

IN THE SUPREME COURT OF FLORIDA

ROBERT J. PLEUS, JR.,

Petitioner,

vs.

Case No. SC09-565

CHARLIE CRIST, GOVERNOR,

Respondent.

**RESPONSE OF GOVERNOR CRIST IN OPPOSITION TO
THE PETITION FOR WRIT OF MANDAMUS**

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BACKGROUND

Section 43.291(4), Florida Statutes, requires that the Governor, in making appointments to judicial nominating commissions, “seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity . . . of the population within the territorial jurisdiction of the court for which nominations will be considered.” This provision has the clear direct purpose of seeking to remediate, when appropriate, racial, ethnic, and gender underrepresentation on judicial nominating commissions, with the much greater, and no less clear, indirect purpose of seeking to remediate racial, ethnic, and gender underrepresentation on the courts themselves. This Court has demonstrated similar commitment to diversity in the judicial branch by convening its Standing Committee on Fairness and Diversity, which has expressed concern that “[t]he Florida justice system . . . does not yet fully reflect the diversity of those it serves,” Florida Supreme Court Standing Committee on Fairness and Diversity, *Executive Summary: Perceptions of Fairness in the Florida Court System* (2008), at 9-10, and its “confiden[ce] that Governor Crist will follow in the footsteps of his predecessors by further enhancing the diversity of Florida’s judiciary,” at 5.

The Governor concurs with these statements of intent and has made it one of the missions of his administration to address, when possible, the historic underrepresentation of minorities on courts throughout the State of Florida. It was

for this reason that the Governor declined to select a judge for the Fifth District Court of Appeal (the “Fifth District”) from the list of names originally certified to him on November 6, 2008, by the Judicial Nominating Commission for the Fifth District (the “JNC” or “Fifth District JNC”), the circumstance that prompted Senior Judge Robert J. Pleus, Jr. to initiate this proceeding. Judge Pleus’s petition asks this Court to enter a writ of mandamus that would force the Governor to make the selection, notwithstanding the Governor’s firm conviction that the applicant pool contained well-qualified minority applicants that merited further consideration by the Fifth District JNC.

The governor’s judicial selection power is detailed in article V, section 11, Florida Constitution. Article V, section 11(a) and (b) collectively require that whenever a vacancy occurs in a judicial office subject to appointment, 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), (b), Fla. Const. Article V, section 11(c) prescribes the following time periods within which the governor and the various judicial nominating commissions are required to take action:

The nominations shall be made 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. The governor shall make the appointment within sixty days after the nominations have been certified to the governor.

Art. V, § 11(c), Fla. Const. These portions of article V, section 11 remain materially unchanged since the section was originally added to the constitution as part of a larger revision of article V in 1972.¹

The attachments to the Petition and supplemental filings accurately portray the constitutionally-relevant time periods and the manner in which the Governor made clear to the Fifth District JNC his unwillingness to appoint a judge from the list of names submitted to him on November 6, 2008. On September 8, 2008, the Governor accepted Judge Pleus's letter of resignation from active service on the Fifth District. Petition, Exhibit B; *see In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992) ("When a letter of resignation to be effective at a later date is received and accepted by [the governor], a vacancy in that office occurs and actuates the process to fill it."). That same day, the Governor notified the Fifth District JNC of the vacancy resulting from Judge Pleus's retirement and exercised his prerogative, specified in article V, section 11(c), to extend the JNC's deadline for nomination by thirty days, to November 7, 2008. Letter to James H. Fallace, September 8, 2008, attached as Exhibit 1.

¹ As originally adopted, article V, section 11 provided, in relevant part: "The governor shall fill each vacancy in judicial office by appointing . . . one of not fewer than three persons nominated by the appropriate judicial nominating commission. . . . The nominations shall be made 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. The governor must make the appointment within sixty days after the nominations have been certified to him."

