Supreme Court of Florida

No. SC11-592

ROSALIE WHILEY,
Petitioner,

vs.

HON. RICK SCOTT, etc.,
Respondent.

[August 16, 2011]

PER CURIAM.

This case is before the Court on the petition of Rosalie Whiley for a writ of quo warranto seeking an order directing Respondent, the Honorable Rick Scott, Governor of the State of Florida, to demonstrate that he has not exceeded his authority, in part, by suspending rulemaking through Executive Order 11-01. We have jurisdiction. See art. V, § 3(b)(8), Fla. Const. In exercising our discretion to resolve this matter, we grant relief and specifically hold that the Governor impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the

rulemaking which has been delegated by the Florida Legislature.[1] Absent an amendment to the Administrative Procedure Act itself or other delegation of such authority to the Governor's Office by the Florida Legislature, the Governor has overstepped his constitutional authority and violated the separation of powers. Accordingly, upon this basis we grant the petition for writ of quo warranto.

BACKGROUND

On January 4, 2011, Governor Scott issued "Executive Order Number 11-01 (Suspending Rulemaking and Establishing the Office of Fiscal Accountability and Regulatory Reform)," which created that office (OFARR) within the Executive Office of the Governor.[2] OFARR is tasked with the goal of ensuring that agency-created rules do not hinder government performance and that they are fiscally responsible. OFARR specifically looks for rules that affect businesses, public health/safety, job growth, and indirect costs to consumers. Under Executive Order

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1. It is most unfortunate that the dissenting opinion of Justice Polston fails to comprehend the fact that parts of an executive order may be valid while other aspects are invalid. See Polston, J., dissenting op. at 30. Under such circumstances the executive order is unconstitutional in part. An invalid section of an executive order cannot survive constitutional scrutiny by riding on the coattails of the valid portions. Even if sections of the Governor's executive order may be valid, the provisions that are contrary to constitutional requirements simply cannot escape without analysis.

2. The requisite duties of the Executive Office of the Governor are specifically identified under section 216.151, Florida Statutes (2010), and those duties pertain to state planning and budgeting.

11-01, state agencies controlled by the Governor were directed to immediately "suspend" rulemaking activities. State agencies not directly under the Governor's control were requested to "suspend" rulemaking activities. The executive order further provided that, before submitting a notice of proposed rulemaking or of amendments to existing rules pursuant to the rulemaking procedures mandated by Chapter 120, the agencies under the direction of the Governor were required to submit the complete text of the proposed rule or amendment to OFARR for review, along with any other documentation the office may require. The executive order directed each agency head to do the following: appoint an "Accountability and Regulatory Affairs Officer"; review and evaluate the agency's current policies "relating to programs and operations administered or financed by the agency and make recommendations to improve performance and fiscal accountability"; submit to the Governor a comprehensive review of existing rules and regulations, together with recommendations as to whether any such rules should be modified or eliminated; and submit a "regulatory plan" which identifies and describes any rules the agency head expects to promulgate during the following twelve-month period. The Secretary of State was ordered not to publish any rulemaking notices in the Florida Administrative Weekly absent authorization from OFARR.

A superseding, second executive order, Executive Order 11-72, also pertaining to agency rulemaking, was issued by the Governor's Office on April 8,

2011. The two executive orders are substantially the same; the primary differences are that the superseding order does not expressly use the terms "suspending" and "suspend," and that the operation of OFARR is continued rather than established.[3]

On March 28, 2011, Whiley, in her capacity as a citizen and taxpayer, filed a petition for a writ of quo warranto naming Governor Scott as the respondent. The petition challenges the authority of the Governor to issue Executive Order 11-01 as a violation of separation of powers. To the extent that Executive Order 11-01—and superseding Executive Order 11-72 (issued subsequent to the date Whiley filed her petition)—suspend the rulemaking process established by the Florida Legislature under Chapter 120, the Florida Administrative Procedure Act (APA), we conclude that the Governor exceeded his constitutional authority.[4]

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3. Apparently the act of issuing a second executive order that superseded the first executive order, excluding the word "suspend," was sufficient for one colleague to conclude that, unlike its predecessor, Executive Order 11-72 does not operate to suspend rulemaking. See Polston, J., dissenting op. at 32. We address what seems nothing more than a sleight of hand within our discussion of the two executive orders. Infra at 11.

4. In addition to her status as a citizen and taxpayer, Whiley also alleged that as a blind food stamp recipient who is required to periodically reapply for benefits and who uses the online Food Stamp application form incorporated in Rule 65A-1.205 of the Florida Administrative Code (Eligibility Determination Process), she is negatively impacted by the operation of Executive Order 11-01. We need not address Whiley's allegations on this point, however, as the extent of harm to the petitioner is not pertinent to the Court's inquiry under quo warranto, and is simply an attempt by the dissent to divert attention. See Polston, J., dissenting op. at 34-35. Rather, a petition for writ of quo warranto is directed at the action of the state officer and whether such action exceeds that position's

I. JURISDICTION

Whiley seeks a writ of quo warranto, and it is clear that the Florida Constitution authorizes this Court as well as the district and circuit courts to issue writs of quo warranto. See art. V, §§ 3(b)(8), 4(b)(3) and 5(b), Fla. Const. The term "quo warranto" means "by what authority," and the writ is the proper means for inquiring into whether a particular individual has improperly exercised a power or right derived from the State. See Fla. House of Reps. v. Crist, 999 So. 2d 601, 607 (Fla. 2008); Martinez, 545 So. 2d at 1339. This Court "may" issue a writ of quo warranto which renders this Court's exercise of jurisdiction discretionary. Art. V, § 3(b)(8), Fla. Const. Furthermore, the Court is limited to issuing writs of quo warranto only to "state officers and state agencies." Id. The Governor is a state officer. See art. III, § 1(a), Fla. Const. ("The governor shall be the chief administrative officer of the state . . . .").

Here, Whiley asserts that the Governor lacked authority to issue Executive Order 11-01 to the extent a portion of the order suspending agency rulemaking exceeds the Governor's authority and violates the doctrine of separation of powers.

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constitutional authority. See Martinez v. Martinez, 545 So. 2d 1338, 1339 (Fla. 1989) (in addressing the issue of standing, stating that "[i]n quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit 'need not show that he has any real or personal interest in it.'") (emphasis added; citing State ex rel. Pooser v. Wester, 170 So. 736, 737 (Fla. 1936)). Thus, when bringing a petition for writ of quo warranto, individual members of the public have standing as citizens and taxpayers. See Chiles v. Phelps, 714 So. 2d 453, 456 (Fla. 1998).

Thus, the petition asserts a proper basis for quo warranto relief upon which this Court may exercise its discretionary review. See, e.g., Fla. House of Reps. v. Crist, 999 So. 2d 601, 607 (Fla. 2008) (concluding that the Court had quo warranto jurisdiction where petitioners sought relief against the governor for exceeding his authority to unilaterally execute a gambling compact expanding casino gambling on tribal lands); Martinez, 545 So. 2d at 1339 (deciding that quo warranto was the proper method to test the governor's power to call a second special session).

