SC11-592

IN THE SUPREME COURT OF FLORIDA

Case No.

ROSALIE WHILEY,

Petitioner,

vs.

The Honorable RICHARD SCOTT, in his official capacity as Governor, State of Florida,

Respondent.
_____/

PETITION FOR WRIT OF QUO WARRANTO

Pursuant to Article V, section 3(b)(8) of the Florida Constitution and Rule 9.100 of the Florida Rules of Appellate Procedure, Petitioner ROSALIE WHILEY, by and through undersigned counsel, asks this Court for issuance of a writ of quo warranto directing Governor RICHARD SCOTT to demonstrate the authority for Executive Order 11-0 issued on January 4, 2011. *See* Fla. Exec. Or. No. 11-01 (Jan 4, 2011) (the "Order") (App. A). If the Governor is not able to demonstrate his authority, the Petitioner requests the Court to enter such orders as will provide relief, including orders entered under the Court's all writs authority.

Contrary to the Florida Constitution and Florida's Administrative Procedure Act (the "APA"), Governor Scott's Executive Order 11-01 purports to create a new

office in state government (the Office of Fiscal Accountability and Regulatory Reform) (the "Office" or "OFARR"), transfer powers from agency heads to the new office, and suspend all rulemaking activities by state agencies under his direction. It also prohibits such agencies from engaging in rulemaking in the future absent express permission from the Office. *See* Fla. Exec. Or. No. 11-01 (App. A).

In his Order, the Governor characterizes state agencies as being either "under the direction of the Governor"[1] or "not under the direction of the Governor." *See, e.g.,* Fla. Exec. Or. No. 11-01 at §§ 1, 2 – 7. For agencies that he considers to be outside his direction, the Governor "requests" that they abide by the executive order. *Id* at §§ 2, 7. For agencies that he deems to be under his direction, the Governor *requires* that they comply with it. *Id. See also* Status of Executive Order 11-01, Section 5, Analysis to Identify Rules That Are Duplicative, Unnecessarily Burdensome, or No Longer Necessary (March 2011), *available at* https://www.myfloridalicense.com/rulereview/reaglist.aspx (listing the agencies that the Governor deems under his direction for purposes of the Order).

[1]Although Petitioner disagrees that the state agencies deemed bound by Executive Order 11-01 are, by law, "under the direction of the Governor" for rulemaking purposes, Petitioner uses the same phrase "under the direction of the Governor" to describe those agencies only to avoid confusion.

Although Executive Order 11-01 asserts as a primary impetus the curtailment of unnecessary restrictions on regulation of businesses and professions, it even suspends rulemaking unrelated to its underlying objective. This sweeping dictate encompasses the rulemaking of more than a dozen state agencies that govern programs and services affecting the everyday lives of millions of Floridians. Indeed, the Governor's broad prohibition has triggered suspension of rulemaking that is urgent to protect vulnerable low-income citizens of Florida.

The Governor does not have the power to abrogate the APA. As discussed below, under Article III, section 1 of the Florida Constitution, the authority to make and change law belongs to the Legislature, not the executive branch. Because Governor Scott's Executive Order 11-01 contravenes the separation of powers set forth at Article II, section 3 of the Florida Constitution by violating express statutory requirements of the APA, this Court should issue a writ of quo warranto.

I. PARTIES

A. Rosalie Whiley.

(1) Petitioner is a citizen and taxpayer.

Petitioner Rosalie Whiley resides at 2901 N.W. 164th Street, Opa Locka Florida, 33054. As a citizen and taxpayer, she has standing to request issuance of a writ of quo warranto in order to enforce the public right to have Governor Scott

exercise his powers in a manner that does not violate the Florida Constitution or displace established state policy embodied in the APA. *Martinez v. Martinez*, 545 So. 2d 1338, 1339 & n.3 (Fla.1989). In quo warranto proceedings seeking the enforcement of a public right, the people are the real party in the action and the person bringing suit "need not show that he has any real or personal interest in it." *State ex rel. Pooser v. Wester,* 126 Fla. 49, 58, 170 So. 736, 737 (1936).

Petitioner's complaints with Executive Order 11-1 include the following:

(a) The Order is beyond the power of the Governor because it purports to create a new office of government, thus usurping the Florida Legislature's constitutional function;

(b) The Order is a rule of the Executive Office of the Governor but has been promulgated without observing the requirements of the APA, Ch. 120, Fla. Stat.,[2] including notice and public hearing; thus, there has been no opportunity for the public to be heard on the rule;

(c) The Order is vague, leaving OFARR with authority over agency rules but without standards for exercising that authority. For example, the Order purports to give OFARR responsibility to review rules to determine if they "*unnecessarily* restrict entry into a profession or occupation;" "*adversely affect* the availability of professional or occupational services to the public;"

[2]All references to the Florida Statutes are to the 2010 edition.