The JNC certified a list of names to the Governor on November 6, 2008. Petition, Exhibit C. On December 1, 2008, the Governor first notified the JNC that he was unwilling to fill the vacancy from the list of names certified to him because he believed that the JNC had overlooked a series of well-qualified minority applicants that merited further consideration. Petition, Exhibit D. Accordingly, the Governor requested that the JNC reconvene and consider whether the interest of diversity necessitated further deliberation. *Id.*

The chair of the JNC responded to the Governor's letter on December 4, 2008. Petition, Exhibit E. While questioning the JNC's authority to reconsider its nominations, the chair reported that the JNC nonetheless convened on December 2, 2008 and voted to resubmit the list that had been rejected by the Governor the previous day. *Id.*

On January 13, 2009, the Governor again urged the JNC to reconsider its position. Letter to James H. Fallace, January 13, 2009, Petitioner's Notice of Filing Additional Correspondence, p.3. The chair of the JNC responded on January 21, 2009, more strenuously questioning the JNC's authority to reconsider and once again resubmitting the list that had been rejected by the Governor on December 1, 2008. Letter to the Honorable Charlie Crist, January 21, 2009, Petitioner's Notice of Filing Additional Correspondence, pp. 4-5.

Judge Pleus filed the Petition on March 30, 2009.

ARGUMENT

I. THE PETITION DOES NOT SATISFY THE REQUIREMENTS FOR MANDAMUS.

“Mandamus is a harsh and extraordinary remedy.” *Slaughter v. State ex rel. Harrell*, 245 So. 2d 126, 128 (Fla. 1st DCA 1971); *see State ex rel. Haft v. Adams*, 238 So. 2d 843, 844 (Fla. 1970); *State v. Amos*, 131 So. 122 (Fla. 1930). This Court has described it as “an extremely limited basis for jurisdiction which traditionally has been, and will continue to be, employed sparingly.” *Brown v. Firestone*, 382 So. 2d 654, 671 (Fla. 1980). A petitioner seeking a writ of mandamus must meet the difficult standard of establishing (1) a clear legal right to compel a public officer (2) to perform a clear legal duty (3) for which no other legal remedies are available. *E.g., Hatten v. State*, 561 So. 2d 562, 563 (Fla. 1990).

As developed below, the Petition must be denied because Judge Pleus has not satisfied any of the requirements for establishing his entitlement to mandamus. Judge Pleus has no clear legal right to compel the Governor to exercise his judicial appointment power because the scope of the judiciary’s authority to compel a governor to exercise this power via mandamus is not clearly established. Judge Pleus cannot establish that the Governor has a clear legal duty to exercise the power under the circumstances outlined in the Petition because it is at best unclear whether the Governor retains the authority to make an appointment outside of the time period prescribed in article V, section 11(c) and, in any event, because the

Governor's power of appointment is inherently discretionary and thus not clearly subject to judicial control via mandamus. Finally, Judge Pleus cannot establish that he lacks an ordinary remedy at law because a declaratory judgment action is a more appropriate means of remediating the alleged injury.

A. Judge Pleus Has No Clear Legal Right to Compel the Governor to Exercise His Judicial Appointment Power.

Judge Pleus cannot establish his entitlement to a writ of mandamus because a citizen's authority to compel the governor to exercise his appointment power is not clearly established in Florida law. This Court has described as "axiomatic that the writ will not be allowed in cases of doubtful right." *State v. Gray*, 111 So. 242, 243 (Fla. 1927). Further, mandamus cannot be used to establish the existence of an enforceable right. *E.g., Walters v. State*, 905 So. 2d 974, 976 (Fla. 1st DCA 2005). Instead, the writ may only be granted "to enforce a right already clearly and certainly established in law." *Florida League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992); *see also, e.g., State, Dept. of Health & Rehab. Servs. v. Hartsfield*, 399 So. 2d 1019, 1020 (Fla. 1st DCA 1981).

Judge Pleus cannot establish a clear and certain right to mandamus for at least two reasons. First, this Court's jurisprudence renders entirely unclear the scope of its jurisdiction to issue writs of mandamus to the governor. Second, it is not clearly established under Florida law that a governor retains the authority to

appoint a judge from a list certified to him by a judicial nominating commission after the sixty-day period specified in article V, section 11(c) has run.

1. The scope of this Court’s power to compel a governor to perform executive functions specified in the Florida Constitution is not clearly and certainly established.

Article V, section 3(b)(8), Florida Constitution, provides the Court with discretionary authority to “issue writs of mandamus and quo warranto to state officers and state agencies.” The Court has stated in recent decisions, without analysis, that this provision provides the Court with jurisdiction to issue writs of mandamus to the governor. *E.g.*, *Jones v. Chiles*, 638 So. 2d 48, 48 (Fla. 1994); *Flack v. Graham*, 453 So. 2d 819, 820 (Fla. 1984).

