IN THE SUPREME COURT OF FLORIDA

WHITNEY S. BOAN,

Petitioner,

vs.

FLORIDA FIFTH DISTRICT COURT OF APPEAL JUDICIAL NOMINATING COMMISSION, and JOSEPH JACQUOT, in His Official Capacity as Chair of the Florida Fifth District Court of Appeal Judicial Nominating Commission,

Respondents.

CASE NO. SC22-1557

REPLY TO RESPONSE TO EMERGENCY PETITION FOR WRIT OF QUO WARRANTO

WILLIAM R. PONALL
Florida Bar No. 421634

ERIC J. SORICE
Florida Bar No. 1025763

PONALL LAW, P.A.
253 N. Orlando Ave., Suite 201
Maitland, Florida 32751
Telephone: (407) 622-1144

LISABETH J. FRYER
Florida Bar No. 89035

LAURA CEPERO
Florida Bar No. 1027980

LISABETH J. FRYER, P.A.
247 San Marcos Avenue
Sanford, Florida 32771
Telephone (407) 960-2671

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

ARGUMENT

Attorney Whitney S. Boan has timely sought the appropriate remedy against the Florida Fifth District Court of Appeal ("the Fifth DCA") Judicial Nominating Commission ("the JNC"). The plain language of the Florida Constitution and the Uniform Rules for DCA Judicial Nominating Commissions establish that a nominee for a vacancy on a district court of appeal must be constitutionally eligible at the time of nomination. In its response, the JNC misconstrues Attorney Boan's petition and ignores the actual facts of the case.

I. ATTORNEY BOAN IS TIMELY SEEKING THE APPROPRIATE RELIEF AGAINST THE JNC IN THE FLORIDA SUPREME COURT.

Initially, the JNC argues that Attorney Boan's Petition is premature because Governor DeSantis has not yet exercised his discretion to make appoint from the list of nominees certified by the Fifth DCA JNC. (JNC Response at 3). The JNC relies on *Thompson v. DeSantis*, 301 So. 3d 180 (Fla. 2020), arguing that a writ of quo warranto is unwarranted "where a JNC's certified list exceeds the

minimum requirement of nominees under article V, section 11(a) of the Florida Constitution." (JNC Response at 3-4).

In *Thompson*, however, the majority declined to consider Petitioner's claims for relief against the JNC—that the JNC violated its procedural rules and the Florida Constitution—because the petition was filed nearly six months after the JNC certified its list of nominees to the Governor. *Thompson*, 301 So.3d at 183-184. In other words, waiting until after the Governor has made his appointments constitutes an unreasonable delay for challenging an action by the JNC.

Justice Polston reached the same conclusion and found the issue moot because the justices had already been appointed. *Id.* at 191 (Polston, J., concurring) ("Allowing citizen taxpayers to attack the composition of a list of nominees after judges are seated and deciding cases would undermine the judiciary and the interests of justice.").

Thus, the filing of this writ prior to the Governor making an appointment is required under *Thompson*. An immediate decision from this Court is necessary so that the Governor can timely

appoint constitutionally eligible nominees to the Fifth DCA, and so that the Fifth DCA can operate with a full staff of judges.

The JNC improperly relies on *Thompson* to argue that Attorney Boan's requested relief should be denied. Unlike the petitioner in *Thompson*, Attorney Boan is not asserting that the irregularity of one ineligible nominee on the JNC's certified list requires discarding the whole list, nor is Attorney Boan seeking an advisory opinion. Instead, Attorney Boan is requesting that this Court issue a writ of quo warranto declaring that the JNC exceeded its legal authority by nominating two individuals who do not meet the constitutional requirements to hold the office of judge on the Fifth DCA. (Petition at 1, 16). Upon the issuance of that writ, those two individuals would necessarily be stricken from the certified list of nominees the JNC has provided to Governor DeSantis.

In its response, the JNC misconstrues Attorney Boan's Amended Petition to argue that she is seeking relief against the Governor and not the JNC. (JNC Response at 5-7). However, Attorney Boan's Petition clearly indicates that it is the JNC, not the Governor, who has exceeded its authority under the Florida

Constitution and the Uniform Rules for DCA Judicial Nominating Commissions. It is readily apparent that Attorney Boan is seeking a remedy against the JNC, not the Governor.

