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.

EMERGENCY SUPPLEMENTAL PETITION FOR WRIT OF QUO WARRANTO AND FOR CONSTITUTIONAL WRIT

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PETITION FOR WRIT OF QUO WARRANTO

This is the third petition for extraordinary relief brought by the League of Women Voters of Florida, Inc., and Common Cause (among others) to fight Governor Scott's attempts to usurp or restrict the right to appoint three justices to this Court, a right belonging to the person Florida voters elect governor on November 6. One commentator has called Governor Scott's efforts not just an attempt at "rigging a supreme court," but "a judicial coup."[1] John Romano, *Rick Scott's Do-It-Yourself Guide to Rigging the Supreme Court*, Tampa Bay Times, Sept. 15, 2018, *available at* https://www.tampabay.com/news/politics/Romano-Rick-Scott-s-do-it-yourself-guide-to-rigging-a-Supreme-Court_171788552.[2]

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[1] Quotations from the media are offered in this petition not as evidence of any adjudicative facts or as argument over legal principles, but to highlight the grave importance and urgency of resolving these issues as transparently and expeditiously as possible to protect the public perception of the judicial selection and the judicial branch itself.

[2] This increasingly well-documented scheme is not unique to Gov. Scott or Florida. A core group of self-styled "conservatives" have used the Federalist Society to attempt to control not just the makeup of Florida's courts, but the federal courts as well. *See generally* Michael Kruse, *The Weekend at Yale That Changed American Politics*, Politico Magazine, Aug. 27, 2018, *available at* https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608; Paul Butler, *The Rightwing Takeover of the U.S. Court System Will Transform America*, The Guardian, Dec. 12, 2017, *available at* https://www.theguardian.com/us-news/commentisfree/2017/dec/12/donald-trump-right-wing-takeover-court-system; Mark Joseph Stern, *An Even More Insidious Kind of Gerrymandering*, Slate, Oct. 10, 2017, *available at* https://slate.com/news-and-politics/2017/10/judicial-gerrymandering-is-coming-to-north-carolina.html.

After the Court denied the first petition as not yet ripe, *League of Women Voters of Fla. v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) ("*League I*"), Petitioners initiated the instant proceeding by filing a new petition for writ of quo warranto, which this petition is intended to supplement, not supersede. In addition to seeking a determination that Governor Scott has no role to play in the process to fill these coming vacancies, the pending petition seeks a determination that the Commission lacks the authority to make its nominations before the vacancies occur, which Petitioners contended would be midnight the beginning of January 9 or, alternatively, January 8 at the earliest.

In an interim order issued October 15, 2018, the Court has ruled that the person elected governor on November 6, and not Governor Scott, will have the sole authority to make these appointments (provided the new governor takes the oath of office by midnight beginning January 8 and the retiring justices do not resign early), the vacancies will occur on midnight the beginning of January 8, and the sixty-day period for the new governor to make the appointments will not begin to run until that day at the earliest. It has set oral argument on November 8 to address the remaining issue of whether the Commission may make its nominations before that date.

Since the filing of the original petition, events have unfolded and Petitioners have discovered additional information that leads them to add this request for

additional relief. While they continue to "fully embrace Justice Cantero's point in his *Mandatory Retirement* 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" (Reply at 14 (citing *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1093 (Fla. 2006) ("*Mandatory Retirement*")), it is now clear that the Commission's decision to continue reviewing applications and proceed with its interview schedule so nominations can be made in time for Governor Scott to participate in vetting the nominees is not only inconsistent with the Court's interim ruling, but directly violates its own rules.[3] It is also clear to Petitioners that the proceedings underway create, at the very least, sufficient appearance of a tainted process that Respondents should be prohibited from any further actions other than alerting the public that applications will continue to be received at least through January 8, 2019 and retaining all records of the Commission's proceedings since the beginning of the Scott administration.

