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.

SUPREME COURT JUDICIAL NOMINATING COMMISSION CHAIR'S RESPONSE IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF QUO WARRANTO AND WRIT OF MANDAMUS

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2001, this Court held that a judge must satisfy the Florida Constitution's eligibility requirements "on the date of assuming office." *Miller v. Mendez,* 804 So. 2d 1243 (Fla. 2001). The *Mendez* decision was consistent with more than five decades of precedent concluding that the constitutional eligibility requirements for judges "refer to eligibility at the time of assuming office and not at the time of qualification or election to office." *Id*. at 1245 (quoting *In re Adv. Op. to the Gov.*, 192 So. 2d 757, 759 (Fla. 1966)). And, most importantly, this Court's longstanding precedent is consistent with the text of the Florida Constitution, which sets forth eligibility criteria "for the office of justice of the supreme court" rather than "for *nomination or appointment to* the office of justice of the supreme court." Art. V, § 8, Fla. Const. Because the Petitioner concedes that Judge Francis will satisfy all applicable eligibility requirements at the time she will assume office, the Petition's underlying legal theory fails as a matter of law. The Petitioner's request for quo warranto and mandamus relief against the Chair of the Florida Supreme Court Judicial Nominating Commission (the "JNC Chair") should be denied on the merits.

As a threshold matter, however, the Petition fails to present a justiciable controversy that is appropriate for adjudication by this Court—let alone adjudication on an "emergency" basis under this Court's discretionary

extraordinary writ jurisdiction. The Petitioner invokes this Court's jurisdiction solely on the basis of so-called "citizen and taxpayer standing," which exists as an aberration in this Court's jurisprudence on the legal doctrine of standing. This Petition presents an opportunity for the Court to reconsider that precedent and restore a justiciability requirement to its jurisdiction under Article V, section 3(b)(8), of the Florida Constitution. The Petition here does not identify any actual justiciable controversy between the Petitioner and the JNC Chair. Instead, the Petitioner asks the Court to provide an opinion on the meaning of the Florida Constitution without any allegations that the Court's determination will affect the Petitioner's legal rights in any way. For that reason, the Petition could be dismissed on jurisdictional grounds without reaching the merits.

The Emergency Petition for Writ of Quo Warranto and Writ of Mandamus should be dismissed on jurisdictional grounds or denied on the merits.

ARGUMENT

I. THE PETITION FAILS TO ESTABLISH EITHER A JUSTICIABLE CONTROVERSY OR EMERGENCY CIRCUMSTANCES WARRANTING THE EXERCISE OF DISCRETIONARY JURISDICTION.

As a threshold matter, the Petition fails to allege any justiciable controversy between the Petitioner and the JNC Chair that would make it appropriate for this Court to exercise its discretionary jurisdiction on an emergency basis. The Court

should dismiss or decline to exercise jurisdiction over the Petition on two independent grounds.

A. The Petition fails to establish a justiciable controversy between the Petitioner and the Chair of the Florida Supreme Court Judicial Nominating Commission.

This Court has long held that the judicial power extends only to the resolution of justiciable controversies. *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952); *see also State ex rel. Clark v. Klingensmith*, 163 So. 704, 705 (Fla. 1935) (holding "the information in quo warranto must tender a justiciable controversy on its face"). The Petition here fails to establish any justiciable controversy between the Petitioner and the JNC Chair and should therefore be dismissed on jurisdictional grounds. More specifically, the Petitioner lacks standing because she alleges no direct and articulable stake in the outcome of this quo warranto and mandamus proceeding.

This Court noted in *May v. Holley* that certain prerequisites to entertaining a declaratory judgment action were grounded in the "constitutional limitations upon the functions of the judicial department of government":

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and

> antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. *These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.*

Holley, 59 So. 2d at 639 (emphasis added); *see also Arbelaez v. Butterworth*, 738 So. 2d 326, 327 (Fla. 1999) (denying petition because "there is no present case in controversy"); *Bryant v. Gray*, 70 So. 2d 581, 584 (Fla. 1954) ("The relief sought should not merely be legal advice by the courts or to give an answer to satisfy curiosity."). The limitation on the exercise of judicial power to the resolution of justiciable controversies "has been attributed to judicial adherence to the doctrine of separation of powers." *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla. 2d DCA 2005) (citing *Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953)).

