

**IN THE SUPREME COURT OF FLORIDA**

ROBERT J. PLEUS, JR.,

Petitioner,

v.

Case No. SC09-565

HON. CHARLES CRIST,  
GOVERNOR,

Respondent.

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**ON ORIGINAL PETITION FOR WRIT OF MANDAMUS**

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**AMICUS BRIEF OF  
THE CENTRAL FLORIDA ASSOCIATION  
FOR WOMEN LAWYERS**

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**TABLE OF CONTENTS**

Table of Contents .....i

Table of Citations .....ii

Statement of Identity and Interest of Amicus Curiae..... 1

Summary of the Argument ..... 1

Argument .....2

**THE RESPONDENT CAN APPOINT A NOMINEE FROM THE LIST CERTIFIED AND HE CAN PRESERVE THE INTEGRITY OF THE JUDICIAL SELECTION PROCESS AND SERVE THE INTEREST OF GENDER DIVERSITY BY, FOR THE FIRST TIME IN ALMOST 20 YEARS, APPOINTING A FEMALE TO THE FIFTH DISTRICT COURT OF APPEAL. ....2**

Conclusion .....9

Certificate of Service..... 11

Certificate of Compliance ..... 11

## TABLE OF CITATIONS

### CONSTITUTIONAL PROVISIONS

Article V, Florida Constitution .....	9
Article V, Section 11, Florida Constitution .....	1, 2
Article V, Section 11(a), Florida Constitution.....	2
Article V, Section 11(c), Florida Constitution.....	2, 5

### OTHER AUTHORITIES

In re Advisory Opinion to the Governor, 600 So. 2d 460 (Fla. 1992) .....	3
Dahlia Lithwick, <i>The Fairer Sex, What do we mean when we say we need more female Justices</i> , Slate, April 11, 2009, <a href="http://www.slate.com/id/2215833">http://www.slate.com/id/2215833</a> .....	8
Ciara Torres-Spelliscy et al., Brennan Center for Justice at New York University School of Law, <i>Improving Judicial Diversity</i> (2008) .....	6
Standing Committee on Fairness and Diversity, Florida Supreme Court, <i>Final Report: Perceptions of Fairness and Diversity in the Florida Courts</i> (March 14, 2008) .....	6
U.S. Census Bureau, State & County QuickFacts, <a href="http://quickfacts.census.gov/qfd/states/12000.html">http://quickfacts.census.gov/qfd/states/12000.html</a> (last visited April 22, 2009) .....	7

## **STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE**

This amicus brief is filed on behalf of the Central Florida Association for Women Lawyers (“CFAWL”), a group comprised of 260 men and women lawyers whose practices are located within the jurisdiction of Fifth District Court of Appeal, and who believe the Governor can fulfill his laudable goal of “diversity” while maintaining the integrity of Florida’s judicial selection process. CFAWL is concerned that the Respondent appears to have overlooked the need to improve gender diversity on the Fifth District – a court that has not had a female appointment in almost 20 years.<sup>1</sup> While diversity is not a legal issue in this case it is an important underlying concern that should not be ignored.

### **SUMMARY OF THE ARGUMENT**

Article V, Section 11 of the Florida Constitution mandates that the Governor shall select one of the nominees certified by the appropriate judicial nominating commission within 60 days. The Respondent can accomplish his goal of diversity and satisfy his constitutional obligations by choosing from the candidates that have already been certified.

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<sup>1</sup> CFAWL’s concerns are statistically supported. The Fifth District currently has nine active judges and four senior judges. Of those 13 judges, only one (an active judge) is a woman, Judge Jacqueline R. Griffin, who was appointed in 1990.

## ARGUMENT

**THE RESPONDENT CAN APPOINT A NOMINEE FROM THE LIST CERTIFIED AND HE CAN PRESERVE THE INTEGRITY OF THE JUDICIAL SELECTION PROCESS AND SERVE THE INTEREST OF GENDER DIVERSITY BY, FOR THE FIRST TIME IN ALMOST 20 YEARS, APPOINTING A FEMALE TO THE FIFTH DISTRICT COURT OF APPEAL.**

Article V, section 11 of the Florida Constitution provides:

Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy by appointing . . . one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.

Art. V, § 11(a), Fla. Const. This duty is mandatory. *Id.* Moreover, the governor is required to appoint one of the three to six nominees certified by the judicial nominating commission within 60 days. *See* Art. V, § 11(c), Fla Const.