[3] Although Petitioners had previously explained some of the reasons why the Commission's October 8 deadline for applications was "unfair and untenable" (Pet. at 18-21), they did not directly challenge that deadline because they presumed that (1) the Commission would act fairly and extend the deadline if and when the Court ruled that nominations did not have to be made by the November 10 deadline imposed by Governor Scott and (2) the Commission was following its own rules in setting the application deadline. It is now clear both presumptions were misplaced.

Petitioners are not alone in these concerns, as the process is already causing tremendous damage to the public perception of Florida's judicial selection process, which used to be a model for the nation. *See, e.g.*, *Editorial: Restart Selection Process for Florida Supreme Court Justices*, Tampa Bay Times, Oct. 16, 2018, *available at* https://www.tampabay.com/opinion/editorials/editorial-restart-selection-process-for-florida-supreme-court-justices-20181016/). (concluding that the current "screening process should start fresh because it has been politically corrupted and there may be well-qualified candidates who did not apply as Scott tried to stack the court on his way out the door" and that "[e]ven a pretense of a nonpartisan screening process for judicial appointments is long gone"); Andrew Pantazi, *Jacksonville Attorneys Vie for Florida Supreme Court Positions*, Florida Times-Union, Oct. 12, 2018, *available at* https://www.jacksonville.com/news/20181012/jacksonville-attorneys-vie-for-florida-supreme-court-justice-positions (quoting former American Bar Association President Sandy D'Alemberte, who played a prominent role in the adoption of the original Askew plan, as asserting that the Commission's "system has been corrupted by turning the merit-selection process into a patronage process").

I. NATURE OF THE RELIEF SOUGHT.

Petitioners seek quo warranto and all-writs relief. Specifically, they ask the Court to order the Commission to accept new applications at least through a

deadline it validly sets for no earlier than January 8, 2019, prohibit the Commission from taking any other action on these vacancies until January 8, 2019, and prohibit Governor Scott from taking any further action related to the Commission or its membership other than preserving all records related to the proceedings of the Commission generated at any time during his administration.

This is a time-sensitive matter and at least an interim order halting the process until an opinion can be issued is warranted as soon as possible. The Commission begins interviewing applicants November 3, and it is clearly poised to make its nominations by November 9, 2018. The dispute will not become moot once interviews begin or even if nominations are made, but it would be far better to decide these issues before the Commission announced nominees.

II. BASIS FOR INVOKING THIS COURT'S JURISDICTION.

The basis for invoking this Court's quo warranto jurisdiction here has already been established without opposition in this case. The Commission has clearly acted to set the October 8, 2018, deadline and has refused to change that decision despite this Court's interim ruling and Petitioners' pleas. In short, this is a fully ripe dispute over whether the Commission "has improperly exercised a power or right derived from the State" that falls squarely in this Court's jurisdiction. *League I*, 232 So. 3d at 265.

As to Petitioners' request that the Court halt the nominating process altogether until January 8, 2019, this Court may issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(b)(7), Fla. Const.; Fla. R. App. P. 9.030(a)(3). Because it is "a form of ancillary power," the all writs provision may be "used to obtain a stay or injunction to preserve the status quo of a proceeding" pending in this Court. Philip J. Padovano, *Florida Appellate Practice* § 3:18 (2018 ed.). "The most common occasion for the invocation of the power to issue 'all writs' in Florida is the perceived necessity to preserve the status quo pending the review of some issue by the court from which the writ is sought." Robert T. Mann, *The Scope of the All Writs Power*, 10 Fla. St. U. L. Rev. 197, 200 (1982); *see also Amends. to Fla. Rules of Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So. 2d 190 (Fla. 2003) (exercising all writs authority to hold a statute in abeyance while this Court considered its jurisdiction and other matters in order to avoid rendering proceedings moot and precluding this Court, should it determine it had jurisdiction, from the "complete exercise" thereof); *Monroe Educ. Ass'n v. Clerk, Dist. Ct. of Appeal, Third Dist.*, 299 So. 2d 1, 3 (Fla. 1974) (noting that all writs jurisdiction is important because "certain cases present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved that require expedition"); *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (providing that this Court may use its all writs authority if

necessary to preserve the status quo and protect this Court's ability to completely exercise jurisdiction).