One way in which the justiciability requirement has been enforced by the judicial branch is through the doctrine of standing, which requires that every case "involve a real controversy as to the issue or issues presented." *Dep't of Rev. v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (citing *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993 (Fla. 1976)). "Put another way, the parties must not be requesting an advisory opinion . . . except in those rare instances in which advisory

opinions are authorized by the Constitution." *Id*. at 721.[1] This Court "has long been committed to the rule that a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980).

Yet these sound jurisdictional principles embodying the "constitutional limitations upon the functions of the judicial department of government," *Holley*, 59 So. 2d at 639, have been steadily eroded when it comes to this Court's extraordinary writ jurisdiction. In quo warranto proceedings, for example, this Court has stated that "individual members of the public have standing as citizens and taxpayers" and "the extent of harm to the petitioner is not pertinent to the Court's inquiry." *Whiley v. Scott*, 79 So. 3d 702, 706 n. 4 (Fla. 2011). Under this approach, *any member* of the public may petition the Court for a legal opinion regarding matters of constitutional interpretation and the exercise of governmental authority, even where the petitioner has no direct or articulable stake in the

[1] *See* Art. IV, § 1(c), Fla. Const. (advisory opinion to governor regarding interpretation of constitutional provisions affecting governor's executive powers and duties); Art. V, § 3(b)(10), Fla. Const. (advisory opinion to attorney general regarding validity of initiative petitions); *see also Estate of McCall v. United States*, 134 So. 3d 894, 915 (Fla. 2014) (declining to answer non-justiciable questions because it "would constitute an advisory opinion, which we are not authorized to provide"); *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said District*, 80 So. 2d 335, 336 (Fla. 1955) ("We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution.").

outcome of the controversy. *But see Holley*, 59 So. 2d at 639 (suggesting that a proceeding seeking "merely the giving of legal advice by the courts or the answer to questions propounded from curiosity" was not "judicial in nature and therefore within the constitutional powers of the courts").

This Court should reconsider its precedent, including *Whiley*, that has recognized "citizen and taxpayer" standing in extraordinary writ proceedings without requiring any showing by a petitioner regarding the traditional indicia of a justiciable controversy.[2] The development and rapid growth of quo warranto petitions in the Florida Supreme Court as an alternative to actions seeking declaratory relief in the trial courts of this state is of relatively recent vintage. The Court in *Whiley* cited three cases in a footnote for the proposition that "the extent of harm to the petitioner is not pertinent to the Court's inquiry under quo warranto, and is simply an attempt by the dissent to divert attention." 79 So. 3d at 706 n.4 (citing *Martinez v. Martinez*, 545 So. 2d 1338 (Fla. 1989); *Chiles v. Phelps*, 714 So. 2d 453, 456 (Fla. 1998); *State ex rel. Pooser v. Wester*, 170 So. 736 (Fla.

[2] A related line of cases recognizes "citizen and taxpayer" standing without a showing of special injury in declaratory judgment actions challenging government action on constitutional grounds based directly on the Legislature's taxing and spending powers. *See*, *e.g.*, *McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016) (citing *Dep't of Administration v. Horne*, 269 So. 2d 659, 662 (Fla. 1972)). This Response does not address the status of these cases, as the Petition here does not assert a constitutional challenge based on the Legislature's taxing and spending power.

1936)). A careful examination of those three cases demonstrates that *Whiley* overstated the scope of their holdings in concluding that the extent of harm to the petitioner is "not pertinent" in quo warranto actions.

The *Martinez* case, for example, involved a petition filed by a legislator against the governor challenging the scope of the governor's call for a special session of the Legislature. 545 So. 2d at 1338. The court's opinion *discussed* the concept of standing without a "real and personal interest," but based its *holding* on the petitioner's direct stake in the controversy: "[A]s a member of the legislature being called into special session, Representative Martinez is directly affected by the governor's action. We hold, therefore, that he has standing to challenge the governor's power to call a special session." *Id*. at 1339.

