IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs. Case No. SC18-1573

HON. RICK SCOTT, in His official capacity as Governor of Florida, FLORIDA SUPREME COURT JUDICIAL NOMINATING COMMISSION, And JASON L. UNGER, in His official capacity as Chair of the Florida Supreme Court Judicial Nominating Commission,

Respondents.

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

RAOUL G. CANTERO
(FBN 552356)
WHITE & CASE LLP
SOUTHEAST FINANCIAL CENTER
200 SOUTH BISCAYNE BOULEVARD
SUITE 4900
MIAMI, FLORIDA 33131-2352

Attorney for Respondent, Florida Supreme Court Judicial Nominating Commission

GEORGE T. LEVESQUE (FBN 0555541)
GRAYROBINSON, P.A.
301 SOUTH BRONOUGH STREET
SUITE 600 (32301)
POST OFFICE BOX 11189
TALLAHASSEE, FLORIDA 32302-3189

Attorney for Respondent, Jason L. Unger in His Official Capacity as Chair of the Florida Supreme Court Judicial Nominating Commission

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INTRODUCTION

For more than three decades, the Florida Supreme Court Judicial Nominating Commission—and every other judicial nominating commission ("JNC") in the State—has permitted its members to convene and nominate judicial candidates before a physical vacancy in office occurs. Petitioners ask this Court to ignore the express limitations on its own constitutional authority, to overrule its precedent, and to ignore decades of uncontroversial and unchallenged practice—describing it as a "tainted process," no less (Emergency Supplemental Petition at 3, 9, 16, 18, 21–26)—and to impose a rule on the executive branch that finds zero support in history, fact, or law.

Petitioners' *third petition*, styled as an emergency supplemental petition, seeks to enjoin the Florida Supreme Court Judicial Nominating Commission ("Commission") from conducting its work to identify nominations to fill the vacancies created by the mandatory retirements of Justices R. Fred Lewis, Peggy A. Quince and Barbara J. Pariente—work that Petitioners have previously conceded (and still confess) could be commenced before those offices are vacated. Interviews have already begun and people from all over the state—59 applicants and nine Commission members, as well as members of the public who are planning to attend the publicly noticed meetings—have arranged their schedules to attend those interviews.

Petitioners' unjustified, unsupported, and frankly unfair accusations of a "tainted" process, based solely on inappropriate innuendo, should not be allowed to interrupt the process. Not only would it inconvenience over 60 people who have adjusted their schedules and are traveling from all over the state to attend upcoming interviews, but it is beyond this Court's authority to do so, and would delay the ultimate appointment of three new justices, leaving the Court shorthanded—and possibly without a quorum—for several months. *See State ex rel. Pooser v. Wester*, 170 So. 736, 738–39 (Fla. 1936) (holding that the Court will decline to grant extraordinary relief "if the granting of such relief in the particular case will result in confusion and disorder and will produce an injury to the public which outweighs the individual right of the complainant to have the relief he seeks"). For the reasons detailed below, the Court should reject Petitioners' call for an unprecedented intrusion into the executive appointment process. To date, the Commission has faithfully adhered to its obligations under the Florida Constitution, and there is not a scintilla of evidence that the Commission and its Chair will deviate from the faithful fulfillment of their duties in the future. *See Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990) ("It must be presumed that members of the executive branch will properly perform their duties."). As this Court has recognized, the Florida Constitution's nomination process is specifically intended to reduce the time of any vacancy, and the JNCs have, for decades,

honored that imperative by conducting their nomination processes in advance of physical vacancies.

STATEMENT OF RELEVANT FACTS

On September 12, 2018, Jason Unger, as duly elected Chair of the Commission, issued a call for applications to fill the vacancies resulting from the imminent retirements of Justices R. Fred Lewis, Barbara J. Pariente, and Peggy A. Quince (App. 12).[1] The notice included instructions for submitting applications and imposed a deadline of 5:00 p.m. on October 8 (*id.*). It also informed interested parties that one seat must be filled by a qualified applicant from the Third Appellate District while the remaining two may be filled by applicants from anywhere in the state (*id*). Fifty-nine applicants applied for nomination to fill the three upcoming vacancies (JNC Supp. 7-9).

