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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1122

LEAGUE OF WOMEN VOTERS FLORIDA, COMMON CAUSE, PAMELA GOODMAN, DEIRDRE MACNAB, and LIZA MCCLENAGHAN,

Petitioners,

v.

HON. RICK SCOTT, 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

Petitioners—two political advocacy organizations and three of their members—have requested that this Court issue an extraordinary writ of quo warranto to prospectively prohibit the Governor from exercising his appointment power to fill judicial vacancies that may exist near the end of his term of office. Conspicuously for a case seeking quo warranto, the Petition does not allege that the Governor has *taken any action* beyond his legal authority. Petitioners instead ask this Court to presume that a *future* dispute will arise over the Governor's exercise of his appointment power. On the merits, the Petition both misconstrues the constitutional provisions addressing the duration of gubernatorial and judicial terms of office and ignores this Court's precedents recognizing a governor's continuing authority to fill vacancies in judicial office until the governor's successor takes office. Lacking both factual and legal support, the Petition should be dismissed for lack of jurisdiction or denied on the merits.

First, as a threshold matter, the Petition should be dismissed because it fails to establish any basis for this Court to exercise its discretionary quo warranto jurisdiction. Although nominally a petition for writ of quo warranto, the Petition does not allege that the Governor has exercised his appointment authority improperly. Instead, Petitioners ask this Court: 1) to presume that a future dispute

will arise over the Governor's exercise of his appointment power; 2) to resolve that future dispute now on the basis of the Petition's presumed facts; and 3) to prospectively prohibit the Governor from exercising his appointment power. In effect, Petitioners seek either an unauthorized advisory opinion or a judgment granting prospective declaratory and injunctive relief. Neither of these remedies is available under quo warranto. Petitioners should not be permitted to circumvent this Court's jurisdictional limits by repackaging a declaratory judgment complaint or request for an unauthorized advisory opinion as an extraordinary writ petition.

The Petition should also be dismissed on jurisdictional grounds because its allegations of a pending "constitutional crisis" depend upon a series of factual assumptions that may *never* ripen into a justiciable controversy. The record in this case fails to establish any facts supporting the Petition's presumptions regarding the dates on which any future vacancies may occur or the time at which the Governor's successor will enter upon the duties of the office. More than half of the justices to depart this Court over the last two decades did so before their final day of constitutional eligibility. App. at 42-51, 64. Petitioners candidly concede that they desire the answer to a general "constitutional question" that does not turn on "any specific facts." Pet. at 5. The extraordinary writ of quo warranto cannot and should not be used to address hypothetical scenarios.

As a final jurisdictional ground supporting dismissal, the doctrine of separation of powers counsels strongly against the Petitioners' invitation for the judiciary to announce general legal principles regarding the constitutional authority of a co-equal branch of government that are untethered to any specific facts or current legal controversy. The Petition's request that this Court anticipate a future justiciable controversy and preemptively prohibit a coordinate branch from exercising its constitutional authority shows far too little deference to longstanding principles of inter-branch comity and mutual respect for the defined roles of the executive and judicial branches of government.

Second, even if Petitioners could overcome these jurisdictional deficiencies, the Petition should still be denied on the merits because the arguments presented fail as a matter of law. This Court has held, in a case involving end-of-term judicial appointments, that a governor continues in office with the full authority to fill judicial vacancies through the exercise of the appointment power until his or her successor qualifies by taking the oath of office. *See Tappy v. State ex rel. Byington*, 82 So. 2d 161, 166 (Fla. 1955) (upholding judicial appointment made by outgoing Governor Johns to fill a county court vacancy that became effective on the same day incoming Governor Collins took office). Petitioners' novel arguments regarding the duration of judicial and gubernatorial terms of office are

contrary to the plain language of the Florida Constitution, this Court's precedent, and longstanding historical practice.

As to gubernatorial terms of office, the Florida Constitution establishes "a term of four years beginning on the first Tuesday after the first Monday in January" following a statewide general election. Art. IV, § 5(a), Fla. Const. The Florida Constitution also identifies the event marking the end of a gubernatorial term by providing for a governor to hold over and "continue in office until a successor qualifies" by taking the oath of office. Art. II, § 5(b), Fla. Const. This Court, in reliance on the plain language of the Florida Constitution, has upheld the validity of an end-of-term judicial appointment based upon an outgoing governor's continuing authority to exercise the appointment power until the governor's successor takes office following the administration of the oath of office. *Tappy*, 82 So. 2d at 166.