"*unreasonably affect* job creation or job retention;" place *unreasonable restrictions* on individuals attempting to find em*ployment;*" *"impose burdensome costs on businesses;"* and *"are justifiable* when the overall cost-effectiveness and economic impact of the regulation, including indirect costs to consumers is considered." Fla. Exec. Or. No. 11-01 at § 3 (*emphasis added*). Each of the phrases in italics is vague and the Order does not provide standards by which the Office is to make judgments;

(d) The Order transfers to OFARR authority that the Florida Legislature has established with the heads of agencies;

(e) The Order directs the Secretary of State not to perform duties that the Florida Statutes require to be performed;

(f) The Order creating OFARR sets up another level of government, thus delaying agency action; and

(g) The Order is established without legislative authority, although the Florida Constitution provides a method by which the Governor could have acted properly. The Florida Constitution provides, "The governor shall by message at least once in each regular session inform the legislature concerning the condition of the state, *propose such reorganization of the executive department as will promote efficiency and economy, and recommend measures in the public interest.*" Art. IV, § (1)(e), Fla. Const.

(*emphasis added*). This provides the Governor with a clear path to carry out his objectives while respecting the separation of powers.

(2) Petitioner has a personal interest.

Although her standing as a citizen and taxpayer is sufficient under Florida law, *Martinez,* 545 So. 2d at 1339, Petitioner Whiley also has a real and personal interest in this action. Ms. Whiley is a Food Stamp recipient and subject to the requirement that she reapply periodically for those benefits. Because Ms. Whiley is blind and unable to reapply for Food Stamps on her own, she must get help from a third party, usually a friend or relative, each time she reapplies. However, the length and complexity of the current on-line Food Stamp application form ("the Form"), which is incorporated in Rule 65A-1.205 of the Florida Administrative Code, make reapplying difficult, especially through a third party. In addition, she is forced to reveal information about herself to whoever is assisting her, even though she would prefer that the information remain private. *See* Affidavit of Rosalie Whiley. (App. B). Contrary to federal law, the on-line Form does not allow her to reapply for benefits by providing only her name, address and signature on the front page.

This Form has been challenged as invalid under Florida's APA. *Etienne v. Dept. of Children and Fam. Servs.*, Case Nos. 10-5141RX, 10-9516RP, 10-10105RP (DOAH Nov. 11, 2010). Among other claims, the *Etienne* challenge

alleges that the Form violates federal law by not allowing applicants to apply for benefits by providing only their name, address and signature on the front page. *See* 7 C.F.R. § 273.2(b)(1)(iv) - (v). However, the challenge is being delayed as a direct result of Executive Order 11-01. Although the Department of Children and Family Services ("DCF") acknowledges that it must change the Form to comply with federal law, the agency moved for a continuance of the challenge, citing, among other things, Governor Scott's suspension of rulemaking ordered in Executive Order 11-01. *See* DCF's Motion for Continuance at 1, 4-5, *Etienne* (App. C). As a result, the Administrative Law Judge ("ALJ") entered an order placing the rule challenge in abeyance on January 24, 2011. In his order, the ALJ decided that, even though the United States Department of Agriculture has "already determined that the online application form fails to comply with the specific federal regulations cited by the Petitioner," Executive Order 11-01 requires that the case be placed in abeyance until "the Respondent has been permitted to resume the rulemaking process." Order Canceling Hearing and Placing Cases in Abeyance at 2, *Etienne* (App. D).[3]

[3]The ALJ's order placing *Etienne* in abeyance is the subject of an interlocutory appeal to the Third District Court of Appeal. *See* Docket Sheet, *Etienne, available at* http://www.doah.state.fl.us/docdoc/2010/010105/10010105M-022811-14392939.PDF.

B. Governor Richard Scott

RICHARD SCOTT is the Governor of the State of Florida. As Governor, he is responsible for ensuring that the laws of the State be faithfully executed. Art. IV, § (1)(a), Fla. Const.

II. BASIS FOR INVOKING JURISDICTION

Petitioner invokes the jurisdiction of this Court under Article V, section 3(b)(8) of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, which authorize the Florida Supreme Court to issue writs of quo warranto to state officers, including the Governor. *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 607 (Fla. 2008). Specifically, Petitioner asks for the issuance of a writ of quo warranto directing the Governor to demonstrate the authority for Executive Order 11-01, which suspends the rulemaking activities of state agencies under the direction of the Governor and prohibits those agencies from engaging in rulemaking in the future absent express permission from OFARR.

Quo warranto is the ideal remedy in this situation. *See Crist*, 999 So. 2d at 607. It is "the proper method to test the exercise of some right or privilege, the peculiar powers of which are derived from the State." *Martinez,* 545 So. 2d at 1339.

Indeed, this Court recognizes that quo warranto actions raising separation of powers violations by the Governor are appropriate "where the functions of government would be adversely affected absent an immediate determination by this Court." *Crist*, 999 So. 2d at 607 (*citation omitted*). That is precisely what is at stake here. Unless this Court acts immediately, the powers and functions of government will be adversely affected, and Chapter 120 of the Florida Statutes will be suspended by a branch of government with no authority to do so. *Id.* at 607-608 (holding that a quo warranto action in the Florida Supreme Court against Governor Crist based on a separation of powers argument is important to immediately prevent implementation of an illegal act).

