IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO
THE GOVERNOR,

Case No. SC10-1186

RE: JUDICIAL VACANCY
DUE TO RESIGNATION

BRIEF OF INTERESTED PARTIES, MICHELLE A. INERE, JOHN L. MILLER, AND CLARA E. SMITH

CHARLES F. BEALL, JR.
Florida Bar Number 066494
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street
9th Floor, SunTrust Tower
Post Office Box 13290
Pensacola, Florida 32591-3290
Telephone: (850) 434-3541
Telefax: (850) 435-7899

Attorneys for Michelle A. Inere, John L. Miller, and Clara E. Smith

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INTRODUCTION

This brief is submitted on behalf of Michelle A. Inere, John L. Miller, and Clara E. Smith (the "Interested Parties") pursuant to the Court's invitation in its June 22, 2010, Order. The Interested Parties have all been nominated by the First Circuit Judicial Nominating Commission for the office of county court judge in Escambia County previously held by Judge David Ackerman.

The issue presented by the Governor's request for an advisory opinion is whether the unconditional resignation of a county court judge from his office after his unopposed reelection creates a vacancy to be filled by the Governor under Article V, section 11(b), of the Florida Constitution, or whether the resigning judge can return to office at his pleasure at the beginning of a new term of office. The undisputed facts here compel the conclusion that the vacancy should be filled by appointment.

STATEMENT OF THE CASE AND OF THE FACTS

Judge David Ackerman, one of five county court judges in Escambia County, was serving the final year of a six-year term that expired on January 3, 2011. *Governor's Request for an Advisory Opinion, dated June 21, 2010 ("Governor's Request"), at p. 1.* The position was scheduled to be filled by an election in the fall of 2010. *Id.*

The qualifying period for Judge Ackerman's position ran from 12 p.m., April 26, 2010, to 12 p.m., April 30, 2010. *App. Tab 1.*[1] Judge Ackerman submitted his qualifying papers to the Supervisor of Elections on April 28. *App. Tab 2.* No other candidates submitted qualifying papers for the position. Thus, on April 30, 2010, after the qualifying period ended, the Supervisor of Elections wrote Judge Ackerman a letter stating, "Congratulations on qualifying for another term as Escambia County Judge without opposition. Your new six-year term will begin on January 4, 2011, and your name will not appear on the ballot in the fall." *App. Tab* 3.

On May 24, 2010—more than three weeks after his constructive reelection—Judge Ackerman tendered his resignation to Governor Crist. The resignation letter stated in full:

> It is with great reservation and difficulty that I write this letter. However, due to personal considerations I must now tender my resignation for the duration of the term that I am currently serving, effective close of business on May 28, 2010. I look forward to returning to my public service at the earliest possible time.

App. Tab 4. Governor Crist accepted Judge Ackerman's resignation on May 28, 2010. *Governor's Request at p. 1.*

[1] A request for an advisory opinion by the Governor does not include a formal record. However, for the Court's convenience, the Interested Parties have attached documents directly relevant to the issue in an appendix. The documents included in the appendix are either public records under Florida law or reprints of newspaper articles.

According to published reports, Judge Ackerman resigned for the express purpose of collecting a lump sum retirement payment of more than $1.2 million. Kris Wernowsky, *Ackerman Payday: $1.2M*, Pensacola News Journal, May 27, 2010, attached as App. Tab 5. Despite resigning, Judge Ackerman informed a newspaper reporter that he intended to return to the bench "next year" as a result of his *de facto* reelection. Kris Wernowsky, *Judge Signs Out So He Can Cash In*, Pensacola News Journal, May 26, 2010, at A1, attached as App. Tab 6. However, if he returned to the bench before an unspecified date in 2011, he would be required to return the lump sum payment. *Id.* As noted in the Governor's Request, even though his new term would have begun on January 4, 2010, Judge Ackerman has indicated that he "does not intend to resume his judicial duties until February 1, 2011." *Governor's Request at p. 1; App. Tab 6.*

