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 SUPPLEMENTAL PETITION FOR WRIT OF QUO WARRANTO AND FOR CONSTITUTIONAL WRIT

DANIEL E. NORDBY (FBN 14588)
General Counsel
MEREDITH L. SASSO (FBN 58189)
Chief Deputy General Counsel
JOHN MACIVER (FBN 97334)
ALEXIS LAMBERT (FBN 24001)
Deputy General Counsel

EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol, PL-05
Tallahassee, Florida 32399-0001
(850) 717-9310
Daniel.Nordby@eog.myflorida.com
Meredith.Sasso@eog.myflorida.com
John.MacIver@eog.myflorida.com
Alexis.Lambert@eog.myflorida.com

Counsel for Governor Rick Scott

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

INTRODUCTION AND SUMMARY OF THE ARGUMENT

At the conclusion of January 7, 2019—just sixty-three days from today—the final terms of Justices Pariente, Lewis, and Quince will expire upon their mandatory retirement from this Court. In anticipation of these three known vacancies, Governor Scott adhered to the consistent practice of his predecessors in office over the past four decades by requesting that the Florida Supreme Court Judicial Nominating Commission begin its nomination process before the occurrence of a physical vacancy in judicial office. And Governor Scott, explicitly invoking the example of bipartisan cooperation observed by Governor Chiles and Governor-Elect Bush with the appointment of Justice Quince in December 1998, expressed his hope and expectation that he and the governor-elect would be able to agree on the selection of well-qualified appointees to avoid the prospect of three prolonged vacancies on this Court.

With their latest filing—styled as a "Supplemental Petition for Quo Warranto" but seeking entirely separate relief on the basis of entirely new allegations—the Petitioners emphatically reject the possibility of cooperation (bipartisan or otherwise) in the selection of the next three justices. Their arguments amount to a claim that Justice Quince's appointment twenty years ago was made in violation of the Florida Constitution, and 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. The Petitioners entirely disregard the role of precedent and the longstanding historical practices of judicial nominating commissions. The Supplemental Petition relies instead on the hyperbolic arguments and rhetoric of opinion columnists to cast unwarranted aspersions on the motivations of the Governor and the Supreme Court JNC.

The Supplemental Petition should be dismissed on jurisdictional grounds or denied on the merits, as it establishes no legal grounds for the relief it seeks against the Governor. As a threshold matter, neither this Court's quo warranto jurisdiction nor its "all writs" authority are appropriately used to address the Petitioners' prospective claims against the Governor. On the merits, the Petitioners fail to establish any legal basis for this Court to "prohibit" the Governor from taking "any further action related to the Commission or its membership." Supp. Pet. at 5, 27.

The Supplemental Petition appears to operate from the premise that simply reiterating the phrase "tainted process" (or some variant thereof) operates to divest the Governor of his constitutional authority. The few specific actions taken by Governor Scott that the Supplemental Petition characterizes as evidence of an alleged "tainted process" demonstrate no impropriety and are largely indistinguishable from actions taken by his predecessors. For four decades,

governors have requested that nominations be provided before the occurrence of a physical vacancy in judicial office in an effort to avoid extended vacancies on the Court. As noted in the Governor's prior Response, 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. Gov. Appx. Table 1.

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 Supplemental Petition for Writ of Quo Warranto.

ARGUMENT

I. The Supplemental Petition against the Governor should be dismissed for lack of jurisdiction.

The Supplemental Petition against the Governor should be dismissed for lack of jurisdiction. Neither this Court's quo warranto jurisdiction, nor its ancillary power to issue "all writs necessary to the complete exercise of its jurisdiction," authorizes this Court to enter the open-ended injunctive relief directed to prospective conduct requested by the Petitioners.

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." *Fla. House of Representatives v. Crist*, 999 So. 2d 601, 607 (Fla. 2008) (emphasis added). This Court recently 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 of Women Voters of Florida v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) ("*League I*).

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 Supplemental Petition does not even attempt to establish a basis for quo

warranto regarding any specific actions that have been taken by the Governor that they assert have exceeded his constitutional authority. Instead, the Petitioners ask this Court to prospectively prohibit the Governor from "taking any further action related to the Commission or its membership" other than preserving public records related to its proceedings. Supp. Pet. at 5, 27. But here, 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 Supplemental Petition should be dismissed for lack of jurisdiction.