Chiles v. Phelps also primarily involved a dispute between the branches of government: a petition by the governor challenging the Legislature's override of two gubernatorial vetoes. 714 So. 2d at 455. While acknowledging the direct stake of the governor in an action involving an override of his vetoes, the court cited to the dicta in *Martinez* involving the enforcement of "public rights" by members of the public without a real or personal interest in the outcome. *Id*. at 456.

The final decision cited in *Whiley* for the proposition that no direct or articulable stake in the outcome is required to maintain an action for quo warranto was *State ex rel. Pooser v. Wester*, 170 So. 736 (Fla. 1936). The petitioner in

Pooser filed an action for quo warranto challenging the conduct of a primary election held in Jackson County "both as a candidate for the office of State Senator from the Fourth Senatorial District" and also as a citizen, resident, and taxpayer of Jackson County. *Id*. at 737. The respondents moved to dismiss the case on two grounds: 1) laches; and 2) lack of standing by the petitioners as citizens and taxpayers. *Id*.

The Court in *Pooser* resolved the case solely on the basis of laches. As reflected in Justice Terrell's opinion, "[a] majority of the court do not think it necessary to answer the latter question [involving citizen and taxpayer standing] in this proceeding." *Id*. The portions of the court's opinion addressing "citizen and taxpayer" standing appear to have been joined only by Justice Terrell and Justice Whitfield. *Id*. at 739 (reflecting Justice Ellis's agreement "to the conclusion on the ground of laches"; Justice Brown's special concurrence in the conclusion "for the reasons stated in the last four paragraphs of the opinion"; and a special concurrence by Justices Davis and Buford addressing separate grounds for denying relief "in addition to the objection of laches").

The majority opinion in *Whiley* overstated the holdings of *Martinez*, *Chiles*, and *Pooser* in dispensing with any standing requirement in quo warranto actions. As noted by a dissenting opinion in *Whiley*, the "citizen and taxpayer" petitioner in that case could not establish any direct and articulable stake in the outcome of the

controversy or that she had actually been adversely affected by the challenged executive orders. *Whiley*, 79 So. 3d at 720 (Polston, J., dissenting). The same dissent appropriately recognized the absence of a justiciable controversy and that the petitioner in *Whiley* had sought (and received) an improper advisory opinion. *Id*. at 718 n. 16 (acknowledging that "Florida courts should not render what amounts to an advisory opinion if parties show only the possibility of an injury based on hypothetical facts that may or may not arise in the future") (citing *Santa Rosa Cnty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995)).

While this Court "has consistently acknowledged the importance of stare decisis, it has been willing to correct its mistakes." *State v. Poole*, 2020 WL 3116597, *14 (Fla. Jan. 23, 2020). The rationale for stare decisis is at its weakest when the Court addresses constitutional principles, because its interpretation "can be altered only by constitutional amendment or by overruling [the Court's] prior decisions." *City of Parker v. State*, 992 So. 2d 171, 187 (Fla. 2008) (Bell, J., concurring in part and dissenting in part) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). In such cases, the doctrine of stare decisis "bends . . . where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). This Court recognizes that "[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and

credibility of the court." *Shepard v. State*, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)).

This Court should reconsider and recede from its prior decisions in cases such as *Whiley* that have dispensed with the fundamental requirements of standing and a justiciable controversy in quo warranto proceedings. The standard set forth in cases such as *May v. Holley* and *Brown v. Firestone* appropriately confines the role of the courts to the adjudication of justiciable controversies between parties with adverse legal interests and a direct and articulable stake in the outcome of the legal proceeding.

The Petition here fails to satisfy the minimal standards of justiciability. The Petitioner has no "bona fide, actual, present practical need for the declaration." *Holley*, 59 So. 2d at 639. No "immunity, power, privilege or right" of the Petitioner is dependent upon the facts or the law applicable to the facts. *Id*. Instead, the "relief sought is . . . merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *Id*. The Petition here does not identify any manner in which the Petitioner's status as a "citizen and taxpayer" is affected by the JNC's nomination process.

