**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.

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**PETITIONERS' REPLY TO RESPONSES TO SUPPLEMENTAL PETITION FOR WRIT OF QUO WARRANTO AND FOR CONSTITUTIONAL WRIT**

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THE MILLS FIRM, P.A.

John S. Mills
Thomas D. Hall
Courtney Brewer
Jonathan Martin
325 North Calhoun Street
Tallahassee, Florida 32301

*Counsel for Petitioners*

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## ARGUMENT IN REPLY

As this reply is being finalized, it appears that the voters have spoken and elected Ron DeSantis as governor, though the results have not yet been certified and we all know anything can happen in a Florida election. Nonetheless, for purposes of this reply and tomorrow's oral argument, Petitioners will assume Mr. DeSantis is the governor-elect[1] and will be the one with the authority to appoint three new justices to this Court (unless he fails to take the oath on time or one or more retiring justices fail to complete their terms). Mr. DeSantis is obviously of the same party as Governor Scott, and their views on the kinds of justices they wish to appoint may be the same or may diverge. But this case and the issues it presents remain ripe for resolution. Fortunately, they might now be decided without further suggestions that Petitioners have been pushing a partisan agenda. No issues raised herein depended on who won this election, and the Court should resolve them now so these issues can be finally decided to avoid future end-of-term rushed litigation.

There are three issues yet to be decided by the Court. The first is whether a JNC has authority to make nominations before a vacancy occurs, an issue that was fully briefed before the supplemental petition. The second is whether the Commission had the authority to set the application deadline when and how it did,

[1] If the results change, the reader should simply substitute the word "Gillum" for "DeSantis" in this reply. The arguments are the same.

an issue addressed in Part I. The third is whether the ongoing process has been sufficiently tainted as to warrant the Court halting it until January 8 so that its remedy on the first two questions can be fully effectuated, which is addressed in Part II.

But first, there is a matter affecting all three issues that is worth (re)addressing up front. A common theme in Respondents' arguments on all three issues is that the Court should look less to the actual language in the laws at issue, and instead adopt their preferred policies because, essentially, "that's the way it's been done" and this Court should feel bound by "precedents" that are historical, rather than established by case law. But the manner of prior nominations or appointments of justices of this Court or judges of any other court should have no bearing.

Petitioners refer the Court to section II(B)(3) of their October 1, 2018, reply on the original petition for why this is so. Those arguments apply equally to the issues raised in the responses to the supplemental petition, and Respondents made no attempt to rebut them. One of the most important is the continuing inaccurate suggestion that Petitioners' arguments have any application to vacancies resulting from resignations. Nothing in Petitioners' arguments suggest that a JNC cannot or should not begin its work immediately upon learning a judge has submitted his or her resignation or that a vacancy is being created for a whole host of other reasons

not at issue here. To the contrary, Petitioners recognize that a JNC **can** receive and review applications (and nominate for that matter) once a judge has submitted a resignation (even one with a future effective date), once a judge dies or is removed from office, once a judge has an unexplained absence for at least sixty consecutive days, once a judge moves residency outside the territorial jurisdiction of his or her court, or upon failing to qualify (e.g., failing to take the oath) within thirty days of commencing a term. Art. V, § 3, Fla. Const.; *see also Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1092 (Fla. 2006) ("*Mandatory Retirement*") (citing *Spector v. Glisson*, 305 So. 2d 777, 779 (Fla. 1974), and noting that when a vacancy occurs due to an expired term due to mandatory retirement is different in light of art. V, §§ 10 and 11).

No matter how hard Respondents try to suggest otherwise, Petitioners have not and are not calling into question **any** past processes. Even as to past nominations that are factually similar to the ongoing process (i.e., vacancies created by an expired term), we are undeniably at a very different place in our State's history and that of our judiciary. Few worried over the letter of the law on these issues before because however imperfect the process might have been, JNCs appeared to be working in non-partisan fashion, and in any event, the governors making the appointments had no concerns. Indeed, the only example cited by Respondents involving a vacancy occurring the day a different governor took

office arose at a time when the original Askew plan was in force, and Governor Chiles had only appointed three of the nine JNC members. Even then, Governor Bush officially signed off on the appointment by signing the commission.