Following Judge Ackerman's resignation, the First Circuit Judicial Nominating Commission ("JNC") convened to provide the Governor with a list of nominees to fill the vacancy caused by Judge Ackerman's resignation.[2] Because the Governor believed "it is not entirely clear as to whether the vacancy created by Judge Ackerman's resignation should be filled by appointment or the constructive election that would result from Judge Ackerman's having qualified unopposed for

[2] The JNC received applications from 12 applicants, conducted interviews on June 29, 2010, and announced its five nominees later that evening, including the three Interested Parties.

re-election," the Governor requested this advisory opinion from this Court. *Governor's Request for an Advisory Opinion, dated June 21, 2010 ("Governor's Request"), at p. 1*.

SUMMARY OF ARGUMENT

Under the facts presented here, there is no conflict between the constitutional provisions for appointing and electing judges. It is well established that, when a public official resigns, he resigns from the office, not from a term of office. By tendering an unconditional resignation after his reelection, Judge Ackerman relinquished any further right to the office, rendered his earlier reelection a nullity, and created a vacancy in the position. As a result, the Governor has no choice but to fill the vacancy by appointment.

ARGUMENT

I. By resigning after his reelection, Judge Ackerman created a vacancy that the Governor is required to fill by appointment

The Governor based his request for an advisory opinion on a perceived conflict between Article V, § 11(b) of the Florida Constitution—which describes the procedures for the Governor to fill a vacancy on a county court by appointment—and Article V, § 10(b)—which states that "[t]he election of county court judges shall be preserved." Respectfully, under the facts presented here, no conflict exists.

As in most election versus appointment cases, the chronology is dispositive. It is undisputed that (1) Judge Ackerman was reelected by default on April 30, 2010, and (2) nearly a month *after* his reelection, he resigned. Thus, at the time Judge Ackerman tendered his resignation, the election was concluded.

By resigning without preconditions after his reelection, Judge Ackerman relinquished his office, along with any right to resume his position in 2011, when his new term was scheduled to begin. As the United States District Court for the Northern District of Georgia has observed:

> [W]e do not believe that the law contemplates or requires serial or multiple resignations for an incumbent office-holder who has been reelected to resign his position….Neither the statute nor common sense requires that an office holder who has been elected to, but not yet entered upon, a new term submit two letters of resignation. *One resigns from an office, not a term of office.*

Duncan v. Poythress, 515 F.Supp. 327, 340 (N.D. Ga. 1981) (emphasis added). This Court has also noted that a judge who resigned "effectively relinquished his public office." *Smith v. Brantley*, 400 So. 2d 443, 451 (Fla. 1981); *see also Diaz v. City of Pahokee, Fla.*, No. 09-80305-CIV, 2009 WL 1124979, at *2 (S.D. Fla. Apr. 27, 2009) (observing that "A resignation is '[t]he act of or an instance of surrendering or relinquishing an office, right, or claim. [It is a] formal notification of relinquishing an office or position.'") (quoting Black's Law Dictionary 1311 (7th ed. 1999)). Indeed, the Interested Parties are not aware of any law (Florida or

otherwise) that would permit a public official to resign just for a single term of office.

Interpreting Judge Ackerman's resignation as anything other than a permanent relinquishment of his office would lead to an absurd result. If incumbent officeholders who were reelected without opposition could resign for the remainder of their current terms, but reassume their offices at the start of the new term, the officeholders could, in effect, unilaterally grant themselves an extended leave of absence without recourse by the taxpayers—which is precisely what Judge Ackerman has attempted to do here. That would be true not only for judges, but also for any other publicly elected officials. And while the Governor could conceivably fill some positions during the interim by appointment, the appointees would be forced to step aside at the start of the new term so that the incumbents—the same ones who abandoned the positions—could reassume the offices.

The nature of incumbency only magnifies the potential problem. According to Florida Division of Elections statistics, in the 2008 elections, more than 60 percent of incumbent officeholders statewide were reelected without opposition. Judges faired even better with 246 of the 281 circuit judges up for reelection being returned to office unopposed. *App. Tab 7.* A result that would permit these

unopposed incumbents to "resign" after their reelections yet resume their positions in the new year would be untenable.