Although the Petition also refers to the Petitioner's status as a member of the Florida House of Representatives, the Petitioner does not identify any aspect of the judicial nomination process that affects her in her capacity as a legislator. The

Florida Legislature itself has no constitutional role in the judicial nomination and appointment process. This case is therefore distinguishable from the cases in which a member of the Florida Legislature filed an extraordinary writ petition challenging actions affecting the member's duties *as a legislator*. *See, e.g.*, *Martinez*, 545 So. 2d at 1338 (legislator "directly affected" by governor's action calling the Legislature into special session had standing to challenge governor's authority to call session)

This Court should dismiss the Petition for lack of jurisdiction due to the absence of a justiciable controversy between the Petitioner and the JNC Chair.

B. The Petition fails to allege any emergency adversely affecting the functions of government.

In addition to the lack of a justiciable controversy, the Petition fails to establish an "emergency" justifying this Court's exercise of its discretionary jurisdiction. Although this Court has discretionary jurisdiction to entertain extraordinary writ proceedings, that jurisdiction is properly invoked "only 'where the functions of government will be adversely affected without an immediate determination.'" *Fla. Senate v. Harris*, 750 So. 2d 626, 631 (Fla. 1999) (citing *Div. of Bond Fin. v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976)); *see also Moreau v. Lewis*, 648 So. 2d 124, 126 (Fla. 1995) (exercising discretionary jurisdiction based on determination that "an immediate determination is necessary to protect governmental functions"). This Court's jurisdictional practices reserve its

resources for those limited circumstances that require *immediate* judicial resolution. *See, e.g.*, *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 607 (Fla. 2008) (accepting jurisdiction where, absent immediate judicial resolution, gaming compact signed by Governor would be given effect); *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980) (accepting jurisdiction where uncertainty regarding veto hampered the state's ability to finance ongoing projects).

The Petition here does not demonstrate that any emergency exists to warrant this Court's immediate determination in an original proceeding. Citing only a generalized notion that the "continued existence of a vacancy" on this Court adversely affects the functions of government, Pet. at 13, the Petition does not identify a single specific function of government impeded by the vacancy. The Court has maintained a quorum[3] and has continued to accept briefs, hold oral arguments, and release opinions since the departures of Justices Lagoa and Luck. Even in the midst of a global pandemic, this Court has provided steady leadership for the judicial branch and has continued to carry out its constitutional functions.

Any claim by the Petitioner that the presence of a vacancy on this Court demands "immediate" resolution is also belied by the timing of the Petition's filing. More than six months have passed since the JNC certified its list of nominees to the Governor. The Petition does not attempt to explain why the

[3] Art. V, § 3(a), Fla. Const.

"continued existence of a vacancy" constitutes an emergency six months after the action of the JNC that is challenged in this proceeding.

The Petition should be dismissed because it fails to justify with any factual allegations its claim that an "emergency" warrants the immediate exercise of this Court's discretionary jurisdiction.

II. IF NOT DISMISSED ON JURISDICTIONAL GROUNDS, THE PETITION SHOULD BE DENIED ON THE MERITS.

If this Court exercises discretionary jurisdiction, the Petition should be denied on the merits. The Florida Constitution imposes certain eligibility requirements "for the office of justice of the supreme court." Art. V, § 8, Fla. Const. Consistent with the plain and ordinary meaning of the constitutional text, this Court has held that the constitutional eligibility requirements for judges "refer to eligibility at the time of assuming office." *Mendez*, 804 So. 2d at 1245 (quoting *In re Adv. Op. to the Gov.*, 192 So. 2d at 759). The Petition fails as a matter of law because it misinterprets the Florida Constitution and ignores this Court's precedent.

A. The Florida Constitution requires eligibility at the time a judge assumes office, not at the time of nomination to office.

To be "eligible for the office of justice of the supreme court," the Florida Constitution requires a person to: 1) be an elector of the state; 2) reside in the territorial jurisdiction of the court; 3) be less than seventy-five years of age (unless

serving upon temporary assignment); and 4) be, and have been for the preceding ten years, a member of the bar of Florida. Art. V, § 8, Fla. Const. This Court has held on multiple occasions over the past sixty years that a judge must satisfy the constitution's eligibility criteria "at the time of assuming office." *Mendez*, 804 So. 2d at 1245. The Petition's underlying premise that an applicant for judicial office must satisfy the constitutional eligibility criteria "at the time of nomination or appointment to office" finds no support in the text of the Florida Constitution or this Court's precedent.