On October 11, 2018, the Commission met in a public meeting to consider and select applicants for interviews and further consideration (Supp. 4). Although some of the applications were submitted after the deadline, the Commission decided without objection to extend the deadline and approved all 59 applicants for

[1] "App. #" and "Supp. #" refers to the page number of Petitioners' appendix and supplemental appendix, respectively; "Gov. App #" refers to the page numbers of the Governor Scott's appendix to his response to the original Petition; "JNC App. #" and "JNC Supp. #" refer respectively to the page numbers of the Florida Supreme Court Judicial Nominating Commission and Jason L. Unger's Joint Appendix, submitted with the their response to the original Petition, and their Supplemental Appendix submitted with this response.

further consideration (*id.*). On October 12, the Commission published a notice of its planned interview schedule, setting two days of interviews in Miami (on November 3 and 4) and two days in Tampa (on November 8 and 9) (JNC Supp. 10-14). The October 12 Notice further advised that the "schedule will position the Florida Supreme Court JNC to certify nominations at the earliest on November 10 or sometime thereafter to give the Governor and Governor-elect ample time to do their vetting and minimize the time that these three judicial vacancies remain unfilled" (*id.*). The Commission's reference to both the Governor and Governor-elect merely reflects the uncertainties about future events and the varied ways in which the appointments may be made.[2]

On October 15, 2018, this Court issued an unsigned order advising that "[t]he governor who is elected in the November 2018 general election has the sole authority to fill the vacancies that will be created by the mandatory retirement of Justices Barbara J. Pariente, R. Fred Lewis, and Peggy A. Quince, provided the justices do not leave prior to the expiration of their terms at midnight between January 7 and January 8, 2019, and provided that the governor takes office immediately upon the beginning of his term." The Order further provided that the

[2] The October 15, 2018, Supreme Court Order scheduling oral argument implicitly acknowledges these varied factors affecting the appointment process by stating that the next Governor has the appointment authority, "provided the justices do not leave prior to the expiration of their terms at midnight between January 7 and January 8, 2019, and provided that the governor takes office immediately upon the beginning of his term."

sixty-day period after the Commission certifies nominations begins to run only when the governor with the authority to appoint has taken office. As to the Commission, the Court's Order confirmed that "the JNC is an independent body" and is not bound by the Governor's deadlines. The Order then set oral argument for November 8 to consider the issue of when the Commission may certify its nominations. On October 26, the Commission published an Amended Notice reflecting some shifts in scheduled interviews, adding noticed meetings for preliminary deliberations before and after each day of interviews, and confirming that the Commission would issue its nominations no earlier than November 10 (Supp. 25). What the Commission does after the interviews conclude is currently unknown. Among a variety of potential courses of action, the Commission may open the process for additional applications, may extend the interview process for second interviews, or may select applicants for nomination.

ARGUMENT

I. GRANTING THE REQUESTED RELIEF WOULD VIOLATE THE SEPARATION OF POWERS.

In the absence of a constitutional violation, this Court lacks authority to interrupt the Commission's work, as Petitioners request. In its first advisory opinion interpreting the revisions to Article V in the 1968 Florida Constitution, this Court discussed several features of the new judicial nominating process, and discussed the roles of the branches of government in making judicial appointments:

> [T]he [JNCs] are elevated to constitutional stature and permanence. The process of non-partisan selection has been strengthened even further because nominations made by the [JNCs] have now been made binding upon the Governor, as he is under a constitutional mandate to appoint "one of not fewer than three persons nominated by the appropriate [JNC]." Moreover, the Governor must make the appointment within sixty days after the nominations have been certified to him.

In re Advisory Opinion to Governor, 276 So. 2d 25, 29 (Fla. 1973) (citation omitted). This Court further held that the appointment of judges, and the screening of judicial applicants, are executive functions. *Id.* Thus, although the Legislature is constitutionally empowered to establish the JNCs, once the JNCs are established it lacks authority to limit the exercise of the JNCs' inherently executive functions. *Id.* at 29-30. Moreover, although JNCs are established within the executive branch, they are independent constitutional entities. As this Court held, "[w]hile the function of the [JNCs] is inherently executive in nature, the mandate for the [JNCs] comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts." *Id.* at 30. And as independent entities, JNCs have the power to promulgate their own rules. *Id.*; *see also The Justice Coal. v. The First Dist. Court of Appeal Judicial Nominating Comm'n*, 823 So. 2d 185, 189 (Fla. 1st DCA 2002) (holding that the Legislature and the Supreme Court lack the authority to require procedures beyond those already imposed by the JNC rules of procedure); *see also* Art. V, § 11(d), Fla. Const. (providing for the adoption of

rules by each level of JNC and for repeal of JNC rules by general law or by the Supreme Court, five justices concurring).[3]

Against this backdrop—a constitutional provision specifically designed to remove politics from the judicial appointment process—Petitioners invite this Court to ignore the Constitution, overrule precedent, and usurp what are quintessentially executive branch functions in contravention of article II, section 3 of the Florida Constitution. This Court should not join in such political games. The Florida Constitution contains no directions about application deadlines, interview schedules, or when the JNC should begin its work. Likewise, it does not address how JNCs must keep their records. "[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985); *see also The Justice Coal.*, 823 So. 2d at 189 (refusing to require production of a JNC's records and declining to impose record retention requirements on a JNC); *Whiley v. Scott*, 79 So. 3d 702, 709 (Fla. 2011) ("Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures . . . we

[3] The provision requiring uniform rules of procedure at each level of the court system and granting repeal authority to the Florida Legislature and the Florida Supreme Court was proposed by H.J.R. No. 1160, as approved by the electors at the November, 1984 general election.

must be equally careful to respect the constitutional authority of the other branches.").

