IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v. Case No.: SC17-1122

HON. RICK SCOTT, in His Official Capacity as Governor of Florida,

Respondent.

PETITIONERS' REPLY TO GOVERNOR SCOTT'S RESPONSE TO PETITION FOR WRIT OF QUO WARRANTO

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Respondent has now confirmed that unless this Court prohibits it, the Governor plans to exceed his authority, usurp the authority of the newly-elected governor, and appoint justices to fill vacancies occurring on this Court after the new governor takes office. Despite this confirmation of his plans, Respondent asserts that the Court must wait until the Governor implements his plan and makes the appointments to issue a writ of quo warranto. But such an approach would require the Court to halt its work upon the appointment of the new justices to examine the writ and create true uncertainty while the issue is resolved as to whether the justices appointed have the right to serve and make decisions. There is no question that such events would "substantially affect[] fundamental functions of state government," warranting issuance of the writ. *Whiley v. Scott*, 79 So. 3d 702, 708 (Fla. 2011). The Governor's intended action, if not stopped now, will create a constitutional crisis and severely impact the work of this Court.

Importantly, Respondent does not contest that this Court, rather than a lower tribunal, should decide the issue. He also does not claim that there are any material, disputed facts at issue. His contention that this Court lacks jurisdiction to consider the propriety of proposed action by a state officer has no basis in the law. And it also appears to encourage the very sort of constitutional or political crisis Petitioners sought to avoid by filing the petition as soon as practicable following

the Governor's announced intention in December 2016. The Court should not permit this chaos to develop, particularly since Governor Scott lacks the authority to appoint replacements for justices or appellate judges with terms expiring even under his interpretation of when that occurs.

I. THIS COURT HAS JURISDICTION AND SHOULD EXERCISE ITS DISCRETION TO GRANT THE WRIT.

A. Quo Warranto Relief Is Not Limited to Reversing Actions Already Taken and It Is Imprudent to Wait Until After the Appointments.

Respondent first asserts that the Court lacks jurisdiction because the quo warranto writ has historically been used to test whether a state officer has already improperly exercised his or her power. (Resp. at 9.) But none of the cases cited by the Governor stand for the proposition that the writ is not appropriate to prevent a state officer from acting in the future. Rather, quo warranto may test "the **claims** of public officers to particular powers." *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 619 (Fla. 2008) (Lewis, J., concurring in result only) (emphasis added) (citing 2 Chester J. Antieau, *The Practice of Extraordinary Remedies: Habeas Corpus and the Other Common Law Writs* § 4.03, at 593, § 4.34, at 663 (1987)).

Here, there is no question that the Governor has claimed the appointment power for any appellate judge whose term expires on his final day in office and that he has unequivocally announced he is going to take action. There is no reason to doubt the Governor's word. This is particularly so given that his response does

not dispute, repudiate, or even address his unequivocal December statement, but does contend Petitioners' claims on the merits, confirming his intention to follow through and appoint three justices on his last day in office as promised. *See Turner v. Governor*, No. 16-428, 2017 WL 43330, at *2 (Vt. Jan. 4, 2017) ("The Governor's pronouncement of his intent to fill a 'vacancy' on the Court by naming Justice Dooley's successor is unequivocal, not conjectural or hypothetical—indeed, he is herein vigorously maintaining his right to do so.").

Moreover, this Court has before issued the writ to prevent anticipated action. *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 411 (Fla. 1998), *receded from on other grounds by Darling v. State*, 45 So. 3d 444, 453 (Fla. 2010). In *Kenny*, the Attorney General sought a writ of quo warranto against Capital Collateral Regional Counsel (CCRC) after CCRC initiated a federal civil rights lawsuit on behalf of death row inmates. 714 So. 2d at 406. After the petition was filed, however, the federal court issued a summary judgment in favor of the State, ending the lawsuit and ceasing any exercise of authority by CCRC. *Id.* Nevertheless, this Court addressed the issue "because it is of great public importance and likely to recur." *Id.* at 406 & n.2 (citing *Holly v. Auld*, 450 So. 2d 217, 223 n.1 (Fla. 1984)). And this Court issued the writ as sought by the State, "directing that CCRC has no authority to represent capital defendants in the federal civil rights action at issue **and** has no authority to represent capital defendants in **any** civil action not directly

challenging the legality of the judgments and sentences of such defendants." *Id.* at 411 (emphases added).