In *Mendez*, this Court resolved a certified conflict between the Third District and the Fourth District regarding whether the constitutional eligibility requirement related to judicial residency "refers to residence at the time of qualifying or residence at the time of assuming office." 804 So. 2d at 1243-44. The Third District, relying on precedent from this Court, held that a judge must satisfy the constitutional eligibility requirements at the time he or she assumes office. *Miller v. Mendez*, 767 So. 2d 678 (Fla. 3d DCA 2000). The Fourth District held that a judicial candidate must satisfy the constitutional residency requirement at the time of candidate qualifying, five-and-one-half months before he or she would assume office, if elected. *Miller v. Gross*, 788 So. 2d 256, 261 (Fla. 4th DCA 2000).

This Court approved the Third District's decision and held that "a candidate for judicial office must meet the eligibility requirements, including the residency

requirements, on the date of assuming office." *Mendez*, 804 So. 2d at 1247. The opinion relied in part on two previous advisory opinions to the governor. *Id*. at 1245 (citing *In re Adv. Op. to the Gov. – Terms of County Court Judges*, 750 So. 2d 610 (Fla. 1999); *In re Adv. Op. to the Gov.*, 192 So. 2d 757 (Fla. 1966) ("*1966 Advisory Opinion*")). In *Terms of County Court Judges*, this Court concluded that a judicial candidate's right to a specified term of office "accrues on the date of assuming office," such that county court judges who assumed office on January 5, 1999, were entitled to a six-year term of office under a constitutional amendment that became effective on the same date. 750 So. 2d at 613-14. The *1966 Advisory Opinion* similarly concluded that the constitutional requirement for a circuit judge to have been a member of the Florida bar for a period of five years referred to "eligibility at the time of assuming office and not at the time of qualification or election to office." 192 So. 2d at 759; *see also Newman v. State*, 602 So. 2d 1351, 1352 (Fla. 3d DCA 1992) (stating that, under the Florida Constitution, "a person must be a member of the Bar for five years at the time he or she takes office, not at the time of qualifying.").

This Court's precedent regarding the eligibility requirements for judicial office is consistent with the plain and ordinary meaning of Article V, section 8, of the Florida Constitution. When construing a constitutional provision, this Court adheres to the supremacy-of-text principle: "The words of a governing text are of

paramount concern, and what they convey, in their context, is what the text means." *Adv. Op. to Gov. re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). The Florida Constitution requires both residency and a specified duration of membership in the Florida Bar as conditions of eligibility for judicial "office." Art. V, § 8, Fla. Const. Both the residency and bar-membership requirements are most naturally read to refer to eligibility to *hold* office, consistent with this Court's precedent, rather than eligibility to *seek* office.

Because the words of a constitutional provision must be considered in their context, this Court reads multiple constitutional provisions addressing a similar subject in pari materia "to ensure a consistent and logical meaning that gives effect to each provision." *Adv. Op. to Gov. – 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 281 (Fla. 1997). Applying this principle, the broader context of the bar-membership requirement for appellate judges and supreme court justices confirms the common-sense interpretation reflected in this Court's precedent: the bar-membership requirement applies at the time a judge or justice assumes office, not at the time he or she is nominated, elected, or appointed to that office.

The separate constitutional provision addressing bar-membership requirements for county court judges in small counties provides additional context

for interpreting and applying the bar-membership requirement for justices of the Florida Supreme Court. Art. V, § 8, Fla. Const. The county-court eligibility provision states:

> Unless otherwise provided by general law, a person *shall be eligible for election or appointment to the office of county court judge* in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.

Id. (emphasis added). The use of different terms in different portions of a legal document is evidence that different meanings were intended. *See, e.g., Maddox v. State*, 923 So. 2d 442, 446-47 (Fla. 2006); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). Unlike the bar-membership requirement for justices or judges of the district court of appeal, the parallel provision for county court judges in small counties is explicitly set out as a condition of eligibility "for election or appointment" to office. The difference in constitutional language should be given the different meaning demanded by its text.