Petitioners do not argue that their constitutional or statutory rights have been violated—nor can they. Yet they ask this Court to effectively re-write the Commission's Rules of Procedure, violating its rights of self-governance under Article V, section 11(d) of the Florida Constitution. As to the Commission's operations, this Court is constitutionally empowered ***only*** to nullify the Commission's rules of procedure, five justices concurring. But Petitioners have not requested the Court to repeal the Commission's rules, and any such repeal would afford Petitioners no relief here. Because this Court's "all writs" jurisdiction may not be used to overcome this limitation on the Court's authority, the Court lacks the constitutional authority to grant petitioners' requested relief.

II. QUO WARRANTO IS INAPPROPRIATE TO CHALLENGE ALLEGED VIOLATIONS OF THE COMMISSION'S RULES OF PROCEDURE.

A writ of quo warranto is appropriate only to remedy a state official's exercise of authority in violation of law. *See, e.g.*, *Whiley*, 79 So. 3d at 707; *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 607 (Fla. 2008); *Orange Cty. v. City of Orlando*, 327 So. 2d 7, 8 (Fla. 1976); *see also State ex rel. Landis v. Prevatt*, 148 So. 578, 35 (Fla. 1933) ("The only question to be determined by this [quo warranto] action is whether the defendants are usurping a liberty, franchise, or

privilege, without authority of law."). Here, the Commission is statutorily established and derives its authority from the Constitution. *See* § 43.291, Fla. Stat.; Art. V, § 11, Fla. Const. Yet Petitioners identify no constitutional provision that the Commission or its Chair have violated. In fact, they concede that the Commission, by continuing its decades-long practice of accepting applications and conducting interviews before a physical vacancy on the Court occurs, has not violated the Constitution.

Petitioners appear to suggest the Commission or its Chair may have violated section 43.291(2), Florida Statutes, by setting an application deadline (Emerg. Supp. Pet. at 21). That suggestion fails for two reasons. First, the Chair's publication of a notice to accept applications does not constitute an "act" within the meaning of the Commission's Rules. *See* Section III.A., *infra* (discussing the three acts requiring a meeting of the Commission). Second, to the extent the statute goes beyond the legislative establishment of JNCs authorized under Article V, section 11(d), and impedes the Commission's constitutional authority to establish its own rules of governance, the Commission would not be bound by such statutory directives. *In re Advisory Opinion to Governor*, 276 So. 2d at 30 (holding that it was the legislature's prerogative "to provide for the number of persons to serve on each judicial nominating commission and the method of their selection" and

concluding that the legislative role in the appointment of judges was completed when it enacted section 43.29, Florida Statutes, establishing the JNCs).

Petitioners' primary claim, however, is that the Commission, through its Chair, violated its own internal Rules of Procedure. But they do not cite a single case that has issued a writ under such circumstances. A writ of quo warranto is improper absent a showing that a state officer has exceeded his or her lawful authority. *See, e.g.*, *Crist*, 999 So. 2d at 607 (recognizing that quo warranto is used to "determine whether a state officer or agency has improperly exercised a power or right derived from the State"); *Chiles v. Phelps*, 714 So. 2d 453, 456 n. 4 (Fla. 1998) (confirming that a petition for writ of quo warranto should be directed at actions that exceed a state official's "constitutional authority"). Indeed, cases involving quo warranto proceedings consistently identify some statute or constitutional provision that a state officer or agency has violated in exceeding its lawful authority. *See*, *e.g.*, *Crist*, 999 So. 2d at 613 (holding that the governor exceeded his lawful authority by authorizing a compact in violation of the separation of powers doctrine and statutes prohibiting certain types of gaming); *NW. Fla. Water Mgmt. Dist. v. Dep't of Cmty. Affairs*, 7 So. 3d 1129, 1131 (Fla. 1st DCA 2009) (granting petition for writ of quo warranto when an agency exercised authority in a manner that violated a statute granting exclusive permitting authority to water management districts, not the agency).