Florida's APA was enacted to rid existing law of statutory "anachronisms" that denied citizens of Florida basic fairness and due process in their dealings with state agencies.[4] The APA remedied not only the failure of agencies to provide adequate and full notice of their activities, but also the lack of procedures allowing affected persons to present their viewpoints, change the agency's view, develop a record capable of judicial review, and know the factual basis and policy reasons for the agency's action. *Id.* Prior to enactment of Florida's APA, administrative agencies acted in secrecy under policies to which only a few were privy. *Id.* at 6.

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[4] Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida at 5 (March 9, 1974), *available at* http://www.japc.state.fl.us/publications/reporterscomments.pdf).

Although the APA was designed to "cut down on the private knowledge of the policies which shape agency decisions which is now possessed only by small groups of specialists and the agencies' staffs," the Order nullifies this protection. *Id.* It lacks a point of entry for affected citizens to voice their concerns over rules that OFARR is reviewing, fails to provide any mechanism for development of an OFARR record, and veils the decision-making of OFARR with secrecy. As such, the Order revives many of the archaic features that Florida's APA was designed to modernize.

The APA's rulemaking requirements are critical to assuring that citizens of Florida are apprised of government polices and afforded notice and an opportunity to be heard concerning proposals that affect them. Yet the Order abolishes those protections, which is both contrary to separation of powers under the Florida Constitution and detrimental to the Petitioner and similarly situated citizens who rely on rulemaking to protect them from illegal policies. No other adequate remedy exists outside the issuance of a writ, and an immediate determination by this Court is appropriate.

III. NATURE OF RELIEF SOUGHT

Petitioner seeks issuance of a writ of quo warranto to require the Governor to demonstrate his authority for Executive Order 11-01. The Petitioner does not challenge the portions of the Order that are authorized by the Constitution and,

although the Governor does not have the power to create new state offices and displace the authority of agency heads to act, the Petitioner believes that the Governor does have authority to request information from state and local agencies. Apart from the authority to obtain information from agencies, the Governor does not have authority to support the Executive Order. If the Court finds that no such authority exists, the Petitioner seeks to have the Executive Order revoked.

The Governor claims that Article IV, section (1) (a) of the Florida Constitution[5] provides the authority for the Order. However, nothing in that provision confers any special authority on the Governor that would permit him to either suspend operation of the APA's rulemaking requirements or exercise direct control over the rulemaking of state agencies, absent an express grant of such authority from the Legislature. Op. Att'y Gen. Fla.081-49 at 2-3 (1981). While Article IV, section (1) (a) confers executive power on the Governor, this grant of power is not unlimited. In fact, the Governor's power over state agencies is only

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[5] Article IV, section (1) (a) of the Florida Constitution states:

> The supreme executive power shall be vested in a governor, who shall be commander-in-chief of all military forces of the state not in active service of the United States. The governor shall take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government. The governor may require information in writing from all executive or administrative state, county or municipal officers upon any subject relating to the duties of their respective offices. The governor shall be the chief administrative officer of the state responsible for the planning and budgeting for the state.

as broad as the Legislature allows. *See* Art. IV, § (6), Fla. Const. (providing that it is up to the Legislature to decide, "by law," who directs the functions of agencies). And, by law, the Legislature gives the function of rulemaking only to the agency head. *See* § 20.05(1)(a) & (e), Fla. Stat. (empowering the "head of a[n] [executive] department" with rulemaking authority under the APA); § 120.54(3)(a)(1), Fla. Stat. (stating that the "agency head" must approve proposed rules); § 120.54(3)(e)(1), Fla. Stat. (stating that the "agency head" must approve final adoption of proposed rules); and § 120.54(1)(k), Fla. Stat. (forbidding the agency head from transferring or delegating responsibilities for proposing or adopting rules).[6] Because the Legislature makes rulemaking the prerogative of the agency head, not the Governor, a writ of quo warranto is appropriate.

IV. STATEMENT OF FACTS ON WHICH PETITIONER RELIES

A. Executive Order 11-01

On January 4, 2011, Governor Scott issued Executive Order 11-01 directing state agencies controlled by the Governor to suspend rulemaking and ordering the

[6]The "agency head" in charge of most state agencies in Florida is the "Secretary." § 20.03(4), Fla. Stat. (defining "head of the department" as the "individual or board in charge of the department" for purposes of the structure of the executive branch); § 20.03(5), Fla. Stat. (stating that the "Secretary" is the "individual who is appointed by the Governor to head a department..."); § 20.05 (1), Fla. Stat. (giving the heads of departments the power to "plan, direct, coordinate and execute the powers, duties and functions vested in that department"). *See also* § 120.52(3), Fla. Stat. (defining "agency head" as the person in a department who is in charge of final agency action).