Consider also the language of a separate provision of the Florida Constitution applicable to justices of the Florida Supreme Court: the requirement that "each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district *at the time of the*

original appointment or election." Art. V, § 3(a), Fla. Const. (emphasis added). Under its plain language, the appellate-district-representation requirement must be satisfied at the time of appointment. The absence of similar language in Article V, section 8, is additional contextual evidence confirming the plain and ordinary meaning of the text adopted in this Court's precedents.

The Petition fails even to acknowledge—much less distinguish—this Court's precedent addressing the constitutional eligibility requirements for judges under Article V, section 8. The Petition does not contain a single citation to *Mendez*, in which this Court held that "a candidate for judicial office must meet the eligibility requirements, including the residency requirements, on the date of assuming office." *Mendez*, 804 So. 2d at 1247. The Petition likewise ignores this Court's *Terms of County Court Judges* decision concluding that a judicial candidate's right to an office "accrues on the date of assuming office." 750 So. 2d at 613-14. Neither the Third District's decision in *Miller v. Mendez* nor its earlier decision in *Newman v. State* are referenced in the Petition even though they bear directly on the question of constitutional interpretation at issue in this case.

The Petition's sole reference to the *1966 Advisory Opinion* inexplicably omits the decision's key constitutional conclusion: that the Florida Constitution's bar-membership requirement for judges speaks to "eligibility at the time of assuming office and not at the time of qualification or election to office." *Adv. Op.*

to Gov., 192 So. 2d at 759. Instead, the Petition mentions in passing the decision's separate conclusion that Governor Burns was prohibited on *statutory grounds* from issuing a commission to a judge who would not possess the constitutional qualifications to hold office within the time then required by law.[4] Pet. at 24.

Although the Petition purports to fly the flag of textualism,[5] it quickly runs aground through a lack of focus on the actual text (and context) of the constitutional provision at issue. The section of the Petition directed to the JNC Chair addresses the language of the constitutional eligibility requirement only once, in a single paragraph on page 16. Rather than providing a legal argument based on text and precedent for its interpretation of "eligible for the office of justice of the supreme court," the Petition begs the question with the bare assertion that the JNC "clearly lacked authority." Pet. at 17.

The Petitioner appears to claim that the language of Article V, section 8, prohibits a judicial nominating commission from certifying the name of a nominee

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[4] The statutory grounds addressed in the *1966 Advisory Opinion* were not described in the Petition but are not implicated here. In 1966, section 114.01 of the Florida Statutes required an officer to qualify "within 60 days after his election or appointment." *Adv. Op. to Gov.*, 192 So. 2d at 759. The same statute currently requires an officer to qualify for office "within 30 days from the commencement of the term of office." § 114.01(1)(h), Fla. Stat. (2019).

[5] *See* Pet. at 14 (quoting the supremacy-of-text principle as set forth in *Adv. Op. to Gov. re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020) and Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012))

who does not satisfy the constitutional eligibility requirements *at the time of nomination*. *See, e.g.*, Pet. at 16 (noting that Judge Francis had not yet been a member of the Florida Bar for ten years as of January 23, 2020); Pet. at 17 (claiming that the JNC lacks authority to nominate an individual for potential appointment as a judge "where that individual may become eligible for that position on some future date"). This argument is squarely foreclosed by the *Mendez* decision, which held that a judge need not satisfy the constitutional eligibility requirements at some earlier point in the process, but only "on the date of assuming office." 804 So. 2d at 1247. As discussed earlier, the Petition does not address *Mendez* or make any attempt to distinguish this Court's leading precedent on the question presented in this case.

For the reasons explained above, the Petitioner's arguments are also irreconcilable with the text of Article V, section 8. The Petitioner would have this Court read additional limitations into the constitutional provision, as though it provided eligibility requirements "for *nomination or appointment to* the office of justice of the supreme court" rather than "for the office of justice of the supreme court." The Court, of course, is "not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision." *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009).

