CASE NO.: SC20-985

Supreme Court of Florida

HON. GERALDINE F. THOMPSON,

Petitioner,

v.

HON. 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 Nominating Commission.

Respondents.

GOVERNOR'S RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE WHY PETITIONER'S AMENDED PETITION SHOULD NOT BE GRANTED

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INTRODUCTION

On July 13, 2020, Petitioner filed her first Petition challenging the Governor's naming of Judge Francis as the first Jamaican American to the Florida Supreme Court. She claimed the Florida Supreme Court Judicial Nominating Commission's ("JNC") list of certified nominees, submitted to the Governor for consideration, was invalid. Petitioner argued a new JNC list from the existing pool of applicants was the "only remedy" that would address her concerns regarding diversity in the judiciary and enable the Governor's consideration of *more* African American candidates for appointment. Pet. at 19.[1] On August 27, 2020, this Court concluded that Petitioner's charges against the JNC were untimely filed—effectively dismissing the JNC from the case—and so held Petitioner's requested remedy "unavailable." *See Thompson v. DeSantis*, No. SC20-985, 2020 WL 5048539, at *1, 3-5 (Fla. Aug. 27, 2020) ("*Thompson I"*). The Court denied the Petition in full. *Id.* at *1-6.

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[1] Citations to the Petition will be abbreviated as "Pet. at __." Citations to Petitioner's Reply will be abbreviated as "Pet'r Reply at __." Citations to Petitioner's Motion for Rehearing and Alternative Motion for Leave to Amend will be abbreviated as "Pet'r Mot. at __." Citations to Petitioner's Amended Petition will be abbreviated as "Amend. Pet. at __." Citations to the Governor's Response to the Petition will be abbreviated as "Res. at __." Citations to the Appendix to the Governor's Response to the Court's Order to Show Cause will be abbreviated as "Res. App. at __."

In its opinion, the Court concluded it had no "role" to grant a remedy "fundamentally different" from that sought by Petitioner and "inconsistent with [her] stated goals," *id.* at *15, but it *sua sponte* opined that an "appropriate remedy" *could* have been raised, *id.* at *14. Unsurprisingly, Petitioner then filed an Amended Petition seeking "the remedy that this Court found correct and appropriate in the decision entered on August 27, 2020." Amend. Pet. at 1. But the about-face Amended Petition actually seeks something more. Her amended petition demands a remedy beyond what this Court suggested in *Thompson I*—relief unavailable under the Constitution's separation of powers.

Petitioner asks the Court to actively alter the JNC list certified to the Governor. *See id.* at 2 ("[T]he only correct and legally available remedy for the constitutional violation in this case would be to require the Governor to appoint one of the 7 individuals that remain on the list certified by the JNC to the Governor on January 23, 2020[.]"); *id.* at 7 ("As part of the writ, this Court should order Governor DeSantis to immediately appoint one of the 7 constitutionally qualified individuals included on the list of nominees certified to him by the JNC on January 23, 2020."). Not only would such amended relief eliminate *any* opportunity for the Governor to select an African American candidate, but it would invade constitutionally allocated actions reserved for the judicial nominations process, *see*

Art. V, § 11, Fla. Const., and violate the Constitution's required separation of powers, *see* Art. II, § 3, Fla. Const.

Petitioner's amended challenge again asks this Court to invalidate the existing JNC list in favor of a new list of "7 individuals"—effectively striking Judge Francis from the list. This remedy is inappropriate on multiple counts. First, the Court already declared challenges to the JNC process "legally unavailable." *See Thompson*, 2020 WL 5048539, at *1. Further, even if the Court had not already foreclosed such relief as "untimely," *see id*. at *2, striking a name from the list would violate Florida law. Because the Court lacks the constitutional authority to conduct functions constitutionally provided to an independent JNC, the Court should not take the extreme act that Petitioner seeks.