However, a series of this Court’s prior decisions stand for the opposite proposition: that the Court cannot compel the governor to perform an executive function via mandamus because “[t]he Judiciary is without power to direct or coerce the Governor in the exercise of any administrative function.” *State ex rel. Axleroad v. Cone*, 188 So. 93, 93 (Fla. 1939); *State ex rel. Bisbee v. Drew*, 17 Fla. 67, 83-84 (Fla. 1879) (“[T]he Governor of the State of Florida cannot be commanded by the courts to perform any act which may be required of him by a law of the State relating to the executive office”), *cited in, e.g., Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 244 n.5 (Fla. 2001), and *Kirk v. Baker*, 224 So. 2d 311, 317 (Fla. 1969).

This Court apparently first addressed the question in *State ex rel. Bisbee v. Drew*, after the victor of a congressional district election petitioned the Court for an order compelling the governor to issue him a certificate of election, as then clearly required by state election law. *Bisbee*, 17 Fla. at 69-70. Explaining that the governor was not an inferior officer, the Court described the certificate of election requirement as “not merely a discretionary act” because it was a direction to the governor as opposed to an officer inferior to the Court. *Id.* at 71-72. Accordingly, the Court concluded that the governor could not be compelled to issue the certificate, even though the requirement to do so had become “a duty” and “a function of [the governor’s] office” through the “the legitimate direction of the Legislature.” *Id.* The constitution did notwithstanding jurisdiction to grant writs of mandamus materially identical to article V, section 3(b)(8).²

The Court followed *Bisbee* in *State ex rel. Axleroad v. Cone*, refusing to compel the governor to countersign a warrant for the petitioner’s salary, even though the petitioner’s right to the warrant had been clearly established in a prior action, and the governor’s duty to countersign the warrant was clearly established in law. *Axleroad*, 188 So. at 93. Although this Court in *Willits v. Askew*, 279 So.

² Article VI, section 5 of the 1868 Constitution provided in 1879 that “the Court shall have the power to issue writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus, and also all writs necessary or proper to the complete exercise of its jurisdiction.” The identical language appeared in article VI, section 5 of the 1885 Constitution at the time this Court decided *Axleroad*.

2d 1 (Fla. 1973), overruled the specific holding of *Axleroad* relating to the countersignature requirement, *id.* at 3, the Court did so in light of a provision, added to the Florida Constitution as part of the 1968 revision, which stated that “[t]he governor shall countersign *as a ministerial duty subject to original mandamus*,” *id.* at 4 (citing article IV, § 4(e), Fla. Const. (1968)) (emphasis added). The Court has never indicated whether *Willits* stands broadly for the proposition that the expansive rule announced in *Bisbee* and followed in *Axleroad* is no longer good law, or, alternatively, whether *Willits* merely acknowledges that the framers of the 1968 Constitution intended to overrule *Axleroad* only, thus carving out a narrow exception to *Bisbee*.³

Bisbee, *Axleroad*, and *Willits* render this Court’s more recent pronouncements concerning the scope of its mandamus jurisdiction over the governor entirely unclear. The Court has seldom exercised jurisdiction over a

³ Many jurisdictions continue to align themselves with the rule announced by this Court in *Bisbee*. *E.g.*, *Town of Milton v. Commonwealth*, 623 N.E.2d 482, 485 (Mass. 1993) (holding governor was not subject to mandamus); *Kelly v. Curtis*, 287 A.2d 426, 430 (Me. 1972) (same); *Straus v. Governor*, 592 N.W.2d 53, 56 (Mich. 1999) (same); *People ex rel. Broderick v. Morton*, 50 N.E. 791, 793 (N.Y. 1898) (same); *Hall v. Tirey*, 501 P.2d 496, 502 (Okla. 1972) (same); *but see, e.g.*, *State ex rel. Turner v. Henderson*, 74 So. 344, 346-47 (Ala. 1917) (holding governor subject to mandamus for ministerial functions); *Winsor v. Hunt*, 243 P. 407, 410 (Ariz. 1926); *South Dakota v. Brown*, 576 P.2d 473, 475 (Cal. 1978) (same); *Blalock v. Johnston*, 185 S.E. 51, 56 (S.C. 1936) (same).