By contrast, in the absence of such a violation, this Court has denied quo warranto relief. *See, e.g.*, *Phelps*, 714 So. 2d at 459–60 (denying petition for writ of quo warranto when the Legislature did not violate Article III, section 8 of the Florida Constitution); *Martinez v. Martinez*, 545 So. 2d 1338, 1339–40 (Fla. 1989) (denying a petition when the governor's actions did not violate the "plain language" of the constitution, and reasoning that the Court "cannot read into the constitution a provision that is not there"); *State ex rel. Bruce v. Kiesling*, 632 So. 2d 601, 603–04 (Fla. 1994) (denying a petition that failed to establish a violation of a statute governing nominations to the Public Service Commission, and rejecting the argument that a nominating council's internal rules imposed requirements beyond the governing statutes, reasoning that the council's "'rules' are statements of procedure and not rules promulgated under chapter 120, Florida Statutes"); *State ex rel. Ervin v. Jacksonville Expressway Auth.*, 139 So. 2d 135, 138–39 (Fla. 1962) (denying a petition failing to establish that an expressway authority violated statutes governing its power to acquire easements).

At bottom, Petitioners identify no law or constitutional provision that the Commission or its Chair violated, and cite no authority for their extraordinary proposition that an executive-branch Commission's internal rules of procedure—duly adopted in accordance with its constitutional charge, and amendable by them at any time—can form the basis of a quo warranto proceeding.

III. THE COMMISSION'S ACTIONS FAITHFULLY COMPLY WITH ITS RULES AND ARE CONSISTENT WITH DECADES OF PRACTICE.

For more than three decades, this Commission, and every other JNC across the State, have consistently interpreted their rules to permit its members to convene to consider, interview, *and nominate* replacements before the vacancy in office physically occurs—regardless of whether the vacancy was triggered by voluntary or mandatory retirement. *See* Joint Resp. to Pet. at 15–17. The suggestion that either the Commission or its chair have committed *ultra vires* acts in calling for applications, setting deadlines, or convening for the purpose of interviewing candidates before a physical vacancy has occurred is legally baseless and historically unsupportable.

The Commission's Rules of Procedure specify only three times when the Commission must convene for decision-making: First, the Commission is required to meet annually to elect a chair and a vice chair (Supp. 17). Second, the Commission is required to meet after the application deadline "to consider the applicants and to select applicants for further investigation and consideration" (Supp. 9). Third, the Commission is required to meet "to select by majority vote qualified nominees from those persons having applied for such vacancy" (Supp. 12). These are the only "actions" or "business" contemplated under the Commission's rules requiring a meeting.

Judicial nominating commissions are constitutionally established for the purpose of certifying nominations to fill vacancies. *See* Art. V, §§ 11(a), (c), (d), Fla. Const. Nothing in the Florida Constitution obligates a commission to accept applications at all, let alone require a commission vote to establish an application deadline. The discretion of how to certify nominations is left to the JNCs, with the rules of procedure to be determined by the JNCs at each level of the court system. Art. V, § 11(d), Fla. Const. To facilitate the work of the Commission, the Commission's Chair has established the application schedule for recent vacancies—wholly consistent with the Commission's rules requiring an application process—under the implicit authority the Commission has granted the Chair to administratively guide the Commission through its work. Any commissioner is free to present a motion for an alternative application deadline. No commissioner has presented motions for alternative application deadlines, nor have any commissioners objected to that procedure. Petitioners cite no contrary legal authority or facts that demonstrate how the Commission's actions conflict with the Florida Constitution, or vary from the longstanding practices of judicial nominating commissions at every level of the court system. Absent such a conflict, quo warranto relief is inappropriate.

A. JNCs have never interpreted their rules to prohibit convening before a physical vacancy has occurred.

The Commission has consistently and lawfully interpreted its Rules to allow it to convene and begin vetting candidates before a physical vacancy occurs. Petitioners argue that the phrase "whenever a vacancy occurs in judicial office" in the Commission's Rules somehow bars the Commission from convening. But they ignore the Commission's discretion to (1) interpret and apply its own Rules concerning when it commences its work; and (2) assign a meaning to a term for purposes of the Rules that differs from the meaning that this Court has ascribed when interpreting the constitution to determine when a vacancy occurs for the purposes of appointing a successor. *See Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984) (refusing to interject the courts into the legislature's internal rules of procedure).

Since at least 1997, the Commission's Rules have contained the phrase "whenever a vacancy occurs on the Supreme Court" (JNC Supp. 16). Similar language has been ensconced in the Uniform Rules of Procedure for District Court of Appeal Judicial Nominating Commissions since 1994 (JNC Supp. 38) ("whenever a vacancy occurs in a judicial office"), and in the Uniform Rules of Procedure for Circuit Judicial Nominating Commissions since 1989 (JNC Supp. 52) (same). As recognized as far back as 1992, a majority of the JNCs acted to certify nominations within 30 days of an upcoming vacancy. *See In re Advisory*

Opinion to the Governor ("Judicial Vacancies"), 600 So. 2d 460, 461–62 (Fla. 1992). Accepting Petitioners' argument would mean that nearly every similar nominating process since 1986—or at least since the Court's advisory opinion in 2006—was flawed by a similarly "tainted process."[4] Giving Petitioners the benefit of the doubt, we assume that Petitioners are not suggesting that this nominating process was truly tainted, and that they use the term repeatedly only as a way—however misguided—to invoke footnote 2 in *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009), where this Court noted, "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. But as explained throughout, Petitioners' mantra-like use of the term has no basis in reality and does nothing but demean the Commission's good-faith efforts to fulfill its constitutional duties.