Secretary of State not to publish any rulemaking notices in the Florida Administrative Weekly absent authorization from OFARR:

> **Section 1.** I hereby direct all agencies under the direction of the Governor to immediately suspend all rulemaking. No agency under the direction of the Governor may notice the development of proposed rules, amendment of existing rules, or adoption of new rules, except at the direction of the Office of Fiscal Accountability and Regulatory Reform (the "Office"), established herein. The Secretary of State shall not publish rulemaking notices in the Florida Administrative Weekly except at the direction of the Office...
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> **Section 4.** Prior to submitting a notice of proposed rulemaking or attempting to amend existing rules, agencies under the direction of the Governor shall submit the complete text of the proposed rule or amendment to the Office, along with any other documentation required by the Office. No notice of proposed rulemaking, or notice of the amendment of existing rules, may be submitted for publication in the Florida Administrative Weekly except with the consent of the Office.

Fla. Exec. Or. No. 11-01 at §§ 1, 4. Under the Order, suspended activities include notices of development of proposed rules, amendment of existing rules, adoption of new rules, and publication of any rulemaking notices in the Florida Administrative Weekly. (App. A). In addition, the Order also prohibits state agencies from engaging in any rulemaking activities in the future, absent authorization from OFARR. *Id.*

B. Impact of Executive Order 11-01 on Regulations Governing Benefits for Low-Income Floridians

Not only does the Governor lack authority to suspend rulemaking, but that

suspension also delays the proposal, amendment, and adoption of regulations that would benefit the State of Florida financially and protect low-income citizens of Florida who are at risk of hunger or medical crisis. For example, DCF is unable to proceed with rulemaking to amend Rule 65A-1.205 (pertaining to DCF's on-line application for Food Stamp benefits) to make it easier for persons with disabilities to apply for Food Stamps. *See* Letter from Huddleston, Grunewald, and Greenfield to Figlio of 2/1/2011 (App. E). If Executive Order 11-01 did not prevent its adoption, this rule would benefit low-income Floridians while, at the same time, saving the State of Florida money. Food Stamp benefits provided to low-income families are paid for, in their entirety, by the federal government.[7] 7 CFR § 271.5(a). By amending DCF's on-line application in Rule 65A-1.205 to make it easier for persons with special barriers to apply, Florida would maximize the amount of federal money flowing into its economy. (App. E). Yet Executive Order 11-01 directly hinders rulemaking to adopt this amendment. *Id.*

V. ARGUMENT

A. Introduction

Governor Scott's January 2011 Executive Order 11-01 requiring state agencies under his direction to suspend rulemaking and prohibiting the Secretary of State from publishing notices of rulemaking usurps the legislative power granted solely

[7] The federal government shares certain administrative costs of the Food Stamp program with the state. 7 C.F.R. § 277.4(b).

to the Florida Legislature by Article III, section 1 of the Florida Constitution, violates the doctrine of separation of powers set forth at Article II, section 3 of the Florida Constitution and is inconsistent with the APA. Under the Order, suspended activities include notices of development of proposed rules, amendment of existing rules, adoption of new rules, and publication of any rulemaking notices in the Florida Administrative Weekly. (App. A). In addition, Governor Scott's Order also prohibits the Secretary of State from publishing notices relating to rulemaking, and bars state agencies under the Governor's direction from engaging in any rulemaking activities in the future, absent authorization from OFARR. (App. A).

More than a dozen of the state agencies that the Governor deems to be under his direction are headed by secretaries who, by statute, are appointed by and serve at the pleasure of the Governor.[8] However, just because the Legislature allows the

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[8] *See* § 20.10 (1), Fla. Stat. (Department of State); § 20.165 (1), Fla. Stat. (Department of Business and Professional Regulation); § 20.18(1), Fla. Stat. (Department of Community Affairs); § 20.19(2)(a), Fla. Stat. (Department of Children and Family Services); § 20.197(1), Fla. Stat. (Agency for Persons with Disabilities); § 20.22(1), Fla. Stat. (Department of Management Services), § 20.23(1)(a), Fla. Stat. (Department of Transportation); § 20.255(1), Fla. Stat. (Department of Environmental Protection); § 20.315(3), Fla. Stat. Department of Corrections; §20.316(1)(a), Fla. Stat. (Department of Juvenile Justice); § 20.317(1)(a), Fla. Stat. (Department of the Lottery); § 20.41(1), Fla. Stat. (Department of Elder Affairs); and, § 20.42(2), Fla. Stat. (Agency for Health Care Administration). These agencies administer a multitude of services, programs, and initiatives that are vital to the safety and welfare of all Floridians, including but not limited to: emergency management, substance abuse, mental health services,

Governor to appoint the heads of these agencies does not mean that the Governor has the power to control their rulemaking by fiat. To the contrary, the Legislature gives the power of rulemaking to the agency heads themselves. *See* discussion *infra* at (V)(A)(1).

The activities that the Governor bans in the Order are all mandated by the APA. The Governor does not have constitutional authority to replace legislative mandates with procedures inconsistent with the APA, as he has done here. Separation of powers forbids this.