Finally, the Petition alleges that the JNC violated its rules of procedure, which the Petitioner interprets to impose substantive eligibility requirements at the time of nomination. Pet. at 15-17. This argument fails for at least three reasons. First, the specific rules cited in the Petition are most naturally interpreted to refer to the qualifications and eligibility requirements imposed by the Constitution itself. Second, it is doubtful that the constitutional authority of judicial nominating commissions to adopt rules of *procedure* would even authorize rules imposing *substantive* eligibility requirements. *See* Art. V, § 11(d), Fla. Const. (addressing rules of procedure for judicial nominating commissions); *Love v. State*, 286 So. 3d 177, 185-86 (Fla. 2019) (addressing distinction between substantive and procedural statutes). Finally, this Court has held that the Florida Legislature lacks the authority to impose qualifications for public office beyond those set forth in the Florida Constitution. *See, e.g.*, *Brinkmann v. Francois*, 184 So. 3d 504, 508-09 (Fla. 2016) (declaring unconstitutional a statute requiring write-in candidates for county commission to satisfy residency requirements at the time of candidate qualifying when the constitution required residency at the time of election). The Petition presents no basis for concluding that a judicial nominating commission would have the authority to adopt rules of procedure imposing substantive eligibility requirements on judicial applicants beyond those set forth in the Florida Constitution.

* * *

The Petitioner's claim that a judicial applicant must satisfy the Florida Constitution's eligibility requirements at the time he or she is nominated by the judicial nominating commission is flatly contradicted by the language of Article V and this Court's precedent. Because the eligibility requirements for the office of justice of the supreme court apply on the date a justice assumes office, the Petition against the JNC Chair fails as a matter of law.

B. The Petition fails to establish any basis for the relief sought against the Chair of the Florida Supreme Court Judicial Nominating Commission.

In the absence of any legal basis for its assumption that the constitutional eligibility requirements apply at the time of nomination, the Petition fails to establish any basis for quo warranto or mandamus relief against the JNC Chair. The Petition should therefore be denied.

1. The Court should deny the quo warranto relief sought in the Petition.

The Petitioner requests a writ of quo warranto concluding that the JNC exceeded its legal authority by including Judge Francis on the list of certified nominees. Pet. at 18. This Court has held that the writ of quo warranto may be used "to determine whether a state officer or agency has improperly exercised a power or right derived from the State." *Crist*, 999 So. 2d at 607. The Petition's claim for quo warranto against the JNC Chair should be denied for two reasons.

First, the Petition alleges that the JNC exceeded the limits of its authority by certifying Judge Francis as a nominee when she had not been a member of the Florida Bar for the preceding ten years at the time of nomination. Pet. at 1. For the reasons explained above, the Petition errs as a matter of law in asserting that a judicial applicant must satisfy the constitutional eligibility requirements at the time of nomination. Instead, a justice must meet the eligibility requirements "on the date of assuming office." *Mendez,* 804 So. 2d at 1247. The JNC did not exceed its authority because each of the nine nominees certified by the JNC on January 23, 2020, was eligible for nomination to the governor under the Florida Constitution.

Second, the Petition's allegations relate entirely to the actions of the Supreme Court Judicial Nominating Commission itself rather than the actions of the JNC Chair. Judicial nominating commissions have been parties in previous cases before this Court. *See, e.g.*, *League of Women Voters of Fla. v. Scott et al.*, 257 So. 3d 900 (Fla. 2018) (quo warranto action against governor, JNC, and JNC Chair); *Judicial Nominating Comm'n, Ninth Circuit v. Graham*, 424 So. 2d 10 (Fla. 1982) (JNC filed mandamus petition against governor and secretary of state). But the JNC itself is not a party in *this* case. The Petitioner does not even allege that the JNC Chair (the named Respondent here) has "improperly exercised a power or right" specific to *his* official duties as a state officer in the judicial nomination process. The Petition therefore seeks a writ of quo warranto regarding

actions taken by a non-party and asks this Court to order relief against a non-party. The Petition fails to state a cause of action for quo warranto against the JNC Chair as a matter of law.

2. The Court should deny the mandamus relief sought in the Petition.

The Petition also fails to properly allege the elements of a mandamus claim against the JNC Chair. To demonstrate entitlement to mandamus relief, "the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009) (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)). The Petition's claim for mandamus against the JNC Chair should be denied for three reasons.

