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IN THE SUPREME COURT OF FLORIDA

WHITNEY S. BOAN,

Petitioner, CASE NO. SC22-1557

vs.

FLORIDA FIFTH DISTRICT COURT OF APPEAL JUDICIAL NOMINATING COMMISSION, et al.,

Respondents.

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RESPONSE TO PETITION FOR WRIT OF QUO WARRANTO

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BACKGROUND

Needing to fill four vacancies in the Fifth District, Governor DeSantis convened the Fifth District Court of Appeal Judicial Nominating Commission ("JNC") on September 9, 2022, to certify names of highly qualified lawyers for appointment by the Governor.

On September 9, the JNC publicly announced it sought applications for four vacancies. The announcement stated that all applications must meet the qualifications in article V, section 8 of the Florida Constitution.

The JNC conducted investigations of candidates, noticed on October 7, 2022. The JNC conducted its applicant interviews and deliberations on October 16 and 17, 2022.

On October 18, 2022, the JNC certified a list of 15 nominees to the Governor to fill four vacancies. It did so after affirmatively determining each nominee did meet the legal requirements for judicial office. Further, the JNC found each nominee did meet the constitutional and statutory requirements for appointment to judicial office.

The Governor has sixty days to "make the appointment" to fill each of these four vacancies from the nominees certified by the JNC.

See Art. V, § 11(c), Fla. Const. The Governor has not yet exercised his appointment power for these vacancies.

On November 17, 2022, thirty days into this sixty-day period, Petitioner filed this Emergency Petition for Writ of Quo Warranto, naming the JNC and its Chair in his official capacity.[1] Petitioner asserts the JNC "ignore[d] the clear requirements of its own rules and of the Florida Constitution." Petition at 3.

The relief sought is that "this Court should issue a writ of quo warranto concluding that the JNC exceeded its legal authority by certifying Judge Kilbane and John MacIver as nominees. As a result, Governor DeSantis should be required to fill the vacancies on the Fifth DCA from the remaining list of 13." Petition at 16.

For the reasons discussed below, the Emergency Petition for Writ of Quo Warranto should be dismissed or otherwise denied on the merits.

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[1] The Petition does not allege any misconduct by the Chair of the JNC nor any individual member of the JNC.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED

A. There is no emergency justifying an extraordinary writ

This Court may consider a writ of quo warranto under its discretionary jurisdiction. *See* Art. V, § 3(b)(8), Fla. Const.

Petitioner protests only two nominees on a list of 15 certified names, alleging a challenge under article V, sections 8 and 11 of the Florida Constitution. *See* Petition at 11, 14. There is no basis for the extraordinary writ because this is not a case where the "functions of government would be adversely affected absent an immediate determination by this Court." *Chiles v. Phelps*, 714 So. 2d 453, 457 (Fla. 1988).

The Constitution expressly states that "the governor shall fill the vacancy" by making the appointment within sixty days after the nominations have been certified. Art. V, § 11(a), Fla. Const. The Governor has yet to exercise his discretion to appoint from this list of nominees. As the sixty-day period has not expired, this Petition for a writ of quo warranto is premature.

Moreover, Petitioner only challenges two of the 15 nominees the JNC has certified to the Governor for four vacancies. The JNC has

provided the Governor with "not fewer than three persons" for a vacancy as required by the Constitution. Art. V, § 11(a), Fla. Const. With only two of the nominees being challenged in this Petition against the JNC, the JNC has provided more than a minimum number of constitutionally required nominees. It is hypothetical to assume how the Governor may exercise his appointment power for these vacancies.

This Court in *Thompson v. DeSantis*, 301 So. 3d 180 (Fla. 2020) determined in similar circumstances that the extraordinary relief Petitioner seeks is not warranted. In *Thompson* this Court stated "[t]here 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." 301 So. 3d at 182. This Court found an "insurmountable problem[]" in that there is "no reason why the irregularity of one ineligible nominee on the JNC's certified list requires discarding the whole list" where a JNC's certified list exceeds the minimum requirement of nominees under article V, section 11(a) of the Florida Constitution. *Id.* at 187. The same reasoning applies here.

There is no function of government imperiled by the current list of certified names that requires the Court's immediate intervention. There is no emergency need for the writ.

B. The Petition seeks an improper advisory opinion

The writ of quo warranto sought on the JNC seeks only an advisory opinion. Petitioner seeks no relief from the JNC itself in relation to its certified list of nominees, and the relief Petitioner seeks does not directly follow from a writ of quo warranto questioning the JNC's authority.

