1D23-0149

In the District Court of Appeal for the First District, State of Florida

J. DOE, anonymously and individually, a/k/a "FloridaSupremeCourtPRR@protonmail.com"

Appellant,

v.

Governor Ron DESANTIS, in his official capacity as custodian of public records, and the Executive Office of the Governor,

Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, No. 2022-CA-1902

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INTRODUCTION

In this case, appellant "J. Doe, anonymously and individually, a/k/a FloridaSupremeCourtPRR@protonmail.com," submitted a public-records request seeking an amorphous range of "materials" reflecting consultations between the Governor, a host of associated individuals (including his wife), and what the request termed "six or seven pretty big legal conservative heavyweights" about the Governor's appointments to the Supreme Court of Florida. R21. But instead of negotiating in good faith to narrow and clarify the scope of that request, Doe demanded that the Governor's office produce the identities corresponding to the "pretty big . . . heavyweights" described in the request. When Doe's demands were not immediately met, Doe brought this action.

The circuit court did not abuse its discretion when it recognized that Doe lacked a clear legal right to compel the Governor's office to comply immediately with those demands. The circuit court correctly recognized that Doe had no right to proceed anonymously and that Doe's request, in any event, both lacked the requisite specificity to constitute a valid request and sought identity information that itself was not a public record. The circuit court also was right

that Doe's request—which sought sensitive information concerning the Governor's high constitutional obligation to appoint Supreme Court justices—implicated the doctrine of executive privilege. The confidentiality of consultations with advisors—precisely the information Doe demands here—is critical to the execution of the Governor's constitutional duty to fill judicial vacancies, and Doe has not identified any need for this information that would overcome the Governor's presumptive privilege to maintain that confidentiality.

The Court should approve the circuit court's judgment.

STATEMENT OF CASE AND FACTS

A. Factual Background

On October 5, 2022, the custodian of records for the Executive Office of the Governor (EOG) received a public-records request from FloridaSupremeCourtPRR@protonmail.com:

> Any and all materials, on official devices or personal devices used for official business, in whatever form, including *but not limited to* call logs, emails, or texts, between or among Governor Ron DeSantis, Casey DeSantis, the governor's chief of staff, his executive or personal assistants or aides, his general counsel or anyone within the general counsel's office, the director of appointments or anyone within the director of appointment's office, and the "six or seven pretty big legal conservative heavyweights" described by the governor in an interview with Hugh Hewitt on August 25, 2002 [sic].

R21. The request did not identify who was seeking the records, explain who would count as "pretty big . . . heavyweights," state the subject matter or timeframe of the "materials" sought, or limit its scope to official communications. EOG acknowledged the request the next day. R20.

Within a week, EOG received another e-mail from the same account, pressing for a response. EOG explained that it "receives a high volume of requests and yours is one of the most recent. We are processing your request along with all others." R20.

Three days later, EOG received a further e-mail from the account, threatening litigation absent an immediate response, and posing certain questions to EOG. The e-mail referred to the "urgency" of the matter "given the approaching merit retention elections for the justices," and expressed the view that "[i]t should be easy to at least disclose who the outside conservative legal heavyweights are, the dates and locations of their interviews of the now justices, and the dates of the governor's or his agents' communications with those people." R19. An hour later, EOG again explained that "[w]e are processing your request along with all other requests" and that "[y]ou do not just get to cut the line because you threaten litiga-

tion." R18. EOG also offered to speak further on the phone, but the e-mailer apparently refused this offer of assistance.

In response, the e-mailer said it would "withdraw the request entirely if the governor's office identifies the conservative legal heavyweights who interviewed the nominees and the vacancies for which the governor consulted them." R18. EOG replied that "[i]t would be extremely helpful to know which justices you were referring to because you mentioned 'the approaching merit retention elections for the justices.' Are you referring to all of the justices appointed by Governor DeSantis"—i.e., including appointees who had left the Court—"or just the justices who are up for retention election?" R17. The e-mailer called this request "fair" and explained that it sought only the names of consultees regarding justices currently on the Court. R17. The e-mailer then proposed to stage answers to its questions, so that EOG first would reveal the names of the consultees for Justices Couriel and Grosshans, and then after the November election would reveal the names of the consultees for Chief Justice Muñiz and Justice Francis. R17.

B. Procedural History

Instead of allowing EOG a further chance to respond, Doe filed this lawsuit a day later, on October 27, 2022. R5. Doe sought a writ of mandamus (R13) as well as a declaration of Doe's right to inspect the records (R14). After a hearing (R215), the circuit court issued an order denying relief (R254).

The circuit court ruled that (1) Doe was not entitled to proceed anonymously (R257–58); (2) Doe was not truly seeking a public record but rather the names of the "legal heavyweights" with whom the Governor and his aides had consulted (R258–60); (3) Doe had not met the prerequisites for mandamus relief (R260–61); and (4) the names of those "legal heavyweights" were privileged (R261–67). Doe appeals that order insofar as it denied mandamus. Doe does not appeal the denial of declaratory relief. Init. Br. 10.

SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion in denying Doe's petition for a writ of mandamus. First, the Florida Rules of Civil Procedure, like the federal rules, permit anonymous pleadings only on a showing of exceptional circumstances that Doe has not even tried to make. Rule 1.630(b)(3) requires a mandamus petitioner to

file "in the name of the plaintiff in all cases." Rule 1.100(c)(1) provides more generally that "[e]very pleading," mandamus petition or otherwise, "must have a caption containing the name of all of the parties." Doe has not shown a need to proceed anonymously. This was Doe's burden as petitioner; it was not the responsibility of EOG or the circuit court to prompt Doe to make the requisite showing.

Second, Doe's petition does not meet the requirements for mandamus relief because Doe has not shown a "clear legal right" or "an indisputable legal duty" on the part of EOG "to perform the requested action." *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). Public-records requests must have "sufficient specificity" before they trigger a duty under the Public Records Act. *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991). Doe's initial request contained no subject-matter or time limitation and vaguely sought records about unidentified "pretty big . . . heavyweights." EOG offered to discuss Doe's requests in more detail, but Doe apparently refused. Later, Doe demanded that EOG answer what amounted to interrogatories (which is not a duty imposed by the Public Records Act) and outright reveal the identities of whatever "heavyweights" the request concerned. But Doe cannot use the public-records laws

to force EOG staff to depose the Governor about which "pretty big . . . heavyweights" the Governor may have been referring to in a radio interview. Those identities are not a public record. Finally, Doe sued—putatively for everything covered by Doe's initial, far-reaching request, *see* Init. Br. 21–22—without giving EOG any reasonable opportunity to estimate the cost of producing the material or review the material for exemptions to disclosure, and without paying any invoiced costs or fees.

