

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC20-985

Petitioner,

vs.

HONORABLE RON DESANTIS, in his
Official Capacity of Governor
of Florida, and DANIEL E. NORDBY,
in his Official Capacity as Chair
of the Florida Supreme Court
Nominating Commission,

Respondents.

**PETITIONER'S MOTION FOR REHEARING OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO AMEND EMERGENCY PETITION FOR
WRIT OF QUO WARRANTO AND WRIT OF MANDAMUS**

The Petitioner, the HONORABLE GERALDINE F. THOMPSON, through her undersigned attorneys, and pursuant to Fla. R. App. P. 9.330, moves this Court for an Order granting rehearing on the Court's decision. In the alternative, the Petitioner, pursuant to Fla. R. App. P. 9.040(d), requests that this Court grant her leave to amend her Emergency Petition for Writ of Quo Warranto and Writ of Mandamus solely on the issue of remedy.

On August 27, 2020, this Court issued an opinion denying Representative Thompson's Emergency Petition for Writ of Quo Warranto and Writ of Mandamus. However, in doing so, the Court explicitly held that the Governor exceeded his constitutional

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authority by appointing Judge Renatha Francis to fill a vacancy on the Florida Supreme Court. *Thompson v. DeSantis*, Case No. SC20-985, slip op. at 1 (Fla. Aug. 27, 2020). Despite that holding, the Court chose to deny the petition based on its conclusion that the remedy Representative Thompson sought is legally unavailable. *Id.* at 2.

A. Motion for Rehearing

In reaching its decision to deny Representative Thompson's petition and provide no remedy for the Governor's clear violation of the Florida Constitution, the Court has overlooked several important issues of law and fact. Importantly, Representative Thompson sought separate writs of quo warranto and mandamus against both the Governor and the Florida Supreme Court Judicial Nominating Commission ("the JNC").¹

By concluding that the Governor exceeded his constitutional authority by appointing Judge Francis to the Supreme Court on a date when she had not been a member of The Florida Bar for the preceding ten years, the Court effectively granted the petition for writ of quo warranto Representative Thompson filed against the Governor. In her petition, Representative Thompson repeatedly requested that the Court issue a writ of quo warranto declaring that the Governor had exceeded his constitutional authority by appointing Judge Francis. (Emergency Petition at 1-2, 19-20, 22-

¹ The Court chose not to address the merits of Representative Thompson's claims against the JNC. *Thompson, supra*, slip op. at 5.

23).

In other portions of her petition, including portions related to her request for a writ of mandamus, Representative Thompson argued that the most appropriate remedy for the Governor's constitutional violation was to require the JNC to immediately certify a new list of nominees to the Governor, and for the Governor to make an appointment from that list. Despite this Court's conclusion to the contrary, Representative Thompson's arguments in support of that specific remedy did not suggest that was the only remedy that was appropriate or the only remedy that she was seeking. Instead, as part of the adversarial system in which this Court operates, Representative Thompson was simply advocating for what she believed to be the most appropriate remedy for the constitutional violation that occurred in this case.

Therefore, once this Court agreed with Representative Thompson's argument that the Governor exceeded his constitutional authority by appointing Judge Francis, it should have granted the requested writ of quo warranto and invalidated the appointment. Once the appointment is invalidated, and without the Court adopting Representative Thompson's preferred remedy or issuing a writ of mandamus, the Governor would automatically be constitutionally required to appoint one of the 7 individuals that remain on the list certified by the JNC to the Governor on January 23, 2020. (Appendix H to Petition). See Art. V, § 11(c), Fla. Const.; *Pleus*

v. *Crist*, 14 So.3d 941, 945 (Fla. 2009).

All five Justices participating in this case recognized this remedy as the correct and legally available remedy. *Thompson, supra*, slip op. at 2, 14 (majority opinion); slip op. at 30 (Polston, J., concurring in result). The Court chose not to employ this remedy because it concluded that "the authorized remedy would defeat the Petitioner's stated objectives in filing this action." *Id.* at 15.

The Court misapprehends Representative's objectives. Representative Thompson has consistently indicated that she supports racial and gender diversity on the Florida Supreme Court. However, she has also consistently stated that achieving diversity should not, and is not, required to come at the expense of sacrificing the appointment of a qualified candidate to the Florida Supreme Court. (Appendix A to Petition).

Representative Thompson supports adherence to the rule of law and the Florida Constitution. She opposes any decision which permits the Governor to unlawfully appoint a constitutionally-unqualified candidate to the Florida Supreme Court.

