SC20-985

IN THE SUPREME COURT OF FLORIDA

HONORABLE GERALDINE F. THOMPSON, in her Official Capacity as Representative for District 44 in the Florida House of Representatives, and as an individual

Petitioner,

v.

HONORABLE RON DESANTIS, in his official capacity as Governor of Florida; and DANIEL E. NORDBY, in his official capacity as Chair of the Florida Supreme Court Judicial Nominating Commission,

Respondents.

BRIEF OF AMICUS CURIAE JESSE PANUCCIO, COMMISSIONER, SUPREME COURT JUDICIAL NOMINATING COMMISSION, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Undersigned Amicus Curiae is a Commissioner on the Florida Supreme Court Judicial Nominating Commission and has served on the JNC for each of the last six nominations for open seats on this Court, including the nomination of Judge Francis on January 23, 2020. Upon assuming the office of Commissioner, Amicus swore an oath to "support, protect, and defend the Constitution … of the State of Florida" and to "faithfully perform the duties of" the office. Art. II. § 5(b), Fla. Const. Petitioner alleges that, in nominating Judge Francis, JNC Commissioners violated the JNC rules and the Florida Constitution, and thus violated our oaths. Pet. 14-15. In the course of filing the Petition, Petitioner has called JNC members a "sham and a farce" and worse than that. Amicus has an interest in answering these unfounded charges.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 31, 2020, Petitioner's name appeared at the close of a public letter directed to the governor, which contained the following statement:

> Judge Francis met the qualifications for applying for the job…. While she can't technically serve on the court before September 24, that is a small detail when weighed against her overall qualifications…. Appoint Judge Francis to the Florida Supreme Court.

Resp. App. 23.

Six months later, Petitioner now asks this Court to undo that very appointment, to ignore the text of the Florida Constitution, to abandon its long-

settled precedent, and to take the extraordinary (and unconstitutional) step of ordering non-party JNC members to certify a new list of nominees. In the course of making this meritless legal argument, Petitioner has attacked the JNC commissioners—all members of the Bar of this Court, with accomplished records as attorneys and public servants—calling them "a sham and a farce" and even worse invective that does not merit quotation here. And while Petitioner tells this Court that she "in no way questions whether Judge Francis has the abilities or qualifications to be considered for appointment as a justice," Pet. at 1 n.1, Petitioner has attacked Judge Francis, speculating that she will judge "based on some political agenda" and that her appointment sets this Court on a "dangerous path."

Petitioner's broadsides against the JNC commissioners and Judge Francis are, unfortunately, part of a larger campaign of abusive rhetoric and attempted intimidation that has been waged over the last several nomination cycles. And they are indicative of an emerging pattern for some politicians who think the judiciary should be a mere continuation of politics by other means, grist for their public-relations mill. *See* Statement from Chief Justice John G. Roberts, Jr. (Mar. 4, 2020) ("statements of this sort from the highest levels of government are not only inappropriate, they are dangerous"), http://bitly.ws/9pyr. This campaign is deeply wrong. It harms Florida's legal profession and judiciary. It is time for it to end.

This Court should refuse to be made a platform for this invective and deny the Petition outright and without oral argument.

On the merits, Petitioner fails to state any ground on which she is entitled to relief. The text and context of the Florida Constitution are plain. The years-in-Bar requirement attaches at the time of taking "office," not at the time of nomination or appointment. Art. V, § 8, cl. 2, Fla. Const. This Court has repeatedly held as much. *See Miller v. Mendez*, 804 So. 2d 1243, 1246 (Fla. 2001) (citing *In re Advisory Op. to the Governor*, 192 So. 2d 757) (Fla. 1966)). Petitioner has accused the JNC members (and Judge Francis) of not knowing the law, but it is Petitioner who failed to even cite to this Court controlling precedent directly contrary to her theory.