As a general rule, unless there is a compelling reason for invoking the original jurisdiction of a higher court, a quo warranto proceeding should be commenced in circuit court. See Vance v. Wellman, 222 So. 2d 449, 449 (Fla. 2d DCA 1969). This Court may choose to consider extraordinary writ petitions "where the functions of government would be adversely affected absent an immediate determination by this Court." Chiles, 714 So. 2d at 457; see, e.g., Allen v. Butterworth, 756 So. 2d 52, 55 (Fla. 2000) (entertaining jurisdiction on a petition for writ of mandamus where failure to resolve the issue would result in a large number of postconviction death case proceedings being in "limbo," and where the responsibilities of a large number of state-employed attorneys would be affected); Moreau v. Lewis, 648 So. 2d 124, 125-26 n.4 (Fla. 1995) (entertaining jurisdiction on a mandamus petition which sought to invalidate a portion of a General Appropriations Act that required Medicaid recipients to make a $1

copayment for pharmacy services, finding that "an immediate determination is necessary to protect governmental functions," and noting that there was no relevant factual dispute which would require "extensive fact-finding"). Moreover, in Harvard v. Singletary, 733 So. 2d 1020, 1021-22 (Fla. 1999), this Court explained that it would "decline jurisdiction and transfer or dismiss writ petitions which . . . raise substantial issues of fact or present individualized issues that do not require immediate resolution by this Court, or are not the type of case in which an opinion from this Court would provide important guiding principles for the other courts of this State." (Emphasis in original).

We find that the present case raises a serious constitutional question relating to the authority of the Governor and the Legislature respectively in rulemaking proceedings. The issue of whether the Governor has the power to suspend agency rulemaking directly and substantially affects the fundamental functions of state government. We also note that a decision from this Court on such an issue would provide important guiding principles to other state courts, and that there do not appear to be any substantial disputes of material fact. Accordingly, we exercise our discretionary jurisdiction and entertain the petition for writ of quo warranto.

II. DISCUSSION

Our precise task in this case is to decide whether the Governor has overstepped his constitutional authority by issuing executive orders which contain

certain limitations and suspensions upon agencies relating to their delegated legislative rulemaking authority and the requirements related thereto.[5] We must first consider the constitutional provision of separation of powers in the context of Florida's APA to determine the proper roles of the executive and legislative branches in that process to determine whether any portion of the executive orders interferes with that authority for the rulemaking process.

Separation of Powers

"[S]eparation of powers 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). In applying

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5. For this reason, we find the Governor's supplemental authority not pertinent to the issue before the Court. The Governor cites to three administrative cases—Etienne v. Dep't of Children and Family Servs., Case Nos. 10-5141RX, 10-9516RP, 10-10105RP (DOAH Nov. 11, 2010)—as well as an interlocutory appeal filed in the Third District Court of Appeal arising from one of the administrative cases—Etienne v. Florida Dep't of Children and Families, Case No. 3D11-461. The Governor informs the Court that each case has been dismissed as moot. The administrative cases either raised the issue of whether Florida's online food stamp application form, adopted through a state regulatory rule, violated federal law, or were related to that issue. Whiley, in addition to relying upon her status as a citizen and taxpayer, argued she was personally affected by the operation of the Governor's issuance of Executive Order 11-01 because she was subject to the regulation requiring reapplication for food stamp benefits. However, this case is not an administrative challenge, but concerns whether the Governor exceeded his authority due to the effect, in part, of Executive Orders 11-01 and 11-72. As previously stated, quo warranto does not require that a petitioner have a real and personal interest in the public official's action at issue. Accordingly, the individual operation of the regulation at issue in the Etienne cases (of which neither party in the instant case was a party), and that those cases are now dismissed, is not pertinent to our resolution of this case.

the separation of powers doctrine, the Court has done so strictly, explaining "that this 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. (quoting Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991)). Whiley's petition raises the first prohibition, for which we find the following discussion particularly pertinent in guiding our review:

> The separation of powers doctrine is founded on mutual respect of each of the three branches for the constitutional prerogatives and powers of the other branches. Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures or to discipline parties before the courts as in contempt proceedings, we must be equally careful to respect the constitutional authority of the other branches. Art. II, § 3; art. V, §§ 1, 2, 3 and 15, Fla. Const.; Florida Motor Lines v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930); Markert v. Johnson, 367 So. 2d 1003 (Fla.1978); Ex parte Earman, 85 Fla. 297, 95 So. 755 (1923). Courts should be loath to intrude on the powers and prerogatives of the other branches of government and, when necessary to do so, should limit the intrusion to that necessary to the exercise of the judicial power.

Orr v. Trask, 464 So. 2d 131, 135 (Fla. 1985).

Executive Orders 11-01 and 11-72 and Agency Rulemaking

Whether some portion of the content of Executive Order 11-01 along with the superseding executive order, Executive Order 11-72, encroaches upon a function of the legislative branch of government thereby violating separation of powers raises two considerations. First, we must determine the governmental

function implicated by those orders. Review of Executive Orders 11-01 and 11-72 themselves is necessary to resolve that issue. Second, we must decide which branch of government is responsible for and has authority over whatever that particular function may be. Constitutional, statutory, and decisional law controls resolution of the Court's latter consideration.

Turning first to the Governor's executive orders, Executive Order 11-01 provided in pertinent part as follows:

> **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.

Fla. Exec. Order No. 11-01, § 1 (January 4, 2011) (emphasis added).[6] Though the language has been revised, Executive Order 11-72, in pertinent part, also requires the suspension of agency rulemaking until approval is obtained from OFARR:

> **Section 1.** I hereby direct all agencies under the direction of the Governor, **prior to developing new rules or amending or repealing existing rules**, to submit all proposed notices, along with the complete text of any proposed rule or amendment, to OFARR. These agencies shall also submit any other documentation required by

6. Executive Order 11-01 included other provisions as well. In addition to the provisions that directly or effectively suspended rulemaking, others required review of already existing rules. Those provisions of the executive order are not the subject of the petition for relief.

> OFARR, and no such agency may submit for publication any required notice **without OFARR's approval**.

Fla. Exec. Order No. 11-72, § 1 (April 8, 2011) (emphasis added).[7] The express terms of the executive orders unequivocally reflect that the governmental function at issue is rulemaking and regulation. Observing that the first executive order, which expressly used the words "suspend" and "suspending," was superseded by the second executive order that issued after Whiley initiated this proceeding, one dissenting opinion concludes that the suspension in the first executive order has been lifted. See Polston, J., dissenting op. at 32. We disagree with that conclusion. Indeed, the only relevant distinction we can discern between the two orders is that Executive Order 11-01 established OFARR, while Executive Order 11-72 continues operation of OFARR. The fact that the Secretary of State is not required to seek OFARR's approval before publishing notices required by the APA, a factor identified by the dissent, fails to contemplate the corollary provision that "no such agency may submit for publication any required notice without OFARR's approval." Rather than engage in a true analysis, one comparing the language of section 1 of the two executive orders, the dissent instead hides behind a discussion of the other sections of Executive Order 11-72—sections that do not

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7. Executive Order 11-72, as was the case with the original executive order on the subject, includes provisions in addition to those alleged to suspend agency rulemaking. Those provisions are also not at issue in this proceeding.

address the issue of suspension of rulemaking. See Polston, J., dissenting op. at 32-34.

Turning to rulemaking, we must determine whether the branch responsible for that function is the Legislature, as Whiley asserts, or whether that function is within the executive branch.

