THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Frances P. Segars-Andrews.....……..Petitioner,

v.

Judicial Merit Selection Commission, The State of South Carolina, The Honorable Andre Bauer, in his official Capacity as President of the South Carolina Senate, and The Honorable Glenn F. McConnell, in his official capacity as President Pro Tempore of the South Carolina Senate, and The Honorable Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives……Respondents.

NOTICE OF PETITION FOR ORIGINAL JURISDICTION

Please take notice that, pursuant to Rule 229, South Carolina Appellate Court Rules, Respondents have twenty (20) days from the date of service hereof to file six (6) copies of a return to the attached Petition for Original Jurisdiction with the Clerk of the Supreme Court and to serve said return upon Morris D. Rosen, Esq. at P.O. Box 893, Charleston, SC 29402, Alexander M. Sanders, Jr., Esq. at 19 Water Street, Charleston, SC 29401 and Armand Derfner, Esq. and D. Peters Wilborn, Jr., Esq. at P.O. Box 600, Charleston, SC 29402. Failure to file a timely return may be deemed consent by that party to the matter being heard in the original jurisdiction of the Supreme Court.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,

_____

Morris D. Rosen
Rosen Rosen & Hagood, LLC
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

_____

Alexander M. Sanders, Jr.
19 Water Street
Charleston, SC 29401
(843) 577-6572

_____

Armand Derfner
D. Peters Wilborn, Jr.
Derfner, Altman & Wilborn, LLC
P.O. Box 600
Charleston, SC 29402
(843) 723-9804

Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Frances P. Segars-Andrews.....…….Petitioner,

v.

Judicial Merit Selection Commission, The State of South Carolina, The Honorable Andre Bauer, in his official Capacity as President of the South Carolina Senate, and The Honorable Glenn F. McConnell, in his official capacity as President Pro Tempore of the South Carolina Senate, and The Honorable Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives……Respondents.

PETITION FOR ORIGINAL JURISDICTION

Pursuant to Rule 229 of the South Carolina Appellate Rules, Petitioner Frances P. Segars-Andrews hereby petitions this Court to accept the attached Petition for Relief for adjudication in the original jurisdiction of the Supreme Court.

As grounds for invoking the original jurisdiction, Petitioner would set forth the following:

1. There are serious issues of constitutional law involved in this case, such that one commentator, a former judge of the South Carolina Court of appeals, has said this case presents a "constitutional crisis."

2. The fundamental issue involves far-reaching issues of protecting judicial independence.

3. The questions touch the nature of a body recently created by passage of a constitutional amendment by the people of South Carolina.

4. The issues also involve the separation of powers and the relationship between the legislative branch and the judicial branch.

5. The specific issue involves the scheduled election in 2010 of a judge to the Family Court of the Ninth Judicial Circuit and could affect the election of other judges.

6. The matter has attracted widespread attention in the Bench and Bar, the general public and the media.

The case is simply stated: Petitioner has been a Family Court judge for 16 years, and her current term ends in 2010. She applied for re-election, and was considered by the Judicial Merit Selection Commission. There was no other applicant for this judicial position.

Now the Commission has found petitioner unqualified. That finding is based solely on one case of the many thousands of cases she has heard during her judicial tenure. The complaint against her – alleging that she acted unethically when she failed to recuse herself from a case -- was brought by a disappointed litigant who, before presenting his complaint to the Judicial Merit Selection Commission, had previously presented his complaint to four judicial bodies – and lost each of the four times: (1) appeal of the merits to the S.C. Court of Appeals, (2) appeal of the order denying recusal to the S.C. Court of Appeals, (3) petition for rehearing of the S.C. Court of Appeals decision upholding the denial of recusal, and (4) complaint to the Disciplinary Counsel of the Commission on Judicial conduct.

Despite these unsuccessful efforts, the disappointed litigant presented his complaint again to the Judicial merit Selection Commission, filing the identical letter he had sent to the Commission on Judicial Conduct and which had been dismissed by the Commission on Judicial Conduct. The Judicial Merit Selection Commission took

cognizance of the disappointed litigant's complaint, and reached its own view -- contrary to the Commission on Judicial Conduct – of what the Canons of Judicial Conduct mean. The Judicial Merit Selection Commission ruled that petitioner had violated the canons that the Commission on Judicial Conduct found she had not violated.

The case raises serious issues of separation of powers, as well as specific issues under several distinct provisions of the South Carolina constitution.

1. The petition alleges that the inclusion of legislators on the Commission – indeed, a majority – is unconstitutional, as a violation of both Art. V. Sec. 27 (the provision setting up the Commission), and Art. III. Sec. 24 (barring dual office-holding).

