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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ROBERT HUTCHINSON and
JEFFREY SHAPIRO,

CASE NO: 2023-CA-02361

Petitioners,

vs.

RON DESANTIS, in his official capacity
as Governor of the State of Florida,

Respondent.
_____/

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *QUO WARRANTO*

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ARGUMENT

I. THE INDIVIDUAL MEMBERS OF THE AUTHORITY ARE NOT INDISPENSABLE PARTIES.

The Governor argues that the individual members of the Authority must be joined to this action as indispensable parties. But that is clearly not the case. The claim of wrongful assertion of authority alleged in this Petition is not directed to any actions taken by individual authority members, but rather to *the Governor's act* in appointing them. The individual Authority members play no role in the appointment process; HB 1645 assigns that role solely to the Governor. Furthermore, the Petition does not ask the Court to direct the individual members to do or refrain from doing anything. Rather, the action is directed to the Governor's responsibilities to publish notice and appoint qualified members under the clear statutory language.

The Governor's briefing on this issue is noticeably deficient as it does not cite to a single quo warranto case supporting his argument. Nor does the briefing make any effort to distinguish the several Florida Supreme Court decisions which have reached a contrary conclusion. *See*, Boan v. Florida Fifth Dist. Court of Appeal Judicial Nominating Comm'n, 352 So.3d 1249 (Fla. 2022) (Judicial candidates not joined to quo warranto action seeking their disqualification based on residency requirements); Thompson v.

DeSantis, 301 So.3d 180 (Fla. 2020) (Judicial nominee not joined in quo warranto action seeking her disqualification based on length of Bar membership); *Cf.*, Florida House of Representatives v. Crist, 999 So.2d 601, 604 (Fla. 2008) (Seminole Tribe not joined to quo warranto action which invalidated its gambling compact); City of Homewood v. State ex rel. City of Birmingham, 358 So.2d 424 (Ala. 1978) (Property owners, whose properties were subject of city's annexation ordinances, were not indispensable parties to quo warranto action seeking to invalidate those ordinances).

Boan is a particularly apt precedent as that case alleged that the judicial nominees did not meet applicable residency requirements. Petitioners challenged those appointments, not by suing the individual candidates, but by bringing a quo warranto petition against the Governor and the Judicial Nominating Commission. Petitioners in this case appropriately sued the appointing official under HB 1645; there is no need to join the putative appointees.

II. QUO WARRANTO IS THE PROPER VEHICLE TO CHALLENGE AN APPOINTMENT MADE WITHOUT AUTHORITY; THE AVAILABILITY OF A DECLARATORY JUDGMENT ACTION POSES NO OBSTACLE TO THIS PROCEEDING.

The Governor argues that quo warranto is not the appropriate vehicle to challenge his appointment authority because a declaratory judgment

action may be available.[1] That argument is incorrect in every way that an argument can fail: (1) the argument was raised and failed in a closely analogous Supreme Court case; (2) the case law cited in the Governor's brief does not support the principle asserted; (3) case law in Florida uniformly holds that quo warranto is the appropriate vehicle for raising these challenges; and (4) the law in Florida and across the nation strongly supports the view that quo warranto is the *exclusive* action available in these circumstances.

The Governor raised the same argument concerning declaratory judgments in the dispute over Justice Francis' appointment to the Court:

> The quo warranto process should not be a tool to avoid what should otherwise be brought through a declaratory judgment action.

See, Governor's Response at 19 in Case SC20-985, attached as Exhibit "A" to this Reply. That argument obviously did not carry the day in Thompson v. DeSantis, *supra*, and it cannot prevail here.

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[1] A declaratory judgment may be sought for nearly any live dispute. *See, generally*, City of Miami Gardens v. City of N. Miami Beach, 346 So. 3d 648, 657 (Fla. 3d DCA 2022). If the Governor's theory is correct, effectively no quo warranto action could ever be brought given the availability of this statutory remedy.

The Governor's argument turns on what amounts to a slogan taken from the headnotes of two cases: Fuller v. Mortgage Elec. Registration Sys., Inc., 888 F.Supp.2d 1257, 1271 (M.D. Fla. 2012) and State v. Duval County, 141 So. 173 (Fla. 1932). The Federal District Court in Fuller[2] considered a County Clerk's challenge to the alternative system for recording mortgages offered by MERS. Relief was *not* denied because an alternative legal remedy was available. Instead, the Court found that quo warranto itself was an inappropriate remedy: "Plaintiff seeks to impermissibly extend the scope of this writ." Id. at 1271. In Duval County relief was denied, not because the petitioner could file a declaratory judgment action, but because a full-blown statutory remedy specific to tolls was in place: "the statute itself provides a procedure and remedy with regard to the complaint against the collection of tolls…"). Duval County, 141 So. at 177.

Quo warranto proceedings are the appropriate means under Florida law to challenge improprieties in the appointment process. *See*, Whiley v. Scott, 79 So.3d 702, 707 (Fla. 2011) ("The term 'quo warranto' means 'by

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[2] Federal trial court decisions are not binding on this Court. *See*, State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976) ("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts.").

what authority,' and the writ is the proper means for inquiring into whether a particular individual has improperly exercised a power or right derived from the State."); *See, also*, Thompson v. DeSantis, *supra*; Boan, *supra*.

Not only is it clear that quo warranto is an appropriate vehicle by which Petitioners can assert their claims, but there is good reason to believe that this may be the *exclusive* remedy for challenges to qualifications and appointments. *See*, Gryzik v. State, 380 So.2d 1102, 1105 (Fla. 1st DCA 1980) ("Where quo warranto is an adequate remedy, it is the only proper remedy…");[3] *See, also*, State ex rel. Booth v. Byington, 168 So.2d 164, 175 (Fla. 1st DCA 1964), *aff'd*, 178 So.2d 1 (Fla. 1965) (Quoting the same language); *Compare*, Orange County. v. City of Orlando, 327 So.2d 7, 8 (Fla. 1976) (Denying equitable relief because the petitioner had an adequate remedy at law through quo warranto); Saleem v. Office of State Attorney, 993 So.2d 76, 77 (Fla. 5th DCA 2008) (Challenge to an official's credentials must be brought by a "direct" quo warranto action and cannot be accomplished through collateral attacks such as appeals).

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[3] Inexplicably, the Governor cites to this case - including this exact quotation - for the proposition that quo warranto is not a proper remedy. (Resp. at 5). It is difficult to see how that can be true when Gryzik tells us that quo warranto is generally the *only* remedy available for such claims.

A survey of the law in other states shows that this perspective is nearly universal. *See, e.g.*, Turner v. Ivey, __ So.3d __, 2023 WL 4672503, at *5 (Ala. July 21, 2023) ("This Court has recently recognized that a declaratory-judgment action cannot serve as a substitute for a quo warranto action."); *See, also*, Boling v. Pub. Employment Relations Bd., 245 Cal. Rptr. 3d 78, 83 (Ct. App. 2019) ("Equitable remedies, including declaratory relief, are generally not available when legal remedies, including quo warranto, are adequate."); Coghlan v. Borough of Darby, 844 A.2d 624, 628 (Pa. Commw. Ct. 2004) ("It is well settled that quo warranto is the sole and exclusive remedy to try the right to hold an elected office…"); State ex rel. Branch v. Pitts, 110 N.E.3d 87 (Ohio Ct. App. 2018); Martin v. Murray, 867 N.W.2d 444 (Mich. Ct. App. 2015); Spencer v. Wyrick, 392 P.3d 290 (Okl. 2017).

III. THERE IS NO TEXTUAL SUPPORT FOR THE GOVERNOR'S ARGUMENT THAT INITIAL APPOINTMENTS ARE SUBJECT TO DIFFERENT RULES OR STANDARDS THAN VACANCY APPOINTMENTS.

House Bill 1645 states that all members of the Authority must reside within the City of Gainesville[4] except that a single member can reside in the

[4] Technically, the Bill speaks in terms of "electors" but, in order to be an elector, one must reside in Gainesville.

County, provided that they receive utility service from GRU. *See*, §7.04(2)(a), (d). The House Bill provides that an additional member residing outside the City may be appointed if the proportion of utility customers living in the County increases over time. *See*, §7.04(3). The language of the statute is plain, unambiguous and capable of ready implementation.

In particular, the plain language of §7.04(2) states that it applies to *all* members of the Authority:

> (2) All members of the Authority shall: …

When the Legislature determined that the statutory qualifications apply to "all members of the Authority", it must surely have meant "all members of the Authority". That is how every speaker of the English language would interpret those words. *Compare*, McGraw v. DeSantis, 358 So.3d 1279, 1280 (Fla. 1st DCA 2023) (Discussing disqualification of school board member under §1001.34(1), Fla.Stat., requiring that "[e]ach member of the district school board ... shall be a resident of the district school board member residence area from which she or he is elected, and shall maintain said residency throughout her or his term of office."); *See, also*, Holman v. Brady, 195 Wash. App. 1063, 2016 WL 4921457 *11 (2016) ("It is particularly clear that "all" members should be plainly read to mean "the entire or total number of members").

In the face of this crystal-clear language the Governor makes the remarkable claim that the residency restrictions apply only when vacancies are filled and that they do not apply to his original appointments. Of course, the Governor cannot cite to any provision of the House Bill that says any such thing. That is because the claim is sheer nonsense, it is invented out of whole cloth, and it flies in the face of the actual text of the statute.

The Governor argues that this supposed exception to the otherwise universal residency restriction makes sense if you follow his convoluted scheme of statutory construction which amounts to a "just-so story". *Compare*, Lovey v. Escambia Cnty., 141 So.2d 761, 774 (Fla. 1st DCA 1962) (in dissent) ("[I]f any distinction exists, it is more apparent than real, a child of legal legerdemain and gobbledygook.")