Rulemaking is a derivative of lawmaking. An agency is empowered to adopt rules if two requirements are satisfied. First, there must be a statutory grant of rulemaking authority, and second, there must be a specific law to be implemented. § 120.536(1), Fla. Stat. (2010). "Rulemaking authority" is statutory language that explicitly authorizes or requires an agency to adopt rules. § 120.52(17), Fla. Stat. (2010). "Rules" are "statement[s] of general applicability that implement[], interpret[], or prescribe[] law or policy or describe[] the procedure or practice requirements of an agency." § 120.52(16), Fla. Stat. (2010). Accordingly, "[w]hen an agency promulgates a rule having the force of law, it acts in place of the legislature." Dep't of Revenue v. Novoa, 745 So. 2d 378, 380 (Fla. 1st DCA 1999); cf. Gen. Tel. Co. of Fla. v. Fla. Pub. Serv. Comm'n, 446 So. 2d 1063, 1066 (Fla. 1984) ("This Court has recognized that agency rulemaking pursuant to statutory authorization, such as the PSC rulemaking in this case, is a quasi-legislative function.").

Moreover, the Legislature has delegated specific responsibilities to agency heads, such as the authority to determine whether to go forward with proposing, amending, repealing, or adopting rules. See § 120.54(3)(a)(1), Fla. Stat. (2010) (providing that, prior to the adoption, amendment, or repeal of any rule, the agency head must give approval); § 120.54(3)(e)(1), Fla. Stat. (2010) (providing that, prior to the filing of the proposed rule with the Department of State, the agency head must give approval). This authority of the agency head cannot be delegated or transferred. See § 120.54(1)(k), Fla. Stat. (2010). Thus, rulemaking is a legislative function. See Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) ("[T]he Legislature may 'enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.'") (quoting State v. Atlantic Coast Line R.R. Co., 56 Fla. 617, 636-37, 47 So. 969, 976 (1908)). The Legislature delegates rulemaking authority to state agencies because they usually have expertise in a particular area for which they are charged with oversight. See Rizov v. State, Bd. of Prof'l Eng'rs, 979 So. 2d 979, 980 (Fla. 3d DCA 2008). Accordingly, the Legislature may specifically delegate, to some extent, its rulemaking authority to the executive branch "to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal

with complex and fluid conditions."[8] Microtel, Inc. v. Fla. Pub. Serv. Comm'n., 464 So. 2d 1189, 1191 (Fla. 1985); see also § 120.536(1), Fla. Stat. (2010).[9]

To determine whether the executive orders encroach upon the legislative delegations of rulemaking authority, the Court must first consider the established procedure for rulemaking. When adopting rules, the agencies must specifically conform to the rulemaking procedure enacted by the Legislature as the Florida Administrative Procedure Act in chapter 120, Florida Statutes. First, the agency

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8. The Legislature's delegation of its rulemaking power itself may be subject to challenge on the basis that it runs afoul of the nondelegation doctrine. See Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) ("Generally, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law."). In this case, however, the extent of any rulemaking delegation is not at issue.

9. Section 120.536 provides in pertinent part as follows:

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

§ 120.536(1), Fla. Stat. (2010).

must provide preliminary notice of the development of the proposed rule in the Florida Administrative Weekly. See § 120.54(2), Fla. Stat. (2010). Second, upon approval of the agency head, the agency must give a more thorough notice of the intended action in the Florida Law Weekly, and this notice must be published at least 28 days prior to the intended action. See § 120.54(3)(a), Fla. Stat. (2010). The agency must file a copy of the proposed rule with the Administrative Procedures Committee as well. See §§ 120.54(3)(a)4; 120.52(4), Fla. Stat. (2010). Third, under certain circumstances and upon the request of any affected person, the agency must provide such persons the opportunity to present evidence and make arguments on all issues under consideration. See § 120.54(3)(c), Fla. Stat. (2010). If all of the statutory requirements are met, the rule is officially "adopted" upon filing with the Secretary of State, and the rule becomes effective twenty days after this filing. See § 120.54(3)(e)6, Fla. Stat. (2010). However, if an agency finds that "an immediate danger to the public health, safety, or welfare requires emergency action," it may adopt "any rule necessitated by the immediate danger"—i.e., an emergency rule. See § 120.54(4), Fla. Stat. (2010). Otherwise, the agency must comply with the normal procedures for rulemaking. See Fla. Health Care Ass'n v. Agency for Health Care Admin., 734 So. 2d 1052, 1053-54 (Fla. 1st DCA 1998).

Both parties rely upon two 1995 executive orders issued by former Governor Lawton Chiles in support of their opposing positions with respect to whether or not

Executive Orders 11-01 and 11-72 interfere with the APA. Upon review of Executive Orders 95-74 and 95-256, we conclude that the Chiles orders were clearly limited to review of agency rules and did not suspend or terminate delegated legislative rulemaking authority contrary to the Florida Administrative Procedure Act.

In Executive Order 95-74, Governor Chiles directed each agency under the supervision of the Governor to conduct a review examining the purpose, intent, and necessity of each rule. Agencies were further directed to identify any rules they felt were obsolete or unnecessary. Executive Order 95-74 mandated that the rules then be sent for analysis to the Office of Planning and Budgeting, within the Executive Office of the Governor. When completed, the rules were then to be provided to the Legislature for an opportunity to review the rules and repeal and/or amend any statutes mandating the rules so that the repeal of the rules could be effectuated. Additionally, any rules that an agency itself had discretion to repeal were also to be submitted to the Legislature for its review and comment.

Executive Order 95-256 extended that which was initially designed as a one-time review process in Executive Order 95-74 to an ongoing agency mandate to be conducted every sixty days and to be reported to the Office of the Executive. Fla. Exec. Order No. 95-256, § 2 (July 12, 1995). Executive Order 95-256 also directed agencies to review the Florida Statutes for recommendations as to

legislative mandates that could be eliminated, without harm to the public health or safety, thereby reducing the operating costs of government. Fla. Exec. Order No. 95-256, § 3 (July 12, 1995). Executive Order 95-74 further instructed agencies to determine if rules were obsolete or otherwise unnecessary. Executive Order 95-256 expanded this criterion to include rules that achieved objectives that could be accomplished in a more efficient, or less expensive or intrusive manner; rules that were overly precise; or rules that duplicated other rules. Fla. Exec. Order No. 95-256, § 2 (July 12, 1995). Executive Order 95-256 also created the Governor's APA Review Commission, which was responsible for recommending changes to the APA to legislative leaders as well as the Governor.

There are limited similarities between the 1995 and 2011 executive orders not really at issue in this case. For example, both establish a review of rules promulgated by executive agencies under the direction of the Governor to take place to determine if any rules are unnecessary, and both direct that agencies pursue to repeal or amend any rule identified as unnecessary. Each also mandates that the agencies' findings be submitted to the Executive Office of the Governor on a regular basis. Aside from these review similarities, however, the 1995 executive orders and Executive Orders 11-01 and 11-72 differ in two substantial and material respects.

First, the Chiles orders did not provide for an additional review body to have authority over the decisions reached by the agencies themselves. While each of the identified executive orders mandated that agencies under the Governor's direction must review their rules and submit a report of any unnecessary rules, Governor Scott's executive orders create an office outside the agencies that has independent review power as well. Fla. Exec. Order No. 11-72, § 3 (April 8, 2011). OFARR was created to operate in the Executive Office of the Governor and has the ability to review not only existing rules to ensure they do not adversely or unreasonably affect businesses or job growth and to ensure that they do not impose unjustified overall costs on the government or consumers, but also rules to be proposed in the future. See id. In contrast, the Chiles executive orders allowed the agencies themselves to solely retain the power to review agency rules and subsequently seek the repeal of those rules.