III. STATEMENT OF THE FACTS.

The facts stated in the original petition remain relevant to the legal issues raised in this petition, and many of the additional facts stated here are taken from a long line of email communications between undersigned counsel and the Commission's counsel beginning October 4, 2018, and running through October 25.[4] On October 25, the Commission confirmed that it has only held two meetings to date regarding these applications (App. 3-4), giving Petitioners the first opportunity to know all official actions that have been undertaken and put together a timeline of events. That is why this petition could not have been filed earlier.

Governor Scott requested the Commission convene by letter sent September 11, 2018, in which he purported to impose a deadline for making nominations by November 10. (Pet. App. 9.) The Commission held no meeting to discuss this, and instead, the Chair simply issued a press release on September 12, 2018, advising that it was now accepting applications for the three vacancies at issue and applications had to be received by 5:00 pm on October 8, 2018. (Pet. App. 12.)

[4] In the interest of professional decorum, Petitioners do not intend to file the emails between counsel unless directed by the Court or necessary to address any disagreement the Commission may express with these facts.

Petitioners instituted this proceeding by filing their original petition on September 20, 2018. In that petition, Petitioners recognized that Governor Scott's deadline had required the Commission to set an application deadline before the general election, and they presented several reasons why they felt this deadline was "unfair and untenable." (Pet. 18-19.) They also quoted this Court's prior explanations that judicial nominating commissions were created to ensure that "politics would not be the only criteria in the selection of judges" and that they "act in an advisory capacity to aid the Governor in the conscientious exercise of his executive appointive power." (Pet. 16 (quoting *Pleus v. Crist*, 14 So. 3d 941, 943-44 (Fla. 2009) (in turn quoting *In re Adv. Op. to Gov.*, 276 So. 2d 25, 28-30 (Fla. 1974) ("*JNC Rules*")))).) And they made the points that while the Commission is required to make nominations based solely on qualifications and not politics, that it had already had ample time to learn "the kinds of non-political characteristics" that Governor Scott sought in making appointments, and that it must "be given the opportunity to afford the same respect and consideration to the new governor before making nominations." (Pet. 17-18.)

The petition spurred the Commission to hold its first meeting about these vacancies, although the only matter discussed was the retention of counsel. (App. 3.) Thus, the Commission did not even consider the actual issues raised in the petition, such as whether Governor Scott's nomination deadline was binding,

whether the application deadline should be postponed for the reasons suggested by Petitioners, or whether the Commission should wait to get input from the new governor.

In its response to the petition, however, the Commission agreed with Petitioners that Governor Scott had no authority to impose the November 10 deadline or otherwise direct their procedures. (Comm'n Resp. 2-3, 4, 9.) On the other hand, it derided Petitioners' suggestion that it should wait to receive input from the new governor as being "contrary to the purpose behind the merit-selection process" and asserting that "Petitioners' argument turns JNCs into another arm of the governor." (Comm'n Resp. 14.) Though this was not responsive to Petitioners' actual argument, which was expressly limited to "non-political characteristics," Petitioners fully embrace these principles. However, subsequent events and further investigation have revealed that, while the Commission is well aware of its proper role and the impropriety of acting as "another arm of the governor," it appears that it has been and continues to play a role in a tainted process.

On October 4, 2018, Petitioners sent the Commission a formal request to extend the deadline for applications until November 27, three weeks after the election. (App. 5-6.) They noted that because the Commission had now agreed that Governor Scott's nomination deadline was unenforceable, there was no reason to rush and require applications before the election. They asserted that a November

27 deadline would still give ample time to complete interviews by the time the vacancies actually occurred. They noted that several potential applicants had contacted them to say they had wanted to apply, but not until they knew who was making the appointments. They explained that the gubernatorial candidates had been campaigning in part on the issue of what kind of justices they would appoint to this Court and emphasized that while the Commission was prohibited from considering politics in making its nominations, "the practical fact remains that many potential applicants have valid reasons to believe that even if nominated they would simply stand no chance with one candidate or the other." Petitioners also noted that the actual qualifications for these positions were on the ballot and that if Amendment 6 passes, older applicants would be more likely to apply because they would not be subject to mandatory retirement until age 75, instead of the current age of 70.

