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.

APPENDIX TO:

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

Attorneys for Intervenor

ANCHORS SMITH GRIMSLEY
909 Mar Walt Drive
Suite 1014
Fort Walton Beach, Florida 32541
(850) 863-4064

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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.

/S/ Kyle Bauman

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Attorney for Intervenor

EXECUTIVE DEPARTMENT

STATE OF FLORIDA

In the Name and by the Authority of the

STATE OF FLORIDA

I, Rick Scott, Governor of Florida, by virtue of the authority vested in me by the Constitution and Laws of this State, do hereby commission

Barbara J. Pariente

who was duly retained on the Sixth day of November, A.D., 2012, to be

Justice of the Supreme Court

for a term beginning on the Eighth day of January, A.D., 2013, until the Seventh day of January, A.D., 2019, according to the Constitution and Laws of the State and in the Name of the People of the State of Florida to have, hold and exercise the said office, and all the powers and responsibilities appertaining thereto, and to receive the privileges and emoluments thereof in accordance with the law.

In Testimony Whereof, I do hereunto set my hand and cause to be affixed the Great Seal of the State, at Tallahassee, the Capital, this the Thirteenth day of December, A.D., 2012, and of the Independence of the United States the Two Hundred and Thirty-Seventh year.

ATTEST:

Secretary of State

Governor of Florida

Appendix Ex. 1

EXECUTIVE DEPARTMENT

STATE OF FLORIDA

In the Name and by the Authority of the

STATE OF FLORIDA

I, Rick Scott, Governor of Florida, by virtue of the authority vested in me by the Constitution and Laws of this State, do hereby commission

R. Fred Lewis

who was duly retained on the Sixth day of November, A.D., 2012, to be

Justice of the Supreme Court

for a term beginning on the Eighth day of January, A.D., 2013, until the Seventh day of January, A.D., 2019, according to the Constitution and Laws of the State and in the Name of the People of the State of Florida to have, hold and exercise the said office, and all the powers and responsibilities appertaining thereto, and to receive the privileges and emoluments thereof in accordance with the law.

In Testimony Whereof, I do hereunto set my hand and cause to be affixed the Great Seal of the State, at Tallahassee, the Capital, this the Thirteenth day of December, A.D., 2012, and of the Independence of the United States the Two Hundred and Thirty-Seventh year.

ATTEST:

Secretary of State

Governor of Florida

EXECUTIVE DEPARTMENT

STATE OF FLORIDA

In the Name and by the Authority of the

STATE OF FLORIDA

I, Rick Scott, Governor of Florida, by virtue of the authority vested in me by the Constitution and Laws of this State, do hereby commission

Peggy A. Quince

who was duly retained on the Sixth day of November, A.D., 2012, to be

Justice of the Supreme Court

for a term beginning on the Eighth day of January, A.D., 2013, until the Seventh day of January, A.D., 2019, according to the Constitution and Laws of the State and in the Name of the People of the State of Florida to have, hold and exercise the said office, and all the powers and responsibilities appertaining thereto, and to receive the privileges and emoluments thereof in accordance with the law.

In Testimony Whereof, I do hereunto set my hand and cause to be affixed the Great Seal of the State, at Tallahassee, the Capital, this the Thirteenth day of December, A.D., 2012, and of the Independence of the United States the Two Hundred and Thirty-Seventh year.

ATTEST:

Secretary of State

Governor of Florida

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001
www.flgov.com
850-717-9418

RICK SCOTT
GOVERNOR

September 11, 2018

Mr. Jason Unger
Chair – Supreme Court
Judicial Nominating Commission
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301

Dear Mr. Unger:

Governor Scott has directed me to request that you convene the Supreme Court Judicial Nominating Commission for the purpose of selecting and submitting to the Governor the names of highly qualified lawyers for appointment to the Florida Supreme Court. This appointment is to fill the vacancy created by the mandatory retirement of **Justices Barbara Pariente, R. Fred Lewis and Peggy Quince.** The Governor strongly prefers submission of the maximum number of nominees (six) for each of the vacancies.

The Commission's deadline for completion of this undertaking is **Saturday, November 10, 2018.** The deadline is final as it includes the discretionary 30-day extension authorized by Article V, Section 11(c) of the Florida Constitution.

Administrative support for the Commission will be provided by the Governor's Office, pursuant to section 43.291(7), Florida Statutes. This includes all essential administrative needs such as document distribution, public announcements and the like. JNC Coordinator Erin Kraeft (850-717-9310; Erin.Kraeft@eog.myflorida.com) will contact you to these ends.

The Commission's expeditious handling of this matter is most appreciated. If I may be of assistance to you or the members of the Commission, please call me at (850) 717-9310.

Sincerely,

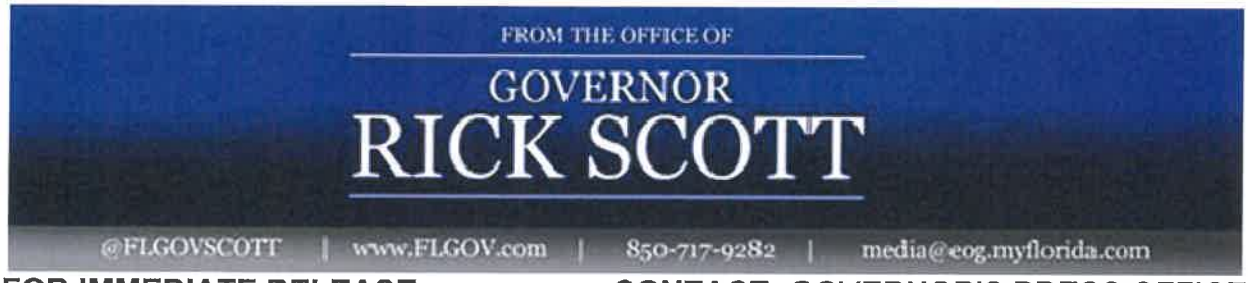
Daniel E. Nordby
General Counsel

cc: The Honorable Charles T. Canady
Chief Justice

Appendix Ex. 2

Killian, Mark

From: Governor's Press Office <Governor'sPressOffice@eog.myflorida.com>
Sent: Tuesday, September 11, 2018 5:16 PM
Subject: Gov. Scott: Supreme Court JNC Must Convene to Prevent Prolonged Vacancies



FOR IMMEDIATE RELEASE
September 11, 2018

CONTACT: GOVERNOR'S PRESS OFFICE
(850) 717-9282
media@eog.myflorida.com

Gov. Scott: Supreme Court JNC Must Convene to Prevent Prolonged Vacancies

TALLAHASSEE, Fla. – Governor Rick Scott, following past gubernatorial precedent, announced today that he has asked the nine-member Supreme Court Judicial Nominating Commission (JNC) to begin the process to nominate highly qualified successors to fill the three upcoming vacancies on the Florida Supreme Court. The JNC will now have 60 days to submit 3-6 names for each vacancy. According to the Florida Constitution, Justice Pariente, Justice Lewis, and Justice Quince are no longer able to serve on the Supreme Court after the end of their current terms on January 7, 2019. For the Florida Supreme Court to not have multiple prolonged vacancies, the JNC must convene now to meet the deadlines outlined in the Florida Constitution.

Governor Scott said, "Today, I have requested that the Florida Supreme Court Judicial Nominating Commission begin the process of nominating highly qualified successors to Justice Pariente, Justice Lewis, and Justice Quince. Each of these justices is constitutionally ineligible to serve beyond the expiration of their current terms. With more than six decades of combined service on the Court, these three justices have made their mark on the state's jurisprudence. To minimize or avoid any period of vacancy on the Supreme Court, the nominating process must begin well in advance of these vacancies. Beginning the process to fill these vacancies right now follows the practice of previous governors. Florida's Supreme Court is so important to Floridians, and we will work together to select the most qualified justices to faithfully serve our state."

The entire nominating and appointment process can take as long as four months. Three vacancies on the Florida Supreme Court for such an extended period would place a burden on the remaining justices and would risk delays in the Court. The JNC must request applications, contact the applicants' references and others in the community, review the results of criminal background screenings conducted by the Florida Department of Law Enforcement and any disciplinary files on the applicants maintained by The Florida Bar or the Judicial Qualifications Commission, interview the applicants, and conduct careful deliberations before making its nominations.

In 1998, Governor Chiles invited Governor-elect Bush to participate in the interview process that led to the appointment of Justice Quince. Governor Scott intends to follow this precedent and will invite the governor-elect to conduct his own interviews of the nominees following the General Election. The Governor's expectation is that he and the governor-elect – like Governor Chiles and then Governor-elect Bush – will agree on the selection of three justices who will serve with distinction. Governor Scott will not appoint any justice to the Florida Supreme Court until the governor-elect has had an opportunity to interview the nominees and review their references and qualifications.

For a Florida Supreme Court FAQ, click **HERE**.

###

APPLICANTS SOUGHT FOR FLORIDA SUPREME COURT JUSTICE

FOR IMMEDIATE RELEASE
September 12, 2018
CONTACT: Jason L. Unger, Chair
Florida Supreme Court Judicial Nominating Commission
TELEPHONE: 850-577-9090

TALLAHASSEE, [September 12, 2018] — The Florida Supreme Court Judicial Nominating Commission is accepting applications to fill three positions of Florida Supreme Court Justice, appointed by the Governor, upon the mandatory retirement of Justices Barbara Pariente, R. Fred Lewis, and Peggy Quince. Based on the Supreme Court's current composition, one seat must be filled by a qualified applicant who resides in the Third Appellate District; the other two seats are at-large.

Applications may be obtained from https://www.floridabar.org/directories/jnc/applications/. Applicants must submit (1) an original application (including all attachments); (2) an electronic copy of the original application (including all attachments) in pdf format; and (3) an electronic redacted copy of the original application, which excludes all material that is exempt or confidential under applicable public records laws.

The original signed, unredacted paper application must be provided to JNC Chair Jason L. Unger, GrayRobinson, 301 S. Bronough Street, Ste. 600, Tallahassee 32301-1724 no later than 5:00 p.m. on October 8, 2018. Additionally, an unredacted copy of the original application (including all attachments) and a redacted copy must be e-mailed, in pdf format, to all Commission members by the same date and time.

Applicants who are selected by the Commission for personal interviews will be informed of their interview times by e-mail.

The members currently serving on the Supreme Court JNC are:

Chair Unger, Tallahassee, jason.unger@gray-robinson.com
Vice Chair Nilda R. Pedrosa, Coral Gables, nildapedrosa@gmail.com
Cynthia G. Angelos, Port St. Lucie, cynthiagangelos@gmail.com
Fred Karlinsky, Weston, karlinskyf@gtlaw.com
Heather Stearns, Tallahassee, hstearns@libertydentalplan.com
Jesse M. Panuccio, Palm Beach Gardens, panuccio@gmail.com
Israel U. Reyes, Coral Gables, ireyes@reyeslawfirmpa.com
Hala A. Sandridge, Tampa, hala.sandridge@bipc.com
Jeanne T. Tate, Tampa, jeanne@jtatelaw.com

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. Case No.: SC18-___

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.

EMERGENCY PETITION FOR WRIT OF QUO WARRANTO

THE MILLS FIRM, P.A.

John S. Mills
Thomas D. Hall
Courtney Brewer
Jonathan Martin
325 North Calhoun Street
Tallahassee, Florida 32301

Counsel for Petitioners

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PETITION FOR WRIT OF QUO WARRANTO

Does the Governor have the authority to require and does a judicial nominating commission (a "JNC") have the authority to make nominations to fill an appellate court vacancy before the vacancy occurs? Because the Florida Constitution requires that the answer is that they have no such authority, last week's official actions by Respondents Governor Rick Scott, the Florida Supreme Court Judicial Nominating Commission (the "FSC JNC"), and Jason L. Unger as its chair exceeded their lawful authority, meriting a writ of quo warranto.

Governor Scott has already conceded to this Court that unless (1) a justice dies or retires early, (2) the governor-elect fails to take the oath before his term starts, or (3) the governor-elect cedes his authority to Governor Scott (none of which have happened), the governor elected this November will be the one with authority to fill the vacancies that will be created by the mandatory retirements of Justices Pariente, Lewis, and Quince. Nonetheless, Governor Scott has issued yet another press release wrongly claiming authority to make these appointments. More importantly for this Court's jurisdiction, he has now taken official action on that intent by directing the FSC JNC to make its nominations by November 10, 2018, nearly two months before the vacancies will occur. And the FSC JNC has officially acted by setting an October 8, 2018, deadline for applications to comply with Governor Scott's directive.

I. NATURE OF THE RELIEF SOUGHT.

Petitioners seek a writ of quo warranto to establish that Governor Scott may not require, and the FSC JNC may not make, nominations to fill the vacancies that will be created by the mandatory retirement of Justices Pariente, Lewis, and Quince until those vacancies occur, which will be on January 8 or 9, 2018, depending on how these justices' six-year terms are calculated. The FSC JNC is prohibited by the constitution and should now be prohibited by this Court from purporting to make nominations any earlier.

This is a time-sensitive matter, and Petitioners respectfully submit that a decision before October 8, 2018, which is the deadline for applications set by the FSC JNC, is necessary to avoid unfairness and undue burden to potential applicants. They further respectfully submit that a decision before the FSC JNC purports to make its nominations (Governor Scott has set a November 10, 2018, deadline for nominations) is necessary to avoid a potential constitutional crisis. But to be clear, the failure to decide this matter before those events would not render this petition moot.

II. BASIS FOR INVOKING THIS COURT'S JURISDICTION.

This Court has jurisdiction to issue writs of quo warranto to "state officers and state agencies." Art. V, § 3(b)(8), Fla. Const. "Quo warranto is used 'to determine whether a state officer or agency has improperly exercised a power or right derived from the State.' " *League of Women Voters of Fla. v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) (hereinafter, "*League I*") (quoting *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 607 (Fla. 2008)). The writ is available to determine whether government officials like Respondents have improperly exercised an official power or right, specifically including powers related to the judicial nominating and appointment process. *E.g.*, *Lerman v. Scott*, No. SC16-783, 2016 WL 3127708, at *1 (Fla. June 3, 2016); *Whiley v. Scott*, 79 So. 3d 702, 707 (Fla. 2011).

"[W]hen bringing a petition for writ of quo warranto, individual members of the public have standing as citizens and taxpayers." *Whiley*, 79 So. 3d at 706 n.4. Not only are individual petitioners Patricia M. Brigham, Joanne Lynch Aye, and Eliza McClenaghan each Florida citizens and taxpayers, but they and the two petitioner organizations, which are collectively comprised of thousands more Florida citizens and taxpayers, have a substantial interest in this issue. Petitioner League of Women Voters of Florida, Inc., (the "League") is a nonpartisan political organization that actively promotes open government responsive to the people of

the state. The League attempts to accomplish its goals and positions through the constitutional amendment process, the legislative process, and the courts. Since Petitioner Common Cause established Common Cause Florida in 1976, it has represented its members in litigation in matters related to redistricting, open government, ethics, and campaign finance. These organizations' dedication to keep all branches of the government accountable to the people make them ideally suited to enforce the constitutional provisions and democratic principles at stake.