The Court has not definitely concluded whether an "appointment" of Judge Francis actually occurred on May 26, 2020. However, considering the Governor's May 26 actions in light of *Thompson I* suggests an appointment *has not* taken place. As described below, *infra*, the *Thompson I* opinion presents two logical outcomes: either (1) the Governor's action constituted an "announcement" of an appointment or (2) the Governor's action was an "appointment" but was invalidated by the Court. Indeed, questions persist regarding the Court's definition of "appointment" and such legal application to the Governor's actions. And the

Court's answers could lead to significant, unintended consequences that shake the institutional foundation of the judicial nominating process. But regardless of whether the Court determines an "appointment" occurred, the resulting outcomes cannot be squared with the extraordinary remedy now sought by Petitioner—an order striking Judge Francis from the JNC list. No decision on whether an "appointment" occurred would allow such judicial overreach.

Finally, the Amended Petition, filed just over two weeks before Judge Francis becomes eligible for office, is untimely, inexcusably delayed, and should be barred under the doctrine of laches. Petitioner's eleventh-hour attempt to redline the JNC list comes almost eight months after the list was published, and more than three months following the Governor's announcement of Judge Francis' pending appointment. Indeed, a mandamus order granting Petitioner's amended relief in such expedited, emergency fashion would deny the Governor fair time to address new issues raised by a petition "fundamentally different" than that initially filed in July—including the impact of *Thompson I* on the Governor's appointment power, an element critical to evaluation of the Amended Petition and judicial appointments writ large.

If granted, an order striking Judge Francis from the list, or locking the Governor into a May 26 appointment date, would offend executive authorities

solely endowed to the JNC and Governor under the Florida Constitution. It would further infringe upon executive discretion to conduct due diligence in nominating and appointing judicial candidates best fit for office and would unfairly prejudice the appointments process.

ARGUMENT

The Amended Petition should be denied for the following reasons: (1) Petitioner's amended remedy exceeds any relief suggested by the Court and is unavailable under the Constitution's separation of powers; (2) under *Thompson I*, the Governor's May 26 act should be treated as an "announcement" instead of an "appointment," but in any event an "appointment" has not yet occurred (3) Petitioner's requested relief is not consistent with this Court's holding in *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009); and (4) the late-filing of the Amended Petition would unfairly prejudice the judicial nominating process and infringe upon the Governor's executive powers.

I. An order requiring the Governor to pick from a modified JNC list of 7 individuals asks this Court to contravene the JNC process set forth in the Florida Constitution.

The Amended Petition pursues a remedy that goes beyond what this Court suggested in *Thompson I*. Instead, Petitioner demands an order directing "the Governor to appoint one of the 7 individuals that remain on the list certified by the

JNC to the Governor on January 23, 2020." Amend. Pet. at 2; *see id*. at 7. To achieve this extraordinary remedy, she would utilize the power of this Court to invade and alter the judicial nominations process. Indeed, she necessarily asks the Court to scratch Judge Francis from the JNC list certified to the Governor. This request is problematic for several reasons and should be denied.

First, Petitioner's request equates to an order invalidating the original JNC list, a remedy this Court has already foreclosed. *See, e.g.*, *Thompson I*, 2020 WL 5048539, at *1 ("There is no legal justification for us to require a replacement appointment from a new list of candidates, rather than from the one that is already before the Governor."); *id*. at *2 (finding it "would not be proper under these circumstances for us to entertain a challenge to the JNC's list of nominees"). Because the Court determined Petitioner's challenge to the certified list was "untimely," the Court dismissed the JNC from the case and determined any remedy against the JNC is "unavailable." *Id*. at *1. Therefore, further challenges to the JNC must be barred.

Second, the Florida Constitution directs the JNC—not the Governor—to certify nominations lists. *See* Art. V, § 11, Fla. Const. To be sure, the unambiguous text of Article V, section 11(a) of the Florida Constitution requires the Governor to appoint *from the* JNC's certified list, not to modify or reject names on the list. *See*

also Pleus v. Crist, 14 So. 3d at 946. The Governor has no authority to add, remove, or replace names he believes unacceptable, nor does he have authority to delete or replace names when eligibility concerns arise. The Constitution clearly directs "a nomination [to] be made by the appropriate [judicial nominating] commission, unrestrained by the influence of the Governor." *In re Advisory Opinion to Governor*, 276 So. 2d 25, 30 (Fla. 1973) ("*1973 Advisory Op.*"). Therefore, because the Governor lacks the authority to reject or modify a JNC list, any remedy requiring him to select from a new list of "7 names" is also unavailable. *See Pleus*, 14 So. 3d at 942, 946.