Third, communications among the Governor and those who advise him in carrying out his constitutional duty to appoint Supreme Court justices are protected by executive privilege. Executive privilege inheres in the enumerated constitutional powers of the executive and in the separation of powers. It was not overridden by the 1992 amendment that added the Public Records Clause in Article I, Section 24 to the Florida Constitution. Maintaining the confidentiality of deliberations concerning judicial appointments is necessary to enable the Governor and his aides to receive candid, unfiltered advice regarding the exercise of an important constitutional function. Doe has shown no need for the information in question that would overcome this privilege.

STANDARD OF REVIEW

"Since the nature of an extraordinary writ is not of absolute right, the granting of such writ lies within the discretion of the court." *Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004). As a result, "[a]n appellate court reviews a trial court's decision on a petition for writ of mandamus under the abuse of discretion standard of review." *Brown v. Jones*, 229 So. 3d 397, 397 (Fla. 1st DCA 2017) (quoting *Rosado v. State*, 1 So. 3d 1147, 1148 (Fla. 4th DCA 2009)); *see also Fla. Agency for Health Care Admin. v. Zuckerman Spaeder, LLP*, 221 So. 3d 1260, 1263 (Fla. 1st DCA 2017).

ARGUMENT

I. The circuit court did not abuse its discretion in ruling that Doe did not justify filing this action anonymously.

In litigation purportedly championing public access to information, J. Doe refuses to disclose his or her identity. But Florida Rule of Civil Procedure 1.630(b)(3) requires a mandamus petitioner to file "in the name of the plaintiff in all cases." Rule 1.630(b)(3) is a particularized application of Rule 1.100(c)(1), which provides that "[e]very pleading," whether a petition for mandamus or otherwise, "must have a caption containing the name of all of the parties." *Cf.*

Fink v. Holt, 609 So. 2d 1333, 1335–36 (Fla. 4th DCA 1992); *Major v. Hallandale Beach Police Dep't*, 219 So. 3d 856, 858 (Fla. 4th DCA 2017) (affirming denial of mandamus because petition failed to comply strictly with Rule 1.630). The plain text of those rules requires Doe to put a real name on pleadings—not a pseudonym with an e-mail address.

Rule 1.100(c)(1) parallels Federal Rule of Civil Procedure 10(a), which is actually more relaxed in requiring only the complaint, and not every pleading, to "name all the parties." Even under the less-strict federal rule, anonymous pleadings are permitted only in exceptional circumstances. "Generally, parties to a lawsuit must identify themselves in their respective pleadings." *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (citing *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979)). This is because the rule is designed to "protect[] the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." *Doe*, 951 F.2d at 322; *see also Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113, 118 (Fla. 1988) (recognizing a "strong presumption of openness . . . for all court proceedings"). As the Eleventh Circuit has observed:

> A lawsuit is a public event. Parties who ask a court to resolve a dispute must typically walk in the public eye. District courts, acting within their discretion, can grant exception from this rule. But it is rare for a district court to grant privacy protections for a party. It is even rarer for a district court to abuse its discretion when denying privacy protections for a party.

In re: Chiquita Brands Int'l, Inc., 965 F.3d 1238, 1242 (11th Cir. 2020). Although it appears this issue has yet to be litigated in a Florida court, the same presumption against anonymous pleadings should apply under Florida's stricter Rule 1.100(c)(1).

The presumption should be even stronger under Rule 1.630(b)(3) because of the extraordinary nature of mandamus relief. *See, e.g.*, *State ex rel. Haft v. Adams*, 238 So. 2d 843, 844 (Fla. 1970) (mandamus is "an extraordinary remedy" that "will not be allowed in cases of doubtful right" (quoting *State ex rel. Perkins v. Lee*, 194 So. 315, 317 (Fla. 1940))). Without knowing the petitioner's identity, it is difficult to assess whether the petitioner indeed has a clear legal right to vindicate via mandamus relief.[1] Even if a person

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[1] *Cf. Consumer Rights, LLC v. Union Cnty.*, 159 So. 3d 882, 884, 886 (Fla. 1st DCA 2015) (county was justified in not responding immediately to anonymous e-mail records request that "appeared to constitute 'phishing'"; that the request "was sent to the county from an email address that did not appear to be the address

might initially be able to request public records anonymously, *see Chandler v. City of Greenacres*, 140 So. 3d 1080, 1084–85 (Fla. 4th DCA 2014),[2] the person should not be entitled to remain anonymous when seeking extraordinary judicial relief, at least not without a heightened showing of need.

In exceptional cases, courts have allowed anonymous mandamus petitions. *See generally, e.g.*, *Doe v. State*, 217 So. 3d 1020 (Fla. 2017); *Doe v. State*, 901 So. 2d 881 (Fla. 4th DCA 2005). But the petitioners in those cases were identified in sufficiently descriptive terms to permit assessment of their need for anonymity and en-

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of a person . . . would lead anyone familiar with the perils of email communication to exercise caution, if not to disregard the communication entirely").

[2] Even in these circumstances, a records custodian must ensure that the requester is indeed a person and not a spammer or a bot. As this Court observed in *Union County*, "[t]he right created by Article I, section 24 and section 119.07 is a right that can only be exercised by a 'person.'" 159 So. 3d at 886. "We know of no law that requires a governmental entity to provide public records to a generic email address, at least not until such time as it is made clear that the address belongs to a person." *Id.* "If a generic email address were treated as the equivalent of a 'person' within the meaning of the constitution and the statute, an unscrupulous computer hacker could bring the work of a government agency to a halt by randomly generating a multiplicity of requests, all of which would require a response, and in the process expose the agency to multiple attorney fee awards for no good reason. *Id.*

titlement to relief. The 2017 *Doe* case involved patients being considered for involuntary placement in mental health facilities under the Baker Act. 217 So. 3d at 1022. The 2005 *Doe* case involved an individual seeking to prevent the release of documents that would identify the petitioner as a confidential source in a criminal investigation. 901 So. 2d at 882. Doe has not supplied anything remotely comparable, apart from conclusory assertions and hypothetical scenarios. *See* R222 (Doe's counsel: "I have to be careful what I say here because of privilege, right, but I believe that my client has a reasonable belief that there would be possible consequences to his or her livelihood if their identity was disclosed."); R224 ("So, let's just pretend, and I'm not saying that this is the fact, but let's just pretend that my client was, say, a clerk at this Florida Supreme Court. If they were to be identified as filing this lawsuit, that could be absolutely catastrophic to their career.").