Finally, Petitioner requests relief that this Court cannot provide. Petitioner asks this Court to order the JNC to certify a new list of nominees. But Petitioner chose not to name the JNC as a respondent in this case, and thus such relief is unavailable against this nonparty. Moreover, even if this Court could order the non-party JNC to act, the remedy Petitioner seeks contravenes this Court's precedent. *See Pleus v. Crist*, 14 So. 3d 941, 946 (Fla. 2009).

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO FOREGO ORAL ARGUMENT AND IMMEDIATELY DENY THE PETITION.

The "nature of an extraordinary writ is not of absolute right," and "the granting of such writ lies within the discretion of the court." *Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004). This Court may deny a writ petition "for numerous and a variety of reasons, some of which may not be based upon the merits of the petition" and may be in the form of an "unelaborated denial." *Id.* As explained by Respondents, and discussed in Part II below, Petitioner *is* wrong on the merits. But this Court should not even reach the question, because it has a compelling reason to deny the Petition immediately and outright without oral argument: namely, so that this Court can avoid being used as a platform for what it has long discouraged—incivility in the legal profession and unwarranted attacks on judges and lawyers.

A. This Court Should Not Permit Itself to Be Used as a Forum for Publicizing Unfounded Political Attacks on Judges and Lawyers.

For months now, Petitioner has waged a public attack on the members of the JNC. In the course of filing her Petition, she called the JNC members "a sham and a farce."[1] And that was one of the more mild insults. Previously, Petitioner has

[1] Jason Delgado, *Rep. Geraldine Thompson Calls Judicial Nominating Commission a "Sham" and a "Farce,"* FLORIDA POLITICS (July 27, 2020), http://bitly.ws/9oWR.

hurled at "JNC members" scurrilous invective not fitting for repetition here, but regrettably cited in the Petition and reprinted in full in Petitioner's Appendix. *See* Pet. 3 n.2; Pet. App. 4, 6. The JNC's ranks include: a former chief judge of the Nineteenth Circuit; a former judge of the Eleventh Circuit; two former general counsels to the governor and experienced appellate advocates; a former deputy general counsel to the governor and corporate president; a recognized authority on insurance law and former member of the Constitutional Revision Commission; a Board-certified appellant attorney and past chair of the Appellate Section of the Florida Bar; a Board-certified adoption attorney who has been recognized with the Florida Adoption Council's Lifetime Achievement Award; and a Board-certified specialist in international law who co-chairs and American Bar Association Committee. All are members in good standing of the Bar of this Court. All have served honorably and well on the Commission and in other public capacities. All have volunteered hundreds of hours of their professional and personal time to vet, interview, deliberate over, and select nominees. These are the lawyers that Petitioner, in connection with this lawsuit, has dubbed a "sham and a farce."

Petitioner has also viciously attacked Judge Francis—a jurist with an unblemished record and whose appointment has garnered widespread community support and praise. *See* DeSantis App. 14-23; Gary Blakenship, *Legislative Black Caucus Still Supports Justice Francis's Appointment*, FLORIDA BAR NEWS (July 23,

2020). Although Petitioner assures this Court that she "in no way questions whether Judge Francis has the abilities or qualifications to be considered for appointment as a justice," Pet. 1 n.1, elsewhere in her filings Petitioner calls Judge Francis the "wrong choice" and asserts that Judge Francis, unlike other applicants, lacks "experience and qualifications." Pet. 1 n.2; Pet. App. 3, 5. Further, at the press conference Petitioner held to announce the filing of the lawsuit, she said Judge Francis's appointment sets this Court on a "dangerous path" and suggested that Judge Francis would not make decisions "based on the law" but instead would act "based on some political agenda." Delgado, *supra* note 1. Petitioner further inveighed against Judge Francis:

> [S]he's a judge and she should know the law. And if she does not know the law that is a major cause for concern that you would apply for a position and know that you are ineligible for that position. And if she did not know that, what does that portend in terms of her service on the Florida Supreme Court?[2]

On Petitioner's Facebook page—a facet of her campaign on which she introduces herself as "a candidate for Florida House of Representatives"—she has plastered Judge Francis's picture and said the only reason Judge Francis was appointed is because she "shares [the governor's] ideology." *See* Geraldine Thompson, Facebook (July 14, 2020), http://bitly.ws/9oXE.