As the Commission's prior nominations attest (Gov. App. 13), since at least 1986 it has interpreted the term "whenever a vacancy occurs" in judicial office as meaning a justice's announced resignation or imminent mandatory retirement. Such an interpretation of its own Rule language is faithful to the long-recognized intention of the framers of Article V, as this Court itself has explicitly

[4] Since 2006, three supreme court justices and 13 district court of appeal judges have been appointed as a result of mandatory retirements (Gov. App. 13, 86-88).

acknowledged, that judicial vacancies should be avoided whenever possible or at least minimized. *Judicial Vacancies*, 600 So. 2d at 462.

In fact, the appellate JNCs have a long history of convening before the occurrence of a physical vacancy in office, even where a judge or justice remains in office until the end of term. *See* Joint Resp. to Pet., at 15–17; Gov. App. 13. For example, the Commission that nominated Justice Quince convened in August 1998 and certified nominations on October 26 even though retiring Justice Ben F. Overton would not vacate office until January 4, 1999 (Gov. App. 13); *see also* Fl. Sup. Ct. Jud. Nom. Comm. R. § 1, as amended September 10, 1997 (JNC Supp. 16). And even after this Court, considering Judge Richard Ervin's mandatory retirement effective January 2007, ruled that the language in Article V, section 10(a) of the Florida Constitution meant that the vacancy caused by mandatory retirement occurs upon the expiration of a judicial term, *see Advisory Opinion to Governor re Judicial Vacancy Due to Mandatory Ret.*, 940 So. 2d 1090, 1091 (Fla. 2006), the First DCA JNC applied language directing JNCs to begin the application process "whenever a vacancy occurs in judicial office" by accepting applications for his replacement by October 30 (JNC Supp. 60) and certifying its nominations on December 5, 2006 (*id.* at 62). *See also* Uniform R. of Proc. DCA JNC, § 1, as amended June 25, 2003 (JNC Supp. 64) (including the same "whenever a vacancy occurs in judicial office" provision).

This Commission's actions, including those of its Chair—which faithfully follow longstanding Commission practices—cannot reasonably be assigned the improper motives that Petitioners attempt to attribute to them. Otherwise, the same improper motives would necessarily be assigned to every Commission that has convened over the last three decades.

While Petitioners proclaim that 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," Emerg. Supp. Pet. at 3, they nevertheless ask this Court to wrest control of the proceedings from the Commission—not for any constitutional infirmity in its actions, but simply because it has not granted Petitioners' requests to extend the application deadlines.[5] *See State ex rel. Adams v. Lee*, 171 So. 333, 335–36 (Fla. 1936) ("[C]ertainly by no recognized rules of construction, even the most broad and liberal, could quo warranto be properly resorted to for the purpose, in effect, of compelling the respondent officer to enforce the provisions of a statute in accordance with the relators' construction of their meaning and effect . . .").

The yardstick against which the Commission's actions are measured should be the Constitution, not Petitioners' subjective personal wishes—which were

[5] The Commission's published notices plainly indicate that the Commission has no intention of certifying nominations in a manner inconsistent with law.

expressed for the first time by filing this extraordinary petition. And Petitioners, through their concession that the Florida Constitution does not prohibit the Commission from commencing its work before a vacancy occurs, acknowledge that the Commission has not acted contrary to the Florida Constitution. In the absence of such a constitutional infirmity, quo warranto relief is unwarranted.

Even if Petitioners were correct that the Commission had somehow violated its own rule, it would not justify issuing a writ of quo warranto. *See Chiles v. Phelps*, 714 So. 2d at 456 n. 4 (confirming that a petition for writ of quo warranto should be directed at actions that exceed a state official's "constitutional authority"). Petitioners cite no case—and we have found none—granting a writ of quo warranto against a public official for violating a procedural rule.[6] In fact, the Supplemental Petition cites only one case that even addressed that writ—this Court's recent opinion in *League of Women Voters v. Scott*, 232 So. 3d 264 (Fla. 2017), which declined to issue one.

[6] To the contrary, as discussed above, the internal rules of procedure governing a separate branch of government are outside the judiciary's purview. *See* Section I *supra*; *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984) (holding that the circuit court lacked jurisdiction to determine whether the legislature violated its internal rules of procedure); *see also Kiesling*, 632 So. 2d at 604 (deferring to the statute and denying a petition alleging violations of a nominating council's procedural rules).