This Court appears to have already recognized that it would have quo warranto jurisdiction over this dispute once Governor Scott undertook "some action" beyond telling the press and public that he intends to fill the vacancies that will be created in January 2019 due to the mandatory retirement of three Justices. *League I*, 232 So. 3d at 265-66. As shown below, Governor Scott has now acted on his stated intention – notwithstanding that his own counsel conceded to this Court that he lacked the authority to do so.

While this Court's jurisdiction is discretionary and concurrent with other courts, specific considerations in this case warrant immediate review by this Court; the "importance and immediacy of the issue justifies [this Court] deciding this matter now rather than transferring it for resolution in a declaratory judgment action." *Fla. House of Reps.*, 999 So. 2d at 608. Indeed, this Court is in a far better position to resolve this petition in the first instance. Given the clarity of the law on

the issue between this Court's decision in *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093 (Fla. 2006) ("*Mandatory Retirement*"), the work the Court has already performed related to this issue in *League I*, and the plain language of the constitutional provisions at issue, there is no need for this Court to require development of the legal analysis in the lower tribunals. *See Lerman*, 2016 WL 3127708, at *1 (deciding question involving gubernatorial authority to make judicial appointments where it was based on prior decision of this Court and straightforward review of subsequent amendments to constitution).

Nor can these questions wait for lower courts to address them first. The FSC JNC has set a deadline of October 8, 2018, for applications, which is less than three weeks away. And the November 10, 2018, deadline Governor Scott purported to impose is less than eight weeks away. Moreover, given the important questions of Florida constitutional law at issue, which are capable of repetition any year a new governor takes office, "this case would in all likelihood ultimately be decided by this Court. Interests of judicial economy favor an immediate resolution." *Chiles v. Phelps*, 714 So. 2d 453, 457 n.6 (Fla. 1998).

In any event, review by the lower courts should be avoided because every circuit and district judge in Florida, save the few who may be ineligible or disinterested in seeking higher judicial office, is a potential applicant for these

vacancies and would, therefore, be confronted with the untenable conflict of having a direct stake in the outcome. That is a very real conflict of interest that simply does not exist for any member of this Court.[1] Judges should not choose which governor may appoint them to the State's highest court.

[1] In *League I*, all seven members of this Court demonstrated their view that they have no disqualifying conflict of interest in deciding the issue even though four will be helping determine the person who will select the colleagues with whom they will deliberate and decide cases for years to come and the other three will be helping determine the person who will appoint their successors.

III. STATEMENT OF THE FACTS.

When appellate judges and justices are first appointed, they serve an initial "term ending on the first Tuesday after the Monday in January of the year following the next general election occurring at least one year after the date of appointment." Art. V, § 11(a), Fla. Const. If retained at the general election preceding the expiration of that initial term, they begin a new six-year term "on the first Tuesday after the first Monday in January following the general election." *Id.*

Absent death, removal, or resignation, appellate judges' and justices' final terms (regardless of whether they are the first term begun by appointment or a subsequent six-year term begun by retention) end and create vacancies subject to gubernatorial appointment in one of two ways: the appellate judge or justice either "is ineligible or fails to qualify for retention"[2] or qualifies but loses the retention vote. *Id.* Thus, for example, vacancies will be created on our appellate courts upon the expiration of the current term of any appellate judges or justices who (1) are serving terms that expire in January 2019 and (2) are not retained by the voters, whether it is because they were not eligible, chose not to run, or ran and lost.

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[2] This could occur, for example, because the judge or justice has turned 70 (as in the case at hand), no longer resides in the territorial jurisdiction of his or her court, fails to timely submit qualifying paperwork to the Secretary of State, is no longer a member of The Florida Bar, or simply declines to run for retention. *See generally* art. V, § 8, Fla. Const. (providing these and other requirements for eligibility for judicial office).

Justices Pariente, Lewis, and Quince were last retained by the voters in the November 6, 2012, general election, leading Governor Scott to issue commissions for terms beginning January 8, 2013, which was the first Tuesday following the first Monday in January following that election. (App. 3-5.) While six years from January 8, 2013, is January 8, 2019, the commissions (erroneously, as explained below) stated that the terms would end a day earlier, on January 7, 2019. (*Id.*)

Having been re-elected in the 2014 general election, Governor Scott is serving his second consecutive four-year term, which began on January 6, 2015, the first Tuesday after the first Monday in January following that election. Art. IV, § 5(b), Fla. Const. Thus, that term will end at the conclusion of January 6, 2019.[3] Despite the technical vacancy that will occur in his office and assuming he has not abandoned his state duties for other opportunities, he will "continue in office until a successor qualifies." Art. II, § 5(b), Fla. Const.

The winner of this year's gubernatorial election[4] will serve a four-year term starting on January 8, 2019, because that is the first Tuesday following the first Monday of the January following the election. Art. IV, § 5(b), Fla. Const. At least

[3] It would be January 5, 2019, if one used the one-year-minus-one-day method Governor Scott used for calculating the end of the judicial terms in the commissions he issued.

[4] The major party nominees are Andrew Gillum and Ron DeSantis, so the incoming governor will be referenced hereinafter by the male pronoun.

the last three governors took their initial oath of office and filed it with the Secretary of State in either November or December, ensuring that they would assume authority – thus ending their predecessor's de jure authority under article II, section 5(b) – at the earliest possible moment. (App. 6-8.) Thus, as Chief Justice Canady observed during oral argument in *League I*, it is "overwhelmingly likely" that the next governor-elect will take office at midnight on January 8, 2019,[5] and it "would take a colossal miscarriage" for this not to occur. Gavel to Gavel Video Portal, *Archived Oral Argument of League I, SC17-1122*, (Nov. 1, 2017) (hereinafter "*League I OA*") at 8:43, 15:09 (available at https://wfsu.org/gavel2gavel/viewcase.php?eid=2462). Thus, the newly elected governor will assuredly assume power the moment the clock strikes midnight when Monday, January 7 turns to Tuesday, January 8.

Governor Scott, through his general counsel, repeatedly conceded to this Court during that oral argument that the three vacancies would occur no earlier than midnight on January 8 (unless the justices left office early) and that the winner of the 2018 gubernatorial election would have the authority to fill those vacancies (unless he fails to file the oath of office in advance or agrees to cede his

[5] Midnight, as used in this petition and common usage, is the first moment of the calendar day. For example, midnight on January 8, 2019, occurs during the night between January 7 and 8.

authority to Governor Scott). *League I OA* at 28:10, 29:50, 31:20, 32:17, 33:06, 33:27; 36:15.

This Court dismissed the petition in *League I*, however, based on its holding that "[a] party must wait until a government official has acted before seeking relief pursuant to quo warranto because a threatened exercise of power which is allegedly outside of that public official's authority may not ultimately occur." 232 So. 3d at 265; *see also id.* at 266 ("Until some action is taken by the Governor, the matter the League seeks to have resolved is not ripe, and this Court lacks jurisdiction to determine whether quo warranto relief is warranted."). It therefore dismissed the quo warranto petition because it was based merely on Governor Scott's statement during a press conference that he intended to fill the vacancies on this Court. *Id.*

Governor Scott has now acted. Specifically, on September 11, 2018, his general counsel conveyed the following directions to the FSC JNC:

> Governor Scott has directed me to request that you convene the Supreme Court Judicial Nominating Commission for the purpose of selecting and submitting to the Governor the names of highly qualified lawyers for appointment to the Florida Supreme Court. This appointment is to fill the vacancy created by the mandatory retirement of **Justices Barbara Pariente, R. Fred Lewis and Peggy Quince.** The Governor strongly prefers submission of the maximum number of nominees (six) for each of the vacancies.
>
> The Commission's deadline for completion of this undertaking is **Saturday, November 10, 2018.** The deadline is final as it includes

> the discretionary 30-day extension authorized by Article V, Section 11(c) of the Florida Constitution.

(App. 9.) In a press release, Governor Scott stated that he intends to allow the governor-elect to interview the nominees and that he has an "expectation … that he and the governor-elect … will agree on the selection of three justices." (App. 10.) But he made clear that he will purport to unilaterally make the appointments if the governor-elect does not agree to grant him veto power over the appointments, despite his previous concession to this Court that he will have no such authority. (*See id.* ("Governor Scott will not appoint any justice to the Florida Supreme Court until the governor-elect had has an opportunity to interview the nominees and review their references and qualifications.").)

The FSC JNC, through its chair (Respondent Jason Unger), has acted to comply with Governor Scott's directive to make its nominations by November 10, 2018. Specifically, on September 12, 2018, Mr. Unger formally began soliciting applications with the direction that they be submitted by October 8, 2018. (App. 12.)

IV. ARGUMENT.

While Petitioners have provided the reader the facts providing context for the question presented, the three dispositive facts in this case are that (1) Justices Pariente, Lewis, and Quince are currently serving six-year terms that began January 8, 2013, (2) those terms will not end until January 2019 and there is no reason to believe these justices will abandon their duties, and (3) the FSC JNC is nonetheless complying with Governor Scott's directive to complete its nominating process nearly two months before the vacancies will occur. The acts challenged by this petition are not statements of intent to the press,[6] but official actions by Governor Scott and the FSC JNC to produce nominations by November 10, 2018. Those actions are unauthorized because (A) the Florida Constitution prohibits nominations from being made other than during a thirty-day window, which can be increased to sixty days by the Governor, opening only when the vacancies occur and (B) such vacancies will not occur until January 9, 2019.

[6] To be sure, Governor Scott continues to try to mislead the public by insisting to the press that he has the right to make the appointments contrary to his concessions to this Court. Respectful of this Court's holding in *League I*, this petition is not directed to his statements to the press, but to challenging his official actions in purporting to set a November 10, 2018, deadline for nominations (and the FSC JNC's official actions complying with this purported deadline).

A. Governor Scott May Not Dictate How the FSC JNC Proceeds, and in Any Event the FSC JNC May Not Make Its Nominations Until the Vacancies Occur.

Governor Scott's attempt to require the FSC JNC to convene and, more importantly, to set a deadline for nominations is unquestionably beyond his authority, as this Court long ago held that the "Governor has no power to establish rules governing the operation of the" JNCs. *In re Advisory Op. to the Governor*, 276 So. 2d 25, 30-31 (Fla. 1973) ("*JNC Rules*"). In any event, the Florida Constitution, specifically "[a]rticle V, section 11(c), governs the time periods applicable to judicial nominating commissions in nominating judicial applicants to fill vacancies and to the governor in making judicial appointments." *Pleus v. Crist*, 14 So. 3d 941, 943 (Fla. 2009).

> The nominations shall be made **within thirty days from the occurrence of a vacancy** unless the period is extended by the governor for a time not to exceed thirty days.

Art. V, § 11(a), Fla. Const. (emphasis added). The question is whether the highlighted phrase means within the thirty- to sixty-day period that starts upon the occurrence of a vacancy or no later than the end of that period. Although the language may be susceptible to either interpretation in isolation, when considered in context, it must mean the former.

This Court considered a similar question in *Jeffries v. State*, 610 So. 2d 440 (Fla. 1992), when it construed section 775.084(1)(a)2, Florida Statutes (Supp.

1988), which at that time provided for a habitual offender sentence for an offense "committed within 5 years of the date of" either the conviction of the last prior felony or the release from a prison sentence imposed for a prior felony. This Court held that the plain language of this statute meant that the offense must be committed during the five-year period starting with either the prior conviction or the release from prison for a prior conviction and, therefore, could not apply to an offense committed in prison when it was committed more than five years after the prior conviction. *Id.* at 441. This Court reasoned:

> It is obvious that the plain meaning of the word "within" is "inside the limits or extent of in time, degree, or distance." *American Heritage Dictionary* 1387 (2d ed. 1985). "Within" means "during the time of." *Black's Law Dictionary* 1602 (6th ed. 1991).[7] In common usage, "within" simply is not synonymous with "no later than." The term "within" implies a measurement fixed both at its beginning and its end, whereas "no later than" implies only a fixed end.

Id. Applying this reasoning to article V, section 11(a), the nominations must be made within a thirty- to sixty-day period that does not commence until the vacancies occur in January 2019.

It is true, however, that after the Court decided *Jeffries*, it retreated from its reasoning that this is the only plain meaning of the term and held that "within" can mean "no later than" in some contexts. *Barco v. Sch. Bd. of Pinellas Cty.*, 975 So. 2d 1116, 1122-23 (Fla. 2008). There, the Court interpreted Florida Rule of

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[7] *Black's Law Dictionary* does not currently define the term.

Civil Procedure 1.525, which at the time provided that a motion to tax costs and attorneys' fees must be served "within 30 days after filing of the judgment." *Id.* at 1118-19. The Court reaffirmed that its interpretation of the word "within" in *Jeffries* was reasonable, but it noted that other authorities demonstrated that it could also mean "not later than." *Id.* at 1122-23.

The Court noted that *Webster's Collegiate Dictionary* had definitions supporting both interpretations and quoted the following statement by the Supreme Court of Iowa with approval:

> In fixing time, this word is fairly susceptible of different meanings … . It may be taken to fix both the beginning and end of the period of time in which a specified act must be done. In this sense "within" means "during."
>
> However, "within" frequently means "not beyond, not later than, any time before, before the expiration of." In this sense "within" fixes the end but not the beginning of the period of time.

Id. at 1122 (quoting *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979)). Having found the word ambiguous, this Court in *Barco* held that to define the term in any given instance, one must look to the surrounding circumstances and purpose for the provision. *Id.*

A review of the patent purpose of article V, section 11(c) demonstrates that it should be interpreted to mean the period beginning with the occurrence of the vacancy. This Court has repeatedly explained that the purpose of this provision was for JNCs "to supplant, at least in part, the Governor's so-called 'patronage

committee' composed of political supporters to ensure that politics would not be the only criteria in the selection of judges, and to increase generally the efficiency of the judicial appointive process." *Pleus*, 14 So. 3d at 943 (quoting *JNC Rules*, 276 So. 2d at 29). "When the commission has completed its investigation and reached a conclusion, the persons meeting the qualifications are nominated. In this respect the commissioners act in an advisory capacity to aid the Governor in the conscientious exercise of his executive appointive power." *Id.* at 943-44 (quoting *JNC Rules*, 276 So. 2d at 30).

Where (as shown to be the case here in Part B below) a new governor will assume office at or after the same moment the vacancies occur, the new governor, not the departing governor, makes the appointments, as Governor Scott conceded in *League I*. In any event, that is what this Court's decision in *Mandatory Retirement* made clear. 940 So. 2d at 1093-94. Thus, it will be the new governor with the constitutional appointment power that is required to make the appointments within 60 days of when nominations are properly made and certified. Art. V, § 11(c), Fla. Const.; *Pleus*, 14 So. 3d at 943-44. To interpret section 11(b) to allow nominations before the vacancies occur would allow the JNC to infringe on the new governor's right to take up to 60 days to make the decision.