Though section 43.291 granted them substantial new authority with regard to the nomination process undercutting the independence of JNCs, Governors Bush and Crist acted with restraint – they never rejected a slate of JNC nominees by the Bar, for example, and made appointments broadening the diversity of the appellate courts, appointing judges and justices of different genders, races, party registration, and practice background. Worries over the independence of JNCs were largely hypothetical back then. But Governor Scott has pushed his authority to, if not beyond, the limits. *See Editorial: A Chess Piece in a Political Game?*, Ocala Star Banner, Nov. 5, 2018, *available at* https://www.ocala.com/opinion/20181105/editorial-chess-piece-in-political-game (noting that JNCs are supposed to follow an "impartial process" that Governor Bush may have injured by supporting and signing § 43.291, but concluding that "Gov. Rick Scott has finished it off"). While the governor's office is not changing parties, these issues remain ripe and deserving of sober reflection and considered resolution. The governor-elect is entitled to make these appointments, and to whatever extent his preferences may diverge from Governor Scott, the process must reflect that the Commission is making nominations in its capacity as advisor to him, not Governor Scott.

## I. THE COMMISSION HAD NO AUTHORITY TO SET THE OCTOBER DEADLINE FOR APPLICATIONS.

Respondents' arguments rely on a footnote by Justice Cantero in a concurring opinion where he expressed the view that the constitution does not prohibit a JNC from starting its work before a vacancy occurred as a result of mandatory retirement.[2] *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090, 1094 n.6 (Fla. 2006) ("*Mandatory Retirement*"). Though this observation drew only one other vote of support (Justice Bell) and, thus, did not reflect the majority view, Petitioners decided not to challenge, but to embrace it. While the Court is certainly not bound by that concession in considering whether to grant relief, every one of Petitioners' arguments would be equally valid if that footnote had appeared in the unanimous opinion of the Court.

The Commission argues it would "violate separation of powers" for this Court to find the Chair had no authority to set the October 8 deadline, relief the Commission also argues is "inappropriate" in a quo warranto proceeding. The gravamen of both arguments appears to be the proposition that this Court can only

[2] Again, this is only an issue where there is a vacancy created by an expired term. The constitution authorizes not just applications, but nominations when there is a resignation submitted, even with a future effective date. So there is no dispute that when a judge submits a resignation, the process can begin immediately.

test a public agency's authority to act under the constitution or maybe under a statute, but not under an agency's own rules of procedure. The Commission cites no on-point authority for this remarkable proposition,[3] and in any event, the issues of whether a JNC must operate in conformity with established rules of procedure and how a JNC may act **are** questions of constitutional law.

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[3] The cases it cites have no bearing on the issue before the Court. *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998), only addressed a challenge to the constitutional authority of the Legislature to take a challenged action (overriding a veto). In any event, nothing in that opinion suggests that quo warranto is only available to determine whether the constitution, as opposed to some other source of law, authorizes a certain action.

*Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984), did not even involve quo warranto. While it did address jurisdiction in a declaratory action to determine whether another branch of government (the Legislature) had complied with its internal rules, there was no constitutional provision that required the Legislature to establish any set of rules. Rather, it involved art. III, § 4(a), which merely said that each house gets to decide its own procedures and had long been interpreted as "giv[ing] each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of **laws** are not violated." *Id.* at 1021. In contrast, art. V, § 11(d) not only requires JNCs to adopt formal rules of procedure, but makes clear that they are binding by giving two different branches (the Legislature and this Court) the authority to repeal the rules. How can authority to repeal a rule have any meaning if a JNC could decide which of its rules to follow, waive, or suspend?

Finally, in *State ex rel. Bruce v. Kiesling*, 632 So. 2d 601 (Fla. 1994), the Court **did** exercise quo warranto jurisdiction to consider whether a nominating council's (not a JNC's) actions were authorized in light of its internal rules, but denied the writ because it found that the rules that authorize the challenged action were beyond the council's authority. *Id.* at 604.

Article V, section 11(d) requires JNCs to establish rules of procedure, which are subject to repeal by the Legislature or this Court. The constitution imposes additional procedural requirements that JNCs are not free to ignore. Section 11(d) requires that all JNC proceedings and records be open to the public other than deliberations. Article V, section 20(c)(6) provides, "All acts of a judicial nominating commission shall be made with a concurrence of a majority of its members." While that provision can be changed by general law, the Legislature has chosen to reinforce it, restating this precise provision in section 43.291(2), Fla. Stat. (2018). Finally, as a collegial body that, though independent, falls under the executive branch, JNCs are subject to article I, section 24(a) and (b) providing a public right of access to their records and meetings and requiring that all meetings of the Commission be "open and noticed to the public."