2. Petitioner also alleges that the Commission's decision to take up the it did breached the separation of powers by invading the judicial province, especially when the matter had been adjudicate3d several times previously, and most especially when one of those adjudications was a dismissal by the Commission on Judicial Conduct – which by Rule 20 barred any reconsideration of the same allegations. The petition alleges that the Judicial Merit Selection Commission's action violated Art. I. Sec. 8, as well as the rule-making provisions of Art. V. Sec. 4 and 4A, in addition to the explicit terms of Rule 20.

PRACTICAL CONSIDERATIONS

This case is appropriate for the original jurisdiction. It raises pure issues of law, with no factual disputes. Petitioner does not perceive there will be any need for discovery.

The need for prompt adjudication is evident. Petitioner's term ends in 2010. As of now, there are no other candidates for that judgeship, so if the Commission's ruling stands, it must reopen the process by announcing a judicial vacancy, screen more applicants and present findings to the General Assembly – which only then would be permitted to conduct the election. If this Court should rule in petitioner's favor, however, the election could take place promptly.

It should be noted that there are other judicial applicants who have been screened and are awaiting further action. It is true that a ruling on the constitutionality of the legislators' presence on the Commission could require re-constitution of the Commission, but it is possible that such a ruling might be made prospective as to other judges (besides petitioner). This could be feasible since there seems to be no contention that any of the other screenings by the Commission were faulty in the procedural aspect.

AUTHORITY FOR THIS COURT'S ORIGINAL JURISDICTION

Under Rule 229 of the South Carolina Appellate Court Rules, the Court may assume jurisdiction when "the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised…" See also S.C. Const. Art. V § 5; Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991).

This Court exercised its authority in the original jurisdiction in a number of recent cases that involved the public interest. See e.g., S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 629 S.E.2d 624 (2006) (deciding whether a Ports Authority's condemnation power is superior to that of Jasper County); Charleston County Pub. Schs. v. Moseley, 343 S.C. 509, 541 S.E.2d 533 (2001) (deciding a school tax issue); Westside Quik Shop v. Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000) (deciding a challenge to video gaming law); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 270 (2000) (determining the Governor's authority to remove Public Service Authority members); Doe v. Condon, 341 S.C. 22, 532 S.E.2d 879 (2000) (determining whether certain activities constitute the unauthorized practice of law); and City of Hardeeville v. Jasper County, 340 S.C. 39, 530

S.E.2d 374 (2000) (determining the authority of a county to enact accommodations and hospitality taxes).

CONCLUSION

Nothing is more important in a free society than the independence of judges. Petitioner is confident that the situation presented in this case will have a grievous, deleterious effect on judges' independence around the state. Anecdotal evidence makes it clear that the Commission's decision, rendered by a body on which politically elected members are a majority, has judges around the state apprehensive about the atmosphere in this state's judicial system.

Petitioner cannot recall an issue with so much potential for long-term importance.

Petitioner would ask the Court, if it accepts original jurisdiction, to expedite the case as much as possible, by shortening time periods where feasible and taking such other action as may be appropriate to expedite consideration while still giving these important questions the careful deliberation they need.

Petitioner stands ready to comply promptly with this Court's orders and schedules to assist in reaching a just and speedy resolution.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,

Morris D. Rosen
Rosen Rosen & Hagood, LLC
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

Alexander M. Sanders, Jr.
19 Water Street
Charleston, SC 29401
(843) 577-6572

Armand Derfner
D. Peters Wilborn, Jr.
Derfner, Altman & Wilborn, LLC
P.O. Box 600
Charleston, SC 29402
(843) 723-9804

Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Frances P. Segars-Andrews.....……..Petitioner,

v.

Judicial Merit Selection Commission, The State of South Carolina, The Honorable Andre Bauer, in his official Capacity as President of the South Carolina Senate, and The Honorable Glenn F. McConnell, in his official capacity as President Pro Tempore of the South Carolina Senate, and The Honorable Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives ……Respondents.

PETITION FOR RELIEF

1. This is a lawsuit to enforce and vindicate provisions of the South Carolina Constitution that guarantee the independence of the judicial system, an essential protection of the liberties of the people. Petitioner alleges that the decision of the respondent Judicial Merit Selection Commission finding her unqualified to be a Family Court judge violates the South Carolina Constitution in several ways: (1) the statute installing members of the General Assembly on the Commission violates both S.C. Const. art. V, § 27 (setting up the Commission) and art. III, § 24 (barring dual office-holding by legislators); (2) the finding against petitioner, which was based solely on a single matter already decided in her favor by the judicial branch, violates S.C. Const. art. I, § 8 (mandating the separation of powers) and further violates the rule-making command of S.C. Const. art. V, §§ 4 & 4A by violating Rule 20 of the Rules for Judicial Disciplinary Enforcement (which provides that allegations in a dismissed complaint

"shall not be used for any purpose"). Rule 20, RJDE, Rule 502, SCACR.