The facts here show just how absurd it would be to interpret this provision to allow nominations before a vacancy occurs. We are not facing a lone vacancy on a

lower court, but three vacancies on this state's highest court. If the FSC JNC makes its nominations before the November 10 deadline Governor Scott purported to impose, then the 60-day period could elapse before the new governor even takes office, a truly absurd result. And even if the FSC JNC takes the full time Governor Scott purported to allot and makes the nominations on November 10 (a Saturday), the deadline for the new governor to make the appointments will be January 9, 2019, his second day in office.

In this instance, moreover, the FSC JNC's duty is to act "in an advisory capacity to aid" the new governor who makes the appointments, not Governor Scott who will have departed by the time the vacancies occur. It must therefore be the new governor with the authority to decide whether and under what circumstances to extend the FSC JNC's deadline beyond 30 days to up to 60 days. And it is the new governor whose "politics" would be one, but "not … the only criteria in the selection." *Pleus*, 14 So. 3d at 943 (quoting *JNC Rules*, 276 So. 2d at 29) (emphasis omitted). Though the FSC JNC, of course, is duty-bound to nominate the most qualified applicants regardless of their political views or background, the FSC JNC cannot perform its advisory role without knowing the kinds of non-political characteristics the new governor intends to emphasize in choosing among nominees. Just as Governor Scott has had ample time to convey to the JNCs what he is looking for in nominees, so too must the JNCs be given the

opportunity to afford the same respect and consideration to the new governor before making nominations.

Any interpretation of article V, section 11(c) that would allow the nominations to be made before the vacancies occur would also cause undue and unfair hardship on potential applicants that could not have been intended by a process designed to encourage the most qualified people to apply. The November 10 deadline Governor Scott purported to impose has required the FSC JNC to set the deadline for applications well before the general election. This is unfair and untenable in any gubernatorial election year – this one most of all where three seats on this Court are at stake – because potential applicants should be able to know the identity of the governor making the appointments and, more importantly, what kind of characteristics he is looking for in making appointments so they can have a sense of whether they have any realistic chance of being appointed before undertaking the arduous and intrusive gauntlet of applying.[8]

The gubernatorial election aside, votes on constitutional amendments can also dramatically impact not just who might be interested in applying, but who is

[8] Judicial applications presently require applicants to divulge all kinds of details about their financial condition and history as well as their physical and mental health. Applicants are also required to recall, search for, and compile extensive information over the course of their legal careers, including details about prior trials, mediations, and appeals. (App. 13-35.) All of this necessarily requires tremendous time and effort.

even eligible to apply. Indeed, the upcoming election provides a clear example. The constitution currently provides, "No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served." Art. V, § 8, Fla. Const. That, of course, is the provision responsible for the three upcoming vacancies. But the Constitution Revision Commission has proposed raising the age to seventy-five (effective in July 2019), and this Court recently cleared that amendment, known as Amendment 6, to go on the ballot. *Dep't of State v. Hollander*, No. SC18-1366, 2018 WL 4275904 (Fla. Sept. 7, 2018) (summary ruling noting a full opinion will follow) (copy of Amendment 6 available at https://dos.elections.myflorida.com/initiatives/fulltext/pdf/11-20.pdf). Whether this amendment passes will have an obvious impact on who is eligible to apply and whether their age, even if not technically disqualifying, would eliminate their prospects of being nominated or appointed as a practical matter.[9]

While the foregoing issues all strongly warrant the same interpretation of "within" as this Court applied in *Jeffries*, there is one potentially countervailing

[9] For example, take an applicant who will turn 70 in the first half of their term, maybe as soon as July 2019. At present, she would have a tough time getting nominated and appointed as she would be limited to only a few months of service. But if the amendment passes, she might be an ideal candidate for this Court because she would not only have all those years of experience and wisdom, but also the ability to serve for several years.

interest, and it does not withstand scrutiny. Allowing nominations before the vacancy might be argued to allow for the earliest possible appointment by the new governor, which – the argument would go – would minimize any disruption to the Court's business caused by three vacancies. But the same efficiencies can already be achieved without this interpretation.

First, while Petitioners interpret section 11(c) to prohibit nominations before the vacancies, nothing in the Florida Constitution prevents a JNC from starting its process before the vacancy, as Justice Cantero noted in his concurrence in *Mandatory Retirement*. 940 So. 2d at 1094. The FSC JNC has demonstrated its view that it can complete its task by setting the deadline for applications roughly 30 days before making its nominations. Thus, the constitution would not prohibit it, for example, from setting the deadline as December 8, 2018, which would allow prospective applicants to know the results of the election but still give the FSC JNC over 30 days to make the nominations on the day the vacancies occur.

Second, while the fact there will be three vacancies in January may not be ideal, there are ample mechanisms long in place that will allow the Court to fully function until the successors are appointed and qualify in due course.[10] *See*

[10] These mechanisms do not, however, appear sufficient to prevent a constitutional crisis and utter chaos should Governor Scott receive nominations while he is still in office and go through with his publicly stated intent to appoint the new justices. At that point, there would be three individuals with commissions

generally art. II, § 5(b), Fla. Const.; *id.* art. V, § 8; *id.* art. V, § 2(b); Fla. R. Jud. Admin. 2.205(a)(2)(B)(iii), (a)(4)(A); Fla. Sup. Ct. Manual Internal Operating P. § I.B.

Thus, unless Respondents are allowed to create a constitutional crisis by purporting to nominate and appoint three putative justices, the Court can continue to function at full staff until successors are properly nominated and appointed by the new governor. There is no reason to adopt an interpretation that would allow the FSC JNC to infringe on the new governor's authority by making nominations before the vacancies occur.

B. The Vacancies Will Not Occur Until January 9, 2019.

Though not necessary to decide whether the writ should issue, the Court ought to resolve one minor conflict raised in *League I* that impacts the specific remedy to be fashioned if the writ is granted – Do the three justices' terms expire as of midnight of January 8, 2019, or January 9, 2019? In other words, until which date should the FSC JNC be prohibited from making its nominations?

In *League I*, in the commissions he signed, and in his press releases, Governor Scott has expressed his view that the terms end January 7, 2019. In other words, Governor Scott appears to believe the vacancies will occur when the clock

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stating they are now justices, but their authority to serve will be immediately suspect and almost certainly challenged.

strikes midnight the evening of Monday, January 7, 2019, and the calendar turns from January 7 to 8. But that method of counting would produce a result that is one day shy of six years, is unsupported by the law, and ignores well established Florida law on how to count periods of time, specifically including six-year judicial terms no less. *See State ex rel. Landis*, 163 So. 248, 256 (Fla. 1935) (noting that judge's six-year term had commenced on June 24, 1929, and "extended to June 24, 1935"). "The general rule for computing the time within which a thing must be done is to count the time by excluding the day on which the initial act occurred and include the corresponding future day." *Carter v. Cerezo*, 495 So. 2d 202, 203 (Fla. 5th DCA 1986); *accord Blanton v. State ex rel. Miller*, 24 So. 2d 232, 232 (Fla. 1945) (recognizing the "rule that in computing duration of time – that is, the period **for which** a condition shall exist – the first day is excluded"); *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012) (explaining that constitutional construction follows "principles that parallel those of statutory interpretation").

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction, issue the writ, and prohibit the FSC JNC from making nominations for vacancies before they occur on January 9, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to Daniel Nordby, General Counsel, Executive Office of the Governor, 400 South Monroe Street, Suite 209, Tallahassee, Florida 32399, daniel.nordby@eog.myflorida.com, counsel for Respondent Rick Scott, and to Respondent Jason L. Unger, in his capacity as Chair of Respondent Florida Supreme Court Judicial Nominating Commission, Gray Robinson, 301 South Bronough Street, Suite 600, Tallahassee, Florida 32301, jason.unger@gray-robinson.com by e-mail and hand delivery on September 20, 2018.

/s/ John S. Mills
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

/s/ John S. Mills
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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1573

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

Petitioners,

v.

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.

GOVERNOR'S RESPONSE IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF QUO WARRANTO

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Every justice currently serving on the Florida Supreme Court was nominated by the Florida Supreme Court Judicial Nominating Commission before the final day in office of his or her predecessor. This indisputable fact is no less true for those current justices whose predecessors departed the Court as a result of mandatory retirement: Justices Pariente, Quince, and Labarga were all nominated by the Supreme Court JNC between four and ten weeks before the departures of former Justices Grimes, Overton, and Anstead, respectively. *See* Appx. Table 1.[1] Nor is this simply a recent practice: the Supreme Court JNC's nominations of Justice Perry (February 2009), Justice Bell (November 2002), Justice Wells (March 1994), Justice Harding (November 1990), Justice Grimes (November 1986), and Justice Kogan (November 1986) *all* occurred between four and ten weeks before the mandatory retirement dates of their predecessors. Indeed, since the implementation of the merit appointment and retention process in this state more than four decades ago, *every* Florida Supreme Court justice who has been appointed following a mandatory retirement from the Court has been nominated

[1] The JNCs for the district courts of appeal have also routinely made nominations before the physical vacancies created by the departure of judges due to mandatory retirement. *See* Appx. Table 2. To the extent necessary, the Governor requests judicial notice of the facts set forth in the Appendix documents under section 90.202(12), Florida Statutes.

by the Supreme Court JNC *before the occurrence of a physical vacancy in office*.

Despite this consistent and longstanding practice, the Petitioners—two political advocacy organizations and three of their members—have now requested that this Court issue an extraordinary writ of quo warranto on an emergency basis to prospectively prohibit the Supreme Court JNC from making nominations to fill the vacancies that will be created by the mandatory retirements of Justices Pariente, Lewis, and Quince "until those vacancies occur, which will be on January 8 or 9, 2018. [*sic*]" Pet. at 2, 15. The Petition disregards the limits of this Court's quo warranto jurisdiction and—on the merits—asks this Court to impose the Petitioners' policy preferences by adopting a strained interpretation of the Florida Constitution that is contrary to its text, history, and purpose. Lacking both factual and legal support, the Petition should be dismissed on jurisdictional grounds or denied on the merits.

First, as a threshold matter, the Petition should be dismissed on jurisdictional grounds. Less than one year ago, this Court reaffirmed its longstanding precedent that the writ of quo warranto cannot be used to address "prospective conduct." *League of Women Voters of Florida v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) ("*League I*"). Notwithstanding this clear direction, the Petitioners seek to invoke this Court's quo warranto jurisdiction to determine prospectively the scope of the Supreme Court JNC's authority to make

nominations. It is undisputed that the Supreme Court JNC has not made any nominations to fill the vacancies in question. The Petition should be dismissed for lack of jurisdiction because the prospective claims directed to the Supreme Court JNC are not ripe for this Court's consideration.

Second, even if the Petitioners could establish a jurisdictional basis for this Court's review, the Petition should still be denied on the merits. To the extent the Petition challenges the Supreme Court JNC's authority to convene at the Governor's request and to solicit applications—the only "completed actions" taken by the Respondents that are arguably reviewable by quo warranto—the Petition should be denied because the Petitioners cannot establish that either the Governor or the Supreme Court JNC "has improperly exercised a power or right derived from the state." *League I*, 232 So. 3d at 265 (quoting *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 607 (Fla. 2008)). Both the Governor and the Supreme Court JNC have acted within their established authority and consistent with longstanding practice in initiating the nominating process to avoid extended vacancies in judicial office.

More significantly, the Petition's arguments prospectively challenging the authority of the Supreme Court JNC to make nominations before the occurrence of a physical vacancy in office are entirely without merit. The Petitioners' interpretation of the applicable constitutional provision is contrary to its plain

language, the longstanding historical practice of the judicial nominating commissions for the Supreme Court and district courts of appeal, and the clearly articulated public policy underlying Article V of the Florida Constitution: avoiding extended vacancies in judicial office. As this Court has repeatedly emphasized over the past 25 years:

> Vacancies in office are to be avoided whenever possible. We are confident that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist.

In re Advisory Op. to Gov. re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 797-98 (Fla. 2010) (quoting *In re Advisory Op. to the Gov. (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992)).

Consistent with this admonition, for the past four decades the Supreme Court JNC has invariably completed its nominating process before the occurrence of a physical vacancy in judicial office due to mandatory retirement from this Court. The Petitioners' arguments amount to a claim that three current justices on this Court, at least six former justices, and an untold number of judges on the district courts of appeal were nominated by their respective judicial nominating commissions in an unconstitutional manner. If this Court addresses the merits of the Petition, it should reject the Petitioners' unfounded reinterpretation of the Florida Constitution.

Finally, this Court should decline to address the ancillary question raised by the Petition: whether Supreme Court Justices serve a six-year term, as specified in Article V, section 10, or a term running for six-years-plus-one-day. Under the plain language of the Florida Constitution, the final six-year terms of the three justices who are subject to mandatory retirement will conclude no later than the end of the day on Monday, January 7, 2019.

Both because there is no proper basis for the exercise of this Court's discretionary jurisdiction, and because there is no legal merit to the claims asserted, this Court should dismiss or deny the Petition for Writ of Quo Warranto.

ARGUMENT

I. The Petition should be dismissed for lack of jurisdiction.

The Petition should be dismissed because the issue presented—whether the Supreme Court JNC has the authority to make nominations to fill vacancies on this Court—is not ripe for consideration and therefore exceeds this Court's quo warranto jurisdiction. Meaning "by what authority," the writ of quo warranto is used "to determine whether a state officer or agency has improperly *exercised* a power or right derived from the State." *Crist*, 999 So. 2d at 607 (emphasis added). Less than one year ago, this Court reaffirmed more than a century of precedent in concluding that petitions for relief in quo warranto "are properly filed only after a public official has acted." *League I*, 232 So. 3d at 265. Because the Petitioners ask

this Court to determine prospectively the scope of the Supreme Court JNC's authority to make nominations, their attempted use of the writ of quo warranto is improper and the Petition should be dismissed for lack of jurisdiction.

In *League I*, the petitioners filed a petition for writ of quo warranto against the Governor to prohibit him prospectively from "filling any judicial vacancies on Florida's appellate courts that occur due to terms expiring in January 2019." *Id*. at 264-65. The Court surveyed the history of the writ of quo warranto, which reflected that petitions are properly filed "only after a public official has acted" and that the "use of the writ to address prospective conduct is not appropriate." *Id*. at 264-65. Instead, this Court's quo warranto jurisdiction is appropriate only to review "completed actions," such as challenges to executive orders that have already been issued or federal lawsuits that have already been filed. *Id*. at 265-66 (citing *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998); *Ayala v. Scott*, 224 So. 3d 755 (Fla. 2017)). The Court in *League I* declined to depart from the historical application of the writ of quo warranto by addressing prospectively actions that had not yet been "consummated." *Id*. at 266.

The Petitioners here attempt to avoid the preclusive effect of *League I* by alleging that the Governor and the Supreme Court JNC have "taken official action." Pet. at 1. Specifically, the Petition notes that the Supreme Court JNC has

convened at the Governor's request and has solicited applications. *Id*. But the Petition is not limited to a request that the Court review these "completed actions." Instead, the Petitioners ask this Court to address prospective conduct by the Supreme Court JNC by prohibiting it from making nominations before January 2019. Pet. at 23. As in *League I*, the "use of the writ to address prospective conduct is not appropriate," 232 So. 3d at 265, and falls outside this Court's quo warranto jurisdiction.