Now that all of the relevant facts are laid bare by the parties including the Commission's admission that the deadline was set unilaterally by the chair without consulting the other members, it should be clear that the Commission had no authority to impose the October 8 application deadline. Respondents offer no actual legal argument as to why the same words in the Commission's rules that applications may be accepted and reviewed "[w]henever a vacancy occurs" should be interpreted differently than this Court unanimously interpreted them in article V, section 10 in *Mandatory Retirement*. Giving these same words a different

meaning would be especially arbitrary and capricious because the *Mandatory Retirement* concurring opinion specifically alerted the Commission and every other reader that the rules were relevant to this very issue. These words have a plain meaning, and the Commission's ironic argument that it is not bound by that and is free to interpret its own rules as its own policy choices dictate must be rejected.

And even if the rules allowed a pre-vacancy application deadline, they do not and could not as a matter of constitutional law allow the chair to unilaterally set the deadline as he pleases without a public meeting and without a majority vote, particularly where the chair has done so to implement a gubernatorial directive that has already been adjudicated to be unconstituitonal. The act of rejecting a request to extend the deadline without even sharing it with the rest of the commissioners to solicit their views is equally invalid. The constitution and general law make clear that "all acts" of a JNC require "a concurrence of a majority of its members." Art. V, § 20(c)(6), Fla. Const.; § 42.391(2), Fla. Stat.

The Commission knows that the setting of the application deadline is not only a "really important" act, but one of the "most critical" acts the Commission takes in the process leading to the nomination. (App.[4] 23-24.) The Commission has also been trained that this is a task that should be determined by the JNC at a

[4] A transcript prepared from the video links to the training materials that were cited in the supplemental petition appears in the appendix hereto, which is cited as "App."

publicly noticed meeting, even if it is just done by phone. (App. 25; *see also* App. 131-32 (assistant attorney general responsible for open government issues advising JNCs of public meeting requirements, which apply to any gathering of two or more members to discuss commission business, a definition taken from the commentary to art. I, § 24); App. 43 (Chair Unger noting that not only was he present for the training sessions but so were "the majority of my JNC").)

In short, it is the constitution and section 43.291 that require all acts of a JNC to be taken pursuant to a majority vote at a properly noticed public meeting, so whether the rules would independently require such a meeting is irrelevant. In any event, the Commission's suggestion that setting an application deadline is just a "ministerial" act that can be performed by the chair unilaterally not only mangles the word "ministerial" with no support in the constitution, general law, or the Commission's rules, but also contradicts the rules' clear statement that the deadline is "established by the Commission." (Supp. Pet. App. 2.)

## II. THE CURRENT PROCESS HAS SUCH AN APPARENT TAINT THAT IT SHOULD BE HALTED ALTOGETHER SO THAT IT MAY RESTART ON JANUARY 8, 2019.

The other relief Petitioners seek is not quo warranto relief at all, but collateral relief under this Court's all writs authority to ensure that the quo warranto relief it may grant is not undermined. This claim does implicate whether there is at least the appearance of a taint to the ongoing process. As the *Pleus*

footnote rightly implies, the new governor will not be bound by nominations that are the result of a tainted process, so an unnecessary rush to provide him nominations on January 8, 2019, could undercut the very concern all have here – that we avoid prolonged vacancies. If he agrees the process has been tainted to limit his choices to only those that would be acceptable to Governor Scott, he should be free to reject the nominees and, if he finds sufficient evidence that one or more members of the Commission materially violated their rules or otherwise engaged in misfeasance, he may have authority to suspend them for cause.

Freezing everything at this point is far better for the process and ensures that the new governor will be able to fully exercise the authority this Court's quo warranto relief should make clear he has. The status quo should be preserved as soon as possible so that he can have the opportunity,[5] once his term begins, to address the situation with the Commission, whose job is to advise him after all, not to advise Governor Scott as it continues to claim. That is the best way to avoid disputes over whether the process was, in fact, tainted to the point that he will not be bound by the result.

