the interest in giving effect "to the clear will of the voters," embodied in section 10, and the policy of alleviating judicial vacancies with the gubernatorial appointment power, embodied section 11. When the vacancy occurred *before* the start of the qualifying period, the appointment process struck the correct balance between the competing provisions, even though a number of potential candidates had stated their intentions to run and one had taken steps to qualify. *Sheriff and Judicial Vacancies*, 928 So. 2d at 1220. When the vacancy occurred *during* the qualifying period, *Appointment or Election [2008]*, 983 So. 2d at 529–30, and *after* the qualifying period in which multiple candidates had qualified, *Appointment or Election [2002]*, 824 So. 2d at 134, 136, the conflict was resolved in favor of election.

In contrast to previous cases, the facts presently before the Court do not present any conflict to be resolved. No tension exists between the appointment power and the policy favoring elections, because no actual election is set to occur. In a constructive election, Judge Ackerman will be deemed elected by operation of law without any participation by the voters. § 105.051(1)(a), Fla. Stat. Thus there

is no risk that an appointment would subvert the "clear will of the voters" when a sitting judge resigns after a qualifying period in which no one else has qualified.

As discussed earlier, sitting judges frequently qualify unopposed, resulting in uncontested elections. In other words, contested elections to compete for the seat of a sitting judge are rare. Here, however, by waiting until after the close of the qualifying period to resign, Judge Ackerman has created something even rarer: an *open, uncontested* seat. This stands in contrast to the scenarios addressed in previous cases addressing the election-versus-appointment question, which contemplated *contested* elections. *See Appointment or Election [2008]*, 983 So. 2d at 527, 529 n.3; *Appointment or Election [2002]*, 824 So. 2d at 134, 136.

In the seminal opinion regarding the balance between "the election section and the vacancy section" of article V, the Governor's appointment power gave way to the "clear will of the voters that circuit and county judges be selected by election" in circumstances where the voters' will would be given expression in an imminent, *contested* election that was already underway. *Appointment or Election [2002]*, 824 So. 2d at 136. The Justices of this Court noted that by the time the Governor would have made an appointment it was possible that "one of the candidates w[ould] have received a majority of votes in the judicial election." *Id.* As such, an appointment would have rendered an election contest "a nullity." *Id.*

By contrast, a gubernatorial appointment under the circumstances of this case does not carry the risk of nullifying the will of the voters. Although a nominal "election" is set to occur, it does not involve any actual voting. It is the "election process" that takes precedence over the Governor's appointment power. *Appointment or Election [2008]*, 983 So. 2d at 528. Here, the election process began and essentially ended *before* the vacancy occurred. No one challenged the incumbent, whose resignation set in motion a statutory process devoid of any voter participation.

While the Justices' opinion in *Appointment or Election [2008]* establishes the commencement of the qualifying period as "the start of the election process," 983 So. 2d at 529–30, the opinion does not address whether that process may end prior to an election. Intuitively, this must be the case. For example, the election process must end at the close of the qualifying period if no candidate qualifies for election of an open seat.

The Justices should similarly conclude that the election process ends where, as here, an unchallenged incumbent judge resigns after the close of the qualifying period. In such circumstances, an interim appointment would not disrupt an actual election such as those contemplated in earlier cases in which an appointment could nullify the "majority of votes" cast in favor of "one of multiple candidates." *Appointment or Election [2002]*, 824 So. 2d at 136. In contrast with circumstances

presented in these earlier cases, an appointment here cannot nullify the "clear will of the voters." *Id.*

A gubernatorial appointment to replace the seat vacated by Judge Ackerman will not deprive the people of Escambia County of their chance to choose a county judge because, as it currently stands, they do not have that ability. What it will do is result in a protracted vacancy, depriving the people of Escambia County of the efficient administration of justice by placing additional strain on the already limited judicial resources in the county. Because there is no conflict between the competing policy interests embodied in article V, the plain language of section 11 should prevail, allowing the Governor to fill the vacant judicial seat by appointment. Art. V, § 11(a), Fla. Const. (providing that "[w]henever a vacancy occurs . . . the governor shall fill the vacancy" by appointment).

Filling the vacancy by constructive election would preserve neither the "election of county court judges" nor the "select[ion] of county judges by merit selection and retention," article V, section 10(b)(2)—the people's choice that this Court has been eager to safeguard against the Governor's appointment power. Here, they have no choice. They will not be asked whether to retain the incumbent and will not cast a vote for any candidate. When they opted to select their judges by election, it is safe to assume the voters did not intend to endure a protracted vacancy to preserve an illusory "election" in which they cast no vote.

Accordingly, the Justices should conclude that the Governor has an obligation to exercise his interim appointment power under the narrow circumstances in which a vacancy occurs after the termination of a qualifying period in which only the incumbent judge qualifies.