The JNC and the requirement that it create rules regarding the manner in which it operate was established by the Florida Constitution. *See* Art. V, § 11(d), FLA CONST. The JNCs are part of the executive branch of Florida's government. *In re Advisory Opinion to Governor*, 276 So.2d 25, 29-30 (Fla. 1973). As a result, the JNC is subject to quo warranto jurisdiction.

The JNC also contends that this Court should not address Attorney Boan's Petition because there is not an emergency. (JNC Response at 3). This Court has repeatedly found it appropriate to consider quo warranto petitions "where the functions of government would be adversely affected absent an immediate determination by this Court." *Whiley v. Scott*, 79 So.3d 702, 707 (Fla. 2011); *Fla. House of Reps v. Crist*, 999 So.2d 601, 608 (Fla. 2008).

Here, the Governor has had the authority to appoint individuals to the Fifth DCA since the JNC made its nominations on October 16, 2022. The Governor is required to make the

appointments no later than December 17, 2022. As previously indicated, an immediate decision from this Court is necessary so that the Governor can timely appoint constitutionally eligible nominees to the Fifth DCA, and so that the Fifth DCA can operate with a full staff of judges.

II. THE FIFTH DCA JUDICIAL NOMINATING COMMISSION EXCEEDED ITS AUTHORITY BY CERTIFYING TWO NOMINEES WHO DO NOT MEET THE RESIDENCY REQUIREMENT OF THE FLORIDA CONSTITUTION.

The JNC contends that it did not exceed its authority because the residency requirement contained in Article V, Section 8 of the Florida Constitution does not apply until the time of appointment. The JNC relies upon this Court's decision in *Thompson, supra*, to support its argument. (JNC Response at 10-12).

The JNC's arguments are fundamentally flawed for several reasons. First, the JNC overstates the application of this Court's holding in *Thompson* to the specific facts of this case.

There were two distinct issues in *Thompson*: (1) whether the JNC exceeded its authority by certifying Judge Renatha Francis as a nominee even though she had not been a member of The Florida

Bar for ten years at the time of her nomination; and (2) whether Governor DeSantis exceeded his authority by appointing Judge Francis even though she had not been a member of The Florida Bar for ten years at the time of her appointment. This Court declined to consider the first issue entirely, instead deciding only the second issue. *Id.* at 183-84.

On the second issue, the Governor argued that "the constitution demands only that an appointee meet the constitutional eligibility requirements prior to the end of her term . . . ." *Id.* at 185. In considering solely the actions of the Governor, not the JNC, the majority held that "when a governor fills by appointment a vacant judicial office, the appointee must be constitutionally eligible for that office at the time of the appointment." *Id.* at 182. In other words, the majority established the critical event for action by the Governor, but did not address the critical event for action by the JNC.

Justice Labarga was the only member of this Court that specifically addressed the merits of the argument that the Supreme Court JNC exceeded its authority by nominating Judge Francis

when she was not constitutionally eligible at the time of her nomination. *Thompson*, 301 So.3d at 188-189 (Labarga J., concurring). Based on the Governor's duty to appoint a constitutionally-eligible individual pursuant to Article V of the Florida Constitution and the requirements of the Supreme Court Nominating Commission Rules, Justice Labarga reached this simple conclusion:

> A nominee must be constitutionally eligible at the time of nomination. The reason for this is clear: while the Governor has up to sixty days to fill the vacancy, the Governor does not have to utilize the entire time period. Each nominee must be immediately ready to fill the vacancy.

Id. at 189 (Labarga, J., specially concurring).

The JNC has provided no legitimate argument why the same conclusion does not apply equally to the residency requirement at issue in the instant case.

Justice Labarga's conclusion is consistent with this Court's repeated holding that "the framers of Article V intended that the nominating process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." *Pleus v. Crist*, 14 So.3d 941, 946 (Fla. 2009); *In re Advisory Opinion to the Governor*

(Judicial Vacancies), 600 So.2d 460, 462 (Fla. 2009). "The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it." *Pleus*, 14 So.3d at 944–945.