Respondent cites *Kenny* but fails to acknowledge that the Court issued the writ to stop future lawsuits by CCRC even though no lawsuit was pending and no specific future lawsuit was even identified. He cites other cases where the writ was issued after an exercise of power had occurred, but no case that holds that a past event is required for the writ's issuance. Indeed, in one of the cases relied on by Respondent, the then-governor argued the reverse of Respondent's contention here: that the writ should not issue because he had already exercised his authority. *Fla. House of Reps.*, 999 So. 2d at 607. The Court declined to place that limitation on the writ either. *Id.* And the concurring-in-result-only opinion explained that the quo warranto writ is used to determine "whether the officer possesses the **power to act**" in a particular matter, not the validity of a particular action already taken. *Id.* at 619, 621 (Lewis, J., concurring in result only).

The only "authority" Respondent offers for his contention that the writ can only be used to halt already-exercised improprieties is a law review article that is over 65 years old, predates Article V, and is antithetical to modern case law. (Resp. at 9 (citing Alto Adams & George John Miller, *Origins and Current Florida Status of Extraordinary Writs*, 4 Fla. L. Rev. 421 (1951)).) In turn, the law review article cites a case from this Court to support its conclusion, *White v. State ex rel.*

Johnson, 37 So. 2d 580, 581 (Fla. 1948). But *White* never even mentions the writ of quo warranto; instead, as the first line of that opinion makes clear "[t]his is an appeal of a final judgment in **prohibition** wherein a peremptory writ was issued." *Id*. (emphasis added).

Respondent discounts this Court's decision in *Lerman v. Scott*, No. SC16-783, 2016 WL 3127708 (Fla. June 3, 2016), on the basis that it involved actual government action to start the appointment process. But the Court's opinion does not specify what, if any, action the Governor had taken at the time it issued its writ. Instead, it holds that the "Governor shall not utilize the Fifteenth Judicial Circuit Judicial Nominating Commission to perform any functions related to nominating candidates for this judicial office," prohibiting future action to fill the vacancy at issue. *Id.* at *1.

Respondent asserts that Petitioners seek a declaratory judgment or advisory opinion, but this argument fails too. For one, this Court has before recognized that it has considered, in the context of quo warranto cases, "separation-of-powers arguments normally reviewed in the context of declaratory judgments, … where the functions of government would be adversely affected absent an immediate determination by this Court." *Fla. House of Reps.*, 999 So. 2d at 607 (internal quotation marks and citation omitted). That Respondent has the authority to request an advisory opinion, as Governor Bush did under the same circumstances,

Advisory Op. to the Governor re Judicial Vacancy Due to Mandatory Ret., 940 So. 2d 1090, 1090 (Fla. 2006), but has declined to do so in favor of dumping a constitutional crisis on his successor and this Court cannot deprive the Court of quo warranto jurisdiction. It only makes the need for relief all the more appropriate, especially since *Mandatory Retirement* cuts so sharply against Respondent.

Finally, the facts in this case are not speculative. The Governor publicly stated that he intended to exceed his authority by appointing three justices on his last day in office and has not recanted that intent in his response but instead defended his right to do so. Such appointments would be prospective because the vacancies do not occur until the following day and would be invalid because the new governor will have taken office.

B. The Issue Is Recurring.

Respondent asserts that Petitioners' argument is hypothetical because the three justices may retire before the last day of their term. Respondent bases this argument entirely on his contention that half of appellate judges leave before their term is up. Of course, that means that just as many serve their term out until the final moment it expires.

Moreover, while Respondent now deems it "hypothetical" as to whether three of the justices will serve out their entire term, the Governor himself assumed

that to be the case when he delivered the statement indicating his intent to improperly exercise his authority: "I'll appoint three more justices the morning I finish my term." *12/16/16 Press Conference on Florida Supreme Court Appointment*, The Florida Channel, http://thefloridachannel.org/videos/121616-press-conference-florida-supreme-court-appointment/ (last visited June 8, 2017) (Governor Scott's quoted statement can be found starting at 8:14).

And as recounted in the Petition, the issue of judicial terms expiring at the same time as the outgoing governor's has arisen throughout recent Florida history. *E.g. Mandatory Ret.*, 940 So. 2d at 1093; *see also* Pet. at 17 (describing past governors' attempts to get sworn "in at midnight specifically to prevent their predecessors from purporting to make midnight appointments"). Although this issue has been resolved previously between outgoing and incoming governors without a legal determination, resolution of a constitutional issue and avoidance of a constitutional crisis should not depend on political deals. Petitioners' constitutional rights should not be abridged in a deal between governors. The people of the State of Florida deserve an answer to this recurring problem "of great public importance." *Kenny*, 714 So. 2d at 406. Indeed, they are entitled to an answer now before the election process for a new governor starts in earnest.

C. Separation of Powers Principles Would Not Be Violated If the Writ Were Issued.

Respondent argues that the petition should be dismissed because issuance of the writ would violate separation of powers. He asserts that the courts cannot decide whether the Governor has authority to act when he has not yet acted. But the Governor has announced how he is going to act. He has not recanted that statement and herein defends his right to appoint justices to replace those retiring even as his own argument is that their terms end the same day as his absent his speculation that his successor might not be timely sworn in.