The invitation to follow that tortured path is itself an error. Courts must not engage in statutory construction where the law is already unambiguous. Instead, the Court is required to apply the law, as written, and without embellishment:

> As with any statutory analysis, we adhere to the cardinal rule that to ascertain and effectuate the intent of the legislature, courts must give the words found in the statute their plain and ordinary meaning and, in the absence of ambiguity, refrain from resorting to canons of construction. *See* Anderson v. State, 87 So 3d 774, 777 (Fla. 2012). We therefore "begin 'with the language of the statute,' and, here, because that 'language provides a clear

> answer, [our analysis] ends there as well.'" Sch. Bd. of Miami-Dade Cnty. v. Fla. Dep't of Health, 329 So.3d 784, 787 (Fla. 3d DCA 2021) (internal quotation marks omitted) (*quoting* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999)).

Vanegas v. State, 360 So.3d 1195, 1198 (Fla. 3d DCA 2023); *See, also*, Koppel v. Ochoa, 243 So.3d 886, 891 (Fla. 2018) *quoting* Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation.").

HB 1645 does include instructions for filling vacant seats on the Authority. However, there is nothing which suggests that vacant positions are treated differently from initial appointments when it comes to qualifications for membership. HB 1645 says that members must be GRU utility customers in order to sit on the Authority. *See*, §7.04(2)(b). Surely, the Governor is not saying that this provision is inapplicable to his initial appointments. Why then should any other qualification be treated differently - including the disqualification for felons [§7.04(2)(c)] and the disqualification for persons living outside of City limits [§7.04(2)(d)]?

The careful balance with respect to residency is reflected in the language of §7.04(2)(d). That provision starts with a ban on any resident living outside of Gainesville, but then carves out an exception for a single

member. That carve out is further modified by the possibility of further adjustments based on the proportion of utility customers. The key here is that the disqualification does not depend on whether Authority members are original appointees or are appointed later to fill a vacancy. [5]

The statute is unambiguous and the Court should not have to resort to legislative history in order to derive its meaning. *See*, Rollins v. Pizzarelli, 761 So.2d 294, 299 (Fla. 2000) ("[W]hen the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute."). However, to the extent legislative history must be consulted, it is clear that the Governor's construction of HB 1645 finds no support in that history. To the contrary, the Bill's sponsor, Chuck Clemons, clearly stated that the intent of his Bill was to provide for only a single member living outside of Gainesville's limits, subject to later adjustment. *See*, Recording of March 17, 2023, Delegates Meeting, Tallahassee, FL, accessible at https://www.gainesville.com/videos/news/local/2023/09/27/state-rep-

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[5] The Governor makes a hypertechnical argument about the doctrine of *in pari materia*. (Resp. at 8). In their Brief, Petitioners were merely showing that §7.04(2)(b) (imposing the residency requirement) must be read in conjunction with §7.04(3) (which provides for changes in the composition of the Authority depending on the proportion of customers in the future).

chuck-clemons-explains-his-gru-authority-bill/70986919007/ (last accessed 12/22/23).

If HB 1645 intended to make an exception from the residency requirements for initial appointments, it would have said so. That would not require any extraordinary skill in drafting: the words "except for the initial appointments to the Authority" would have done nicely. But no such words appear in the statute and no such exception can be read into its plain and unambiguous terms.

The public policy at work here is apparent on the face of the statute. The Legislature clearly intended to provide for proportional representation on the Authority so that both city residents and county residents would be served. The Legislature built into that equation a requirement that most members of the Authority be residents of Gainesville to reflect both the reality of the Gainesville customer base and the fact that the Authority remains a "unit" of the City. That policy would not be served by construing the statute to allow the Governor to initially appoint whomever he wished regardless of where the appointee resided.

The Governor admits that his "initial appointments included four members residing outside Gainesville city limits." (Resp. at 7). Accordingly,

there is no factual or legal support for the Governor's claim that these appointments complied with the requirements of HB 1645.

IV. INFORMAL POSTING ON THE GRU WEBSITE IS NOT SUFFICIENT NOTICE UNDER THE STATUTE.

HB 1645 requires the Governor to publish notice soliciting applications for the Authority but does not specify how that notice must be given. See, §7.02 ("The Governor shall issue a public notice…"). The Governor concedes that public notice to apply for Authority board positions was not given in the conventional way: through a legal advertisement in a local newspaper. *See, e.g.* §166.041, Fla.Stat. (enactment of municipal ordinances); §180.24, Fla.Stat. (bids for municipal contracts). Neither was notice given through the City of Gainesville's website or that of Alachua County. The Governor claims that notice was published on the EOG website. (Resp. at 12). However, that is not true. Rather, that website is merely a one-size-fits-all application form. See, https://eogforms.eog.myflorida.com/pages/SeatApplication.aspx. (last accessed 12/14/23). When one navigates to that page, one does *not* see any information about the Authority. That information is buried in a pull-down menu. Thus, one must first know about the existence of an open position before navigating to the EOG page; it does

not itself alert anyone to an open Authority position.[6]

In reality, the only notice given appeared on the website for Gainesville Regional Utilities. The main page of GRU is at https://www.gru.com and the specific page which included information about the application process appears at https://www.gru.com/AboutGRU/TheGRUAuthority.aspx. (last accessed 12/14/23). It is important to note that this is *not* the City of Gainesville's main webpage. The City's actual website is found at https://www.gainesvillefl.gov/Home.

Publication by website is not the norm in Florida. It is allowed under some circumstances for some government business under a new statute: §50.0311, Fla.Stat. However, the Governor's notice does not comply with that statute because it was not published on Alachua County's official website which is the "publicly accessible website" identified by the statute. *See*, §50.0311(2), Fla.Stat.

Notice was not given in the conventional way and it is also apparent that the notice did not comply with the statute allowing internet publication

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[6] The Court will recall that Petitioner's counsel submitted a public records request to the Governor's Office seeking information concerning any public notice prior to filing suit. The Governor responded saying that "a search of the Executive Office of the Governor's files produced no documents responsive to your request." *See*, Ex. B to Amended Petition.

for some local government notices. Accordingly, the Governor can only argue that the limited notice was nonetheless reasonable under the circumstances. *Compare*, Transparency for Florida v. City of Port St. Lucie, 240 So.3d 780 (Fla. 4th DCA 2018) (Adopting a reasonableness standard for purposes of notice under the Sunshine Law). The notice was not reasonable here because it did not appear on the City of Gainesville's official website where an interested party would naturally look. Even the GRU information does not provide a direct link to the EOG page.[7] While it is possible for a highly motivated person to stumble across the information buried in the GRU website and then follow those multiple links, that sort of publication is unreasonable because it is not likely that the general public would ever encounter the notice. *See*, Florida Citizens All., Inc. v. Sch. Bd. of Collier Cnty., 328 So.3d 22, 28 (Fla. 2d DCA 2021) ("[B]urying a notice inside a committee application and calendar on the instructional materials page of the District's website is an unreasonable way to give public notice…"); Florida

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[7] In fact, one must navigate across three websites with three intervening links accessed through tabs buried in the text before finally arriving to the blank application page: https://www.gru.com/AboutGRU/TheGRUAuthority.aspx links to flgov.com which links to https://www.flgov.com/appointments/ which includes a tab which finally links to the application. (All last accessed 12/14/23).

Citizens All., 328 So.3d at 28 ("If a member of the public navigated to the instructional materials page and had known to click on the link for the application to be a member of a Textbook Committee or to check the calendar for committee members, the person would have found when the meetings were scheduled. The Plaintiffs point out that a person would have had to click on nine different applications - one for each subject - to get all the dates for all the committee meetings."); *Compare*, Florida Dept. of Cmty. Affairs v. Bryant, 586 So.2d 1205, 1209–10 (Fla. 1st DCA 1991) ("[T]he Department did not post notice of the position opening that was awarded to Case. Thus, Bryant had no way of knowing that the position was available.").

In the absence of reasonable notice, all of the appointments are invalid.

V. ANY DISRUPTION CAUSED BY A FAILURE OF THE APPOINTMENT PROCESS IS ENTIRELY ATTRIBUTABLE TO THE GOVERNOR.

The Governor suggests that the Court should refrain from granting relief because the Authority Board would be left "without a quorum for at least 30 days, creating a potentially disastrous situation for GRU customers". (Resp. at 15). However, GRU's customers seemed to have survived a much longer gap caused by the statute itself: there was no one in control over the utility between July 1st, when HB 1645 stripped the City of control, and

October, when the Authority members were appointed. The failure to advertise and appoint qualified members is attributable to the Governor's disregard of the plain language of the law and to no other factor.

VI. THE PETITION WAS TIMELY FILED AS TO BOTH CLAIMS ASSERTED.

There is no basis to assert that the Petition was untimely in any respect. The law is clear that no action could have been maintained before the Governor acted. *See*, Thompson v. DeSantis, 301 So.3d at 191 *quoting* League of Women Voters of Fla. v. Scott, 232 So.3d 264, 265 (Fla. 2017) ("[T]he history of the extraordinary writ reflects that petitions for relief in quo warranto are properly filed only after a public official has acted."). The action complained of here is the appointment of unqualified Authority members through a process that did not comply with legal requirements.[8] The Petition was filed on October 2nd - mere days after the Governor made the first of his appointments on September 26th. *Contrast*, Warren v. DeSantis, 365 So. 3d 1137 (Fla. 2023) (Denial of quo warranto justified by delay of more than

[8] The Governor apparently faults the Petitioners for not calling the defective publication to his attention. But the law imposes that duty on the Governor, not the Petitioners.

six months before filing petition). The Amended Petition was filed on October 9th - less than a week after the second group of appointees was announced.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply has been forwarded to Attorney General, Ashley Moody, [oag.civil. eserve@myfloridalegal.com], Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399; and to NICHOLAS J.P. MEROS, Esquire [Nicholas.Meros@eog.myflorida.com], Executive Office of the Governor, The Capitol, PL-5 400 S. Monroe Street, Tallahassee, Florida 32399, by E-mail this 27th day of December, 2023.