The Florida Constitution at Article II, section 3, divides the powers of government into three branches--legislative, executive and judicial-- and forbids "any person belonging to one branch [from] exercis[ing]...any powers appertaining to either of the other branches unless expressly provided herein." One of the powers that the Florida Constitution gives to the Legislature is the sole authority to make laws and direct rulemaking under a grant of legislative powers. Art. III, § 1, Fla. Const. (stating that "[t]he legislative power of the state shall be vested in a legislature of the State of Florida"); *Dept. of Rev. Novoa,* 745 So. 2d

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child care, community planning, Medicaid, transportation, water and air resources, waste management, recreation and parks, state prisons, community corrections, detention centers and long-term care, as well as the licensing and permitting of a host of businesses and professions. *See generally* Chapter 20 of the Florida Statutes. With few exceptions, each of these agencies has been created by the Legislature. *Id.*

378, 380 (Fla. 1st DCA 1999). *See also Chiles v. Children*, 589 So. 2d 260, 264 (Fla. 1991).

Because rulemaking is controlled by the Legislature, state agencies in the executive branch lack any power to adopt rules unless the Legislature expressly delegates permission to do so. *Fla. Elections Comm. v. Blair*, 52 So. 3d 9, 12 (Fla. 1st DCA 2010); *Novoa*, 745 So. 2d at 380. *Cf. Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). Even when the Legislature does delegate rulemaking permission, the delegation must include "statutory language that explicitly authorizes or requires an agency to adopt...a 'rule.'" § 120.52(17), Fla. Stat. (defining "rulemaking authority"). *See also Schiavo*, 885 So. at 332; *Blair*, 52 So. 3d at 9; § 120.52(8), Fla. Stat. (setting out the standards for determining whether an agency has improperly exercised the delegation of rulemaking authority given it by the Legislature); § 120.536, Fla. Stat. (reiterating that state agencies are only permitted to engage in rulemaking to the extent that the Legislature grants them permission).

In the vast majority of the hundreds of instances in which the Legislature delegates rulemaking authority, that delegation is to a state agency. *See e.g.,* § 63.202 (3), Fla. Stat. (giving the DCF rulemaking authority over licensure of adoption agencies); § 110.1099(5), Fla. Stat. (directing the Department of Management Services ("DMS") to adopt rules governing education and training for state employees); § 110.121, Fla. Stat. (allowing state agencies to adopt rules

governing the pooling of sick leave); § 110.2035(6)(c), Fla. Stat. (directing DMS to establish rules about classification and compensation program); § 409.2557(3), Fla. Stat. (giving rule making authority to the Department of Revenue to implement laws concerning child support enforcement); § 414.45, Fla. Stat. (giving DCF authority to adopt rules concerning public assistance); § 414.35(1), Fla. Stat. (directing DCF to adopt rules for the administration of emergency assistance programs); § 443.036(9), Fla. Stat. (allowing Agency for Workforce Innovation ("AWI") to adopt rules providing for the establishment of a uniform benefit year for the unemployment compensation program); and § 445.004(5)(c), Fla. Stat. (allowing AWI to adopt rules to administer workforce programs). Delegation of rulemaking power to state agencies makes sense because these agencies "generally have...expertise in a specific area they are charged with overseeing." *Rizov v. Bd. of Prof. Eng'rs,* 979 So. 2d 979, 980 (Fla. 3rd DCA 2008).

The insertion into rulemaking of an additional step (to be executed by personnel who do not necessarily have the specialized knowledge of the agencies) is wasteful and unnecessary. To do it through the purported establishment of a new super-agency solely responsible to the Governor is beyond the Governor's powers.

The web site established by the Governor's Office to describe information about OFARR also provides material designed to educate the public on the

operation of government. This site is entitled "Florida Has a Right to Know: Holding Government Accountable" (March 2011) *available at* http://floridahasarighttoknow.com/index.html. It contains, among other features, a "Rules & Rulemaking Tutorial." Among the statements made on this site are these:

- "We have three branches of government. Only the legislature can make laws unless it allows an agency to make law through rules."
- "When the Legislature delegates authority to an agency, it is called Rulemaking Authority."
- "Any statute that gives a duty to an agency must be carried out by the agency, sometimes through rulemaking."
- "...[A]ll rulemaking and hearing notices are published in the Florida Administrative Weekly."
- "The Department of State is responsible for publishing the FAC and FAW."
- "Even though it may seem complicated, the rulemaking process from Chapter 120, Florida Statutes, was designed to encourage public participation."
- "Generally, section 120.54, Florida Statutes, outlines the procedure for creating a rule."
- "The procedure contains numerous opportunities for the public to comment on the rule and legally object to the rule."

The Executive Order itself violates all these principles and purports to promulgate new procedures that conflict with legislative enactments.