[2] Florida Channel, *Supreme Court Briefs—Lawsuit over Supreme Court Appointment*, http://bitly.ws/9oXM.

These insults about Judge Francis are of a piece with Petitioner's broader statements about this Court. At her press conference, Petitioner said she was "concerned … with the integrity of the Court" and asked, with "some weighty decisions coming up," "are we going to be comfortable, then, with a Court that has been selected because of an ideology rather than merit and rather than work in the judiciary?"[3]

All of this invective would be bad enough if it were included with the serious presentation of a legal argument. But it is not. As explained below, the supposed textual analysis Petitioner relies upon is nonexistent, and—most tellingly—Petitioner failed to disclose to this Court precedent that is directly contrary to her position. *See* Nordby Resp. 18.[4] This glaring omission only underscores that this lawsuit appears to be less focused on presenting this Court with a robust analysis of the law, and more focused on creating another avenue for invective against the JNC and the judiciary. Indeed, in an interview with the Florida Bar News conducted after she filed the lawsuit, Petitioner admitted that the constitutional question is not central to her case: "To be very honest, I think the independence of the court is the issue here." Blakenship, *supra* page 5. Just so.

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[3] Rep. Geraldine Thompson, Remarks at Press Conference at the Florida Press Association (July 27, 2020) (audio recording on file with undersigned counsel).

[4] *See also State v. Cregan*, 908 So. 2d 387, 389 n.1 (Fla. 2005) ("We remind counsel of their obligation to disclose controlling legal authority, even if it is 'directly adverse to the position of the client.'").

Time and again, this Court has conveyed to the Bar and the public the importance of civility and of respecting the integrity of the judiciary. Indeed, "[t]his Court has been discussing professionalism and civility for years" and "do[es] not tolerate unprofessional and discourteous behavior" because "if we are to have an honored and respected profession, we are required to hold ourselves to a higher standard." *Fla. Bar v. Ratiner*, 238 So. 3d 117, 126 (Fla. 2018). *See also Fla. Bar v. Patterson*, 257 So. 3d 56 (Fla. 2018) (noting that "this Court [was] greatly troubled by the general lack of respect and professionalism [a lawyer] displayed toward judges and other professionals" and disciplining lawyer for "making inappropriate and disparaging statements in courts filings … about opposing counsel … [and thus] contributing to the general lack of civility and professionalism this Court is striving to curb in the legal profession"); *Fla. Bar v. Norkin*, 132 So. 3d 77, 89 (Fla. 2014) ("it is crucial to recognize that the Court and The Florida Bar have been advocating professionalism and civility for over twenty years"); *In re Oath of Admission to the Florida Bar*, 73 So. 3d 149, 150 (Fla. 2011) ("[r]ecognizing the importance of respectful and civil conduct in the practice of law").

The Florida Bar, an official arm of this Court, has likewise instructed that in order "[t]o maintain the fair and independent administration of justice," "lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly

criticized." Rules Regulating the Florida Bar 4-8.2, Comment.[5] No surprise, then, that twenty-three former Florida Bar presidents once stated that they "are deeply concerned about unfounded and unwarranted attacks upon our judicial system[,] which through the Constitutional process of merit … selection has given Florida … one of the finest judiciaries in the nation." Joint Resolution of the Undersigned Past Presidents of the Florida Bar (Sept. 2012), http://bitly.ws/9oYY. Further, these Bar presidents stated that they were "concerned" about "enabl[ing] … politically motivated groups to effectively destroy our system through unwarranted attacks on the Florida Supreme Court," and about "the irreparable damage to our system of judicial fairness and impartiality that will occur" from an "ill-conceived political campaign" against Justices of this Court. *Id.* These former Bar presidents thus resolved "[t]o use [their] best efforts to assist[,] and encourage the assistance of members of The Florida Bar and the public[,] in defeating the unwarranted attacks on our judicial system." *Id.* The former Florida Bar presidents' words are as important in 2020 as they were in 2012.