This construction of article V is bolstered by the fact that applying a different rule would yield untenable results when a vacancy occurring after an uncontested qualifying period is caused by events other than resignation. *See* Art. X, § 3 (providing a vacancy shall occur upon, *inter alia*, death, unexplained absence for sixty consecutive days, and failure to qualify within thirty days from commencement of the term). If a death, rather than a resignation, had occurred on May 24, 2010, the vacancy would be filled by appointment in September at the latest.[2] On the other hand, filling the vacancy by a nominal "election"—because the death occurred after the start of the qualifying period—would unnecessarily prolong the vacancy and produce an absurd result: the vacancy could not be filled until January 2011, the start of the next term to which the deceased individual would have been constructively elected.

Were the vacancy to occur due to an unexplained absence of more than sixty days, the result would be similarly absurd and the duration would be even longer.

[2] The appointment process' maximum length is 120 days; the JNC has up to sixty days to nominate candidates for appointment by the Governor, who then has up to sixty days to make an appointment. Art. V, § 11(c), Fla. Const.

If Judge Ackerman had disappeared after qualifying unopposed on April 28, 2010, a vacancy would occur in late June and would be filled by appointment in October at the latest. However, if the constructive election process was given precedence, a new vacancy would not occur until the new term began in January and the absentee judge failed to qualify thirty days later. Thus after waiting over eight months for the return of an absentee judge (who under normal circumstances would already have been replaced by gubernatorial appointment) the citizens of Escambia County would have to wait up to 120 more days for the appointment process to be completed, resulting in a potential vacancy of over a year.

Here, it is not entirely clear if or when the retired Judge Ackerman will return to the bench. Subsequent to tendering his letter of resignation, he verbally expressed an intention to resume his former duties in February 2011. However, this does not alter the fact that *an actual vacancy presently exists*.

Judge Ackerman has retired, vacating his seat, and he cannot return to his former post unless he is elected or appointed. If the vacancy is filled by constructive "election," and the former judge ultimately decides not to interrupt his retirement in February, the citizens of Escambia County will be without a county judge until the appointment process is completed in late Spring 2011—a vacancy of approximately one year. Notwithstanding Judge Ackerman's oral promise to return sometime next year, the Justices should treat vacancies caused by

resignation as no different from those caused by other circumstances, such as death or sixty-day absence, following the unopposed qualification of an incumbent judge. In every such case, the retirement of a judge who has qualified unopposed should be filled by gubernatorial appointment because no election with actual voter participation is at stake.

Notably, this Court has contemplated "other [hypothetical] scenarios" in which exercise of the Governor's appointment authority "after candidates have qualified" would nullify an election, such as "where an incumbent judge runs for reelection but the incumbent judge's opponent wins the election, and then the incumbent judge resigns, dies, or is removed from office prior [to] the commencement of the elected term of office." *Appointment or Election [2002]*, 824 So. 2d at 136 n.8. By contrast, although a gubernatorial appointment in this case would occur after the qualifying period, it would not nullify any will of the voters, because there is no "opponent" and the people cannot vote.

Only in the most hyper-technical sense is Judge Ackerman "runn[ing] for reelection." *Id.* He is currently retired, having done so after the close of the qualifying period. As such, denying the Governor the right to exercise his appointment power would cause a protracted depletion of judicial resources without any countervailing interest in giving effect "to the clear will of the voters." *Appointment or Election [2008]*, 983 So. 2d at 528.

The Constitution and statutes provide for an orderly appointment process designed to fill what are often *unexpected* vacancies. To the extent vacancies can be predicted, as in the case of a retirement, judges are encouraged to time their resignations in a way that helps to "keep the position[s] filled." *Judicial Vacancies*, 600 So. 2d at 462. Allowing a vacancy to be filled by the constructive election of an unopposed judge who resigns after the qualifying period would create an incentive for judges to do the opposite.

In Florida, opposition to incumbent judges is rare and the qualification of unopposed judges is frequent. In cases such as this one, requiring that a nominal election supplant the gubernatorial appointment power would place this Court's imprimatur on what could in the future become a frequent, intentional practice of timing resignations with the purpose of causing vacancies. This result is unacceptable because it is contrary to both the people's will that judges be selected by election and the well-recognized policy disfavoring unreasonable and extended vacancies.

CONCLUSION

For the foregoing reasons, Governor Charlie Crist respectfully submits that the Justices should advise that the vacancy caused by Judge David B. Ackerman's resignation should be filled by gubernatorial appointment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to: C.B. Upton, General Counsel, Department of State, R.A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250; Honorable Terry D. Terrell, Chief Judge, First Judicial Circuit, M.C. Blanchard Judicial Building, 190 Governmental Center, 5th Floor, Pensacola, Florida 32502; Honorable David B. Ackerman, P.O. Box 30216, Pensacola, Florida 32503; Roy Kinsey, Chair, First Judicial Circuit Nominating Commission, 438 East Government Street, Pensacola, Florida 32502, by U.S. Mail this 30th day of June, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition is typed in Times New Roman 14 point font and complies with Florida Rule of Appellate Procedure 9.210(a).

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