In the present case, on September 2, 2008, the Petitioner notified the Respondent of his upcoming mandatory retirement in January of 2009 (Petitioner's Exhibit A). The Petitioner informed the Respondent well in advance of his retirement for the express purpose of avoiding a vacancy on the court (Petitioner's Exhibit A). The Respondent accepted the resignation and acknowledged the

importance of minimizing any disruption to the court “by making timely judicial appointments . . . .” (Petitioner’s Exhibit B).<sup>2</sup>

On September 8, 2008, the Respondent, through his counsel, notified the Fifth District’s judicial nominating commission (“the JNC”) that it must convene to submit the names of “highly qualified individuals” for his consideration (Petitioner’s Exhibit B). The Respondent’s counsel also expressed the Respondent’s belief that Florida’s judges “should reflect the racial, *gender* and geographic diversity of the people they serve” and requested that the commission send the “maximum number of nominees (six)” to accomplish that goal (Petitioner’s Exhibit B) (emphasis added).

When the Respondent convened the JNC to fill the Petitioner’s seat, the Respondent’s counsel informed the JNC that it must complete its work by November 7, 2008, and that this deadline was “final,” because it is mandated by Florida’s Constitution (Petitioner’s Exhibit B).

The JNC advertised for the position and received 26 applicants (Petitioner’s Exhibit E). All applicants were investigated and interviewed by the full commission in a public forum. On November 6, 2008, after considerable deliberation, the JNC timely tendered the names of the maximum number of

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<sup>2</sup> Indeed, the intent of the framers of the Florida Constitution was that judicial vacancies be “minimized” by completion of the selection process before the vacancy occurs. *See In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462-63 (Fla. 1992).

nominees (Petitioner's Exhibit C). Two of the nominees are female and four are male, representing four counties within the Fifth District. None are African-American.

On December 1, 2008, without having interviewed any of the applicants or nominees, the Respondent purported to reject the list of nominees because none were African-American. The Respondent suggested that the JNC had not followed his request for diversity and that his rejection of the list was in the "interest of diversity on our courts" (Petitioner's Exhibit D). Although the Respondent had specifically noted the need for "gender" diversity in his letter dated September 8, 2008, he failed to acknowledge that two of the nominees – a full one third of the list – are female. Importantly, the Respondent did not choose this opportunity to appoint one of the women nominees.<sup>3</sup>

The JNC replied to the Respondent's request by letter dated December 4, 2008 (Petitioner's Exhibit E). The JNC stated that it had submitted the names of the six most qualified individuals, and had taken into consideration "racial, ethnic

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<sup>3</sup> This was not the Respondent's first opportunity to appoint a woman to the Fifth District Court of Appeal. In January of 2008, the Respondent passed over a qualified female nominee from Ocala, Angela C. Flowers, and instead appointed a white male from Orlando. The Respondent made the appointment even though the Fifth District has only one female judge, the fewest of any appellate court in Florida, and that no governor has appointed a female to the Fifth District since Judge Jacqueline R. Griffin was appointed in 1990.

and gender diversity” (Petitioner’s Exhibit E, at 2). The Respondent again rejected the JNC’s nominees.

The Respondent did not make the appointment by the January 5, 2009, deadline.<sup>4</sup> Instead, on January 13, 2009, he wrote the JNC and sought other nominees.<sup>5</sup>

The JNC responded, noting that “the State’s interest in diversity was properly considered” and that the prior list of names was the “most qualified” applicants for the nomination.<sup>6</sup> The JNC further stated that, according to the Attorney General, it did not have the authority to withdraw the list and certify a new list.<sup>7</sup> The JNC requested that the Respondent provide contrary legal authority if he believed any existed.<sup>8</sup> To date, the Petitioner’s vacancy remains unfilled.

With all due respect to the Governor and his commendable attention to racial diversity, the Governor can achieve his diversity goal by making the appointment

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<sup>4</sup> Art. V, section 11(c) of the Florida Constitution states: “[T]he governor shall make the appointment within 60 days after the nominations have been certified to the governor.” *See also In re Advisory Opinion to the Governor*, 600 So.2d 460, 462-63 (Fla. 1992) (recognizing that governor shall make appointment within 60 days).

<sup>5</sup> Petitioner’s Notice of Filing of Additional Correspondence (Respondent’s letter dated January 13, 2009).

<sup>6</sup> Petitioner’s Notice of Filing of Additional Correspondence (JNC’s letter dated January 21, 2009).

<sup>7</sup> Petitioner’s Notice of Filing of Additional Correspondence (JNC’s letter dated January 21, 2009).

<sup>8</sup> *Id.* (JNC’s letter dated January 21, 2009, at 2).

from the list of six nominees certified by the JNC. The Respondent has the opportunity to foster diversity by helping to fill a gender gap – a gap that has been gaping open for almost 20 years – by selecting a woman to fill the vacancy caused by the Petitioner’s retirement.