Governor Scott's role in creating the problems with this process can hardly be overstated. The only reason we even have a JNC rushing what should be a more

[5] Petitioners, of course, do not purport to speak for any party or politician. Should Governor-elect DeSantis seek to intervene or be heard and declare he has no concerns that would warrant this relief, he is free to do so.

deliberative and considered process with a more open application deadline is Governor Scott's order that the Commission make its nominations by November 10. The JNCs' training materials advise that they should "always back up our schedule from the due date that the governor's office gives us." (App. 24.) But Governor Scott has no authority to impose deadlines, as this Court has found and the Commission's counsel conceded. That the Commission has continued its interview process with the stated goal of being finished in time so Governor Scott can participate in the vetting process even after this Court has ruled he will have no role in that process (unless something entirely unexpected occurs) only heightens concerns about the Commission's impartiality.

In any event, the deadline from which the Commission should set its schedule should be the last date it can make nominations, not the first moment, which is what November 10 would be if the Court accepts the Commission's alternative argument that it can make nominations within a thirty- to sixty-day period before or after a vacancy. This is not just common sense, but a point made in the Commission's own training materials, which recommend "starting with the date that we're obligated to give the names up to the governor and work backways from there, and typically what we'll do is have the interviews at the very latest we can in that period." (App. 29.) Yet the Commission does the opposite.

The concerns about the application deadline have nothing to do with whether potential applicants had sufficient notice. Respondents miss the points made by the Petitioners and by all the amici. The point they continue to avoid is that members of the Bar who know from history and his public statements that Governor Scott is unlikely to consider them have had a strong incentive not to apply. Potential applicants who are registered Democrats, have a history of being trial lawyers representing plaintiffs in tort litigation, or are perceived as "liberal" have long known they have had no chance of being appointed by Governor Scott, but might have a different calculus now that it is known Governor Scott will not be making these appointments. *See, e.g.*, John Romano, *Rushing Ahead with Florida Supreme Court Interviews Is a Great Idea for One Demographic*, Tampa Bay Times, Nov. 6, 2018, *available at* https://www.tampabay.com/news/courts/Rushing-ahead-with-Florida-Supreme-Court-interviews-is-a-great-idea-for-one-demographic_173285272 ("[T]he kind of judges who might expect Scott to appoint them to the Supreme Court would probably be very different from the judges who might apply if, say, Andrew Gillum were governor.").

Whether the belief that Governor Scott would make the appointments chilled some potential applicants from applying requires no speculation, as amici have represented quite clearly to this Court that they are, in fact, "aware of highly qualified women and minorities who will apply if the deadline is extended."

(Amicus Br. of FAWL et al. at 12.) The undersigned made a similar representation in conveying Petitioners' request to extend the deadline. (*See* Supp. App. 5 ("Since we filed the petition, I have heard from several potential applicants whose decision whether to apply depends on the results of next month's election.")[6] Again, the risks of applying when you have no chance of being appointed are especially severe for private practitioners who have clients and employers to think about. Respondents fail to address these arguments at all.

Moreover, the qualifications for these positions have changed since the application deadline. Amendment 6 passed. The mandatory retirement age will be 75 come next July. There may well be particularly qualified applicants – for example, district court of appeal judges nearing seventy – who wish to apply now that they know they can serve until their seventy-fifth birthday.

That the Commission now hints that maybe it will reopen the deadline after all, contrary to its flat refusal to do so when requested by Petitioners, only demonstrates that there is no prejudice to **anyone** in extending the deadline. The relief Petitioners are requesting will not prejudice any current applicant. All but a

[6] Whether those potential applicants will wish to apply now that Mr. DeSantis has won the election may depend on any statements he chooses to make on the subject. He may conclude that a diverse, representative, and well-rounded judicial branch may result from making clear that he is willing to appoint qualified judges who will follow the law even if they happen to be trial lawyers, registered in the opposing party, or even have supported or expressed personal views that diverge from his own.

handful of the interviews have either already taken place or will have taken place by the time of oral argument. So there is no risk of inconveniencing those applicants at this point. The only question is whether additional applications will be accepted and reviewed fairly on the same terms.