/s/ Gary S. Edinger
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel certifies that this Petition is typewritten using 14 point Arial font and complies with the font requirements of Rule 9.045, Fla.R.App.P. This Petition contains 3,183 words which complies with the word count provisions of Rule 9.210(a)(2), Fla.R.App.P.

/s/ Gary S. Edinger
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EXHIBIT “A”

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 IN OPPOSITION TO EMERGENCY PETITION FOR WRITS OF QUO WARRANTO AND MANDAMUS

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

On May 26, 2020, Governor DeSantis appointed the first Jamaican-American to the Florida Supreme Court, Judge Renatha Francis ("Judge Francis"). Numerous diverse legal organizations, including the Jamaican-American Bar Association and the Haitian Lawyers Association, supported her appointment. And several black state legislative leaders support Judge Francis, finding her "a qualified candidate who brings a different life experience and a diversity of thought." *See* Res. App. at 23-24.[1] Yet, Petitioner alone denounces the appointment of Judge Francis as "ideological" and "insulting." *See* James Call, *Lawmaker aims to block Gov. DeSantis' Florida Supreme Court appointee as unqualified*, Tallahassee Democrat (July 27, 2020), https://www.tallahassee.com/story/news/politics/2020/07/27/lawmaker-aims-block-gov-desantis-florida-supreme-court-appointee/5516912002/. Elevating the partisanship, Petitioner brings this unfounded challenge to the Governor's ability to appoint Judge Francis.

The Petition for Writ of Quo Warranto seeks to invoke this Court's discretionary jurisdiction under Article V, section 3(b)(8) of the Florida

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[1] Citations to the Petition will be abbreviated as "Pet. at __". Citations to the Appendix to the Petition will be abbreviated as "Pet. App. at __". Citations to the Appendix to the Response will be abbreviated as "Res. App. at __".

Constitution by asking what authority Governor DeSantis has to appoint Judge Francis to the position of Justice of the Florida Supreme Court. The Governor's authority to appoint Judge Francis is derived from Article V, section 11 of the Florida Constitution.

Here, Petitioner, as an individual taxpayer *and* in her official capacity as a member of the Florida House of Representatives, cries foul on the nomination and appointment of Judge Francis to the Florida Supreme Court solely on the basis that Judge Francis did not meet the constitutional eligibility requirements articulated in Article V, section 8 of the Florida Constitution at the time she was appointed by Governor DeSantis.

First, as a threshold matter, the Petition is an abuse of the extraordinary writ of quo warranto. Petitioner does not have standing to seek to invoke this Court's discretionary jurisdiction because she has not alleged a special injury as a citizen and taxpayer. Nor has Petitioner alleged any of her official duties as a member of the Florida House of Representatives have been adversely affected by the Governor's appointment of Judge Francis. Rather, Petitioner raises a generalized question as to the authority of the Florida Supreme Court Judicial Nominating Commission ("Supreme Court JNC") to nominate and Governor to appoint Judge Francis, who upon taking her oath of office and assuming office will satisfy all

requirements of Article V, section 8 of the Florida Constitution.

While this Court has held a petitioner in quo warranto proceedings "seeking the enforcement of a public right" need not show "any real or personal interest," *see Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989) (citation omitted), the Court has also traditionally limited the exercise of its discretionary jurisdiction to petitions showing a special injury, *see Rickman v. Whitehurst*, 74 So. 205 (Fla. 1917), *or* in which one branch of government or government actor challenges the action of another government actor based on the separation of powers, *see Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998).

Second, even if Petitioner can overcome the jurisdictional deficiency, the Petition should still be denied on the merits because the arguments fail as a matter of law. Petitioner misreads the plain language of Article V, section 8 of the Florida Constitution and argues in direct conflict with this Court's decision in *Miller v. Mendez*, 804 So. 2d 1243 (Fla. 2001). Petitioner claims Judge Francis was ineligible to be nominated by the Supreme Court JNC and appointed by Governor DeSantis because she was not yet a member of the Florida Bar for ten years prior to her *appointment*. *See* Pet. at 16, 20. However, the plain language of the constitutional requirements, supported by this Court's precedent, require eligibility at the time of *assuming office*, not the date of appointment. And while not

necessary when the text is clear, employing the canons of statutory construction confirm this plain language reading—crumbling Petitioner's unsupported interpretation. Because Petitioner fails to allege a special injury or show a violation of the separation of powers requiring an immediate determination by this Court, and because there are no legal merits to the claims asserted, this Court should dismiss or deny the Petition for Writ of Quo Warranto.

BACKGROUND

A. Facts

Governor DeSantis received the resignations of Justices Robert Luck and Barbara Lagoa on November 18 and 22, 2019, respectively, creating immediate vacancies on the Florida Supreme Court. Pet. App. at 7-8. Upon acceptance of their resignations, Governor DeSantis requested the Supreme Court JNC convene "for the purpose of selecting and submitting . . . names of highly qualified lawyers for appointment to the Florida Supreme Court." Pet. App. at 9. The Supreme Court JNC, pursuant to Article V, section 11(c) of the Florida Constitution, had sixty days to complete this task, the maximum allowed under the Constitution.

On November 25, 2019, the Supreme Court JNC announced it was seeking applicants and requested all interested persons submit their application no later than December 24, 2019. Pet. App. at 10. Thirty-two individuals submitted

applications. *See* Pet. App. at 11. Over the course of two days, the nine members of the Supreme Court JNC interviewed each applicant. *See generally Florida Supreme Court Judicial Nominating Commission Interviews*, The Florida Channel (Jan. 11, 2020), https://thefloridachannel.org/videos/1-11-20-florida-supreme-court-judicial-nominating-commission-part-1/. On January 23, 2020, the Supreme Court JNC certified a list of nine nominees to the Governor for consideration of appointment. Pet. App. at 15.

On March 1, 2020, Governor DeSantis issued Executive Order 20-51 directing the State Surgeon General to declare a public health emergency due to the Novel Coronavirus Disease 2019 ("COVID-19"). *See* Res. App. at 3-6. A week later, Governor DeSantis declared a state of emergency for the entire state of Florida due to COVID-19. *See* Res. App. at 7-13. On March 19, 2020, Governor DeSantis announced that his entire attention and focus was on responding to the unprecedented COVID-19 pandemic and, therefore, he would delay his appointments to the Florida Supreme Court. *See* Gray Rohrer, *Swamped with coronavirus response, DeSantis punts on Florida Supreme Court picks*, Orlando Sentinel (Mar. 20, 2020), https://bit.ly/39TTeFB. Governor DeSantis' decision reflected the notion that the appointment of one justice, let alone two, to the Florida Supreme Court is an incredible responsibility that demands careful review

and consideration.

Throughout the appointment process, Governor DeSantis received numerous letters of support for the individuals certified for appointment, including Judge Francis. Judge Francis received support from a variety of organizations and individuals, including the Florida Legislative Black Caucus[2] and the Judicial Diversity Initiative, a collection of bar associations in South Florida comprised of the Charles B. Norton Chapter of the National Black Prosecutors Association, the Caribbean Bar Association, the F. Malcolm Cunningham, Sr. Bar Association, the Gwen S. Cherry Black Women Lawyers Association, the Haitian Lawyers Association, the T.J. Reddick Bar Association, and the Wilkie D. Ferguson, Jr. Bar Association. *See* Res. App. at 14-24. (sampling of letters of support). The first African American president of the Florida Bar, former President Eugene Pettis, penned an op-ed encouraging the appointment of Judge Francis. *See* Eugene K.

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[2] On January 31, 2020, the Florida Legislative Black Caucus sent letters to Governor DeSantis encouraging the appointment of Judge Francis to the Florida Supreme Court after she was nominated by the Supreme Court JNC. Petitioner's name appears as a member of the Judicial Nominations Committee of the Florida Legislative Black Caucus. *See* Res. App. at 17-18. Recently, the Florida Legislative Black Caucus confirmed its continued support for Judge Francis. *See* Gary Blankenship, *Legislative Black Caucus Still Supports Justice Francis' Appointment*, The Florida Bar News (July 23, 2020), https://www.floridabar.org/the-florida-bar-news/legislative-black-caucus-still-supports-justice-francis-appointment.

Pettis, *Point of View: A diverse Florida Supreme Court is worth the wait*, The Palm Beach Post (Feb. 4, 2020), https://www.palmbeachpost.com/opinion/20200204/point-of-view-diverse-florida-supreme-court-is-worth-wait.

After thoroughly reviewing the applications and materials and conducting interviews of the nominees, Governor DeSantis on May 26, 2020 appointed John Couriel and Judge Francis to the Florida Supreme Court. *See* Pet. App. at 16-17. Francis has not yet taken the oath, received her commission, or assumed office. Judge Francis intends to assume office on or about September 24, 2020.