The nature of public-records litigation only compounds concerns over anonymous pleading. A plaintiff's identity is often necessary to determine his entitlement to any records. In 2017, the Florida Legislature passed legal reforms to crack down on public-records requests and litigation with improper purposes. *See* ch. 2017-21,

Fla. Laws (May 23, 2017) (adding § 119.12(3), Fla. Stat.). Proceeding anonymously can frustrate the required inquiry into whether Doe brought this civil action "primarily to cause a violation" of the Act or "for a frivolous purpose." § 119.12(3), Fla. Stat. Additionally, public-records plaintiffs are not entitled to relief if they have an outstanding balance of past due fees for previous public-records requests—a rule plaintiffs could avoid with impunity if they were permitted to sue anonymously. *See Lozman v. City of Riviera Beach*, 995 So. 2d 1027, 1028 (Fla. 4th DCA 2008) (affirming denial of writ of mandamus seeking access to public records because requester had failed to pay fees for previous request). In *Chandler*, the individual whose initial public-records request was anonymous later filed his mandamus petition in his actual name. 140 So. 3d at 1082. Absent some serious justification beyond imagined harms to hypothetical plaintiffs, Doe was required to do the same.

Doe contends finally that "[t]he trial court should have afforded [Doe] the opportunity" to file a motion to proceed anonymously. Init. Br. 19; *see also* R224. But neither the circuit court nor EOG bore the burden to litigate Doe's case for him. By the time of the hearing, nearly a month had passed since EOG had objected to

Doe's proceeding anonymously in EOG's response to the show-cause order. *See* R5 (Doe files mandamus petition on October 27, 2022); R24 (EOG responds to show-cause order on November 23, 2022); R215 (circuit court holds hearing on December 20, 2022). Doe still offered nothing to justify proceeding anonymously. If nothing else, Doe could have asked the circuit court to consider any proffered justifications, along with supporting evidence, in camera. *See, e.g.*, *Deer Consumer Prods., Inc. v. Little*, 938 N.Y.S.2d 767, 780–81 (N.Y. Sup. Ct. 2012). Doe could also have moved to keep records of the case confidential. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.420(e). Because Doe did neither, the circuit court did not abuse its discretion in dismissing Doe's petition.

II. The circuit court did not abuse its discretion in ruling that Doe failed to state a claim for mandamus relief.

Even if Doe could proceed anonymously, Doe is not entitled to a writ of mandamus. Doe has not shown a "clear legal right," or "an indisputable legal duty" on the part of EOG "to perform the requested action." *Huffman*, 813 So. 2d at 11. Doe also has not identified a duty of EOG that is "ministerial," or "not discretionary." *Zuckerman*, 221 So. 3d at 1263 (citing *Wuesthoff Mem'l Hosp. Inc. v. Fla. Elec-*

tions Comm'n, 795 So. 2d 179, 180 (Fla. 1st DCA 2001)). Finally, Doe has not shown "he has no other legal method for redressing the wrong or of obtaining the relief to which he is entitled." *Holland v. Wainwright*, 499 So. 2d 21, 21 (Fla. 1st DCA 1986) (citations omitted).

A. Doe did not request public records with the requisite specificity to afford a "clear legal right" to those records.

Doe's request was breathtakingly non-specific:

> Any and all materials, on official devices or personal devices used for official business, in whatever form, including but not limited to call logs, emails, or texts, between or among Governor Ron DeSantis, Casey DeSantis, the governor's chief of staff, his executive or personal assistants or aides, his general counsel or anyone within the general counsel's office, the director of appointments or anyone within the director of appointment's office, and the "six or seven pretty big legal conservative heavyweights" described by the governor in an interview with Hugh Hewitt on August 25, 2002 [sic].

R21. It identified no subject-matter limitation or time frame, much less a concrete search term or set of search terms to limit the expanse of "materials," "in whatever form," encompassed by the request. It furthermore sought these materials as they existed "between or among" a lengthy list of parties, including the Governor, the Governor's wife, his top aides, all of the Governor's "executive or

personal assistants or aides," "anyone within the general counsel's office," "anyone within the director of appointment's office," and the "six or seven pretty big legal conservative heavyweights" alluded to by the Governor during an interview on a date (21 years ago) that was obviously inaccurate. The request thus extended to any combination of staff, of whatever rank or function, within several different groups of personnel. By its terms, the request encompassed non-official and purely personal "materials," as long they were memorialized somewhere on "official devices or personal devices used for official business."

That request was inscrutable to the point of indeterminacy. As long as the communication was (1) between any of the parties listed in the request, (2) "prepared in connection with official agency business," and (3) "intended to perpetuate, communicate, or formalize knowledge of some type," it was covered by the request. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980). By its literal sweep, the request covered official business having nothing to do with judicial appointments—e.g., a calendar invitation sent by one of the Governor's aides for an upcoming budget meeting, or even arguably a text in which the Governor

told his wife he would be working until 9 p.m. That request did not meet the requirement that "a requestor identif[y] a record with sufficient specificity to permit [the agency] to identify it." *Wootton*, 590 So. 2d at 1040; *see also Grapski v. City of Alachua*, 31 So. 3d 193, 196 (Fla. 1st DCA 2010).

Doe suggests that the records custodian should have inferred subject-matter and time-frame constraints from the reference to the "'six or seven pretty big legal conservative heavyweights' described by the governor in an interview with Hugh Hewitt on August 25, 2002 [sic]." R21; Init. Br. 20–21. But it is not the EOG record custodian's burden to effectuate a personal deposition of the Governor to discern what the Governor "described" in an interview in order to process Doe's records request. Doe cannot use a public-records request to extract information from the Governor's mind—he cannot, for instance, validly request records of "all communications between the Governor and the Governor's three favorite staffers." Instead, it is Doe's burden under the Public Records Act to make a "specific request." *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040 (Fla. 4th DCA 2018) (quoting *Grapski*, 31 So. 3d at 196).

Doe's claim that "the topic and timeframes" of the initial request were "clear," Init. Br. 21, is belied not only by the plain text of the request but also Doe's subsequent interactions with EOG. Doe followed up on the initial request by asking EOG to "disclose who the outside conservative legal heavyweights [we]re, the dates and locations of their interviews of the now justices, and the dates of the governor's or his agents' communications with those people." R19. Then Doe asked that EOG "identif[y] the conservative legal heavyweights who interviewed the nominees and the vacancies for which the governor consulted them." R18. Finally, admitting that EOG's request for further clarification was "fair," R17, Doe asked that EOG reveal these identities and vacancies only insofar as they related to "Justices Couriel and Grosshans" and then, after the 2022 judicial retention elections, as they related to "Chief Justice Muñiz and Justice Francis." R17. This back-and-forth indicates Doe's recognition that the initial request was anything but clear.

Doe thus laid bare that the request was not for records at all. It was an interrogatory, not a request for production. As the circuit court correctly ruled, "[t]he mere identity of the legal heavyweights meets neither the statutory definition of a public record nor the def-

inition set forth by the Florida Supreme Court in *Shevin*." R260. It is not a document or other material "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. Nor is it "material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin*, 379 So. 2d at 640.