The Petitioners misinterpret the statement in the closing paragraph of *League I* that their quo warranto petition would not be ripe until "some action is taken" by the Governor. *Id*. at 266. Throughout the *League I* opinion, the Court noted that quo warranto is properly used to address actions that have already been taken by a state officer or agency. *See, e.g., id*. at 265-66 ("petitions for relief in quo warranto are properly filed only *after a public official has acted*"; "[a] party must wait *until a government official has acted* before seeking relief pursuant to quo warranto…"; "[w]e previously considered whether issuance of the writ was appropriate in situations whether the state officer or agency *had already acted*"; "we reviewed *a completed action*") (emphasis added). In this context, the Court's statement that a quo warranto claim will not be ripe "until some action is taken by the Governor" merely reiterates the case's holding that quo warranto is available only to review a "completed action" by a state officer or agency. Once "some

action is taken" by the Governor, *that action* may be ripe for review under quo warranto. Nothing in *League I* suggests that the writ of quo warranto may be used to address prospective conduct such as the authority of the Supreme Court JNC to make nominations.

This Court's decision in *Lerman v. Scott*, SC16-783, 2016 WL 3127708 (Fla. June 3, 2016), is not to the contrary. The petitioner in *Lerman* sought a writ of quo warranto to challenge specific actions that had already been taken by the Governor and Secretary of State to fill a vacancy in a county court seat through the merit selection process rather than election. *Id*. The Secretary of State had notified the Palm Beach County Supervisor of Elections that no legally authorized election could be held for the seat in question; the Governor had requested that the JNC convene to begin the nomination process. Petition at 6, *Lerman v. Scott*, No. SC16-783. The petitioner's quo warranto complaint in *Lerman* challenged those specific completed actions—the Secretary's cancellation of the election and the Governor's initiation of the nominating process—on the basis that those actions were unauthorized because the county court seat in question should be filled by the election process. *Id*. Under those circumstances, the petitioner argued that the Governor and Secretary of State had improperly exercised their authority by taking actions in furtherance of the appointment process. This Court granted the writ, noting that quo warranto was appropriate to address "whether a particular

individual *has improperly exercised* a power or right." *Id.* at 1. (emphasis added). *Lerman* therefore involved a review of "completed actions" taken by the Governor and Secretary of State. *Id*.

In the present case, unlike *Lerman*, there is no dispute that all vacancies on the Florida Supreme Court will be filled through the Supreme Court JNC's nominating process. And the Petitioners concede that the Supreme Court JNC has the authority to convene and solicit applications, even before the occurrence of a physicial vacancy in office. Pet. at 20. But the Petition goes well beyond a review of any completed actions—and seeks relief far exceeding this Court's quo warranto jurisdiction—in requesting a prospective determination regarding the Supreme Court JNC's authority to make nominations. As to this request, just as in *League I*, the Petitioners effectively seek either prospective declaratory and injunctive relief or an impermissible advisory opinion—neither of which this Court has the authority to grant to them. *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said Dist.*, 80 So. 2d 335, 336 (Fla. 1955) ("We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution"). The Petition should be dismissed because it seeks relief that is not available under this Court's quo warranto jurisdiction.

II. If not dismissed on jurisdictional grounds, the Petition should be denied on the merits.

To the extent the Petition is not dismissed on jurisdictional grounds, it should be denied on the merits. The Petition fails to establish that either the Governor or the Supreme Court JNC have "improperly exercised a power or right derived from the state" through any actions they have taken. *League I*, 232 So. 3d at 265 (quoting *Crist*, 999 So. 2d at 607). More significantly, the Petition's prospective challenge to the Supreme Court JNC's authority to make nominations before the occurrence of a physical vacancy in office is entirely without legal merit. The Petitioners' interpretation is contrary to the plain language of the Florida Constitution, the public policy underlying Article V as set forth in this Court's precedents, and the consistent and longstanding historical practice of the Supreme Court JNC, which has always made its nominations before the occurrence of a physical vacancy in office following a mandatory retirement from this Court.

A. The Supreme Court Judicial Nominating Commission has the authority to convene and to solicit applications before the occurrence of a physical vacancy in office.

On September 12, 2018, the Supreme Court JNC published notice that it would be accepting applications until 5 p.m. on October 8, 2018, to fill three positions on the Florida Supreme Court. Pet. App. 12. The Petitioners claim that

the Supreme Court JNC exceeded its authority when it convened at the Governor's request and established a deadline for applications. Because neither the Governor nor the Supreme Court JNC have "improperly exercised a power or right derived from the state," the Petition should be denied on the merits.

The Petitioners concede that the Supreme Court JNC has the authority to convene and to solicit applications before the occurrence of a physical vacancy in office. Pet. at 20. The Petition correctly notes that "nothing in the Florida Constitution prevents a JNC from starting its process before the vacancy." *Id*. (citing *Mandatory Retirement*, 940 So. 2d at 1094). The Petitioners simply assert—on policy, not legal grounds—that the JNC should have chosen an application deadline other than October 8, 2018. The Petitioners would prefer an application deadline in December to "allow prospective applicants to know the results of the election" and the identity and "politics" of the governor-elect. Pet. at 17, 18, 20. But the Petitioners' policy preferences are not the law of this state, and they make no effort to claim that the Supreme Court JNC has exceeded its legal authority in convening at the Governor's request and establishing an application deadline of October 8, 2018.

In fact, the Supreme Court JNC's decision to establish an application deadline of October 8, 2018, is entirely consistent with its historical practice when making nominations to fill vacancies caused by mandatory retirements coinciding

with a gubernatorial election year. There have been five such vacancies on this Court in the past forty years, and in every case the Supreme Court JNC established an application deadline in September or October—before the general election:

Appointment	*Application Deadline*
Justice Bell	October 26, 2002
Justice Quince	October 5, 1998
Justice Harding	October 15, 1990
Justice Grimes	September 15, 1986
Justice Kogan	September 15, 1986

See Appx. Table 1.

Far from being an outlier, the Supreme Court JNC's application deadline of October 8, 2018, falls earlier than two and later than three of its comparable historical predecessors.[2] By establishing an application deadline sufficiently in advance of the physical vacancies in office, the Supreme Court JNC has also furthered the established policy of the state by conducting the nominating process "in such a way as to avoid or at least minimize the time that vacancies exist."

[2] Similarly, in every instance in which a judicial nominating commission was convened to fill vacancies on district courts due to mandatory retirement, the commission was convened before the existence of the physical vacancy. *See* Appx. Table 2.

Judicial Vacancies, 600 So. 2d at 462.

The nominating process takes time: time to advertise the vacancies, time for potential applicants to complete their judicial applications, time for the JNC to contact references and research the applicant's qualifications, time for The Florida Bar, the Judicial Qualifications Commission, and the Florida Department of Law Enforcement to gather background information and provide it to the JNC, time for the JNC to interview the applicants, and time for the JNC to deliberate before making its nominations. The Petitioners have failed to establish that the Supreme Court JNC has improperly exercised any power or right derived from the state by convening at the Governor's request and establishing an application deadline of October 8, 2018.

The Petitioners' allegations regarding actions taken by the Governor also fail to provide a basis for relief in quo warranto. The Florida Constitution "is silent on when the [judicial nominating] process must begin." *Advisory Op. to Gov. re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1094 (Fla. 2006) (Cantero, concurring). Although not constitutionally required, the Executive Office of the Governor has traditionally issued correspondence to the JNC's Chair to request that the JNC convene to make nominations in connection with a particular vacancy in judicial office. *See, e.g., Pincket v. Harris*, 765 So. 2d 284, 285 (Fla. 1st DCA 2000) (noting that governor's office had requested that JNC

"convene for the purpose of submitting nominees" to fill a vacancy); Pet. Appx. at 9. This practice facilitates the Governor's constitutional authority to extend the nominating period and is consistent with the statutory obligation of the Executive Office of the Governor to provide "administrative support" for each JNC. § 43.291(7), Fla. Stat. As a practical matter, the Executive Office of the Governor is often the first to be informed of the various factual circumstances that can create a vacancy in judicial office, including the resignation of an incumbent, succession of an incumbent to another office, removal of an incumbent from office, or the creation of a new office. Art. X, § 3, Fla. Const.

Notwithstanding its legal and historical precedent, the Petitioners claim that the Governor's request that the Supreme Court JNC convene and make its nominations by November 10, 2018, "is unquestionably beyond his authority." Pet. at 13. The only legal authority cited for this proposition is an Advisory Opinion issued to Governor Askew, which concluded that the governor lacked the authority to establish rules of procedure for judicial nominating commissions. *In re Advisory Op. to the Governor*, 276 So. 2d 25, 30-31 (Fla. 1973). The Governor's request that the Supreme Court JNC convene and make nominations on a schedule that will minimize vacancies in office—a request that has been conveyed to other JNCs on countless prior occasions—is readily distinguishable from a claim of gubernatorial authority to bind a JNC to rules of procedure.

Indeed, the same Advisory Opinion to Governor Askew concluded that the governor was not precluded from making recommendations to the JNC concerning its rules. *Id*. at 30. No authority supports the Petitioners' claim that the Governor exceeded his legal authority in requesting that the JNC convene and provide nominations.

As discussed further in section II(B), below, the Governor's request that the Supreme Court JNC make its nominations before the occurrence of a physical vacancy in office is also consistent with the longstanding and unbroken practice of past governors when making nominations to fill vacancies caused by mandatory retirements coinciding with a gubernatorial election year:

Appointment	*Nominations Certified*
Justice Bell	November 14, 2002
Justice Quince	October 26, 1998
Justice Harding	November 14, 1990
Justice Grimes	November 8, 1986
Justice Kogan	November 8, 1986

See Appx. Table 1.

As with the request to convene, Governor Scott's request that the Supreme Court JNC provide its nominations by November 10, 2018, is entirely consistent

with historical precedent. The date is later than three and earlier than two of its comparable historical predecessors. The Petitioners have identified no legal basis to conclude that the Governor has improperly exercised any power or right derived from the state by requesting that the Supreme Court JNC convene and make its nominations by November 10, 2018. The Petition for Writ of Quo Warranto should be denied on the merits.

B. The Supreme Court Judicial Nominating Commission has the authority to make nominations before the occurrence of a physical vacancy in office.

The Florida Constitution requires judicial nominating commissions to make nominations "within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days." Art. V, § 11(c), Fla. Const. The Petitioners claim that this provision forbids the Supreme Court JNC from making its nominations other than within a narrow window falling *after* the occurrence of a physical vacancy in office. The Petitioners' interpretation is contrary to the text, history, and purpose of this constitutional provision. As described below, judicial nominating commissions for the past four decades have universally and consistently made nominations before the occurrence of a physical vacancy resulting from mandatory retirement in an effort to minimize the duration of vacancies in judicial office. If this Court considers the merits of the Petitioners' claim notwithstanding its jurisdictional deficiencies, the

Petition should be denied.

In matters of constitutional interpretation, this Court "follows principles parallel to those of statutory interpretation." *Zingale v. Powell,* 885 So. 2d 277, 282 (Fla. 2004). Any inquiry into the proper interpretation of a constitutional provision "must begin with an examination of that provision's explicit language." *Id*. (quoting *Fla. Soc. of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986)). A court may "discern from a dictionary" the plain and obvious meaning of a statute or constitutional provision. *Edwards v. Thomas,* 229 So. 3d 277, 283 (Fla. 2017). If that language is "clear and unambiguous and conveys a clear and definite meaning," the unequivocal meaning is applied. *Id*. If an ambiguity exists, the Court looks to the rules of statutory construction to help interpret legislative intent "which may include the examination of a statute's legislative history and the purpose behind its enactment." *Id*. "Where reasonable differences arise as to the meaning or application of a statute, the legislative intent must be polestar of judicial construction." *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248, 1249 (Fla. 1985).

The constitutional provision at issue in this case requires the judicial nominating commission to make its nominations:

> within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to the governor.

Art. V, § 11(c), Fla. Const.

The dispute in the present case turns on the proper interpretation of the constitutional phrase "within thirty days from the occurrence of a vacancy." The Petitioners claim that the term should be interpreted to refer only to a narrow thirty-day window of time that "starts upon the occurrence of the [physical] vacancy." Pet. at 13. Based on the text, history, and purpose of this provision, however, the term "within thirty days from the occurrence of a vacancy" is properly construed to require nominations *no later than* thirty days after the occurrence of a vacancy, but not to prohibit the Supreme Court JNC from making nominations *before* the occurrence of the vacancy. This interpretation best harmonizes the explicit constitutional language, the policy objective of minimizing vacancies in office, and the consistent and longstanding practice of the Supreme Court JNC. Since the implementation of the merit appointment and retention process more than four decades ago, *every* Florida Supreme Court justice who has been appointed following a mandatory retirement from the Court has been nominated by the Supreme Court JNC *before the occurrence of a physical vacancy in office* rather than during a narrow thirty to sixty day window following

the mandatory retirement date. *See* Appx. Table 1.

"If action is required by a statute within a certain time 'after' an event, the general rule is that the action may be taken before the event, since the statute will be considered as fixing the latest, but not the earliest, time for the taking of the action." 86 C.J.S. *Time* § 4. When used relative to time, the preposition "within" has been defined as meaning "any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than" (Black's Law Dictionary 1437 (5th ed. 1979)); "[i]nside the limits or extent of; [i]nside the fixed limits of; not beyond" (American Heritage Dictionary 2051 (3d ed. 1992)).

In *Barco v. School Board of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008), the meaning of the word "within" was critical to this Court's interpretation of a deadline contained in Florida Rule of Civil Procedure 1.525. The Rule at issue provided:

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion *within 30 days after filing of the judgment*, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Id. at 1119. (emphasis added). The dispute in *Barco*, as in the present case, was whether the term "within 30 days after filing of the judgment" set an outside deadline for serving a motion *no later than* 30 days after the filing of the judgment (but not prohibiting an earlier filing); or whether the motion could *only* be served

during "a narrow window…that begins only after the filing of the judgment and closes thirty days later." *Id*. at 1118.

After finding the term "within" ambiguous, the Court in *Barco* construed "within" to mean "not later than" 30 days after the filing of the judgment. *Id*. at 1123-24. The Court concluded that this interpretation gave effect to the Rule's intended purpose: "to effect a speedy and just determination on the merits." *Id*. at 1123-24; *see also Chatlos v. Overstreet*, 124 So. 2d 1, 3 (Fla. 1960) (construing "within" to mean "not later than" and concluding that the word "does not fix the first point of time, but the limit beyond which action may not be taken").

In the present case, the term "within" should likewise be interpreted to establish an outer boundary on the authority of the judicial nominating commission rather than a narrow window beginning only after the occurrence of a physical vacancy in office. More than 25 years ago, this Court emphasized that "[v]acancies in office are to be avoided whenever possible." *Judicial Vacancies*, 600 So. 2d at 462. And in interpreting the scope of a judicial nominating commission's authority under Article V, this Court has stated that it was "confident that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." *Id*. To the extent the term "within" is ambiguous, an interpretation recognizing the judicial nominating commission's

authority to make nominations before the occurrence of a physical vacancy would best effectuate the purpose of the constitutional provision at issue and avoid or minimize the extent of any physical vacancies in judicial office.