Only in a few situations does the Legislature grant the Governor either rulemaking authority over state agencies or the power to pre-authorize the rules of state agencies. *See, e.g.,* § 14.34(3), Fla. Stat. (allowing the Executive Office of the Governor, in consultation with the Adjutant General and other appropriate entities, to adopt rules concerning the Governor's Medal of Merit); § 39.001(11), Fla. Stat. (directing the Executive Office of the Governor to adopt rules to implement child protection standards); § 43.291(7), Fla. Stat. (directing the Executive Office of the Governor to adopt rules concerning the judicial nominating commission); § 215.97(4)(a), Fla. Stat. (stating that the Department of Financial Services shall confer with the Executive Office of the Governor to adopt rules to provide appropriate guidance concerning requirements of the Florida Single Audit Act); and § 403.061(31), Fla. Stat. (allowing the Department of Environmental Protection to adopt rules stricter than those set by U.S. Environmental Protection Agency if approved by Governor). In this case, the Legislature has not given the Governor the right to either pre-authorize rules or pre-empt the APA. Had the Legislature intended the Governor to have this power, it knows how to provide the Governor such authority and could have granted it. *See Olmstead v. Fed. Trade Comm'n*, 44 So.3d 76, 82 (Fla. 2010).

In short, the power to enact laws is "quintessentially a legislative function." *Crist*, 999 So. 2d at 615. When a governor issues an order that is contrary to

existing law, that order "encroaches on the legislative function and ...[is] beyond his authority." *Id.* (holding that Governor Crist's execution of a contract allowing gambling that is illegal under Florida law violates separation of powers). Under separation of powers, even when a governor has authority to act, his actions "cannot contradict the state's...laws." *Id.* at 612. As described below in (1) - (3), Executive Order 11-01 expressly contravenes Florida's APA in a myriad of ways. The Governor does not have constitutional authority to do this and quo warranto is appropriate.

1. Executive Order 11-01 Contravenes Separation of Powers Because It Violates the APA's Express Prohibition on Delegation of the Agency Head's Authority to Propose Rules or File Proposed Rules for Adoption

The Florida Legislature gives the agency head authority to propose and adopt rules. § 120.54(1)(k), Fla. Stat. *See also* §§ 20.05(1)(e) (empowering the "head of a[n] [executive] department" with rulemaking authority under the APA); § 120.54(3)(a)(1), Fla. Stat. (stating that the "agency head" must approve proposed rules); and § 120.54(3)(e)(1), Fla. Stat. (stating that the "agency head" must approve final adoption of proposed rules). Although this rulemaking power is statutorily non-delegable, Governor Scott's Executive Order 11-01 transfers the ultimate decision to propose and adopt rules to OFARR. § 120.54(1)(k), Fla. Stat.; Fla. Exec. Or. No. 11-01 at §§ 1, 4. In giving the "final say" to OFARR, the

Order violates the APA and, therefore, also violates separation of powers as described below.

When the Legislature delegates rulemaking authority to a state agency, the agency must adopt policies that meet the definition of a "rule" under the adoption procedures set forth in Florida's APA. *Sch. Bd. of Palm Beach County v. Survivors Charter Schs.*, 3 So.3d 1220, 1231 (Fla. 2009); *Adam Smith Enters., Inc. v. State Dept. of Env.*, 553 So.2d 1260 (Fla 1st DCA 1989). In such an instance, the agency has no discretion but to proceed expeditiously with rulemaking. § 120.54(1)(a), Fla. Stat. (requiring agencies to adopt policy statements as rules "as soon as feasible and practicable"). These procedures are a specific "continuum of events" in a "complex process" that culminates in a properly adopted rule filed with the Secretary of State. *Adam Smith*, 535 So. 2d at at 1265. One of the first statutorily mandated steps in rulemaking is for the agency to publish notice of a proposed rule at the direction of the agency head. § 120.54 (3)(a)(1), Fla. Stat. After the agency has provided the public with notice and opportunity to be heard about the agency's intentions, the agency must file the proposed rule with the Department of State to complete final adoption. § 120.54 (3)(e)(1), Fla. Stat.

The obligation and resultant authority for proposing and adopting rules belongs to the agency and is not a delegable power. Indeed, the APA expressly prohibits

the agency head from delegating or transferring either of these rulemaking responsibilities:[9]

> ...[R]ulemaking responsibilities of an agency head under subparagraph (3) (a) 1 [pertaining to giving notice of proposed rulemaking][10]...subparagraph (3) (e) 1 [pertaining to filing rules for final adoption with the Department of State],[11] or subparagraph (3) (e) 6 [pertaining to adopting rules identical to federal regulations][12] may not be delegated or transferred.

§ 120.54(1)(k), Fla. Stat. *See also* § 120.54(3)(a)(1), Fla. Stat. (stating that the "agency head" must approve proposed rules) and § 120.54(3)(e)(1), Fla. Stat. (stating that the "agency head" must approve final adoption of proposed rules).

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[9]The APA only authorizes delegation of the authority to *develop* a rule under section 120.54(2) of the Florida Statutes. § 120.54(1)(k), Fla. Stat.

[10]Section 120.54(3)(a)(1) of the Florida Statutes states:

> (3) ADOPTION PROCEDURES.—
> (a) Notices.—
> 1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action...

[11]Section 120.54(3)(e)(1) of the Florida Statutes states:

> (e) Filing for final adoption; effective date.—
> 1. If the adopting agency is required to publish its rules in the Florida Administrative Code, the agency, upon approval of the agency head, shall file with the Department of State three certified copies of the rule it proposes to adopt...

