IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v. Case No.: SC17-1122

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

Respondent.

PETITIONERS' RESPONSE TO GOVERNOR'S VERIFIED MOTION TO DISQUALIFY JUSTICE PARIENTE

Respondent's Motion to Disqualify Justice Pariente does not state a timely or legally sufficient basis for disqualification and should be promptly denied so it does not further delay resolution of this important case.[1] As titillating as a tale may first appear when it starts with judges being inadvertently caught on a "hot mic" while chatting between oral arguments, it is now beyond clear that "there is no there there" in this case. Gertrude Stein, *Everybody's Biography* 289 (1937). No

[1] Though his counsel at oral argument appeared to concede the merits of Petitioners' position that barring some unexpected turn of events – such as the governor-elect neglecting to take the oath on time – the newly elected governor will appoint the successors to appellate judges and justices whose final terms end in January 2019, Governor Scott's motion makes clear that the issue of "whether the Governor will be in office at the time the judicial offices become vacant" remains a live dispute warranting this Court's resolution unless it accepts his alternative argument that this Court's quo warranto jurisdiction does not "extend[] to the type of relief sought by the Petitioners." (Motion at 3.)

Supreme Court Justice should be disqualified for unintelligible comments that – even as interpreted by the Governor – had no possible relevance to the case that had just been heard and expressed no antipathy to any party or attorney in the case. Respondent's attempt to fan the flames of false controversy through his public remarks and the instant motion notwithstanding,[2] a recusal here would set a dangerous precedent for a Court that has heard innumerable recent cases in which the Respondent is a party or has a direct interest and will no doubt hear many more in the remainder of his term. Putting the Governor on the recusal list of a sitting Justice would be highly disruptive and should be avoided unless truly necessary. Even a cursory review of the facts and law demonstrates it is not.

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[2] After criticizing Petitioners for citing press accounts of central events in their petition, Respondent offers a long list of citations to press reports of his reaction to the private exchange between justices inadvertently recorded by The Florida Channel. (Motion at 11 n.2) Notably, none even remotely suggest any actual public concern that Justice Pariente cannot impartially participate in the decision in this case.

Indeed, what transpired after the oral argument in this case is just another example of a bugaboo that has plagued the bench and bar in wired courtrooms for years. One would be hard pressed to find a trial judge or practicing lawyer today with any significant courtroom experience who does not have at least one war story of embarrassing private remarks caught on a live microphone at counsel's table or in chambers. And it is not a phenomenon limited to courtrooms or the legal profession. A simple Google search of phrases like "caught on live mic in courtroom" or "microphone gaffe" (a term with its own Wikipedia page, no less) yields innumerable recent examples, ranging from an exchange between Justices Scalia and Thomas hoping for stiff sentences for courtroom protesters to President Obama criticizing a foreign leader to current United States Senators criticizing President Trump.

Facts

Though it is far from clear that the Court microphone inadvertently picked up Justice Pariente uttering the word "crazy" as opposed to "where's he" or something else, the motion is legally insufficient even if every fact alleged is accepted at face value. Thus, Petitioners assume – though only Justice Pariente and Chief Justice Labarga know exactly what was said – that in the break between oral argument in this case and the next, Justice Pariente provided Chief Justice Labarga a list of the members of the Supreme Court Judicial Nominating Commission (the "JNC") and the following partial exchange took place:

> After Justice Labarga reacted to the document by saying the name "Panuccio," Justice Pariente replied with the word "crazy." Justice Labarga then stated, "Izzy Reyes is on there. He'll listen to me." Pointing again to the document, Justice Pariente appeared to say, "Look whose pick they're getting ...." Finally, Justice Pariente turned to Justice Quince, saying "did you see who ..." before the next oral argument began.

(Motion at 3.)

Though he notes this exchange was "recorded and broadcast to the public by the Florida Channel," Respondent does not dispute the obvious fact that these were not public statements and were, in fact, a private exchange partially caught by an inadvertent "live mic." Respondent correctly recognizes that the referenced list of JNC members "was neither a part of the record in this case nor the subject of either party's oral arguments." (Motion at 4.)

Respondent also references a fragment of a sentence Justice Pariente reportedly made at a "campaign event to retain her in office" in 2012, asserting that she "urged potential voters" that "a vote against retention 'will give Gov. [Rick] Scott the right to make his appointments, which will result in partisan political appointments.' " (Motion at 4 (alterations by Respondent).) Petitioners assume for purposes of this motion that this assertion is correct as well, though the entire sentence is not provided, much less any context.

Legal Standard

Respondent initially (and correctly) recognizes that the legal sufficiency of the motion and the propriety of imposing the duty of completing her work in this fully briefed and argued case on another jurist rests squarely and solely within Justice Pariente's discretion. (Motion at 5 (citing *In re Estate of Carlton*, 378 So. 2d 1212, 1216 (Fla. 1979)).) This is because the standards applicable to disqualification of a trial judge, which are governed by sections 38.02 and 38.10, "apply only to trial judges and not to appellate judges." *In re Estate of Carlton*, 378 So. 2d at 1216. As this Court unanimously held many years ago,

> each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances. This procedure is in accord with the great weight of authority, and it reenforces [sic] the modern view of disqualification as a matter which is "personal and discretionary with individual members of the judiciary . . . ."