This Court has also applied a "strong presumption" that a contemporaneous construction "rightly interprets the meaning and intention of a constitutional provision." *Greater Loretta Imp. Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 670 (Fla. 1970); *see also Johnson v. State*, 91 So. 2d 185, 187 (Fla. 1956) (stating that "contemporaneous construction and long acquiescence in a particular construction are entitled to great weight"). For more than four decades, the Supreme Court JNC has consistently carried out its constitutional mandate by making its nominations several weeks *before* the occurrence of a physical vacancy on the Florida Supreme Court. Every justice currently serving on this Court was nominated by the Supreme Court JNC before the final day in office of his or her predecessor:

Appointment	*Nominations Certified*	*Predecessor's Final Day*
Chief Justice Canady	August 14, 2008	September 6, 2008
Justice Pariente	October 10, 1997	November 17, 1997
Justice Lewis	October 12, 1998	December 31, 1998
Justice Quince	October 26, 1998	January 3, 1999
Justice Polston	August 14, 2008	October 1, 2008

Justice Labarga	December 9, 2008	January 5, 2009
Justice Lawson	November 28, 2016	December 31, 2016

See Appx. Table 1. Of particular note, Justices Pariente, Quince, and Labarga were nominated by the Florida Supreme Court JNC before their predecessors departed the Court as a result of mandatory retirement—precisely the action that the Petitioners now claim is unconstitutional and ask this Court to prospectively prohibit.

Not only every justice *currently* serving on this Court, but each and every justice *previously* appointed to the Court following the mandatory retirement of his or her predecessor over the past four decades was also nominated by the Supreme Court JNC before the retiring justice's final day in office:

Appointment	*Nominations Certified*	*Predecessor's Final Day*
Justice Perry	February 2, 2009	March 2, 2009
Justice Bell	November 14, 2002	January 6, 2003
Justice Wells	March 24, 1994	May 31, 1994
Justice Harding	November 14, 1990	January 6, 1991
Justice Grimes	November 8, 1986	January 5, 1987
Justice Kogan	November 8, 1986	January 5, 1987

See Appx. Table 1.

The consistent and longstanding practice of the Supreme Court JNC is entitled to great weight, particularly where it aligns with the plain meaning of the Florida Constitution in a manner that effectuates the purpose of Article V: conducting the nominating process in a manner that avoids or minimizes vacancies in judicial office.

Notwithstanding this consistent precedent, the Petitioners argue that the constitional phrase "within thirty days from the occurrence of a vacancy" should instead be interpreted to prohibit a judicial nominating commission from making nominations except within a narrow thirty-day window beginning with the occurrence of a physical vacancy in office following a mandatory retirement. Pet. at 13. The Petition acknowledges that this Court has previously construed "within" to mean "not later than," but argues that term is "ambiguous" and the "context" demands their more restrictive reading. *Id*.

The Petitioners' interpretation cannot withstand scrutiny. Not only is their interpretation contrary to the consistent and longstanding practice of the judicial nominating commissions, it would always result in extended vacancies in judicial office. But this Court has stated that the framers of Article V's nominating and appointment process intended that they be conducted "in such a way as to avoid or at least minimize the time that vacancies exist." *Judicial Vacancies*, 600 So. 2d at

462. To the extent the Petitioners themselves allege that the term "within" is ambiguous, it should be interpreted consistent with the policy of minimizing vacancies.

The Petitioners' interpretation would also lead to absurd results in the case of mid-term mandatory retirements. The Petition's policy arguments are focused entirely on the circumstances of a mandatory retirement at the end of a gubernatorial term. But Article V, section 11(c), is not textually confined to end-of-term vacancies. For example, the Petitioners' interpretation would have required the Supreme Court JNC to have waited until the mandatory retirement of Justice McDonald on May 31, 1994, before making its nominations to Governor Chiles, even though there was plainly no question regarding his authority to make the appointment. Because the Supreme Court JNC actually certified its nominations two months earlier, on March 24, 1994, Governor Chiles was able to announce the appointment of Justice Wells to succeed Justice McDonald on May 25, 1994, and minimize or avoid any gap in service. *See* Appx. Table 1. The Petitioners' policy objections based on the desire of potential applicants to be able "to know the identity of the governor making the appointments" are inapplicable to mid-term mandatory retirements.

The Petitioners also claim that it would be "truly absurd" if the Supreme Court JNC were able to make its nominations more than 60 days before the new

governer would take office. Pet. at 17. But that is precisely what occurred in 1998, when the Supreme Court JNC nominated Justice Quince on October 26, more than 60 days before Governor Bush took office. *See* Appx. Table 1. Contrary to the Petitioners' rhetoric, no "constitutional crisis" was created. Instead, Governor Chiles and Governor-Elect Bush both interviewed the nominees and reached an agreement regarding the appointment of Justice Quince. Governor Chiles appointed Justice Quince on December 11, 1998, for a term beginning on January 5, 1999. *See* Appx. at 53. The Petitioners provide no legal basis to presume that this appointment was unconstitutional.

Finally, the Petitioners' interpretation amounts to a claim that three current justices on this Court, at least six former justices, and an untold number of judges on the district courts of appeal were nominated by their respective judicial nominating commissions in an unconstitutional manner. If this Court addresses the merits of the Petition, it should reject the Petitioners' unfounded interpretation of the Florida Constitution. The Petition should be denied because the Supreme Court JNC has the authority to make nominations before the occurrence of a physical vacancy in office following a mandatory retirement.

III. The final six-year terms of Justices Pariente, Lewis, and Quince conclude on January 7, 2019.

While claiming that it is "not necessary" to decide whether the writ should issue, the Petitioners nevertheless ask this Court to determine the date on which the mandatory retirements of Justices Pariente, Lewis, and Quince will create a vacancy in office. Should this Court belive it necessary to resolve this issue, it should conclude that the six-year term of a justice that began on Tuesday, January 8, 2013, will expire at the end of Monday, January 7, 2019.

This straightforward application of the language of Article V, section 10(a), to determine the duration of a judicial term is not only consistent with the constitutional text and this Court's precedent, it is also in accord with the commissions issued by governors under Article IV, section 1(a), of the Florida Constitution, which also reflect judicial terms concluding on the first Monday in January.

As in *League I,* the Petitioners argue that the six-year term of office for a justice or appellate judge specified in Article V, section 10(a), actually extends for a period of *six years and one day*—that a term commencing on Tuesday, January 8, 2013, runs through midnight at the end of the day on Tuesday, January 8, 2019—the beginning of the next governor's *second* day in office. The Petition does not engage meaningfully with the constitutional text or historical practice in

asserting this conclusion. Instead, Petitioners' counter-textual argument is based primarily on unrelated cases addressing procedural deadlines such as statutes of limitations for filing negligence lawsuits. The Petition also cites the language of an entirely separate constitutional provision addressing the conclusion of a judge's initial term in office following appointment, rather than the duration of a six-year term in judicial office following retention by the voters. The legal calculation of a deadline involves an entirely different consideration from the duration of a term. For example, the Petitioners' methodology would calculate the duration of the Florida Legislature's 60-day regular session by excluding Day 1, counting forward 60 days, and ending at the conclusion of the 61st day. This clearly incorrect result demonstrates the inapplicability of the Petitioners' interpretation.

The Petition's legal arguments regarding the duration of a judicial term of office fail as a matter of law. If this Court chooses to address them, it should determine that the six-year term of a justice or judge that commenced on Tuesday, January 8, 2013, will expire no later than at the end of Monday, January 7, 2019, as required by the plain text of the Florida Constitution and this Court's precedents.

CONCLUSION

The Emergency Petition for Writ of Quo Warranto should be dismissed on jurisdictional grounds or denied on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated Response is prepared in Times New Roman 14-point font and complies with the font requirement of Florida Rule of Appellate Procedure 9.100(*l*), and that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal this 26th day of September, 2018, to the following:

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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,

vs. 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.

THE FLORIDA SUPREME COURT JUDICIAL NOMINATING COMMISSION AND JASON L. UNGER'S JOINT RESPONSE TO EMERGENCY PETITION FOR QUO WARRANTO

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Appendix Ex. 6

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INTRODUCTION

This (premature) petition seeks a writ of quo warranto prohibiting the Florida Supreme Court Judicial Nominating Commission ("Commission") from nominating candidates to fill the vacancies left by three retiring justices until "January 8 or 9, 2018" (petition at 2). Petitioners' argument contradicts the language of the Florida Constitution; the goal that the language furthers, and which this Court has acknowledged, of filling judicial vacancies as quickly as possible; and the unbroken, decades-long tradition of nominating replacements for retiring judges and justices before the vacancy occurs.

STATEMENT OF RELEVANT FACTS

The judicial nominating process articulated in article V, section 11 of the Florida Constitution was intended to remove, or at least minimize, the injection of politics into the selection of judges. *See In re Advisory Opinion to Governor*, 276 So. 2d 25, 30 (Fla. 1973) (noting that the purpose of the judicial nominating commission is "to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge"); *Spector v. Glisson*, 305 So. 2d 777, 783 (Fla. 1974) (describing the judicial nominating process as "a restraint upon the governor' as to "the 'pork barrel' procedure of purely political appointments without an overriding consideration of qualification and ability"); *Pleus v. Crist*, 14 So. 3d 941, 943-44

(Fla. 2009) (affirming the judicial nominating commission process as a constitutional restraint on the governor's appointment power). Consistent with that purpose, the judicial nominating commissions ("JNC" or "JNCs") independently solicit and accept applications, vet applicants, and submit their work—a distillation of three to six names of qualified candidates to fill each vacancy—to the governor for consideration.

The appointment of judges, and the screening of judicial applicants, are executive functions. *In re Advisory Opinion to Governor*, 276 So. 2d at 29. Thus, a JNC is technically considered part of the Executive branch. *Id.* at 29-30. In nominating candidates, the JNCs act in an advisory capacity to aid the governor in the conscientious exercise of the executive appointive power. Art. V, § 11(a), Fla. Const. And the Executive Office of the Governor offers administrative support to the JNCs. *See* § 43.291(7), Fla. Stat. (2018).

Despite this relationship, however, JNCs operate independently. For example, although the Governor makes the appointment, the pool of candidates is limited to the list of three to six candidates submitted by the JNC. Art. V, § 11(a), Fla. Const.; *see also Pleus*, 14 So. 3d at 946 (holding that the governor had a mandatory duty to fill the judicial vacancy with an appointment from the JNC's certified list). JNCs may also adopt uniform rules to govern their operations at each level of the court system—without approval or interference from the

governor. Art. V, § 11(d), Fla. Const. A JNC member may only be suspended for cause. § 43.291(5), Fla. Stat. (2018). And to preserve their independent decision making, the JNCs' deliberations are not open to the public. Art. V, § 11(d), Fla. Const. Moreover, under their respective rules, commissioners cannot contact the governor to influence the ultimate decision; nor may they rank or otherwise disclose any preference among nominees. *See* Rule IX, Supreme Court Jud. Nom. Comm. R. P.; Rule VIII, Uniform R. P. District Courts of Appeal Jud. Nom. Comm.; Rule VIII, Uniform R. P. Circuit Jud. Nom. Comm.

To minimize the disruption resulting from judicial vacancies, JNCs have historically nominated replacements as soon as practicable. In fact, since the adoption of the merit selection and retention process, for every vacancy arising from a Supreme Court justice's mandatory retirement, the Commission submitted its nominations before the outgoing justice had vacated office. This is true for the three retiring justices—two of whom were also appointed by the outgoing governor before the office they were assuming was vacated.[1]

[1] Justice Pariente was nominated on October 10, 1997, and appointed on December 10, 1997, to replace Justice Stephen Grimes, mandatorily retired effective November 17, 1997. (JNC App. 11, 15) Justice Lewis was nominated on October 12, 1998, and appointed on December 7, 1998 by outgoing Governor Lawton Chiles, to replace Justice Gerald Kogan, who retired effective December 31, 1998, but was subject to mandatory retirement on January 4, 1999. (JNC App. 11, 22). Justice Quince was nominated on October 26, 1998, and appointed on December 11, 1998 by Governor Chiles, to replace Justice Ben F. Overton, retired effective

Pertinent to the issue presented, the Florida Constitution provides that "nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days." Art. V, § 11(c), Fla. Const. This framework imposes the responsibility to submit nominations within the constitutional timeframe squarely on the JNCs. *See generally* Art. V, § 11, Fla. Const.; § 43.291, Fla. Stat. (2018). The governor has no right to convene or control a JNC.

On September 12, 2018, Jason Unger, as Chair of the Commission, issued a call for applications to fill the vacancies resulting from the imminent retirements of Justices R. Fred Lewis, Barbara Pariente, and Peggy Quince (App. 12).[2] The notice included instructions for submitting applications and imposed a deadline of 5:00 p.m. on October 8 (*id.*). It also informed interested parties that one seat must be filled by a qualified applicant from the Third Appellate District while the remaining two may be filled by applicants from anywhere in the state. The notice was issued after Governor Rick Scott requested the Commission to convene and provide nominations for the outgoing Justices (App. 9). His letter to the Commission noted that the deadline "for completion of this undertaking is

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January 4, 1999. (JNC App. 10, 11, 17). *See* Section II.C. below for greater detail on the timing of Supreme Court nominations since 1986.

[2] "App. #" refers to the page number of Petitioners' appendix; "JNC App. #" refers to the page numbers of the Florida Supreme Court Judicial Nominating Commission and Jason L. Unger's Joint Appendix, submitted with this response.

Saturday, November 10, 2018. The deadline is final as it includes the discretionary 30-day extension authorized by Article V, Section 11 (c) of the Florida Constitution." *Id.*

At this time, it is unknown how many candidates will apply for the vacancies and when and where the interviews will occur. Likewise, the date and time for the Commission's deliberations to select its nominations has not been set.

ARGUMENT

I. The Petition for Writ of Quo Warranto is not Ripe for Consideration Because the Commission has not yet Taken any Action that Petitioners would deem Unlawful.

Quo Warranto is an extraordinary writ whose purpose is to determine whether "a state officer or agency has improperly *exercised* a power or right derived from the State." *League of Women Voters of Fla. v. Scott,* 232 So. 3d 264, 265 (Fla. 2017) (emphasis in original) ("*League I*"). The nature of the writ requires a party to wait until the government official has acted. The writ is inappropriate to consider hypothetical future actions. *Id.* Where this Court has considered petitions for quo warranto, official action had already occurred. *See Fla. House of Representatives v. Crist,* 999 So. 2d 601, 607 (Fla. 2008) (after the governor had signed a gaming compact, holding that he lacked authority to execute a compact that would change existing law); *Whiley v. Scott,* 79 So. 3d 702 (Fla. 2011) (after the governor had suspended rulemaking through

an executive order, considering whether he had exceeded his authority); *Chiles v. Phelps*, 714 So. 2d 453, 455 (Fla. 1998) (after the Legislature voted to override a gubernatorial veto, considering a petition for writ of quo warranto challenging the Legislature's authority to override the veto while in regular session); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 406 (Fla. 1998) (after the Capital Collateral Regional Counsel filed a federal civil rights suit, issuing writ of quo warranto prohibiting it), *receded from on other grounds in Darling v. State*, 45 So. 3d 444 (Fla. 2010). Here, the Commission has not yet submitted nominations to the Governor and there is no indication that it will act in a constitutionally inappropriate manner.