The issue of who gets to make judicial appointments has long been a matter in dispute in this country. *E.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803). But this Court, in interpreting the constitution, affirms rather than violates separation of power tenets. *See Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998) ("as the highest court of the judicial branch of government, one of our primary judicial functions is to interpret statutes and constitutional provisions") (citing *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla 1992)). As explained in *Phelps*, in "carrying out this function," the Court does "not violate the separation of powers doctrine by determining whether" an act is constitutional. *Id.*

Respondent relies primarily on the First District's decision in *Collins v. Horten*, 111 So. 2d 746 (Fla. 1st DCA 1959), which, along with the other cases Respondent cites, simply stands for the principle of law that courts cannot opine on

issues not before them. In *Collins*, the trial court determined a rule promulgated by a conservation board regarding oyster harvesting was invalid. *Id.* at 750. At the invitation of the parties, the trial court also addressed whether the same rule in a non-existent statute passed by the Legislature would be constitutional. *Id*. at 751. The First District held that "[n]o court … has the power to determine in advance of its enactment the validity or constitutionality of any act of the Legislature." *Id.* Here, by contrast, there is no question that the Governor intends to fill vacancies that occur after his term, that such an exercise is invalid, and that waiting until the appointment occurs would cause a great deal of constitutional and political mayhem.

II. RESPONDENT HAS NO AUTHORITY TO FILL VACANCIES THAT OCCUR AFTER HIS TERM.

A. *Tappy* Is Inapplicable.

Respondent argues that *Tappy v. State ex rel. Byington*, 82 So. 2d 161 (Fla 1955), recognizes that a governor maintains full authority to fill judicial vacancies until a successor takes the oath of office. (Resp. at 19.) Respondent asserts Petitioners ignore *Tappy*, but *Tappy* was not addressed in the petition because it does not apply to this case or these facts. *Tappy* stands for the proposition that even when a prospective appointment for a future vacancy was authorized, it was valid only "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.

In *Tappy*, this Court upheld the outgoing governor's authority to prospectively appoint a county court judge in December 1954 for a vacancy that arose before the new governor was sworn in around noon on Tuesday, January 4, 1955. That holding is irrelevant for a variety of reasons. *Tappy* did not involve filling a vacancy for a "judicial office to which election for retention applies," so article V, sections 10(a) and 11(a) of the Florida Constitution would not have applied even if they had been in force at the time. Additionally, the constitution at that time provided that a governor's term ran "for four years from the time of his installation." *Id.* at 165 (citing art. IV, § 2, Fla. Const.). The constitution now provides that a governor's term begins on the first Tuesday after the first Monday in January. Art. II, § 5(b), Fla. Const. As explained below, the next governor can therefore assume office as soon as the clock strikes midnight on January 8, 2019, which is the same moment the vacancy would occur under Respondent's argument.

Factually, unlike this case and in *Mandatory Retirement*, where this Court also did not mention *Tappy*, the vacancy in *Tappy* arose not as the result of an expired term, but because the prior judge had submitted a letter of resignation "to take effect 'as of midnight on (Monday) January 3, 1955,' " which was the first Monday in January. *Tappy*, 82 So. 2d at 163. In short, *Tappy* makes no difference to this case.

B. The Newly-Elected Governor's Term Will Start at Midnight on Tuesday, January 8.

Petitioners wholeheartedly agree that the constitution does set boundaries for when a new governor takes office. But there is no provision governing exactly when during the day the new governor is supposed to take the oath. Since the new governor takes office on Tuesday, there is no debate that he or she can be sworn in at midnight when Tuesday legally commences, which, as the petition notes, many governors have chosen to do.

What makes Respondent's refusal to recognize the timing of the oath most egregious is that he knows from his own personal experience that the new governor does not even need to wait until midnight of the first Tuesday after the first Monday to execute the oath of office for governor. The next governor can take the oath of office any time after having been elected and then file that oath with the Secretary of State so that by operation of law he or she takes office exactly at midnight. That is exactly what Governor Scott did his first term when he took the oath of office in November and immediately filed it with the Secretary of State. (App. to Reply 2.) Given that his predecessors did the same (*id.* at 3-4), Respondent's assumption that the newly elected governor will not assume office until later in the day on January 8 is particularly hard to fathom. Given the critical executive powers and actions at stake, which go beyond the authority to fill judicial vacancies, ensuring that control transfers at midnight will be a priority.

C. No Authority in Case Law or the Constitution Provides That Judicial Terms Expire on Monday, January 7, But Respondent Lacks the Authority to Fill the Vacancies Even if They Do.