B. The Commission's Chair is empowered to perform ministerial responsibilities, including the establishment of application deadlines.

The Chair of the Commission possesses the authority to perform ministerial acts that facilitate the Commission's work. The Commission's Rules of Procedure dictate only three instances in which the entire Commission must act as a body: to elect a chair, to select applicants for further investigation and consideration, and to select nominees to certify to the Governor (App. 9, 12, 17). The Florida Constitution does not require anything further, or prohibit the Chair from undertaking ministerial, administrative duties to facilitate the Commission's work. Petitioners' suggestion that the Chair acted improperly by requesting applications and establishing a deadline for submission of applications is simply one more ad hominem attack on the Commission and its Chair. Petitioners' standing to raise this argument is doubtful at best, *see* Section II, *supra*. Moreover, no sitting commissioner has objected to the Chair's establishment of application deadlines, nor has any commissioner objected to the interview schedules the Chair established.

Rather, just the opposite is true. At its October 11, 2018, meeting, the Commission unanimously decided to extend the deadline to allow late-submitted applications to be considered, and unanimously decided to interview all the applicants. Any commissioner could have objected, could have moved to extend the deadline for applications, or could have proposed an alternative approach

contrary to the Chair's exercise of authority. Yet not a single commissioner objected or suggested an alternate proposal. The Chair did not act unilaterally; he acted in a manner that reflected the Commission's unanimous consent (Supp. 4).

IV. PETITIONERS PRESENT NO JUSTIFICATION FOR AN UNPRECEDENTED TAKEOVER OF THE JUDICIAL NOMINATING PROCESS.

To support their call for an unprecedented intrusion into an executive-branch function, Petitioners rely on select news editorials—which they nevertheless claim not to proffer as "evidence of any adjudicative facts or as argument over legal principles." Suppl. Pet. at 1 n. 1. But if the editorials are offered neither as evidence of fact nor as appropriate legal argument, these materials are entirely irrelevant to the question before this Court. They can therefore be meant only to cast aspersions on the Commission for doing what appellate JNCs have been doing for decades—working with both Republican *and* Democratic governors.[7]

[7] One such attack directed at the five gubernatorially-appointed Commissioners suggests that they are not qualified for service because they have "little to no apparent experience with litigation in this or any Florida appellate court" (Emerg. Supp. Pet. at 17). Aside from the inaccuracy of the statement, only two of the governor's appointees are required to be members of the Florida Bar engaged in the practice of law, *see* § 43.291(1)(b), Fla. Stat. The statute reflects the policy that nominating commissions benefit from a diversity of viewpoints—including those of nonlawyers. Moreover, the current Commission Chair, a member of the Florida Bar in good standing, has participated in the nominating process for five justices—four of whom presently serve on the Court. The Court has not been impaired by the participation in the nomination process of persons who are not either former judges or board-certified appellate attorneys.

Petitioners' requested relief only politicizes the judicial nominating process more, not less. For example, Petitioners suggest that the Governor's establishment of a training video is a nefarious intrusion into the Commission's independence. But the Commission's Rules of Procedure require commissioners to attend training to familiarize members with Commission rules and procedures, including "segments regarding interviewing techniques and diversity" (Supp. App. 18). Furthermore, the JNCs are comprised of uncompensated volunteers administratively supported by the Executive Office of the Governor ("EOG"). *See* § 43.291(7), Fla. Stat. Given that commissioners bring with them a wide variety of experiences but may not have experience in the vagaries of government bureaucracy, it is simple good sense to require such training. And there is nothing untoward about the EOG providing such training because it is required by law to do so.

Likewise, Petitioners' implication of impropriety concerning responses to their requests for public records and referral to the EOG is baseless. The EOG is "the official repository and custodian of records of the Commission" (Supp. App. 18), consistent with that office's statutory directive to provide administrative support to the JNCs. The referral to the EOG was done in conformance with the rule and out of necessity: the records being requested were not in the Commission's possession, but were maintained by the Governor's office.

Petitioners also criticize the Commission's call for applications before the election of the next governor, arguing that not waiting until after the election had a chilling effect on applicants. Yet in this nomination cycle, the Commission received 59 applications—more than any prior Supreme Court JNC has received for any other series of vacancies. In what is likely to have been the most publicized series of vacancies in the history of the state, potential applicants knew about the governor's race and knew that one of two candidates would win. While this uncertainty may have discouraged more politically-oriented candidates from applying, the actual numbers suggest that it *increased* the applicant pool by encouraging lawyers and judges of all backgrounds to apply.