What Doe seeks is a compiled list of names. But a records custodian "is not required by law to compile information and prepare lists."[3] The Public Records Act requires only the production of "public records," not the extraction and sorting of information from those records or the presentation of that information in a format convenient to a requester. *See* § 119.07(1)(a), Fla. Stat. "Nothing in the statute, case law or public policy imposes such a burden upon our public officials." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982) (answering no to the "more insidious question of wheth-

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[3] *Tampa Television, Inc. v. Clay Cnty. Sch. Bd.*, No. 92-1347-CA, 1993 WL 204090, *2 (Fla. 4th Cir. Feb. 11, 1993) (citing *Wootton*); *see also Wootton*, 590 So. 2d at 1040 ("We do not read the statute as requiring appellee to furnish appellant with a list of documents which may be responsive to some forthcoming request.").

er the public may require information contained in public records to be made available for inspection and copying *in a particular format*").[4]

Doe does not deny that the identities of the "heavyweights" the Governor may have been referring to in the interview are not themselves public records. Doe nonetheless thinks it "absurd to fault" him "for not identifying the heavyweights." Init. Br. 21. But it is Doe who bore the burden of identifying with specificity the records requested. What is absurd is for Doe to ask the courts to cure that lack of specificity by compelling EOG personnel to question the

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[4] In *Consumer Rights, LLC v. Bradford County*, the county did provide a compiled list (of employee e-mail addresses) to the records requester, and this Court found the county's delay in responding sufficient to give rise to a cause of action under the Public Records Act. 153 So. 3d 394, 396 (Fla. 1st DCA 2014). The requester, however, had made clear that it was not asking the county to generate any lists if they did not already exist, only records from which the requester could itself create such a list. *Id.* The county did not provide any records for three months; when it did belatedly provide just the list, it noted that the Public Records Act "does not require an agency to create a public record if such a record does not already exist." *Id.* In reversing the dismissal of the requester's complaint, this Court did not dispute the shared assumption of the parties that the list itself was gratuitous; it ruled only that the county's failure to respond in any way for three months was facially actionable under the Public Records Act. *Id.* at 398.

Governor personally about what the Governor might have meant in a short, nebulous statement during a misdated interview.

B. Doe did not follow the procedures necessary to establish a "clear legal right" to the records requested.

Quite apart from the lack of specificity, Doe is not entitled to mandamus relief because Doe has not completed the process required by the Public Records Act to establish a "clear legal right" to the records. If, as Doe contends (Init. Br. 21–22), Doe never withdrew the expansive initial request, Doe was required to give EOG the opportunity to search its files, determine the reasonable costs of production and special service fees, and provide Doe with an invoice. Doe was then required to pay those reasonable costs and fees. Doe did none of that; instead, Doe petitioned almost immediately for mandamus.

Production under the Public Records Act is not automatic. Rather, records custodians must complete several preliminary steps: "determining, for instance, if they possess the records, retrieving the records, assessing whether exemptions apply, deleting those portions of the record believed to be exempt, notifying the requester, and making the non-exempt records available." *Siegmeister v. John-*

son, 240 So. 3d 70, 73–74 (Fla. 1st DCA 2018) (citing *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984)). In addition, records custodians may charge requesters a fee for the cost of production, and records requesters must pay that fee before being entitled to the relevant records. *See* § 119.07(4), Fla. Stat. ("The custodian of public records shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law."); *Zuckerman*, 221 So. 3d at 1264; *Roesch v. State*, 633 So. 2d 1, 2–3 (Fla. 1993). "If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance," as it was in this case, "the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service." § 119.07(4)(d), Fla. Stat. That requires the records custodian to search its databases and determine the cost of complying with the request, which the custodian then invoices to the requester. *See Zuckerman*, 221 So. 3d at 1262.

Here, Doe did not wait to get an invoice, much less pay any reasonable costs and fees. Doe filed the request on October 5, 2022. R21. By Doe's own account, on October 15, Doe offered to withdraw the request if EOG would disclose the identities of the "pretty big . . . heavyweights." R19, 21. On October 26, EOG sought further clarity, a request Doe characterized as "fair." R17. Doe then proposed to stage answers to the questions regarding the identities of those who had advised on the four DeSantis appointees then on the Florida Supreme Court. R17. But without giving EOG a chance to respond to that proposal, without giving EOG a reasonable opportunity to search its records and give Doe a cost estimate for the entire initial request—let alone search them for exempt materials and produce the records—and without paying any costs or fees, Doe sued the next day. Because Doe did not complete the necessary process, Doe had no "clear legal right" to the records that would support a petition for mandamus.

This Court's decision in *Zuckerman* is on point. There, the requester had "submitted ten different requests seeking records dating back to 2002, relating generally "to the calculation of behavioral health capitation payments certified by HMOs to AHCA," and had

initially proposed "a total of seventy-seven search requests." 221 So. 3d at 1261. AHCA's initial search for records responsive to these requests "yielded an extraordinary number of results." *Id.* at 1262. The parties then negotiated over how to narrow the search terms, which caused AHCA to issue multiple revised estimates of costs. *Id.* Zuckerman never paid any of these invoices and also never withdrew its request. Instead, it petitioned for mandamus, which the circuit court initially granted. But this Court reversed, ruling that the circuit court "erred by requiring production of the documents prior to payment of AHCA's invoices." *Id.* at 1264. Here, the circuit court did not so err; it correctly denied Doe's premature petition for mandamus.

C. EOG's duty to respond to Doe's request was not merely "ministerial."

A third reason the circuit court was correct to deny Doe's mandamus petition is Doe has identified no "ministerial duty" that EOG failed to perform. Doe instead is trying to use mandamus to compel the exercise of discretion. Because "[EOG's] duty to protect exempted information through redaction precedes its duty to provide the documents to [Doe]," "[Doe's] right to the records is not ab-

solute." *Zuckerman*, 221 So. 3d at 1264. That means EOG's duty in this case "is not ministerial." *Id.*

Zuckerman is again on point. There, the requester had "submitted ten different requests seeking records dating back to 2002." *Id.* at 1261. As it applied those searches, even with subsequent narrowing by the requester, the agency repeatedly had to assess whether certain records were confidential under the Public Records Act. *Id.* at 1262. In the end, the requester filed a petition "attaching the ten sets of public records requests," and the agency argued that the requester inappropriately "sought to impose mandamus for non-ministerial actions." *Id.* This Court agreed.[5]

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[5] In *Mills v. Doyle*, a newspaper reporter sought mandamus compelling certain school officials to disclose the records of a grievance filed by a teacher. 407 So. 2d 348 (Fla. 4th DCA 1981). The Fourth DCA reasoned that the grievance records fell within the statutory definition of public records and thus did not "trigger an exercise of discretion." *Id.* at 350. The school officials did also contend the teacher had a constitutional right of privacy that required withholding the grievance records entirely, and the Fourth DCA deemed it appropriate to evaluate this contention in granting the petition. Insofar as *Mills* suggests that mandamus is an appropriate remedy when a request presents the possibility of an exemption, EOG respectfully submits that it is in conflict with this Court's more recent ruling in *Zuckerman*.