Petitioners also catalogued the reasons a potential applicant would be deterred from applying unless he or she believed there was a chance of being appointed. They reiterated the points from the original petition that applications are very burdensome to complete and required disclosure of sensitive personal financial and health information. They also explained the burdens that applying

without knowing there is a chance of being appointed puts on practicing attorneys.[5] Because applications are made public, merely applying alerts an employer that an employee is seeking another job, tells existing clients they may lose their lawyer, and makes it very difficult to generate new business because new clients will know the lawyer is looking to leave the practice. Finally, they requested copies of all rules and policies of the Commission governing application deadlines as well as the minutes and related records of the Commission addressing the deadline.

Through an email from its counsel, the Commission responded early on the afternoon of the October 8 deadline and advised that the Commission would wait until all applications had been submitted that day to determine whether to extend the deadline. Counsel indicated he was providing records from the Chair that were responsive to the requests, but no minutes were included, nor was any document provided indicating how the Chair decided to impose an October 8 deadline.

The next day, the Commission provided Petitioners with a link to the list of applications. Although section III of the Commission's rules require applicants to provide electronic redacted copies of applications (App. 9-10), the Commission declined to provide any applications and instead required Petitioners to wait until

[5] Because Governor Scott has long made clear the kinds of applicants he would not consider, a disproportionate number of potential applicants that may apply only if it is clear his policies will not control have been effectively barred from appointment to the lower courts. Thus, more practicing attorneys than normal should be expected to apply depending on the result of the election.

the Governor's office redacted the applications and then the Bar posted them on its website, which did not occur until October 22.

These applications, which are available at https://www.floridabar.org/directories/jnc/florida-supreme-court-jnc/, reveal that of the 59 applicants, only 11 women applied, only 6 applicants identify as black, and only 6 identify as Hispanic.[6] The list of applicants has been described in the press as including a "who's who of conservative judges." Dara Kim & Jim Saunders, *Notable Conservative Judges Seek Florida Supreme Court Seats*, Daily Business Review, Oct. 9, 2018, *available at* https://www.law.com/dailybusinessreview/2018/10/09/notable-conservative-judges-seek-florida-supreme-court-seats/.

On October 11, the Commission held its second (and only other as of this date) meeting to consider and select applicants for interviews. The minutes reflect that the only business discussed were unanimous decisions to accept all applications submitted on the deadline even though some arrived after 5:00 and to interview all 59 applicants. (App. 4.) The Commission did not consider any of the issues raised by Petitioners and did not address whether to extend or reopen the application deadline.

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[6] According to the Census Bureau's most recent estimates (July 2017), women make up 51.1% of Florida's population, and the percentages of black and Hispanic Floridians are 16.9% and 25.5%, respectively. https://www.census.gov/quickfacts/fl.

On October 15, of course, the Court issued an interim ruling that the person elected governor next month will have the sole right to make these appointments and would have sixty days to do so beginning January 8, 2019. The day after that order, the Commission filed its interview schedule with this Court. The notice that was filed states that the Commission decided to set the interviews for November 3-4 in Miami and November 8-9 in Tampa "to give the Governor and Governor-elect ample time to do their vetting and minimize the time that these three judicial vacancies remain unfilled."

On October 17, Petitioners asked whether the Commission had made a decision on their request to reopen the application deadline in light of the Court's ruling and whether the version of the Commission's rules appearing on the Bar's website[7] remain operative even though they state that they are "as amended 11/16/2016." The Commission's counsel responded that the Commission would not be reopening the application process, and replied "[w]e believe" the 2016 version of the rules was the most current version.

