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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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,

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

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