

IN THE SUPREME COURT OF FLORIDA

LEAGUE OF WOMEN VOTERS OF
FLORIDA, INC., COMMON CAUSE,
PATRICIA M. BRIGHAM, JOANNE
LYNCH AYE, and ELIZA
McCLENAGHAN,
Petitioners,

v.

SC CASE NO.: SC18-1573

HON. RICK SCOTT, in His official
capacity as Governor of Florida,
FLORIDA SUPREME COURT
JUDICIAL NOMINATING COMMISSION,
And JASON L. UNGER, in His official
capacity as Chair of the Florida Supreme
Court Judicial Nominating Commission,
Respondents,

and

JEFFREY LEONARD BURNS,
Intervenor.

**VERIFIED MOTION TO INTERVENE FOR LIMITED PURPOSE, OR
ALTERNATIVELY FOR LEAVE TO FILE INTERVENOR PETITION**

COMES NOW, Intervenor **Jeffrey Leonard Burns** (“Intervenor”), who
hereby respectfully seeks to intervene, and disqualify Justices Barbara Pariente, R.
Fred Lewis, and Peggy Quince (collectively the “Retiring Justices”) from this action,
due to their objective economic conflict of interest, and states as follows:

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I. Introduction/Summary of Argument.¹

Intervenor seeks to intervene in this matter for the limited purpose of moving to disqualify the three Retiring Justices. The Retiring Justices have an economic incentive to determine that their last day of work ends at 5:00 p.m. on January 8, 2019, as opposed to January 7, 2019. This economic incentive mandates disqualification of the Retired Justices, under both Canon 3E(1)(c), *Florida Code of Judicial Conduct*, and the Due Process Clause of the Fourteenth Amendment. Simply put, the three Retiring Justices will each lose one day of salary (\$884.94) if they deny the Petitioners' request for relief. Objectively², this creates the impression that the Retiring Justices have an economic incentive to rule for the Petitioners, thus mandating the disqualification of the three Retiring Justices from this matter.

Intervenor believes that there is an economic incentive for the three Retiring Justices to rule for the Petitioners, and questions the impartiality of the Retiring Justices. Intervenor respectfully requests that the three Retiring Justices be disqualified, and that the Chief Justice appoint three substitute justices to this action.

¹This motion shall refrain from a lengthy recitation of the facts set forth in the briefs, as the Court is well aware of the issues and underlying facts.

²The subjective thought process of the three Retiring Justices is irrelevant, and Intervenor does not impute any ill motive or ill intent on the three Retiring Justices. The Intervenor's concern stems purely from the objective appearance of bias, not on any specific subjective implication or subjective judgment.

II. Verified Motion to Intervene for Limited Purpose.

Intervenor has standing to intervene.³

1. Private citizens, with an interest in a Quo Warranto cause of action brought before the Florida Supreme Court, have a right to intervene in the Quo Warranto proceeding. *City of Clearwater v. City of Auburndale v. State ex rel. Landis*, 184 So. 787, 789 (Fla. 1938).

2. Intervenor's application for nomination to the Florida Supreme Court, was provided to the Florida Supreme Court Judicial Nominating Commission (the "JNC") on October 8, 2018, and he is scheduled to be interviewed by the JNC in Miami, Florida, on November 3, 2018.

3. On October 8, 2018, Intervenor's interest in this Quo Warranto cause of action ripened, and the interest shall remain ripe so long as either Intervenor's application is still under consideration, or Intervenor is appointed by the Governor.

³While interventions are not allowed in appeals before the Florida Supreme Court, interventions are permitted in Original Proceedings, like this Quo Warranto matter. There is no prescribed procedural rule for intervening in Original Proceedings, however Phillip Padavano in his treatise recommends filing a Petition to Intervene as a separate cause of action, and then filing a Motion for Consolidation in the Original Proceeding. § 10:14.Intervention, *2 Fla. Prac., Appellate Practice* § 10:14 (2017 ed.). Considering the great public importance of this proceeding, and the lack of formal rules for intervention before the Supreme Court, Intervenor requests that the Court, if a Brief is even required, permit the Brief be filed in this matter directly, and thus avoid the consolidation process.