B. Judicial Appointments

Article V of the Florida Constitution governs the judiciary, including the process for appointing and electing judges, their terms of office, and eligibility requirements. On March 14, 1972, Florida voters overwhelmingly passed Amendment 1—a complete restructuring of the judiciary, including creation of the JNC process. *See generally Fla. Votes in Judicial Reform Bill*, Ocala Star-Banner 5A (Mar. 15, 1972), https://bit.ly/2D1tSJx; Raquel A. Rodriguez, *Judicial Selection In Florida, An Executive Branch Perspective*, Fla. B.J. (Jan. 2005), https://www.floridabar.org/the-florida-bar-journal/judicial-selection-in-floridaan-executive-branch-perspective. Appointment of judges remained an executive function in the newly adopted Article V. *See* Art. V, § 11, Fla. Const.; *see also In*

re Advisory Opinion to Governor, 276 So. 2d 25, 29-30 (Fla. 1973) ("*1973 Advisory Op.*"). To this day, Article V remains consistent on the process for appointing judges and the qualifications one must meet to hold judicial office.

Article V, section 8 of the Florida Constitution defines the eligibility to hold the office of justice or judge. Relevant to these proceedings, in order to hold the office of justice of the Florida Supreme Court, the Constitution outlines,

> No person shall be eligible for office of justice . . . unless the person is an elector of the state and resides in the territorial jurisdiction of the court. No justice . . . shall serve after attaining the age of seventy-five years except upon temporary assignment. No person is eligible for the office of justice of the supreme court . . . unless the person is, and has been for the preceding ten years, a member of the bar of Florida.

Art. V, § 8, Fla. Const. Therein, four clear requirements must be maintained to hold the office: (1) elector of the state; (2) residing in Florida; (3) under the age of seventy-five; and (4) a member of the Florida Bar for the preceding ten years. Additionally, the Florida Supreme Court is unique in that each appellate district must have at least one representative, with residency determined on the date of appointment. *See* Art. V, § 3(a), Fla. Const.

Judges in Florida can assume office in two ways: gubernatorial appointment, *see* Art. V, § 11, Fla. Const., or election, *see* Art. V, § 10, Fla. Const. Generally, a judge's term is six years, commencing on the first Tuesday after the first Monday in January following the applicable general election. *See* Art. V, § 10(a), Fla.

Const. Justices of the Supreme Court and judges of the District Courts of Appeal are not elected, rather they are appointed by the Governor and, therefore, face merit retention. *See id.*; Art. V, § 11(a), Fla. Const. And because justices are appointed, their initial term is not six years, but rather, "for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment." Art. V, § 11(a), Fla. Const. After justices face their first merit retention following appointment, they continue to serve six-year terms until they resign, reach seventy-five years of age, or fail to be retained. *See* Art. V, §§ 8, 10(a), Fla. Const.

Article V, section 11 of the Florida Constitution governs the appointment process for members of the judiciary whenever there is a vacancy. In relevant part, Article V, section 11 states,

> (a) Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.
> . . .
>
> (c) The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to the governor.

> (d) There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. Uniform rules of procedure shall be established by the judicial nominating commissions at each level of the court system. Such rules, or any part thereof, may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring. Except for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records shall be open to the public.

Pursuant to Article V, § 11(d), the Florida Legislature by general law enacted provisions relating to the judicial nominating commissions. *See* § 43.291, Fla. Stat. Of import, each JNC is comprised of nine members who serve four year terms—five individuals appointed by the Governor, *see* § 43.291(1)(b), Fla. Stat., and four members of the Florida Bar recommended to the Governor by the Board of Governors of the Florida Bar, *see* § 43.291(1)(a), Fla. Stat.

The process and requirements of Article V are straightforward. The JNC has the responsibility to solicit interested candidates and interview and nominate at least three, but not more than six, names to the Governor. Art. V, § 11(a), (c), Fla. Const. The Governor then must appoint an individual from the certified list of nominations. Art. V, § 11(a), Fla. Const. Upon appointment, the Governor has met his constitutional obligations under Article V. It remains on the justice to take the final steps—swearing the oath of office, receiving a commission issued by the

Governor indicating the dates upon which the term will commence and end, and assuming the office. *See* Art. II, § 5(b), Fla. Const.; Art. IV, § 1(a), Fla. Const.

C. The Petition for Writ of Quo Warranto

On July 13, 2020, Petitioner filed her Emergency[3] Petition for Writ of Quo Warranto challenging (1) the Supreme Court JNC's decision to put Judge Francis on the certified list of nominees to the Governor and (2) Governor DeSantis' authority to appoint Judge Francis to the Supreme Court of Florida. Pet. at 1-2. Petitioner has requested oral argument. This Court acknowledged the Petition and ordered Respondents to file responsive briefs on or before August 3, 2020. As more fully addressed below, Petitioner's claims are defective, and the Petition should either be dismissed for lack of jurisdiction or denied on the merits.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

This Court should dismiss the Petition for lack of jurisdiction. Extraordinary writ petitions, including petitions for quo warranto and mandamus, may be dismissed or denied "based on a number of reasons other than the actual merits of

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[3] Petitioner styles her Petition as an Emergency; however, she waited 172 days since the Supreme Court JNC nominated Judge Francis and 48 days since Governor DeSantis made the appointment to challenge Judge Francis' appointment.

the claim." *Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004). Because writs of quo warranto and mandamus are extraordinary, this Court should only employ them "with great caution and under very limited circumstances." *Whiley v. Scott*, 79 So. 3d 702, 723 (Fla. 2011) (Polston, J., dissenting); *see also English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977) (extraordinary writ of prohibition to be employed with great caution and utilized only in emergencies). Accepting discretionary jurisdiction for extraordinary writ proceedings should be limited to cases wherein the petitioner can meet taxpayer standing or allege a violation of the separation of powers.

Petitioner passingly alleges standing because she is "a Florida citizen and taxpayer" and "an elected Representative . . . in the Florida House of Representatives." Pet. at 13. Petitioner relies on *Whiley* and *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009), as the basis for meeting the standing requirement. However, neither of these cases is applicable for conferring standing to Petitioner. Petitioner cannot show that she meets the taxpayer standing requirement outlined in *Rickman* nor does she allege a separation of powers violation requiring immediate determination by this Court. The Petitioner cannot satisfy these bare requirements to invoke this Court's discretionary jurisdiction for an extraordinary writ proceeding; therefore, her Petition cannot proceed.

A. Petitioner lacks standing to seek relief because she has not alleged a special injury.

Petitioner lacks standing as a "Florida citizen and taxpayer," *see* Pet. at 13, because she does not claim a special injury or real interest connected to Governor DeSantis appointing Judge Francis. Standing is a threshold jurisdictional question that "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). The petitioner must demonstrate he or she has standing to invoke the power of the court to determine the merits of an issue. *McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016), *review denied*, SC16-1668, 2017 WL 192043 (Fla. 2017). "[E]xcept as otherwise required by the constitution, Florida recognizes a general standing requirement in the sense that *every case* must involve a real controversy as to the issue or issues presented." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (emphasis added).

In order to demonstrate standing to a challenged governmental action, this Court's long-standing precedent supports that a citizen taxpayer is required to allege he or she suffered or will suffer a special injury, distinct from other members of the community at large. *See Rickman*, 74 So. at 207. Exceptions to the special injury rule exist when standing is explicitly granted by statute or a

constitutional challenge based directly upon the Legislature's taxing and spending power. *See, e.g.*, *Sch. Bd. of Volusia County v. Clayton*, 691 So. 2d 1066, 1067 (Fla. 1997).

The "special injury" rule was applied to a Sunshine Amendment challenge in *St. John Medical Plans, Inc. v. Gutman*, 696 So. 2d 1294 (Fla. 3d DCA 1997). There, private plaintiffs brought an action under the Article II, section 8 of the Florida Constitution (the "Sunshine Amendment") challenging an official action even though the plaintiffs recognized they had no special injury. *Id.* at 1295. The District Court noted the Sunshine Amendment provides "[t]he people . . . the right to secure and sustain [public] trust against abuse" but, regardless, denied the claim based on lack of standing. *Id.* (citation omitted). In so holding, the district court cited long established precedent that, in order to establish standing, "a taxpayer must allege either a special injury distinct from other taxpayers or a constitutional violation of the legislature's taxing and spending power." *Id.* (citing *Sch. Bd. of Volusia County*, 691 So. 2d at 1068). Upon review, this Court agreed, holding "only the state has standing under article II, section 8(c), not individual citizens." *St. John Medical Plans, Inc. v. Gutman*, 721 So. 2d 717, 720 (Fla. 1998).

Here, Petitioner appears as "a Florida citizen and taxpayer," *see* Pet. at 13, and as "an elected Representative for District 44 in the Florida House of

Representatives," *see* Pet. at 13. Petitioner relies on this Court's prior opinions in *Whiley* and *Pleus* conferring her legal right to seek quo warranto. *See id.* But as more fully addressed below, a petitioner in a quo warranto action should be held to the same standing requirements as other actions challenging governmental action. Petitioner fails to allege facts sufficient to confer standing. Chiefly, Petitioner fails to allege that she has suffered any distinct harm because of the appointment of Judge Francis.

Neither *Whiley* nor *Pleus* is applicable to Petitioner's standing. First, this Court in *Whiley* applied a broad rule, that in quo warranto proceedings, individual members have standing without any showing of specialized injury. *Whiley*, 79 So. 3d at 706-07. The majority's holding in *Whiley* conferring standing in an extraordinary writ proceeding without clear special injury is in tension with traditional standing doctrine. Rather, the majority in *Whiley* conferred special injury standing for two reasons: (1) a potential violation of the separation of powers, *see id.* at 707, and (2) as a food stamp recipient, Whiley feared the abeyance of rulemaking would negatively impact her ability to reapply for government benefits, *see id.* at 720 (Polston, J. dissenting). But as the dissent in *Whiley* rightfully acknowledged, the scant showing of a potential injury sometime in the future should not confer standing in an extraordinary writ proceeding—that

would make it an advisory opinion. *See id.* at 718-720 (Polston, J., dissenting). And here, Petitioner cannot make a comparable argument that she has a special injury distinct from other taxpayers based on the challenged action. Second, the petitioner in *Pleus* was the vacating judge seeking to compel Governor Crist to fill his vacancy. *Pleus*, 14 So. 3d at 942. And even then, this Court did not address why the petitioner had standing to challenge the failure to appoint. Petitioner is neither one of the thirty-one applicants nor other nominees sent to the Governor for appointment who *may* be able to allege special injury.