Doe's initial request is of similar breadth and similarly certain to turn up materials that will require review and redaction. It is implausible that, among all the materials covered by Doe's sprawling initial request, some would not have been classified as "exempt . . . but not confidential." *See* Government-in-the-Sunshine Manual 179 (2023), https://tinyurl.com/yc27vkrv. An agency is "not prohibited from disclosing" these kinds of documents and retains discretion whether to do so. *Id.* Even if narrowed to records concerning judicial appointments (a limitation that, again, was not initially clear on the face of the request), Doe's request was likely to include many of these types of documents, including criminal background checks, *see* § 119.071(2)(c), Fla. Stat.; *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991); agency memoranda reflecting mental impressions, conclusions, litigation strategies, or legal theories, *see* § 119.071(1)(d), Fla. Stat.; answers to questions asked for purposes of licensure or employment, *id.* § 119.071(1)(a); and complaints of discrimination in connection with employment practices, *id.* § 119.071(2)(g). Because discretion was thus inevitably embedded within Doe's records request, that request was not enforceable via mandamus.

D. Doe had other adequate remedies that ruled out mandamus relief.

The availability of other remedies supplies the final reason Doe's mandamus petition falls short. The Florida Supreme Court has long emphasized that "mandamus should not be resorted to when there is another adequate remedy." *City of Miami Beach v. State ex rel. Epicure, Inc.*, 148 Fla. 255, 257 (Fla. 1941); *see also, e.g.*, *Huffman*, 813 So. 2d at 11. And when it comes to restraining unlawful action that threatens irreparable injury to the complainant, "the remedy by injunction is ordinarily appropriate and adequate." *Epicure*, 148 Fla. at 257.

Here, Doe could have sought declaratory or injunctive relief. *See, e.g.*, *Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 122 (Fla. 2016). In fact, Doe did seek declaratory relief (R14) but chose not to appeal the denial of that relief (Init. Br. 10). Because Doe has other recourse to establish entitlement to the information Doe seeks, the circuit court did not abuse its discretion in denying Doe mandamus relief.

III. The circuit court ruled correctly that Doe's records request was barred by executive privilege.

The circuit court correctly denied Doe's petition for another reason. The information Doe sought fell squarely within the scope of two important components of executive privilege: for high-level executive communications and for pre-decisional, deliberative advice. Executive privilege has roots in common law but has come to be recognized as inherent in the enumerated constitutional powers of the executive and in the separation of powers. Contrary to Doe's and Doe's amici's arguments, these privileges were not written out of the Florida Constitution by the 1992 amendment adding the public records clause in Article I, Section 24. And Doe has not even attempted to show a need that would overcome these privileges.

A. The executive branch, like the legislative and the judicial, has a privilege against disclosure of information whose confidentiality is critical to its constitutional functions.

Numerous Florida cases confirm the existence of an inherent, constitutionally based privilege for the legislature,[6] the judiciary,[7]

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[6] *League of Women Voters v. Fla. House of Reps.*, 132 So. 3d 135, 138 (Fla. 2013) ("recogniz[ing] a legislative privilege founded on the constitutional principle of separation of powers"); *Fla. House of*

and the executive.[8] As the Florida Supreme Court recognized in *League of Women Voters*, those privileges derive from two constitutional sources: "the supremacy of each branch within its own assigned area of constitutional duties," 132 So. 3d at 145–46 (quoting

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Reps. v. Expedia, Inc., 85 So. 3d 517, 524 (Fla. 1st DCA 2012) ("[L]egislative privilege exists by virtue of the separation of powers provision of the Florida Constitution.").

[7] *Times Pub. Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995) (clerks of court, when acting under Article V powers, are not subject to Florida's public record laws); *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994) (judge may not be examined about thought process in making decisions (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941))); *The Florida Bar—In re Adv. Op. Concerning Applicability of Ch. 119, Fla. Stat.*, 398 So. 2d 446, 448 (Fla. 1981) ("[C]hapter 119, Florida Statutes, does not apply to The Florida Bar's Unauthorized Practice of Law investigation files.").

[8] *Chavez v. State*, 132 So. 3d 826, 830–31 (Fla. 2014) (Governor's clemency power overrides negative implication of exclusion of non-investigative Parole Commission records from Public Records Act exemption); *Parole Comm'n v. Lockett*, 620 So. 2d 153, 158 (Fla. 1993) (separation of powers prohibited circuit court from ordering Parole Commission to produce investigative files compiled for Governor pursuant to clemency powers); *Expedia*, 85 So. 3d at 523 ("[A]s with their counterparts in the judiciary and the legislature, public officials in the executive branch are entitled to a testimonial privilege."); *Dep't of Health & Rehab. Servs. v. Brooke*, 573 So. 2d 363, 370–71 (Fla. 1st DCA 1991) (Secretary could not be made to testify about discretionary budget decisions); *cf. League of Women Voters*, 132 So. 3d at 145–46 (basing recognition of legislative privilege on U.S. Supreme Court's recognition of executive privilege in *Nixon*); *Girardeau v. State*, 403 So. 2d 513, 517 n.6 (Fla. 1st DCA 1981) (citing *Nixon*'s recognition of presidential communications privilege as basis for potential recognition of legislative privilege).

Nixon, 418 U.S. at 705), and the cognate separation of powers principle that "no branch may encroach upon the powers of another," *id.* at 145 (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)); *see also, e.g.*, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 447 (1977). This is no less true of the executive than of any other branch.

At the federal level, executive privilege was long honored at common law, *see, e.g.*, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324–27 (1966), and later in exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b). Increased confrontation between the branches following World War II eventually forced recognition of what had always been true but unnecessary to explicate: executive privilege was anchored in the U.S. Constitution as well.[9] Many states have followed the same course, recognizing a

[9] *See, e.g.*, *Nixon*, 418 U.S. at 705–06 (recognizing qualified constitutional privilege for presidential communications); *Sealed Case*, 121 F.3d at 737 n.4 (recognizing that "[s]ome aspects of the privilege, for example the protection accorded the mental processes of agency officials, *see United States v. Morgan*, 313 U.S. 409, 421–22 (1941), have roots in the constitutional separation of powers"); *see also Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (Wilkey, J., concurring) (all three branches have "privilege against

constitutionally based executive privilege with common law parallels that can override statutory disclosure requirements analogous to Florida's Public Records Act.[10]

Against this dominant trend, Doe and Doe's amici contend that Florida joins only Massachusetts in eliminating executive privilege under its constitution. *See Babets v. Sec'y of Exec. Off. of Human Servs.*, 526 N.E.2d 1261, 1263 (Mass. 1988). They base this contention on the public records clause in Article I, Section 24,

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disclosure of the decision-making process" that "arises from two sources: one common law and the other constitutional").