Incredibly, Petitioners not only ignore the explicit constitutional language providing for a governor to continue in office until the qualification of a successor, they argue to this Court that there is *no constitutional basis* to identify any particular event as marking the beginning of a new governor's term. Pet. at 17. Petitioners also fail to acknowledge—much less distinguish—this Court's opinion in *Tappy*. Rather than acknowledging the plain text of the Florida Constitution and

this Court's precedent, the Petition relies on the conclusions of opinion columns in newspapers, speculates about the intent of voters regarding a proposed constitutional amendment that did not pass, and argues that general considerations of public policy should dictate a different result. Pet. at 17-21. Petitioners' policy preferences are not the law of this state. On the merits, this Court should determine that a governor's term of office continues until his or her successor qualifies, as required by the plain text of the Florida Constitution and this Court's longstanding precedent.

As to judicial terms of office, the Florida Constitution explicitly provides that a justice or judge who is retained in office by the voters is retained "for a term of six years." Art. V, § 10(a), Fla. Const. The six-year term "shall commence on the first Tuesday after the first Monday in January following the general election." *Id*. Upon the expiration of the six-year term of a justice or judge who is ineligible for retention, the Constitution provides that a vacancy in judicial office "shall exist." *Id.*; *see also Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093 (Fla. 2006) ("*Mandatory Retirement*") (concluding that vacancy exists upon the expiration of the term of the judge or justice rather than upon the failure of a judge to qualify for retention). The six-year term of a justice or judge commencing on the first *Tuesday* after the

first Monday in January therefore expires at the end of the first *Monday* in January, six years later. *See*, *e.g.*, App. at 1-3, 5-10, 13-14, 16-17, 19-20 (current and former commissions of Justices Pariente, Lewis, and Quince reflecting terms concluding on the first Monday in January 2019, 2013, and 2007; and of Justices Canady, Polston, and Labarga reflecting terms concluding on the first Monday in January 2023 and 2017).

Petitioners argue that the six-year term of office for a justice or appellate judge specified in Article V, section 10(a), actually extends for a period of *six years and one day*—that a term commencing on Tuesday, January 8, 2013, runs through midnight at the end of the day on Tuesday, January 8, 2019—the beginning of the next governor's *second* day in office. Pet. at 16. This counter-textual argument is based primarily on unrelated cases addressing procedural deadlines such as statutes of limitations for filing negligence lawsuits. The Petition also cites the language of an entirely separate constitutional provision addressing the conclusion of a judge's initial term in office following appointment, rather than the duration of a six-year term in judicial office following retention by the voters.

None of the arguments advanced by Petitioners in support of a six-years-and-one-day interpretation of the length of a judicial term provides a basis to

disregard the plain language of the Florida Constitution, the commissions issued to each justice and appellate judge retained in office in 2012, or the longstanding historical practice of justices who have departed this Court upon the conclusion of their final term on the first Monday in January—not the first Tuesday in January. *See, e.g.*, *Spector v. Glisson*, 305 So. 2d 777, 780 (Fla. 1974) (reflecting resignation by Justice Ervin as of midnight at the end of the first Monday in January 1975 to allow successor to fill vacancy in office on the following Tuesday); *see also* App. at 41, 44-45 *and* Justices of the Florida Supreme Court, *Former Justice Harry Lee Anstead*, *available at* http://www.floridasupremecourt.org/justices/retired/anstead.shtml (records reflecting that Justices Overton, Shaw, and Anstead all concluded their service on this Court on the first Monday in January). If this Court reaches the merits of the Petition, it should determine that a vacancy in judicial office exists upon the expiration of the term of a justice or judge who is ineligible for retention, and that the six-year term of a justice or judge that commenced on Tuesday, January 8, 2013, and who is ineligible for further retention, will expire no later than at the end of Monday, January 7, 2019.