Third, any order amending the JNC's list of nominees, while side-stepping the proper JNC process, would violate the Constitution's separation of powers and infringe upon the commission's important constitutional check. *See* Art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). The JNC, though part of the executive branch, is an independent, constitutional entity. *Judicial Nominating Comm'n, Ninth Circuit v. Graham*, 424 So. 2d 10, 11 (Fla. 1982); *see* Art. V, §§ 11(a), (d), Fla. Const. The JNC's purpose "is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge." *1973 Advisory Op.*, 276

So. 2d at 30. The JNC's check on the Governor's appointment power is not illusory. Article V, § 11(d) of the Florida Constitution insulates the JNC by authorizing it solely to establish "[u]niform rules of procedure" for nominating candidates, and it ensures their "deliberations" are confidential. Art. V, § 11(d), Fla. Const.

To be sure, the JNC is the appropriate party to certify new JNC nominations. In addition to the JNC's clear constitutional authorities, its complex review and deliberations processes best position it to review and recommend judicial candidates. The JNC's process is understandably cumbersome. The commission reviews candidates' written applications and legal publications, and other written works. The JNC also conducts in-person interviews and investigates applicants' backgrounds and qualifications. Section V, *Standards and Qualifications; Criteria*, Supreme Court Nominating Commission Rules. Altogether these efforts ensure the JNC fulfills its obligation to provide the Governor with the most capable candidates for office.

The JNC's operative rules also require assessment of whether candidates satisfy all legal requirements of the office. *Id.* at Sections II, V, and VI. To this end, the commission's highly capable members—esteemed attorneys from across the state—must consider the constitutional restraints applicable to judicial

candidates prior to certification. Here, the JNC was undoubtedly aware of Judge Francis' background, credentials, and any limitations surrounding her potential appointment. And in the absence of this Court's *Thompson I* opinion, the JNC relied upon case precedent that arguably supported the notion that constitutional eligibility requirements attach upon assumption of office. *See Miller v. Mendez*, 804 So. 2d 1243 (Fla. 2001); *Lawson v. Page*, 250 So. 2d 257, 258 (Fla. 1971). Therefore, the JNC did its job and certified a list of nominees to the Governor. Accordingly, a Court order modifying the existing JNC must permit the Commission to start over with its typical review process, especially considering the Court's new *Thompson I* jurisprudence and that eight months that have passed since its last certification.

A final reason why the Court may not amend the existing JNC list is that such order would arguably violate the Constitution's requirement that "[no] more than six persons" be nominated for a vacancy. Art. V, § 11(a), Fla. Stat. Here, the Court's grant of Petitioner's remedy would establish *a modified* list of "7 individuals" for consideration. Whether such mandate would run afoul of Article V warrants further legal analysis and reaffirms why any deviation from the existing list should involve a constitutional JNC process.

In sum, Petitioner's new remedy constitutes a collateral attack on the JNC

process. The proper party for that relief is not the Governor, but the Court has already dismissed the JNC. While Petitioner amended her petition, she has lost her proper party. Thus her relief must be denied.

II. The Court should not issue mandamus before determining whether an "appointment" occurred.

The Court's August 27, 2020 opinion concluded the Governor exceeded his authority when he "appointed" Judge Francis to the Court. But the *Thompson I* Court did not determine whether an appointment had *actually* occurred. Instead, the Court merely "assume[d]" there was an appointment. *See Thompson I*, 2020 WL 5048539, at *3 n.3. Yet the Governor's actions and expressed intentions on May 26, 2020, along with this Court's precedent in *State ex re. Lawson v. Page*, should be the basis of the Court's determination of a Judge Francis appointment.