Petitioner cannot distinguish herself from any other citizen in Florida. Nor does Petitioner even attempt to allege she has suffered a special injury as a result of Governor DeSantis appointing Judge Francis. Petitioner simply believes Judge Francis is not qualified and would like another individual—someone who was not even nominated for the certified list to the Governor—to be appointed. *See generally* Pet. at 6-11, 23. This is precisely the type of generalized harm insufficient to confer standing, as required in declaratory judgment actions, to create a justiciable controversy.

B. There is no violation of the separation of powers, and this Court therefore should decline to invoke its discretionary jurisdiction.

Petitioner secondarily alleges standing because "she is also an elected Representative for District 44 in the Florida House of Representatives." Pet. at 13.

To be sure, there is no special standing because someone is an elected member of the Legislature to bring an extraordinary writ petition in the absence of the person's official duties being impacted. This Court has traditionally limited its discretionary jurisdiction to consider extraordinary writ petitions to situations where there is a violation of the separation of powers. *See generally Chiles*, 714 So. 2d at 456 (collection of writ cases brought by one branch against another based on separation of powers). Petitioner has not alleged that Governor DeSantis' appointment of Judge Francis was a violation of the separation of powers explicit in Article II, section 3 of the Florida Constitution, nor has Petitioner alleged that Governor DeSantis has exercised some authority exclusively granted to the Legislature.

Compare the instant action to *Martinez*, wherein Representative Elvin Martinez filed a quo warranto petition challenging Governor Bob Martinez's ability to call a special session on issues already the subject of a prior call for special session. *Martinez*, 545 So. 2d at 1338-39. This Court specifically acknowledged Representative Martinez, being a member of the Legislature that was called to special session, was "directly affected by the governor's actions" and determined to invoke its discretionary jurisdiction and decide the merits. *Id.* at 1339. Subsequent to *Martinez*, additional quo warranto actions have been brought

by one branch of government testing another branch's authority to act in a way that infringes on the separation of powers. *See, e.g.*, *Fla. House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008) (Florida House quo warranto challenge to Governor Crist's authority to bind the State of Florida in the Seminole Tribe Gaming Compact); *Chiles v. Phelps*, 714 So. 2d 453 (Fla. 1998) (consolidated action wherein Governor Chiles and an affected clinic and doctor challenged the legislature's veto override); *Fla. House of Representatives v. Martinez*, 555 So. 2d 839 (Fla. 1990) (Florida House petition for writ of mandamus challenging Governor Martinez's veto authority); *Fla. Senate v. Graham*, 412 So. 2d 360 (Fla. 1982) (Florida Senate challenging Governor Graham's authority to limit special apportionment session to less than 30 days).

These cases are distinguished from the one now raised by Petitioner because they were brought by one branch of government seeking quo warranto on a question directly related to the separation of powers. At the heart of these cases was an allegation that the functions of government may be adversely affected without immediate decision by this Court. *See Chiles*, 714 So. 2d at 456 ("[T]his Court historically has taken jurisdiction of writ petitions where members of one branch of government challenged the validity of actions taken by members of another branch" infringing on their committed duties). Petitioner is not alleging

that Governor DeSantis has exercised authority that explicitly belongs to another branch of government or government actor, nor could she. Article V, section 11 of the Florida Constitution explicitly commits filling judicial vacancies to the Governor and JNCs. Because Petitioner does not allege any violation of the separation of powers, this Court should decline discretionary jurisdiction.

The quo warranto process should not be a tool to avoid what should otherwise be brought through a declaratory judgment action. *See Fla. House of Representatives v. Crist*, 999 So. 2d at 619-20, 619 n.13 (Lewis, J., concurring in result). Without some showing of either (a) special taxpayer standing or (b) a violation of the separation of powers, quo warranto challenges essentially become requests for an advisory opinion available to anyone in the state against any government actor. *Contra Martinez*, 545 So. 2d at 1339 ("In quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit need not show that he has any real or personal interest in it." (internal citations and footnote omitted)); *Florida Cent. & P.R. Co. v. State ex rel. Mayor*, 13 So. 103, 105 (Fla. 1893) (same as to mandamus). However, standing *is* required in quo warranto actions challenging a person's right to hold office—which is what this case is really about. *See* § 80.01, Fla. Stat. (only the Attorney General *or* "[a]ny person claiming title to an office

which is exercised by another has the right" to file the quo warranto action); *see also Tobler v. Beckett*, 297 So. 2d 59, 61 (Fla. 2d DCA 1974) ("Ordinarily, quo warranto is the proper remedy to determine the right of an individual to hold public office. It may be instituted only by the Attorney General of Florida, *or by a person claiming title to the office*." (emphasis added) (footnote omitted)).

Unlike the historical use of quo warranto, wherein one individual seeks to challenge the authority of another to claim title to particular office, this is not that case. *See State ex rel. Landis v. Prevatt*, 148 So. 578, 579-80 (Fla. 1933) (quo warranto is a common-law remedy to test the right to office); *see also* § 80.01, Fla. Stat. And unlike quo warranto actions wherein one government actor seeks to challenge the authority of another government actor for violating the separation of powers, this is not that case either.

Rather, lacking any special injury, Petitioner seeks to convert a declaratory action, which should be filed in circuit court, into a quo warranto and mandamus action in this Court by challenging Governor DeSantis' authority to appoint Judge Francis to the Supreme Court of Florida. This Court should clarify its discretionary jurisdiction under Article V, section 3(b)(8) of the Florida Constitution by finding that Petitioner failed to (a) establish taxpayer standing under *Rickman* or (b) allege a violation of the separation of powers.

Requiring standing to invoke this Court's discretionary jurisdiction in quo warranto proceedings is not a high bar to clear, but it is nonetheless important. This Court should dismiss the Petition because the Petitioner does not have standing and there is no violation of the separation of powers that requires immediate determination because of Governor DeSantis' appointment of Judge Francis.

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

A. Petitioner misreads Article V, section 8 of the Florida Constitution.

The plain text of the eligibility section of Article V is contrary to the position Petitioner seeks this Court to impose. Petitioner would like this Court to read eligibility criteria to apply when the Supreme Court JNC certifies a list of nominees or upon the Governor's appointment. However, this reading is not supported by the text of Article V, section 8 of the Florida Constitution and has been expressly rejected by this Court in *Miller v. Mendez*, 804 So. 2d 1243 (Fla. 2001) ("*Miller II*"). While the text is not ambiguous, when utilizing the canons of statutory interpretation, Petitioner's reading further crumbles. Therefore, this Court should find the eligibility requirements in Article V apply at the time a judicial appointee *assumes office*, which supports the Governor's appointment of Judge Francis.

i. The plain text of Article V, section 8 of the Florida Constitution supports the eligibility requirements apply at the time of assuming office

This Court interpreting Article V, section 8 of the Florida Constitution spoke in clear terms regarding the very question Petitioner posits. "[E]ligibility requirements need not be satisfied until the time of taking office." *Miller II*, 804 So. 2d at 1245. This favors eligibility of Judge Francis when she *assumes* office on or about September 24, 2020.

When interpreting a constitutional provision, this Court has said the "proper interpretation . . . must begin with an examination of that provision's explicit text." *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986). Article V of the Florida Constitution governs the judiciary, including eligibility to hold judicial office, *see* Art. V, § 8, Fla. Const., and the process for appointing and electing judges, *see* Art. V, § 11, Fla. Const. Relevant to determining who is eligible to hold the office of justice of the Supreme Court, Article V, section 8 says,

> 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. No justice or judge shall serve after attaining the age of seventy-five years except upon temporary assignment. No person is *eligible for the office* of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida.

(Emphasis added.) Four eligibility requirements plainly exist for justices to hold

office: (1) being an elector of the State; (2) residency in Florida; (3) being under the age of seventy-five; and (4) membership in the Florida Bar for the preceding ten years. *See id.* But the eligibility requirements are only applicable at the moment the individual assumes the office, not at the moment of appointment as Petitioner would suggest. *See* Pet. at 2, 22. To be sure, Article V, section 8 of the Florida Constitution applies to the judge or justice, not the executive appointment process outlined in Article V, section 11.

While Judge Francis has been appointed to the Florida Supreme Court, she has not yet taken the requisite steps to assume and hold office. We know this because Article II, section 5(b) of the Florida Constitution requires justices, "before entering upon the duties of the office" to swear an oath. *See also* § 876.05, Fla. Stat. (required oath of office for all public employees prior to compensation or salary); Oath of Office, Form DS-DE 56, Florida Department of State, https://dos.myflorida.com/media/702653/dsde56-oath-acceptance-feb-2020.pdf (form of Article II, § 5(b) oath of office); Candidate Oath – Judicial Office, Form DS-DE 303JU, Florida Department of State, https://dos.myflorida.com/media/702980/dsde303ju-judicial-oath-apr-2020-final.pdf (affirming qualifications to hold judicial office under the Constitution and affirming the oath provided in section 876.05, Florida Statutes, applicable "if

elected and when term of office begins"). Upon taking the oath, the Governor signs the commission, *see* Art. IV, § 1(a), Fla. Const., indicating the beginning and end dates of the term. *See State ex rel. Lawson v. Page*, 250 So. 2d 257, 258-59 (Fla. 1971) (an appointment is not completed and final until the execution of a commission). Therefore, until Judge Francis assumes office, eligibility is not material, nor is it in question.