Finally, Florida's governors have a long history of cooperation regarding end-of-term vacancies on this Court. On December 11, 1998, Governor Chiles

appointed then-Judge Quince to fill the vacancy on the Florida Supreme Court that would exist on January 5, 1999, upon the expiration of the final term in office of Justice Overton. App. at 32. Justice Quince was commissioned by Governor MacKay on December 30, 1998. App. at 8. Governor Bush, who assumed office the same day as Justice Quince, did not contest the appointment and signed the commission issued by Governor MacKay. App. at 8. Earlier disputes regarding end-of-term vacancies on this Court following the terms of Justices Ehrlich, Boyd, and Adkins were likewise resolved without judicial intervention. This Court should decline Petitioners' explicit and improper invitation to "clarify for the electorate . . . what is at stake in the 2018 election," by addressing the mere *possibility* of a future justiciable controversy through an extraordinary writ of quo warranto.

Both because there is no proper basis for the exercise of this Court's discretionary jurisdiction, and because there is no legal merit to the claims asserted, this Court should dismiss or deny the Petition for Writ of Quo Warranto.

ARGUMENT

I. The Petition should be dismissed for lack of jurisdiction.

As a threshold matter, the Petition should be dismissed because it fails to establish any basis for this Court to exercise its discretionary quo warranto

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). This Court should dismiss the Petition on any of three separate jurisdictional grounds.

A. The Petition should be dismissed because it does not seek relief available under this Court's quo warranto jurisdiction.

First, and most significantly, the Petition should be dismissed because it does not seek relief within this Court's quo warranto jurisdiction. The Florida Constitution authorizes this Court to issue writs of quo warranto to state officers. Art. V, § 3(b)(8), Fla. Const. Meaning "by what authority," the writ of quo warranto has historically been used "to determine whether a state officer or agency has improperly exercised a power or right derived from the State." *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 607 (Fla. 2008).

Consistent with its historical application, this Court has used the writ of quo warranto to test the legality of an action "*after* a public official has acted." *Id.* (emphasis in original). Quo warranto is not appropriate to test an anticipated abuse of discretion. Alto Adams & George John Miller, *Origins and Current Florida Status of Extraordinary Writs*, 4 Fla. L. Rev., 421, 454 (1951) ("[I]n quo warranto, as in prohibition, the mere anticipation of abuse of discretion does not authorize

issuance of the writ.") (*citing White v. State ex rel. Johnson*, 37 So. 2d 580, 581 (Fla. 1948)).

Although this Court has the authority to issue writs of quo warranto, Petitioners do not allege that the Governor *has exercised* his appointment power improperly. Instead, the Petition asks this Court: 1) to presume that a future dispute will arise over the Governor's exercise of his appointment power; and 2) to resolve that future dispute now on the basis of the Petition's presumed facts; and 3) to prospectively prohibit the Governor from exercising his appointment power. In effect, Petitioners seek either an unauthorized advisory opinion or a judgment granting prospective declaratory and injunctive relief. Neither of these remedies is available under quo warranto.

No precedent cited in the Petition supports such an expansive exercise of this Court's quo warranto jurisdiction. None of the cases cited by Petitioners involved the prospective exercise of quo warranto jurisdiction in the manner urged here. *See Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (testing governor's authority to issue executive orders after executive orders issued); *Fla. House of Reps. v. Crist*, 999 So. 2d 601 (Fla. 2008) (testing governor's authority to bind State to Indian gaming compact after compact signed); *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998) (holding that the Legislature and its officers exceeded their authority

in overriding the Governor's veto); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998) (issuing the writ after the Capital Collateral Regional Counsel had filed a federal civil rights suit, concluding that it had no authority to file it); *Martinez v. Martinez*, 545 So. 2d 1338 (Fla. 1989) (testing the governor's power to call a special session of the legislature after special session proclamation issued).

Even *Lerman v. Scott*, SC16-783, 2016 WL 3127708 (Fla. June 3, 2016), a case on which Petitioners attempt to establish their jurisdiction, is readily distinguishable. In *Lerman*, the petitioner challenged the authority of the Governor and Secretary of State to determine that a vacancy in a specific county court seat caused by the resignation of an incumbent judge should be filled by gubernatorial appointment rather than election. *Id*. This Court noted that quo warranto was appropriate to address "whether a particular individual *has improperly exercised* a power or right." *Id.* at 1. (emphasis added). *Lerman* therefore involved a dispute regarding official actions that had already been taken by the Governor and Secretary of State to fill a vacancy in judicial office following a resignation. *Id*. The Petition here, in contrast, does not allege that the Governor has taken *any* official actions to improperly exercise a power or right.