The Petition for issuance of an extraordinary writ does not seek affirmative relief against the JNC. Instead, it is asking this Court for an advisory opinion. *See* Petition at 1 and 16. This Court has made it clear that it will not give such an advisory opinion. *See May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952) (relief sought cannot merely be legal advice by the courts); *see also Bryant v. Gray*, 70 So. 2d 581 (Fla. 1954) (dismissing a petition for a declaratory decree as an advisory opinion); *Santa Rosa County v. Administration Com'n, Div. of Administrative Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (without a need to render relief, courts will not render what is an advisory opinion).

Specifically, the Petition merely seeks a judicial "conclusion" with no remedy directed to the JNC's exercise of its authority. *See* Petition at 1, 16. Unlike *Fl. House v. Crist*, 999 So. 2d 601, 608-609 (Fla. 2008), where the Court's grant of the petition halted the legal effect of the gaming compact following the Governor's signature, Petitioner here is not seeking to unwind the JNC's certification.

Even if this Court were to grant the Petition questioning the JNC's authority, that advisory opinion would not provide relief that would bind the Governor's ***future*** appointment power as Petitioner requests.

C. The Petition for writ of quo warranto cannot provide relief Petitioner demands

The Petition does not seek issuance of a writ of mandamus. It only seeks issuance of a writ of quo warranto that would "require the Governor to appoint individuals from the remaining list of constitutionally-eligible nominees." Petition at 1.

A proper petition for issuance of a writ of quo warranto determines whether a "state officer or agency has improperly *exercised* a power or right derived from the State." *Israel v. DeSantis*, 269 So. 3d 491, 494 (Fla. 2019) (quoting *League of Women Voters of*

Fla. v. Scott, 232 So. 3d 264, 265) (Fla. 2017)). Here Petitioner is asking this Court to place restrictions on the Governor's appointment power, ***prior to*** the Governor making any appointment. *See* Petition at 1, 16. That kind of prior restraint is not proper relief available in quo warranto.

Furthermore, unlike *Thompson*, Petitioner has not filed a writ of mandamus to do so. *See Thompson*, 301 So. 3d at 183. The Petition only seeks issuance of a writ of quo warranto against the JNC. In doing so, Petitioner asks this court to constrain the appointment power of the Governor who, unlike *Thompson*, is not a party to this proceeding. *See* Petition at 16.

II. THE CONSTITUTION DETERMINES ELIGIBILITY FOR OFFICE

A. The JNC Rules are procedural, implementing Constitutional requirements

The Uniform Rules of Procedure for DCA Judicial Nominating Commissions ("Rules") are, as stated, procedural rules. The Constitution directs JNCs to establish "[u]niform rules of procedure." Art. V, § 11(d), Fla. Const. Those Rules are promulgated by the members of the JNCs themselves. *See* Uniform Rules, Note.

As constitutionally required, the JNC Rules are expressly procedural. Procedural rules prescribe steps for having a duty enforced, as opposed to the law that defines specific duties themselves. *See* Black's Law Dictionary, procedural law (11th ed. 2019). A procedural rule does not create new rights or duties but operates to further existing rights or duties in the law. *See McCord v. Smith*, 43 So. 2d 704, 709 (Fla 1950); *see also City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961). "Rules of procedure regulate secondary rather than primary conduct." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994). The Rules are not substantive as they do not add requirements beyond what is required by the law.

Under these procedural Rules, the JNC applies requirements for eligibility exactly as the Constitution sets out. A JNC has no authority to impose eligibility requirements beyond those laid out in the Constitution.

The Constitution expressly demands that "no person shall be eligible for office" unless he or she resides within the jurisdiction of the Fifth District. Art. V, § 8, Fla. Const. As such, eligibility "***for office"*** is the constitutional standard. The Rules reflect this requirement as the JNC ensures a nominee "meets" the requirements

for "judicial office." *See* Uniform Rules, Sections II, V and VI.[2] In other words, the Rules recognize that the JNC's role is to assess and affirm whether a nominee satisfies the residency requirement for the nominee ***assuming judicial office*** as required by the Constitution.