[10] "It is generally acknowledged that some form of 'executive privilege' is a necessary concomitant to executive power." *Construction and Application, Under State Law, of Doctrine of Executive Privilege*, 10 A.L.R.4th 355, 357 (1981); *see also, e.g.*, *Protect Fayetteville v. City of Fayetteville*, 566 S.W.3d 105, 110 (Ark. 2019); *Vandelay Ent., LLP v. Fallin*, 343 P.3d 1273, 1276–79 (Okla. 2014); *Freedom Found. v. Gregoire*, 310 P.3d 1252, 1258–59 (Wash. 2013); *Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't*, 283 P.3d 853, 868 (N.M. 2012); *Wilson v. Brown*, 962 A.2d 1122, 1131–34 (N.J. Super. Ct. App. Div. 2009); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 484 & n.3 (Ohio 2006); *Guy v. Jud. Nominating Comm'n*, 659 A.2d 777, 782 (Del. Super. Ct. 1995); *Taylor v. Worrell Enter., Inc.*, 409 S.E.2d 136, 139–40 (Va. 1991); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1373 (Vt. 1990); *Doe v. Alaska Super. Ct.*, 721 P.2d 617, 622–26 (Alaska 1986); *Hamilton v. Verdow*, 414 A.2d 914, 924 (Md. 1980); *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978); *Lambert v. Barsky*, 398 N.Y.S.2d 84, 86 (N.Y. Sup. 1977).

which was added to the Florida Constitution by voter referendum in 1992. They are wrong.

1. The text of Article I, Section 24 does not support abolition of executive privilege.

Section 24 applies only to "public" records and excludes records "specifically made confidential by this Constitution." Art. I, § 24(a), Fla. Const. It does not, as Doe implies, Init. Br. 40, require that a constitutional exemption be "express." It requires only that the exemption be "specific."

Executive privilege is "specific"; it is not a personal prerogative to withhold any document in the possession of the executive, as the Florida Supreme Court would briefly but erroneously hold in *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (Fla. 1991) ("*Locke I*") (App. 5). Rather, it is a subject-matter prerogative: it covers only specific categories of documents defined by whether disclosure of that type of document would acutely impair the executive's performance of constitutional functions.

The constitutional provisions providing for executive privilege are also "specific": Article IV, Section 1(a) vests "the supreme executive power . . . in a governor," and Article II, Section 3 provides that

"[t]he powers of the state government shall be divided into legislative, executive and judicial branches." "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.* As the U.S. Supreme Court observed in *Nixon*, executive privilege is "inextricably rooted" in the separation of powers. 418 U.S. at 708. Because "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012), Section 24 should not be construed as silently abrogating what has historically been understood to be "a necessary concomitant to executive power." *Freedom Found.*, 310 P.3d at 1260 (quoting *Dann*, 848 N.E.2d at 481 (quoting *Executive Privilege*, 10 A.L.R.4th at 357)).

Executive privilege also inheres in "the nature of enumerated powers." *Nixon*, 418 U.S. at 705. The understanding is "universal[]" that "that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant." *Id.* at 705 n.16 (quoting *Marshall v. Gordon*, 243 U.S. 521, 537 (1917)). Here, maintaining the confidentiality of communica-

tions regarding judicial appointments is critical to executing the Governor's power to fill judicial vacancies.[11] The Florida Supreme Court reasoned similarly in *League of Women Voters*, citing *Nixon* approvingly and finding legislative privilege justified by "the practical concern of protecting the integrity of the legislative process by not unnecessarily interfering with the Legislature's business." 132 So. 3d at 146; *see also id.* at 159 (Canady, J., dissenting) (agreeing that "the legislative privilege is inherent in the separation of powers under Florida's Constitution" and disagreeing only with qualification of that privilege).

Article I, Section 24 does not abrogate executive privilege.

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[11] Doe attempts to draw negative implications from the last sentence of Article V, Section 11(d), which provides: "Except for deliberations of the judicial nominating commissions ['JNCs'], the proceedings of the commissions and their records shall be open to the public." But JNCs are beyond the reach of the Public Records Act to begin with. *See Just. Coal. v. First DCA JNC*, 823 So. 2d 185, 188–89 (1st DCA 2002). The subordinate clause in Section 11(d), which predates Article I, Section 24, made clear that the primary clause making JNC records "open to the public" did not override the privilege of JNCs, themselves part of the executive branch, *In re Adv. Op. to Gov'r*, 276 So. 2d 25, 29–30 (1973) ("*Judicial Appointments*"), to keep their deliberations private. Section 11(d) thus sheds little light on how to interpret and apply Section 24, apart from confirming the existence of another component of executive privilege, applicable to the judicial-appointment process, preceding Section 24.

2. The framing history of Article I, Section 24 does not support abolition of executive privilege.

The history of the 1992 amendment confirms that conclusion. As Doe correctly notes, the impetus for the amendment was the aberrant ruling in *Locke I*, 16 Fla. L. Weekly at S716 (App. 5), which the 1992 amendment was intended to address. But Doe misreads history in broadly inferring from that fact that "[i]n adopting section 24, voters intended to override separation of powers when it comes to public records," full stop. Init. Br. 39.

In *Locke I*, the Florida Supreme Court held in sweeping fashion that the compelled disclosure of *any* document held by "the constitutional officers of the three branches of government"—legislative, judicial, or executive—would violate the separation of powers, regardless of the nature of the document and regardless of whether the officer's interest in confidentiality was outweighed by any competing interest in disclosure. 16 Fla. L. Weekly at S717 (App. 6). As a result, all documents in the possession of constitutional officers or the departments they supervised—no matter how harmless their disclosure might have been to the fulfillment of those officers' constitutional duties—were beyond the reach of the Public

Records Act. *Locke I* augured the transformation of Florida from one of the more disclosure-friendly states in the union to one of the most hostile. Its holding was untethered to any traditional conception of executive privilege. And its holding applied equally to all three branches of government.

