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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