In *League I*, this Court dismissed a petition for writ of quo warranto effectively seeking to prohibit the Governor from "filling any judicial vacancies on Florida's appellate courts that occur due to terms expiring in January 2019." 232 So. 3d at 264-65. Because no appointments had been made, the Court concluded that "to review an action which is merely contemplated but not consummated" would depart from the historical application of the writ. *Id.* at 266. When a writ is sought for action that is conjectural or hypothetical, judicial consideration is tantamount to an impermissible advisory opinion. *Id.* at 265.

Here, the Commission has not submitted its nominations to the Governor. Indeed, the *only* action it has taken is to issue, through its chair, a call for

applications (App 12). And Petitioners concede that "nothing in the Florida Constitution prevents a JNC from starting its process before the vacancy, ..." Petition at 20. Therefore, the Commission has taken no action that Petitioners argue is unconstitutional. Instead, Petitioners seek to prohibit the Commission from taking *prospective* action by transmitting nominations to the Governor before January 2019. *League I* clearly counsels against the issuance of a writ in situations such as this where the state official or agency has not yet acted.

Petitioners rely on *Lerman v. Scott*, No. SC16-783, 2016 WL 3127708 (Fla. June 3, 2016). Petition at 5. But *Lerman* considered whether a circuit-court vacancy occurring in the middle of a six-year term should be filled by appointment or election (election, the Court held). This Court's "decision without published opinion" does not explain whether the governor had already acted, except to say that a writ of quo warranto "is the proper means for inquiring into whether a particular individual *has improperly exercised* a power or right derived from the State." *Id.* at 1 (emphasis added). *Lerman* provides no authority for the argument that the writ can be issued *before* the alleged unlawful exercise of power.

Petitioners' argument that the Commission will submit its nominations to the Governor before November 10 to thwart or hamstring selection by the Governor-elect is unsupported. *See* Petition at 16-17. Petitioners instead ask this Court to

presume that the Commission will act in such a manner and ask the Court prohibit it from doing so.

At this time, the only Commission action is a call for applications to be submitted by October 8. That deadline could foreseeably be extended if the Commission decides that the applicant pool is insufficient to provide the Governor with three to six nominations for each vacancy, including three to six names from the Third Appellate District. Until the pool of applicants is known, final details for vetting and interviewing applicants cannot be finalized. Any contention that the Commission will provide its nominations to the Governor before November 10 is speculative.

Petitioners assert that the Commission "has demonstrated its view that it can complete its task by setting the deadline for applications roughly 30 days before making its nominations." Petition at 20. They fail to explain or otherwise support this statement. The Commission has not indicated that 30 days will be sufficient to complete the substantial task of vetting an as-yet-undetermined number of candidates and nominating 9-18 of them. In fact, no JNC in recent memory has had to nominate candidates to fill three simultaneous vacancies on the Court.

The submission of nominations to the Governor requires substantial time and effort on the part of the Commission. The process of distilling numerous applications down to three to six nominations involves closely reviewing the

applications, reviewing the background reports from the Florida Bar and the Florida Department of Law Enforcement, and intensive vetting and interviewing of each applicant. It is reasonable to assume that there will be a greater number applicants to fill three vacancies, significantly increasing the Commission's workload. The review of these applicants will take a considerable amount of time.

The Governor's request to receive the nominations by a date certain does not require the Commission to do so. Its authority to vet and nominate candidates does not depend on the Governor, except that the Governor may extend the deadline. *See* Art. V, § 11(c), Fla. Const. ("The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days."); *cf.* Article V, § 11(d) (establishing separate judicial nominating commissions and granting authority to adopt rules, subject to repeal by general law or a vote of five justices of the supreme court). While the Commission's activities will necessarily be coordinated with the Governor's office, they are not controlled by it. Therefore, the fact that the Governor's requested nominations by a certain date is not a mandate.

Petitioners' speculation that the Commission *may* act in a way they argue could be improper is an insufficient basis for a writ of quo warranto. As it did in *League I,* this Court should dismiss the Petition.

II. If This Court Considers the Merits, it Should Deny the Petition.

If this Court reviews the merits of the Petition, it should nevertheless deny it because (A) the plain meaning of "within" includes actions taken both before and after a certain event; (B) such a reading is consistent with the goal of filling judicial vacancies as quickly as possible; and (C) for decades JNCs have nominated replacements for retiring judges and justices before vacancies occur.

A. In the context of filling judicial vacancies, the meaning of "within" includes actions taken both before and after a vacancy occurs.

The Florida Constitution requires that "[t]he nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days." Art. V, § 11(a), Fla. Const. The question in this case is whether "thirty days from the occurrence of a vacancy" establishes only an outer limit or—as Petitioners argue—it means thirty days *after* the vacancy occurs.

This Court has observed that the term "within" is subject to varying meanings. *Barco v. Sch. Bd. of Pinellas Cty.*, 975 So. 2d 1116, 1122 (Fla. 2008). In *Barco*, this Court catalogued the meanings of "within," noting that it could mean "not later than," "any time before," "at or before," "at the end of," "before the expiration of," "not beyond," "not exceeding," "being inside," "not longer in time than," and "before the end or since the beginning of," among potential usages. 975

So. 2d at 1122. To divine the proper usage in the context of a specific rule of civil procedure, this Court looked to the purpose behind the Rules of Civil Procedure and the rule at issue. *Id*. at 1123.

Constitutional provisions should "be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole." *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006). In this case, the first sentence directs the actions of the JNCs to be conducted "within thirty days *from* the occurrence of a vacancy." But the second sentence directs the governor's actions to be completed "within sixty days *after* the nominations have been certified to the governor." Art. V, § 11(c), Fla. Const. (emphasis added). Plainly, the drafters were familiar with the preposition "after," but chose to use "from" to describe the period for the JNCs to complete their tasks.[3] The use of different words in those two sentences signifies a different meaning. *See Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) ("the legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended."); *W. Fla. Reg'l*

[3] A related statute adds insight into different uses of the term "within." Florida law requires the Commission to nominate candidates for regional counsel to fill vacancies in the Office of Criminal Conflict and Civil Regional Counsel in each appellate district "within 6 months *after* the date of the vacancy." *See* § 27.511(3)(b), Fla. Stat. (2018) (emphasis added). In contrast to the constitutional provision involved here, the statute's clear language requires the Commission to submit nominations *after* the vacancy in the office of regional counsel occurs.

Med. Ctr., Inc. v. See, 79 So. 3d 1, 9 (Fla. 2012) (explaining that constitutional construction follows "principles that parallel those of statutory interpretation"). Given the juxtaposition of the two sentences, "within thirty days *from* the occurrence of a vacancy" must delineate only an outer limit for nominations to be submitted.

Even if this Court adopts Petitioners' premise that "within" means a time fixed in *both* beginning and end, however, the beginning point need not be the occurrence of a vacancy. "Within thirty days from the occurrence of a vacancy" is reasonably interpreted to encompass thirty days *before* and *after* the vacancy occurs, and which may be increased to sixty days if so extended by the governor. This interpretation would be most consonant with the preposition "from" and the myriad of ways in which vacancies may occur, some of which are planned and known months or years in advance—such as mandatory retirements—as well as sudden unforeseen departures from office.

B. Interpreting the term "within" to allow JNCs to nominate candidates before a vacancy occurs fulfills the goal of filling judicial vacancies as quickly as possible.

This Court has noted that vacancies in judicial office are to be minimized. *In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 462 (Fla. 1992). As this Court said in *Judicial Vacancies*,

> Vacancies in office are to be avoided whenever possible. We are confident that the framers of article V intended that the nominating

> and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist. Judges are encouraged to and do submit their resignations, to be effective in the future, at a time that permits the process to proceed in an orderly manner and keep the position filled.

600 So. 2d at 462. *See also Advisory Op. to the Governor re Judicial Vacancy Due to Mandatory Ret. (Mandatory Retirement)*, 940 So. 2d 1090, 1095 (Fla. 2006) (noting that "it is in the interest of the people of Florida that such vacancies be filled as quickly as possible.") (Cantero, J., concurring).

Interpreting the term "within" as permitting the JNCs to nominate candidates before a vacancy actually occurs remains faithful to the constitution's plain language while fulfilling the purpose of minimizing the period in which judicial vacancies exist. It would permit a governor to interview nominees before the vacancy arises so that the vacancy can be filled at the earliest possible date.

Petitioners' narrow interpretation would instead delay the process and contradicts the policy of "minimiz[ing] the time that vacancies exist." *Judicial Vacancies*, 600 So. 2d at 462. Petitioners cite *Jeffries v. State*, 610 So. 2d 440 (Fla. 1992). Petition at 13-14. In *Jeffries*, this Court applied the rule requiring strict construction of criminal statutes, derived from article I, section 9 and article II, section 3 of the Florida Constitution, which trumped the common law rules of construction. *Id.* at 441. No such constitutional restriction applies here. No compelling reason exists to narrowly interpret the term "within." *See Chatlos v.*

Overstreet, 124 So. 2d 1, 3 (Fla. 1960) (interpreting "within" to mean "not longer in time than" or "not later than" to give full effect to an individual's constitutional right to access to courts).

Petitioners' interpretation also contradicts the purpose behind the judicial merit selection and retention process. The current process was intended to combat the "political patronage" of past eras, to restrain the influence of the governor, and to ensure that qualified individuals are elevated to the State's appellate benches. *See In re Advisory Opinion to Governor*, 276 So. 2d at 29-30; *Spector*, 305 So. 2d at 783; and *Pleus*, 14 So. 3d at 943-44. Yet Petitioners now argue that a Commission that is supposed to act independently of the governor—without regard to politics or elections—and nominate the most qualified persons, should consider input from the governor (or governor-elect?) *before* it nominates candidates. Such an argument runs contrary to the purpose behind the merit-selection process, would render JNCs mere gubernatorial tools, and would emasculate the filtering mechanism designed to protect the merit-selection process from political pressures. Although politics may still influence whom a governor ultimately *appoints*, it is not supposed to influence whom the JNC *nominates*. Petitioners' argument turns JNCs into another arm of the governor.

C. For decades, JNCs have nominated replacements for retiring judges and justices before vacancies occur.

Relying on this longstanding precedent, the JNCs have long endeavored to ensure that governors are timely provided nominations so that vacancies may be avoided or minimized. In fact, every sitting Justice on the Court was nominated *before* the predecessor left office. This is true for each of the three retiring justices, all of whom were nominated to replace a justice subject to mandatory retirement, and two of whom were appointed before their predecessor left office.

This is not a recent phenomenon. It has been the Commission's longstanding practice. For over thirty years—and without exception—the Commission has submitted nominations to replace justices subject to mandatory retirement *before* the retiring justice left office.

- On November 10, 1986, the Supreme Court JNC submitted the nomination of Stephen G. Grimes (and others) to Governor Bob Graham to fill the vacancy of Justice James Adkins, who was subject to mandatory retirement, effective January 6, 1987 (JNC App. 10, 13).
- On October 10, 1997, the Supreme Court JNC submitted the nomination of Barbra J. Pariente (and others) to Governor Lawton Chiles to fill the vacancy of Justice Grimes, who was subject to mandatory retirement, effective November 17, 1997 (JNC App. 11, 15).

- On October 26, 1998, the Supreme Court JNC submitted the nomination of Peggy A. Quince (and others) to Governor Lawton Chiles to fill the vacancy of Justice Ben F. Overton, who was subject to mandatory retirement, effective January 4, 1999 (JNC App. 10, 17).
- On November 14, 2002, the Supreme Court JNC submitted the nomination of Kenneth B. Bell (and others) to Governor Jeb Bush to fill the vacancy of Justice Leander J. Shaw, Jr., who was subject to mandatory retirement, effective January 6, 2003 (JNC App. 11, 18).
- On December 9, 2008, the Supreme Court JNC submitted the nomination of Jorge Labarga (and others) to Governor Charlie Crist to fill the vacancy of Justice Harry Lee Anstead, who was subject to mandatory retirement, effective January 5, 2009 (JNC App. 11, 19).
- On February 2, 2009, the Supreme Court JNC submitted the nomination of James E.C. Perry (and others) to Governor Charlie Crist to fill the vacancy of Justice Charles T. Wells, who was subject to mandatory retirement, effective March 2, 2009 (JNC App. 11, 21).

The following table further explains the succession dates:

JUSTICE	TERMINATION DATE/ REASON[4]	REPLACED BY JUSTICE[5]	JNC NOMINATION DATE	APPOINTMENT DATE[6]
Adkins	1-6-1987 Could Not Run Again	Grimes	11-10-1986 (JNC App. 13)	1-30-1987
Grimes	11-17-1997 Mandatory Retirement	Pariente	10-10-1997 (JNC App. 15)	12-10-1997
Overton	1-4-1999 Could Not Run Again	Quince	10-26-1998 (JNC App. 17)	12-8-1998
Shaw	1-6-2003 Could Not Run Again	Bell	11-14-2002 (JNC App. 18)	12-30-2002
Anstead	1-5-2009 Mandatory Retirement	Labarga	12-9-2008 (JNC App. 19)	1-2-2009
Wells	3-2-2009 Mandatory Retirement	Perry	2-2-2009 (JNC App. 21)	3-11-2009

As the table above shows, the practice of submitting nominations in advance of a vacancy is a prudent practice that the Commission has uniformly observed.[7] This reasonable construction of the Florida Constitution by the constitutional

[4] JNC App. 10, 11. "Succession of Justices of Supreme Court of Florida, Justices of the Supreme Court of Florida," available at http://www.floridasupremecourt.org/pub_info/documents/appointed.pdf.

[5] JNC App. 7. "Succession of Justices of Supreme Court of Florida, Successors to the Current Seats on the Supreme Court" available at http://www.floridasupremecourt.org/pub_info/documents/appointed.pdf.

[6] *See* n. 4.

[7] It has also been the practice in the five District Court of Appeal JNCs.

officers charged with implementing it is presumed correct. *See Fla. Soc. of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1120 (Fla. 1986) (finding the applicable veto period to be fifteen days where the governor and the legislature had consistently construed the provision in the same manner). For more than 40 years since the adoption of the merit selection and retention process, JNCs have construed the provisions of article V, section 11 of the Florida Constitution to permit a JNC to submit nominations to fill a vacancy before the vacancy occurs. Over forty years of acquiescence creates a strong presumption, which this Court should not blithely disregard.