Respondents have also missed the point of Petitioners' reference to the training materials Governor Scott's office prepared for the Commission. The point was not intended to suggest there is anything improper with the governor providing training. There is not. It is what is in those videos, which have now been transcribed and included in the appendix hereto, that contributes to concerns over a tainted process. After Petitioners had suggested the Commission wait for the election so the new governor can provide at least non-partisan input as to what he is looking for in judges, the Commission responded with accusations that allowing a JNC to receive that kind of input would be improper and make JNCs just another "arm of the governor" in violation of the policy that they be independent. (Comm'n Resp. to Original Pet. 14.) But the training video shows that both Governor Scott and his general counsel directly addressed these issues with the commissioners. (App. 5-10.) That the Commission is trained to act as an "arm" of Governor Scott, but refuses to wait to allow the new governor to have a similar discussion is strong evidence of a process designed to impose the policy choices of Governor Scott and his appointees on the new governor. The Commission has lost

sight of the fact that its role here should be as advisor to the new governor, not Governor Scott.

In contrast to the Commission's prior response to this Court recognizing it should not be acting as a mere "arm of the governor," the training materials tell JNC members that while "there has been some controversial discussion … as to whether they are constitutionally independent," the "greater weight of authority is that they are an arm of the executive appointment power of the governor." (App. 91.) And one of Governor Scott's former general counsels explained that since section 43.291 moved administrative support from the Bar to the governor, "the governor is much more in command of the JNCs beyond the constitutional power to appoint." (App. 92.) He explained that "staff oftentimes paints and colors what JNCs do." (App. 92.) A process where any governor, let alone a governor who will not be making the appointments, has such "command" over the JNCs that he can provide a staff to "paint and color" what the JNCs do is exactly the kind of tainted process that concern Petitioners and the public.

The scenario everyone should fear is a governor who contacts each of his appointed members to not just express the non-partisan traits he is looking for in judges he hopes to appoint (something that is perfectly appropriate), but to also suggest specific names and ask they be included among nominations. Incredibly, nothing in the Commission's rules prohibit that. The only prohibition on

communication with the governor is to restrict a commissioner's ability to lobby the governor **after** the nominations have been made. (*See* Supp. App. 14-15 (prohibiting commissioners from contacting the governor's office after nominations are made, but allowing them to answer questions if he contacts them).) The training materials highlight there is no prohibition on speaking with the governor's office before nominations are made, and one of Governor Scott's prior general counsels admitted that he had reached out to the governor's office himself before nominations were made when he served on a JNC. (App. 110-11.)

In considering whether this might be a partisan process that violates not only the spirit of a JNC but also the Commission's rules flatly prohibiting bias, it is useful to briefly consider the backgrounds of the Commission's members. This is not an ad hominem attack on the members, nor is it a comment on their qualifications. Petitioners referenced their partisan backgrounds solely to show that, at least from a public perception standpoint, most of these fine men and women were selected for this position because they share the policy goals and views of Governor Scott – indeed, most are expert policy makers or at least influencers. That is fine and does not disqualify them, but it does tend to contribute to reasonable fears that they may have difficulty putting aside their personal policy preferences to fairly consider applicants whose personal views might not match those of Governor Scott. Just as a law enforcement officer, prosecutor, defense

lawyer, or former criminal defendant is not automatically disqualified for cause from serving as juror in a criminal case does not mean that it is unreasonable to have some concern and seek reassurance that they can set aside personal opinions and experience to render an impartial judgment.

These concerns are only heightened by Respondents' assertions that the commissioners are being attacked with no acknowledgement that there are at least worrisome circumstances to dispel. At no point in this litigation or in anything the Commission has communicated to applicants or the public has there been any assurance that the concerns expressed not just by Petitioners but by media all over the state can be laid to rest. It might have gone a long way, for example, if there was some statement in the response or to interviewees that everyone can relax because the Commission intends to nominate the most qualified applicants even if they may not be the kind of applicants Governor Scott would appoint.