On February 27, 1992, the Supreme Court vacated *Locke I* and issued the more circumspect *Locke II*. This time around, the Court limited its ruling to the legislature, holding that "section 119.011's definition of 'agency' does not, by its terms, include the legislature or its members." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) ("*Locke II*"). The Court did also indicate that the term "agency" would include "executive branch agencies and their officers," but it did not elucidate how the Act would interact with documents whose confidentiality was essential to the execution of constitutional duties by executive officers, such as the Governor. *Id.* at 37.[12]

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[12] Local officials tried to push that holding even further. In the weeks after the decision, the Chief Assistant State Attorney of Hillsborough County declared that the Public Records Act did not apply to his office, reasoning that the constitution created his office, not the legislature. Supp. App. 40. The Polk County School Board likewise said it would deny access to a school desegregation map. *Id.*; *see also* Supp. App. 66 (after *Locke I*, it was "unclear whether local

Meanwhile, and before the Florida Supreme Court decided *Locke II*, a resolution to add Article I, Section 24 to the Florida Constitution had passed both houses of the legislature. *See* Kara M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 Fla. St. U. L. Rev. 525, 530–33 (1992). The design of the 1992 amendment was to correct the error of *Locke I* and prevent its recurrence. At the November 1992 election, voters approved this amendment.

Doe suggests that when the voters rejected the absolute right of non-disclosure from *Locke I*, they created an equally absolute duty of disclosure, unless the legislature saw fit to allow the executive an exception. *See* Init. Br. 38–39. In Doe's own words, "voters intended to override separation of powers when it comes to public records." Init. Br. 39. The more plausible inference, however, is that the voters simply rejected *Locke I*'s extreme rule, without disturbing

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constitutional officers such as sheriffs, elections supervisors, state attorneys, public defenders, court clerks, tax collectors and property appraisers also may be exempt"). Voicing the reasonable concern that *Locke I* had swept too broadly, parties on both sides asked for rehearing and clarification. *See* Supp. App. 5, 12, 29.

the more modest, and qualified, doctrine of executive privilege that had existed in Florida prior to that decision.

Prior to *Locke I*, Florida courts had recognized inter-branch privileges of various types, including executive privilege, without any of the uproar *Locke I* later generated. In 1953, for instance, the Florida Supreme Court ruled that a governor's request for an advisory opinion, "[d]uring the period it is within the breast of the Court, [was] not subject to public inspection or inquiry." *Pet. of Kilgore*, 65 So. 2d 30, 30 (Fla. 1953). And in 1991, this Court ruled that the Secretary of Health and Rehabilitation Services had the right not to testify about "any inquiry involving the discretion of the secretary"—in that case, decisions over the allocation of funds for placement of dependent children in therapeutic residential treatment. *Dep't of Health & Rehab. Servs. v. Brooke*, 573 So. 2d 363, 371 (Fla. 1st DCA 1991). Later, in *Expedia,* this Court recognized *Brooke* as "holding that the head of a state administrative agency was protected by executive privilege and could not be forced to appear in court and answer questions about funding of the agency." 85 So. 3d at 523. These decisions recognized an executive privilege that was both circumscribed and qualified. *See Brooke*, 573 So. 2d

at 371 ("the separation of powers doctrine would not preclude a circuit court from calling before it a member of the executive branch for narrowly defined informational purposes").

The framing history shows that Article I, Section 24 corrected *Locke I*, but did not take the more drastic step of sweeping away all that had come before it. A Senate staff analysis said that the amendment "would have the effect of providing in the constitution the requirements of the Public Records Law"—i.e., restoring the law to how it looked prior to *Locke I*. Supp. App. 61. In its 1992 Session Wrap-Up, the Senate Committee on Rules and Calendar provided the same assessment. Supp. App. 64.

Newspaper reports leading up to the November 1992 vote voiced this same understanding. They referred to the "harmful Florida Supreme Court ruling last November"—i.e., *Locke I*—and the overreach of officials now claiming they were constitutional officers and refusing to disclose any documents. Supp. App. 77; *see also* Supp. App. 81, 83, 91. They described the amendment as "designed to repair the damage" of *Locke I*, Supp. App. 82, and "clarify" rights of access under existing law, Supp. App. 77. They did not describe the amendment as turning the dial so far back as to zero out execu-

tive privilege completely or otherwise do anything "deeply profound." Supp. App. 81 (quoting assessment of state constitutional law professor at Florida State University). As Deputy Attorney General Antonacci explained, the amendment was meant simply to "return the law to where it was prior to the opinion." Supp. App. 67. Attorney General Butterworth, who championed the amendment, agreed, assessing that it would "memorialize the existing practices." Supp. App. 69.

These same reports also characterized the amendment as putting the three branches of government back onto an "equal footing" with respect to their public-disclosure obligations. Supp. App. 79; *see also* Supp. App. 77, 80, 85. In other words, the amendment did not single out the executive branch for disadvantage. It did not make one branch dependent on the good graces of another to maintain a measure of confidentiality essential to that branch's constitutional functions.

A legal text should be interpreted to "suppress the mischief" to which it is directed. Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 980 (2021) (quoting 1 William Blackstone, *Commentaries on the Laws of England* *87 (1765)). The mischief that occasioned

the 1992 amendment was *Locke I*. The amendment did not careen to the opposite extreme and erase all vestiges of executive privilege.

3. Precedent since enactment of Article I, Section 24 confirms that the 1992 amendment did not abolish executive privilege.

That a doctrine of executive privilege survived the enactment of Article I, Section 24 is confirmed by *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993), and its progeny. Even as recently as 2013, the Florida Supreme Court confirmed that the 1992 amendment did not abolish privileges entrenched in the constitutional separation of powers. *See League of Women Voters*, 132 So. 3d at 143, 144 (recognizing a legislative privilege despite "Florida's broad constitutional right of access to public records"; "another important factor . . . weighs in favor of recognizing the privilege—the doctrine of separation of powers"). If, as Doe contends, the amendment abolished the privileges rooted in the separation of powers, then *League of Women Voters* would have been decided differently.

In *Lockett*, the Florida Parole Commission sought a writ of prohibition to prevent a circuit judge from ordering it to release "certain investigative files compiled by the Commission" related to a death row prisoner. 620 So. 2d at 154. The Court issued the writ,

reasoning that "the clemency process is derived solely from the constitution and is strictly an executive branch function." *Id.* at 155. A court order to release the files "would effectively overrule the rules of executive clemency, resulting in a violation of the separation of powers." *Id.* at 157.

Doe attempts to dismiss *Lockett* (Init. Br. 43) because it preceded the effective date of Article I, Section 24, *see* 620 So. 2d at 154 n.2, and the statutory exemption for clemency records, *see* ch. 93-405, § 6, Fla. Laws (June 13, 1993), *codified at* § 14.28, Fla. Stat. But the Florida Supreme Court has repeatedly cited *Lockett* in the years since these enactments for the proposition that clemency records are exempt from disclosure under the Constitution, not merely as a matter of legislative grace. *See Asay v. Parole Comm'n*, 649 So. 2d 859, 860 (Fla. 1994); *Spaziano v. State*, 660 So. 2d 1363, 1366 n.7 (Fla. 1995); *Roberts v. Butterworth*, 668 So. 2d 580, 582 (Fla. 1996); *King v. State*, 840 So. 2d 1047, 1049–50 (2003).