As Justice Polston explained in his concurrence in *Thompson*: "Nothing in article V, section 11 specifies that the Governor must only select nominees certified by the JNC that are eligible under article V, section 8 ***on the date of certification***." 301 So. 3d at 192 (emphasis added). Here, reading article V, sections 8 and 11 together, Petitioner is asserting the Governor may only select from a list of nominees who are residents of the District at the time of the JNC's nomination, rather than upon the Governor's appointment. Such a reading would improperly add words to the Constitution. *See id.*

A JNC certainly could find that it is impossible for a particular candidate to satisfy the residency requirement before appointment to

[2] *See* Petition at 8-10, *quoting* Section II. Initial Screening: "the commission affirmatively determines that the applicant meets all legal requirements for that judicial office"; Section V. Standards and Qualifications: "the commission finds that the nominee meets all constitutional and statutory requirements and is fit for appointment to the particular judicial office"; and Section VI. Final Selection of Nominees: "applicants who meet all legal requirements for the judicial office."

judicial office. But, aside from a JNC's appropriate exercise of its discretion to nominate, a JNC cannot substantively add to the Constitutional requirement. For example, no JNC rule could require 2 years of residency prior to appointment. Likewise, no JNC rules require residency 2 months prior to appointment. As such, Petitioner is incorrect in asserting there is a pre-eligibility requirement for the JNC prior to being eligible for appointment by the Governor. *See* Petition at 12. In fact, there is not a separate residency requirement "at the time the JNC makes it[s] nominations." Petition at 12.

B. Eligibility for office is determined at the date of appointment

As this Court held in *Thompson*, the point at which the constitutional eligibility requirements must be satisfied is when the Governor fills the vacancy. 301 So. 3d at 185.

The Petition fails to address the *Thompson* majority opinion but skips to a concurrence. It does so because *Thompson*, in evaluating eligibility for Bar membership, placed the "date of appointment" as the sole determination of eligibility. *Id.* at 182 ("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.”).

As the years of Bar membership, the residency requirement is an eligibility requirement for judicial office. *See* Art. V, § 8 (“No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court.”) “Eligible” means “fit and proper to be selected.” *See* Black’s Law Dictionary, eligible (11th ed. 2019). Thus, selection, or appointment, is the critical event.

Article V, section 8 maintains a parallel sentence construction between eligibility based on the residency and on the Bar membership. There is a close connection between these requirements lodged within the same section, using similar wording to establish when a person is “eligible for office.” *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (Presumption of Consistent Usage). This weighs toward interpreting the provisions similarly as to eligibility.

Article V, section 11 requires that the Governor to fill a vacancy by appointing and that “[t]he governor shall make the appointment within sixty days after the nominations have been certified to the

governor" by the JNC. Art. V, § 11(c), Fla. Const. As this Court interprets constitutional provisions in their context, these provisions should be read *in pari materia*. *Zingale v. Powell*, 885 So. 2d 277, 283 (Fla. 2004) (applying *in pari materia* for "a consistent and logical meaning"); *see Thompson*, 301 So. 3d at 185. This Court made clear in *Thompson* that the legally significant event is the Governor's appointment, and his appointment must be of someone eligible for the office ***at that time***. *See id.* "It necessarily follows that, in this context, any constitutional eligibility requirement 'for the office' attaches at the time of appointment." *Id.* This is a single Constitutional standard which the JNC affirms an applicant/nominee meets.

For example, a future interest is an existing property interest for a future possession or enjoyment. *See Black's Law Dictionary*, future interest (11th ed. 2019). Such an interest is entitled to judicial protection at the current time. *See id.* Similarly, a nominee's eligibility for assuming office at the future time of appointment can be evaluated by the JNC at the time of the candidate's investigation and nomination.

Finally, *Miller v. Mendez*, 804 So. 2d 1243 (Fla. 2001), which held a candidate elected to judicial office must be a resident of the court's territorial jurisdiction by the time he or she assumes office, is not inconsistent. *Miller* actually precludes Petitioner's argument as it held eligibility requirements need not be satisfied at an earlier date but only "on the date of assuming office." *Miller* at 1247. So, in a post-*Thompson* application, the date of appointment is the point, and the only point, at which a nominee must be a resident of the District.

CONCLUSION

This Court should dismiss the Petition as the relief sought is improper for an emergency writ of quo warranto. If the Court should entertain Petitioner's question, this Court should find that the JNC properly applied its Rules and the Florida Constitution.

Respectfully submitted,

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I HEREBY CERTIFY this response complies with the type size and style requirements of Rule 9.045(b), Florida Rules of Appellate Procedure and has been prepared in Bookman Old Style, 14 Point Font.

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