Gender diversity is important and simply has not yet been achieved, especially at the appellate level. According to a recent study conducted by the Brennan Center for Justice at New York University School of Law, white males are over-represented on state appellate benches by a margin of nearly two-to-one. Ciara Torres-Spelliscy et al., Brennan Center for Justice at New York University School of Law, *Improving Judicial Diversity*, at 1 (2008). There are still fewer female judges than male, despite that the majority of today’s law students and recipients of *juris doctorate* degrees are female. *Id.* In addition, although Florida has aggressive diversity provisions in its selection of members to its judicial nominating commissions, only 19% of Florida’s appellate judges are women. *Id.* at 19. Most importantly, only one female judge currently presides on the Fifth District Court of Appeal– the very court at issue.

"Justice in Florida will be accessible, fair, effective, responsive, and accountable." Florida Supreme Court Standing Committee on Fairness and Diversity, *Final Report Perceptions of Fairness and Diversity in the Florida Courts*, at i (March 14, 2008) [hereinafter *Diversity in the Florida Courts*]. The

Standing Committee explains that to be fair, to adequately serve the people of Florida, and to enhance the credibility of our justice system, Florida's judicial branch should include judges and court staff that reflect the community's diversity. *Id.* at 5. A diverse bench lends itself not only to fairness in the courtroom, but also to confidence in the judicial system.

Unfortunately, according to the Standing Committee's report, court participants believe that women are treated with disrespect and overall bias in the courtroom. *Id.* at 48. The Committee further found that Florida's judges do not yet fully reflect the diversity of the communities they serve. *Id.* at 10. Clearly, the lack of gender diversity in the judicial branch reflects poorly on Florida's judicial system and diminishes the integrity of the legal process.

The Standing Committee urged the Florida court system to be ever vigilant in identifying and eliminating impediments to fair treatment, especially bias based on a protected class such as gender. *Id.* at 10. One way to accomplish this goal is to ensure that the composition of the judicial bench reflects the diversity of the community it serves. To that end, we bring to the Court's attention the following statistical data reflecting the composition of the community in the present case compared to the composition of its bench as it relates to gender.

According to the U.S. Census Bureau, in 2007, women comprised over 50% of the Central Florida and Florida populations. U.S. Census Bureau: State &

County QuickFacts, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited April 22, 2009). Despite a relatively equal gender composition, in 2007, Florida's judiciary was 70.9% male and only 28.6% female. *See Diversity in the Florida Courts*, at 6). That same year, the JNC recommended six male candidates and only three female candidates to the Governor for appointment to the Fifth District Court of Appeal. *Id.* at 7. No female candidate was appointed. In fact, since her appointment in 1990, Judge Jacqueline R. Griffin is the only female judge appointed to serve on the Fifth District Court of Appeal out of the 12 ensuing appointments. Of the 12, one appointment was an African American male and the other 11 appointments were all white males.

The importance of having women serve on the bench should not be overlooked. As recognized in *The Fairer Sex, What do we mean when we say we need more female Justices*:

[Y]ou can be the most empathetic, open-minded, and sensitive jurist in all the world – and still be a complete dolt about gender. It's why liberal lion William Brennan could write so expansively about equality and fairness and justice while still refusing to hire female law clerks. It's why Ginsburg was denied a clerkship with the legendary judge Learned Hand. (He refused to hire her because he liked to use salty language).

Dahlia Lithwick, *The Fairer Sex, What do we mean when we say we need more female Justices*, Slate, April 11, 2009, <http://www.slate.com/id/2215833>.

We like to think we have come far since the time Justice Ginsburg could not obtain a clerkship. However, the reality that, despite numerous qualified female candidates being certified, *not a single woman* has been appointed to the Fifth District Court of Appeal in almost 20 years demonstrates that we have not come as far as we have hoped. The Respondent should recognize his opportunity to right this wrong.

### **CONCLUSION**

It is respectfully submitted that the list certified by the JNC, in accordance with Article V of the Florida Constitution, accomplishes the Respondent's diversity goal by giving due consideration to the lack of gender diversity on the Fifth District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Talbot D'Alemberte, Esquire**, 1117 Myers Park Drive, Tallahassee, Florida 32301, attorney for Petitioner Robert J. Pleus, Jr., and **Erik Figlio, Esquire and Jason Gonzalez, Esquire**, General Counsel, Executive Office of the Governor, 400 S. Monroe Street, Room 209, Tallahassee, Florida 32399, attorney for Respondent Governor Charles Crist, by U.S. mail this 23<sup>rd</sup> day of April, 2009.

*/S/Keersten Heskin Martinez*

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

*/S/Keersten Heskin Martinez*

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