Second, the Chiles executive orders did not change the agencies' process for proposing, amending, or repealing rules. Each Governor's action substantially and materially differs with regard to how both proposed rules, as well as established rules that are sought to be amended or repealed, are treated. Executive Order 11-72 mandates that absolutely no required notice may be published without the approval of OFARR. Fla. Exec. Order No. 11-72, § 1 (April 8, 2011). Pursuant to the APA, however, agencies are required to provide notice prior to the adoption,

amendment, or repeal of any rule (other than an emergency rule). § 120.54(3)(a)(1), Fla. Stat. (2010). Executive Order 11-72 mandates that agencies receive OFARR approval before taking any of these three rulemaking actions. Significantly, Executive Order 95-256 contains no provision requiring an entity within the Executive Office of the Governor to approve rulemaking activity. Thus, under the 1995 executive orders, agencies were free to engage in the proposal, amendment, and repeal of rules without approval from a member of the Executive Office of the Governor.

Suspension

The foregoing leads the Court to conclude that the Governor's executive orders at issue here, to the extent each suspends and terminates rulemaking by precluding notice publication and other compliance with Chapter 120 absent prior approval from OFARR—contrary to the Administrative Procedure Act—infringe upon the very process of rulemaking and encroach upon the Legislature's delegation of its rulemaking power as set forth in the Florida Statutes. Whether the Governor exceeded his authority derived from state law does not turn upon the number of times the encroachment occurred or whether petitioner was personally affected by it. Issuance of Executive Order 11-72, and specifically section 1, suspends rulemaking; the precise language therein leads the Court to that inescapable conclusion. One colleague's dissent suggesting that this opinion

questions the Governor's authority to issue Executive Order 11-72, see Polston, J., dissenting op. at 30, is a red herring.

Constitutional Authority

The Governor argues that his authority for establishing OFARR and the duties and responsibilities thereunder derives from the Florida Constitution, art. IV, sec. 1(a). That provision reads as follows:

> 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.

Art. IV, § 1(a), Fla. Const.

Previously presented in an attorney general opinion dated July 8, 1981, in relevant part, was the following question: "1. Can the Governor by executive order . . . give binding directions to state agencies to implement and comply with Florida's Coastal Zone Management Plan without violating the requirements of the Florida Administrative Procedure Act?" Op. Att'y Gen. Fla. 81-49, at 1 (1981). There it was opined that section 1(a) of article IV of the Florida Constitution did not confer upon the governor "any power of direct control and supervision over all state agencies . . . ." Id. at 2. As explained by that opinion, "to hold otherwise,

would render the plain language [Executive departments] of s. 6, Art. IV, meaningless." Id. The attorney general opinion addresses an issue comparable to that raised in the instant petition. Because the department heads,[10] and not the Governor, shall direct the powers, duties, and functions vested in a department, the opinion stated that the Governor could not give binding directions to any state executive department to comply with a particular plan or act, or exercise rulemaking authority "in that regard over or for such executive departments, absent some specific authorization in part II of ch. 380, F.S.,[11] or other general law, which would permit such." Id. at 3.

Although not binding upon this Court, see Inquiry Concerning a Judge, re Holder, 945 So. 2d 1130, 1132 (Fla. 2006), we find persuasive attorney general opinion 81-49. If article IV, section 1(a) of the Florida Constitution does not authorize the Governor to direct the manner in which an executive agency shall

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10. Section 20.05, Florida Statutes (2010), provides in pertinent part that "(1) Each head of a department, except as otherwise provided by law, must: . . . (e) [s]ubject to the requirements of chapter 120, exercise existing authority to adopt rules pursuant and limited to the powers, duties, and functions transferred to the department; . . . ." § 20.05(1)(e), Fla. Stat. (2010). "Department" is the principal administrative unit of or within the executive branch, §§ 20.03(2) and 20.04(1), and "the individual or board in charge of the department" is the "[h]ead of the department." § 20.03(4).

11. Chapter 380 of the Florida Statutes, Land and Water Management, includes, in Part II, the Florida Coastal Planning and Management Act at issue in the attorney general's opinion numbered 81-49.

proceed under a statutory act, we reject the proposition that that same constitutional provision authorizes the Governor to suspend, terminate, and control agency rulemaking contrary to the APA, as contrasted with review of agency rulemaking.[12]

With apparent disregard for the Court's precedent, the dissents deem the Governor all-powerful as "the supreme executive power" by virtue of article IV, section 1(a) of the Florida Constitution. See Canady, C.J., dissenting op. at 28-29; Polston, J., dissenting op. at 43. The phrase "supreme executive power" is not so expansive, however, and to grant such a reading ignores the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power. See, e.g., State ex rel. Kennedy v. Lee, 274 So. 2d 881, 882 (Fla. 1973); Bd. of Pub. Instruction v. Wright, 76 So. 2d 863, 864 (Fla. 1955). Moreover, the dissents' failure to address the provisions of the APA delegating to agency heads the

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12. The Court has carefully reviewed the arguments against application of attorney general opinion 81-49 raised by Attorney General Bondi in her amicus brief in support of the Governor. Those arguments include the following: the Governor merely established an across-the-board process by which rules and proposed rules will be reviewed; the relevance of the attorney general opinion has been lessened by the subsequently adopted administrative accountability regime, including that the Governor's powers relating to his oversight of executive agencies has been expanded, especially in light of the passage of Amendment 4 and section 20.051, Florida Statutes; and no subsequent opinion of the Attorney General has cited this particular attorney general opinion. These arguments fail to take into account the distinction between OFARR's review function, which does not run afoul of separation of powers, and OFARR's initial rulemaking role as a "gatekeeper," which does.

authority to determine whether to go forward with proposing, amending, repealing, or adopting rules—i.e., sections 120.54(3)(a)(1) and 120.54(3)(e)(1), Florida Statutes (2010)—an authority that cannot be delegated by any entity other than the Legislature, demonstrates the absence of support for the position advanced.

In support of the requirements under Executive Orders 11-01 and 11-72, the Governor also relies upon his supervisory power under article IV, section 6 of the Florida Constitution. That provision provides, in pertinent part, as follows: "The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, . . . or an officer or board appointed by and serving at the pleasure of the governor . . . ." The Governor argues, consequently, that he has the authority—at will—to remove agency heads who serve at his pleasure. See art. IV, § 6, Fla. Const.

The dissents similarly give expansive interpretation to the "serving at the pleasure of the governor" phrase in article IV, section 6 of the Florida Constitution. See Canady, C.J., dissenting op. at 28-29; Polston, J., dissenting op. at 43. Apparently, the dissents believe that the Legislature only intended that the agency head not be permitted to redelegate or transfer the delegated power to approve pursuant to section 120.54(1)(k), Fla. Stat. (2010) within the agency, and that, in light of the Governor's gatekeeper role in deciding what rules would be proposed,

the agency head's role pursuant to sections 120.54(3)(a)(1) and 120.54(3)(e)(1) is nothing more than that of a figurehead, whose authority is purely illusory.

We reject the Governor's and the dissents' interpretation of article IV, section 6 of the Florida Constitution; the power to remove is not analogous to the power to control. This is particularly the case where the delegated authority is a legislative function and the Legislature has expressly placed the power to act on the delegated authority in the department head, and not in the Governor or the Executive Office of the Governor. See § 20.05(1)(a), (e), Fla. Stat. (2010). In this case, Executive Orders 11-01 and 11-72 supplant legislative delegations by redefining the terms of those delegations through binding directives to state agencies, i.e., first by suspending and terminating rulemaking, second, by requiring agencies to submit to OFARR any amendments or new rules the agency would want to propose, and then by causing OFARR to interject itself as the decisive entity as to whether and what will be proposed.