Although nominally a Petition for Writ of Quo Warranto, the relief sought

by Petitioners far exceeds the scope of this Court's historical application of quo warranto. The Petition effectively requests prospective declaratory and injunctive relief from this Court by seeking a determination of the scope of the Governor's executive authority and requesting that this Court "prohibit Respondent from filling any judicial vacancies on Florida's appellate courts that occur due to terms expiring in January 2019." Pet. at 21. This Court plainly has no original jurisdiction to issue a declaratory judgment.

Just as this Court lacks jurisdiction to entertain an original action seeking declaratory and injunctive relief under the guise of quo warranto, this Court cannot issue an advisory opinion to Petitioners regarding the scope of the Governor's constitutional authority. Petitioners do not challenge any specific executive action that has been taken by the Governor, but rather seek the Court's opinion regarding the scope of the Governor's executive authority to act in the future under a hypothetical set of facts. *See* Pet. at 7 (Petitioners seek relief "before Governor Scott attempts to make the subject appointments"). Indeed, the Petition's opening sentence lays bare the fact that the Petition simply posits "a constitutional question" regarding the scope of the Governor's constitutional appointment power, rather than a justiciable controversy. Pet. at 1.

This Court's jurisdiction to issue advisory opinions is limited to specific

proceedings initiated by the Governor or Attorney General. *See* Art. IV, § 1(c), Fla. Const. (advisory opinion to governor regarding interpretation of constitutional provisions affecting governor's executive powers and duties); Art. V, § 3(b)(10), Fla. Const. (advisory opinion to attorney general regarding validity of initiative petitions). Petititioners have no standing to seek an advisory opinion from this Court regarding abstract "constitutional questions." *See, e.g.*, *Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014) (declining to answer non-justiciable questions because it "would constitute an advisory opinion, which we are not authorized to provide"); *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said Dist.*, 80 So. 2d 335, 336 (Fla. 1955) ("We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution.").

Petitioners should not be permitted to circumvent this Court's jurisdictional limits by repackaging a declaratory judgment complaint or request for an unauthorized advisory opinion as an extraordinary writ petition. The Petition should be dismissed because it does not seek relief available under this Court's quo warranto jurisdiction.

B. The Petition should be dismissed because this Court's jurisdiction has been prematurely invoked.

Second, the Petition should be dismissed on jurisdictional grounds because its allegations of a pending "constitutional crisis" depend upon a series of factual assumptions that may never ripen into a justiciable controversy. Quo warranto cannot be used to answer hypothetical scenarios. *State ex rel. Landis v. Valz,* 157 So. 651, 654 (Fla. 1934). This Court has long held that parties seeking to invoke its jurisdiction must articulate an actual controversy requiring a judicial determination of a presently held right. *State ex rel. Clark v. Klingensmith,* 163 So. 704, 705 (Fla. 1935) (holding "the information in quo warranto must tender a justiciable controversy on its face"). The Petition fails to satisfy this standard.

As one example of the Petitioners' reliance upon unproven factual assumptions, the Petition presumes—without any record support—that the justices on this Court and other appellate judges who are constitutionally ineligible to stand for retention in 2018 will choose to serve until the final moment at which their respective terms expire. Over its recent history, however, justices have routinely departed this Court before their final day of constitutional eligibility. More than half of the justices to depart this Court over the last two decades did so before their final day of constitutional eligibility. *See* App. at 42-51, 64. Only last

year, Justice Perry resigned effective December 30, 2016, when he would have been constitutionally entitled to remain in service on this Court through the conclusion of his term on January 2, 2017. *See* App. at 64. In total, four of this Court's seven justices hold seats vacated by their predecessors before the constitutional expiration of their respective terms. *See* App. at 4, 12, 15, 21. Judges on Florida's district courts of appeal also frequently depart before their final day of constitutional eligibility. *See, e.g.*, App. at 53-63.

Recognizing that vacancies in office "are to be avoided whenever possible," this Court has noted that judges "are encouraged to and do submit their resignations . . . at a time that permits the process to proceed in an orderly manner and keep the position filled." *In re Advisory Opinion to Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 797-98 (Fla. 2010) (*quoting In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992)). The Petition provides no factual basis for its assumptions regarding the future plans of *any* currently serving justice or appellate judge.