As an initial matter, the Court's ruling on Petitioner's initial pleadings definitively concluded the Bar eligibility requirement "attaches at the time of appointment" and not a separate occasion where the appointee assumes the duties of office. *See id*. at *7-8. Further, the Court rejected any notion that the "appointment" and "filling of office" could be distinct occurrences. *Id*. at *9. From the Court's opinion in *Thompson I*, we now know "a governor's appointment has the immediate effect of *filling the office*," *id.* at *4, and it "fills a vacancy in judicial office immediately at the time of appointment," *id*. at *5.

Although the Court's *Thompson I* opinion signaled that a singular "correct remedy" could have been raised, *see id*. at *2, a proper remedy hinges on the Court's clarification of the intentions and effects of the Governor's actions on May 26. This Court should thus clearly define its understanding of "appointment" and clarify whether the Court believes the Governor intended, having reasonably relied on this Court's past precedents, and yet now in light of *Thompson I*'s interpretation, to issue an "appointment" equating to a filling of the office. The facts at issue, the relevant law, and the recognition that the Governor would not have knowingly taken an immediately futile action, all clearly point to an understanding the Governor merely "announced" an appointment on May 26. As discussed below, this understanding supplies an appropriate remedy, but no circumstance warrants the extraordinary remedy Petition seeks—for the Court to sever a name from the certified JNC list, or otherwise restrict the Governor from selecting from the list as presented to him by the JNC.

While the Court previously *assumed* Judge Francis was appointed based on the arguments of the parties, we now know from *Thompson I* that an appointment as defined by the Court did not reasonably occur. At a press event in Miami on May 26, the Governor stated, "I'm happy today and very pleased to *announce* the appointments of two more South Floridians, Judge Renatha Francis and John

Couriel as the next Justices for the Florida Supreme Court." Res. App. at 3 (emphasis added). After discussing Judge Francis' background, the Governor stated, "I think her ascension to the Court when in September is going to be something that we're all looking very forward to." *Id.* at 4. The record is replete with the Governor's stated intention that Judge Francis would be eligible on September 24, 2020 and would not fill the office until such time. *See* Res. at 7, 22. These points are further compounded by the fact the Governor did not issue her a commission on May 26.

Under the law set forth in *Thompson I*, the Governor's naming of Judge Francis on May 26, 2020 is even more clearly recognized as an "announcement" and not an "appointment." Of course, the Governor would not have appointed her on May 26, 2020 knowing she would immediately be ineligible. Indeed, it makes no sense to assume the Governor intended a futile appointment on May 26. The Court should thus reject an unreasonable assumption and rely on the actual actions and expressed intentions of the Governor on that day. Now in light of *Thompson I*'s interpretation of an appointment having the legal effect to fill the judicial office, the Court should recognize the Governor would have only announced the appointments of Judge Francis and John Couriel.

This conclusion squares with Justice Polston's precedent-based definition,

which concluded that the Bar requirement must be satisfied at "appointment," but clarified an appointment is not complete and valid "until a commission is executed by the Governor and attested by the Secretary of State." *See Thompson I*, 2020 WL 5048539, at *10 (Polston, J., concurring in result only) (citing *State ex rel. Lawson v. Page*, 250 So. 2d at 258). Indeed, Justice Polston recognized Governor DeSantis' May 26 act as an "announcement" of a future appointment and determined the Governor "had not appointed Judge Francis under this Court's precedent" because "she has not yet received a commission [] to assume office[.]" *Id*. In light of *Thompson I*, this *announcement then appointment* framework is most consistent with the Court's view that an "appointment" equates to "filling of office." This provides a proper remedy for the Governor to complete the appointment process. Accordingly, the Governor will do so in a mere two weeks by appointing and commissioning Judge Francis upon satisfaction of her Bar eligibility. This remedy is most consistent with the judicial appointments process without the drastic remedy proposed by Petitioner that otherwise runs counter to Constitution's fundamental separation of powers.