Respondent criticizes Petitioners for relying on statutes of limitations case law and similar constitutional provisions in concluding that a six-year term beginning on January 8, 2013, expires on January 8, 2019. But, in turn, Respondent's assertion that the terms actually expire on January 7, 2019, is supported only by Commissions he himself wrote and an analogy to a child's age. The latter support is inapt. And the Governor-created commissions are nothing more than the Governor's interpretation about when he believes the term ends. The Governor cites no law in support.

The constitution should control in this case, not Commissions prepared by the Governor. Indeed, Respondent offers no reason why only those judges appointed by the Governor to fill a vacancy would end their terms on the first Tuesday after the first Monday in January under article V, section 11 of the Florida Constitution, but judges appointed and then retained for six-year terms should end them the day prior. Consistency and uniformity in the end dates for all appointed judges should prevail in the absence of authority to the contrary.

Petitioners cited *State ex rel. Landis v. Bird*, 163 So. 248, 256 (Fla. 1935), because, even though different facts and constitutional provisions were at stake, it states that the judge's six-year term started on June 24, 1929, and officially

extended to June 24, 1935. If Respondent's calculations prevailed, the judge's six-year term should have run only to June 23, 1935. And in other cases cited by the petition but unaddressed by Respondent, this Court has stated its commitment "to the rule that in computing duration of time—that is, the period **for which** a condition shall exist—the first day is excluded." *Blanton v. State ex rel. Miller*, 24 So. 2d 232, 232 (Fla. 1945) (calculating statutory marriage license waiting period).

As for the statute of limitations case law, Respondent offers no reason why the analogy Petitioners relied on should be rejected. Constitutional construction follows "principles that parallel those of statutory interpretation," *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012), so the manner in which a term of years is calculated when stated in a statute or by rule should be, at the very least, persuasive authority for how a constitutional term of years is interpreted.

Respondent also relies on examples of justices who retired on the first Monday in January. (Resp. at 26.) But just because some past appellate judges have chosen to end their terms on Monday at midnight does not mean that the Constitution required it. Others ended their terms on the first Tuesday in January upon facing mandatory retirement. *See* Sup. Ct. of Fla., *Succession of Sup. Ct. of Fla.*, http://www.floridasupremecourt.org/pub_info/documents/appointed.pdf (updated June 24, 2017) (indicating that Justices Boyd and Adkins retired on January 6, 1987, a Tuesday).

In any event, how the Court resolves the question of when a judge or justice's six-year term expires matters not. Respondent does not contend that a term ending on Monday, January 7, 2019, will end prior to the very end of the day. That means even under Respondent's interpretation, no vacancy exists for any justice serving out his or her full term until midnight on January 8, 2019, at which point the newly-elected governor should and will have the authority to appoint the replacement justice(s).

Petitioners acknowledge that preventing Respondent from naming new justices to this Court will leave the Court without a full complement of justices for an unknown, but relatively short, period. To some extent that may burden the remaining justices. That alone, however, should not be a reason to deny the writ and allow Respondent to exceed his constitutional authority. There are numerous procedures in place for the Court to operate with less than a full complement of justices and to manage its workload. The Chief Justice has authority under Florida's constitution to name other judges to the Court to aid in disposing of its caseload. Art. V, § 2, Fla. Const. As this Court is aware, numerous chief justices have done so in the past.

The recent amendment to Florida Rule of Judicial Administration 2.205 would not impact the Chief Justice's authority to add retired justices or other judges to temporary duty until all vacant positions are filled. *See In Re:*

Amendments to Fla. R. Jud. Admin. 2.205, 214 So. 3d 623, 624 (Fla. 2017) (adopting new rule that provides "no retired justice who is eligible to serve on assignment to temporary judicial duty or other judge who is qualified to serve may be assigned to the supreme court, or continue in such assignment, after 7 sitting duly sworn justices are available and able to perform the duties of office.").

On the other hand, if Governor Scott names justices to the Court as he leaves office and those justices' authority to occupy the office is challenged, the Chief Justice would be faced with the difficult question of whether the challenged justices were "available and able to perform the duties of office," for the remainder of the Court's cases. Either way, any decision might later be challenged as invalid because justices (either those appointed by Governor Scott or the Chief Justice) not authorized to sit may cast the deciding vote(s) in cases disposed of. Thus, waiting until the Governor improperly exercises his authority in the manner he has declared he will stands to create far more bedlam than ensuring the newly-elected governor chosen by the people can exercise his or her appointment authority for vacancies occurring on or after January 8, 2019.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, issue the writ, and prohibit Respondent from filling any judicial vacancies on Florida's appellate courts that occur due to terms expiring in January 2019.

Respectfully submitted,

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

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