IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: _____

FLORIDA J.A.I.L. 4 JUDGES, FLORIDA DIVISION OF ELECTIONS COMMITTEE #35025,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.
_____/

PETITIONER'S MOTION AND AFFIDAVIT FOR DISQUALIFICATION OF ALL THE SITTING JUSTICES OF THE FLORIDA SUPREME COURT

Petitioner, Florida J.A.I.L. 4 Judges, Florida Division of Elections Committee #35025, by and through its undersigned counsel and pursuant to 28 U.S.C. §1746 under penalty of perjury hereby moves to disqualify all of the Justices of this Court from further involvement in this matter upon the authority of *In re: Estate of Carlton,* 378 So.2d 1212 (Fla. 1979), due process concerns as recognized in *Peters v. Kiff*, 407 U.S. 493 (1972)[1], and the federal constitutional and common law right to an impartial tribunal and for grounds in support thereof states under oath as follows:

Petitioner believes that the impartiality of Justices of this Court might

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[1] Where that Court stated, "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias"

reasonably be questioned and that their voluntary recusation would be in the best interests for the administration of justice for the following reasons:

A. THE JUSTICES WOULD VIOLATE PETITIONER'S FIFTH AMENDMENT FUNDAMENTAL RIGHTS

Petitioner is indisputably entitled under the Fifth Amendment to the "absolute right" to an impartial tribunal. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). As such, the Fifth Amendment acts as a limitation upon the exercise of judicial power – to wit, justices sitting as adjudicators in cases in which they have an interest as the Respondent The Florida Bar is an "arm" of this Court and otherwise fully controlled by this Court as more fully detailed in the Petition filed contemporaneously herewith.

Here, by proceeding in any fashion to adjudicate the contemporaneous filed petition, the Justices of this court would be violating Petitioner's right to an impartial tribunal recognized in *Marshall*.

B. THE JUSTICES WOULD VIOLATE PETITIONER'S NINTH AMENDMENT FUNDAMENTAL RIGHTS

The Ninth Amendment to the United States Constitution states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The extent of those rights was detailed in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) in Justice Goldberg's concurrence:

> While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth And Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

Similarly, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category of fundamental rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental rights appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503,(1977) where they are characterized as

those liberties that are "deeply rooted in this Nation's history and tradition."

Thus, among those rights "retained by the people" is the ancient doctrine of *nemo judex in parte sua* made applicable to state judges under the Ninth and Fourteenth Amendments.

As expressly recognized in *In re Murchison*, 349 U.S. 133, 136 (1955), "But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases **where he has an interest in the outcome**." (Emphasis added.)

This right however clearly pre-dates the Constitution and was recognized – and thus preserved – by the Ninth Amendment as a fundamental right. Indeed, *nemo judex in parte sua* is more than a Constitutional right: it is a <u>fundamental</u> right. "Unquestionably it is a fundamental principle that no man shall be judge in his own case." *Duncan v. McCall* 139 U.S. 449, 454 (1891). *See also*: Publius Syrus (42 B.C.), *Moral Sayings* 51, (D. Lyman translation, 1856) ("No one should be judge in his own cause."); Blaise Pascal (1623-1662), *Thoughts, Letters and Opuscules* 182 (O. Wight translation 1859) ("It is not permitted to the most equitable of men to be a judge in his own cause."); 1 W. Blackstone (1765), Commentaries 91 ("[I]t is unreasonable that any man should determine his own quarrel.")

As such, being indelibly imbedded in the common law, *nemo judex in parte sua*

may not be disparaged by state judicial actors without doing violence to the protections reserved by the Ninth Amendment to the people.

Therefore, *nemo judex in parte sua* is a right preserved under the Ninth Amendment which would be violated if the Justices sit in adjudication of Petitioner's petition. As such, the Ninth Amendment similar to the Fourth Amendment operates as a limitation upon the exercise of state power. Thus it "guarantees to citizens of the United States the absolute right to be free" from state judges who would judge their own case.

C. THIS COURT'S VIOLATION OF *NEMO JUDEX IN PARTE SUA*

Of course, the Justices of this Court have attempted to exempt themselves from the obligations imposed by the common law and Florida Statute §38.10[2] by enacting Rules of Judicial Administration Rule 2.160 which expressly limits its scope to trial judges.[3]

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[2] "§ 38.10. Disqualification of judge for prejudice; application; affidavits; etc. "Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending . . ."

[3] Rule 2.160(a) . Disqualification of Trial Judges – "Application. This rule applies only to county and circuit judges in all matters in all divisions of court." Moreover, Canon 3E(1) of the Code of Judicial Conduct does not apply to Justices: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ."

Instead, appellate judges in this state reserve unto themselves whether or not they will disqualify themselves. Indeed, this Court held that "each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances." *In re Estate of Carlton,* 378 So. 2d 1212, 1216 (Fla. 1980). Moreover, this Court found that such a procedure reinforces the ***modern*** view that disqualification is personal and discretionary with the individual members of the judiciary. *Id.* at 1216-17 (quoting *Department of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7, 9 (Fla. 1975)). Fortunately for the citizens of this state, this attempted grotesque usurpation of such power has been denied to the Justices' of this Court by Article VI, §2 and the Ninth and Fifth Amendments of the federal constitution.

In sum, Petitioner can not receive a fair hearing before the Justices of this Court as the actions and behavior of this Court – and its agent, the Florida Bar – are the sum and substance of the petition file contemporaneously herewith. Unpalatable as it will be for this Court to grant this motion and cede the decision to other, the plain fact cannot be avoided: No one is above the law. As more eloquently stated:

> Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage, the least as feeling its care, and the greatest as not being

exempt from its power.[4]

D. THE RULE OF NECESSITY IS INAPPLICABLE

The "Rule of Necessity" is a well-settled principle at common law that, as Pollack put it, "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise" F. Pollack, *A First Book of Jurisprudence* 270 (6th ed. 1929). *Accord*: *United States v. Will*, 449 U.S. 200, 219 (1980) ("We therefore hold that §455 was not intended by Congress to alter the time-honored Rule of Necessity. And we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).")

Here, the Florida Rules of Judicial Administration, Rule 2.205 provide an alternative means of supplying Florida Supreme Court Justices to determine a matter which the presently seated Justices are barred from determining as detailed *supra*. *Cf*: Rule 2.205(a)(3)(A) ("The chief justice may, either upon request or when otherwise necessary for the prompt dispatch of business in the courts of this state, temporarily assign justices of the supreme court, judges of district courts of appeal,

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[4] *State of Ohio ex rel. v. Chase, Governor*, 5 Ohio State, 529.

circuit judges, and judges of county courts to any court for which they are qualified to serve." Accordingly, the Rule of Necessity may not be invoked to avoid the plain requirement of disqualification.

I HEREBY CERTIFY that this motion and affidavit and the statements made herein are made in good faith and that the foregoing statements contained in this affidavit are true to the best of my knowledge and belief.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Date: _____ By:_____
Montgomery Blair Sibley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on February 21, 2007, by Email upon Laura Rush: RushL@flcourts.org and Laura Beth Fargasso: lbfaragasso@henryblaw.com.

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