The JNC's purported construction of Article V and the Uniform Rules for DCA Judicial Nominating Commissions would contradict the intent of the framers of Article V because it would significantly lengthen the appointment process. The Governor should be able to rely on the JNC's certification that its nominees satisfy all the minimum constitutional requirements and are eligible for immediate appointment.

The Governor should not have to redo the work of determining constitutional eligibility that has been properly delegated to the JNCs. If that were the case, the Governor would be required to closely examine each nominee's unique circumstances to determine when they would be constitutionally eligible to be appointed. In the case of a sitting trial judge who lives outside the territorial jurisdiction of the relevant DCA, the Governor would be required to

determine when the judge would resign his or her position and when the judge would be able to relocate in order to reside within the territorial jurisdiction of the DCA.[1] The same issue would arise with a sitting member of the Florida Senate or House of Representatives.[2]

These considerations would necessarily slow down the appointment process because they would impose additional requirements upon the Governor before he could make a lawful appointment. The Florida Constitution and the Uniform Rules for DCA Judicial Nominating Commissions dictate a much more straightforward approach: all nominees must meet all the constitutional requirements, including the residency requirement, at the time of their nomination by the JNC.

Next, even if this Court accepts the JNC's argument that the holding in *Thompson* should be applied directly to the facts of this case, the JNC's argument still fails. In *Thompson*, this Court held

---

[1] Pursuant to Article V, Section 8 of the Florida Constitution, county and circuit court judges must also reside within the territorial jurisdictions of the courts on which they sit.

[2] Pursuant to Article III, Section 15(c) of the Florida Constitution, legislators must reside in the district from which they were elected.

that "when a governor fills by appointment a vacant judicial office, the appointee must be constitutionally eligible for that office at the time of the appointment." 301 So.3d at 182.

The Court specifically rejected the Governor's argument that the appointee must only be constitutionally eligible on a later date when he or she actually takes office. The Court reasoned that an appointment takes effect immediately. *Id.* at 184-187.

"Appoint" means "[t]o choose or designate (someone) for a position or job, esp. in government." *APPOINT*, Black's Law Dictionary, Bryan A. Garner (11th ed. 2019). By definition, a nominee would be appointed as soon as the Governor or the Governor's office announced the nominee was selected to fill one of the vacancies on the Fifth DCA or personally advised the nominee he or she was selected. The nominee would have to meet all the constitutional requirements to be a DCA judge at the time of the announcement or notification. Pursuant to *Thompson*, the nominee would not be permitted to relocate after being appointed so that he or she could meet the applicable residency requirement.

Finally, the JNC seeks to rely on this Court's decision in *Miller*

v. Mendez, 804 So.2d 1243 (Fla. 2001). (JNC Response at 13). The JNC's reliance on *Miller* is misplaced.

In her original Petition, Attorney Boan provided a detailed analysis as to why *Miller* applies only to judicial elections, not to cases involving judicial appointments. (Amended Petition at 13-15). For the reasons previously asserted, *Miller* does not apply to this case and provides no support for the arguments put forth by the JNC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply has been furnished by e-service to Joseph Jacquot, in his official capacity as Chair of Respondent, the Fifth DCA Judicial Nominating Commission, jjacquot@gunster.com, and to Attorney Kenneth B. Bell, kbell@gunster.com, on this 12th day of December, 2022.

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

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

/s/ Laura Cepero
LAURA CEPERO
Florida Bar No. 1027980

/s/ Eric J. Sorice
ERIC J. SORICE
Florida Bar No. 1025763

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.

Attorney Laura Cepero designates laura@lisabethfryer.law as her primary email address and trinaise@lisabethfryer.law as her second address.

Attorney Eric J. Sorice designates ejsorice@hotmail.com as his primary email address and bgallaher@PonallLaw.com as his second address.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply is submitted in Bookman Old Style 14-point font and complies with the font and word count requirements of Fla. R. App. P. 9.045(b).

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

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

/s/ Laura Cepero
LAURA CEPERO
Florida Bar No. 1027980

/s/ Eric J. Sorice
ERIC J. SORICE
Florida Bar No. 1025763

ATTORNEYS FOR PETITIONER