After reviewing the redacted applications finally made public on October 22, Petitioners noted that many did not list the applicant's residence and asked the Commission how many applicants resided in either Miami-Dade or Monroe

[7] https://www.floridabar.org/wp-content/uploads/2018/08/JNC-Uniform-Rules-of-Procedure-Supreme-Court.pdf

County, which is notable because at least one of the three new appointments must be a nominee who resides in one of those counties. The Commission responded that eleven applicants were "current residents of the Third District," but made a point to advise that "one need only reside in the Third District at the time of appointment."

Later that day, the Commission's counsel kindly agreed to send Petitioners courtesy copies of all notices of meetings and other notices as they go out and to provide the minutes of meetings. When Petitioners asked the Commission for public records showing the history of these proceedings and to ensure that any records relating to its prior proceedings to fill the vacancy created by Justice Perry's appointment were not destroyed, the Commission's counsel referred them to the Executive Office of the Governor, noting that he had forwarded their request to that office. And as noted, he provided the minutes the afternoon of October 25.

Just as this supplemental petition was being finalized for filing, the Commissions' counsel alerted Petitioners that the Commission has amended its notice of the interview schedule. Although there has been no public meeting to discuss the changes, the new notice advised the public that each morning over the four days of interviews, the Commission will go into a closed session for the purpose of conducting some kind of "[p]reliminary deliberations" before hearing

from the applicants. (App. 25.) The Commission continues with its plan to "give the Governor and Governor-elect ample time to do their vetting."

Further investigation into public records available on the internet involving the Commission's history has revealed that the Commission has, in fact, received the kind of input from Governor Scott that its counsel argued would render it a mere "arm of the governor." (Comm'n Resp. 14.) A training video is posted on the Governor's website at https://www.flgov.com/judicial-and-judicial-nominating-commission-information/. A review of part 1 of that video reveals that Governor Scott's then-general counsel advised the commissioners on "what does the governor look for in a judge" and that Governor Scott even appeared by video to provide his own thoughts directly to them. (Pt. 1 at 3:41, 6:17.) A panel discussion invited commissioners to question applicants on how they would judge matters before them. (Pt. 1 at 35:11-41:45.) They were advised that to keep sensitive information away from the public, commissioners should make information they found out through the vetting process part of the deliberation process. (Pt. 1 at 54:31.) They were also advised that setting the application deadline as far back as possible was important to give the maximum time for people to apply and that applicants should be given at least three to four weeks. (Pt. 1 at 21:44; Pt. 2 at 14:06-21:03.)

While this litigation has been pending, the public perception of the process has eroded tremendously and, at the very least, the appearance of a tainted process has taken hold. In addition to the editorials quoted earlier, a columnist has elaborated on why it appears the Commission is acting in a partisan fashion and invited anyone who doubts that to watch the video of the Commission's interviews of applicants for the vacancy created by Justice Perry's retirement. John Romano, *Liberals Are Dreaming When It Comes to Holding on to Florida's Supreme Court*, Tampa Bay Times, Oct. 17, 2018, *available at* https://www.tampabay.com/news/politics/John-Romano-Liberals-are-dreaming-when-it-comes-to-holding-on-to-Florida-s-Supreme-Court-_172703139. And an advocate sharing Governor Scott's agenda in appointing justices correctly predicted all three nominees based on the "buzz" she was hearing over a month before the Commission even solicited applications. Nancy Smith, *Three Leading Florida Supreme Court Contenders Named Already*, Sunshine State News, Sept. 12, 2016, *available* at http://sunshinestatenews.com/story/three-leading-supreme-court-contenders-surface-already; *see also* Nancy Smith, *Rick Scott Can't End Judicial Activism, Conservatives, It's All Up to YOU Now*, Sunshine State News, Oct. 16, 2018, *available at* http://sunshinestatenews.com/story/rick-scott-cant-end-judicial-activism-florida-conservatives-its-you-now (railing against what she perceives to be "judicial activism" reflected by this Court's decisions and urging

voters to elect the candidate she believes will follow Governor Scott's preferences in appointing judges).