Petitioner asks this Court to recede from *Page* alleging it was wrongly decided. *See* Pet. at 24. Petitioner's request is rooted in the theory that the Florida Constitution does not distinguish between appointment and assuming office. *Id.* As discussed below, Petitioner's reasoning is flawed because appointment does not constitute assuming office. The appointee has been designated to fill a position but still must accept the responsibilities and undertake the legal obligations to assume office. *See also* Art. IV, § 1(a), Fla. Const. ("The Governor shall . . . commission all officers of the state[.]"). Petitioner provides no other valid basis for this Court to recede from *Page*, nor does any exist—at the time the Governor makes the appointment the officer still must take the oath of office, receive the commission, and assume office.

Petitioner alleges that a preferred reading of Article V, section 8 means eligibility attaches either when the Supreme Court JNC certified names to

Governor DeSantis, *see* Pet. at 16-17, or when Governor DeSantis appointed Judge Francis, *see* Pet. at 22. Yet that is not what the Florida Constitution says; instead, the text makes plain that eligibility attaches upon assuming office. Petitioner's scant analysis is unsupported by the plain text of Article V and this Court's precedent.

Article V, section 8 plainly states a justice is not "eligible for the office" until certain requirements are met. Eligible in this context means to be "capable of holding office." *ELIGIBLE*, Black's Law Dictionary (6th ed. 1990); *see also ELIGIBLE*, New Oxford American Dictionary (3rd ed. 2010) (defining "eligible" in relevant part as "satisfying the appropriate conditions"). A reasonable person would understand "eligible for the office" to mean one must meet certain requirements prior to assuming the office and exercising the duties. This understanding is consistent with common parlance as to eligibility.

By way of example, consider the election of Joe Biden to the United States Senate in 1972. Article I, section 3, clause 3 of the United States Constitution governing eligibility to be a United States Senator says,

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Here the United States Constitution establishes three requirements: (1) thirty years

of age; (2) nine years a citizen of the United States; and (3) a resident of the State when elected.[4] Mr. Biden was born on November 20, 1942. *Joe Biden Biography*, Biographical Directory of the United States Congress, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=B000444 (last visited Aug. 3, 2020). On November 7, 1972, at the age of twenty-nine years, eleven months and eighteen days, Mr. Biden won the election to become United States Senator for Delaware. *See* Official Results of General Election 1972, State of Delaware (Jan. 1, 1973), https://elections.delaware.gov/electionresults/pdfs/1972.pdf; *Joe Biden wins US Senate election in Delaware*, World History Project, https://worldhistoryproject.org/1972/11/7/joe-biden-wins-us-senate-election-in-delaware (last visited Aug. 3, 2020). While he was not thirty when he won election, Mr. Biden attained the age of thirty by January 5, 1973, when he was sworn into office. *See Joe Biden Biography*. Surely Petitioner would not contend that Mr. Biden was ineligible to be a Senator because he had not attained the age of thirty prior to being elected. And that is because the thirty years of age and nine years citizen of the United States are qualifications that must be met by the time a

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[4] There is a noticeable distinction made as to the qualifications. The United States Constitution clearly makes residency applicable "when elected" and leaves the age and citizenship requirements for holding office. *See* U.S. Const., art. I, § 3, cl. 3.

Senator *assumes* office.

The same logic applies here. A judicial candidate can *apply* for appointment and be appointed, as long as he or she meets the eligibility requirements on the date of taking office. Just as the United States Constitution holds that no person "shall be a Senator" who has not attained the age of thirty upon being sworn into office, the Florida Constitution establishes no person "shall be eligible for the office of justice" who has not been a member of the Florida Bar for ten years upon assuming office.

As discussed above, the eligibility requirements under Article V, section 8 of the Florida Constitution apply to the justice or judge—governing their requirements to hold office. Separately, Article V, section 11(a) governs the appointment process—more specifically the requirements on the Executive to fill vacancies in the judiciary. While Governor DeSantis exercised his appointment authority in Article V, section 11(a) to *appoint* Judge Francis, it is undisputed that Judge Francis has not yet *assumed* office—a distinction that matters. The exercise of appointment authority clearly means Judge Francis has been designated to fill an office at some later point in time. *See, e.g.*, *APPOINTMENT*, Black's Law Dictionary (6th ed. 1990) ("The selection or designation of a person, by the person . . . having authority . . . to fill an office[.]"); *APPOINTMENT*, The American

Heritage Dictionary (5th ed. 2011) ("The act of appointing or designating someone for an office or position."). Nowhere in Article V is *assumption of office* required to occur simultaneously (or within short-order) of *appointment*. And to be sure, the Florida Constitution could have included that requirement or provided the Legislature with the authority to mandate the same because there is a temporal requirement placed on individuals seeking election or appointment to the county court. *See* § 34.021(1), Fla. Stat.[5]

The plain text reading of Article V, section 8 of the Florida Constitution—eligibility controls at the time of assuming office—has been affirmed by this Court in numerous instances. In 1966, Governor Burns requested an advisory opinion from the Court as to whether he could sign the commission of Circuit Judge-Elect Stephen R. Booher ("Booher"). *In re Advisory Opinion to the Governor* ("*1966*

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[5] When Article V, section 8 was amended in 1972, it created a specific eligibility requirement for the office of county court judges—for counties with a population of more than 40,000, five years membership of the Florida Bar and membership to the Florida Bar for counties with a population less than 40,000. However, the amendment also provided the Legislature the authority to amend by general law this eligibility requirement. Art. V, § 8, Fla. Const. The Legislature acted on that grant of authority, enacting section 34.021, Florida Statutes. *See* Ch. 72-404, Laws of Fla. (eliminating the membership of the Florida Bar requirement for counties with a population less than 40,000). In 1978 and 1984, the Legislature amended section 34.021 to establish eligibility as a member of the Florida Bar must be met *at the time of qualifying for office* or *applying to the judicial nominating commission*. *See* Chs. 78-346 and 84-303, Laws of Fla.

Advisory Opinion"), 192 So. 2d 757, 758 (Fla. 1966). At the 1966 General Election, Booher was elected to the office of 17th Circuit Judge. *Id.* Simultaneously, Florida voters passed an amendment to Article V, adding the five-year membership of the Florida Bar eligibility requirement. *Id.* When Booher's term was set to commence, January 3, 1967, he had not been a member of the Florida Bar for five years—he would hit that mark on November 16, 1967. *Id.* Addressing whether Governor Burns could issue the commission, the Court explained, "a member of the Florida bar refer[s] to eligibility *at the time of assuming office and not at the time of qualification or election to office.*" *Id.* at 759 (emphasis added) (internal citations omitted). The Court held that because section 114.01, Florida Statutes (1965), provided that a vacancy exists if the official is unable to qualify "within sixty days after his election," and because Booher would not be able to meet the eligibility requirement within that period of time, Governor Burns was not authorized to issue the commission. *Id.*

Since *1966 Advisory Opinion*, courts have consistently affirmed this understanding. *See, e.g.*, *Matthews v. Steinberg*, 153 So. 3d 295, 297 (Fla. 1st DCA 2014) (acknowledging the distinction between constitutional eligibility for office and statutory requirement to qualify to run for office); *In re Advisory Opinion to the Governor re Com'n of Elected Judges*, 17 So. 3d 265, 266-67 (Fla. 2009); *In re*

Advisory Opinion to the Governor-Terms of County Court Judges, 750 So. 2d 610, 613-14 (Fla. 1999); *Newman v. State*, 602 So. 2d 1351, 1352 (Fla. 3rd DCA 1992) ("Under [Article V, section 8 of 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."). Perhaps the best analysis of the very issue presented by Petitioner can be found in this Court's 2001 precedent, *Miller II*. This Court was presented with a certified conflict between the Third District and the Fourth District Courts of Appeal on the issue of eligibility of judges. A brief history of the procedural posture of *Miller II* will assist this Court in addressing the question posed by Petitioner.

In 2000, Dade County Judge Terri-Ann Miller ("Judge Miller") sought election as a Broward County Judge in the upcoming election. *Miller v. Gross*, 788 So. 2d 256, 257-58 (Fla. 4th DCA 2000) ("*Gross*"). Prior to qualifying, Judge Miller rented an apartment in Broward County and applied for a driver's license with a Broward County address. *Id.* at 257. A declaratory judgement was brought against Judge Miller challenging her eligibility to run for the Broward County judicial office. *Id.* at 258. The trial court found Judge Miller ineligible for the position because "the most convincing evidence" suggested Judge Miller would not reside in Broward County, but rather maintain her domicile in Dade County.

Id.

