

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 AMENDED MOTION TO INTERVENE, OR IN THE
ALTERNATIVE, VERIFIED WRIT OF CERTIORARI TO INTERVENE,
AND REQUEST DISQUALIFICATION OF CERTAIN JUSTICES**

Attorneys for Intervenor

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Background

On October 16, 2018, this Court entered an order which simply stated: “The Motion to Intervene for Limited Purpose, Or Alternatively for Leave to File Intervenor Petition, is hereby denied.” The Order did not contain any reasoning for the denial, and the Intervenor has been left to speculate if the denial was based on: (1) the substance of the motion, (2) the method/procedure of requesting intervention (a motion, as opposed to petition for certiorari), or (3) on the technical deficiencies contained in the original jurat.

In an abundance of caution, and since the original motion to intervene was not denied with prejudice, the Intervenor, through the undersigned, is filing this Amended Motion/Petition for Certiorari, that utilizes the ‘certiorari plus consolidation’ method of appellate level intervention espoused by former Judge Phillip Padavano, and which fixes the Jurat.

If the Court denies this Amended Motion/Petition for Certiorari, then Intervenor has no intention of filing additional motions to intervene, or motions to disqualify.

**VERIFIED AMENDED MOTION TO INTERVENE
(VERIFIED PETITION FOR WRIT OF CERTIORARI TO INTERVENE AND
REQUEST DISQUALIFICATION OF CERTAIN JUSTICES)**

JEFFREY LEONARD BURNS (“Intervenor”), as an applicant who is seeking a seat on the Florida Supreme Court, per *City of Clearwater v. City of Auburndale v. State ex rel. Landis*, 184 So. 787, 789 (Fla. 1938), hereby moves to intervene in this original Quo Warranto proceeding, or in the alternative, per *Tallahassee Democrat, Inc. v. O’Grady*, 421 So.2d 58 (Fla.1st DCA 1982), petitions this Court for a writ of common law certiorari, along with an order of consolidation (as requested in the concurrently filed motion to consolidate), to intervene in this original proceeding, 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 the Intervenor’s concomitant fear that the Judicial Nominating Commission, whom shall interview the Intervenor on November 3, 2018, will not receive a fair and impartial adjudication of the remaining issues in this matter due to the three Retired Justices’ identical objective economic conflict of interest, and in support thereof would show that:

Basis for Invoking Jurisdiction

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

However, “Intervention is not authorized at the appellate level; instead a petition for a writ of certiorari coupled with a motion to consolidate is appropriate.” *Tallahassee Democrat, Inc. v. O’Grady*, 421 So.2d 58 (Fla.1st DCA 1982). Intervenor requests that this Court exercise its certiorari review, consolidate this matter with the main Quo Warranto proceeding, and then consider the Intervenor’s request/motion to disqualify the Retiring Justices.

Relevant Facts

- Justices Barbara Pariente, R. Fred Lewis, and Peggy Quince, will have to retire when their terms end on January 7, 2019. *Appendix Ex. 1.*
- On September 11, 2018, the Governor directed the JNC to convene for the purpose of selecting highly qualified lawyers for appointment to the Florida Supreme Court, to replace the three Retiring Justices. The Governor provided the JNC with a deadline of November 10, 2018, to provide him with the names of nominees. *Appendix Ex. 2.*
- On September 12, 2018, the JNC formally began soliciting applications, with the direction that they be submitted to the JNC by October 8, 2018. *Appendix*

Ex. 3.

- On September 20, 2018, the Petitioners commenced this original proceeding by filing an Emergency Petition for Quo Warranto, seeking (1) a ruling that Governor Scott does not have the power to appoint the three successors to the Retiring Justices, and (2) that the JNC may not provide nominees to the Governor until January 9, 2019. *Appendix Ex. 4.*

- On September 26, 2018, the Governor, and JNC filed separate Responses in Opposition to Emergency Petition for Quo Warranto. *Appendix Ex. 5,* and *Appendix Ex. 6.*

- The Petitioners filed their Reply to Responses on October 1, 2018, *Appendix Ex. 7.*

- On October 8, 2018, the Intervenor submitted his application for appointment to Florida Supreme Court. *Appendix Ex. 8.*