[5] *See also* Rules Regulating the Fla. Bar 4-8.2 ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge … or candidate for … appointment to judicial … office."); Rules Regulating the Fla. Bar 4-8.4(d) ("A lawyer shall not … engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, [or] humiliate … other lawyers."); *see also* Oath of Admission to the Fla. Bar ("To opposing parties and their counsel, I pledge fairness, integrity, and civility … in all written and oral communications.").

Petitioner is not a lawyer and thus is not subject to the Rules of Professional Conduct. Under the First Amendment, she has the right to express her views about the JNC members and judges, no matter how ugly or unfounded and regardless of whether they are consistent with the honor and influence of the high office she holds. *Cf.* Statement from Chief Justice John G. Roberts, Jr. (Mar. 4, 2020), http://bitly.ws/9pyr ("Justices know that criticism comes with the territory, but threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous."). But Petitioner does not have a right to use this Court and its televised oral arguments as a bullhorn for her vituperation.

To further entertain this Petition—to grant televised oral argument through which Petitioner can continue to impugn the JNC commissioners and Judge Francis—would cut against the very civility this Court has repeatedly demanded and against the Bar's repeated denunciations of attacks on the judiciary and the merit-selection process. And it would only further encourage the broader campaign—waged during every nomination cycle since 2016—of scurrilous attacks on the JNC. *See, e.g.*, Emergency Supp. Pet. for Writ of Quo Warranto, *League of Women Voters of Fla., Inc. v. Scott*, No. SC18-1573 (filed Oct. 26, 2018) (accusing JNC members of conducting a "tainted process" and of having the "taint of partisan bias" and impugning the professional qualifications of commissioners by falsely stating that they have "little or no apparent experience with litigation in this or any Florida

appellate court"). Indeed, the last time this Court heard oral argument in a challenge to the JNC's process, counsel accused the JNC members of being "politicized" "partisans" who practiced "gamesmanship" and had "difficulty putting aside their bias"—comments so lacking in foundation and decorum that Chief Justice Canady had to admonish counsel that he was engaging in "totally speculative political rhetoric." Oral Arg. at 9:22, 23:55, 58:28, 59:06, *League of Women Voters of Fla. v. Scott*, 257 So. 3d 900 (Fla. 2018) (No. SC18-1573), https://wfsu.org/gavel2gavel/viewcase.php? eid=2515.

Enough is enough. It is time for this Court to send a clear message to the Bar and the public that this long-running campaign of attacks on the JNC, which has now spilled over into attacks on judges, is unacceptable. This Court should immediately dismiss the Petition without oral argument.

B. Petitioner's Long Delay in Filing the Petition Counsels in Favor of Dismissal.

The curious timing of the Petition also counsels in favor of dismissal without further consideration. Petitioner first raised her unfounded concerns about Judge Francis's constitutional eligibility in an op-ed published on February 14, 2020, three weeks after the JNC nominated Judge Francis and three months before the governor made his appointment. *See* Pet. App. 3 (reprinting op-ed objecting to Judge Francis because she "had less than 10 years as a Florida Bar member"); *id.* at 15 (nomination), *id.* at 17-18 (appointment). Yet Petitioner did not file her

"emergency" petition raising this very same objection until July 13, 2020—some *five months* after she first aired her supposed constitutional concerns and *seven weeks* after the governor's announcement. If Petitioner truly viewed this an emergency, her long delay in filing the Petition is puzzling—though the suit was announced on her campaign Facebook page and coincides nicely with the primary election set for August 18, 2020.