Petitioners candidly concede that they desire the answer to a general "constitutional question" that does not turn on "any specific facts."[1] Pet. at 5. The

[1] In fact, Petitioners' claim that this Court should exercise original jurisdiction based on the absence of controverted facts proves too much. Pet. at 5. The "facts"

extraordinary writ of quo warranto cannot be used to address hypothetical questions. *See Bryant v. Gray*, 70 So. 2d 581, 584 (Fla. 1954) ("The relief sought should not merely be legal advice by the courts or to give an answer to satisfy curiosity."). Where there is no controversy to be decided, the Court should deny the petition as prematurely filed. *See Topps v. State*, 865 So. 2d 1253, 1257 n. 5 (Fla. 2004) (noting extraordinary writ petitions can be denied "for a number of reasons" including "the relief sought is either premature or moot"); *see also Arbelaez v. Butterworth*, 738 So. 2d 326, 327 (Fla. 1999) (denying petitioner's all writs petition because "there is no present case in controversy").

The Petition's presumptions regarding the occurrence of future events are far too speculative to support the exercise of jurisdiction at this time. The Petition should be dismissed as prematurely filed.

C. The Petition should be dismissed based upon the doctrine of separation of powers.

Finally, the doctrine of separation of powers also counsels strongly against the relief sought by the Petition. Petitioners invite the judiciary to announce general principles regarding the constitutional authority of a co-equal branch of

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that would be necessary to resolve this case are not established and undisputed—they are presumed and hypothetical.

government that are untethered to any specific facts or legal controversy. The Petition's request that this Court anticipate a future justiciable controversy and preemptively act to prohibit a coordinate branch from exercising its constitutional authority shows far too little deference to longstanding principles of inter-branch comity and mutual respect for the defined roles of the executive and judicial branches of government. To the extent the Petition seeks relief in the absence of a justiciable controversy, the doctrine of separation of powers justifies dismissal of the Petition.

This Court has strictly applied the doctrine of separation of powers, acknowledging that Florida's Constitution "recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). This Court has explained that the doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Id.* (*citing Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)).

"The limitation on the exercise of judicial power to the decision of justiciable controversies has been attributed to judicial adherence to the doctrine

of separation of powers." *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) (citing *Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953)). The judiciary's adherence to this constitutional principle was demonstrated in *Collins v. Horten*, 111 So. 2d 746 (Fla. 1st DCA 1959). In *Collins*, the plaintiffs challenged the validity of a conservation board rule extending operation of a statute relating to the taking of oysters from natural bars. *Id.* at 748. The trial court declared the rule invalid, and the First District Court of Appeal affirmed. The First District determined, however, that the trial court had improperly answered the broader question of whether it was possible for the State to constitutionally fix the situation at hand—even though the answer would have provided the litigants final closure. *Id.* at 751. In so holding, the Court noted:

> No court in this state has the power to determine in advance of its enactment the validity or constitutionality of any act of the Legislature. Any attempt to do so would be a clear invasion by the judiciary of the legislative branch of the government. If, as was attempted to be done here, the trial court and this court could lawfully determine in advance that a hypothetical act of the Legislature is constitutional, such courts could, by the same reasoning, declare any such proposed act unconstitutional, thereby effectually preventing the exercise by the Legislature of its law making authority. Elemental principles dispel the notion that our courts have any such power.

Id; see also Montgomery v. Dep't of Health & Rehabilitative Servs., 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985) ("It is the function of a judicial tribunal to

decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.").

Just as the First District in *Collins* lacked jurisdiction to invalidate hypothetical acts by a separate branch of government, the doctrine of separation of powers prohibits this Court from determining the merits of Petitioners' hypothetical dispute over the future exercise of gubernatorial authority in the absence of a current justiciable controversy.

For any of the grounds cited above, the Petition should be dismissed for lack of jurisdiction.

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 deficiencies identified above, it should be denied on the merits. In a previous case involving end-of-term judicial appointments, this Court recognized that a governor maintains the full constitutional authority to fill judicial vacancies through the appointment power until his or her successor qualifies by taking the oath of office. *See Tappy*, 82 So. 2d at 166 (upholding appointment made by outgoing Governor Johns to fill a vacancy in judicial office that began the same day incoming Governor Collins

took office). The logic of the *Tappy* decision is entirely consistent with this Court's more recent advisory opinion concluding that a vacancy in judicial office exists upon the expiration of the term of a judge, rather than upon the failure of the judge to qualify for retention. *Mandatory Retirement*, 940 So. 2d at 1093. Although the specific question of the Governor's authority to fill any *particular* vacancy near the end of his term depends on facts that are not yet known with certainty, as described above, the legal framework for evaluating these questions is well-established under the Florida Constitution and this Court's precedents.