Legislative Delegation to Executive or Amendment to Chapter 120[13]

Finally, the last possible source of authority for the Governor's action in requiring prior approval by OFARR before the legislative delegation of rulemaking

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13. Although the parties did not address the potential import of legislative delegation of rulemaking authority to the Executive in their pleadings before the Court, the issue did arise at oral argument based upon a filing of supplemental authority by the Governor.

may occur would be by either legislative delegation or direct amendment to Chapter 120. The Legislature previously has, in specifically delineated terms and circumstances, delegated to the Executive Office of the Governor certain responsibility for the oversight of rulemaking. See, e.g., § 14.2015, Fla. Stat. (2010),[14] and § 288.7015, Fla. Stat. (2010). These two statutes demonstrate that the Legislature understands how to confer upon the Governor the authority to oversee agency rulemaking when it so desires. See Cason v. Fla. Dep't of Mgmt. Servs., 944 So. 2d 306, 315 (Fla. 2006) ("In the past, we have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question").[15]

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14. The Legislature repealed section 14.2015 during the 2011 legislative session, Ch. 2011-142, § 477, Laws of Fla., in the course of transferring the functions and trust fund of the Office of Tourism, Trade, and Economic Development to the newly created Department of Economic Opportunity, Ch. 2011-142, § 4(1), Laws of Fla.

15. This principal is of particular import here, as the two statutory provisions expressly provided for substantially the same goals the Governor subsequently sought through Executive Orders 11-01 and 11-72. For example,

> [t]he purpose of the Office of Tourism, Trade, and Economic Development is to assist the Governor in working with the Legislature, state agencies, business leaders, and economic development professionals to formulate and implement coherent and consistent policies and strategies designed to provide economic opportunities for all Floridians.

§ 14.2015(2), Fla. Stat. (2010). The "rules ombudsman" that the Governor is to appoint in the Executive Office of the Governor is to consider "the impact of

Another possible source of delegation of rulemaking authority to the Governor would be by amendment to the APA with specific provisions directed to the Executive Office of the Governor. With the enactment of section 120.745, Florida Statutes, on June 24, 2011, upon the Governor's signature of House Bill 993, see Ch. 2011-225, § 5, Laws of Fla., the Legislature essentially approved the process by which OFARR reviews agency rules that have already been promulgated. However, by its own terms, section 120.745, which pertains to legislative review of agency rules, is limited to those rules "in effect on or before November 16, 2010." Thus, the recent amendment to Chapter 120 applies to only the process by which OFARR reviews existing rules; in contrast, it does not authorize the provisions in Executive Orders 11-01 and 11-72 that suspend or terminate rulemaking.

III. CONCLUSION

We distinguish between the Governor's constitutional authority with respect to the provisions of the executive orders pertaining to review and oversight of rulemaking within the executive agencies under his control, and the Legislature's

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agency rules on the state's citizens and businesses." § 288.7015, Fla. Stat. (2010). Specifically, the rules ombudsman is charged with, for example, reviewing "state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses," § 288.7015(2), Fla. Stat. (2010), and to "[m]ake recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to businesses," § 288.7015(3), Fla. Stat. (2010).

lawmaking authority under article III, section 1 of the Florida Constitution. The Legislature retains the sole right to delegate rulemaking authority to agencies, and all provisions in both Executive Order 11-01 or 11-72 that operate to suspend rulemaking contrary to the APA constitute an encroachment upon a legislative function. We grant Whiley's petition but withhold issuance of the writ of quo warranto. We trust that any provision in Executive Order 11-72 suspending agency compliance with the APA, i.e., rulemaking, will not be enforced against an agency at this time, and until such time as the Florida Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.

It is so ordered.

PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
CANADY, C.J., dissents with an opinion, in which POLSTON, J., concurs.
POLSTON, J., dissents with an opinion, in which, CANADY, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

CANADY, C.J., dissenting.

As Justice Polston's dissent cogently explains, there is no basis for the majority's decision. I join fully in that dissent.

The petitioner strikingly has failed to show any specific action required by law that was prevented by the implementation of the executive orders at issue here. In the absence of such a showing, the majority nonetheless rules in favor of the

petitioner by imposing unprecedented and unwarranted restrictions on the Governor's constitutional authority to supervise subordinate executive branch officers. In doing so, the majority's decision insulates discretionary executive policy decisions with respect to rulemaking from the constitutional structure of accountability established by the people of Florida. I strongly dissent from this ill-conceived interference with the constitutional authority and responsibility of Florida's Governor.

It is elementary that the Administrative Procedure Act (APA), §§ 120.50-.891, Fla. Stat. (2011), and other pertinent statutes do not preordain the substance of all decisions made by agencies regarding rulemaking. The APA and other statutes impose certain constraints and requirements, but an area of executive policy discretion exists with respect to rulemaking. The majority's decision does not take seriously this reality that the rulemaking process involves certain discretionary policy choices by executive branch officers within the parameters established by the APA and other pertinent statutes. Nor does the majority come to terms with the absence from Florida law of any restriction on the authority of the Governor to supervise and control such policy choices made by subordinate executive branch officials with respect to rulemaking.

The Governor's right to exercise such supervision and control flows from the "supreme executive power" which is vested in the Governor by article IV,

section 1(a) of the Florida Constitution, together with the Governor's power under article IV, section 6 of the Florida Constitution, to appoint executive department heads who serve at the Governor's pleasure. The Governor's "supreme executive power," of course, does not give the Governor the right to direct subordinate executive officers to disobey the requirements of law. But if "supreme executive power" means anything, it must mean that the Governor can supervise and control the policy-making choices—within the range of choices permitted by law—of the subordinate executive branch officers who serve at his pleasure.

Neither the petitioner nor the majority identify any provision of law containing an express restriction on the Governor's power to supervise and control the exercise of discretion by subordinate officers with respect to rulemaking. The majority's inference of such a restriction flies in the face of the constitutional provisions which vest "supreme executive power" in the Governor and authorize the Governor to appoint executive department heads who "serve at his pleasure." Given the constitutional structure establishing the power and responsibilities of the Governor, it is unjustified to conclude—as does the majority—that by assigning rulemaking power to agency heads, the Legislature implicitly divested the Governor of his supervisory power with respect to executive officials who serve at his pleasure.

In issuing the executive orders, the Governor acted lawfully to supervise the agency heads who are responsible to him and for whom he is responsible. The quo warranto petition should be denied.

POLSTON, J., concurs.

POLSTON, J., dissenting.

The majority improperly grants this petition for an extraordinary writ based on the hypothetical that the Governor might exceed his authority or violate the law. The majority is issuing an improper advisory opinion[16] holding that Executive Order 11-01 and Executive Order 11-72 should not be utilized to violate Florida's Administrative Procedure Act "to the extent" they could hypothetically be used to do so. See majority op. at 1, 4, 5, 19 (repeatedly employing the equivocal phrase "to the extent"). This is not a sound basis for issuing a writ of quo warranto. To the contrary, Governor Scott has the express constitutional authority to issue Executive Order 11-72 as this State's chief administrative officer charged with faithfully executing the law. See art. IV, § 1(a), Fla. Const.