governor, acting as governor,⁴ in mandamus proceedings. None of these cases, other than *Willits*, contains any explanation of the Court's assertion of jurisdiction apart from bare citation to article V, section 3(b)(8). *E.g.*, *Wright v. Florida Medical Examiners Comm'n*, 625 So. 2d 846, 846 (Fla. 1993); *Flack*, 453 So. 2d at 820; *Judicial Nominating Comm'n, Ninth Cir. v. Graham*, 424 So. 2d 10, 10 (Fla. 1982). In many of these cases, the governor was not the principal respondent. *See Flack*, 453 So. 2d at 822 (holding petitioner county court judge was entitled to unpaid salary from comptroller and governor after successful election challenge); *Thompson v. Graham*, 481 So. 2d 1212, 1215 (Fla. 1985) (asserting jurisdiction but denying relief to petitioner seeking expunction of gubernatorial vetoes by secretary of state); *Florida House of Representatives v. Martinez*, 555 So. 2d 839, 846 (Fla. 1990) (directing secretary of state to expunge vetoes and directing governor and comptroller to ensure implementation of expunction in the financial operations of the state). In the majority of cases, the writ was denied. *Jones*, 638 So. 2d at 54;

⁴ By contrast the Court has clearly established its jurisdiction over the governor as member of a state board or commission, along with fellow board members or commissioners, having exercised such jurisdiction on numerous occasions both prior and subsequent to its decision in *Axleroad*. *See, e.g.*, *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988) (denying mandamus directed to Florida Elections Canvassing Commission); *State ex rel. Metro. Dade County v. Askew*, 267 So. 2d 827 (Fla. 1972) (granting mandamus directed to Board of Trustees of the Internal Improvement Fund); *Sholtz v. State ex rel. Jones*, 168 So. 803 (Fla. 1936) (affirming grant of mandamus directed to State Board of Administration); *State ex rel. Dupont Ball, Inc., v. Sholtz*, 150 So. 731 (Fla. 1933) (granting writ directed to State Board of Administration).

Wright, 625 So. 2d at 847; *Thompson v. Graham*, 481 So. 1212, 1215 (Fla. 1985); *Flack v. Graham*, 461 So. 2d 82, 84 (Fla. 1984); *Judicial Nominating Comm'n, Ninth Cir.*, 424 So. 2d at 12.

The remaining handful of cases do not stand for any broad propositions: the Court has compelled the governor through mandamus to (1) countersign warrants for debts of the state, at a time when the Constitution required the governor to do so “as a ministerial duty subject to original mandamus,” *Willits*, 279 So. 2d at 4; art. IV, § 4(e), Fla. Const. (1968); (2) to ensure along with the state comptroller that an elected state official due unpaid salary was paid that salary, *Flack*, 453 So. 2d at 822; (3) to take actions necessary, along with the state comptroller, that the secretary of state’s veto expunctions were reflected in the financial operations of the state, *Florida House of Representatives*, 555 So. 2d at 846; and (4) to call a special primary election as required by the Election Code, *Republican State Executive Committee v. Graham*, 388 So. 2d 556, 559 (Fla. 1980). None of these isolated cases provides any signal of whether the Court intended limited exceptions to *Bisbee*, or, alternatively, whether *Bisbee* has been overruled by implication. Accordingly, until the Court reconciles these cases, no one can claim a clear and certain legal right to compel a Florida governor to perform any function, or, at very least, a function that a governor has not been compelled to perform in the past.

Moreover, the Court has never used its mandamus jurisdiction to force a governor to perform a function that necessarily involves the exercise of significant executive discretion, such as the governor's power of judicial selection at issue here. This power is a core constitutional function that, while mandatory, is immutably discretionary. *See Allen v. Byrd*, 144 S.E. 469, 470 (Va. 1928) (holding governor could not be compelled to appoint state supreme court judges, noting that “[i]t does not necessarily follow that because a duty imposed is mandatory that it is also ministerial”).⁵ “[T]he right of appointment, of necessity, involves the power of selection and the exercise of discretion and judgment.” *People ex rel. Balcom v. Mosher*, 57 N.E. 88, 91 (N.Y. 1900); *see also, e.g., Horvath v. Mayor of the City of Anaconda*, 116 P.2d 874, 878 (Mont. 1941) (“The power to appoint carries with it a presumption that the appointing power is also, necessarily, discretionary.”).