Most recently, in *Chavez v. State*, 132 So. 3d 826 (Fla. 2014), a death-row inmate sought certain clemency records to support his motion for postconviction relief. The records in *Chavez* fell outside the Public Records Act exemption for clemency records, § 14.28,

Fla. Stat. The Court nevertheless ruled that the Act did not compel disclosure, because the Governor's clemency prerogative "'derived' solely from the Constitution." 132 So. 3d at 831 (quoting *Lockett*, 620 So. 2d at 157).

Doe contends that "clemency is different than Supreme Court appointments," because "the Constitution did not vest sole, unrestricted, unlimited discretion in the governor in the appointment of Supreme Court justices." Init. Br. 46–47. But the Governor appoints from a list of nominees submitted by a JNC, Art. V, § 11(a), Fla. Const., subject to constitutional eligibility requirements, *id.* § 8; *see Thompson v. DeSantis*, 301 So. 3d 180 (Fla. 2020). Within those bounds, the Governor's discretion is indeed absolute. *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) ("[I]n fulfilling this constitutional duty, the Governor has discretion in his selection of a nominee."). The Florida Constitution "confers upon the Governor the express power to make the final and ultimate selection" in judicial appointments. *Judicial Appointments*, 276 So. 2d at 29. That mirrors the discretion of the President, who must obtain Senate approval of some of his appointees, but whose discretion is otherwise unbounded by Con-

gress. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring in the judgment).

B. The records Doe sought fell within the ambit of executive privilege.

The information Doe seeks regarding the Governor's judicial-appointment process is protected by two components of constitutionally based executive privilege.

The first is the executive communications privilege. "Every court that has examined the executive communications privilege in light of open government laws has recognized both the privilege and its applicability to open government laws." *Freedom Foundation*, 310 P.3d at 1259. The rationale for the executive communications privilege is intuitive: "[The executive] and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon*, 418 U.S. at 708. This privilege "safeguards the public interest in candid, confidential deliberations within the Executive Branch," *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020), in order to promote "the effectiveness of the ex-

ecutive decision-making process," *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973).

The executive communications privilege thus covers communications made "in performance of [the executive's] responsibilities" and "in the process of shaping policies and making decisions." *Sealed Case*, 121 F.3d at 744 (quoting *Nixon v. Adm'r*, 433 U.S. at 449). That means it applies to communications with the executive himself and with aides who have "'broad and significant responsibility' for advising the [executive]." *Thompson*, 20 F.4th at 26 (quoting *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004))).

Because Doe's request sought information about specific advice and advisors the Governor consulted to assist in making judicial appointments, it would fall within this component of executive privilege.[13] The Governor's constitutional responsibility to appoint

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[13] *See Pub. Citizen*, 491 U.S. at 466 ("That construing FACA to apply to the Justice Department's consultations with the ABA Committee [regarding judicial appointments] would present formidable constitutional difficulties is undeniable."); *Nero*, 386 A.2d at 853 (executive privilege protects investigative report concerning prospective gubernatorial appointee to state lottery commission); *Lambert*, 398 N.Y.S.2d at 86 (executive privilege protects question-

judges of high integrity and excellent legal abilities would be "compromised if the *source* and substance of the advice and information provided to the governor [concerning a judicial appointment] were not protected." *Guy*, 659 A.2d at 784 (emphasis added); *see also Wilson*, 962 A.2d at 1134 ("[T]he chief executive should be able to receive a broad range of information from diverse *sources* to discharge the executive function." (emphasis added)). "[C]ompelled release of this information could have a chilling effect" both on the Governor and on "individuals he might wish to consult." *Taylor*, 409 S.E.2d at 138. "Even routine meetings between the Governor and other lawmakers, lobbyists or citizens' groups might be inhibited if the meetings were regularly revealed to the public and the participants routinely subjected to probing questions and scrutiny by the press." *Courier-Journal v. Jones*, 895 S.W.2d 6, 8 (Ky. Ct. App. 1995) (quoting *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240, 252 (Cal. 1991) (en banc)). "A lack of candor or an unwillingness to participate in the decision-making process is as likely to flow from the

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naire submitted to gubernatorial advisory committee by prospective appointees to judicial office).

compelled disclosure of the fact of consultation as from the disclosure of the content of the consultation." *Taylor*, 409 S.E.2d at 139.

The second component of executive privilege that applies to Doe's request is the deliberative process privilege. That privilege allows the executive to "withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sealed Case*, 121 F.3d at 737 (citations and quotations omitted); *see also Doe*, 721 P.2d at 625 ("[I]nternal memoranda and 'miscellaneous papers' in [the governor's] appointment file"—insofar as they "contain advisory opinions and recommendations"—"constitute the type of internal deliberative communication the privilege is designed to protect."). It protects materials that are "predecisional" and "deliberative" in nature and not final decisions or "purely factual" information. *Judicial Watch*, 365 F.3d at 1113 (quoting *Sealed Case*, 121 F.3d at 737).

That said, factual material is still privileged if it is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Sealed Case*, 121 F.3d at 737; *see also Judicial Watch*, 365

F.3d at 1121; *Soucie*, 448 F.2d at 1077–78. That is the case with the identities of the Governor's outside advisors. "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes." *Times Mirror*, 813 P.2d at 251. "[S]uch information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." *Id.*

In short, Doe's request is covered by the executive communications and deliberative process components of executive privilege.

C. Doe did not show a need for the records that overcame executive privilege.

Both the executive communications and deliberative process privileges are qualified and can be overcome by a specific, constitutionally based need. *Nixon*, 418 U.S. at 713; *Judicial Watch*, 365 F.3d at 1113–14. In *Nixon*, for example, the Supreme Court held that privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial" when it is "central to the fair adjudication of a particular criminal case." 418 U.S. at 713.

But Doe has not made any comparable showing, preferring instead the cloak of anonymity to conceal any individual circumstances that would enable consideration of putative need. "A general assertion of a need for full disclosure of the basis for governmental decision making . . . does not establish a specific or focused need sufficient to overcome the executive privilege." *Wilson*, 962 A.2d at 1136 (citing *Nero*, 386 A.2d 846). "Nor does a vaguely defined specter of misconduct," which, to be clear, Doe has not in any way alleged. *Id.* (citing *Piniero v. N.J. Div. of State Police*, 961 A.2d 1, 9–10 (N.J. Super. Ct. App. Div. 2008)). Otherwise, the privilege would be swallowed whole and the public interest in effective gubernatorial decision-making would be sacrificed in every case.

CONCLUSION

For the foregoing reasons, this Court should approve the circuit court's order denying Doe's petition for mandamus.

Respectfully submitted.

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I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 30th day of October, 2023, to all parties of record, including:

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I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 10,395 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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