On appeal, Judge Miller maintained the residency requirement in Article V, section 8 should be determined when the term of office begins, not at qualifying or on election day, in accordance with *1966 Advisory Opinion*. *Id.* at 260. But the Fourth District Court of Appeal attempted to distinguish *1966 Advisory Opinion* stating, "[t]here is nothing in article V, section 8, or in any statute [Judge Miller] has cited to us, suggesting that she can qualify for election to an office to which she is ineligible at the time of qualifying." *Id.* at 261. Using the language of the "Oath of Candidate" Judge Miller signed upon qualifying, the Fourth District opined the oath does not say "I will be qualified when I actually take office" it says "I am qualified." *Id.* (emphasis omitted). In relying on that extrinsic evidence, the Fourth District held, "we sense that Article V, section 8, has a purpose to insure that judges come from the community within the territorial jurisdiction of the court" and the court determined Judge Miller was not eligible for the office of Broward County Judge. *Id.*

While *Gross* was under review in the Fourth District, the Third District was reviewing a similar question in *Miller v. Mendez*, 767 So. 2d 678 (Fla. 3d DCA 2000) ("*Miller I*"). Judicial candidate Gina Mendez ("Mendez") was challenged for not residing in Miami-Dade County at the time she signed her oath of candidate—

she resided in Broward County. *Miller I*, 767 So. 2d at 678-79. The Third District relied entirely on the facts and application of law from the trial court ruling in favor of Mendez. Of note, during the trial court proceedings, Mendez established permanent residency in Miami-Dade County and received a legal opinion from the Division of Elections that residency need only be established at the time of assuming of office. *Id.* The Third District affirmed the trial court ruling that eligibility is determined at the time of assuming office and not at qualification or election, *see id.* at 697, and the court certified conflict with *Gross*.

This Court accepted jurisdiction and reviewed the conflict between *Miller I* and *Gross*. Justice Quince, writing for the majority, confirmed that the Division of Elections' opinion—residency must be met at the time of assuming office—was reasonable and supported by the Court's prior advisory opinions, including *1966 Advisory Opinion. See Miller II*, 804 So. 2d at 1245. Addressing the Fourth District's reliance on the oath of candidate imposing a present tense requirement, this Court dismissed the oath as conflicting with the constitutional eligibility requirements. *Id.* at 1246. Establishing a bright-line rule on the residency eligibility, Justice Quince wrote,

> [I]n order to be eligible for judicial office, a candidate need only be an elector of the state and a resident of the territorial jurisdiction of the court on the date that the candidate *assumes* office.

Id. at 1247 (emphasis added). This Court's affirmance of *Miller I* disapproves of the rationale in *Gross* and provides great guidance on the current issue. Petitioner does not cite to nor attempt to distinguish *Miller II*. There has not been a showing that this opinion is an "error in legal analysis" or "unsound in principle" that would put *Miller II* in doubt. *See State v. Poole*, No. SC18-245, 2020 WL 3116597, at *14 (Fla. Jan. 23, 2020). Therefore, the decision binds this Court.

Perhaps Petitioner could claim that the residency requirement is different than the membership of the Florida Bar requirement in Article V, section 8 of the Florida Constitution. However, there is no support to draw such a distinction. The wording in the two requirements is similar:

> (1) "No person shall be *eligible for office* of justice . . . unless the person . . . resides in the territorial jurisdiction of the court. . . ."
>
> (2) "No person is *eligible for the office* of justice of the supreme court . . . unless the person is, and has been for the preceding ten years, a member of the bar of Florida."

Art. V, § 8, Fla. Const. (emphasis added). The phrases are nearly identical and give no indication that eligibility for residency would attach at a different time than membership in the Florida Bar. There is a presumption that words and phrases within text have the same meaning unless there is a material variation. *See, e.g.*, *City of Bartow v. Flores*, 45 Fla. L. Weekly D1298, 2020 WL 2781872, at *7 (Fla. 1st DCA 2020) (Winokur, J., concurring in part, dissenting in part); *R.N. v. State*,

257 So. 3d 507, 510 (Fla. 4th DCA 2018); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). And because the words and phrases for residency and membership of the Florida Bar are without distinction, there is no reason to find they have different meaning or apply at different times. Petitioner does not even attempt to distinguish the two—because she cannot.

Assuming Petitioner's claim is correct, this Court would have to recede from its prior precedents on the issue *and* read text into the Constitution that simply does not exist. For example, Petitioner might have a valid argument if Article V, section 8 of the Florida Constitution read as follows, with the new text underlined,

> 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. No justice or judge shall serve after attaining the age of seventy-five years except upon temporary assignment. No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless <u>prior to the date of appointment</u> the person is, and has been for the preceding ten years, a member of the bar of Florida.

This wording would draw a clear indication that the intent of Article V, section 8 of the Florida Constitution was to place residency eligibility *at the time of assuming office*, and membership of the Florida Bar eligibility *at the date of appointment*. However, because the hypothetical language does not exist, this Court should not read it into the Constitution. *See Villanueva v. State*, 200 So. 3d

47, 52 (Fla. 2016).

It seems Petitioner would like this Court to avoid the omitted-case canon (*casus omissus*). *See Reading Law* at 93. This Court has consistently held that it cannot add words to express what may or may not have been the intent. *See Villanueva*, 200 So. 3d at 52 (courts are not at liberty to add words to constitution provisions not placed there by the drafters); *Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008). A *casus omissus* cannot be supplied by the Court "because that would be to make laws." *Greenberg v. Greenberg*, 101 So. 2d 608, 609 (Fla. 3d DCA 1958).

Put simply, Petitioner's plain text analysis as to eligibility, *see* Pet. at 21-22, is "like a pirate ship . . . sail[ing] under a textualist flag." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting). This Court confirmed in *Miller II* the plain language of Article V, section 8 places eligibility on holding office, not appointment. Therefore, the Petition must be denied based on the plain text.

ii. Reading Article V in pari materia confirms eligibility requirements must be met at the time of assuming office, not appointment

This Court need not rely solely on the text of Article V, section 8 of the Florida Constitution and *Miller II* for confirmation that eligibility attaches at the time of assuming office. Rather, reading Article V *in pari materia* confirms that

some requirements are tied to the date of appointment, while others, like eligibility, are tied to assuming office. As this Court stated in *Sylvester v. Tindall*, 18 So. 2d 892, 900 (Fla. 1944), "a constitutional amendment becomes a part of the constitution and must be construed in pari materia with all of those portions . . . bearing on the same subject." It is proper for this Court to read all parts of Article V together to "achieve a consistent whole." *Forsythe v. Longboard Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992); *see also Reading Law* at 252 (describing the related-statutes canon).

As mentioned above, the Florida Constitution's creation and governance of the judiciary is contained in Article V. And because of that, all the sections should be read together and interpreted harmoniously. Specifically, the eligibility requirement found in Article V, section 8 of the Florida Constitution should be read together with sections 3(a) and 11(a).

Article V, section 3(a) which addresses the organization of the Supreme Court states:

> Of the seven justices, 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*.

(Emphasis added.) The Constitution explicitly contemplates representation of each appellate district should be governed based on when the Governor *appoints* a new

justice, and not when the new justice *assumes* office. There may be many reasons the Constitution draws this distinction, but the distinction was drawn on residency for the purpose of ensuring that each appellate district had at least one justice determined at the time of appointment. As such, Article V, section 3(a) of the Florida Constitution is a constraint directly on the Governor's appointment discretion, unlike Article V, section 8.

Similarly, Article V, section 11(a) of the Florida Constitution addresses when gubernatorial judicial appointees must face election stating,

> [T]he governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after *the date of appointment*[.]

(Emphasis added.) Again, the distinction was drawn that gubernatorial appointees would face election at the next general election at least one year after their date of appointment, not at the next general election at least one year after they assume office. This provision applies another constraint directly connected to the time of the Governor's appointment.

As mentioned *supra*, if the Constitution intended for the date of appointment to control judicial qualifications, just as it does for appointments and elections, it could have been written with continuity. However, the text is not consistent among the various provisions, and, therefore, the Court must give each provision its plain

meaning with acknowledgment of distinct temporal requirements imposed in related provisions. The phrases "at the time of applying to the judicial nominating commission," *see* § 34.021, Fla. Stat., "at the time of the original appointment," *see* Art. V, § 3(a), Fla. Const., or "by the date of appointment," *see* Art. V, § 11(a), Fla. Const., could have been added to the eligibility requirements found in Article V, § 8—but they were not. And therefore, reading Article V *in pari materia*, this Court can only conclude that the ten year membership of the Florida Bar requirement applies at the time Judge Francis assumes the office of Justice of the Florida Supreme Court, which has not yet occurred.

Put simply, this Court is bound by the plain text of the Florida Constitution. *See, e.g., Advisory Op. to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020) ("*Advisory Op. re: Amend. 4*"); *Poole*, 2020 WL 3116597, at *15. In applying the plain text of Article V, section 8, this Court must find Petitioner misreads the eligibility requirements and, therefore, Governor DeSantis acted within his authority to appoint Judge Francis.

B. The Florida Constitution establishes appropriate limits on the Executive appointment power.

Unable to ground her interpretation of the Florida Constitution in either text or precedent, Petitioner resorts to the argument that upholding the Governor's appointment of Judge Francis would "lead to an absurd result." Pet. at 26. In her

view, allowing the Governor to "appoint a nominee prior to that individual obtaining the constitutionally required amount of experience" would unduly permit governors to "allow vacancies in Florida's appellate courts to remain open for extremely lengthy periods of time." Pet. at 26-27.

This Court should flatly reject Petitioner's misguided invitation to place public-policy-oriented constraints on the Executive appointment power disassociated from constitutional text. As explained below, the Florida Constitution itself establishes appropriate limits on the Executive appointment power.

A proper understanding of the Florida Constitution demonstrates that the Governor's power to appoint appellate court justices and judges is subject to temporal limitations. Article V, section 11(a) of the Florida Constitution is silent as to when an appellate court appointee's term of office begins.[6] However, it does clearly establish when his or her term of office ends:

> Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy *by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment*, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.

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[6] The beginning of the term of office is specified on the commission signed by the Governor pursuant to Article IV, section 1(a) of the Florida Constitution.