To this end, the Court should not immediately jump to Petitioner's amended relief, an extraordinary order of mandamus, without first clarifying the definition of "appointment" and resulting implications of such findings. Prior to the Court

considering Petitioner's remedy, the Governor should be provided with adequate time to brief and argue these central issues – the Court should not base such a grave remedy on a mere assumption. Indeed the implications of *Thompson I* on the time and effect of appointment are pivotal in this case and in the future of the judicial appointments process.

If the Governor's mere naming of an appointee is defined as an "appointment" and thus understood to immediately "fill the office," several significant ramifications result in light of *Thompson I*. The traditional practice of affording appointees discretion, even mere days, to choose when they assume the judicial role to which they have been appointed comes into question. An appointee would likely have little or no time to prepare for a career change or to wind down a law practice. An appointee must be scrupulous in the timing of the appointment to avoid dual officeholding prohibitions or conflicts of ethics in the judiciary. *See* Art. II, § 5(a), Fla. Const.; Fla. Code Jud. Conduct, Canon 5G. A judge seeking to tender his resignation to the Governor well in advance of his retirement date may be required to withhold, and a court may find a seat remaining unfilled for additional time due to a delay in the start of the JNC process.

Should the Court instead find that an "appointment" was actually made on May 26, 2020, it should deem that appointment nullified by *Thompson I* as if it

never occurred. The Governor would thus remain obligated to make an appointment from the JNC's certified list. The selection of a Supreme Court Justice is one of the highest constitutional duties of the Governor as it directly affects the composition of another branch of government. Governor DeSantis does not take this obligation lightly. He personally reviews extensive files of each nominee on the JNC's certified list and conducts personal interviews with many, if not all, of the nominees. For the Governor to consider a new appointment would demand weeks of additional due diligence: Florida Department of Law Enforcement background checks would require updates; all opinions, cases or other legal or public actions taken by a nominee over the past months would be reviewed; and interviews or re-interviews would likely be conducted. At any point in the judicial selection process, whether at its inception or "immediately," Governor DeSantis would conduct the appropriate due diligence over the course of weeks to dutifully and respectfully exercise his authority to select a member of the Supreme Court.

Whether the Court finds that the Governor announced Judge Francis' appointment on May 26 or that he made the appointment on May 26, the Governor will certainly remedy that action, in light of *Thompson I*, in the coming weeks. The Governor acknowledges the Court's order to show cause asks whether the Governor will immediately fill the Supreme Court vacancy by appointing a

nominee from the JNC's certified list who is constitutionally eligible for appointment. The Governor would appoint from that the list as certified by the JNC a nominee who is eligible at the time of his near-future appointment—whether it be the actual act of Judge Francis' appointment in barely two weeks or an appropriate reconsideration of all nominees with an appointment of one who is eligible at that future time.

III. The Court's precedent in *Pleus v. Crist* does not stand for Petitioner's new remedy.

Petitioner wrongly misinterprets *Pleus v. Crist* to support her amended remedy. But *Pleus* does not require such an expansive view of judicial power. As an initial matter, nothing within the Florida Constitution grants the Court the extraordinary power to take a red pen to the JNC's certified list. *See* Art. V, § 11(a), Fla. Const. But that is precisely the sort of remedy Petitioner suggests. The holding in *Pleus*, on the contrary, does not permit this Court to strike a name from the certified JNC list and direct the Governor to appoint from it. *See Pleus*, 14 So. 3d at 946. In fact, *Pleus* stands for the opposite. It holds that a Governor "lacks authority" to consider "a new list of nominees," and he must "fill the vacancy [using] the list certified to him"). *Id. Pleus* does not permit the Governor to change the list, nor does it permit this Court to strike names from the list. *See id.* at 945 ("By allowing this mandamus proceeding, we do not direct the Governor's

discretionary decision as to the actual appointment to fill the judicial vacancy. . . . We recognize that, in fulfilling this constitutional duty, the Governor has discretion in his selection of a nominee from the list."). Rather, *Pleus* stands for the limited proposition that this Court may order the Governor to appoint "from the list certified to him" if and when he fails to make an appointment "within sixty days of that certification." *Id.* at 946.