Id. at 1216-17 (quoting *Dep't of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7, 9 (Fla.1975) (footnote omitted)).

Directly contrary to this clear holding and reasoning, the rest of Respondent's motion improperly relies on case law developing the standards applicable to motions to disqualify lower court judges. (Motion at 5, 7-10 (citing *Hayslip v. Douglas*, 400 So. 3 553 (Fla. 1981), *State ex rel. Brown v. Dewell*, 179 So. 695 (Fla. 1938), *Adams v. Smith*, 884 So. 2d 287 (Fla. 2d DCA 2004), *Siegel v. State*, 861 So. 2d 90 (Fla. 4th DCA 2003), and *Pistorino v. Ferguson*, 386 So. 2d 65 (Fla. 3d DCA 1980)). Those cases simply do not apply here. But even if they did, the motion would still be legally insufficient and, indeed, frivolous on its face. The motion would not support disqualification even of a trial judge, who is powerless to address the substance of the accusations and is governed purely by appearances and not reality.

Indeed, when presented with a request for disqualification in the seminal *Carlton* case, Justice Overton chose to essentially apply the kind of analysis typically applied on a motion to disqualify a trial judge – examining the timeliness of the request first and then the question of whether the alleged facts were sufficient to support disqualification. *Carlton*, 378 So. 2d at 1218-20 (Overton, J., on request for disqualification).

The "Open Mic" Comments

As an initial matter, Respondent does not dispute that he became aware of the comments when made and initially reported immediately after oral argument in this case on November 1, 2017. Thus, the motion would be time-barred under the strict ten-day deadline imposed for motions to disqualify trial judges under Florida Rule of Judicial Administration 2.330(e). Respondent offers no reason why he should have more time to move to disqualify a justice of this Court than a trial judge, and Justice Pariente would be well within her discretion to deny the motion as untimely. *See id.* at 1218 ("It is a general rule of law that a party waives any grounds for disqualification of a judge or justice when the suggestion is not filed within a reasonable period of time after having knowledge of such grounds.").

Even if the clock did not start running until Respondent confirmed from his public records request what he clearly already knew and was widely reported (i.e., that the names discussed were members of the JNC),[3] Justice Pariente's quoted comments do not support recusal and the concomitant imposition upon another jurist with the obligation of getting up to speed on this fully briefed and argued case. Respondent's suggestion that this was a " 'public statement that commits, or appears to commit, the judge with respect to' a party, issue, or controversy in the

[3] The grounds for recusal are Justice Pariente's comments themselves, not anything contained in the document provided in response to the records' request.

proceeding" in violation of Canon 3E(1)(f) of the Florida Code of Judicial Conduct is spurious. These were clearly not intended as public statements, but in any event, they do not in any way commit or appear to commit Justice Pariente with respect to any party, issue, or controversy in this proceeding.

The only potentially applicable basis for disqualification under the Code of Judicial Conduct would be if Justice Pariente "has a personal bias or prejudice concerning a party or a party's lawyer." Canon 3E(1)(a). Under no reasonable view is this standard met. No reasonable person could read the partial remarks by Justice Pariente as suggesting any view whatsoever about Respondent or any of the lawyers representing him, much less bias or prejudice against them. As Respondent himself notes, the referenced list of JNC members has nothing to do with this case whatsoever. Neither the JNC nor Mr. Panuccio are parties to this case, and Mr. Panuccio is not Respondent's lawyer. Moreover, the comments do not even suggest bias or prejudice against Mr. Panuccio even if Justice Pariente uttered the word "crazy." There is no basis to suggest that the partial quote represented an opinion that Mr. Panuccio (or anyone else for that matter) is crazy. It is simply impossible to tell what the remark referenced.

The 2012 Comment

Respondent's reliance on Justice's Pariente's 2012 comments is even more frivolous. This statement has long since been waived as a basis for disqualification,

as it had been publicly reported roughly five years before this case was even filed. Though clearly cognizant of the fact that this proceeding asks four justices to decide who appoints their future colleagues and three justices to decide who appoints their successors, the parties fully briefed and orally argued the merits without even a suggestion that any justice should recuse.

Regardless, the context of the 2012 remark shows it has nothing to do with this case. Though his motion appears calculated to lead the casual reader to conclude otherwise, Respondent well knows that this statement was not even an indirect reference to the issue before the Court – whether Respondent has the right to appoint the successors to justices whose final terms are expiring in 2019 – because he had not yet even run for re-election at the time the comment was made and the comment was about what would happen if the subject justices lost their 2012 retention vote. Under no reasonable view was this a comment on what would or should happen if the justices were retained and completed their final terms and Respondent successfully ran for re-election. As Justice Erlich noted in denying a similar motion to disqualify many years ago, a motion to disqualify a justice based on statements made during a retention campaign should be viewed carefully:

> I have done only that which I was allowed by law and required by political exigency to do. If standing for merit retention raises the assumption in the eyes of the Bar and the public at large that judicial misconduct has occurred, no judge may ever ethically seek to retain his office.