PARTIES

2. Petitioner is a citizen and qualified elector of Charleston County. She is a Judge of the Family Court for the Ninth Judicial Circuit.

3. a. Respondent Judicial Merit Selection Commission ("Commission") is a body created by law, S.C. Code § 2-19-10, pursuant to the South Carolina Constitution, Art V, § 27. Its function is to consider the qualifications and fitness of candidates for judicial office.

b. Respondent the State of South Carolina ("State") is a state of the United States of America embodying and exercising the sovereign powers of the people.

c. Respondents Bauer, McConnell and Harrell are elected officials who are the presiding officers of the South Carolina Senate and the South Carolina House of Representatives. They are sued in their official capacities.

FACTS

4. Family Court judges are elected by the General Assembly for six-year terms. Petitioner was first elected to an unexpired term of the Family Court in 1993 and was re-elected in 1998 and 2004. The Commission was created in 1997, and in both 1998 and 2004, it found petitioner qualified and fit for judicial office. She has heard thousands of cases as a judge, including more than 5000 cases since her last re-election in 2004.

5. Petitioner's current term expires in 2010. She applied for reappointment but, on December 18, 2009, the Commission found her not qualified for judicial office (Exhibit 1).

6. By the terms of the Constitution, Art. V, § 27, the Commission's finding of "not

qualified" makes her ineligible for re-election, that is, the General Assembly is barred from re-electing her.

7. Accordingly, she has no other remedy except this action at law and equity.

8. In reaching its finding, the Commission considered nine factors and found favorably for petitioner on eight of the nine. Its sole negative finding was in the category of "ethical fitness." As to that category, the Commission ruled that petitioner had violated the Code of Judicial Conduct. Canons 2 & 2A, CJC, Rule 501, SCACR.

9. The negative finding on "ethical fitness" was based on allegations concerning a single case out of the more than 5000 cases she has heard since her last re-election. The case was *Simpson v. Simpson*, a domestic dispute that she heard and decided in 2006. During the course of that case, one party in the suit (hereinafter "husband") asked petitioner to recuse herself, which she declined to do.

10. Following the conclusion of the case in the Family Court, the husband challenged the ruling in several ways:

a. He appealed the decision on the merits of the domestic dispute. The Court of Appeals affirmed. 377 S.C. 527, 660 S.E.2d 278 (Ct. App. 2008) (Exhibit 2).

b. He appealed petitioner's decision not to recuse herself. The Court of Appeals affirmed, and held she had a duty to sit. 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (Exhibit 3). He petitioned for a rehearing and was denied (Exhibit 4).

c. He filed a complaint against petitioner with the Disciplinary Counsel of the Commission on Judicial Conduct, alleging in detail that she had acted unethically. This complaint was dismissed by the Commission of Judicial Conduct upon a finding that even if the factual statements made by husband were true, there was no evidence that

petitioner had violated any ethical rules. Dismissal Letter of Commission on Judicial Conduct, dated November 22, 2006 (Exhibit 5).

11. Rule 20 of the Rules for Judicial Disciplinary Enforcement, Rule 20, RJDE, Rule 502, SCACR, provides:

> "If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is reopened by the Commission [on Judicial Conduct]."

12. In violation of Rule 20, husband presented to respondent Commission the identical allegations in the identical letter previously submitted to and dismissed by the Commission on Judicial Conduct. Based on that identical complaint, respondent Commission decided that in its view – and contrary to the rulings of the Court of Appeals and the Commission on Judicial Conduct – petitioner had violated the Code of Judicial Conduct in that case. Respondent Commission directly quoted the Code of Judicial Conduct and based its finding on its interpretation of Canons 2 and 2A and the commentary thereto. *See Report of a Candidate's Qualifications* at pp. 16-17 (December 18, 2009), interpreting Canons 2 & 2A, CJC, Rule 501, SCACR. Based solely on this issue, respondent Commission found petitioner not qualified to be a Family Court judge.

13. Three members of the Commission dissented, finding that petitioner had at all times acted in good faith, that there was no indication husband had been denied a fair trial, and even if petitioner had erred in that one case, that was no basis for finding her not qualified. *See Report of a Candidate's Qualifications* at pp. 21-30 (December 18, 2009).