The Commission faces a historically unique situation due to the simultaneous mandatory retirement of three justices. Any delay in filling vacancies only compounds the potential constitutional quandary that may arise. Five justices are required for a quorum. Art. V, § 3(a), Fla. Const. The Chief Justice does have authority to temporarily assign judges when recusals for cause would prohibit the Court from convening, *id.*, but that section does not address a lack of quorum due to vacancies in office. S*ee id.* The Chief Justice is also empowered to assign "consenting retired justices or judges, to temporary duty in any court for which the judge is qualified," but nothing in the plain text of the Florida Constitution expressly grants the Chief Justice the authority to temporarily fill a vacant judicial office. Art. V, § 2(b), Fla. Const. Likewise, the Supreme

Court of Florida Manual of Internal Operating Procedures, revised September 16, 2016, section X establishes procedures for the use of "associate justices" in cases requiring recusal; but it does not address the use of associate justices to temporarily fill a vacancy. *See also* Fla. R. Jud. Admin. 2.205(a)(4)(A). Therefore, the longer these vacancies remain unfilled, the longer this Court may lack a quorum to conduct business.

CONCLUSION

For the reasons stated, Respondents, the Florida Supreme Court Judicial Nominating Commission, and Jason L. Unger respectfully requests that this Court either dismiss the Petition as premature or deny it outright.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on September 26, 2018, a true copy of the foregoing has been filed via the Court's electronic filing system, which shall serve a copy via email to the following counsel of record, constituting compliance with the service requirements of Fla. R. Jud. Admin. 2.516(b)(1) and Fla. R. App. P. 9.420:

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this response is Times New Roman 14 point and in compliance with the Florida Rules of Appellate Procedure.

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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. 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.

PETITIONERS' REPLY TO RESPONSES TO PETITION FOR WRIT OF QUO WARRANTO

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Appendix Ex. 7

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REPLY TO GOVERNOR SCOTT'S RESPONSE

I. BOTH DISPUTES ARE RIPE.

A. The Dispute With Governor Scott Is Ripe Because Petitioners Challenge an Executive Order He Has Already Issued.

The petition challenges Governor Rick Scott's authority to direct the Florida Supreme Court Judicial Nominating Commission (the "Commission") to make its nominations by November 10, 2018. Governor Scott has already ordered the Commission to make its nominations by then, going so far as to state, "The deadline is final as it includes the discretionary 30-day extension authorized by Article V, Section 11(c) of the Florida Constitution." (Pet. App. 9.) Quo warranto jurisdiction lies when "the challenged executive order had already been issued." *League Women Voters Fla. v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) (citing *Whiley v. Scott*, 79 So. 3d 702, 705 (Fla. 2011)).

Indeed, this Court has recently issued the writ to halt a nominating process initiated by precisely this kind of executive order. *Lerman v. Scott*, SC16-783, 2016 WL 3127708 (Fla. June 3, 2016). As Governor Scott recognizes, the gubernatorial action that was successfully challenged there was "the Governor's initiation of the nominating process," which was accomplished when "the Governor had requested that the JNC convene to begin the nomination process." (Gov. Resp. 8.) The only difference between the cases as to jurisdiction is that in

this case Governor Scott has not only "requested the JNC convene to begin the nomination process," but has imposed a deadline that Petitioners assert is unlawful.

B. The Dispute With the Commission Is Ripe Because Petitioners Challenge a Process It Has Already Initiated.

The action of the Commission that Petitioners challenge is the formal initiation of the process to make nominations to Governor Scott before the vacancies occur. There should be no question that that the Court has quo warranto jurisdiction to stop or limit an official proceeding before it is complete. The Commission cites no law prohibiting quo warranto to challenge an ongoing action until the damage is done. To the contrary, this Court did not wait for an unlawful nominating process to conclude before issuing the writ in *Lerman*; it issued the writ at the same stage we are in now. 2016 WL 3127708; *see also Adm'r., Retreat Hosp. v. Johnson*, 660 So. 2d 333, 339-40 (Fla. 4th DCA 1995) (issuing writ to declare a trial court had no authority to impose additional requirements beyond those imposed by statute for hospitalizing Baker Act patients even though the trial court had only begun the process of considering those requirements).

While parts of the Commission's response noted below reveal that it agrees that Governor Scott has no authority to impose a deadline, the rest of the response confirms that the Commission is nonetheless engaged in a process to submit nominations to Governor Scott before the vacancies occur. The Commission makes no suggestion that there is any speculation to Petitioners' assertion that its ongoing

process is designed to produce nominations by November 10. The Commission only argues that it would be speculative to presume the nominations will be made **before** that date. (Comm'n Resp. 7-8.) And by stating that "[a]ny contention that the Commission will provide its nominations to the Governor before November 10 is speculative" (*Id.* at 8), the Commission confirms that there is no speculation that the nominations will be provided to Governor Scott by that date, which is roughly two months before the vacancies arise. The Commission's ripeness arguments, thus, ironically demonstrate that this is a current, live controversy.

The Commission's substantive arguments further confirm that this is a process to nominate before the vacancies occur. The Commission argues that article V, section 11(c) authorizes nominations before a vacancy occurs, that historical practice shows that the Commission has often made nominations before the vacancy arises, and that doing so here is necessary to avoid prolonged vacancies. Thus, the Commission is clearly working right now to produce nominations before the vacancies occur.

II. THE PETITION IS MERITORIOUS AGAINST BOTH RESPONDENTS.

A. Governor Scott Had No Authority to Impose a Deadline.

Governor Scott had no authority to impose a November 10 deadline for two reasons. First, not only did this Court squarely hold in *In re Advisory Opinion to the Governor*, 276 So. 2d 25, 29 (Fla. 1973), that the Governor has no authority to

direct a JNC how to conduct its business, but the Commission's response also agrees with Petitioners on this point. (*See* Comm'n Resp. 9 ("The Governor's request to receive the nominations by a date certain does not require the Commission to do so."); *id* at 4 ("The governor has no right to convene or control a JNC."); *id.* at 2-3 (noting that JNCs have autonomy over their operations "without approval or interference from the governor").)

Second, although the final clause of the first sentence of article V, section 11(c) provides governors the authority to extend a JNC's nomination deadline by up to 30 days (the only authority Governor Scott cites for his action), that is not what Governor Scott has done here, even under his own interpretation of section 11(c). All parties agree that the constitutional deadline for making nominations – with the 30-day extension the governor is authorized to grant – is 60 days after the vacancy occurs. In the guise of an "extension," Governor Scott has purported to move that deadline **ahead** 120 days. He has no authority to do that.

B. The Commission Has No Authority to Nominate Before a Vacancy Is Created by an Expired Term.

The issue of the proper interpretation of article V, section 11(c) has now been joined as a classic multiple choice question with three possible answers:

> The Florida Constitution provides that when an appellate judge serves out his or her final term but is ineligible for another, a vacancy does not occur until the expiration of the term. The constitution provides that "nominations shall be made within thirty days from the

occurrence of a vacancy." During what time period may the nominations be made?

A. During the thirty-day period starting with the vacancy.

B. Whenever the commission wishes so long as it is before the thirtieth day following the vacancy.

C. During the sixty-day period starting thirty days before the vacancy and running through thirty days afterward.

Petitioners submit that any reasonable person – lay or expert – would find that choice A is the most natural reading of this language. But proving the truth of this Court's holding in *Barco v. School Board of Pinellas County*, 975 So. 2d 1116, 1122 (Fla. 2008), that the word "within" is ambiguous, Governor Scott claims that choice B is the only proper interpretation, while the Commission apparently believes it could be either B or C. Because either of those produce absurd results that are not compelled by any other rule of construction, choice A is correct.

1. Petitioners' Interpretation Is the Only One That Avoids Absurd Results or Internal Conflict.

Respondents' alternative interpretations both produce absurd results that conflict with the second sentence of section 11(c), which grants the governor 60 days from the nominations to make an appointment. The only difference is the degree. Governor Scott has not attempted to recede from his well-documented admission and the Commission does not dispute that under article V, sections 10(a) and 11(a), as interpreted by this Court in *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093-94 (Fla.

2006) ("*Mandatory Retirement*"), it will be the newly elected governor who will have the authority to fill the vacancies. Thus, Respondents are contending that the Commission is free to make nominations to Governor Scott even though he will not have the authority to make the appointments. That fails any test of common sense.

Beyond that, under Governor Scott's only interpretation, which is also the Commission's primary position, the Commission could have made these nominations already – indeed, they could have made them last year. That interpretation would also necessarily mean that the Commission could go ahead and nominate the replacements for all seven justices on the Court now because they will all become vacant at some point. That result is not only patently absurd, but would eviscerate the requirement that the governor make the appointment within 60 days of receiving nominations. *Pleus v. Crist*, 14 So. 3d 941, 943-44 (Fla. 2009). For any nomination made more than 60 days before a vacancy occurs, a timely appointment would be impossible.

The absurdity and conflict with the appointment deadline that would result from the Commission's alternative interpretation is different only in degree. While it would at least prohibit nominations more than 60 days before the vacancy,[1] it

[1] It would have the additional absurd result of creating an unknowable start time for making nominations in instances of unexpected vacancies, such as those caused by death, removal, moving out of state, and the like.

would still allow the Commission to usurp some or nearly all of the time allotted to the governor. Indeed, the Commission is seeking to make its nomination at the earliest possible moment under this alternative interpretation, November 10, 2018, which is exactly 60 days before the vacancies will occur. If it is allowed to do this, then the governor with the authority to make the appointments will have be bound to do so by January 8, 2019, his very first day in office.

In short, the Commission's alternative interpretation of the first sentence of section 11(c) would prevent the second sentence from being effective any time vacancies occur when a new governor is taking office. And a new governor takes office at least every eight years, so this is not some outlier scenario. Petitioners made this point previously (Pet. 16-17), but the Commission failed to address it at all in its response. Yet it ironically cited a case that squarely held that one constitutional provision should not be interpreted in a way that would shorten the amount of the time that another provision gives the governor to complete an important duty that requires deliberation. *See Fla. Soc. Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1120 (Fla. 1986) (rejecting a construction of the first sentence in art. III, § 8(a) because it would shorten the time the second sentence intended to give the governor to veto certain bills). That decision further supports Petitioners' interpretation.

Though it offers other reasons to reject Petitioners' interpretation, the Commission makes no suggestion that Petitioners' interpretation would yield absurd results. Thus, the question should become whether the other reasons advanced by the Commission compel this Court to adopt its interpretation notwithstanding the absurd result that would obtain in this case.

2. The Commission's Interpretation Is Not Required by the Use of the Word "After" in Section 11(c)'s Second Sentence.

Although the Commission chose not to address Petitioners' argument that the Commission's interpretation of the first sentence would undermine the first, it does recognize that "[c]onstitutional provisions should 'be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light of the others to form a congruous whole.' " (Comm'n Resp. 11 (quoting *Bush v. Holmes*, 919 So. 3d 392, 407 (Fla. 2006)).) Petitioners could not agree more, but this only proves why their interpretation is the correct one. There is no "congruous" whole if you read the first sentence to authorize the Commission to take away the right the second sentence gives to the governor.

Continuing to ignore this absurdity, the Commission turns to an inapposite rule of statutory construction – that "use of different terms in different portions of the same statute is strong evidence that different meanings were intended." (Comm'n Resp. 11 (quoting *Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006)).)

While Petitioners do not dispute this rule of construction may be applied in interpreting constitutional language, nothing in *Maddox* or any other case creates an absolute rule that use of different language in the same law always requires different meanings. More importantly, the "evidence that different meanings were intended" by the use of different prepositions in the two sentences at issue here is not nearly as strong as the Commission suggests.[2]

Moreover, there is an explanation for why section 11(c) would use a different word in the second sentence without intending different meanings. It would have simply been awkward to use the same construction in the second sentence as the first. Such a sentence would state, "The governor shall make the appointment within sixty days **from** the nominations have been certified to the governor." That is just not how we use these words in the English language.

Would it have been more clear had the drafters foreseen this problem and used "after" instead of "from" in the first sentence? Perhaps. But that would only create a bigger problem under *Barco*. In that case, this Court interpreted that precise phrase of "within 30 days after" as meaning "no later than thirty days." 975 So. 2d at 1124. As explained above, this is the interpretation the Governor

[2] The first sentence references a deadline of "within thirty days **from**" an event, while the second sentence references a deadline of "within sixty days **after**" a different event. Thus, the issue is whether "from" and "after" must have different meanings.

advocates, and it would absurdly allow the Commission to nominate successors for every justice on this Court (and their successors and their successors and on and on) today. Thus, the use of the preposition "from" instead of "after" in the first sentence of section 11(c) does not compel the absurd result that would obtain from Governor Scott's interpretation.

This case should not devolve into who can set more angels dancing on the head of a pin by overly parsing everyday ambiguous prepositions like "within," "from," or "after." The interpretation should be derived the same way these words are given meaning in every day usage – applying common sense by looking at the context in which they are used and the goals being served.

3. Historical Practice Is Irrelevant in Light of This Court's *Mandatory Retirement* Decision.

The primary argument leveled in both responses is that the Court should interpret what was meant when this language was adopted in 1976 by how governors and JNCs have done things since that time. Even if the case the Commission cites – *Fla. Soc. Ophthalmology*, 489 So. 2d at 1120 – supported the notion that public officials can alter the meaning of constitutional language by defying what it was intended to require (and it does not), Respondents have overlooked or misapprehended this Court's decision in *Mandatory Retirement*.

The issue there was when a vacancy occurs for an appellate judge or justice completing a final term due to mandatory retirement. This was important because

article V, section 11(a) only authorizes a governor to appoint a new appellate judge or justice "[w]henever a vacancy occurs." Recognizing that "a physical vacancy occurs upon the termination of the term," Governor Bush sought an advisory opinion from this Court because "a question has arisen as to when a constitutional vacancy occurs, effectuating the process to fill it." *Id.* at 1091.

This Court made clear that the term "constitutional vacancy" derived from past decisions holding that a vacancy may be filled when a public officer's resignation is accepted even if the resignation does not take effect (thereby creating a "physical vacancy") until a future date. *Id.* at 1091-92, 1094 (citing *Specter v. Glisson*, 305 So. 2d 777 (Fla. 1974) and other cases). It explained that this notion of a constitutional vacancy occurring before an actual vacancy derived from article X, section 3, which it quotes as providing (as it still provides today) as follows:

> Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or resignation of the incumbent or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

Id. at 1092 n.2 (quoting Art. X, § 3, Fla. Const.).

Because mandatory retirement due to age is not among the listed events, the Court concluded, "This provision clearly has no application to the current facts." *Id.* Thus, the holding in *Specter* that a judge's resignation letter triggered a vacancy

that could be filled before the resignation becomes effective "does not apply to the vacancy in Judge Ervin's position." *Id.* at 1092. The seat of Judge Ervin of the First District was the subject of the request for an advisory opinion, and he was in the same position there as Justices Pariente, Lewis, and Quince are now – he faced mandatory retirement but chose not to abandon his final term early. For this reason, Respondents' reliance of prior nominations to seats that were vacated due to resignation (or any other reason save failing to qualify for retention) are irrelevant to the issue in this case. Article X, section 3 provides support not only for nominations but actual appointments before physical vacancies in those instances.