Fla. Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783, 796 (Fla. 1985) (Erlich, J., denial of request for disqualification).

Conclusion

Though beginning his motion with the recognition that "[p]rejudice of a judge is a delicate question to raise" (Motion at 1), Respondent has decided not to presume good faith by a leader of a co-equal branch of government and instead presumes the worst based on nothing but partial quotes devoid of context and amplified by baseless speculation. None of the comments attributed to Justice Pariente bear any reasonable relationship to the parties, lawyers, or any issue presented in this case.

At bottom, Respondent's allegations are not only untimely, but more importantly, they are legally insufficient as pure speculation that a member of this Court has a personal prejudice or bias against the Governor. This Court has long held that subjective fears of prejudice like this are too "speculative, attenuated, and too fanciful to warrant relief." *5-H Corp. v. Padovano*, 708 So. 2d 244, 248 (Fla. 1998). Indeed, while Justice Pariente retains the discretion to voluntarily recuse herself regardless of the merits of the motion, she must balance that discretion against her "constitutional duty to sit on cases within the constitutional jurisdiction of this Court," a balance Justice Sundberg explained should be resolved in favor of staying on when no showing of impartiality had been made. *Daytona Beach*

Racing & Recreational Dist. v. Volusia County, 372 So. 2d 417, 417 (Fla. 1978) (Sundberg, J.). Justice Overton similarly denied a motion to disqualify after explaining the need to resist the temptation to recuse simply to avoid controversy:

> Under my oath I am bound to consider the issues of the above-styled cause fairly and impartially upon the existing case law of this state as well as the existing statutory and constitutional law whether I personally agree with it or not. In my opinion, I can properly carry out this responsibility without bias or prejudice. Therefore, I have a duty to sit and should not recuse myself from this cause. *See Laird v. Tatum*, 409 U.S. 824, 837, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972). Frankly, recusing myself would make it much easier since I could avoid both the responsibility of reaching a decision on this case and being involved in this controversy. My recusal, however, would set a dangerous precedent.

Daytona Beach Racing & Recreational Dist. v. Volusia County, 372 So. 2d 417, 419 (Fla. 1978) (Overton, J., on request to disqualify); *see also Dep't Revenue v. Golder*, 322 So. 2d 1, 6 (Fla. 1975) (England, J., on request to disqualify) (finding a legally insufficient motion to disqualify him should be denied and he should not voluntarily recuse himself in light of the fact "there is unquestionably a 'duty to sit' in all cases, so long as it is feasible for me to do so").[4]

[4] After an apparently aggressive motion for reconsideration, Judge England gave into the temptation Justice Overton warned against and recused despite his continued belief there was no basis requiring disqualification. *Id.* at 7 (England, J., on motion for reconsideration). The rest of the Court accepted his decision, but issued an opinion criticizing the movant for filing a motion for reconsideration that "created an intolerable adversary atmosphere between [the movant] and Justice England." *Id.* at 7 (per curiam).

How to strike the proper balance in this case – where the motion for disqualification is as strident as it is baseless – is the only even debatable question presented. On the one hand, whatever controversy Respondent has sought to create might be diffused by voluntary recusal, which would certainly be the easy road for Justice Pariente. On the other hand, giving in to this transparent bullying tactic would set a dangerous precedent, guaranteeing a motion to disqualify her in every case involving the Respondent from this point forward. Moreover, if there were a 3-3 split by the remaining justices, delay would ensue and judicial resources would unnecessarily be required for a chief judge from one of the district courts of appeal to be appointed as an associate justice to get up to speed and break the tie. *See generally* Fla. Sup. Ct. Internal Operating Procedures § X. And if that judge happens to have aspirations to applying for one of the positions at issue, a whole new tangle of recusal issues would be needlessly created. At bottom, whether to voluntarily recuse at this late stage is a question precedent places solely in Justice Pariente's discretion.

Respectfully submitted,

THE MILLS FIRM, P.A.

/s/ Thomas D. Hall
John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Thomas D. Hall
Florida Bar No. 0310751

thall@mills-appeals.com
Courtney Brewer
Florida Bar No. 0890901
cbrewer@mills-appeals.com
service@mills-appeals.com (secondary)
The Bowen House
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by email on November 28, 2017 to:

Daniel Nordby, General Counsel
John P. Heekin, Asst. General Counsel
Meredith L. Sasso, Asst. General Counsel
Peter L. Penrod, Asst. General Counsel
John MacIver, Asst. General Counsel
Executive Office of the Governor
The Capital, Suite 209
Tallahassee, Florida 32399-0001
daniel.nordby@eog.myflorida.com
Jack.Heekin@eog.myflorida.com
Meredith.Sasso@eog.myflorida.com
Peter.Penrod@eog.myflorida.com
John.MacIver@eog.myflorida.com

Counsel for Respondent

/s/ Thomas D. Hall
Attorney