LEGAL ISSUES

A. Composition of the Commission – Presence of Legislators: S.C. Const. art. V, § 27

14. A fundamental protection of the people's liberty in this State is the separation of powers in our state government. Article I, § 8 of the South Carolina Constitution provides that "the legislative, executive and judicial branches of the government shall be forever separate and distinct," and "no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

15. Under the Constitution, the judicial function is vested in a unified judicial system headed by a Supreme Court. S.C. Const. art. V, § 1. In that system, the Supreme Court decides cases and also makes rules governing administration of all the courts, and practice and procedure in all the courts. S.C. Const. art. V, § 4.

16. The legislative role is to select the justices and judges, by joint public vote of the General Assembly. S.C. Const. art. V, §§ 3, 8 & 13. Under the separation of powers, S.C. Const. Art. I, § 8, the judiciary cannot discharge the function of selecting judges, and the legislature cannot discharge the functions of the judiciary, including administering the courts or regulating the conduct of judges.

17. Over the years, concerns have been expressed that having the entire power and process of selecting judges vested in the General Assembly may make the process too political. Some of these concerns have been expressed by members of the General Assembly themselves. At one time, the General Assembly tried appointing internal judicial screening committees to make recommendations, but this was eventually abandoned.

18. In 1996, the voters of South Carolina approved an amendment to the Constitution that created a separate body to exercise a portion of the power of selecting judges. S.C.

Const. Art. V, § 27. This provision called for the creation of a Judicial Merit Selection Commission, appointed by the General Assembly, to screen judges for fitness and qualification before consideration by the General Assembly. The independent power of the Commission lies in the constitutional provision that the General Assembly "must" elect the judges and justices "from among the nominees of the commission." The Constitution repeats this mandate by saying that "no person may be elected to these positions unless he or she has been found qualified by the commission." S.C. Const. art. V, § 27.

19. The evident purpose of the people in adopting S.C. Const. Art. V, § 27 was to create a requirement beyond the power of the General Assembly, in the form of an independent body which could act as a check and balance on the legislature.

20. Nevertheless, when the General Assembly by statute created the Commission called for in the new clause of the Constitution, it inserted a provision in the statute which required that certain commissioners – six out of ten – must be sitting members of the General Assembly. S.C. Code § 2-19-10(B).

21. By placing legislators on an independent body designed by the Constitution to be a check on the legislator, S.C. Code § 2-19-10(B) violates the S.C. Const. Art. V, § 27.

B. Composition of the Commission – Presence of Legislators: S.C. Const. Art. III, § 24

22. In addition, another provision of the Constitution bars members of the General Assembly from simultaneously holding any other "office or position of profit or trust" under the State of South Carolina, the United States or any other power. S.C. Const. art. III, § 24. This is known as the ban on dual office-holding. It specifies exceptions allowing service in the militia, a fire department or as a notary public. This ban on dual

office-holding is repeated twice more in the Constitution, in art. VI, § 3, and art. XVII, § 1A (in the latter two sections, the phrase is "office of honor or profit").

23. Service on the Commission is an "office of honor" or an "office of trust" because these terms are interpreted to include any office or position in which one exercises a portion of the sovereignty of the State of South Carolina. Because the Commission is not merely advisory but has the absolute power to decide who is eligible for a judgeship, it meets the definition of exercising a portion – a significant portion – of the state's sovereignty.

24. There is a well-recognized exception to the ban on dual office-holding, commonly known as the "ex officio exception," but that exception does not apply here. Under this exception, an officer who has additional duties "incident" to his principal duties is not regarded as holding another office. Service on the Budget and Control Board by the two legislative members is an example of such "incidental" service, and has thus been held to not violate the dual office-holding requirement. *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967); *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406 (1977). (In *Elliott v. McNair*, one of the factors involved in upholding the Board was the fact that the legislators were only a minority of the Board, which was held not to "usurp" another branch's function.)

25. If the duties of the Commission were simply "incidental" to duties of members of the General Assembly, it would not be a dual office. That could possibly be true if the Commission were simply an advisory body. But the Constitution sets the Commission apart as a separate body, demarcating it from the General Assembly by barring the General Assembly from even voting on people not nominated by the Commission.

26. The statute mandating that sitting legislators be members of the Commission – indeed, a majority – also means that the legislators will vote twice on an applicant, once at the Commission and again in the General Assembly. This process resembles a trial judge rendering a decision, and then sitting as an appellate judge to review his own decision.

27. Thus, S.C. Code § 2-19-10(B) violates the Constitution, Art. III. § 24.

28. Therefore, by putting sitting legislators on the Commission, S.C. Code § 2-19-10(B) is unconstitutional because it separately violates Art. V. § 27 and Art. III. § 24, or, in the alternative, it violates their combined meaning.