The Petition completely ignores this Court's opinion in *Tappy*—not even citing the case—and misconstrues the relevant provisions of the Florida Constitution and this Court's opinion in *Mandatory Retirement*. Petitioners' primary arguments—that the six-year terms of justices and appellate judges ineligible for further retention will expire at the *end* of the day on Tuesday, January 8, 2019, while the Governor's term will conclude at the *beginning* of the same day—are contrary to the plain language of the Florida Constitution, this Court's precedents, and longstanding historical practice. If not dismissed on jurisdictional grounds, the Petition should be denied as a matter of law.

A. Under the Florida Constitution, a governor's term in office continues until his or her successor qualifies by taking the oath of office.

The Florida Constitution provides for the election of a governor to serve "a term of four years beginning on the first Tuesday after the first Monday in January" following a statewide general election. Art. IV, § 5(a), Fla. Const. "[B]efore entering upon the duties of the office" at the beginning of a gubernatorial term, a governor-elect must take the oath of office prescribed in Article II, section 5(b), of the Florida Constitution. At the conclusion of a four-year term, the office of governor does not become vacant. Instead, an outgoing governor is constitutionally directed to hold over and "continue in office until a successor qualifies" by taking the oath of office. Art. II, § 5(b), Fla. Const.

In *Tappy v. State ex rel. Byington*, this Court acknowledged the continuing constitutional authority of an outgoing governor by upholding the validity of a judicial appointment made by an outgoing governor for a term of office beginning on the same day that the governor's successor qualified. 82 So. 2d at 166. Following the 1954 general election, Governor Johns appointed Thomas Tappy to fill a county court vacancy that became effective at midnight on Monday, January 3, 1955, the same day as the governor's own final full day in office. *Id*. at 163. After Governor Collins took office on January 4, 1955, he attempted to appoint a

different judge, John Byington, to fill the same county court vacancy. *Id*.

This Court, in a case challenging the commission issued to Judge Tappy, relied explicitly upon the constitutional provisions[2] requiring an incoming governor to take the oath of office before entering upon his or her duties and providing for an incumbent officer to continue in office until his or her successor qualifies. *Id*. at 165. Because Governor Collins did not take his oath of office until about noon on Tuesday, January 4, 1955, this Court held that Governor Johns continued in office until that time and "was entitled to exercise and perform all the powers and duties of governor, including the authority to exercise any power to appoint to office that was vested in the office of governor." *Id*. at 165-66; *see also id*. at 166 ("[W]here the legal incumbent of an office is authorized by law to hold over at the expiration of the term until his successor is elected and qualified, 'the period of his holding over is as much a part of his tenure of office as the regular period fixed by law; the office is held by the same title and by as high and lawful a tenure after the prescribed term, until the title of a duly elected successor attaches,

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[2] The relevant portions of Articles XVI, sections 2 and 14, of the Florida Constitution of 1885 are preserved in Article II, section 5, of the current Florida Constitution. *See Gray v. Bryant*, 125 So. 2d 846, 856 (Fla. 1960) (noting the presumption that the readoption of an identical provision into a subsequent constitution incorporates the construction previously placed upon it).

as before and during such term…'") (*citing* 67 C.J.S. *Officers*, § 48(c)).[3]

The Petition erroneously claims that no constitutional provision addresses when a gubernatorial term commences other than the reference to the first Tuesday after the first Monday in January. *See* Pet. at 17 (*citing* Art. IV, § 5(a), Fla. Const.). Petitioners not only ignore the explicit constitutional provisions in Article II, section 5, which both requires an incoming governor to take the oath of office "before entering upon the duties of the office" and also requires an outgoing governor to "continue in office until a successor qualifies," they argue to this Court that there is *no constitutional basis* to identify *any* particular event as marking the beginning of a new governor's term. Pet. at 17. As described above, Petitioners are simply wrong.

