

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC18-1573

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LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.

Petitioners,

v.

HON. RICK SCOTT, in his official capacity as Governor of Florida, et al.,

Respondents.

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**GOVERNOR'S MOTION FOR REHEARING OR CLARIFICATION**

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Governor Scott moves for rehearing or clarification of the Order issued by the Supreme Court Clerk on October 15, 2018. Fla. R. App. Proc. 9.330. The Order—in part—discusses the scope of the gubernatorial *appointment* power, a matter that was neither challenged by the Petitioners nor briefed by the parties in this quo warranto proceeding. And the Order addresses this issue in a manner that appears to preclude the type of collaborative process by which Justice Quince was herself appointed by Governor Chiles—with the concurrence of Governor Bush—on December 11, 1998. This Court should grant rehearing and clarify the Clerk's Order by limiting its scope to those matters that have been properly presented to the Court in this case and which are therefore within its quo warranto jurisdiction.

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On its face, the Order suggests that the Court may have overlooked or misapprehended the relief sought by the Petitioners in this proceeding. The Petition for Writ of Quo Warranto asked this Court to resolve only three discrete legal questions: 1) whether the terms of Justices Pariente, Lewis, and Quince expire on the midnight between January 7 and 8, 2019, or on the midnight between January 8 and 9, 2019; 2) whether the Florida Supreme Court Judicial Nominating Commission has the authority to make its nominations before the occurrence of a physical vacancy in judicial office; and 3) whether the Governor had the authority to require the Florida Supreme Court JNC to make its nominations by November 10, 2018. *See* Pet. at 1 (“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?”); Pet. at 21-22 (“Do the three justices’ terms expire as of midnight of January 8, 2019, or January 9, 2019?”).

Given the scope of the issues presented in the Petition, the Responses in Opposition filed by the Governor and JNC—and the Petitioners’ Reply Brief—addressed only the three legal questions set forth in the Petition. The Governor’s Response, for example, argued that the Petition should be dismissed on jurisdictional grounds to the extent it sought to use the writ of quo warranto to address “prospective conduct.” *See* Gov. Resp. at 5-9 (citing *League of Women*

*Voters of Florida v. Scott*, 232 So. 3d 264, 265 (Fla. 2017)). On the merits, the Governor's Response cited precedent and four decades of history supporting the authority of the Supreme Court JNC to complete the nominating process before the occurrence of a physical vacancy in judicial office due to mandatory retirement from this Court. *See* Gov. Resp. at 10-25; Gov. Appx. Finally, the Governor's Response argued that the terms of the retiring justices conclude at midnight between January 7 and 8, 2019. *See* Gov. Resp. at 26-27.

As to the three legal questions presented in the Petition for Writ of Quo Warranto and addressed by the parties' briefs, the October 15 Order:

1. Resolved the first question against the Petitioners by concluding that the retiring justices' terms expire at midnight between January 7 and 8, 2019;
2. Addressed the second question by setting oral argument on November 8, 2018, regarding the JNC's authority to certify nominations; and
3. Resolved the third question against the Governor by concluding that he lacked the authority to require nominations from the JNC by November 10, 2018.

In addition to addressing the three questions presented by the Petition and briefed by the parties, however, the October 15 Order also stated:

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.

The Petition for Writ of Quo Warranto filed in this case did not ask this Court to determine the scope of the gubernatorial *appointment* power. Instead, the Petition is directed entirely to the *nomination* process. As a result, the parties' briefs in this case did not address the scope of the appointment power. And the Governor had no occasion, in this case, to present legal argument on the significant and disputed constitutional question that was the subject of previous litigation between the parties. The October 15 Order appears to have overlooked or misapprehended the distinction between the nomination and appointment processes. Only certain discrete aspects of the nomination process have been challenged via a Petition for Quo Warranto in this proceeding.

This Court should grant rehearing and clarify the October 15 Order in one of at least two ways. First, the second sentence of the Order could be removed in its entirety, leaving in place the Court's conclusions as to the first and third legal questions presented above, with oral argument scheduled for November 8, 2018, on the second question raised by the Petition for Quo Warranto.

Alternatively, this Court could clarify the October 15 Order by including the additional circumstances acknowledged in the parties' prior litigation under which Governor Scott would have the authority to make the appointments at issue. The October 15 Order already recognizes that Governor Scott would have the authority to fill the vacancies resulting from the mandatory retirement of Justices Pariente,

Lewis, and Quince if the justices “leave prior to the expiration of their terms” or if Governor Scott’s successor fails to “take[] office immediately upon the beginning of his term.”

But another circumstance exists under which Governor Scott would have the authority to fill the vacancies in question: through appointments with the concurrence of the governor-elect. It was under these circumstances that Governor Chiles appointed Justice Quince on December 11, 1998, after her nomination was certified by the Supreme Court JNC on October 26, 1998. *See* Gov. Resp. at 21-22; Gov Appx. Table 1. And it was precisely those circumstances that Governor Scott invoked in requesting that the Supreme Court JNC convene to avoid prolonged vacancies on this Court. As noted in the Governor’s press release:

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.

Pet. Appx. 11.

The 1998 precedent cited by Governor Scott was celebrated at the time as “a welcome example of bipartisan cooperation, civility and unity.” Editorial, *Applaud Bush-Chiles Unity in Filling Supreme Court Vacancy*, South Florida Sun-Sentinel

(Dec. 11, 1998). After conducting separate interviews and reaching agreement on the appointment of Justice Quince, Governor Chiles and Governor-Elect Bush were praised for “an encouraging example of gubernatorial cooperation...[T]he cooperative manner in which Chiles and Bush made the appointment served Florida’s interests.” Editorial, *A Fine Choice for the Court*, St. Petersburg Times (Dec. 10, 1998). The Petitioners have not argued that Justice Quince’s appointment to this Court was unconstitutional. Nor have they articulated a legal basis to question the authority of Governor Scott—under the same circumstances as Governor Chiles—to similarly make an appointment with the concurrence of the Governor-Elect.

Governor Chiles and Governor-Elect Bush decided in late November 1998 to attempt to reach an agreement on the selection of Justice Overton’s successor. Associated Press, *Chiles, Bush Try to Avoid Justice Tiff; They Will Both Interview Candidates Who Want to Be Justice Ben Overton’s Successor* (November 25, 1998). The Petitioners have provided no basis at this time to foreclose even the possibility of a similar agreement between Governor Scott and his successor. If this Court does not clarify the October 15 Order by removing its second sentence, the Order should be clarified by recognizing that Governor Scott—like Governor Chiles—has the authority to make the appointments in question with the consent of the Governor-Elect chosen at the November 2018 General Election.

## Conclusion

This Court should grant rehearing and clarify its Order of October 15, 2018.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

I hereby certify that this computer-generated Motion 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 30th day of October, 2018, to the following:

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