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,

Petitioner,

vs.

HONORABLE RON DESANTIS, in his Official Capacity of Governor of Florida,

Respondent.
_____/

CASE NO. SC20-985

PETITIONER'S REPLY TO RESPONSE OF GOVERNOR DESANTIS TO COURT'S ORDER TO SHOW CAUSE WHY REPRESENTATIVE THOMPSON'S AMENDED PETITION SHOULD NOT BE GRANTED

WILLIAM R. PONALL
PONALL LAW
SunTrust Building
253 North Orlando Ave., Suite 201
Maitland, Florida 32751
Telephone: (407) 622-1144
bponall@PonallLaw.com
Florida Bar No. 421634

LISABETH J. FRYER
LISABETH J. FRYER, P.A.
247 San Marcos Avenue
Sanford, Florida 32771
Telephone (407) 960-2671
lisabeth@lisabethfryer.law
Florida Bar No. 89035

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTIONAL PROVISIONS

ADDITIONAL AUTHORITY

ARGUMENT

THIS COURT SHOULD GRANT REPRESENTATIVE THOMPSON'S AMENDED PETITION.

As a result of this Court's decision on September 27, 2020, there are now two indisputable legal facts which are the law of the case: (1) the Governor violated Article V, Section 8 of the Florida Constitution by appointing Judge Renatha Francis to the Florida Supreme Court; and (2) the Governor is currently in violation of Article V, Section 11(c) of the Florida Constitution, because he has failed to appoint a constitutionally-eligible individual to the Supreme Court within 60 days of receiving a certified list of nominees from the Supreme Court Judicial Nominating Commission. *See Thompson v. DeSantis*, _____ So. 3d _____; 2020 WL 5048539, *1 (Fla. Aug. 27, 2020); *Thompson*, 2020 WL 5048539 at *8 (Polston, J., concurring in result).

While turning a blind eye to these undisputed facts, the Governor continues to make bizarre arguments which seek to manipulate the requirements of the Florida Constitution so that his unconstitutional appointment is permitted to stand. The Governor's untenable position is directly contrary to the oath he took to support, protect, and defend the Constitution of the State of Florida. *See* Art. II, § 5, Fla. Const.

This Court should grant Representative Thompson's petition. Any other decision would seriously undermine the institutional integrity of this Court.

A. Representative Thompson's Requested Remedy is Consistent with this Court's Decision and the Florida Constitution.

Initially, the Governor erroneously contends that Representative Thompson is requesting that this Court improperly alter the certified list of nominees the Supreme Court JNC provided to him on January 23, 2020. (Governor's Response at 5-8). Representative Thompson is simply seeking the remedy this Court held was the only correct remedy in this case. This Court unequivocally concluded that the only appropriate remedy for the Governor's constitutional violation was for him to "immediately appoint a constitutionally eligible person from the JNC's existing certified list of certified nominees." *Thompson*, 2020 WL 5048539 at *5.

The Governor's attempt to frame the requested remedy as one which invalidate or alters the original JNC list is directly contrary to this Court's previous decision in this case. This Court concluded that the inclusion of one ineligible nominee on the JNC's certified list does not justify discarding the whole list. As a result, the Court held that the current list remains valid and that the Governor has the authority to appoint anyone on the list

that is currently constitutionally eligible. *Id.* Since Judge Francis has been and remains ineligible for appointment, the Governor's authority is specifically limited to selecting one of the seven individuals other than Francis who remains on the JNC's certified list.

Next, the Governor incorrectly contends that the JNC, not the Governor is the appropriate party to certify new JNC nominations. (Governor's Response at 8-9). In her Amended Petition, Representative Thompson is not requesting that the JNC certify a new list of nominees to the Governor. This Court previously held that relief against the JNC is not available in this case. *Thompson*, 2020 WL 5048539 at *2. As a direct result of this Court's decision on that issue, Representative Thompson chose not to include the JNC as a party in her Amended Petition.

Finally, the Governor argues that the JNC's existing list of nominees violates Article V, Section 11(a) of the Florida Constitution because it contains more than six persons. Section (11)(a) requires the JNC to certify a minimum of three nominees and a maximum of six nominees for each vacancy on the Supreme Court.

In making this argument, the Governor ignores the fact that, as result of the resignations of Justices Lagoa and Luck in November 2019, there were originally two vacancies in this case.

Thompson, 2020 WL 5048539 at *1. Given that fact, the JNC had authority to include a maximum of twelve nominees on its certified list to the Governor. It was completely lawful for the JNC to certify a total of nine nominees to the Governor for his consideration. The Governor did not and cannot render the JNC's existing list unconstitutional by appointing one constitutionally eligible individual (Justice John Couriel) and appointing a second individual (Judge Francis) who is constitutionally ineligible.