Executive Order 11-72, which supersedes the now moot Executive Order 11-01, simply institutes a review of proposed and existing rules, a review that does not

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16. See Santa Rosa County v. Admin. Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1193 (Fla. 1995) (explaining that Florida courts should not render what amounts to an advisory opinion if parties show only the possibility of an injury based on hypothetical facts that may or may not arise in the future).

violate the separation of powers. The Petitioner has presented no evidence that this executive order violates Florida's Constitution, Florida's Administrative Procedure Act (APA), or a legislative delegation of rulemaking authority. Cf. Fla. House of Reps. v. Crist, 999 So. 2d 601, 616 (Fla. 2008) ("[T]he Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers."). The Governor contends that he is exercising his authority under the Florida Constitution and has not violated the APA or altered the legislative delegation of rulemaking authority to state agencies. The Governor further contends that, if he violated the APA or altered the delegation of rulemaking authority, it would then be an unlawful act, but that issuing Executive Order 11-72 does not constitute such an act. I agree with the Governor's view. Simply put, the Governor may act according to his executive order without violating any law, and no violation has been demonstrated.

I respectfully dissent.

I. BACKGROUND

A. The Executive Orders & Petitioner Whiley

On January 4, 2011, Governor Scott signed Executive Order 11-01, which created the Office of Fiscal Accountability and Regulatory Reform (OFARR) within the Executive Office of the Governor. Executive Order 11-01 directed the agencies under the Governor's supervision to suspend rulemaking and obtain

OFARR's direction before publishing the notices of rulemaking activity required by chapter 120, Florida Statutes (2010), Florida's APA. Specifically, section 1 of Executive Order 11-01 provided as follows:

> **<u>Section 1.</u>** 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 [OFARR]. The Secretary of State shall not publish rulemaking notices in the Florida Administrative Weekly except at the direction of [OFARR].

Thereafter, on April 8, 2011, Governor Scott issued Executive Order 11-72. Executive Order 11-72 expressly states that it supersedes Executive Order 11-01. Section 1 of Executive Order 11-72, which replaces the now moot section 1 of Executive Order 11-01 quoted above, provides as follows:

> **<u>Section 1.</u>** I hereby direct all agencies under the direction of the Governor, prior to developing new rules or amending or repealing existing rules, to submit all proposed notices, along with the complete text of any proposed rule or amendment, to OFARR. These agencies shall also submit any other documentation required by OFARR, and no such agency may submit for publication any required notice without OFARR's approval.

Therefore, under the current executive order, rulemaking is not suspended, and the Secretary of State is not required to seek OFARR's approval before publishing notices required by the APA. Instead, under Executive Order 11-72, all agencies under the Governor's supervision must submit proposed rules and proposed notices

to OFARR and must receive OFARR's approval before submitting any notices for publication.

Additionally, Executive Order 11-72 details OFARR's general responsibilities. Section 3 provides that OFARR is to review proposed and existing rules to determine if they unnecessarily restrict entry into an occupation, adversely affect the availability of services, unreasonably affect job creation or retention, impose unreasonable restrictions on those seeking employment, or impose unjustified costs on businesses and consumers. OFARR is also tasked with the responsibility of analyzing the impact of proposed and existing rules on public health and safety as well as on job and business creation. Furthermore, section 3 specifies that "[c]onsistent with statutory provisions, [OFARR is to] work with the Florida Small Business Regulatory Advisory Council, the Office of Small Business Advocate, the Rule Ombudsman,[[17]] and the Florida Legislature, to identify rules and regulations, particularly those relating to small businesses, that have an adverse or disproportionate impact on business, and make recommendations for actions that would alleviate those effects."

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17. Through section 288.7015, Florida Statutes (2010), the Legislature requires the Governor to appoint a Rules Ombudsman within the Executive Office of the Governor "for considering the impact of agency rules on the state's citizens and businesses." The Rules Ombudsman makes "recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to businesses." § 288.7015(3), Fla. Stat. (2010).

Section 6 of Executive Order 11-72 directs each agency under the Governor's direction to conduct an annual review of existing rules, including recommendations as to whether any rules should be modified or repealed. It also requires each agency "to identify any legislative mandates that require the agency to promulgate, or continue to impose, rules that the agency believes have a negative impact on business, job creation, or job retention in Florida."

Finally, section 7 of Executive Order 11-72 requires each agency under the Governor's supervision to "submit to OFARR an annual regulatory plan that shall identify and describe each rule that the agency expects to begin promulgating during the next twelve-month period."

On March 28, 2011, Rosalie Whiley filed a petition for a writ of quo warranto in this Court, challenging the Governor's authority to issue Executive Order 11-01.[18] Whiley argues that the executive order contravenes the separation of powers by violating the APA's time limits and by violating the agency heads' authority to propose rules and file rules for adoption.

Whiley alleges standing as a citizen taxpayer but also expresses a personal interest in the matter. According to her petition, Whiley is a food stamp recipient who must periodically reapply for her benefits using an online process that is difficult to complete due to her blindness. She contends that Governor Scott's

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18. No amended petition was filed challenging Executive Order 11-72.

executive orders have directly caused an abeyance in the rulemaking process modifying the online application to make it easier for her to complete in compliance with federal law. However, Whiley's counsel conceded during oral argument the accuracy of the statement in the Governor's Response to the Petition for Writ of Quo Warranto, that the proposed amendment to the online application was approved by OFARR the day after it was submitted to the office by the Department of Children and Families, and that neither the executive order nor OFARR "has delayed or otherwise had a negative impact upon the rulemaking process surrounding DCF's SNAP applications."[19] Response to Petition for Writ of Quo Warranto at 12. Further, the administrative rule challenge proceeding, which was the subject of the abeyance described by Whiley, has been dismissed as moot because the Department actually modified the online application while the rule challenge was pending. See Etienne v. Dep't of Children & Family Servs., Fla. Admin Order No. 10-5141RX (July 21, 2001) (on file with Clerk, Div. of Admin. Hearings).

B. Rulemaking Overview

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19. Petitioner's improper response to Respondent's supplemental authority after oral argument appears to contradict her concession at oral argument. To the extent that Petitioner now claims that the executive order caused delay, it should be ignored or the case should be sent to the circuit court for determination of a disputed fact.

Rulemaking under Florida's APA is a complex process, but it is also a flexible one with room for agency discretion and public participation. See generally Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U.L. Rev. 965, 988-1018 (1986). When an agency engages in rulemaking, it is performing a quasi-legislative function.[20] See Adam Smith Enters., Inc. v. State Dep't of Envtl. Regulation, 553 So. 2d 1260, 1260-70 (Fla. 1st DCA 1989); see also Gen. Tel. Co. of Fla. v. Fla. Pub. Serv. Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984). An agency can only engage in rulemaking if it has been granted the authority to do so from the Legislature. See § 120.52(17), Fla. Stat. (2010). Further, "[a] grant of rulemaking authority is necessary but not sufficient to allow

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20. The majority misstates that agency "rulemaking is a legislative function." See majority op. at 13. To the contrary, when an agency engages in rulemaking pursuant to a legislative delegation of rulemaking authority, it is engaging in a quasi-legislative function. See Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1979) ("Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy."). In other words,

> a delegation of authority is constitutional as long as the enabling statute establishes constitutionally adequate guidelines limiting the scope of authority that may be exercised and does not involve a core power of one of the branches of government. In such cases the legislature has delegated only quasi-legislative or quasi-judicial power.

Florida Administrative Practice § 1.12 (8th ed. 2009) (emphasis added) (citing Adam Smith Enters., Inc. v. State Dep't of Envtl. Regulation, 553 So. 2d 1260 (Fla. 1st DCA 1989)).

an agency to adopt a rule; a specific law to be implemented is also required." § 120.536(1), Fla. Stat. (2010). And "[a]n agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute." Id.