There is some authority for the proposition that boards composed of inferior state officers can be compelled to make appointments required by law. *See, e.g., State ex rel. Alderman v. Beville*, 144 So. 331, 332 (Fla. 1932). These cases, however, involve statutorily-created inferior state officers performing functions

⁵ The jurisdictions that have both held governors subject to mandamus and addressed the question of whether a governor can be compelled via mandamus to exercise a power of appointment are split as to the latter question. *Compare, e.g., Allen*, 144 S.E. at 470; *with, e.g., State ex rel. Brotherton v. Moore*, 230 S.E.2d 638, 641-43 (W. Va. 1976); *see also Murrill v. Edwards*, 613 So. 2d 185, 194 (La. Ct. App. 1992) (holding governor could not be compelled by mandamus to appoint members to local boards because “[t]he act of appointing [was] a discretionary decision not a mandatory, ministerial duty”).

prescribed by statute. It is one thing for the Court, for example, to compel a statutorily-created state live stock sanitary board to appoint a disinterested party to assist in arbitrating the fair market value of cow dipping as mandated by statute, *id.*, and another thing entirely to compel the Governor to exercise his constitutional power to appoint an article V judge or justice. Other courts have drawn similar distinctions in the appointment context. *E.g., Murrill*, 613 So. 2d at 194 (“[I]t is inappropriate to compare the amount of discretion exercised by a mayor acting pursuant to a home rule charter or act of the legislature authorizing municipal government and the governor of the state acting under authority reserved to him in the constitution.”). The distinction between the governor and inferior executive officials was also the foundation for this Court’s holding in *Bisbee* that the governor is not subject to mandamus. *Bisbee*, 17 Fla. at 70-72.

The above discussion demonstrates that the scope of any right to compel the Governor to exercise a constitutional appointment power is, at best, entirely unclear. To grant the Petition, the Court would have to overrule precedent and would have to be willing, for the first time in the Court’s history, to compel a governor to exercise a core constitutional power that necessarily involves significant discretion. The Petition thus fails to demonstrate the existence of any clear legal right at issue, and mandamus cannot be an appropriate remedy.

- 2. The text of article V, section 11 does not clearly and certainly establish that the Governor retains the authority**

to appoint a judge after the sixty-day appointment period has expired.

Because mandamus cannot be used to establish the existence of an enforceable right, a petition for a writ of mandamus grounded solely on the text of a statute or constitutional provision can only be appropriate if the construction of the provision offered by the petitioner is its only reasonable construction. *See Sancho v. Joanos*, 715 So. 2d 382, 385 (Fla. 1st DCA 1998). As such, the Petition must demonstrate that article V, section 11(c) clearly and unambiguously confers on the Governor a mandatory, ministerial duty to exercise his power of judicial appointment after the time specified in article V, section 11(c) for its exercise has expired. The Petition does not accomplish this because the time periods specified in article V, section 11(c) are most reasonably construed as mandatory,⁶ and because a construction that would render the provisions enforceable through mandamus would lead to absurd and untenable consequences that could not have been contemplated by the framers of the provision or the people who voted for it.

a. The deadlines imposed by article V, section 11(c) are mandatory.

Article V, section 11 imposes a series of duties on judicial nominating commissions and the governor pertaining to the judicial selection process, each of

⁶ Because mandamus cannot be used to establish the existence of a right, *see Sancho*, 715 So. 2d at 385, the Petition must demonstrate that, pursuant to article V, section 11(c), the Governor clearly and unambiguously retains the authority to make an appointment notwithstanding the expiration of the specified time periods.

which appears to be mandatory.⁷ Article V, section 11(a) and (b) require that, “[w]henver a vacancy occurs in a judicial office . . . , 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), (b), Fla. Const. (emphasis added). By its plain and unambiguous terms, article V, section 11 thus obligates judicial nominating commissions to submit three to six nominees to the Governor for any judicial appointment and requires the Governor to select the judicial appointees in every case from the nominees submitted to him by the appropriate judicial nominating commission.

Similarly, article V, section 11(c) imposes, on both judicial nominating commissions and the governor, mandatory deadlines for action. The subsection requires that “nominations *shall* be made *within thirty days* from the occurrence of a vacancy *unless the period is extended by the governor*” and requires that “[t]he governor *shall* make the appointment *within sixty days* after the nominations have been certified to the governor.” (Emphasis added).