A premature gubernatorial appointment prior to a nominee's satisfaction of the 10-year eligibility requirement would of course be invalid. *See Thompson I*, 2020 WL 5048539, at *28 (Polston, J., concurring in result only) ("Of course, under this Court's precedent, Governor DeSantis would have exceeded his authority had he gone ahead and executed a commission for Judge Francis to assume office while she was ineligible."). Therefore, whether or not an appointment occurred on May 26, as discussed above *supra*, the appropriate remedy under *Pleus* takes the Governor back to the existing JNC list. Because such holding is inconsistent with Petitioner's requested remedy, it should be denied.

IV. The Amended Petition is untimely filed, would unfairly prejudice the judicial appointments process, and should be barred under the doctrine of laches.

The doctrine of laches exists to foreclose relief to litigants who "unreasonably delay" raising claims to the prejudice of the judicial process or other

litigants. *See, e.g.*, McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997); *State ex rel. Pooser v. Wester*, 170 So. 736 (Fla. 1936). *See generally*, LACHES, Black's Law Dictionary (11th ed. 2019) ("The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought."). It applies to the circumstances presented here.

To be clear, Petitioner's eleventh-hour challenge to the Governor's naming of Judge Francis clearly amounts to inexcusable delay. Indeed, Petitioner could have challenged the JNC list when it was issued in January 2020, and for weeks thereafter. She did not. She could have brought a petition in May following the Governor's naming of Judge Francis to the Court, but she did not. Petitioner could have sought the remedy *now raised* when she filed her initial pleading with the Court in July. Again, she did not. Instead, she brings a new petition less than three weeks prior to the date upon which Judge Francis becomes constitutionally eligible to assume office. This Court should not countenance Petitioner's sitting-on-her-hands form of litigation.

Petitioner's dilatorily filed amended petition, if granted, would unquestionably prejudice the Governor's ability to faithfully carry out his discretionary appointment powers in at least two ways. First, her amended petition

does not afford the Governor fair time to adequately brief novel issues and respond to a fundamentally different complaint. As explained previously, Petitioner is seeking a remedy beyond what this Court suggested in *Thompson I*—a remedy that that would violate Florida's strict separation of powers by invading the constitutionally allocated actions reserved to the JNC (i.e., the power to create a list of nominees) and the Governor (i.e, the power to appoint a single nominee from the list). Moreover, this Court's decision in *Thompson I* stands to impact not only the appoint of Judge Francis specifically by the judicial appointments process generally. These issues amongst others warrant further briefing. And second, Petitioner's challenge, if successful, would irreparably infringe upon the Governor's executive powers to appoint a highly qualified nominee to the Florida Supreme Court. Any order requiring an "immediate" new appointment would certainly deny the Governor adequate time to receive updated nominee investigations from the Florida Department of Law Enforcement, thoroughly review nominees' recent orders, opinions, and other writing samples, and conduct nominee interviews.

It has been four months since the Governor announced his intent to appoint Judge Francis. The Governor is deeply aware that his decision will reverberate across the State's judiciary for decades to come. He takes seriously his solemn

duty to perform the constitutional act of appointing a justice to the State's highest court. Striking Judge Francis from consideration and requiring an "immediate appointment" would not only prejudice the Governor and the judiciary, but the very citizens of Florida whom both branches serve. The people of Florida reasonably expect that their Governor will have sufficient time to vet and select a nominee to assume the duties of the State's highest court.

CONCLUSION

Petitioner's Amended Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated Response is prepared in Times New Roman 14-point font and complies with the font requirement of Florida Rule of Appellate Procedure 9.100(*l*), and that a true and correct copy of the Response in opposition to the Court's Order to Show Cause has been furnished by electronic service through the Florida Courts E-Filing Portal this 9th day of September, 2020, to all counsel of record.

/s/ James W. Uthmeier
Deputy General Counsel