4. The Petitioners' Quo Warranto action seeks to curtail both: (1) the JNC's task of vetting all of the applicants seeking nomination to the Florida Supreme Court, and (2) the JNC's submittal of finalists to the Governor for his review, and appointment.

5. Intervenor has devoted considerable time to his application, incurring hundreds of dollars in out of pocket costs, and forgoing a substantial amount of legal work that he would be paid for if he had not devoted time out of his work schedule to instead complete the application process. Furthermore, Intervenor will incur substantial out of pocket expenses traveling to Miami for the November 3rd interview with the JNC, in addition to further opportunity costs (lost billable legal work) spent preparing for, and attending the interview.

6. Thus, Intervenor, as an applicant to replace one of the Retiring Justices, has a clear personal interest in this matter entitling him to intervene.

7. **ACCORDINGLY**, due to his standing as an applicant for nomination to the Florida Supreme Court, his associated monetary investment (both out of pocket and intrinsic/opportunity) with the application process, and the direct impact that this Quo Warranto action will have on his application, then Intervenor has standing to intervene in this action for the limited purpose of seeking the disqualification of the three Retiring Justices.

Justices Barbara Pariente, Fred Lewis, and Peggy Quince must be disqualified from this matter due to their financial/economic interest in the outcome of the action.

8. The *Florida Code of Judicial Conduct* (“the Code”), clearly states that “This Code applies to justices of the Supreme Court...” *Fla. Code Jud. Conduct, Application of the Code of Judicial Conduct*. It is notable that the Code, which is adopted by the Florida Supreme Court, uses the term “This Code” when stating it applies to the Supreme Court.

9. The Ordinary Meaning Canon of Construction states that “Words are to be understood in their ordinary everyday meanings – unless the context indicates that they bear a technical sense.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 69 (Thomson/West 2012). There is nothing in the context of the use of “This Code” to indicate some special technical usage. Thus, the term “This” when read together with “This Code” is comprehensive and encompasses the entire *Florida Code of Judicial Conduct*, and the use of “This” applies all of the provisions of the Code to Supreme Court Justices.

10. The only way the three Retiring Justices can avoid application of the entire Code is for a majority of the Court to adopt an amendment to the Code during the pendency of this cause, with the amendment specifying only “some” of the Code and not “This Code” applies to the Justices, and then to retroactively apply the change

in the Code to this matter. Otherwise, the three Retiring Justices have a mandatory duty to follow the Code.

11. Canon 3E(1)(c), *Florida Code of Judicial Conduct*, states:

“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where: ... (c) the judge knows that he or she individually... has an economic interest in the subject matter in controversy....”

(Emphasis added).

12. The word “shall” is mandatory in nature. *Sanders v. City Of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008); *Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002); *Drury v. Harding*, 461 So. 2d 104, 107 (Fla. 1984).

13. Canon 3E(1)(c) expressly uses the term “shall” in mandating that a “judge shall disqualify himself or herself... where ... the judge knows that he or she individually... has an economic interest in the subject matter in controversy....”

14. The Petitioners’ Quo Warranto action centers around determining the final date of the terms for Justices Barbara J. Pariente, R. Fred Lewis, and Peggy A. Quince, and the concurrent creation of three vacancies on the Florida Supreme Court.

15. The Petitioners argue that the three vacancies will be created on January 9, 2019, while the Respondents argue that the three vacancies will be created at the end of the day on January 7, 2019.

16. Effectively, the Petitioners and Respondents are arguing over whether or not Justices Barbara J. Pariente, R. Fred Lewis, and Peggy A. Quince shall be employed as Justices on January 8, 2019, and therefore paid a Justice's salary for working on January 8, 2019.