During this long delay, parties have relied on the status quo to make important decisions and arrange their affairs. For example, Petitioner asks this Court to order the JNC "to immediately provide Governor DeSantis with a new list of nominees," but suggests that the list should come from the pool of applicants who previously applied and without further "investigation and interviews." Pet. 18 & n.7. Yet months have passed and applicants have changed positions—in ways that might matter to the applicants or to the JNC.[6] Moreover, this Court has presumably made extensive preparations for the addition of Judge Francis, including decisions about staffing, case assignments, and more. Most importantly, the people of Florida—with the same claim to standing in this matter as Petitioner—now have long-settled expectations for Judge Francis to take the bench, and her appointment has been widely applauded. *See* Resp. App. 14-23; Blakenship, *supra* page 5.

[6] *See, e.g.*, Press Release, Florida Second District Court of Appeal, Judge Samuel J. Salario, Jr. to Resign June 4 (May 26, 2020).

Those "who seek[] to correct … violations" relating to officer-holder selection "must move against them seasonably and appropriately," and "[t]his [C]ourt is committed to the doctrine that extraordinary relief will not be granted … where such relief in the particular case will result in confusion and disorder." *State ex rel. Pooser v. Wester*, 170 So. 736, 738-39 (Fla. 1936). Petitioner's faux-emergency, inexplicably delayed in its presentation for so many months, seeks to invoke this Court's equitable jurisdiction to undo long-settled expectations. This unexplained and inexcusable delay is reason enough for the Court to deny the exercise of its discretionary jurisdiction.

II. PETITIONER'S CLAIM THAT JUDGE FRANCIS FAILS TO MEET THE CONSTITUTIONAL BAR MEMBERSHIP REQUIREMENT IS MERITLESS.

A. Petitioner Ignores the Text and Context of Article V, Section 8.

Petitioner's claim on the merits is that the JNC could not nominate, and the governor could not appoint, Judge Francis because, at the time of nomination and appointment, she had not been a member of the Florida Bar for ten years. Petitioner relies exclusively on Article V, section 8, clause 2, which states: "No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida."[7] Petitioner posits that the "supremacy-of-the-text principle"

[7] Petitioner claims that the JNC violated "Section[s] II, V, and VII of its own rules." Pet. 17. These rules refer to the "legal requirements for the office to be

supports her case. Pet. 14. That principle holds that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Advisory Op. to Governor re Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020). The only problem for Petitioner's invocation of this principle is, well, the words of the governing text and their context.

The text is straightforward. It says "eligible for *the office* of," not "eligible to be nominated for" or "eligible for appointment as." Under their plain meanings, "office," "nominate," and "appointment" are different concepts.[8] And under the Florida Constitution, one does not "enter[] upon the duties of *the office*" until one takes the oath, and is not an "officer[] of the state" until one has been "commission[ed]" by the governor. Art. II, § 5(b) (emphasis added), Art. IV § 1(a), Fla. Const. *See also State ex rel. Page v. Lawson*, 250 So. 2d 257, 258 (Fla. 1971) (holding that a person appointed to office does not hold that office "unless and until

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filled," the "constitutional … requirements," and "qualified nominees"—all phrases that simply refer back to the constitutional question. To the extent Petitioner is suggesting that the JNC rules create extra-constitutional requirements for nominees, the Constitution affords the JNC only the power to adopt rules of "procedure," not substance. Art. V, §11(d), Fla. Const. *Cf. Powell v. McCormack*, 395 U.S. 486, 548 (1969) (Congress's power to judge qualifications of its members is a power to "judge only the qualifications expressly set forth in the Constitution").

[8] *Compare Office, n.*, Oxford English Dictionary Online, http://bitly.ws/9oAZ ("official position," as in "to … take, hold … office"), *with Nominate, v.*, *id.*, http://bitly.ws/9oB2 ("To propose or formally enter as a candidate for election or for an honour, award, etc."), *and* DeSantis Resp. 27-28 (recounting dictionary definitions of "appointment" as the "selection … of a person … to fill an office").

a commission is executed by the Governor and attested by the Secretary of State").[9] *That* is when "eligibility for *the office*" must be satisfied.