C. Violation of Rule 502, SCACR

29. In this case, the Commission relied solely on its view of matters committed to the judicial branch of government, and indeed matters which had already been decided by the judicial branch.

30. The husband had pressed his arguments before the appropriate judicial bodies, four times, and each of those judicial bodies had ruled against him.

31. Allowing a disappointed litigant to seek out another forum to press the same claim a fifth time, and in the legislative branch, was impermissible and in violation of law and the Constitution.

32. Rule 20, RJDE, Rule 502, SCACR, by its terms barred reconsideration of the allegations the husband had made to the Commission on Judicial Conduct, unless the Commission on Judicial Conduct was requested to reopen the matter – which was not done.

33. The Judicial Merit Selection Commission not only considered the same

allegations that had been made before the Commission on Judicial Conduct, but chose to adopt its own interpretation of the Canons and commentary contained in the Code of Judicial Conduct, an interpretation which was contrary to the findings of the proper judicial body, the Commission on Judicial Conduct.

34. Therefore, the respondent Judicial Merit Selection Commission violated Rule 20 when it took up the same complaint and decided for itself that petitioner had violated Canons of Judicial Conduct which the Commission on Judicial Conduct held she had not.

35. Rule 20 is based on the Constitution. Along with other portions of the Code of Judicial Conduct and Rules 501 and 502 of the South Carolina Appellate Rules, it was promulgated by the Supreme Court pursuant to Art. V. § 4, and it was submitted to and approved by the General Assembly pursuant to Art. V § 4A. It is binding on all state officials, including judges, legislators and the Judicial Merit Selection Commission.

36. For all these reasons, the Commission's decision to hear and decide the husband's claim of unethical conduct violated Rule 20, as well as Art. V. § 4 and 4A.

37. As such, it was also a fundamental violation of judicial independence guaranteed by the separation of powers embedded in the Constitution. Art. I. § 8.

D. Not a Political Question

38. The Commission exercises a portion of the legislative power. As a result, ordinary judicial review of the Commission's decisions is barred under the doctrine of "political question." However, the political question doctrine does not bar consideration of constitutional questions such as the ones involved here. *South Carolina Public Interest Group v. Judicial Merit Selection Commission*, 369 S.C. 139, 632 S.E.2d 277 (2008). Therefore the political question doctrine does not apply in this case.

E. Irreparable Injury – Judicial Independence

39. The action of the Commission threatens irreparable injury not only to the petitioner in this case, but, far more important, to the precious safeguard of judicial independence. Nothing can be more important to the liberty of a free people than a system of justice that protects the independence of judges.

40. The violations here threaten the independence of judges.

a. If the action of the people in adopting a constitutional check on the unlimited power of the political branch to select judges is compromised and undermined by installing the legislators in the very agency that it is to be the check on them, then Art. V, Sec, 27 is rendered nugatory, and Art. III, § 24's ban on dual office-holding is a vain hope.

b. By the same token, if the separation of powers, so highly valued in our State, is to be nullified by simply allowing the new Commission to invade the judicial function, the constitutional system designed to protect judicial independence is undone.

c. And if the explicit words of Rule 20 can be ignored, the carefully crafted system of regulating judges' conduct in a way that balances protections of both of the judges and the people who come before them, will be cast aside to the ultimate injury of all the people.

d. South Carolina is almost alone in placing the entire power to select judges in the political branch. Moreover, judicial terms of office are short. When the basic structure provides so little protection against threats to judicial independence, it is all the more important to enforce rigorously what few protections there are. In this case, those protections have been breached and must be restored.

RELIEF

41. WHEREFORE, petitioner prays that this Court hear this case in its original jurisdiction and issue a declaration as follows:

a. That S.C. Code § 2-19-10(B) is unconstitutional insofar as it includes legislators on the Judicial Merit Selection Commission.

b. That the Judicial Merit Selection Commission's finding that petitioner was not qualified to be a Family Court judge violated the Constitution and laws of South Carolina.

Petitioner further prays for costs and fees, and for such other relief as may be appropriate.

(SIGNATURE PAGE TO FOLLOW)

Respectfully submitted,

Morris D. Rosen
Rosen Rosen & Hagood, LLC
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

Alexander M. Sanders, Jr.
19 Water Street
Charleston, SC 29401
(843) 577-6572

Armand Derfner
D. Peters Wilborn, Jr.
Derfner, Altman & Wilborn, LLC
P.O. Box 600
Charleston, SC 29402
(843) 723-9804

Attorneys for the Petitioner