Instead, the Commission's response attacks the motives of Petitioners, their counsel, and journalists. And the interviews already underway have, in the eyes of one observer in the media at least, "seemed designed to pry open the applicants' ideological beliefs," sought to have applicants identify opinions they disagree with, and identify the members of this Court they would "most emulate." Andrew Pantazi, *Before Next Governor Is Chosen, Florida Supreme Court Hopefuls Face Ideological Test*, Florida Times-Union, Nov. 4, 2018, *available at*

https://www.jacksonville.com/news/20181104/before-next-governor-is-chosen-florida-supreme-court-hopefuls-face-ideological-test. The JNC training materials actually encourage JNC members to "ask questions about how [applicants] would judge matters before them," how an applicant would "approach things … from a legal or a philosophical standpoint," and how an applicant would subjectively decide "actual legal questions in front of them." (App. 39.) It seems the JNCs are intent on getting applicants to violate the Code of Judicial Conduct, which prohibits judges and those seeking to be judges from making any "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." Fla. Code Judicial Conduct 7A(3)(e)(i).

The training materials also make the point that to serve in its role as advisor to the governor, JNCs should strive to nominate six applicants for each vacancy whenever possible, but that a unique voting system in this Commission's rules are "built in" to only send up three names and "[a]nything above three is the exception, not the rule." (App. 32-33.) One speaker implored the Commission to vet this issue and change its rules to fix this problem because "it's built in to kind of restrain the governor's ability to appoint, which I don't think is really probably optimal." (App. 33.) The voting procedures have not changed, so the Commission appears intent on sticking with a system designed to place the maximum restraint on the governor's appointment power. That may be no real concern where commissioners and the

governor share the same preferences for the kinds of judges they want to see, but it paints a partisan process when their views diverge, as now appears to be the case.

The best way to ensure the Court can provide a fully effective writ of quo warranto determining that applications must be received and reviewed on or after January 8, 2019, with nominations to follow that date and, indeed, the only way to prevent this important process from appearing even more tainted as time goes on is to exercise the Court's all-writs authority to maintain the status quo and order that all further proceedings be halted so they can resume in the normal course on January 8, 2019. *See Editorial: A Chess Piece in a Political Game?*, Ocala Star Banner, Nov. 5, 2018, *available at* https://www.ocala.com/opinion/20181105/editorial-chess-piece-in-political-game (calling for the ongoing process to "be stopped and allowed to continue by either DeSantis or Gillum when one or the other takes office"); John Romano, *Rushing Ahead with Florida Supreme Court Interviews Is a Great Idea for One Demographic*, Tampa Bay Times, Nov. 6, 2018, *available at* https://www.tampabay.com/news/courts/Rushing-ahead-with-Florida-Supreme-Court-interviews-is-a-great-idea-for-one-demographic_173285272 (characterizing decision to "plow right ahead with the process" despite this Court's recent ruling not just "a little premature," but "maybe even a slap in the face to current Supreme Court members who are just days from discussing this very issue").

Respectfully submitted,

THE MILLS FIRM, P.A.

/s/ John S. Mills
John S. Mills
Florida Bar No. 0107719
jmills@mills-appeals.com
Thomas D. Hall
Florida Bar No. 0310751
thall@mills-appeals.com
Courtney Brewer
Florida Bar No. 0890901
cbrewer@mills-appeals.com
Jonathan Martin
Florida Bar No. 117535
jmartin@mills-appeals.com
service@mills-appeals.com (secondary)
The Bowen House
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

*Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the following by email on November 7, 2018:

*Counsel for Respondent, Gov. Rick Scott*

Daniel E. Nordby
Meredith L. Sasso
John MacIver
Alexis Lambert
EXECUTIVE OFFICE
OF THE GOVERNOR
The Capitol, PL-05

*Counsel for Respondent, Jason L. Unger*

George T. Levesque
GRAYROBINSON, P.A.
301 South Bronough Street
Suite 600
Tallahassee, Florida 32301
George.levesque@gray-robinson.com
Mari-jo.lewis-wilkinson@gray-

Tallahassee, Florida 32399-0001
Daniel.Nordby@eog.myflorida.com
Meredith.Sasso@eog.myflorida.com
John.MacIver@eog.myflorida.com
Alexis.Lambert@eog.myflorida.com

robinson.com
Teresa.barreiro@gray-robinson.com

*Counsel for Respondent, Florida Supreme Court Judicial Nominating Commission*

Raoul G. Cantero
WHITE & CASE LLP
Southeast Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, Florida 33131-2352
Raoul.cantero@whitecase.com

/s/ John S. Mills
Attorney

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

/s/ John S. Mills
Attorney