Petitioners also fail to acknowledge—much less distinguish—this Court's opinion in *Tappy*. Rather than acknowledging the plain text of the Florida Constitution and this Court's precedent, the Petition relies on the conclusions of

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[3] Notably, this Court in *Tappy* also found that "[t]he fact that, in the exercise of the power and duty to fill the vacancy, Acting Governor Johns appointed Tappy several days prior to the time the office held by County Judge Wingfield actually became vacant did not invalidate the appointment. A prospective appointment is valid if the governor who makes the appointment is still in office at the time the vacancy occurs and the commission becomes effective." 82 So. 2d at 166. This holding was neither briefed nor addressed by this Court in *Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006).

opinion columns in newspapers, speculates about the intent of voters regarding a proposed constitutional amendment that did not pass, and argues that general considerations of public policy should dictate a different result. Pet. at 17-21.

Petitioners' policy preferences are not the law of this state. And the Petition's request that "any ambiguity" be resolved in favor of the Petitioners' preferred public policy runs counter to this Court's own conclusions regarding the policy preferences of the framers of Article V: "Vacancies in office are to be avoided whenever possible. We are confident 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." *Mandatory Retirement*, 940 So. 2d at 1095 (Cantero, concurring) (*citing In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992)).

Although the specific facts regarding precisely when the Governor's successor will qualify by taking the oath of office cannot be known at this time, the Petition's legal arguments regarding the conclusion of the Governor's term fail as a matter of law. If this Court addresses the merits of the Petition, it should determine that a governor's term of office continues until his or her successor qualifies, as required by the plain text of the Florida Constitution and this Court's longstanding precedent.

B. Under the Florida Constitution, a vacancy in judicial office exists upon the expiration of the six-year term served by a justice or appellate judge who is ineligible for retention.

The Florida Constitution provides that each justice or appellate judge who is retained in office by the voters serves for "a term of six years" that "shall commence on the first Tuesday after the first Monday in January following the general election." Art. V, § 10(a), Fla. Const. If a justice or appellate judge is ineligible to qualify for retention, "a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge." *Id*.; *see also Mandatory Retirement*, 940 So. 2d at 1093 (concluding that vacancy exists upon the expiration of the term of the judge or justice rather than upon the failure of a judge to qualify for retention). Accordingly, the six-year term of a justice or appellate judge retained in office in November 2012, and who is ineligible to qualify for retention in 2018, began on Tuesday, January 8, 2013, and will expire at the end of Monday, January 7, 2019.

This straightforward application of the language of Article V, section 10(a), to determine the duration of a judicial term is not only consistent with the constitutional text and this Court's precedent, it is also in accord with the commissions issued by governors under Article IV, section 1(a), of the Florida Constitution, which also reflect judicial terms concluding on the first Monday in

January. *See, e.g.*, App. at 1-3, 5-10, 13-14, 16-17, 19-20 (current and former commissions of Justices Pariente, Lewis, and Quince reflecting terms concluding on the first Monday in January 2019, 2013, and 2007; and of Justices Canady, Polston, and Labarga reflecting terms concluding on the first Monday in January 2023 and 2017). The longstanding historical practice of justices who have left this Court upon the conclusion of their terms similarly confirms that the six-year judicial term concludes at the end of the first Monday in January. *See, e.g.*, *Spector*, 305 So. 2d at 780 (reflecting resignation by Justice Ervin as of midnight at the end of the first Monday in January 1975 to allow successor to fill vacancy in office on the following Tuesday); *see also* App. at 41, 44-45 *and* Justices of the Florida Supreme Court, *Former Justice Harry Lee Anstead*, *available at* http://www.floridasupremecourt.org/justices/retired/anstead.shtml (records reflecting that Justices Overton, Shaw, and Anstead all concluded their service on this Court on the first Monday in January).[4]

Petitioners argue that the six-year term of office for a justice or appellate judge specified in Article V, section 10(a), actually extends for a period of *six*

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[4] The final six-year terms of judges serving on Florida's district courts of appeal have also historically concluded on the first Monday in January. *See, e.g.*, App. at 22-31, 33-40.

years and one day—that a term commencing on Tuesday, January 8, 2013, runs through midnight at the end of the day on Tuesday, January 8, 2019—the beginning of the next governor's *second* day in office. Pet. at 16. The Petition does not engage meaningfully with the constitutional text or historical practice in asserting this conclusion. Instead, Petitioners' counter-textual argument is based primarily on unrelated cases addressing procedural deadlines such as statutes of limitations for filing negligence lawsuits. The Petition also cites the language of an entirely separate constitutional provision addressing the conclusion of a judge's initial term in office following appointment, rather than the duration of a six-year term in judicial office following retention by the voters.