[12]Section 120.54(3)(e)(6) of the Florida Statutes states:

> 6) ADOPTION OF FEDERAL STANDARDS...[A]n agency is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law...

Yet Executive Order 11-01 contravenes the APA's statutory prohibition on delegation of this responsibility. Contrary to the APA, the Governor removes this responsibility from the agency head and transfers it to OFARR. *See, e.g.,* Fla. Exec. Or. No. 11-01 at § 1 (prohibiting agencies from providing notice of "the development of proposed rules, amendment of existing rules or adoption of new rules, except at the direction of...[OFARR]"); and at § 4 (forbidding agencies from "submitting a notice of proposed rulemaking" absent consent from OFARR). The Governor does not have the constitutional power to usurp legislation properly enacted by the Legislature. Under the APA, the responsibility for proposing and adopting rules belongs solely to the agency head and cannot be delegated to the Office of Fiscal Accountability or anyone else. Thus, the Governor's delegation of this responsibility to the Office of Fiscal Accountability is a direct violation of separation of powers.

2. Executive Order 11-01 Violates Separation of Powers Because It Conflicts with the APA's Express Time Limits for Adopting or Withdrawing Proposed Rules

The APA is replete with mandatory time limits on agencies at various stages of rulemaking. As described below, not only are agencies required to move expeditiously in proposing rules and responding to petitions for rulemaking, but agencies are also bound by strict time limits for a myriad of other steps, such as

finalizing adoption. Executive Order 11-01 directly conflicts with many of these mandates.

The APA requires that agencies formally adopt policies that meet the definition of a "rule" "as soon as feasible and practicable," without giving agencies any discretion in the matter. § 120.54(1)(a), Fla. Stat. If an agency does not move expeditiously, the APA puts the burden on the agency to demonstrate that it meets a specified exception excusing the agency's delay. *Id.* at (1) (a)(1) – (2). Suspension of rulemaking by the Governor is not an enumerated excuse in the APA for failure to adopt rules. *Id.*

After an agency publishes notice of a proposed rule, the APA requires the agency to finalize its adoption no less than 28 days before and no more than 90 days after it gives notice of the proposed rule. § 120.54(3)(e)(2), Fla. Stat. The only circumstances that affect this time limit are things like review by the legislative Joint Administrative Procedures Committee ("JAPC"), the offer of a regulatory alternative by the Small Business Regulatory Advisory Council, a notice of change, final public hearing, statement of estimated regulatory costs, or a decision on a rule challenge. § 120.54(3)(b)(2)(b)(II) and (3)(e)(2) & (6), Fla. Stat. No exception to these time limits exists for suspension of rulemaking by the Governor.

The agency is also bound by statutory time limits even if it does not finalize a proposed rule. If an agency does not adopt a rule that it has proposed, the APA mandates that the agency publish a notice of withdrawal "in the next available issue of the publication in which the original notice of rulemaking was published." § 120.54(3)(d)(4), Fla. Stat. *See also* § 120.54(3)(e)(5) & (6)(d), Fla. Stat. (setting forth other mandatory time limits in rulemaking). Again, the APA does not recognize noncompliance based on suspension of rulemaking by the Governor.

Similarly, the APA places time limits on rulemaking after an agency receives a petition to initiate rulemaking. § 120.536(2), Fla. Stat. (requiring agencies to initiate rulemaking or deny a petition to repeal a rule within 30 - 45 days); § 120.54(7)(b), Fla. Stat. (requiring agencies to act on petitions to initiate rulemaking by initiating rulemaking or providing notice of a public hearing on the matter in the Florida Administrative Weekly within 30 days). Suspension of rulemaking imposed by the Governor is not a defense for failing to comply with these time standards under the APA.

Because it unilaterally suspends rulemaking, Executive Order 11-01 contravenes the time limits set out in the APA. Fla. Exec. Or. No. 11-01 at §§ 1, 4. Not only does the Governor assert the power to stop rulemaking, he also prevents agencies from complying with statutory time limits for actions, such as acting on petitions to initiate rulemaking or finalizing proposed rules that are already in the

pipeline. Some proposed rules that were in the pipeline and, to date, had been neither timely withdrawn nor timely filed for adoption under applicable statutory time limits because of the Order include: Rules 61J2-2.027 (proposing to change the real estate license application form to ask about treatment of mental impairments and drug disorders within the last five years) and 64B-7.002 (proposing to set forth disciplinary guidelines for registered pain management clinics).

In response to an inquiry from JAPC asking when notice of withdrawal for Rule 61J2-2.207 would be published, counsel for Florida's Attorney General stated that:

> Executive Order No.: 11-01, Mandate, has suspended all rulemaking process, unless prior authorization is granted, or the Executive Order is lifted by the Governor's office. Until such time, the Commission cannot engage in any rulemaking process.

Letter from Barnhart to Moore of 2/9/2011 (Composite App. F). *See also* Letter from Moore to Barnhart of 2/4/20100 (Composite App. F) *available at* http://www.japc.state.fl.us/results_detail.cfm?cn=R148248&ruleNo=61J2-2.027.