- On October 12, 2018, the JNC informed the Intervenor that he would be interviewed, on November 3, 2018. *Appendix Ex. 9.*

- On October 15, 2018, this Court entered an Order that ruled against Governor Scott, and determined that the next Governor has exclusive authority to appoint the three successors to the Retiring Justices. *Appendix Ex. 10.*

- On October 15, 2018, this Court ordered oral arguments to be held on

the remaining issues raised in the Petitioner's Emergency Writ. *Id.*

- On October 15, 2018, the Intervenor file the original motion to intervene, which sought intervention in this matter for the sole purpose of disqualifying the three Retiring Justices. *Appendix Ex. 11.*

- On October 16, 2018, the original motion to intervene was denied by this Court without prejudice. *Appendix Ex. 12.*

Relief Sought

Intervenor respectfully requests that the Amended Motion be granted, or alternatively that the Petition for Certiorari be consolidated into this Quo Warranto original proceeding, and that the three Retiring Justices be disqualified from this matter, and that the Chief Justice appoint between 1-3 substitute justices for this particular matter.

Argument

I. Introduction/Summary of Argument.¹

As stated in the original motion, the Intervenor seeks to intervene in this matter for the limited purpose of moving to disqualify the three Retiring Justices.

The Petitioners strenuously argue in their briefs that the vacancies on the

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.

Florida Supreme Court, created by the Retiring Justices' retirements, shall occur on January 9, 2019. *Emergency Petition for Writ of Quo Warranto* at Pg. 21; *Petitioners' Reply to Responses to Petition for Writ of Quo Warranto* at Pg. 15. However, the commissions for all three of the Retiring Justices make it abundantly clear that their last date as Florida Supreme Court Justices shall be January 7, 2019. *See Appendix Ex. 1*. Indeed, the Petitioners, throughout their two briefs, disagree with the January 7, 2019, terminal date listed on the commissions, and instead the Petitioners advocate that January 8, 2019, is the actual final date of the Retiring Justices' terms.

Florida Supreme Court Justices have one of the highest salaries for any governmental employees in the state of Florida. Thus, objectively the Retiring Justices have an economic incentive to rule in favor of the Petitioners, and to determine that their last day of work ends at midnight on January 8, 2019, as opposed to dates listed on their commissions – 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.

Intervenor, who shares an interest with the JNC in the remaining issue before

this Court, believes that there is an economic incentive² for the three Retiring Justices to rule for the Petitioners, therefore Intervenor has a legitimate fear that the JNC will not receive a fair and impartial adjudication of the remaining issues in this matter due to the shared objective economic conflict of interest of the Retiring Justices. Intervenor respectfully requests that the three Retiring Justices be disqualified, and that the Chief Justice appoint 1-3 substitute justices to this action.

II. Intervenor has standing to intervene.

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

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. The Petitioners' Quo Warranto action seeks to interfere with, and curtail both: (1) the JNC's task of vetting of the applicants seeking

²Intervenor 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.

nomination to the Florida Supreme Court, and (2) the JNC's submittal of finalists to the Governor for his review, and appointment. As an applicant before the JNC, who stands to have the entire process shutdown via Petitioner's Quo Warranto action, Intervenor has an interest in the outcome of this proceeding. Indeed, 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.

Furthermore, 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. Additionally, Intervenor has incurred hundreds of dollars more in expenses by purchasing a plane ticket, and booking a hotel room, for the trip to Miami for the November 3rd interview with the JNC. Finally, Intervenor will incur further opportunity costs (lost billable legal work) spent preparing for, and attending the interview.

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.

III. Per the Florida Code of Judicial Conduct, 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.

The Retiring Justices should be disqualified from this action, because the Retiring Justices all have a pecuniary-interest/economic-incentive, in adopting the argument raised by the Petitioner, which is set for oral argument on November 8th.

The *Rules of Judicial Administration* have limited applicability to this Court, however, 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*.³ Specifically, Canon 3E(1)(c), *Florida Code of Judicial Conduct*, states:

“A judge shall disqualify himself or herself in a proceeding in which

³It 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. 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.

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).

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...." 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).

