HENRY MCMASTER
GOVERNOR

July 3, 2024

The Honorable Thomas C. Alexander
President of the Senate
State House, Second Floor
Columbia, South Carolina 29201

Dear Mr. President and Members of the Senate:

I have signed into law R-244, S. 1046, which amends Chapter 19 of Title 2 of the South Carolina Code of Laws in various ways related to the selection of state judges. I have approved this legislation not because it satisfies the need or public demand for comprehensive judicial reform, but because it contains improvements, although incremental, to the judicial-selection process. I write to emphasize that this is a first step—but by no means the last—in implementing meaningful judicial reform.

Certain provisions of S. 1046 should facilitate overdue improvements to the existing judicial screening and selection process. For instance, establishing term limits for members of the Judicial Merit Selection Commission ("JMSC") should bring confidence to the process. It will help ensure that judicial candidates and sitting judges do not feel beholden to a small cadre of lawyers who appear as perpetual gatekeepers, repeatedly controlling the keys to a candidate's eligibility to stand for election by the entire General Assembly. *See* 2024 S.C. Acts No. __, R-244, S. 1046, § 1 (codified at S.C. Code Ann. § 2-19-5(C)). Likewise, raising the "cap" on the number of judicial candidates from three to six should make it much more difficult for the JMSC to effectively "fix" a judicial election by not favorably "screening out"—or not finding "qualified and nominated"—all of the strongest candidates. *See id.* (codified at S.C. Code Ann. § 2-19-80(A)); *see also Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 124–25, 691 S.E.2d 453, 461 (2010) ("The JMSC misapprehends its power. The exercise of power of the sovereign by the JMSC is seen not only in its ability to favorably submit judicial candidates to the Legislature for consideration, but more importantly in its power to *exclude* candidates.").

But these changes are only a start. More reform is needed. I have made clear that my preference is for the federal model of executive appointment with legislative confirmation. I recognize, however, that two-thirds of the General Assembly's members—the threshold necessary for a constitutional amendment—appear unwilling to relinquish its exclusive authority to elect judges. Yet a constitutional amendment is not necessary to address certain concerns that have

featured prominently in the judicial reform debate, such as those related to JMSC's composition and lawyer–legislators being perceived as receiving favorable treatment when they appear in court before the judges they select and elect. People of good faith may disagree on the validity of these concerns. Nevertheless, even the perception of impropriety is a problem. Not only must our judges be, in fact, independent, honest, impartial decisionmakers, but they must also be perceived to be so. Otherwise, the public will lose faith in our judicial system.

Entrusting a single branch of government with effective control over the screening and selection of candidates and exclusive control over their election is not only inconsistent with the separation-of-powers principles enshrined in our Constitution, but it has also created at least the public perception that the process elevates a candidate's influence and connections over merit and objective qualifications. Unfortunately, S. 1046—by simply giving the Executive Branch an immediately outnumbered proportion of JMSC's membership—is unlikely to eliminate this outcome.

Just as that public perception fails to recognize our State's many distinguished jurists and public servants, the selection process (before or after S. 1046) unnecessarily burdens incumbent judges who may find themselves (or perceive themselves to be) in a proverbial Catch-22 scenario when a legislator appears before them in court. This legislation also does not significantly change or sufficiently improve the current screening process. It is demeaning, inordinately time-consuming, and completely unprofessional for those willing to stand for judicial office. Such requirements as assuming a campaign post in the lobby or at the bottom of the escalator in the hope of speaking to a legislator as they hurry by to their work discourage many capable but apolitical attorneys from seeking judicial office. No good argument can justify maintaining or merely tinkering with the status quo. Continued resistance to meaningful change will only further elevate the current perception and exacerbate the actual imbalance of power.

For the foregoing reasons, the next General Assembly must act promptly to adopt the following additional reforms:

1. The Executive Branch must have at least the same number of appointments to JMSC as the General Assembly. The Executive Branch and the Legislative Branch (that is, the House and Senate together, *see* S.C. Const. art. III, § 1) are coequal branches of government, but under S. 1046, the General Assembly still retains two-thirds of the 12 appointments to JMSC. That lopsided structure will allow the General Assembly to continue to dominate the process of selecting judges—while still exclusively controlling their ultimate election—and deny the Executive Branch a sufficient voice in that process.

2. JMSC's staff must include members of the Governor's staff (or other Executive Branch employees) instead of being supported exclusively by legislative staff. This would ensure that both the Executive and Legislative Branches are aware of everything that happens during the screening process and avoid an informational (and representational) imbalance.

3. Legislators should comprise less than half (if any) of JMSC's members. Additionally, lawyer–legislators must not attempt to use S. 1046's provisions to expand their (already controversial) authority over judicial selection. During the legislative debates on adoption of the conference report, there was a suggestion that lawyer–legislators could serve in the seats on JMSC appointed by legislative leadership and designated for individuals "whom must be selected from the South Carolina Bar and must be a member in good standing with ten years' experience in the practice of law." 2024 S.C. Acts No. __, R-244, S. 1046, § 1 (codified at S.C. Code Ann. § 2-19-5(A)(2)(a)). I do not read S. 1046 as permitting as much, and interpreting S. 1046 that way would make this legislation reform in name only. To be clear, I do not read S. 1046 as permitting such an absurd result. As a threshold matter, such a contorted interpretation of this legislation would seemingly violate the South Carolina Constitution's dual-office-holding prohibition since additional, secondary service by legislators on JMSC would not be "incidental" to their legislative duties. S.C. Const. art. III, § 24; *id.* art. VI, § 3; *id.* art. XVII, § 1.A; *see Segars-Andrews*, 387 S.C. at 125–26, 691 S.E.2d at 462. Moreover, should legislators pursue this approach, it would conclusively answer the question of whether the General Assembly is more interested in "reform in name only" than advancing a well-intentioned effort to improve the status quo. Indeed, the General Assembly still must address the underlying issue of legislative control over the process and outcome. At bottom, JMSC should *not* be controlled by legislators. Instead, JMSC's role should be to carefully screen and recommend candidates for legislators' consideration for election. Continued legislative dominance over JMSC, both before and after S. 1046 takes effect, simply allows a small group of legislators to choose the candidates from whom the rest of their colleagues are permitted to elect, instead of the entire General Assembly being presented with a slate of candidates screened by an independent body.

Because the General Assembly unnecessarily delayed the effective date of S. 1046's changes for a year, legislators have the opportunity—if they are truly committed to judicial reform—to adopt these additional improvements in time for them to also take effect in July 2025.

Of course, I must also note that the final compromise version of S. 1046 did not include any of the magistrate-related reforms proposed by the House of Representatives. That is unfortunate. I have already instituted a more rigorous application and corresponding screening procedures for candidates recommended by the Senatorial Delegations to serve as magistrates, and I will continue to utilize that enhanced process. In the meantime, however, the General Assembly must—at the very least—end the present ability of magistrates to serve indefinitely in holdover status. *See* S.C. Code Ann. § 22-1-10. Such service essentially turns magistrates into at-will judges serving at the pleasure of, and functionally subject to removal only by, their home-county Senators (some of whom may regularly appear before them in magistrate's court). If such a statutory change does not come or recommendations for a reappointment or a new appointment are not promptly made when (or before) a magistrate's term ends, I will consider making interim appointments or submitting magistrate nominations without any recommendation.

With the understanding that additional legislative action is required to implement the necessary changes to the current judicial selection process, I have signed S. 1046 into law. I look forward to working with the next General Assembly to accomplish these goals and make meaningful judicial reform a reality.

Yours very truly,

Henry Dargan McMaster