To be very clear, nothing in this petition or its quotation of the foregoing media accounts should be read to raise any question whatsoever about the impartiality, integrity, or qualifications of the nominees that emerged from that process. Nor is there any basis to suggest that any issues with the prior nominating process could call into question the validity of the resulting appointment. The sole point of referencing these accounts is that circumstances surrounding that nomination process helped foster at least the appearance that the Commission is acting not just to nominate well-qualified applicants, but also to ensure they would be politically acceptable to Governor Scott.

Finally, profiles emphasizing the conservative bona fides of all nine members of the Commission have been published, suggesting that the five appointed directly by Governor Scott (i.e., not vetted and nominated by the Bar)[8] are experts in conservative lobbying and policymaking with little to no apparent experience with litigation in this or any Florida appellate court. Jason Garcia, *Gov. Scott Won't Pick Three State Supreme Court Justices, But Here's Why He Wins Anyway*, Florida Trend, Oct. 16, 2018, *available at*

[8] The four bar nominees appear to have extensive judicial and/or appellate litigation experience – two are former trial judges and two are board-certified lawyers with experience as lead counsel in litigation in this Court.

https://www.floridatrend.com/article/25624/gov-scott-wont-pick-three-state-supreme-court-justices-but-heres-why-he-wins-anyway. To again be clear, the point of referencing the commissioners' backgrounds is not to contend they are biased in fact or denigrate their experience, but simply to provide further evidence of at least the appearance that the ongoing proceedings have a taint of partisan bias.

IV. ARGUMENT.

A. The Commission Has No Authority to Receive and Review Applications Until January 8, 2019.

In *Mandatory Retirement*, this Court ruled that the governor may not appoint an appellate judge or justice to a vacancy created by mandatory retirement until after the retiring judge or justice's term has ended. 940 So. 2d at 1092-93. This unanimous holding was based on the plain language of two constitutional provisions. The Court started with article V, section 11(a), Florida Constitution, which provides, in relevant part, "**Whenever a vacancy occurs** in a judicial office to which election for retention applies, the governor shall fill the vacancy …" *Id.* at 1091 (emphasis added). It held that this language means the governor cannot make the appointment before the vacancy occurs. *Id.*

It then turned to article V, section 10(a), which provides that when an appellate judge or justice "is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge." *Id.* This is the same reason this Court entered its interim order holding

that the new governor will have the sole authority to make these appointments – Governor Scott will be out of office the moment the three terms expire.

Justice Cantero agreed, but wrote a concurrence to "emphasize that in these circumstances, nothing in the Florida Constitution prevents the relevant judicial nominating commission ('JNC') from beginning the process of nominating the retiring judge's successor before the vacancy occurs." *Id.* at 1094. Petitioners continue to agree with this point, which is why they do not argue that the constitution prohibits the Commission from accepting and reviewing applications before the vacancies occur. But Justice Cantero dropped a crucial footnote:

> There may well be provisions of the Uniform Rules of Procedure for District Courts of Appeal Judicial Nominating Commissions relevant to this issue. I consider here only the requirements of the Florida Constitution.

Id. at 1094 n.6.

The constitution requires the Commission to establish and follow rules of procedure, and any of its rules may be repealed by the Legislature or this Court. Art. V, § 11(d), Fla. Const. The very first sentence of the Florida Supreme Court Judicial Nominating Commission Rules of Procedure not only addresses when the Commission can consider applications, but uses the exact language that this Court ruled prohibits action before the vacancy occurs:

> **Whenever a vacancy occurs** on the Supreme Court, … the Supreme Court Judicial Nominating Commission (the "Commission")

> shall receive and review applications submitted by those applicants who timely request consideration.