Since the Court is not inclined to employ Representative Thompson's preferred remedy, she is specifically requesting that the Court employ the remedy it has deemed to be correct and legally available in this case. "Every court has inherent powers to do all things that are reasonably necessary for the administration of

justice within the scope of its jurisdiction . . .” *Jimenez v. Bondi*, 259 So.3d 722, 726 (Fla. 2018). Here, this Court has the authority to, and should exercise its power to impose the only remedy which it deems fit to correct the Governor’s unconstitutional action.

Even if this Court concludes that Representative Thompson only requested a single remedy, this Court is still required to impose a legal remedy for the Governor’s constitutional violation. Pursuant to the authority granted it by Article V, Section 2(a) of the Florida Constitution, this Court promulgated Rule 9.040(c), Florida Rules of Appellate Procedure. Rule 9.040(c) states the following:

Remedy. If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

Fla. R. App. P. 9.040(c).

By use of the term “shall,” the plain language of this rule indicates that this Court is mandated to treat Representative Thompson’s petition as if she sought the proper remedy. “The rule encompasses all ‘improper’ remedies, whatever their label or title.” *Pridgen v. Board of County Commissioners of Orange County*, 389 So.2d 259, 260-261 (Fla. 5th DCA 1980).

This Court’s “first and foremost duty is to **enforce** our Constitution and to protect all the rights of all Floridians

thereunder." *Wright v. City of Miami Gardens*, 200 So.3d 765, 779 (Fla. 2016) (emphasis added). Therefore, Rule 9.040(c) requires this Court to enforce the Florida Constitution by employing the remedy it has concluded is appropriate and correct.

Accordingly, this Court should grant this motion for rehearing, grant the petition for writ of quo warranto, and invalidate Judge Francis' appointment to the Florida Supreme Court. As a result, the Governor would be required to immediately appoint a constitutionally eligible person from the remaining seven individuals included on the JNC's existing certified list of nominees.

B. Motion for Leave to Amend

In the event this Court concludes that rehearing is inappropriate, it should grant Representative Thompson leave to amend her petition. Rule 9.040(d) provides the following:

Amendment. At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.

Fla. R. App. P. 9.040(d) (emphasis added).

It is well-established that Rule 9.040(d) applies to petitions such as the one filed by Representative Thompson in this case. See *e.g. Spence v. Tucker*, 107 So. 3d 444 (Fla. 1st DCA 2012) (writ of mandamus); *N. Beach Ass'n of St. Lucie County, Inc. v. St. Lucie*

County, 706 So. 2d 62, 63 (Fla. 4th DCA 1998) (writ of certiorari). "Amendments should be liberally allowed under this rule . . . if it would not result in irreparable prejudice." *N. Beach Ass'n, supra* (citing 1977 Committee Note to Florida Rule of Appellate Procedure 9.040(d)).²

Here, Representative Thompson respectfully requests that this Court grant her leave to amend her claims against the Governor to specifically clarify that she is seeking the remedy that this Court unanimously found appropriate in the decision it rendered on August 27, 2020. Permitting such an amendment is in the interests of justice because it would allow this Court to impose a remedy for the Governor's constitutional violation and to invalidate an unlawful appointment to the Supreme Court. It would certainly enhance public confidence in the judiciary if all seven members of the Supreme Court were lawfully appointed and constitutionally eligible to serve as justices on the highest court in the state.

Leave to amend would not prejudice the Governor. In light of this Court's comprehensive analysis of the merits of the parties'

² Subdivision (d) is the appellate procedure counterpart of the harmless error statute, section 59.041, Florida Statutes (1975). It incorporates the concept contained in former rule 3.2(c), which provided that deficiencies in the form or substance of a notice of appeal were not grounds for dismissal, absent a clear showing that the adversary had been misled or prejudiced. **Amendments should be liberally allowed under this rule, including pleadings in the lower tribunal, if it would not result in irreparable prejudice.** 1977 Committee Note to Florida Rule of Appellate Procedure 9.040(d) (emphasis added).

respective arguments, and its conclusion concerning the only appropriate remedy in this case, the Government's legal arguments are unaffected. Upon that remedy being employed, the Governor could promptly fill the existing vacancy by immediately appointing a person included on the JNC's existing certified list of nominees.

C. Consultation with Opposing Counsel

The undersigned attorneys have consulted with Attorney Joseph W. Jacquot, Executive Office of the Governor, who indicates that the Governor opposes this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion has been furnished by e-service to Joseph W. Jacquot, General Counsel, Executive Office of the Governor, joe.jacquot@eog.myflorida.com, counsel for Respondent Ron DeSantis, Respondent Daniel Nordby, in his official capacity as Chair of Respondent Florida Supreme Court Judicial Nominating Commission, dnordby@shutts.com, and Commissioner Jesse Panuccio, jpanuccio@bsfllp.com, on this 31st day of August, 2020.

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