Likewise, Petitioners' and Amici's concerns for the representation of women and minorities are laudable—and indeed, are concerns shared by the Commission—but their requested relief is misplaced. There is no evidence at all in either Petitioners' or Amici's briefs that extending the deadline would produce more women and minority applicants or alter the likelihood of their nomination or appointment.

The circumstances surrounding the appointment of Justice Quince unquestionably demonstrates this point. The call for applications to replace Justice Ben F. Overton was made on August 15, 1998, setting a deadline of September 15 (Gov. App. 54). Of the nine applicants who applied, Justice Quince was the only

female (*id*. at 55). The Commission then extended the deadline until October 5, but received no new applicants (Gov. App. 55, 56). On October 27, 1998—more than two months before Justice Overton's term expired and Governor Jeb Bush took office—the Commission submitted four nominations, including that of Justice Quince, who ultimately became the consensus pick of both Governor Chiles and then-Governor Elect Bush. (Gov. App. 56).

The experience of the appointment of Justice Quince makes clear: No evidence supports Petitioners' and Amici's speculation that more time for applications would materially affect the appointment process. Diversity in appointments may be achieved so long as women and minorities apply, which they undeniably have—both in this nomination cycle and historically.

Furthermore, the Commission's own rules express a commitment to using the application process as a tool to promote diversity in the judiciary. The Commission's Rules of Procedure expressly require in the application a page identifying the "race, ethnicity and gender" of the applicant for the purpose of "assess[ing] and promot[ing] diversity in the judiciary" (Supp. 9). And, the Commission's Rules of Procedures require each commissioner to undergo "diversity sensitivity" training within the first twelve months of his or her appointment to the Commission (Supp. 18). Consistent with their Rules of Procedure, the Commission has historically fulfilled, and will continue to fulfill, its

commitment to considering applications from a broad pool of applicants in making nominations.

Neither Petitioners nor Amici suggest that these vacancies were inadequately publicized, so that anyone serious in applying knew that the vacancies existed and either knew about or could learn of the deadlines. Without detailing any of their own efforts to encourage a diverse applicant pool and without any ability to assure that extension of the application deadline would materially increase the diversity of the applicant pool, Petitioners and Amici ask this Court to intrude upon and direct the internal processes of the Commission for the purposes of diversity. Prior governors have expressed this same concern, but it does not justify intruding into the Commission's process. *See Pleus*, 14 So. 3d 941 (finding that the governor was bound to select from the nominations provided and lacked the authority to reject a list of candidates on the basis of lack of diversity).

To be sure, Petitioners do not claim that the Commission has acted in an unlawful or discriminatory manner—nor could they. Rather, they simply note the demographic makeup of the applicants, and then criticize the larger applicant pool as "conservative"—without defining the term or stating how they arrived at that conclusion. Emerg. Supp. Pet. at 12. Again, Petitioners' attacks are entirely untethered from any legal or factual basis justifying the unprecedented relief that Petitioners demand in this case.

The Florida Constitution does not distinguish between political parties—granting one set of rights to an office held by one party and a different set of rights to another party holding the same office. This Commission is constitutionally obligated to certify three to six names for each vacancy "within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days." Art. V, § 11(c), Fla. Const. This obligation exists regardless of which Governor sits in office. And unlike the limited term of a governor, the terms of JNC commissioners transcend a governor's term. *See* § 43.291(3), Fla. Stat. (providing for four-year staggered terms of appointment). The Commission presently engaged in vetting applicants for nominations would be the same one performing the same activities in January.[8] The delay Petitioners seek would needlessly prolong the vacancy on the Court.

CONCLUSION

Petitioners' unjustified, unfair, and unsupported accusations of a "tainted process" is insufficient to keep the nominating process from continuing. Not only would it inconvenience over 60 people who have adjusted their schedules and are traveling from all over the state to attend upcoming interviews, but it is beyond this Court's authority to do so, and would delay the ultimate appointment of three new

[8] A member of a JNC may be suspended only for cause. *See* § 43.291, Fla. Stat.

justices, leaving the Court shorthanded—and possibly without a quorum (see response to petition at 18-19)—for several months.

Respectfully submitted,

/s/ Raoul G. Cantero
RAOUL G. CANTERO
FLORIDA BAR NO. 552356
WHITE & CASE LLP
Southeast Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
raoul.cantero@whitecase.com

Attorney for Respondent, Florida Supreme Court Judicial Nominating Commission

/s/ George T. Levesque
GEORGE T. LEVESQUE
FLORIDA BAR NO. 0555541
GRAYROBINSON, P.A.
301 SOUTH BRONOUGH STREET
SUITE 600 (32301)
Post Office Box 11189
Tallahassee, Florida 32302-3189
Telephone: (850) 577-9090

Attorney for Respondent, Jason L. Unger, In His official capacity as Chair of the Florida Supreme Court Judicial Nominating Commission

CERTIFICATE OF SERVICE

I CERTIFY that on November 5, 2018, a true copy of the foregoing has been filed via the Court's electronic filing system, which shall serve a copy via email to the following counsel of record, constituting compliance with the service requirements of Fla. R. Jud. Admin. 2.516(b)(1) and Fla. R. App. P. 9.420:

THE MILLS FIRM, P.A.