⁷ “The word ‘may’ when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word ‘shall.’” *The Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla.2002). While “shall” may be given a permissive construction in appropriate circumstances, *e.g.*, *Belcher Oil Co. v. Dade County*, 271 So. 2d 118, 121 (Fla.1972), article V, section 11 contains both terms, suggesting that “may” and “shall” were intended to have their natural and ordinary meaning, *see Chaky v. State*, 651 So. 2d 1169, 1172 (Fla. 1995) (construing “shall” to be mandatory and “may” to be directory in rules of procedure).

While statutory time periods that appear to be mandatory are sometimes regarded as directory by the courts, *see generally Schneider v. Gustafson Indus., Inc.*, 139 So. 2d 423, 425 (Fla. 1962), the Court cannot find the “shalls” in article V, section 11(c) to be directory without violating several well-settled rules of statutory construction. By the clearest of terms, the first “shall” obligates judicial nominating commissions to certify their nominations within thirty days of a vacancy “*unless the period is extended by the governor.*” Art. V, § 11(c), Fla. Const. (emphasis added). This period cannot be extended by any state officer or entity other than the Governor without violating the principle of construction “*expressio unius est exclusio alterius.*” *See Weinberger v. Bd. of Pub. Instruction*, 112 So. 253, 256 (Fla. 1927) (“Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.”), *quoted in Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006). Such a construction would also lead to unnecessary disharmony between constitutional provisions, specifically article V, section 11 and article II, section 3, because article V, section 11 confers the power to extend the deadline to the governor alone. *See State v. Florida Police Benevolent Ass’n, Inc.*, 613 So. 2d 415, 418 (Fla. 1992) (“The constitutional right to bargain must be construed in accordance with all provisions of the constitution. Surely it was not intended to

alter fundamental constitutional principles, such as the separation of powers doctrine.”). As the first “shall” in article V, section 11(c) is clearly mandatory, the second “shall” cannot be directory without violating the principal that identical terms used in the same subsection or related subsections presumptively mean the same thing. *See Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202, 204 (Fla. 1958); *Anderson Columbia v. Brewer*, 994 So. 2d 419, 423 (Fla. 1st DCA 2008) (“A contrary holding would violate the principle that, in deciphering statutory language, courts must strive to harmonize the various subsections of a statute, such that a term used on one subsection has the same meaning as the same term used in another.”); *Crist v. Florida Ass’n of Criminal Def. Lawyers*, 978 So. 2d 134, 139-40 (Fla. 2008) (“When reviewing constitutional provisions, this Court follows principles parallel to those of statutory interpretation.”) (quotation omitted). Finally, the Court cannot hold that the Governor retains the power of appointment after the period has lapsed without rendering these time periods essentially meaningless. *See State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) (holding that statutory time period for conducting trial under Jimmy Ryce Act was mandatory in part because contrary reading would render part of statute meaningless).

Article V, section 11(c) thus obligates judicial nominating commissions and the governor to exercise their powers of nomination and appointment within the periods specified. It follows that judicial nominating commissions and the

governor must act within the period specified or lose the authority to act.⁸ Because neither the respective judicial nominating commission nor the governor retains the authority to act under article V, section 11 after the time period has expired, neither can retain a clear legal duty to act. Accordingly, neither a judicial nominating commission nor the governor can be compelled via mandamus to exercise a power under article V, section 11 after the time period prescribed for its exercise has expired.

- b. Any construction of article V, section 11 that would render judicial selection enforceable through mandamus would yield absurd consequences that could not have been contemplated by the drafters of the section or the people who voted for it.**

This Court cannot adopt an interpretation of a constitutional provision which will lead to an absurd result “when the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people.”

⁸ The legislative drafters of article V, section 11 were acutely aware of the potential for the issue raised by the Petition to arise, but ultimately failed to address it. Article V, section 11, added to the Florida Constitution in 1972, was part of a larger revision of article V, proposed by the Legislature in a 1971 special session and approved by the voters the following year. As originally proposed in a House Joint Resolution, article V, section 11 provided: “If the governor fails to make the appointment within sixty days after the nominations have been certified to him, the chief justice shall make the appointment from those nominated.” HJR 11-D, § 11, *reprinted in* The Journal of the Florida House of Representatives, at 30 (Dec. 2, 1971). The version ultimately approved by both houses and the voters amended the operative language in a manner that made it materially identical to its present form: “The governor must make the appointment within sixty days after the nominations have been certified to him.” *See* SJR 52-D, § 11, *reprinted in* The Journal of the Florida House of Representatives, at 106 (Dec. 9, 1971).