(App. 8 (emphasis added).) While vacancies caused by other reasons such as resignation may occur earlier for purposes of nominating or considering applications, the constitution is clear that vacancies created by the failure to be eligible or qualify for retention do not occur until the terms expire. Art. V, § 10(a), Fla. Const.

In short, the plain language of the very first sentence of the Commission's own rules prohibit it from receiving and reviewing applications before the vacancies occur on January 8, 2019, every bit as much as the same language in article V, section 11(a) prohibits Governor Scott from making the appointments before that date.[9]

But even if the rules authorized the Commission to review applications before a vacancy occurs, the Commission has failed to properly act to set the deadline. There was no meeting noticed or held and no vote had to establish the deadline in the first place, and no meeting or vote to consider Petitioners' request to reopen the deadline. Instead, it appears that the chair has usurped those decisions

[9] While its rules prohibit even receiving applications before the vacancy, Petitioners see no practical reason to suggest the 59 applications received should be returned or ignored. That would be unfair to those applicants, and their applications should simply be held and considered equally with any further applications submitted by a validly imposed deadline on or after January 8, 2019.

and simply decided for himself in secret when the Commission will accept applications to implement a directive by Governor Scott, for nominations to be made by November 10, 2018, a directive that the Commission conceded through counsel and this Court has now found to be unlawful.

The Commission's rules required the deadline for applications to be "established by the Commissions" – no the chair alone – through a public meeting. (App. 6) Except only for its deliberations on nominees, "the proceedings of the commissions and their records shall be open to the public." Art. V, § 11(d), Fla. Const. "**All acts** of a judicial nominating commission shall be made with a concurrence of a majority of its members." Art. V, § 20(c)(6), Fla. Const.; § 43.291(2), Fla. Stat.

Under any view, the October 8 application deadline is improper and should be voided as in violation of the Commission's rules. Quo warranto relief is therefore warranted to stop the Commission from continuing to act in defiance of this limitation on its authority.

B. The Current Process Has Such an Appearance of Partisan Taint That It Should Be Halted Altogether So That It May Restart on January 8, 2019.

While this should be the end of the matter, experience has shown that Governor Scott is prepared to do anything possible to ensure that he gets to vet these candidates and ensure that his policy choices will limit the kind of nominees

the new governor will get to appoint. The lynchpin of this strategy is another unanimous holding of this Court – its ruling in *Pleus* that the governor is without authority to reject a JNC's list of nominations and is required to appoint from that list even if dissatisfied with the choices. 14 So.3d at 942. But once again, this Court's footnotes must not be overlooked. The Court was careful to provide a warning that appeared to foresee the kind of crisis now rapidly approaching:

> This case does not involve any claim that the process for the selection of the nominees was tainted by impropriety or illegality. Our decision in this case should not be understood to suggest that no remedy would be available to address such a tainted process.

Id. at 942 n.2.

The Court also devoted much of its opinion to describing how the process is intended to restrain the governor's authority to engage in pure political patronage and remove politics from the nomination process. *Id.* at 943. As the Bar informs the public, the whole nature of a judicial nominating commission is to

> provide a climate that fosters public confidence in the process while encouraging highly qualified applicants to apply. They must not be a political or partisan entity and should be representative of the community to be served by the judge.

Understand the Florida Judicial Nominating Commission and Judicial Application Process, available at https://www.floridabar.org/wp-content/uploads/2018/08/ADA-JNC-and-Judicial-Application-and-Appointment1.pdf (quoting Sandra Day

O'Connor, *The O'Connor Judicial Selection Plan*, The Institute for the Advancement of the American Legal System at 5, June 2014).

Indeed, in overstating the case against Petitioners' suggestion the Commission should consider non-political input from the new governor,[10] the Commission made the very valid point about how important it is to avoid any process that 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*.

(Comm'n Resp. 14.) Petitioners could not agree more.