(Emphasis added.) The end date of an appellate court appointee's term of office is clearly calculated from and triggered by "the date of [their] appointment," Art. V, § 11(a), Fla. Const., not the date of taking the oath of office under Article II, section 5(b) of the Florida Constitution. Once the Governor exercises his appointment power, the end of the term and merit retention dates are set. *See* Art. V, § 11(a), Fla. Const. And if the judicial appointee could never become constitutionally eligible for his or her appointed term, it follows that he or she could never become constitutionally eligible to sit for retention election. *See* Art. V, § 10(a), Fla. Const. ("If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge."). Article V, section 11(a) of the Florida Constitution thus limits the class of persons the Governor is empowered to appoint to an appellate court to those who are constitutionally eligible to take office prior to the expiration of their appointed term. Stated differently, in order for the vacancy to be filled, the judicial appointee must assume the office prior to the date the term ends.

The temporal limitations on the Governor's appointment power are not boundless—they are readily calculable. Let's assume for the moment that the Governor had appointed an appellate court judge on November 6, 2019—364 days

before the next general election to be held on November 3, 2020, and three years and two days before the general election to be held on November 8, 2022.[7] We know that this would more or less create the longest period within which an appellate court appointee could become constitutionally eligible for office—three years, one month, and twenty-eight days—because the appointment would be for a term ending on January 3, 2023. *See* Art. V, § 11(a), Fla. Const. ("[T]he governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment[.]").[8] But let's instead suppose the Governor had appointed an appellate court judge on November 4, 2019—one year and one day before the next general election to be held on November 3, 2020. We know that this would more or less create the shortest period within which an appellate court appointee could become constitutionally eligible for office—one year, two months, and 1 day—because the appointment would be for a term ending on January 5, 2021. These hypotheticals serve to illustrate the appropriate temporal

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[7] Because a general election is held "on the first Tuesday after the first Monday in November of each even-numbered year," Art. VI, § 5(a), Fla. Const., the 2020 and 2022 general elections serve as a useful baseline hypothetical. This hypothetical operates on the assumption that there are 365 days in a year notwithstanding the fact that 2020 was a leap year.

confines within which the Governor must exercise his appointment power.

The Governor's appointment of Judge Francis comfortably rests within the temporal limitations of Article V, section 11(a) of the Florida Constitution. In this case, the Governor appointed Judge Francis to the Florida Supreme Court on May 26, 2020—five months and eight days before the next general election to be held on November 3, 2020, and two years, five months, and thirteen days before the general election to be held on November 8, 2022. Judge Francis will clearly satisfy the ten-year bar requirement and become constitutionally eligible for office under Article V, section 8 of the Florida Constitution on September 24, 2020—two years, three months, and ten days prior to the end of her appointed term on January 3, 2023.[9] Therefore, her appointment is valid.

Petitioner does not acknowledge the clear temporal limitations that Article V, section 11(a) of the Florida Constitution imposes on the Executive appointment power, or that the Governor's appointment of Judge Francis was permitted by this constitutional provision. Instead, she asks this Court to constrain the Governor's power to appoint Judge Francis by invoking the public policy of "avoid[ing]" and

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[8] Circuit and county court appointments would be subject to different calculations. *See* Art. V, §§ 8, 11(b), Fla. Const.

[9] Judge Francis was admitted to the Florida Bar on September 24, 2010. *See* Pet. App. at 13.

"minimiz[ing]" the time that judicial vacancies exist. Pet. at 26. The Court has previously opined on the genesis of this public policy, stating that "the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." *Pleus*, 14 So. 3d at 946 (quoting *In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992)).[10] But what Petitioner fails to understand is that her appeal to public policy, and by extension the intent of the framers, simply has no bearing on the Court's interpretation of the constitutional text at issue here. The meaning of the text of the Florida Constitution *is* the public policy of the State; the public policy of the State is already written into its governing charter. To the extent Petitioner seeks to constrain the Executive appointment power by referencing considerations untethered to constitutional text, her attempt is misguided. The public policy of avoiding and minimizing the time that judicial vacancies exists is primarily effectuated through the temporal limitations of Article V, section 11(a) of the Florida Constitution and the role of the JNC to use its discretion in which applicants are certified to the Governor. *See also* Art. V, § 11(c), Fla. Const. (contemplating that there are instances where it could take up to 120 days to

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[10] Intent of the framers can never license "the judicial imposition of meaning that the text cannot bear, either through expansion or contraction of the meaning carried by the text." *Advisory Op. re: Amend. 4*, 288 So. 3d at 1078.

appoint for a judicial vacancy).[11]

This understanding of the Governor's appointment power is further bolstered by historical practice. It is the exception, not the rule, for a justice or judge to take the oath of office, receive his or her commission and enter upon the duties of the office on the date of appointment.[12] This makes perfect sense. Winding down one's law practice before assuming office can take time. Similar concerns ring true for lower court judges appointed to higher courts and for public servants transitioning from the executive and legislative branches to the judiciary. And there may be other events which may delay an individual assuming judicial office.[13] Petitioner's

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[11] Governors have regularly utilized the flexibility afforded to receive nominations and make appointments to the appellate courts within the 120-day period contemplated by the Florida Constitution. *See, e.g.*, Res. App. at 25-29 (118 days from the Governor's request to convene the JNC to Judge Eric Eisnaugle's appointment to the Fifth DCA); Res. App. at 30-34 (117 days from the Governor's request to convene the JNC to Judge Andrew Atkinson's appointment to the Second DCA).

[12] As an example, seven months and twenty-four days passed between Judge Harvey Jay's appointment and the day he assumed office on the Fourth Judicial Circuit. *See* Res. App. at 35-37.

[13] Judge Francis recently welcomed her second child and is currently on maternity leave. This Court has recently adopted the presumptive three-month parental leave rule, *see* Fla. R. Jud. Admin. 2.570, signaling support for continuing legal matters based on the birth or adoption of a child. *See In re: Amendments to the Fla. Rules of Judicial Admin.—Parental Leave*, 288 So. 3d 512 (Fla. 2019). Similarly, it is reasonable to allow a judicial appointee the ability to enjoy maternity leave prior to

cramped understanding of the Governor's appointment power should be rejected, as it fails to account for the reality that Article V, section 11(a) of the Florida Constitution provides judicial appointees with flexibility to decide when to enter upon the duties of office.

C. Petitioner's mandamus claim must be dismissed because it requests an improper remedy.

Petitioner's claim that Governor DeSantis violated Article V, section 11(c) of the Florida Constitution by failing to make an appointment within sixty days of receipt of the list of nominees from the JNC, *see* Pet. at 21, is moot because Governor DeSantis made the appointment from the list of certified names submitted by the JNC. And Petitioner's mandamus claim must be dismissed because it requests an improper remedy.

The Florida Constitution mandates that the Governor make a judicial appointment within sixty days after the JNC submits a certified list of names. *See* Art. V, § 11(c), Fla. Const. "To be entitled 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

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assuming office. Assuming Judge Francis took office the same day she was appointed, she still would have been on maternity leave and unable to serve the Court.

have no other adequate remedy available.'" *See Pleus*, 14 So. 3d at 945 (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)).

Petitioner argues that under *Pleus* the appropriate remedy is for the Court to issue a writ of mandamus instructing the Governor "to promptly select a constitutionally-qualified nominee from the original list of 31 eligible applicants." Pet. at 25. That remedy is improper and misreads *Pleus*.

In *Pleus*, then-Governor Crist rejected the certified list submitted by the JNC and requested that the JNC reconvene to consider the applications of three African-Americans who had applied to fill the vacancy. *See Pleus*, 14 So. 3d at 943. The Court directed then-Governor Crist to fill the vacancy with an appointment from the original certified list submitted by the JNC, but withheld mandate. *Id.* at 946. Here, Governor DeSantis completed his legal duty by appointing Judge Francis and John Couriel to the Florida Supreme Court on May 26, 2020. Both Judge Francis and Justice Couriel were included on the list of nine certified names submitted by the Supreme Court JNC to the Governor on January 23, 2020.

Petitioner's sixty-day claim is moot because Governor DeSantis made the appointment from the list of certified names submitted by the JNC. His delay in making the appointments was not an attempt to sidestep his legal duty to make the appointments, nor was it done in protest of the list provided to him. Governor

DeSantis took longer than sixty days because he was focused on protecting the public in responding to the COVID-19 emergency. During a March 19, 2020 press conference, the Governor announced that his entire attention and focus was on responding to the unprecedented COVID-19 pandemic, and he, therefore, would delay his appointments to the Supreme Court. *See* Gray Rohrer, *Swamped with coronavirus response, DeSantis punts on Florida Supreme Court picks*, Orlando Sentinel (Mar. 20, 2020), https://bit.ly/39TTeFB. The Governor made these appointments on May 26, 2020. The Governor's role in a state of emergency is one of great responsibility and his duty to lead the State in such a time derives from his supreme executive power and responsibility to meet the dangers presented to the State by emergencies. *See* Art. IV, § 1(a), Fla. Const.; *see also* Ch. 252, Fla. Stat.

Petitioner's mandamus requests to have the Supreme Court JNC "immediately certify a new list of nominees" of the original thirty-one applicants and the Governor appoint from the new list. *See* Pet. at 26. The relief requested is not available nor is it supported by the Florida Constitution or precedent. In fact, the relief would place this Court in a position of dictating a purely executive function without consideration for the requirements in the Florida Constitution—namely that upon a vacancy the JNC shall convene and nominate names to the Governor.

CONCLUSION

The Emergency Petition for Writs of Quo Warranto and 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 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 to Petition for Writ of Quo Warranto has been furnished by electronic service through the Florida Courts E-Filing Portal this 3rd day of August, 2020, to all counsel of record.

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