Nor does this Court's "all writs" power authorize the relief requested against the Governor. It is well established that the all writs provision "does not constitute a separate source of original or appellate jurisdiction." *See, e.g.*, *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). Instead, this Court's all writs authority "operates as an aid to the Court in exercising its 'ultimate jurisdiction' conferred elsewhere in the constitution." *Id.*; *see also St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1980) ("The all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court's all writs power cannot be used as an independent basis of jurisdiction as petitioner is hereby seeking to use it"). When this Court's jurisdiction has been properly invoked on separate constitutional grounds, the all writs authority may be used to ensure that the Court's jurisdiction over a case on those independent grounds is

not rendered moot. *See, e.g., Amends to Fla. R. Crim. P. 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So. 2d 190 (Fla. 2003) (exercising all writs authority to hold statutory deadline in abeyance while considering petitions invoking this Court's jurisdiction to issue writs of mandamus and to adopt rules of court procedure).

The Petitioners' attempt to invoke this Court's all writs authority in the present case is entirely inappropriate. As described above, the Court has no independent basis to exercise jurisdiction over the Governor under quo warranto or any other ground. The Petitioners ask this Court to exercise its all writs authority over the Governor not to *preserve* the status quo, but to alter it. Supp. Pet. at 5, 27. And the Supplemental Petition fails to identify any circumstances under which it is "necessary" for this Court to exercise its all writs authority against the Governor to protect its ability to completely exercise its jurisdiction. *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968).

The Petition should be dismissed because it seeks relief that is not available under this Court's quo warranto jurisdiction or through its all writs authority.

II. The Petitioners have established no legal basis for the relief sought against the Governor.

Even if this Court had jurisdiction to entertain the Petitioners' claims, their request for relief against the Governor should be denied on the merits. The

Supplemental Petition repeatedly asserts that the nominating process has been "tainted" and should therefore be suspended by the Court—and, vaguely, that the Governor should be prohibited from "taking any further action related to the Commission or its membership." Supp. Pet. at 5, 27. But the remarkably few factual allegations proferred by the Petitioners in support of their grandiose claim of a "tainted" process reveal nothing of the kind.

The Petitioners' evidence of a tainted process? The Executive Office of the Governor has conducted training for members of the judicial nominating commissions as required by the JNC's Rules of Procedure. Supp. Pet. at 15. The Supreme Court JNC has begun the nominating process, and has (thus far) declined the Petitioners' demand for an extension of the application deadline. Supp. Pet. at 3. And Governor Scott has publicly expressed the characteristics that he believes are important in a judge. Supp. Pet. at 15, 23. *See also* Rebecca Ocariz, *The Great Oz: What Really Happens Behind the Curtain of JNC Deliberations* (Fla. Bar Journal June 2018) (noting that Governor Scott "values the opportunity to appoint men and women of integrity, intelligence, and humility to serve on the bench. Above all, the governor is looking for nominees who will follow the law, who will interpret the law according to its plain and ordinary meaning, and who understand the judicial role under our constitution"). The Petitioners' allegations fall far short of establishing any legal basis for the relief sought in their Supplemental Petition,

which should therefore be denied.

The Petitioners base their entire legal theory on a footnote in *Pleus v. Crist*, 14 So. 3d 941, 946 (Fla. 2009), a case in which this Court unanimously affirmed that a governor is "is bound by the Florida Constitution to appoint a nominee from the JNC's certified list, within sixty days of that certification" and that "[t]here is no exception to that mandate." In *Pleus*, Governor Crist purported to reject a certified list of nominees from the Fifth DCA JNC and requested that the JNC reconvene in the interest of diversity to consider the applications of three African-Americans who had applied to fill the vacancy. *Id*. at 942. While recognizing the governor's well-intentioned interest in achieving diversity, this Court nevertheless noted that the Florida Constitution did not grant to the governor the discretion to refuse or postpone making an appointment to fill the vacancy. *Id*. at 946.