The context is also straightforward. As Respondents point out, the Florida Constitution distinguishes between qualifications for office and qualifications for appointment. Indeed, Article V, section 8 itself has an "appointment" eligibility requirement for certain county court judges. *See* Art. V, § 8, cl. 6, Fla. Const. ("a person shall be eligible for … appointment … if the person is a member in good standing of the bar of Florida"). And Article V, section 3(a) has an "appointment" eligibility requirement for Justices of this Court. Art. V, §3(a), cl. 2, Fla. Const. ("each appellate district shall have at least one justice … who is a resident of the district at the time of original appointment"). Petitioner invokes *Reading Law* as instructive on the "supremacy-of-the-text" principle. Pet. 14. As that learned treatise explains, and Petitioner ignores, "different term[s] denote … different idea[s]." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). The Florida Constitution imposes (i) eligibility requirements for appointment and (ii) eligibility requirements for taking office—different terms denoting different ideas.

[9] This Court, in its Rules Regulating the Florida Bar, has adopted the standard concept that oaths, and not appointments, typically trigger office-holding. *See* Rule 3-3.4(d), (f) (appointed grievance committee members "must subscribe to an oath to fulfill the duties of office" and their terms are measured "from the date of administration of the oath").

Still more context proves the point. Petitioner's theory is that, at the time of nomination or appointment (or both?), the putative judge must meet all of the qualifications for office. Yet Article V, section 13 requires that "[a]ll justices and judges … shall not engage in the practice of law." The roster of this Court's membership is replete with current and former Justices who were "engage[d] in the practice of law" at the time of their nominations and appointments. Ditto for the district courts of appeal. Almost all of the current judges of the First DCA, for example, did not satisfy section 13 upon nomination or appointment. Were all of these jurists' nominations and appointments invalid? Are they subject to JQC proceedings for violating section 13's prohibition? Of course not. Their appointments were valid because they wound down their practices after appointment and met the office-holding requirement before they took the oath, just as Judge Francis will do with respect to the years-in-Bar requirement before she takes the oath.

The plain meaning of the text and context of Article V, section 8 is why this Court has had no trouble holding, twice over, that "the bar membership eligibility requirements 'refer to eligibility at the time of assuming office and not at the time of qualification or election to office.'" *Miller v. Mendez*, 804 So. 2d 1243, 1246 (Fla. 2001) (quoting *In re Advisory Op. to the Governor*, 192 So.2d 757, 759 (Fla. 1966)). This Court has held that it will "not deviate from the principle that article V, section

8 of the Florida Constitution requires a candidate for judicial office meet the eligibility requirements by the date the term of office begins." *Id.* Judge Francis will do just that on September 24, 2020.

B. Petitioner's Policy Arguments Are Irrelevant and Unpersuasive.

Without textual, contextual, or precedential support for her argument, Petitioner is left to argue policy. As an initial matter, this Court has held that "extraneous considerations" beyond constitutional "text and context" are inappropriate considerations. *Advisory Op. to the Governor*, 288 So. 3d at 1078. But even taken on their merits, Petitioner's policy arguments falter.

First, Petitioner relies on this Court's statement that "'vacancies in judicial office are to be avoided wherever possible.'" Pet. 13 (quoting *Pleus*, 14 So. 3d at 946). That is true so far as it goes, but this Court does not engage in "judicial imposition of meaning that the text cannot bear." *Advisory Op. to the Governor*, 288 So. 3d at 1078. Thus, this Court has recognized—as recently as the last time it considered a quo warranto petition relating to the Supreme Court JNC—that the Constitution's text does sometimes compel or permit vacancies in judicial office. *See League of Women Voters of Fla., Inc. v. Scott*, No. SC18-1573, order at 1 (Fla. Oct. 15, 2018) (holding that vacancies for Justices facing mandatory retirement do not occur until "expiration of their terms" and that the "sixty-day period after nominations have been certified … begins to run only when the governor with the

authority to appoint has taken office").[10] Indeed, because justices and judges choose when to take their oaths—and because they must wind down their practices or arrange personal affairs before taking the bench—it is common for there to be some period of vacancy. *See, e.g.*, Resp. App. 35