As for Respondents' reliance on examples of pre-vacancy nominations to replace justices and judges who completed their final terms, most involved nominations and appointments made before this Court resolved the uncertainty surrounding when a vacancy occurs in *Mandatory Retirement*. Governor Bush requested the advisory opinion because there was still a question of whether a constitutional vacancy arose "upon the failure of a judge to qualify for retention." *Id.* at 1091. The history cited by Respondents demonstrates at most that at least some prior governors and JNCs thought the failure to qualify created a constitutional vacancy for which nominations or even appointments could be made before the actual vacancy. But this Court held to the contrary in *Mandatory Retirement* due to the plain language of article V, section 10(a), which provides

that in the event of ineligibility or failure to qualify for retention, "a vacancy shall exist in that office upon the expiration of the term being served." *Id.* at 1092-94. Accordingly, examples of what governors and JNCs did before this Court answered the question in *Mandatory Retirement* have no relevance here.

That leaves the examples of the nominations and appointments of Justices Perry and Labarga. Justice Perry's appointment is irrelevant because he was not appointed to a seat left vacant by the expiration of his predecessors term, so article V, section 10(a) never came into play. And while it is technically true that a proper interpretation of sections 10(a) and 11(a) and (c) reveals that the Commission nominated and Governor Crist appointed Justice Labarga a few days prematurely, so what? That technical irregularity had no impact on Justice Labarga's appointment. Justice Anstead's term ended in the middle of Governor Crist's term, so there was never any questions as to which governor would make the appointment.

Had someone sought to embarrass the Commission and Governor Crist for their premature actions, all that would have happened is that the Commission would have recertified the same nominations and Governor Crist would have reappointed Justice Labarga. Any challenge to those long passed events brought today would accordingly be barred by the doctrine of laches. *E.g.*, *State ex rel. Pooser v. Wester*, 170 So. 736, 738-39 (Fla. 1936). This is the first time since the

Court's unanimous decision in *Mandatory Retirement* that the issue of when a JNC may nominate to fill a vacancy created by an expired term has made any difference. Especially because Governor Scott has publicly asserted he will make the appointments, the need to answer the question now is more than academic; it is now necessary to resolve the issue to avoid a constitutional crisis.

4. The Commission's Interpretation Does Not Require Vacancies of Any Longer Duration Than That of Respondents.

Respondents correctly note that their interpretation(s) would further the important purpose of minimizing the length of any vacancy. Petitioners fully agree this is an important goal, but their interpretation is every bit as faithful to this policy, while still respecting the right of the governor to take the time he needs (up to sixty days) to make such important appointments. All three interpretations allow for an appointment at the same time – the day the vacancies occur. Petitioners fully embrace Justice Cantero's point in his *Mandatory Retirmement* concurrence that nothing in the constitution prohibits a JNC from starting its work before the vacancy and having the nominations ready to certify as soon as the vacancies occur.

Thus, if the Commission sets a reasonable deadline for applications of, say, November 27, 2018, it could take more time to make its decision than under its present schedule and still have the nominations ready to certify the day the

vacancies arise. The new governor could then make the appointments that very day, resulting in precisely the same delay as would result under Respondents' interpretations. The only difference is that the discretion to take longer that the constitution clearly affords him would be respected and left intact.

III. THE VACANCIES WILL OCCUR JANUARY 9, 2019.

The Commission does not dispute Petitioners' argument that the vacancies will occur January 9, 2019, and Governor Scott's argument to the contrary is as unsupported and faulty as his arguments on jurisdiction and the merits. The date the vacancies will occur – i.e., the date before which the Commission should be prohibited from making nominations – is January 9. Petitioner's calculation is supported both by specific authorities cited in the petition and ignored by Governor Scott and also by common usage. Governor Scott's claim – citing not a single authority – that six years from January 8, 2013, is January 7, 2019, has no support, and the fact that he wrote that date on the justices' commissions does not change the rules of law or mathematics.

For all these reasons, both controversies are ripe, Governor Scott cannot impose a deadline for nominations, and article V, section 11(c) must be interpreted as requiring nominations be made during the 30- to 60-day period that starts when the vacancy occurs. Thus, the Court should prohibit the Commission from certifying its nominations until January 9, 2019.

Respectfully submitted,

THE MILLS FIRM, P.A.

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following by email on October 1, 2018:

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

/s/ John S. Mills
Attorney

Jeff Burns

From: Jeff Burns
Sent: Monday, October 08, 2018 10:25 AM
To: Jason Unger
Subject: Re: Unredacted Application for Nomination to Florida Supreme Court

I just dropped off the hard copy at your office as well.

Thanks!

On Oct 8, 2018, at 5:41 AM, Jason Unger <Jason.Unger@gray-robinson.com> wrote:

> Thank you.
>
> **Jason Unger | Tallahassee Managing Director**
> **GRAY | ROBINSON**
>
> 301 South Bronough Street, Suite 600 | Tallahassee, Florida 32301
> **T:** 850-577-9090 | **F:** 850-577-3311 | **D:** 850-577-5489
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>
> ---
>
> **From:** Jeff Burns <jlburns@asglegal.com>
> **Sent:** Sunday, October 7, 2018 11:52 PM
> **To:** Jason Unger; nildapedrosa@gmail.com; cynthiagangelos@gmail.com; karlinskyf@gtlaw.com; hstearns@libertydentalplan.com; panuccio@gmail.com; ireyes@reyeslawfirmpa.com; hala.sandridge@bipc.com; jeanne@jtatelaw.com
> **Subject:** Unredacted Application for Nomination to Florida Supreme Court
>
> JNC Members,
>
> Please find attached the unredacted version of my Application for Nomination to the Florida Supreme Court. Due to the size of the pdfs, I am sending my redaction version in a separate email.

Appendix Ex. 8

Thank you,

Jeffrey L. Burns, Esq.*

Attorney At Law

***Licensed to practice law in Florida and Alabama**

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909 Mar Walt Drive, Suite 1014, Fort Walton Beach, Florida 32547

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Jeff Burns

From: Jason Unger <Jason.Unger@gray-robinson.com>
Sent: Friday, October 12, 2018 3:54 PM
To: Judge Mark W. Klingensmith; Laurel Moore Lee; Judge Jonathan Gerber, Chief; ANGELA COWDEN; Jeff Burns; Judge Jamie R. Grosshans; Tatiana Salvador; Boulris, Amy; Judge M. Kemmerly Thomas; Andrews, Judge Michael; Robert Muniz; JOHN stargel; Cynthia Cox; Siracusa, Judge Pat; Stephen Senn; Tim Osterhaus; Ponder, Norma; Kim Ballance; Judge Duncan; Soud, Adrian; Daniel, James; Robert Long; Thomas, William; Ross Bilbrey; Jonathan Sjostrom; Matthew Thatcher; Scott Makar; Mark Miller; Trawick, Daryl; Donna Greenspan Solomon; Cymonie Rowe Hinkel; Anuraag Singhal; Howard Coates; Judge Samuel Salario; MPM; Paul Huck and Barbara Lagoa; Mahon, Mark; Farach, Manny; Thomas Winokur; Hunter W. Carroll; Norma Lindsey; BRUCE KYLE; Elijah Smiley; Eric Roberson; Clay Roberts; Jeffrey Kuntz; Bradley Harper; escales edscalespa.com; Ramsberger, Judge Thomas; Tatti, Anthony; Drew Atkinson; William Roby; John.Couriel@kobrekim.com; Judge Ketchel; Bokor, Alexander; eguedes@wsh-law.com; Bokor, Alexander; Veronica Barthelemy; hayden.obyrne@klgates.com; R. Luck
Cc: Teresa Barreiro
Subject: Notice

From: Escobar, Kenia [mailto:KEscobar@floridabar.org]
Sent: Friday, October 12, 2018 2:00 PM
To: The Florida Bar Public Information
Subject: FLORIDA SUPREME COURT JUDICIAL NOMINATING COMMISSION - NOTICE OF MEETINGS AND INTERVIEW SCHEDULE

FLORIDA SUPREME COURT JUDICIAL NOMINATING COMMISSION - NOTICE OF MEETINGS AND INTERVIEW SCHEDULE

FOR IMMEDIATE RELEASE
October 12, 2018
CONTACT: Jason L. Unger, Chair
Florida Supreme Court Judicial Nominating Commission
TELEPHONE: 850-577-9090

The Florida Supreme Court Judicial Nominating Commission will meet on Nov. 3 and Nov. 4 in Miami to begin the interview process, and will resume interviews in Tampa on Nov. 8 and Nov. 9 with deliberations to fill three positions of Florida Supreme Court Justice, upon the mandatory retirement of Justices Barbara Pariente, R. Fred Lewis, and Peggy Quince to follow thereafter.
The interview schedule and locations are listed below. This schedule will position the Florida Supreme Court JNC to certify nominations at the earliest on Nov. 10 or sometime thereafter to give the Governor and Governor-elect ample time to do their vetting and minimize the time that these three judicial vacancies remain unfilled.

Miami interview location:
Miami International Airport Hotel
Terminal E; Level 2 to hotel lobby (7th floor conference rooms once in hotel)
(Door #11 if arriving from outside the airport)
305-871-4100

Nov. 3 - Miami

9:00 a.m. Alexander Bokor
9:30 a.m. Amy Boulris
10:00 a.m. Jeffrey Burns
10:30 a.m. Howard Coates
11:00 a.m. John Couriel
11:30 a.m. Cynthia Cox

1:00 p.m. James Duncan
1:30 p.m. Manuel Farach
2:00 p.m. Jonathan Gerber
2:30 p.m. Edward Guedes
3:00 p.m. Bradley Harper
3:30 p.m. Terrance Ketchel

4:30 p.m. Mark Klingensmith
5:00 p.m. Jeffrey Kuntz
5:30 p.m. Bruce Kyle

Nov. 4 – Miami

9:00 a.m. Barbara Lagoa
9:30 a.m. Norma Lindsey
10:00 a.m. Robert Luck
10:30 a.m. Mark Miller
11:00 a.m. Carlos Muniz
11:30 a.m. Hayden O'Byrne

1:00 p.m. William Roby
1:30 p.m. Cymonie Rowe
2:00 p.m. Leonard Samuels
2:30 p.m. Edwin Scales
3:00 p.m. Anuraag Singhal
3:30 p.m. Elijah Smiley

4:30 p.m. Donna Greenspan Solomon
5:00 p.m. William Thomas
5:30 p.m. Daryl Trawick

Tampa interview location:
Airport Executive Center
2203 N. Lois Avenue
Tampa, FL
(813) 348-4963

Nov. 8 - Tampa

9:00 a.m. Michael Andrews
9:30 a.m. J. Andrew Atkinson
10:00 a.m. Ross Bilbrey

10:30 a.m. Hunter Carroll
11:00 a.m. Angela Cowden
11:30 a.m. James Daniel

1:00 p.m. Bryan Gowdy
1:30 p.m. Jamie Grosshans
2:00 p.m. Laurel Lee
2:30 p.m. Robert Long
3:00 p.m. Mark Mahon
3:30 p.m. Scott Makar

4:30 p.m. Michael McDaniel
5:00 p.m. Timothy Osterhaus
5:30 p.m. Thomas Ramsberger

Nov. 9 - Tampa

9:00 a.m. Eric Roberson
9:30 a.m. Clayton Roberts
10:00 a.m. Samuel Salario
10:30 a.m. Tatiana Salvador
11:00 a.m. Stephen Senn
11:30 a.m. Pat Siracusa

1:00 p.m. Jonathan Sjostrom
1:30 p.m. Adrian Soud
2:00 p.m. John Stargel
2:30 p.m. Anthony Tatti
3:00 p.m. Matthew Thatcher
3:30 p.m. M. Kemmerly Thomas

4:30 p.m. Waddell Wallace
5:00 p.m. Thomas Winokur

The members currently serving on the Supreme Court JNC are:

Chair Jason Unger, Tallahassee, jason.unger@gray-robinson.com
Vice Chair Nilda R. Pedrosa, Coral Gables, nildapedrosa@gmail.com
Cynthia G. Angelos, Port St. Lucie, cynthiagangelos@gmail.com
Fred Karlinsky, Weston, karlinskyf@gtlaw.com
Heather Stearns, Tallahassee, hstearns@libertydentalplan.com
Jesse M. Panuccio, Palm Beach Gardens, panuccio@gmail.com
Israel U. Reyes, Coral Gables, ireyes@reyeslawfirmpa.com
Hala A. Sandridge, Tampa, hala.sandridge@bipc.com
Jeanne T. Tate, Tampa, jeanne@jtatelaw.com

###

_____

Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

Jason Unger | Tallahassee Managing Director
GRAY | ROBINSON

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Supreme Court of Florida

MONDAY, OCTOBER 15, 2018

CASE NO.: SC18-1573

LEAGUE OF WOMEN VOTERS OF FLORIDA, ET AL.	vs.	RICK SCOTT, GOVERNOR, ET AL.
Petitioner(s)		Respondent(s)

The petition for writ of quo warranto against Governor Rick Scott is hereby granted. The governor who is elected in the November 2018 general election has the sole authority to fill the vacancies that will be created by the mandatory retirement of Justices Barbara J. Pariente, R. Fred Lewis, and Peggy A. Quince, provided the justices do not leave prior to the expiration of their terms at midnight between January 7 and January 8, 2019, and provided that the governor takes office immediately upon the beginning of his term. Governor Scott exceeded his authority by directing the Supreme Court Judicial Nominating Commission ("the JNC") to submit its nominations to fill these vacancies by November 10, 2018. The sixty-day period after nominations have been certified within which the governor is required to make appointments, as set forth in article V, section 11(c), of the Florida Constitution begins to run only when the governor with the authority to appoint has taken office. As the JNC is an independent body, it is not bound by Governor Scott's deadlines.

The issue of when the JNC can certify its nominations shall be the subject of oral argument to be held at 9:00 a.m. on Thursday, November 8, 2018. A maximum of twenty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

Appendix Ex. 10

kj
Served:

RAOUL G. CANTERO
THOMAS D. HALL
DANIEL E. NORDBY
COURTNEY BREWER
MEREDITH L. SASSO
JONATHAN ANTHONY MARTIN
JOHN S. MILLS
ALEXIS LAMBERT
GEORGE T. LEVESQUE
JOHN MACIVER
JASON LAWRENCE UNGER

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:

Appendix Ex. 11

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. Objectively[2], 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.

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[1]This 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.

[2]The 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 Clearwaterv. 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.

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[3]While 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.

---

[4]The 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. Conduc*t, Canon 3E(l)).

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
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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 Date: 10-15-18
Fla. Bar No.: 40782

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
Jeffrey L. Burns
Fla. Bar. No. 40782

Supreme Court of Florida

TUESDAY, OCTOBER 16, 2018

CASE NO.: SC18-1573

LEAGUE OF WOMEN VOTERS OF FLORIDA, ET AL.	vs.	RICK SCOTT, GOVERNOR, ET AL.
Petitioner(s)		Respondent(s)

The Motion to Intervene for Limited Purpose, Or Alternatively for Leave to File Intervenor Petition, is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

lc
Served:

RAOUL G. CANTERO
THOMAS D. HALL
COURTNEY BREWER
JONATHAN ANTHONY MARTIN
ALEXIS LAMBERT
JOHN MACIVER
JEFFREY LEONARD BURNS
DANIEL E. NORDBY
MEREDITH L. SASSO
JOHN S. MILLS
GEORGE T. LEVESQUE
JASON LAWRENCE UNGER

Appendix Ex. 12