The rulemaking process (with the exception of emergency rules) begins in one of three ways. First, an agency on its own must initiate the process "as soon as practicable and feasible" after an agency statement becomes a rule of general applicability. § 120.54(1)(a), Fla. Stat. (2010). Second, the Legislature may require implementation of a statute by agency rules, and "such rules shall be drafted and formally proposed as provided by [the APA] within 180 days after the effective date of the act, unless the act provides otherwise." § 120.54(1)(b), Fla. Stat. (2010). Finally, the process to adopt, amend, or repeal a rule can begin upon a petition to initiate rulemaking filed by a regulated person or a person having a substantial interest in a rule. § 120.54(7), Fla. Stat. (2010). An agency must initiate the rulemaking process or deny the petition in writing no later than thirty days after the petition is filed. Id.

An agency must provide notice of the development of proposed rules (with the exception of an intention to repeal a rule) in the Florida Administrative Weekly. § 120.54(2)(a), Fla. Stat. (2010). However, "[t]he APA establishes no particular procedure to be followed by an agency during the original drafting of the

proposed rule." Adam Smith, 553 So. 2d at 1265 n.4. An agency may choose to develop a proposed rule on its own, or it may choose to hold a public workshop or to utilize negotiated rulemaking between interested parties. See § 120.54(2)(c)-(d), Fla. Stat. (2010). However, if an affected person requests in writing a public workshop, an agency must hold one unless the agency head explains in writing why a workshop is not necessary. § 120.54(2)(c), Fla. Stat. Additionally, "[a]n agency head may delegate the authority to initiate rule development." § 120.54(1)(k), Fla. Stat. (2010).

At least twenty-eight days prior to adoption and upon the agency head's approval, a notice of the proposed rule must be published in the Florida Administrative Weekly, including the proposed rule's text and a reference to the statute being implemented. § 120.54(3)(a), Fla. Stat. (2010). The agency may schedule a public hearing on the proposed rule and must do so if an affected party requests a public hearing within 21 days of the publication of intended agency action. § 120.43(3)(c)1, Fla. Stat. (2010).

As a legislative check, the agency must also file the proposed rule with the Administrative Procedures Committee. § 120.54(3)(a)4, Fla. Stat. (2010); § 120.545(1), Fla. Stat. (2010). If the Administrative Procedures Committee objects to the proposed rule, the agency must respond. § 120.545(3), Fla. Stat. (2010). And if the agency does not initiate administrative action to address the committee's

objection, the committee may recommend legislative action to address it. § 120.545(8)(a), Fla. Stat. (2010).

Additionally, the APA provides that certain matters must (or should) be considered during the rule adoption process. For instance, "all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated . . . which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." § 120.54(1)(d), Fla. Stat. (2010). Moreover, prior to adoption, an agency is encouraged to prepare a statement of estimated regulatory costs and is required to do so if the proposed rule will impact small businesses. § 120.54(3)(b)1, Fla. Stat. (2010). The statement of estimated regulatory costs must include "[a] good faith estimate of the number of individuals and entities likely to be required to comply with the rule," a good faith estimate of the cost to the agency or other government entity to implement and enforce the rule, and "[a] good faith estimate of the transactional costs likely to be incurred by individuals and entities . . . to comply with the requirements of the rule." § 120.541(2), Fla. Stat. (2010). Further, the APA provides that an agency is required whenever practicable to "tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities . . . that do not contribute

significantly to the problem the rule is designed to address." § 120.54(3)(b)2.a., Fla. Stat. (2010).

Within 21 days of the publication of a proposed rule notice, a substantially affected person may submit a written proposal for a lower cost alternative. § 120.541, Fla. Stat. (2010). Upon submission of a proposal, the agency must prepare a statement of estimated regulatory costs or revise its previously prepared statement. Id. Then, the agency must either adopt the lower cost alternative or explain its reasons for rejecting it in favor of the proposed rule. Id.

A substantially affected person may also "seek an administrative determination of the invalidity of the [proposed rule or an existing] rule on the ground that the rule is an invalid exercise of delegated legislative authority." § 120.56(1)(a), Fla. Stat. (2010). The APA defines an invalid exercise of delegated legislative authority to include any of the following:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in [the APA];
> (b) The agency has exceeded its grant of rulemaking authority. . .;
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented. . .;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
> (e) The rule is arbitrary and capricious. . . . .; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

§ 120.52(8), Fla. Stat. (2010). And an administrative law judge (ALJ) must hold a hearing on the petition challenging the rule within a specified timeframe. § 120.56(1)(c), Fla. Stat. (2010). If the ALJ determines that a proposed rule is partially or wholly invalid, the proposed rule may not be adopted unless the ALJ's determination is reversed on appeal.[21] § 120.56(2)(b), Fla. Stat. (2010).

A proposed rule is adopted when it is filed, upon the agency head's approval, with the Department of State. § 120.54(3)(e), Fla. Stat. (2010). It cannot be filed for adoption less than 28 days or more than 90 days after the publication of the notice of proposed rulemaking, "until 14 days after the final public hearing, until 21 days after a statement of estimated regulatory costs . . . or until the administrative law judge has rendered a decision" in a challenge to a proposed rule, whichever is applicable. § 120.54(3)(e)2., Fla. Stat. (2010).

Importantly, an agency has the discretion to withdraw or modify a proposed rule after the publication of the notice of the proposed rule but before the rule is adopted. § 120.54(3)(d), Fla. Stat. (2010). An agency is required to withdraw a proposed rule if the time limits and other requirements of the APA have not been satisfied. § 120.54(3)(e)5., Fla. Stat. (2010). Thereafter, an agency must notice its withdrawal or modification in the Florida Administrative Weekly. § 120.54(3)(d),

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21. If the ALJ determines that an existing rule is partially or wholly invalid, the rule is void after the time for appeal expires. § 120.56(3)(b), Fla. Stat. (2010).

Fla. Stat.; § 120.54(3)(e)5., Fla. Stat. But once a rule has become effective, it can only be repealed or amended through the rulemaking process. § 120.54(3)(d)5., Fla. Stat. (2010).

II. ANALYSIS

Under section 3(b)(8) of article V of the Florida Constitution, this Court may issue writs of quo warranto to "state officers and state agencies." "The term 'quo warranto' means 'by what authority.' " Crist, 999 So. 2d at 607. "This writ historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the State." Id. However, in exercising our jurisdiction to issue writs of quo warranto, it is important to keep in mind that they are extraordinary writs. Extraordinary writs should only be employed with great caution and under very limited circumstances. See English v. McCrary, 348 So. 2d 293, 296 (Fla. 1977); Curtis v. Albritton, 101 Fla. 853, 857 (Fla. 1931); Sica v. Singletary, 714 So. 2d 1111, 1112 (Fla. 2d DCA 1998); Broward County v. Fla. Nat'l Props., 613 So. 2d 587, 588 (Fla. 4th DCA 1993); see also Chiles v. Phelps, 714 So. 2d 453, 457 (Fla. 1998) (explaining that usually the constitutionality of an act should be challenged in a declaratory action in circuit court, and that this Court only accepts jurisdiction in extraordinary writ proceedings "where the functions of government would be adversely affected absent an immediate determination by this Court"). Therefore, extraordinary writs

should not be employed to address hypothetical scenarios. In fact, one cannot even seek the ordinary remedy of a declaratory judgment based upon hypothetical facts. See Roberts v. Brown 43 So. 3d 673, 680 (Fla. 2010).

Here, no one disputes that Governor Scott has the authority to issue executive orders. And Executive Order 11-72 is entirely within his constitutional authority as chief administrative officer and his constitutionally vested duty to manage, plan, and hold agencies under his charge accountable to State laws, including the APA. The actual facts before us do not demonstrate otherwise.