Plante v. Smathers, 372 So. 2d 933, 936 (Fla. 1979). Pursuant to this settled rule of construction, the Court cannot construe article V, section 11(c) in a manner that would render the judicial selection process enforceable via mandamus because article V, section 11(c) is susceptible to another construction, *see* discussion *supra* § I.A.2.a., and doing so would lead to absurd consequences that could not have been intended by the voters or the drafters of the provision. Specifically, it would subjugate the governor’s duty to appoint to the judicial nominating commissions’ power to nominate even in circumstances where the governor is aware that the nominations were the product of malfeasance.

In its brief in support of the Petition, the Appellate Practice Section of the Florida Bar (the “Appellate Section”) urges the Court to grant the Petition on the grounds that it is necessary to preserve “the critical balance” between the governor and the various judicial nominating commissions. Amicus Brief of the Appellate Practice Section of the Florida Bar in Support of the Petitioner, at 7-8. The Appellate Section is wrong because the Court’s order would not preserve the balance of power. It would destroy it.

The Constitution contemplates that each judicial nominating commission will nominate only applicants who, in the commission’s estimation, meet the qualifications for judicial selection. If a commission makes individual selections for nefarious reasons, such as to limit the discretion of the Governor beyond the

limitations specified in article V, section 11(a) and (b), such conduct constitutes malfeasance that could subject individual members of the commission to suspension and removal. In a truly egregious case, a commission could attempt to force the Governor to select a particular individual by nominating the article V, section 11 equivalent of “window dressing”—two to five applicants that, although meeting the constitutional qualification for selection (members of The Florida Bar for the requisite time period, art. V, § 8, Fla. Const.), each had some serious defect that would render his or her appointment impossible. In such a case, the governor and senate could be justified in suspending and removing each commission member who voted for those nominees. However, if article V, section 11 is enforceable via mandamus, the Governor would nonetheless have a mandatory duty to appoint from the list that resulted in the suspensions and removals.

Similarly, any member of a judicial nominating commission would commit malfeasance if he or she consciously chose to reject an applicant on any basis prohibited by article I, section 2 of the Florida Constitution or the Fourteenth Amendment to the United States Constitution, such as race or gender. If article V, section 11 is enforceable via mandamus, the Governor would have no choice but to select a judge from any slate of nominees, even if the Governor had direct knowledge that the list was the product of a race or gender based civil rights violation. Similar absurdities would result if each nominee was the child, relative,

or close personal friend of a commission member or if nominations had been acquired through bribery. The Court cannot grant the writ in this case without expressly or implicitly recognizing that the Governor would be no less required, as a ministerial officer, to make an appointment from such a list. The Constitution does not provide any means of distinction.

These absurdities could not have been intended by the drafters of this provision and the people who voted for it because, in 1972, when article V, section 11 was added to the Constitution, this Court's precedent clearly prohibited courts from controlling the governor via mandamus. In 1972, this Court's controlling precedent clearly provided that "[t]he Judiciary is without power to direct or coerce the Governor [via mandamus] in the exercise of any administrative function." *Axleroad*, 188 So. at 93; *see discussion supra* § I.A.1.

Furthermore, the drafters of article V, section 11 surely knew how to carve out exceptions to this precedent. Article IV, section 4(e) of the original 1968 Constitution required the governor to countersign warrants for disbursement of state funds, and further provided that this requirement "[w]as a ministerial duty *subject to original mandamus*." Art. IV, § 4(e), Fla. Const. (1968) (emphasis added). Article IV, section 4(e) was added to the Constitution for the first time in 1968, just a few years before the revision of article V was proposed and adopted. Accordingly, if the drafters of article V, section 11 intended the governor's judicial

appointment power to be a ministerial duty subject to original mandamus, the drafters must have known how to make that intention clear. Their silence in the face of *Bisbee*, *Axleroad*, and the 1968 version of article IV, section 4(e) strongly signals the opposite intention.