Second, Petitioner invokes the boogey-man of an "absurd result," namely that anything other than her reading of Article V, section 8 would permit "governors to allow vacancies in Florida's appellate courts to remain open for extremely lengthy periods of time." Pet. 26. But if that is true, it is true regardless of whether an appointee meets the eligibility requirements at the time of appointment, because the Constitution requires appointment, but not taking of office, within sixty days of certified nominations. Constitutions do not answer all questions. They empower the legislative and executive branches to act, often within broad ranges of discretion, and the fundamental premise of our republic is that the people will elect able leaders who act with the dignity, prudence, and judgment the office deserves. And if an elected official falls short of that duty, as happens from time to time, the remedy is the ballot box, not the courtroom. *Cf.* Antonin Scalia, A MATTER OF

[10] The JNC could be forgiven for having a sense of whiplash in now facing a "no-vacancy" argument. In the last quo warranto salvo against the JNC, the argument was that this Court should order the JNC to restart the application process on January 8, 2018—an outcome that would have permitted *three* vacancies of more than *four months*, depriving this Court of a quorum for an extended period. *See* Oral Arg. at 23:30, 51:35, *League of Women Voters of Fla. v. Scott*, 257 So. 3d 900 (Fla. 2018) (No. SC18-1573); Art. V, § 3(a) (quorum requires five Justices).

INTERPRETATION 20 (1997) ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."); *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) ("where the Constitution is silent, it raises no bar to action"). Here, the governor has appointed a well-qualified and respected jurist who is on maternity leave during the summer, while this Court is not in regular session. The vacancy is not particularly long, not even the longest found in the record of this case. *See* Resp. App. 35. The Court continues to function. The Republic still stands. Petitioner's dire warnings notwithstanding, there is no emergency, and no constitutional rule barring this period of vacancy.

III. PETITIONER IS NOT ENTITLED TO THE REQUESTED RELIEF AGAINST NONPARTY JNC MEMBERS.

Petitioner asks this Court for a writ "order[ing] the JNC to immediately provide Governor DeSantis with a new list of nominees." Pet. 27. This relief is unavailable for two reasons. First, Petitioner neglected to name "the JNC" as a party to this lawsuit. Petitioner instead named as a Respondent the "Chair of the Florida Supreme Court Judicial Nominating Commission." But the Chair of the JNC does not act for the JNC and cannot direct the JNC to take any particular action. *See* Art. V, § 20(c)(6), Fla. Const. ("All acts of a judicial nominating commission shall be made with a concurrence of a majority of its members."); § 43.291(2), Fla. Stat. ("All acts of a judicial nominating commission must be made with a concurrence of

a majority of its members."); *id.* § 43.291(6) ("A quorum of the judicial nominating commission is necessary to take any action or transact any business."). The Florida Constitution does not empower this Court to grant, and due process does not allow, relief against non-parties who have had no opportunity to answer the claims against them. *See Oakland Props. Corp. v. Hogan*, 117 So. 846, 848 (Fla. 1928); *Trans Health Mgmt. Inc. v. Nunziata*, 159 So. 3d 850, 857 (Fla. 2d DCA 2014) ("Having elected not to make these entities parties to the action … the Estate could not legally obtain an injunction against these nonparties.").

Second, this Court has already rejected the notion that the JNC, once it has certified a list of nominees and the constitutional nomination period has lapsed, can be directed to certify a new list simply because some political actor disfavors the list. *See Pleus*, 14 So. 3d at 946 ("the Governor is bound by the Florida Constitution to appoint a nominee from the JNC's certified list"). This holds true whether it is a governor, this Court, or a state legislator who disfavors the list because "the mandate for the commissions comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts." *Id.* at 944.

CONCLUSION

This Court should immediately dismiss the Emergency Petition for a Writ of Quo Warranto and Writ of Mandamus, without oral argument.

August 13, 2020

Respectfully submitted,

/s/ *Jesse Panuccio*

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a), and that a copy has been provided through the Florida Courts E-Filing Portal on August 13, 2020 to:

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