Petitioners make three principal arguments regarding the length of judicial terms of office. The Petition places primary reliance on cases addressing procedural deadlines, such as the statute of limitations for filing a lawsuit claiming negligence. *See* Pet. at 15 (*citing Williams v. Albertson's, Inc.*, 879 So. 2d 657, 658 (Fla. 5th DCA 2004)). Petitioners provide no basis for relying on these precedents, which involve entirely different considerations regarding the calculation of time. The legal calculation of a deadline or a time "within which" to act, for example, often "exclude[s] the day on which the initial act occurred." *See* Pet. at 14 (*quoting Carter v. Cerezo*, 495 So. 2d 202, 203 (Fla. 5th DCA 1986)).

When assessing the duration of a term of office, in contrast, a more reasonable interpretation would include each and every day of service *without excluding the first day*. By way of analogy, a one-month term of office for the month of January would naturally be understood to encompass each and every day beginning on January 1 and continuing through the end of January 31, not a term extending from January 1 through and including all of February 1. Similarly, a child whose fourth birthday falls on July 25 is considered a four-year-old from that date through and including July 24 of the following year, not through and including all of the following July 25. As noted above, the commissions issued to justices and judges in Florida have historically reflected this straightforward and natural understanding of both the commencement and conclusion of the six-year term of office.

Petitioners discuss (in a footnote) the separate constitutional provision in Article V, section 11(a), which addresses the length of an initial judicial term following a gubernatorial appointment to fill a vacancy in office. *See* Pet. at 14 n. 2. The initial term of judicial office for such an appointee is not a six-year term, but a term commencing upon appointment and ending on the first Tuesday after the first Monday in January following the next general election occurring at least one year after the date of appointment. Art. V, § 11(a), Fla. Const. Petitioners have

not identified any justice or judge who is facing mandatory retirement in 2019 at the conclusion of his or her initial term following appointment. Rather, the Petition involves the terms of justices and appellate judges who have *already been retained* for a six-year term commencing on the first Tuesday after the first Monday in 2013. Accordingly, section 10(a) of Article V—not section 11(a)—provides the applicable term of office under the Florida Constitution.

Finally, Petitioners quote a portion of a statement of facts in *State ex rel. Landis v. Bird*, 163 So. 248 (Fla. 1935). Pet. at 14. In the cited portion of *Landis*, this Court provided an example of the operation of a law regarding appointment of circuit judges following a reapportionment of circuit judges and the creation of additional offices under two provisions of the Constitution of 1885. 163 So. at 256. The opinion describes a judge appointed by the Governor and confirmed by the Senate who died before the conclusion of his term. *Id*. The deceased judge's official term "extended to June 24, 1935" but "in legal effect extended to July 30, 1935, by section 45 of article 5 [of the Constitution of 1885, as amended] and chapter 17085, Acts of 1935." *Id*. The opinion then describes a series of legislative sessions and adjournments and successive interim appointments to the same judicial office, including the appointment of another judge who also died before the conclusion of his term. *Id*. The Petition fails to explain why these facts

involving the application of a statute are relevant to the interpretation of Article V of Florida's current constitution.

Although the specific facts regarding when any particular justice or judge who is ineligible for retention in 2018 will choose to depart the court are not established in the Petition and cannot be known at this time, the Petition's legal arguments regarding the duration of a judicial term of office fail as a matter of law. If this Court addresses the merits of the Petition, it should determine that a vacancy in judicial office exists upon the expiration of the term of a justice or judge who is ineligible for retention, and that the six-year term of a justice or judge that commenced on Tuesday, January 8, 2013, will expire no later than at the end of Monday, January 7, 2019, as required by the plain text of the Florida Constitution and this Court's precedents.

CONCLUSION

Florida's governors have a long history of cooperation regarding end-of-term vacancies on this Court, and Petitioners have wholly failed to articulate any presently known facts to demonstrate the existence of an actual dispute warranting judicial intervention here. This Court should decline Petitioners' explicit and improper invitation to "clarify for the electorate . . . what is at stake in the 2018 election," by addressing the mere *possibility* of a future justiciable controversy

through an extraordinary writ of quo warranto.

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 foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal this 19th day of July, 2017, to the following:

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