B. <u>Based on the Governor's Own Factual Representations, an Appointment has Occurred</u>.

Next, the Governor argues that, in contradiction of his previously stated factual representations to this Court in his original Response, he did not actually appoint Judge Francis but merely announced his intention to appoint her at some future date. (Governor's Response, 10-16). Further, the Governor alleges that this Court's finding that the appointment occurred was an erroneous assumption of this Court. (Governor's Response, 10).

We do not have to wonder how the Court concluded that an appointment occurred in this matter. The Governor plainly stated that the appointment occurred, and this Court assumed the Governor could be relied upon to provide correct facts:

> The parties dispute the validity of Judge Francis's appointment, but they agree that the Governor has in fact made an appointment,

> effective on May 26, 2020, even though no commission has been issued. The Governor's response is replete with representations that he has "appointed" Judge Francis to the Court, not merely announced his selection of Judge Francis. And the response asserts that, "[u]pon appointment, the Governor has met his constitutional obligations under Article V." Specifically with regard to the Petitioner's request for mandamus relief, the Governor's response says that "Governor DeSantis completed his legal duty by appointing Judge Francis ... to the Florida Supreme Court on May 26, 2020." For purposes of our analysis, we will take the case as it has been argued to us and assume that the Governor has in fact made an appointment.

Thompson v. Desantis, ___So. 3d ___(Fla. 2020); 2020 WL 5048539, n. 3.

It is disingenuous at this point in the litigation to attempt to change the underlying facts in this case, particularly the facts provided to this Court by the Governor and relied upon by this Court in resolving this matter. *See* Philip J. Padovano, Appellate Practice § 16:18 (2019 ed.) ("While appellate practitioners cannot change the facts, neither should they underestimate the importance of their role in stating the facts."). Accordingly, this Court should reject the Governor's argument that a mere announcement, rather than an appointment occurred.

C. **The "New Remedy" the Petitioner Seeks is the Law of the Case**.

The Governor argues that "*Pleus v. Crist* does not stand for Petitioner's new remedy." (Governor's Response, 16-17). 14 So. 3d 941 (Fla. 2009). However, this argument misses the point. The

remedy sought by Petitioner in her Amended Petition, that the Governor be required immediately to fill the vacancy in office of justice of the supreme court by appointing a candidate who was on the JNC's certified list of January 23, 2020, and is now constitutionally eligible for appointment, was not a remedy fashioned by her. Instead, this is the precise remedy this Court concluded was proper in its August 27, 2020 Order. Citing *Pleus*, this Court ruled:

> [A]t this point, the only legally appropriate and available remedy would be to require the Governor immediately to appoint a constitutionally eligible person from the JNC's existing certified list of nominees.

Thompson, ___So. 3d ___(Fla. 2020); 2020 WL 5048539, pg. 5.

As such, this remedy is not merely a suggestion from the Petitioner, it is the law of the case and the only avenue available for a lawful, constitutional appointment of a justice to the Florida Supreme Court:

> Under the law of the case doctrine, questions of law that have actually been decided on appeal must govern the case in the same court and in the trial court through all subsequent stages of the proceedings. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla.2001); *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Fla., Inc.*, 832 So.2d 810, 813 (Fla. 2d DCA 2002). This doctrine includes not only issues explicitly ruled upon by the court, but also those issues which were implicitly addressed or necessarily considered by the appellate court's decision. *Juliano*, 801 So.2d at 106.

Specialty Restaurants Corp. v. Elliott, 924 So. 2d 834, 837 (Fla. 2d DCA 2005).

Consequently, we are well past analyzing whether the remedy is lawful. The Petitioner initially sought a remedy that could provide the Governor with a slate of meritorious, diverse, and constitutionally qualified candidates. The Governor vigorously argued against this remedy and this Court concluded that remedy was not legally available. The Petitioner accepts this Court's ruling and will accept a remedy that guarantees, at a minimum, a lawful appointment. It is surprising that the Governor sees it differently.

D. Representative Thompson's Amended Petition is Timely.

The Governor contends that Representative Thompson's Amended Petition is untimely and should be denied based on the doctrine of laches. (Governor's Response at 17-20). As an initial matter, this issue was resolved against the Governor by the Order entered by this Court on September 8, 2020.

In that Order, the Court granted Representative Thompson's motion for leave to amend her original petition on the issue of remedy. The Court explicitly concluded that the Governor would not be prejudiced by the amendment. In fact, the Court noted that the Governor failed to argue that allowing the amendment would cause him any prejudice. (Court's Order, Sept. 8, 2020, Page Three).

In its current response, the Governor again fails to establish how he is prejudiced by the amendment in this case. The Governor fails to indicate how he would have argued the merits of this case any differently had Representative Thompson originally sought the remedy this Court deemed appropriate.