17. If this Court sides with the Petitioners, then the three justices shall be paid for working on January 8, 2019. If this Court sides with the Respondents, then the three justices shall not be employed as justices on January 8, 2019, and therefore they shall not be paid a justice's salary, for working on January 8, 2019.

18. The value of one day's salary for a Florida Supreme Court Justice is approximately \$884.94 per work day.⁴

19. To most Floridians, \$884.94 is not a de minimis amount of money, as it can be a monthly mortgage payment, a monthly rent payment, or multiple monthly car payments. For most Floridians, it is a significant amount of money, and the incentive to receive the funds, when viewed objectively, creates a perception that the retiring justices would have an economic incentive to determine that their final date of employment is the end of the work day on January 8, 2019.

⁴The per diem salary is calculated by taking the annual salary of \$220,600.00, and dividing it by 249 work days. The number of work days is derived by taking 365 and subtracting the 12 official holidays that the Supreme Court has adopted for 2019, and also subtracting the 104 weekend days for 2019 – which leaves a maximum of 249 possible work days for any Justice.

20. Indeed, there is an objective economic incentive for the three Retiring Justices to feel pressured to accept the Petitioners' arguments, and essentially pay themselves for one more day of work as a Justice.

21. The objective conflict created by the additional salary creates doubt in the undersigned Intervenor's mind regarding whether the three retiring justices can truly remain impartial in this matter. Intervenor does not impute any ill intent or motive on the three Retiring Justices, but simply notes that, when viewed objectively, the three Retiring Justices have a clear objective economic incentive to side with the Petitioners.

22. Even if the three Retiring Justices only consider \$884.94 to be a de minimis amount of money, their own subjective viewpoint is still improper to consider, because objectively \$884.94 is a significant sum of money to most Floridians.

23. Therefore, the three Retiring Justices must be disqualified, because Canon 3E(1)(c) mandates disqualification in situations where the Justices have an economic interest that is intertwined with the cause of action before them.

24. **ACCORDINGLY**, the three Retiring Justices have an objective economic incentive to side with the Petitioners in this cause of action, and this economic incentive violates Canon 3E(1)(c), therefore mandating that the three

Retiring Justices be disqualified from this matter.

The Due Process Clause of the Fourteenth Amendment Requires the disqualification of the three Retiring Justices.

25. The Supreme Court of the United States (“SCOTUS”) has concluded that the Due Process Clause of the Fourteenth Amendment requires the disqualification of a state supreme court justice for the bias created by the justice’s personal economic interest in a matter before the state supreme court.

26. Specifically, the Due Process Clause of the Fourteenth Amendment requires recusal of a state supreme court justice when there is an objective economic incentive that may influence a state supreme court justice to opine a certain way, as “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *See also Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927) (“[O]fficers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule.”).

27. In *Caperton*, the SCOTUS reversed the West Virginia Supreme Court, and determined that the Due Process Clause of the Fourteenth Amendment was violated when a West Virginia Supreme Court Justice denied a recusal motion.

Caperton, 556 U.S. at 872. The basis for the motion was that the justice had received “campaign contributions in an extraordinary amount” from the board chairman and principal officer of one of the parties to the case. *Id.* West Virginia's Code of Judicial Conduct, like Florida’s, mandates a judge “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” *Id.* at 888 (quoting *W. Vir. Code Jud. Conduct*, Canon 3E(1)).

28. The standard that the SCOTUS used in *Caperton* is an objective standard, which avoids an actual inquiry into the mind of the judge or justice. *Caperton*, 556 U.S. at 883-84. The objective standard is defined as “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Caperton*, 556 U.S. at 883-84.

29. Per *Caperton*, the analysis involves an objective analysis of whether the three Retiring Justices would be biased. Any actual subjective bias, or lack thereof, of each of the three Retiring Justices is irrelevant.