For Rule 64B-7.002, the Department of Health's ("DOH") Assistant General Counsel similarly responds to JAPC's question about publication of a notice of correction:

> In compliance with Executive Order Number 11-01, the Department will not of course publish a notice of correction in the Florida Administrative Weekly or subsequently proceed to publish a Notice

of Change until these actions are approved by the Office of Fiscal Accountability and Regulatory reform ("OFARR").

Letter from Erlich to Holladay of 1/11/2011(Composite Exhibit G). *See also* Letter from Holladay to Erlich of 1/5/2011(Composite Exhibit G) *available at* http://www.japc.state.fl.us/results_detail.cfm?cn=R148395&ruleNo=64B-7.002.

Executive Order 11-01's unilateral pre-emption of statutory time standards violates the APA's express time limits for action. Executive Order 11-01 contravenes separation of powers. Quo warranto is proper.

3. Executive Order 11-01 Violates Separation of Powers Because It Violates the APA's Express Mandate for the Department of State to Publish Rulemaking Notices in the Florida Administrative Weekly

The Florida Administrative Weekly is the portal for state agencies to provide the citizens of Florida notice of activities and actions that affect the public. § 120.55 (1)(b), Fla. Stat. The APA explicitly directs that the Department of State "shall" publish rulemaking-related notices, such as notices of adoption of rules, notices of proposed rules, and notices of rulemaking hearings. § 120.55 (1)(b)(1)-(3), Fla. Stat. Yet the Order contravenes the APA's command by forbidding the Secretary of State from publishing rulemaking notices "except at the direction of the Office of Fiscal Accountability." Exec. Order 11-01 at § 1. Nothing in the APA prohibits the publication of rulemaking notices absent permission from OFARR or makes publication contingent on OFARR permission. Because the

Governor lacks authority to issue mandates contrary to preexisting law, Executive Order 11-01 violates separation of powers.

4. The Governor Fails to Comply with the APA in Issuing Executive Order 11-01

The Governor is an "agency" subject to the APA if he is not "acting pursuant to powers derived from the constitution" under section 120.52(1) (a) of the Florida Statutes. In such cases, any policy statement issued by the Governor that meets the definition of a rule at section 120.52(16) must be authorized by the Legislature and adopted pursuant to the APA's rulemaking procedures. § 120.536(1), Fla. Stat. (prohibiting agencies subject to the APA from adopting rules without legislative authority); § 120.54(1) (a), Fla. Stat. (requiring that all agency statements defined as rules be adopted by rulemaking procedures). The Governor is exempt from these mandates only if he has specific legislative authority to proceed without adopting rules or if he is acting pursuant to a constitutionally authorized power. *Thompson v. State*, 342 So.2d 52 (Fla. 1977).

Here, Executive Order 11-01 meets the definition of a rule because it is a statement of general applicability that prescribes law and policy and describes the procedure or practice requirements binding on OFARR and other state agencies. *See* § 120.52(16), Fla. Stat. None of the statutory exemptions for rulemaking at section 120.57(6) (a)-(c) of the APA applies to the Order. Yet, although the Governor has neither the constitutional authority he purports to exercise in

Executive Order 11-01 nor permission from the Legislature to proceed without complying with the APA, he fails to follow rulemaking procedures mandated by the APA. This denies public participation in rulemaking and is improper.

VI. CONCLUSION

Executive Order 11-01 violates fundamental principles of separation of powers required by Article II, section 3 of the Florida Constitution. Although the Legislature has enacted detailed rulemaking procedures in Florida's Administrative Procedure Act at Chapter 120 of the Florida Statutes, Governor Scott's Executive Order 11-01 violates the APA by suspending rulemaking and replacing legislative mandates with procedures that are inconsistent with law. The Florida Constitution gives the authority to make law to the Legislature, not the Governor. The powers and functions of Florida's government have and will continue to be adversely affected absent intervention by this Court. The APA is critical to assuring that Florida's most vulnerable low-income citizens are informed of government polices and afforded notice and opportunity to be heard concerning measures that adversely affect them. Yet the APA is being unilaterally preempted by a branch of government with no authority to do so. Quo warranto is appropriate because the Governor does not have constitutional authority to create OFARR, to place another level of government into the rulemaking process, and to transfer power from the

heads of agencies to OFARR. The Petitioner asks this Court to grant her petition for writ.

Respectfully submitted,

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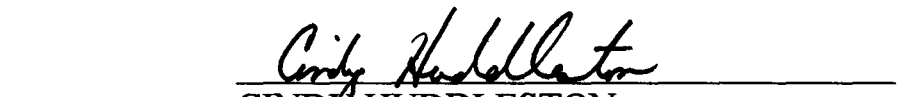

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to both Rick Figlio and Charles Trippe, General Counsel, Office of Governor, The Capitol, 400 S. Monroe St., Room 209, Tallahassee, FL 32399-0001 by hand-delivery this 28 day of March 2011.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure.

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