In a footnote, the Court in *Pleus* noted that its decision "should not be read to suggest that no remedy would be available" to address a nomination process "tainted by impropriety or illegality." *Id*. at 942 n. 2. The Supplemental Petition seizes on that footnote, desperately attempting to conjure up something that it can label as an "impropriety" or a "tainted" process. But they produce no evidence—and scarcely any allegations—supporting this extraordinary claim.

First, the Petitioners ominously note that the Executive Office of the Governor has provided training to JNC members. Supp. Pet. at 15, 23. But they

fail to acknowledge that Florida law requires the Executive Office of the Governor to provide administrative support for each JNC. § 43.291(7), Fla. Stat.

Second, the Petitioners appear to allege that the nominating process is "tainted" because the Supreme Court JNC has begun the process before the occurrence of a physical vacancy and (thus far) has declined to extend the application deadline. Supp. Pet. at 3. As set forth in the Governor's Response to the prior Petition, however, the nomination process has always taken place before the existence of a physical vacancy in judicial office. This allegation fails to establish any "tainted" process justifying the extraordinary relief sought against the Governor in the Supplemental Petition.

In short, the Supplemental Petition provides no evidence to suggest that Governor Scott has "tainted" the nominating process or threatened the independence of the Supreme Court JNC by, for example, attempting to reject a list of nominees (as Governor Crist did in *Pleus*) or attempting to suspend a Commissioner from office for failing to produce nominees of the governor's choosing. The independence of the judicial nominating commissions is protected by a variety of structural features under the law: 1) Commissioners do not serve at the pleasure of the governor, but may be suspended only for cause; 2) the governor is obligated to appoint four of the nine members from a list of nominees certified by the Board of Governors of The Florida Bar; and 3) the nine Commissioners on

each JNC serve staggered four-year terms, with three of the members' terms expiring in July of the first, second, and fourth years of a gubernatorial term. § 43.291, Fla. Stat.

The Petitioners also fundamentally err in suggesting that a judicial nominating commission is prohibited from considering the Govenor's views regarding potential nominees. When thoroughly vetting the qualifications of potential nominees, a judicial nominating commission may seek relevant information from any source: references provided by the applicants, opposing counsel, judges before whom the applicants have appeared, attorneys who have appeared before the applicants, advocacy groups such as the Petitioners and *amici* in this case, and even members of this Court. The Petitioners themselves have even argued that the Supreme Court JNC must be given the opportunity to show "respect and consideration" to the governor-elect and that it "cannot perform its advisory role" without knowing "the kinds of non-political characteristics the new governor intends to emphasize in chosing among nominees." Pet. at 17. Apparently the only person who the Petititioners believe absolutely *cannot* provide input to the Supreme Court JNC without "tainting" the process is Governor Scott.

The Petitioners cannot establish any legal basis for the relief they seek against the Governor in their Supplemental Petition. It should be denied on the merits.

CONCLUSION

The Petitioners' "Emergency Supplemental Petition for Writ of Quo Warranto and for Constitutional Writ" should be dismissed on jurisdictional grounds or denied on the merits.

Respectfully submitted,

/s/ Daniel E. Nordby
DANIEL E. NORDBY (FBN 14588)
General Counsel
MEREDITH L. SASSO (FBN 58189)
Chief Deputy General Counsel
JOHN MACIVER (FBN 97334)
ALEXIS LAMBERT (FBN 24001)
Deputy General Counsel

EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol, PL-05
Tallahassee, Florida 32399-0001
(850) 717-9310
Daniel.Nordby@eog.myflorida.com
Meredith.Sasso@eog.myflorida.com
John.MacIver@eog.myflorida.com
Alexis.Lambert@eog.myflorida.com

Counsel for Governor Rick Scott

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 5th day of November, 2018, to the following:

John S. Mills
Courtney Brewer
Thomas D. Hall
Jonathan Martin
jmills@mills-appeals.com
thall@mills-appeals.com
cbrewer@mills-appeals.com
jmartin@mills-appeals.com
service@mills-appeals.com

The Mills Firm, P.A.
325 North Calhoun Street
Tallahassee, Florida 32301
850-765-0897

/s/ Daniel E. Nordby
Attorney