30. Here, the economic interest in the cause of action is even more direct than in *Caperton*, because here the three Retiring Justices have a quantifiable economic incentive to stay on through the end of the day on January 8, 2019, and to

pay themselves an additional day of salary.

31. Objectively, an economic incentive to vote to receive an additional \$884.94 creates the appearance that the three Retiring Justices would be biased, and that they would vote to extend their terms simply to receive the additional funds.

32. **ACCORDINGLY**, the three retiring justices have an objective economic incentive to side with the Petitioners in this cause of action, and this economic incentive violates the Due Process Clause of the Fourteenth Amendment, and mandates that the three Retiring Justices be disqualified.

III. Prayer for Relief.

WHEREFORE, Intervenor respectfully requests that:

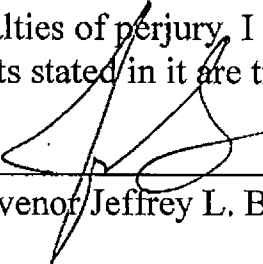
1. Intervenor be permitted to intervene in this matter for the limited purpose of moving to disqualify the three Retiring Justices;
2. This Motion be deemed sufficient to effectuate intervention for the stated limited purpose, and additionally that this Motion be deemed a Motion seeking disqualification of the three Retiring Justices;
3. If this Motion is deemed sufficient for Intervention, and also deemed a sufficient Motion seeking disqualification of the three Retiring Justices, then the Motions be granted, and the three Retiring Justices disqualify themselves, and the Chief Justice appoint three substitute justices for this particular matter;

4. If this Motion is deemed insufficient to effectuate an intervention, then Intervenor be permitted to file a Petition to Intervene directly in this matter, as opposed to the ad-hoc procedure former Judge Philip Padavano advocates for in his treatise, wherein an intervenor must first file a separate proceeding, and then seek consolidation of the separate proceeding into the main proceeding.

/S/ Jeffrey L. Burns
Jeffrey L. Burns
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Intervenor

Verification

Under penalties of perjury, I declare that I have read the foregoing document and that the facts stated in it are true the best of my knowledge and belief.

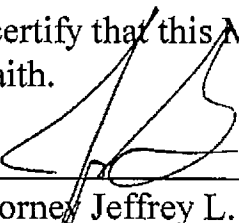


Intervenor Jeffrey L. Burns

Date: 10-15-18

Certificate of Good Faith

I hereby certify that this Motion and the factual statements made herein are made in good faith.



Attorney Jeffrey L. Burns
Fla. Bar No.: 40782

Date: 10-15-18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Clerk of the Florida Supreme Court on October 15, 2018, and has been furnished by E-mail to Raoul G. Cantero, White & Case, LLP, Southeast Financial Center, 200 South Biscayne Boulevard, Suite 4900, Miami, Florida 33131-2352, raoul.cantero@whitecase.com; George T. Levesque, Gray Robinson, P.A., 301 South Bronough Street, Suite 600, Post office Box 11189, Tallahassee, Florida 32302-3189, george.levesque@gray-robinson.com mari-jo.lewis-wilkinson@gray-robinson.com teresa.barreiro@gray-robinson.com; Daniel Nordby, General Counsel, Meredith L. Sasso, Chief Deputy General Counsel, John MacIver, Alexis Lambert, Executive Office of the Governor, 400 South Monroe Street, Suite 209, Tallahassee, Florida 32399, Daniel.Nordby@eog.myflorida.com Meredith.Sasso@eog.myflorida.com John.MacIver@eog.myflorida.com Alexis.Lambert@eog.myflorida.com ; John S. Mills, Thomas D. Hall, Courtney Brewer, Jonathan Martin, The Mills Firm, P.A., The Bowen House, 325 North Calhoun Street, Tallahassee, Florida 32301, jmills@mills-appeals.com thall@mills-appeals.com cbrewer@mills-appeals.com jmartin@mills-appeals.com service@mills-appeals.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of Rule 9.210(2), Fla.R.App.P.

/S/ Jeffrey L. Burns
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