In short, by resigning from the *office* of county court judge in May, Judge Ackerman, rendered his reelection 24 days earlier moot. As a result, the vacancy must be filled by appointment under the plain language of Article V, § 11(b) of the Florida Constitution.

II. Filling the judgeship by appointment is entirely consistent with this Court's prior advisory opinions

Even if the Court determines that Judge Ackerman could resign just the remainder of his term of office—thereby creating the potential conflict noted by the Governor in his letter—the result would be the same. Under the facts presented here, appointment, rather than election, is consistent not only with this Court's prior advisory opinions, but also better fulfills the public policy concerns raised by the Court in those opinions.

First, the result advocated by the Interested Parties is entirely consistent with this Court's prior precedent. This Court has held that, when a judicial vacancy occurs *before* the election process, the position should be filled by appointment. *See Advisory Opinion to Governor re Sheriff and Judicial Vacancies Due to Resignation*, 928 So. 2d 1218, 1220 (Fla. 2006). The Court has further held that, when a judicial vacancy occurs *during* the election process, the position should be filled by election. *See Advisory Opinion to Governor re Appointment or Election of*

Judges, 983 So. 2d 526, 528-30 (Fla. 2008); *Advisory Opinion to Governor re Appointment or Election of Judges*, 824 So. 2d 132, 136 (Fla. 2002). Here, unlike any of the prior cases, the vacancy occurred *after* the election had concluded and *after* the reelected incumbent had resigned.

Second, appointing a judge to fill the vacancy will best meet the public policy concerns underlying this Court's prior advisory opinions. As this Court has observed in addressing the conflicting provisions in the Constitution between appointing and electing judges, "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." *Advisory Opinion*, 824 So. 2d at 136. Ironically, under the facts presented here, appointment will best fulfill this policy.

Given Judge Ackerman's *de facto* reelection on April 30, by law, his name will not appear on the ballot and no election for his position will be held in 2010. *See* § 105.051(1)(a), Fla. Stat. (2010). Because he was elected for a six-year term, the next time Judge Ackerman's position will be up for election is 2016. *See* Art. V, § 10, Fla. Const. In contrast, if the Governor appoints a replacement to fill the vacancy, the position will be up for election in 2012, and any interested, qualified candidates—including Judge Ackerman—would have the option of entering the election. Art. V, § 11(b), Fla. Const. So, appointment, in this case, would place the position up for election sooner, thereby giving greater effect to the "clear will

of the voters." *Advisory Opinion*, 824 So. 2d at 136. If Judge Ackerman is permitted to reassume in 2011 the office he previously resigned in 2010, the position would be filled not by the "will of the voters," but by the will of the incumbent.

CONCLUSION

Because Judge Ackerman resigned from his office as a county court judge after he had been reelected, the Interested Parties respectfully request that the Court advise the Governor to fill the office under the appointment provisions in Article V, § 11(b) of the Florida Constitution.

Respectfully submitted:

CHARLES F. BEALL, JR.
Florida Bar Number 066494
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street
9th Floor, SunTrust Tower
Post Office Box 13290
Pensacola, Florida 32591-3290
Telephone: (850) 434-3541
Telefax: (850) 435-7899

Attorneys for Michelle A. Inere, John L. Miller, and Clara E. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Honorable Charles Crist, Governor, THE CAPITOL, Tallahassee, FL 32399, by hand delivery this 30th day of June, 2010.

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CHARLES F. BEALL, JR.
Florida Bar Number 066494
MOORE, HILL & WESTMORELAND, P.A.
220 West Garden Street
9th Floor, SunTrust Tower
Post Office Box 13290
Pensacola, Florida 32591-3290
Telephone: (850) 434-3541
Telefax: (850) 435-7899

Attorneys for Michelle A. Inere, John L. Miller, and Clara E. Smith

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief was prepared using Times New Roman 14-point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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Charles F. Beall, Jr.