Article IV, section 1(a) of the Florida Constitution provides that "[t]he supreme executive power shall be vested in a governor," "[t]he governor shall take care that the laws be faithfully executed," and "[t]he 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." Section 1(a) also provides that "[t]he governor shall be the chief administrative officer of the state responsible for the planning and budgeting for the state." Section 6 of article IV states that "[t]he administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor . . . or an officer or board appointed by and serving at the pleasure of the governor."

Based upon these provisions, the governor of Florida has the constitutional authority to act as this State's chief administrative officer as well as the constitutional duty to faithfully execute this State's laws and to manage and hold agencies under his charge accountable to State laws, including the APA. This Court has explained that "[t]he Governor is given broad authority to fulfill his duty in taking 'care that the laws be faithfully executed.' " In re Advisory Op. to Governor, 290 So. 2d 473, 475 (Fla. 1974) (quoting Finch v. Fitzpatrick, 254 So. 2d 203, 204 (Fla. 1971)); see also Advisory Op. to the Governor - 1996 Amendment 5 (Everglades), 706 So. 2d 278, 280-81 (Fla. 1997). This Court has also recognized that that a Governor's actions are presumptively in accord with his official duties. See Kirk v. Baker, 229 So. 2d 250, 252 (Fla. 1969).

Florida law provides no specific process for carrying out the Governor's executive duties with respect to holding his executive agencies accountable in their rulemaking functions. Governor Scott has chosen to rely upon an accountability structure by which the Governor, through OFARR, reviews existing and proposed rules to ensure that the rules are in accord with the codified goals and requirements of the APA. For example, to ensure that an agency is meeting its responsibility to consider the effect of a proposed rule on small businesses as required by section 120.54(3)(b), OFARR is tasked with the responsibility of identifying rules that will have an adverse effect on businesses (particularly small businesses) and

recommending actions to alleviate those effects. And to ensure that an agency is considering less costly alternatives as required by sections 120.54(1)(d) and 120.541, OFARR reviews proposed rules to determine if they impose unjustified costs and makes recommendations for simplifying the regulations.

Nothing in the APA prohibits the Governor from performing executive oversight to ensure that the rulemaking process at his agencies results in effective and efficient rules that accord with Florida law. To the contrary, a recent amendment to the APA acknowledges and implicitly approves of the Governor's oversight through OFARR. See ch. 2011-225, Laws of Fla. (providing that the required biennial review of an agency's existing rules must include a "[r]eview of each rule to determine whether the rule has been reviewed by OFARR").

Additionally, contrary to the majority's[22] and the Petitioner's suggestions otherwise, the Governor's executive order does not violate the Legislature's delegation of rulemaking authority. Executive Order 11-72 does not impermissibly delegate or transfer the agency's or the agency head's responsibilities under the APA to OFARR. For example, the Legislature has specifically delegated to agency heads the rulemaking authority to approve notices of proposed rules and the filing of rules for adoption. See § 120.54(1)(k), Fla. Stat. ("An agency head may delegate the authority to initiate rule development under subsection (2);

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22. See majority op. at 11, 19.

however, rulemaking responsibilities of an agency head under subparagraph (3)(a)1., subparagraph (3)(e)1., or subparagraph (3)(e)6. may not be delegated or transferred.”). Under Executive Order 11-72, agency heads still must approve the notices required by section 120.54(3)(a)1, and they still must approve the filings with the Department of State required by sections 120.54(3)(e)1 and 120.54(3)(e)6. However, nothing in the APA prohibits an agency from receiving OFARR’s approval before an agency head authorizes the publication of notices of rulemaking activity and the filing of rules for adoption.

The Petitioner more specifically alleges that the Governor’s executive orders violate the APA’s time limits for adopting or withdrawing proposed rules. However, to the contrary, no provision of Executive Order 11-72 suspends the APA’s time limits or requires agencies to violate them. All agencies remain subject to the APA’s time limits, and the Governor remains constitutionally responsible for ensuring that Florida’s laws, including the APA’s time limits, are faithfully executed by the agencies under his supervision. Therefore, an agency must still initiate the rulemaking process (1) once an agency statement becomes a rule of general applicability, (2) 180 days after the effective date of the statute to be implemented, or (3) 30 days after a petition to initiate rulemaking is filed. See §§ 120.54(1), (7) Fla. Stat. (2010). And once the rulemaking process is initiated,

the agency is still responsible for abiding by the APA's other time limits. See, e.g., 120.54(3)(e)2., Fla. Stat.

Petitioner has not demonstrated in this record a single instance of the Governor's executive order causing any violation of the requirements proscribed by the APA. Moreover, if hypothetically speaking an agency violated an APA requirement due to Governor Scott's actions under the executive order, such a violation should be challenged under the remedies provided by the APA, not in an extraordinary writ proceeding before this Court. See, e.g., § 120.56, Fla. Stat. (2010); §120.68(1), Fla. Stat. (2010).

Instead of examining the facts of this case and the language of Executive Order 11-72, which is the only operative executive order at this point and therefore the only proper executive order to examine, the majority's opinion assumes that Governor Scott is incapable of acting (or unwilling to act) within the bounds of Florida law. But no provision of the Executive Order 11-72 conflicts with any Florida law. It is entirely possible for an agency to comply with all of the provisions of Executive Order 11-72 as well as all of the requirements of the APA. To get around this, the majority improperly employs the opposite of the standard used for a facial challenge. In other words, the majority construes Executive Order 11-72 (together with moot Executive Order 11-01) in a way to effect an unconstitutional outcome by coming up with a hypothetical set of circumstances

under which the executive order would be invalid, rather than determining whether there is no set of circumstances under which the executive order would be valid. Cf. Fla. Dep't of Rev. v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) (explaining that this Court is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible," and that "a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid") (quotations and citations omitted).

Specifically, the majority's decision supposes a hypothetical whereby Executive Order 11-72 (specifically the requirement that OFARR approve notices for publication) could somehow indefinitely suspend and terminate rulemaking under the APA. See majority op. at 4, 19, 21-22, 26-27. However, there is no evidence in this record that the order has caused any such suspension and termination. Instead, the record includes a statement from the Governor's counsel that OFARR usually completes its review of proposed rulemaking activity in less than a week and can process urgent requests even faster. The Petitioner even acknowledged during oral argument that the proposed amendment to the online application for food stamps that was of concern to her was approved by OFARR the day after it was submitted to the office by the Department of Children and Families. Accordingly, there is no evidence in this record that Executive Order 11-

72 has resulted in any suspension and termination of rulemaking under the APA, and the order does not facially require it. The majority's hypothetical envisioning the contrary is improper in this extraordinary writ proceeding. See English, 348 So. 2d at 296 (explaining that extraordinary writs should be employed cautiously and in only very limited circumstances).

III. CONCLUSION

Under article IV, section 1(a) of the Florida Constitution, Governor Scott is this State's chief administrative officer charged with faithfully executing the law and with managing and ensuring that the agencies under his control also faithfully execute the law, including the APA. Governor Scott was completely within this constitutional authority when he issued Executive Order 11-72, which institutes a review of existing and proposed rules that is consistent with the APA's requirements and goals. Therefore, instead of issuing an improper advisory opinion addressing hypothetical facts and a moot executive order, I would deny the petition for a writ of quo warranto. I respectfully dissent.

CANADY, C.J., concurs.

Original Proceeding – Quo Warranto

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