Despite the Court's apparent resolution of this issue, the Governor asserts that the doctrine of laches precludes this Court from granting Representative Thompson her requested relief. In support of that contention, the Governor argues that Representative Thompson should have challenged the JNC's list when it was issued in January 2020. (Governor's Response at 18).

As previously asserted, Representative Thompson is not currently challenging any actions of the JNC. In her Amended Petition, she is asserting solely that the Governor exceeded his authority by appointing Judge Francis and is in violation of the Florida Constitution because he has failed to timely appoint a constitutionally eligible individual to the Supreme Court. Importantly, this Court has held that it only has jurisdiction to consider a petition for quo warranto after a state official has taken some official action. *See League of Women Voters of Florida v. Scott*, 232 So.3d 264 (Fla. 2017).

In this case, the Governor only exceeded his constitutional authority under Article V, Section 8 of the Florida Constitution

on May 26, 2020, when he appointed a constitutionally ineligible individual to the Supreme Court. Representative Thompson timely filed her original petition challenging the constitutionality of that appointment less than 2 months later on July 13, 2020.

Representative Thompson's Amended Petition relates back to the date she filed her original petition because it is based on the exact same factual scenario. For purposes of timeliness, this Court has held that as long as the initial complaint gives the defendant fair notice of the general factual scenario or factual underpinning of the claim, amendments stating new legal theories relate back to the date the initial complaint was filed. *See e.g. Kopel v. Kopel*, 229 So. 3d 812, 816 (Fla. 2017); *Palm Beach County Sch. Bd. v. Doe*, 210 So. 3d 41, 47 (Fla. 2017).

The Governor's reliance on this Court's decision in *McCray v. State*, 699 So.2d 1366 (Fla. 1997), is seriously misplaced. In *McCray*, this Court held that laches is a doctrine asserted as a defense, which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *McCray*, 699 So.2d at 1368.

In *McCray*, without justification, the defendant waited 15 years to file a petition for habeas corpus challenging his criminal conviction based on ineffective assistance of appellate counsel. The Court held that the petition was barred by laches because there

was no justification for the delay and State was prejudiced by the significant amount of time that had elapsed since the defendant's trial. *Id*.

Here, Representative Thompson timely and diligently challenged the unconstitutional actions of the Governor within two months and long before Judge Francis was eligible to serve on the Supreme Court. The Governor has not been prejudiced in any manner by the filing of Representative Thompson's original or amended petition. As a result, this Court's decisions in *McCray* and *City of Daytona Beach v. Layne*, 91 So.2d 814 (Fla. 1957) (laches did not apply to mandamus petition where no one was prejudiced or materially affected by 7-month delay in filing), precludes the application of laches in this case. This Court should address the merits of the Amended Petition.

Finally, the Governor argues that a remedy which requires him to "immediately" appoint an individual other than Judge Francis would interfere with his ability to appoint a highly-qualified nominee to the Supreme Court. Without referencing an affidavit or sworn testimony, the Governor blindly argues that this remedy would deny him "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." (Governor's Response at 19).

The Governor's argument is in direct contravention of the Florida Constitution. Pursuant to this Court's decision in *Pleus*, the Governor has been required to appoint a constitutionally eligible individual to the Court since March 23, 2020. Any interference with his ability to immediately appoint an eligible nominee to the Supreme Court is the result of his own actions and inaction. The Governor cannot rely on his own unconstitutional conduct as a justification for further delay. The Governor's immediate compliance with the duties required by the plain text of the Florida Constitution is required.

CONCLUSION

For the reasons in both the Amended Petition and in this Reply, this Court should issue a writ of quo warranto, a writ of mandamus, or both. This Court should order Governor DeSantis to immediately appoint one of the seven individuals, other than Judge Francis, that remain on the list certified to him by the JNC. In order to avoid any confusion, and to clearly articulate its decision, this Court should specifically indicate that the Governor is explicitly precluded from appointing Judge Renatha Francis to fill the current vacancy on the Supreme Court, as she is constitutionally

unqualified to serve as a Florida Supreme Court Justice at this point in her legal career.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply 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, on this 10th day of September, 2020.

/s/ William R. Ponall
WILLIAM R. PONALL
Florida Bar No. 421634

/s/ Lisabeth J. Fryer
LISABETH J. FRYER
Florida Bar No. 89035

DESIGNATION OF EMAIL ADDRESSES

Attorney William R. Ponall hereby designates bponall@PonallLaw.com as his primary address and ponallb@criminaldefenselaw.com as his secondary email address.

Attorney Lisabeth J. Fryer designates lisabeth@lisabethfryer.law as her primary email address and trinaise@lisabethfryer.law as her secondary email address.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ William R. Ponall
WILLIAM R. PONALL
Florida Bar No. 421634

/s/ Lisabeth J. Fryer
LISABETH J. FRYER
Florida Bar No. 89035