The Commission's own rules make clear that not only must its members refrain from imposing the governor's policy preferences on the process, but they must also lay aside their own policy preferences – there should be no "activism" on a judicial nominating commission any more than on a bench:

> Commissioners hold positions of public trust. A Commissioner's conduct should not reflect discredit upon the selection process or disclose partisanship or partiality in the consideration of applicants. Consideration of applicants shall be made impartially and objectively.

[10] Of course, we now know that the Commission's own training materials directly incorporate not just input from Governor Scott, but a videotaped message about the kinds of judges he is seeking.

(App. 14.) Thus, a nominating process that is based on identifying and nominating applicants who have favored policy views while screening out applicants who may not agree with the policies favored by a governor or the commissioners is the very definition of a tainted process.

A process that limits the number of applications and/or excludes those who would only apply depending on whether one or the other candidate wins the election is equally tainted, at least when there is no good reason to require such an early application deadline. This should be doubly so when extending the deadline would not only encourage more qualified candidates to apply overall, but could lead to more women and minorities applying in particular. The current applicant pool is woefully thin on female and black applicants, right at the time that the only female and/or black justices are leaving the Court. While the process certainly cannot guarantee that sufficient women and minorities will be nominated, much less appointed, a process that unnecessarily shuts the door to more women and minorities applying is tainted.

More broadly, the circumstances related in the statement of facts above tend to foster the risk of an increasing public perception that the Commission's proceedings are tainted with partisanship and part of Governor Scott's plan to usurp or at least unfairly restrict the ability of the person the people elect to make these appointments based on his own preferences instead of those of Governor

Scott. In short, the person elected governor on November 6 cannot fully exercise the sole authority to make these selections, to which this Court has already ruled he will be entitled, unless there is a nominating process free of even the appearance of taint. By stopping the process now, the Court will ensure that its remedy will be effective and the new governor can fulfill his duties.

Halting the process now is especially warranted to protect this Court's jurisdiction to provide a meaningful remedy because Respondents have demonstrated that they are not restrained by what they know the law to be. Even though his counsel conceded on the floor of this Court over a year ago that Governor Scott could not make these appointments absent unlikely exceptions, he proceeded to try to do exactly that even as it became clearer and clearer that the exceptions will not apply. Even though the Commission has known Governor Scott has no power to impose a deadline, it has faithfully sought to follow the deadline he ordered. And even after this Court ruled that the new governor will have sole authority to make these appointments, the Commission filed a notice that it is proceeding with its interviews as scheduled "to give **the Governor** and Governor-elect ample time to do their vetting." (Comm'n Not. of Filing (Oct. 16, 2018) (emphasis added).)

There is no vetting for Governor Scott to do in this case, and the only involvement his office should have in these matters is to make sure it preserves all

records in its possession relating to the nomination of appellate judges during his tenure. How the governor-elect could practically or legally vet nominees before he is in office and before he has a staff has never been explained.

Finally, while a good case might be made to amend the Commission's rules in the future to allow it to accept applications before a vacancy under fair circumstances, the Court should not allow the Commission to change the rules in the middle of these proceedings. While prolonged vacancies are to be avoided where possible, those prospects should not be overstated. After all, the Third District just completed its process of nominating nine applicants to two vacancies on that court just nine days following receipt of applications. (App. 20-24.)

This Court has dealt with gaps before, whether caused by the nominating process or the time appointees have required to wrap up their private practice or lower court duties before assuming office. Otherwise, the chief justice can elevate one or more chief judges of the district courts of appeal if necessary to have enough votes to decide a case. Regardless, the integrity of the process to nominate and appoint three-sevenths of this Court should not be sacrificed on that altar of expediency.

CONCLUSION

For the foregoing reasons, this Court should order the Commission to accept new applications at least through a deadline it validly sets for no earlier than

January 8, 2019, prohibit the Commission from taking any other action on these vacancies until January 8, 2019, and prohibit Governor Scott from taking any further action related to the Commission or its membership other than preserving all records related to the nomination of judges during his administration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following by email on October 26, 2018:

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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*).

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