As stated above, this Court cannot adopt an interpretation of a constitutional provision that will lead to an absurd result if “the provision is fairly subject to another construction which will accomplish the manifest intent and purpose of the people.” *Plante*, 372 So. 2d at 936. The people could not have intended for the governor’s role in the judicial selection process to be subject to mandamus because the Court’s precedent at the time the people voted for article V, section 11 prevented that result, at least absent a constitutional override of that precedent. *See Willits*, 279 So. 2d at 4. Accordingly, the Court can best accomplish “the manifest intent and purpose of the people” by denying the writ.

B. Judge Pleus Should Have Sought A Declaratory Judgment.

“One of the requirements that must be met before a writ of mandamus will issue is that no other adequate remedy exists.” *Holman v. Florida Parole & Prob. Comm’n*, 407 So. 2d 638, 638 (Fla. 1st DCA 1981); *see Shevin ex rel. State v. Public Serv. Comm’n*, 333 So. 2d 9, 12 (Fla. 1976) (“Just as equitable remedies are unavailable when there is an adequate remedy at law, so relief by mandamus is unavailable unless no other adequate remedy exists.”). Further, the Court may not

“. . . employ an extraordinary remedy to assist a litigant who has foregone an ordinary one which would have served adequately.” *State ex rel. Dep’t of Gen. Servs. v. Willis*, 344 So. 2d 580, 592-93 (Fla. 1st DCA 1977). “It must not be forgotten that mandamus is an extraordinary remedy, not intended as a substitute for other remedies, but rather to afford relief in cases where other remedies do not exist or are inadequate” *State v. Call*, 26 So. 1016, 1018 (Fla. 1899). Judge Pleus cannot be entitled to mandamus because the Declaratory Judgment Act, chapter 86, Florida Statutes, provides him with a more appropriate remedy.

A writ of mandamus may only be granted to enforce a right “already clearly and certainly established in law.” *Florida League of Cities*, 607 So. 2d at 401. Mandamus cannot be used to establish the existence of an enforceable right. *Walters*, 905 So. 2d at 976. By contrast, “[t]he purpose of the declaratory judgment statute is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations” *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991). As explained above, it is uncertain at best whether Judge Pleus has a right to compel the Governor to exercise his power of judicial selection, particularly after the time period for its exercise has passed. See discussion *supra* § I.A. A declaratory judgment action is the proper vehicle for the courts to determine if any such right exists. *Cf. Gray*, 111 So. at 243 (“It is axiomatic that the writ will not be allowed in cases of doubtful right.”); *Williams v.*

Schulman, on Behalf of Sch. Bd. of Palm Beach County, 721 So. 2d 1244, 1245 (Fla. 4th DCA 1998) (holding teacher not entitled to writ of mandamus to compel school district to provide him with professional service contract because he had adequate remedy at law through suit for declaratory relief and money damages).

II. EVEN IF JUDGE PLEUS HAS MET THE REQUIREMENTS FOR MANDAMUS, THIS COURT SHOULD DECLINE TO GRANT THE WRIT FOR PRUDENTIAL REASONS.

Even if Judge Pleus has met the requirements for mandamus, the Court should exercise its discretion to deny the writ. *See Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004) (“[E]xtraordinary writs may be denied for numerous and a variety of reasons, some of which may not be based upon the merits of the petition.”). “It is well settled that mandamus is a discretionary writ that is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles.” *Haft*, 238 So. 2d at 844. Specifically, this Court has recognized that mandamus may be denied in circumstances “where by its issuance the public would be injuriously affected” *State ex rel. Long v. Carey*, 164 So. 199, 206 (Fla. 1935) (emphasis and quotation omitted). The Court should decline to grant the writ as it would be injurious to the public because, as provided above, it would upset the constitutional balance of power in the judicial selection process between the governor and the judicial nominating commissions. *See discussion supra* § I.A.2.b; *Thompson*, 481 So. 2d at 1215 (noting, in declining

to grant writ against the governor relating to veto expunction that granting the writ “would have a chilling effect on [the] balance of power” between the governor and legislature in lawmaking process).

CONCLUSION

In light of the foregoing, this Court should deny the Petition.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was written in a proportionally spaced Times New Roman 14-point font in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail and hand delivery this 23rd day of April 2009 upon: Talbot D'Alemberte, Esq., 1117 Myers Park Drive, Tallahassee, Florida 32301, attorney for Petitioner, Robert J. Pleus, Jr., and Siobhan Helene Shea, Chair, Appellate Practice Section, The Florida Bar, P. O. Box 2436, Palm Beach, Florida 33480.

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