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. The Petitioners argue that the three vacancies will be created on January 9, 2019, and not at midnight between January 7, 2019 and January 8, 2019. Effectively, the Petitioners have raised the issue of 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.

If this Court sides with the Petitioners, and determines that the vacancies are

created on January 9, 2018, then the three justices shall be paid for working on January 8, 2019. If this Court rejects the Petitioners' argument, 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.

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

The relevant inquiry "is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling." *State ex rel. Brown v. Dewell*, 179 So. 695, 697-98 (Fla. 1938). Here, the Intervenor honestly believes that \$884.94 is not a *de minimis* amount of money. The amount of \$884.94

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.

covers most of the monthly living expenses for the Intervenor's family, other than mortgage payments. Furthermore, Intervenor's parents are similar in age to the Retiring Justices, and \$884.94 is even more important to them, because they are in the process of retiring, and they have to strictly budget their finances in their retirement. Therefore, to the Intervenor there is an appearance of 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 justices.

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. 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.

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. 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.

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

The Due Process Clause of the Fourteenth Amendment requires that the Retired Justices be disqualified, due to their personal economic interest in this matter. 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.”).

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

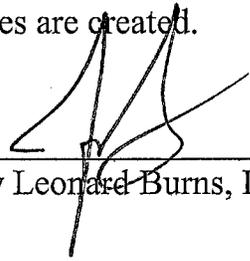
Conduct, like Florida's, mandates a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *Id.* at 888 (quoting *W. Vir. Code Jud. Conduct*, Canon 3E(1)).

In *Caperton*, the SCOTUS utilized 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.

Per *Caperton*, any actual subjective bias, or lack thereof, of each of the three Retiring Justices is irrelevant. Objectively, the economic interest at stake in this matter is even more direct than the alleged incentive to receive more campaign contribution underlying the *Caperton* opinion. The three Retiring Justice here have a quantifiable direct pecuniary incentive to adopt the position advocated by the Petitioners, stay on through the end of the day on January 8, 2019, and receive an additional day of salary. Objectively, an economic incentive to receive an additional \$884.94 creates the appearance that the three Retiring Justices would be biased, and that they would rule for the Petitioners, and extend their terms to receive the additional funds.

Verification/Jurat

I Jeffrey Leonard Burns, the Intervenor named above, hereby swear that I have knowledge of the facts stated in this Verified Motion and that those facts are true and correct. Indeed, I fear, as a part of the 59 member pool of applicants (three of whom shall eventually be selected to replace the three Retiring Justices), that I will not receive a fair adjudication of the issues that will be argued at the November 8, 2018, Oral Argument in this matter, because of the apparent objective economic/pecuniary/financial conflict of interest the three Retiring Justices objectively possess and share, in deciding whether to rule for, or against, the Petitioners, who have advocated throughout their briefs that January 9, 2019, and not January 8, 2019, is the date the three vacancies are created.

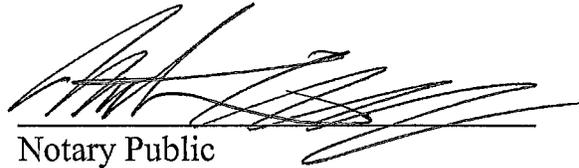


Jeffrey Leonard Burns, Intervenor

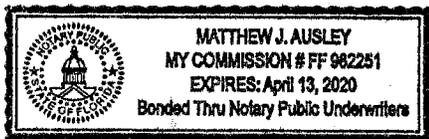
STATE OF FLORIDA
COUNTY OF OKALOOSA

The foregoing instrument was acknowledged before me this 18 day of October, 2018, by JEFFREY LEONARD BURNS, who is personally known to me, and whom took an oath verifying the facts set forth above.

WITNESS my hand and official seal.



Notary Public
My Commission expires:



Certificate of Good Faith

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



Kyle Bauman
Fla. Bar No. 111356

CERTIFICATE OF SERVICE

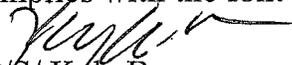
I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Clerk of the Florida Supreme Court on October 18, 2018, and has been furnished by E-mail to Raoul G. Cantero, White & Case, LLP, Southeast Financial Center, 200 South Biscayne Boulevard, Suite 4900, Miami, 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/ Kyle Bauman

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