First, the Petition claims that the JNC had a "clear and indisputable legal duty to certify to the Governor a list of individuals which only included 'qualified' nominees." Pet. at 19. The Petition acknowledges that the JNC has already certified a consolidated list of nine nominees for the two vacancies created by the departures of Justices Lagoa and Luck. Pet. at 10-11; *see also* Art. V, § 11(b), Fla. Const. (requiring nomination of between three and six nominees for each vacancy). Yet the Petitioner seeks a writ of mandamus "compelling the JNC to immediately provide Governor DeSantis with a new list of nominees" that "include[s] 6 of the

31 individuals that previously applied and that were constitutionally eligible to hold the office as of January 23, 2020." Pet. at 18.

The Petition does not explain how the JNC would even have the authority—much less an "indisputable legal duty"—to certify a new and separate list of nominees for the same judicial vacancy. Even in a hypothetical scenario where a nominee became unavailable to hold office (for example, because of an untimely death), the Petition provides no legal basis or authority for concluding that the JNC would have an "indisputable legal duty" to revisit its original applicant list and certify an entirely separate list of nominees where the existing list of nominees continues to satisfy the requirements of Article V, section 11(b), of the Florida Constitution.

The only precedent cited by the Petitioner, *Pleus v. Crist*, is a mandamus case holding that Governor Crist was "bound by the Florida Constitution to appoint a nominee from the JNC's certified list" and "lacks authority under the constitution to seek a new list of nominees from the JNC." 14 So. 3d at 946. The *Pleus* case certainly does not stand for the principle that the JNC has an "indisputable legal duty" to provide a new list of nominees to the Governor. And if the Petitioner's claim is actually that a "new" vacancy exists on the Court, any such vacancy would presumably be filled through a new nomination and appointment process under Article V, section 11. The Petition does not attempt to justify with any legal

argument its claim that the JNC's potential nominees for a *new vacancy* would be limited to the list of applicants for a *prior vacancy*.

Second, the Petition contains no support for its claim that the Petitioner has a "clear legal right" to the requested relief. As described above, the Petition does not present any justiciable controversy involving the Petitioner's legal rights. In *Pleus*, the petitioner was a retired judge of the Fifth District who was serving as a senior judge and sought an order compelling the governor to fill the vacancy created by his own mandatory retirement. 14 So. 3d at 942. The Petition here does not allege that *the Petitioner* has any "clear legal right" to have the JNC certify a new and separate list of nominees for justice of the supreme court. Mandamus may not be used to establish the existence of a right but "only to enforce a right already clearly and certainly established in the law." *Fla. League of Cities v. Smith*, 607 So. 2d 397, 401 (Fla. 1992); *accord Pincket v. Detzner*, No. SC16-768, 2016 WL 3127704 at *1 (Fla. June 3, 2016). No such right exists here.

Finally, as with the claim for quo warranto relief, the Petition seeks relief directed to the Florida Supreme Court Judicial Nominating Commission as a whole but has named only the JNC Chair as a Respondent. *See* Pet. at 18 (requesting "a writ of mandamus compelling the JNC to immediately provide Governor DeSantis with a new list of nominees"); Pet. at 27 (requesting the Court to "order the JNC to immediately provide Governor DeSantis with a new list of nominees that were

constitutionally eligible to hold the office as of January 23, 2020"). The JNC is not a named Respondent in this case. The JNC Chair has no independent authority or "indispensable legal duty" to the Petitioner to certify a new list of nominees to the Governor even if that relief were warranted under the facts and the law. The Petition fails to state a cause of action for mandamus against the JNC Chair as a matter of law.

* * *

Both as a matter of pleading standards and on the merits, the Petition fails to establish any basis for quo warranto or mandamus relief against the JNC Chair. The JNC did not improperly exercise any right or duty derived from the state when it certified a list of nine nominees, all of whom were eligible for nomination. And the JNC owes no "indisputable legal duty" to the Petitioner to certify a new list of nominees when it already complied with its constitutional duties by certifying a consolidated list of nine nominees for two vacancies more than six months ago. The quo warranto and mandamus relief requested in the Petition should be denied.

CONCLUSION

The Emergency Petition for Writ of Quo Warranto and Writ of Mandamus should be dismissed on jurisdictional grounds or denied on the merits.

Respectfully submitted,

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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 3, 2020 to:

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