JOHN S. MILLS
THOMAS D. HALL
COURTNEY BREWER
JONATHAN MARTIN
THE BOWEN HOUSE
325 NORTH CALHOUN STREET
TALLAHASSEE, FLORIDA 32301
(850) 765-0897
JMILLS@MILLS-APPEALS.COM
THALL@MILLS-APPEALS.COM
CBREWER@MILLS-APPEALS.COM
JMARTIN@MILLS-APPEALS.COM
SERVICE@MILLS-APPEALS.COM

EXECUTIVE OFFICE OF THE GOVERNOR

DANIEL NORDBY
GENERAL COUNSEL
400 SOUTH MONROE STREET
SUITE 209
TALLAHASSEE, FLORIDA 32399
DANIEL.NORDBY@EOG.MYFLORIDA.COM

WHITE & CASE, LLP

RAOUL G. CANTERO
SOUTHEAST FINANCIAL CENTER
200 SOUTH BISCAYNE BOULEVARD
SUITE 4900
MIAMI, FLORIDA 33131-2352
RAOUL.CANTERO@WHITECASE.COM
LILLIAN.DOMINGUEZ@WHITECASE.COM

FLORIDA ASSOCIATION FOR WOMEN LAWYERS

JENNIFER SHOAF RICHARDSON
501 RIVERSIDE AVENUE
SUITE 902
JACKSONVILLE, FL 32202
JENNIFER.RICHARDSON@JACKSONLEWIS.COM

WILKIE D. FERGUSON, JR. BAR ASSOCIATION
MONIQUE D. HAYES
199 E. FLAGLER STREET, NO. 405
MIAMI, FLORIDA 33132
MONIQUEH@GOLDMCLAW.COM

CARIBBEAN BAR ASSOCIATION
CHARISE MORGAN
1031 IVES DAIRY RD.
SUITE 228
MIAMI, FL 33179
ATTYCMORGAN@GMAIL.COM

GWEN S. CHERRY BLACK WOMEN LAWYERS ASSOCIATION
MELBA V. PEARSON
4343 WEST FLAGLER STREET
SUITE 400
MIAMI, FL 33134
MPEARSON@ACLU.ORG

DANIEL WEBSTER PERKINS BAR ASSOCIATION, INC.
GREGORY SAMUEL REDMON
GSREDMON@SENIORCOUNSELLAW.COM
2318 PARK STREET
JACKSONVILLE, FL 32204

HAITIAN LAWYERS ASSOCIATION
SANDY BOISROND
P.O. BOX 640131
MIAMI, FL 33164
CONTACT@THESPECTRUMLAW.COM

VIRGIL HAWKINS FLORIDA CHAPTER NATIONAL BAR ASSOCIATION
LASHAWNDA K. JACKSON
300 SOUTH ORANGE AVENUE, SUITE 1400
ORLANDO, FL 32801
LJACKSON@RUMBERGER.COM

FRED G. MINNIS SR. BAR ASSOCIATION
CARMEN MILLER
P.O. BOX 514
LARGO, FL 33779
CARMENMILLERLEGAL@GMAIL.COM

GEORGE EDGECOMB BAR ASSOCIATION VALERIA OBI
P.O. BOX 956
TAMPA, FL 33601
GEBAANNOUNCEMENTS@GMAIL.COM

TJ REDDICK BAR ASSOCIATION
ELAINE L. THOMPSON
PO BOX 261926
TAMPA, FL 33626
FLORIDA.APPELLATE.COUNSEL@OUTLOOK.COM

TJ REDDICK BAR ASSOCIATION
TOMIKA COLE
TOMIKA COLE LAW FIRM, PLLC
PO BOX 290293TAMPA, FL 33687-0293
TOMIKACOLEATTORNEY@GMAIL.COM

/s/ *George T. Levesque*
GEORGE T. LEVESQUE (FBN 822671)
GRAYROBINSON, P.A.
301 SOUTH BRONOUGH STREET
SUITE 600 (32301)
Post Office Box 11189
Tallahassee, Florida 32302-3189
Telephone: (850) 577-9090
george.levesque@gray-robinson.com
mari-jo.lewis-wilkinson@gray-robinson.com
teresa.barreiro@gray-robinson.com

CERTIFICATE OF COMPLIANCE

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

/s/ *George T. Levesque*
GEORGE T. LEVESQUE (FBN 822671)
GRAYROBINSON, P.A.